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Second Circuit Strikes Down FCC's 'Fleeting Expletives' Rule as 'Arbitrary and Capricious'

A three-judge panel of the Second Circuit U.S. Court of Appeals in New York overturned a Federal Communications Commission (FCC) indecency ruling against Fox Television, finding that the Commission's new policy against one-time, unscripted use of expletives is "arbitrary and capricious" under the Administrative Procedure Act.

In *Fox Television Stations, Inc. et al. v. Federal Communications Commission*, 489 F. 3d 444 (2d Cir. 2007), decided June 4, the court vacated two FCC notices of apparent liability issued against Fox for violations of indecency and profanity prohibitions because the commission failed to give a reasoned basis for a significant change in policy, according to the majority opinion by Judge Rosemary Pooler.

The majority stopped short of striking down the "fleeting expletives" policy outright, however. Instead, it remanded the case to allow the FCC to formulate a "reasoned analysis" for its rule change, despite being "doubtful that…the Commission can adequately respond to the constitutional and statutory challenges raised by the Networks."

Fox Television Stations, Inc., CBS Broadcasting, Inc., and ABC, Inc. were listed as petitioners in the case, along with intervenors NBC Universal, Inc., NBC Telemundo, and Center for Creative Voices in Media, Inc., a nonprofit organization of professional writers, directors, producers, performers, and musicians.

Judge Pierre Leval wrote a dissent to the 2 to 1 decision.

Specifically at issue were "fleeting expletives" broadcast live by Fox at the 2002 and 2003 Billboard Music Awards. In 2002, upon receiving an award, actress and singer Cher said, "People have been telling me I'm on the way out every year, right? So f*ck 'em." In 2003 presenter Nicole Richie made reference to her popular television show, saying, "Why do they even call it 'The Simple Life?' Have you ever tried to get cow sh*t out of a Prada purse? It's not so f*cking simple."

The FCC received complaints after both broadcasts and issued notices to Fox that it was in violation of the commission's new policy prohibiting the broadcast of "fleeting expletives." The FCC had also found broadcasts of ABC's "NYPD Blue," CBS's "The Early Show," and NBC's broadcast of the 2003 Golden Globe Awards indecent and profane for similar utterances. The FCC later reversed its position on "NYPD Blue" and "The Early Show." (See "FCC Backtracks on Some Indecency Rulings, Continues to Pursue Others in Court" in the Fall 2006 issue of the Silha *Bulletin*.)

According to Pooler's majority opinion, the notices issued by the FCC in these cases clearly demonstrated a change in policy, as the networks contended in oral arguments and in briefs filed with the court. (See "Broadcasters Challenge Indecency Standards" in the Winter 2007 issue of the Silha *Bulletin* for more on the oral arguments.)

In accordance with the Administrative Procedure Act, 5 U.S.C. § 706, under which the FCC operates, administrative agencies are free to revise rules and policies at their discretion, as long as the changes are not "arbitrary and capricious." This term was defined in *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29 (1983) as meaning that "the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."

The majority said that the FCC's reliance on a "first blow" theory to restrict fleeting expletives was problematic.

In the landmark broadcast indecency case *FCC v. Pacifica Found.*, 438 U.S. 726 (1978), the court rebutted the notion that radio listeners could simply "switch off" offensive material. "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow," the majority in *Pacifica* said.

The FCC relied on this idea in a remand order issued in the instant case, saying "granting an automatic exemption for 'isolated or fleeting' expletives unfairly forces viewers (including children) to take 'the first blow.'"

Pooler's majority opinion said that the FCC provided no justification for what was a sudden change in course. In the thirty years since the *Pacifica* ruling, the FCC had consistently upheld the notion that fleeting expletives would not result in sanctions against broadcasters.

Fleeting Expletives Rule, *continued on page 2*

Senate Committee Approves Bill to Reverse Ruling, Empower FCC

Fleeting Expletives Rule, *continued from page 1*

> “The record simply does not support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to this language on the airwaves.”
>
> – Judge Rosemary Pooler
> Second Circuit U.S. Court of Appeals

Moreover, Pooler said, “the ‘first blow’ theory bears no rational connection to the Commission’s actual policy regarding fleeting expletives.”

In a number of cases, including the reversal of position on “The Early Show” broadcast and an uncensored broadcast by ABC of the film “Saving Private Ryan,” the FCC apparently made exceptions to the “first blow” rule. “The Early Show” was exempted because it was a “*bona fide* news interview,” according to the FCC, and “Saving Private Ryan” was exempted because deleting the expletives uttered in the film “would have altered the nature of the artistic work and diminished the power, realism and immediacy of the film experience for viewers.”

“The record simply does not support the position that the Commission’s new policy was based on its concern with the public’s mere exposure to this language on the airwaves,” said the majority opinion.

The majority also dismissed the FCC’s contention that “given the core meaning of the ‘F-Word,’ any use of that word or a variation, in any context, inherently has a sexual connotation,” which, Pooler said, “defies any commonsense understanding of these words.”

Because the court agreed with the networks’ argument that the FCC’s rules were “arbitrary and capricious,” it said it did not consider it necessary to reach other problems the networks raised. However, in dicta, the majority opinion addressed constitutional challenges to the “fleeting expletives” policy.

“We question whether the FCC’s indecency test can survive First Amendment scrutiny,” Pooler said. “We are sympathetic to the Networks’ contention that the FCC’s indecency test is undefined, indiscernible, inconsistent, and consequently, unconstitutionally vague.”

“Indeed, we are hard pressed to imagine a regime that is more vague than one that relies entirely on consideration of the otherwise unspecified ‘context’ of a broadcast indecency,” the majority said.

The majority said constitutional challenges were “further buttressed” by the U.S. Supreme Court’s finding unconstitutionally vague a similarly worded Internet indecency regulation in *Reno v. ACLU*, 521 U.S. 844 (1997), as well as changes in technology which have made the broadcast media less “uniquely pervasive” and also provided the FCC with less restrictive options for controlling the broadcast of indecency, such as the V-chip and parental ratings systems.

“It is increasingly difficult to describe the broadcast media as uniquely pervasive and uniquely accessible to children, and at some point in the future, strict scrutiny may properly apply in the context of regulating broadcast television,” said the majority opinion.

Leval’s dissent said the FCC “gave a sensible, although not necessarily compelling, reason” for what he called a “relatively modest change of standard.” He criticized the majority’s main argument, saying that the FCC’s inconsistent application of the new policy did not make it an irrational policy.

“What we have is at most a difference of opinion between a court and an agency,” Leval wrote. “Because of the deference courts must give to the reasoning of a duly authorized administrative agency in matters within the agency’s competence, a court’s disagreement with the Commission on this question is of no consequence.”

FCC Chairman Kevin J. Martin told *The Washington Post* he was “disappointed” in the court’s ruling.

“I think the commission had done the right thing in trying to protect families from that kind of language, and I think it’s unfortunate that the court in New York has said that this kind of language is appropriate on TV,” Martin said.

According to *The Washington Post*, Fox spokesman Scott Grogin released a statement that said, “We are very pleased with the court’s decision and continue to believe that government regulation of content serves no purpose other than to chill artistic expression in violation of the First Amendment.”

On July 19, the Senate Commerce Committee approved a bill that would effectively reverse the Second Circuit’s decision.

The “Protecting Children from Indecent Programming Act,” S. 1780, is sponsored by Senator Jay Rockefeller (D-W.Va.), and would amend the Public Telecommunications Act of 1992 (47 U.S.C. 303 note), requiring the FCC to “maintain a policy that a single word or image may constitute indecent programming.”

According to a July 30 *Broadcasting & Cable* story, the FCC decided not to request an *en-banc* review of the Second Circuit decision. The deadline to file a petition for *certiorari* with the U.S. Supreme Court is September 4.

– Patrick File
Silha Fellow and *Bulletin* Editor

FCC News

FCC Releases Report on Television Violence; Critics Challenge Conclusions and Recommendations on Various Grounds

A long-awaited Federal Communications Commission (FCC) report, released April 25, 2007, said that research shows a connection between television violence and children's aggressive behavior, and recommended that Congress act to limit how much violence children are exposed to on television.

Many critics have said the report lacks depth and is inconclusive; others have questioned the legislative feasibility and legality of its proposed solutions.

Former Chairman of the U.S. House of Representatives Committee on Energy and Commerce Joe Barton (R-Texas), requested the report on behalf of 39 members of the House of Representatives in March 2004. The FCC issued a notice of inquiry later in 2004, requesting input, research, and opinion on the issue.

According to the report, members of Congress asked that the FCC address several questions, including what the cumulative negative effects of violent programming on children are, what "constitutional limits" exist in regulating violent programming, whether regulations can be "narrowly tailored" to serve governmental interests, and whether the government could formulate and implement a definition of "excessively violent programming that is harmful to children" that would be constitutional.

The resulting 24-page report, titled "In the Matter of Violent Television Programming and its Impact on Children," MB Docket No. 04-261, reviews research on the effects of violent programming on children as well as some of the government regulation and common law precedent of indecent and violent broadcast and cable content, and makes suggestions for how Congress might approach legislating violence on television. The full report is available at http://www.firstamendmentcenter.org/PDF/FCC_TV_violence_2007.pdf.

According to FCC Chairman Kevin Martin, in a comment released separately from the report on April 25, the report "concludes that exposure to violent programming can be harmful to children and that Congress could provide parents more tools to limit their children's exposure to violent programming in a Constitutional way."

The report begins with a summary of several decades of research into the effects of violent programming on children's behavior. The FCC says that it agrees with a 2001 U.S. Surgeon General report that concludes that "a diverse body of research provides strong evidence that exposure to violence in the media can increase children's aggressive behavior in the short term, [but] many questions remain regarding the short- and long-term effects of media violence, especially on violent behavior."

The report also addresses the law and policy regulating violent television programming. It discusses *Action for Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), in which the U.S. Court of Appeals for the D.C. Circuit found that "channeling" indecent broadcast television content between the hours 10 p.m. and 6 a.m. would not unduly burden the First Amendment rights of broadcasters. The report suggests that such channeling could be similarly used to regulate excessively violent content.

The report says a scheme of "viewer-initiated blocking and mandatory ratings" is an alternative to time channeling that might "impose lesser burdens on protected speech;" however, it says research has shown that such a scheme already in place has not worked. In 1996, Congress amended Title III of the Communications Act, 47 U.S.C. § 303(x) to require that all televisions with screens larger than 13 inches purchased in the U.S. after the year 2000 must contain a "V-chip" which allows users to block programs they do not want to view. To facilitate the use of the V-chip and other blocking technology, broadcast, cable and satellite companies have voluntarily devised a ratings system that encodes each program, excluding news and sports, with a rating based on the amount of violent or sexual content. According to the FCC report, research on the effectiveness of these measures has shown that many televisions in use in America still do not have V-chips, and even if they do, many parents do not use them. Other studies have found that the voluntary TV ratings system has been of limited effectiveness, because programs are rated inaccurately or because parents often do not understand what the ratings mean.

The report says that although developing a definition for "excessively violent programming that is harmful to children" would be challenging, "we believe that Congress could do so." The report suggests that a more general definition would be required for a regulation that required channeling of violent content, but for a viewer-initiated, ratings-based blocking scheme, more specific definitions would need to be developed.

"We believe that developing an appropriate definition of excessively violent programming would be possible, but such language needs to be narrowly tailored and in conformance with judicial precedent," the report said. Any definition, the report said, would have to "be sufficiently clear to provide fair notice to regulated entities."

In its conclusion, the FCC says that research has shown that current technology and industry-imposed regulation is not effective in protecting children from violent programming. An alternative the FCC suggests for cable and satellite service providers is an "a la carte" regime, which would allow customers more choice over how to avoid violent programming they do not wish to receive. Such a regime, says the report, could give customers an "opt out" option, whereby cable and satellite companies would refund customers money for channels they chose to block, or an "opt-in" option, which would allow customers more specific choices as to which individual channels or "bundles" of channels they want to receive.

A number of commissioners released comments

FCC Television Violence Report, *continued on page 4*

"By failing to address this issue in a serious and truly responsive manner, the commission undermined any possible policy recommendations regarding which programs Congress should endeavor to restrict."

– Robert Corn-Revere
Attorney and FCC regulation expert

FCC Television Violence Report, *continued from page 3*

separate from the report on April 25. Despite a common agreement that violent television poses a risk to children and a challenge to parents, the report had its critics within the commission. FCC Commissioner Robert McDowell said that the report's legal analysis, which focused only on the regulation and legal precedent of broadcast television, and not cable, may "fall short" of Congress' request.

"Potential Congressional action against television violence based upon our Report should only be considered in the limited context of broadcasting, because the Commission has not offered sufficient legal analysis to support broader regulation," McDowell wrote.

Commissioner Jonathan Adelstein offered more pointed criticism. Adelstein said the report did not fully support its conclusions.

"Like a financial consultant who advises a client that he could win the lottery, this report discusses an optimal conclusion, but does not provide a complete analysis or a sound plan," Adelstein wrote.

Specifically, Adelstein criticized the report's failure to formulate and recommend a specific definition for "excessively violent programming that is harmful to children" as they were asked to do, instead passing the task back to Congress, saying they "could do so."

Adelstein also said the report provided an incomplete record with regard to court decisions that have "either expressed serious skepticism or invalidated efforts to regulate violent content" and in discussing the evolving technology which has allowed users to block programming.

Adelstein wrote the FCC's recommended regime, a la carte, is "primarily a price-regulation mechanism," and "far too blunt an instrument to provide much help to beleaguered parents who already have the ability to block any cable channel they want, whether they are analog or digital [cable] subscribers."

Adelstein offered, for example, the History Channel, which he said provides valuable educational programming despite sometimes showing war scenes "far too violent for children."

Robert Corn-Revere, a partner at Davis Wright Tremaine, LLP in Washington D.C., an expert in FCC regulation and the 2007 Silha lecturer, called the report "seriously deficient." (See "Corn-Revere to Deliver 2007 Silha Lecture" on page 6 of this issue of the Silha *Bulletin*.)

In a commentary on the First Amendment Center Web site at http://www.firstamendmentcenter.org/commentary.aspx?id=18493, Corn-Revere said that the report failed to answer the fundamental questions posed by the 39 members of Congress in 2004.

The FCC's 2004 notice of inquiry requested more definitive information and research on the effects of violent programming on children's behavior. In spite of this, the report released April 25 concedes that very little new information was submitted since then.

According to Corn-Revere, however, "this did not prevent the FCC from converting the questions it raised in 2004 into conclusions in 2007. By failing to address this issue in a serious and truly responsive manner, the commission undermined any possible policy recommendations regarding which programs Congress should endeavor to restrict."

Corn-Revere, like Adelstein, also noted the failure to approach a definition of "excessively violent programming that is harmful to children" in the FCC report. In fact, the report suggests that Congress may have to create a variety of definitions if it favors mandatory ratings systems. "It is difficult to imagine how Congress might find this aspect of the report helpful," wrote Corn-Revere.

The report recommends that Congress' definition of excessive violence should be "narrowly tailored and in conformance with judicial precedent," said Corn-Revere, but it offers no discussion of the judicial precedent that might support or oppose regulation.

Corn-Revere cites opinions from the Tennessee Supreme Court, *Davis-Kidd Booksellers, Inc. v. McWherter,* 866 S.W.2d 520 (Tenn. 1993) and from the Seventh Circuit U.S. Court of Appeals, *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, (7th Cir. 1985), which have voiced skepticism about the government's ability to define or regulate violent media content in a way that would survive First Amendment scrutiny.

Corn-Revere said a report on "Marketing Violent Entertainment to Children" released by the Federal Trade Commission in April 2007, a few weeks before the FCC report, reviewed relevant precedents in media and violence.

"In that largely unnoticed report," Corn-Revere wrote, "the FTC…found that courts have uniformly struck down efforts to 'treat violence like obscenity' or indecency and to impose either direct content regulations or mandatory ratings. Accordingly, the FTC concluded: 'Given important First Amendment considerations, the Commission supports private sector initiatives by industry and individual companies.'"

Meanwhile, cable company executives have challenged the FCC's support for a la carte billing programs.

According to a May 9 Associated Press (AP) story, executives speaking at The Cable Show, a yearly convention hosted by the National Cable & Telecommunications Association, said an a la carte scheme would be bad for the cable industry and bad for consumers.

According to the AP, Viacom Inc. chief executive Philippe Dauman said such a model would mean cable channels that are not economically viable would disappear when they can not be packaged with profitable channels.

"The unintended consequence is that it may drive [competing channels] to produce the edgier content that a la carte was supposedly intended to reduce," Dauman said, according to the AP.

The AP story said Time Warner Inc. chief executive Richard Parsons said, "[w]hat's being responsible is enabling adults to make adult choices and decisions about what their children see and tolerating choices that adults make for themselves." The AP story said Parsons called those who favor government regulation of violence and indecency "vocal and well-funded minority groups."

FCC Television Violence Report, *continued on page 6*

FCC News

Food Advertisers Phase out Marketing to Kids after Agencies, Lawmakers Suggest Government Regulations

Pressure from Washington D.C. over their role in contributing to obesity in children has driven food companies to create new, stricter rules on advertising.

On July 18, 2007, the same day the Federal Trade Commission (FTC) held an event to address the progress the food industry has made on calls for more responsible advertising schemes aimed at children, 11 of the nation's biggest food and drink companies announced the adoption of new rules, organized through the Council of Better Business Bureaus, that limit advertising to children under the age of 12.

In May, *Broadcasting & Cable* magazine reported that Federal Communications Commission (FCC) Chairman Kevin Martin had suggested that the FCC may consider restrictions on television food advertisements to children if a government and industry task force could not create sufficient industry-imposed regulation.

The May 14, 2007 *Broadcasting & Cable* story said that Martin's comments came from a letter to House Telecommunications and Internet Subcommittee Chairman Ed Markey (D-Mass.). Markey has proposed that television shows that air "junk food" ads be disqualified from meeting the FCC-imposed three-hour weekly educational programming minimum.

The Task Force on Media and Childhood Obesity, formed in September 2006, includes Martin and two other FCC commissioners, two U.S. senators and 35 representatives from advertising, food, and television companies, research and public policy groups and U.S. universities. (A full list of participants can be found at http://www.fcc.gov/obesity/participants.html.)

On July 5, the task force announced that the deadline for issuing its recommendations, originally scheduled to be released in summer 2007, has been extended into the fall. According to *Broadcasting & Cable*, Martin wrote in his letter to Markey that the FCC would wait until the task force released its recommendations before it considered regulation.

Markey responded in a statement saying the FCC should not wait, according to *Broadcasting & Cable*. "I continue to believe that the Commission should begin the process of developing a public record on problematic food advertising to children. By starting such a proceeding now, the Commission can assure the public that it is developing an adequate, and timely, policy response to an important health issue," Markey wrote.

The food companies appear to have decided not to wait for task force recommendations or government regulations or restrictions. The self-imposed rules should be fully implemented by the end of 2008 and differ widely from company to company, according to the Associated Press (AP).

For example, McDonald's USA said it will only market two types of Happy Meal to children under 12: a four-piece Chicken McNuggets meal with apples, caramel dip and low-fat milk, and a meal with a hamburger, apples, dip, and milk. General Mills will now only market products with fewer than 12 grams of sugar to children under 12. According to the AP, in 2005 General Mills limited its use of licensed cartoon, movie and television characters in advertising. Spokeswoman Christina Shea told *The Washington* (D.C.) *Times* that under the new rules, General Mills will begin using the SpongeBob cartoon only on packaging for frozen vegetables.

The AP also reported that seven companies now pledge not to use licensed characters unless they are marketing "better for you" products. PepsiCo, which sells Pepsi, Tropicana, Aquafina, and Gatorade and owns Frito-Lay and Quaker Foods, said it will market only Gatorade and Baked Cheetos Cheese Flavored Snacks to children.

A list of the eleven companies and their pledges may be found at the Council of Better Business Bureaus Web Site at http://www.cbbb.org/initiative/pledges.asp.

The Kellogg Company announced a month before the 11 other companies, on June 13, 2007, that it would self-impose similar rules. According to *The New York Times*, the maker of popular breakfast cereals like Froot Loops, Apple Jacks and Rice Krispies said it would stop marketing products to children under 12 and stop using licensed characters or branded toys unless the products met nutritional guidelines for calories, sugar, fat and sodium. According to *The New York Times*, Kellogg President and Chief Executive David Mackay said that products that did not meet the company guidelines would either be reformulated or no longer be marketed to children.

According to *The Washington Times*, FTC officials at the July 18 event said that they were pleased with the companies' announcements, but would continue to watch the marketing practices of the food industry.

"Responsible, industry-generated action and effective self-regulation are critical to addressing the national problem of childhood obesity," FTC Chairman Deborah Majoras said. "The FTC plans to monitor industry efforts closely, and we expect to see real improvements."

On August 9, the *Advertising Age* magazine Web site reported that the FTC issued subpoenas to 44 food marketers, including McDonald's, Procter & Gamble and Coca-Cola. The subpoenas require that the marketers provide detailed information on their various strategies for marketing products to children under the age of 12 and between ages 12 and 17 on various media and through viral campaigns, product placement, and using licensed characters.

The information is due November 1st, according to *Advertising Age*, and will be used by the FTC in a forthcoming congressional report.

– Patrick File
Silha Fellow and *Bulletin* Editor

"I continue to believe that the Commission should begin the process of developing a public record on problematic food advertising to children. By starting such a proceeding now, the Commission can assure the public that it is developing an adequate, and timely, policy response to an important health issue."

– Rep. Ed Markey (D-Mass.)
Chairman, House Telecommunications and Internet Subcommittee

Silha Events

Attorney, FCC Expert Robert Corn-Revere to Deliver 2007 Silha Lecture on Regulating Television Violence

Attorney Robert Corn-Revere will deliver the 22nd Annual Silha Lecture on Monday, Oct. 1, 2007. His lecture, "The Kids are All Right: Violent Media, Free Expression, and the Drive to Regulate," will examine the conflict between the First Amendment and government controls over media content that reaches children at a time when the Federal Communications Commission (FCC) and Congress are poised to consider new regulations on violence on television.

The Lecture begins at 7:00 p.m. in the Cowles Auditorium at the Hubert H. Humphrey Center on the West Bank Campus of the University of Minnesota in Minneapolis.

Robert Corn-Revere is a partner at the law firm of Davis Wright Tremaine in Washington, D.C. He has served as counsel in litigation and regulatory proceedings involving the Communications Decency Act, the Child Online Protection Act, FCC Indecency Rules, Internet content filtering in public libraries, and public broadcasting and cable television regulations.

Attorney Robert Corn-Revere's lecture, "The Kids are All Right: Violent Media, Free Expression, and the Drive to Regulate," will examine the conflict between the First Amendment and government controls over media content that reaches children.

Corn-Revere was the lead counsel in *United States v. Playboy Entertainment Group, Inc*., 529 U.S. 803 (2000), in which the U.S. Supreme Court invalidated Section 505 of the Telecommunications Act of 1996 as a violation of the First Amendment. Section 505 restricted the transmission of cable television channels primarily dedicated to sexually oriented programming, requiring that they be fully scrambled or not shown during times of day that, according to the FCC, children would likely be watching. Most cable operators responded to 505 by restricting the programs based on time of day, which meant paying subscribers did not have access to them for two-thirds of the day.

Corn-Revere also served as lead counsel for CBS television network in *Fox Television Stations, Inc. et al. v. Federal Communications Commission*, 489 F.3d 444 (2d Cir. 2007), in which the U.S. Court of Appeals for the Second Circuit ruled that the FCC's new policy regarding "fleeting expletives" was "arbitrary and capricious" because the agency did not provide a sufficient reason for the change since 2004. (See "*Second Circuit Strikes Down FCC's 'Fleeting Expletives' Rule*" on page 1 of this issue of the Silha *Bulletin*.)

Corn-Revere is co-author of a three-volume treatise, *Modern Communications Law* (West Group, Inc. 1999), and the author of a chapter, "Freedom of Speech and Content Regulation on the Internet," in the treatise *Internet Law and Regulation*, (Pike & Fischer, Inc., May 2005).

The presentation will include an opportunity for audience questions following the lecture. The event is free and open to the public; no reservations or tickets are required. Light refreshments will be served.

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

– Sara Cannon
Silha Center Staff

FCC Television Violence Report, *continued from page 4*

According to the AP, Dan Isett, director of corporate and government affairs for the Parents Television Council, a conservative non-profit group which supports regulation of indecency and violence on television, challenged the idea that a la carte programming would hurt competition in the cable market.

"Good programming at good prices will always find a market, just like any other good or service," Isett said.

According to the AP, Isett said the real issue is what consumers are forced to pay for. "People are forced to subsidize the really graphic and explicit sex and violent content on 'expanded basic' just to get things like the Disney Channel and a football program on Saturday," Isett said.

The U.S. Senate Committee on Commerce, Science and Transportation addressed the issue of media violence and children in a hearing on June 26, 2007. Testimony was presented by Tim Winter, president of the Parents Television Council; Dr. Dale Kunkel, professor of communication at the University of Arizona; Jeff McIntyre of the public policy office of the American Psychological Association; Laurence Tribe, a professor of Constitutional law at Harvard University; and Peter Liguori, Fox Entertainment's chairman.

Winter's written testimony supported the proposals for regulation outlined in the April 25 FCC report, and Kunkel and McIntyre both offered support for the report's suggestion that research has shown that violent television programming leads to violent behavior in children.

According to Tribe's 69-page written testimony, however, none of the regulatory schemes proposed in the FCC report -- channeling, mandatory ratings systems, or mandatory a la carte "unbundling" -- can be reconciled with the First Amendment, because all three would require the application of strict scrutiny, and none represents the least restrictive means of government regulation.

A video webcast of the hearing, along with downloadable copies of witnesses' testimony, is available at the Senate Commerce Committee Web site at http://commerce.senate.gov/public/index.cfm?FuseAction=Hearings.Hearing&Hearing_ID=1879.

– Patrick File
Silha Fellow and *Bulletin* Editor

Reporter Privilege News

Proposed Federal Shield Law will go to House Floor; Justice Department and Big Business Offer Criticism

The latest iteration of a federal reporter shield law, introduced in both the House and Senate, has gained support from media organizations, media advocates and Democrat and Republican lawmakers, but has critics and opponents both in the Bush administration and big business.

Identical bills were introduced on May 2, 2007 in both the U.S. House of Representatives and U.S. Senate bearing the short title The Free Flow of Information Act of 2007. The Senate bill, S. 1267, was sponsored by Senators Richard Lugar (R-Ind.) and Christopher Dodd (D-Conn.); the House bill, H.R. 2102, was sponsored by Representatives Mike Pence (R-Ind.) and Rick Boucher (D-Va.). It was approved and sent to the House floor by the House Judiciary Committee on August 1.

The bill approved by the House Judiciary Committee would protect journalists from compelled disclosure of confidential sources and information in federal criminal and civil proceedings. It says that the qualified privilege could be overcome if the information is needed to prevent "an act of terrorism" or "significant and specified harm to national security," imminent death or bodily harm, or in order to reveal the sources of leaks of trade secrets of significant value, identifiable health information or other personal financial information revealed in violation of existing federal laws. Judiciary Committee amendments excluded defamation, libel and slander lawsuits from the bill's protection, and extended the national security exception to threats to U.S. allies.

"Covered person" is defined in the bills as "a person engaged in journalism." "Journalism" is defined as "the gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

Boucher has said that Internet bloggers would be covered by this bill, provided they are engaged in newsgathering, according to a May 2 story on the Reporters Committee for the Freedom of the Press (RCFP) Web site.

This is the third time in as many years that reporter shield bills under the title The Free Flow of Information Act have been introduced, but the first time ever such a bill will go to the House floor for a vote, according to the RCFP. The language of the bill, whom it covers, and how it is limited have evolved during that time. According to a June 15, 2007 Associated Press (AP) story, sponsors of the current bill say they have tailored the exceptions, specifically those related to imminent harm to national security and death or bodily harm, to concerns raised by the Bush administration and the Department of Justice (DoJ).

The House Judiciary Committee held a hearing on the legislation on June 14, 2007. In his introductory comments, Pence said, "The Free Flow of Information Act is not about protecting reporters. It is about protecting the public's right to know."

At the hearing, testimony in support of the bill was presented by media lawyer and 2001 Silha Lecturer Lee Levine, longtime *New York Times* columnist William Safire, and Jim Taricani, a reporter for WJAR-TV, an NBC affiliate in Providence, R. I. who served four months house arrest for refusing to divulge his source for a video tape that showed corruption by public officials. (See "Reporters Privilege News: Journalist Sentenced to House Arrest for Refusing to Reveal Source" in the Fall 2004 issue of the Silha *Bulletin*.)

Safire and Taricani said that journalists are concerned that an increased willingness on the part of litigants, federal prosecutors, and courts to compel journalists to reveal their sources has restricted their ability to do their job and has created a "chilling effect," as sources are reluctant to trust reporters, and news organizations fear subpoenas and expensive court battles.

"Don't believe that ordinary citizens as well as public officials won't think twice about trusting a reporter to respect a confidence," Safire said, "it's happening right now as never before."

Levine's testimony cited evidence showing more aggressive pursuit of journalists' confidential sources since 2001.

"There appear to have been only two decisions from 1976 to 2000 arising from subpoenas issued by federal grand juries or prosecutors to journalists seeking confidential sources. Both involved alleged leaks to the media and in both, the subpoenas were quashed," Levine's testimony said. "Yet, beginning in 2001, four federal courts of appeals have affirmed contempt citations issued to reporters, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history."

The list of sentenced journalists, according to Levine, includes Vanessa Leggett, who served 168 days for civil contempt in 2001; Taricani, who served four months for criminal contempt in 2005; Judith Miller, who served 85 days for civil contempt in 2005; Joshua Wolf, who served 226 days for civil contempt in 2006 and 2007; and BALCO journalists Lance Williams and Mark Fainaru-Wada, who were facing 18 months for civil contempt before their confidential source came forward in early 2007. (Coverage of all these cases can be found in previous issues of the Silha *Bulletin*. See the archive at www.silha.umn.edu.)

Levine's testimony also offered a list of instances where the public interest has been served by the use of confidential sources by reporters, from Watergate and the Pentagon Papers case in the 1970s, to more recent stories such as the Enron scandal, abuse at Abu Ghraib prison, conditions at Walter Reed Army

Federal Shield Law, *continued on page 8*

"[B]eginning in 2001, four federal courts of appeals have affirmed contempt citations issued to reporters, each imposing prison sentences more severe than any previously known to have been experienced by journalists in American history."

– Lee Levine
Media Lawyer

Federal Shield Law, *continued from page 7*

Medical Center, and BALCO.

"Needless to say, the prospect of substantial prison terms and escalating fines for honoring promises [of confidentiality] to sources threatens this kind of journalism," Levine said.

Assistant Attorney General Rachel Brand, in testimony on behalf of the DoJ, said the bill would "upset [the] balance" that existing policies strike between a free flow of information and fair and effective law enforcement, resulting in the unnecessary protection of unauthorized leaks and disclosures of sensitive information and, ultimately, threats to national security.

Brand's testimony said that DoJ guidelines, codified at 28 C.F.R. § 50.10 "demonstrate how seriously the Department takes any investigative or prosecutorial decision that implicates ... members of the news media."

Under the guidelines, Brand said, the U.S. Attorney General must personally approve all contested subpoenas directed to journalists, following a "rigorous and multi-layered internal review process.

"Only after all reasonable attempts have been made to obtain information from alternative sources and negotiations for voluntary production have failed may a prosecutor seek permission to issue a subpoena to the media," Brand's testimony said.

Brand said the effectiveness of these guidelines and the limits they place on the availability of subpoenas to the media refutes the argument that freedom of the press and the free flow of information to the public have been restricted.

Quoting *Branzburg v. Hayes*, 408 U.S. 665 (1972), the only time the U.S. Supreme Court has addressed reporter privilege under the First Amendment, Brand's testimony said, "estimates of the inhibiting effect of … subpoenas on the willingness of informants to make disclosures to newsmen are widely divergent and to a great extent speculative."

Brand also said the bill's definitions of "covered person" and "journalism" offer a privilege with no regard for nationality, affiliation, occupation, and profession.

"Such a broad definition would accord the status of 'covered person' to a terrorist operative who videotaped a message from a terrorist leader threatening attacks on Americans, because he would be engaged in recording news or information that concerns international events for dissemination to the public," Brand said.

According to a June 15, 2007 *San Francisco Chronicle* story, House Judiciary Committee Chairman John Conyers (D-Mich.), in an interview following the hearing, challenged the DoJ assertion that terrorists would be protected by the shield law.

"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."

Randall D. Eliason, a Professorial Lecturer in Law at George Washington University Law School who testified against the bill, said in his testimony that from an historical perspective, media advocates' concerns about a chilling effect were unfounded.

"Proponents of a privilege often cite the importance of confidential sources to the reporting of such historic events as Watergate, the Pentagon papers, or the Iran-Contra scandal. What they usually fail to note is that those stories all were reported despite the lack of any federal reporter's privilege law," said Eliason.

Eliason also said the actions of BALCO reporters Lance Williams and Mark Fainaru-Wada were "deplorable, not heroic," because they assisted defense attorney Troy Ellerman with the illegal leak of grand jury testimony, and because they knew that Ellerman lied when denying knowledge of the leak in a sworn statement to a judge but failed to report it when the defense blamed prosecutors for the leak.

Eliason said a federal shield law would not prevent journalists from going to jail. "Journalists don't go to jail simply because of the lack of a federal reporter's privilege," Eliason's testimony said. "They go to jail in part due to a professional culture that insists on an absolute privilege, chastises reporters who comply with court orders to testify, and lionizes those who defy the law as martyrs for the First Amendment. Passage of a federal privilege law will not alleviate that problem."

According to *San Francisco Chronicle* Editorial Page Editor John Diaz, the U.S. Chamber of Commerce, the National Association of Manufacturers, beverage companies, and tire makers have hired lawyers and a public relations firm from Washington D.C. to challenge the Free Flow of Information Act of 2007. Diaz said in a July 15 column following an interview with Phil Goldberg, an attorney from the firm Shook, Hardy & Bacon who represents the business groups who oppose the bill, that they are proposing amendments that would offer journalists no shield for the disclosure of any trade secrets or proprietary information.

Forty-nine states and the District of Columbia have recognized at least a qualified reporter privilege in the common law. Thirty-three states and the District of Columbia have shield laws, according to the Reporters Committee for the Freedom of the Press. Maryland passed the first such statute in 1896. Washington state's new shield law went into effect on July 22, 2007.

According to Levine's June 14 testimony, "the experience of the states demonstrates that shield laws have no material impact on law enforcement or on the discovery of evidence in judicial proceedings, criminal or civil."

– Patrick File
Silha Fellow and *Bulletin* Editor

Reporter Privilege News

Roundup: State Lawmakers Consider Privilege Statutes

Supporters advocate shield law in Massachusetts

Journalists and First Amendment experts testified in support of a proposed reporter shield law at a June 12, 2007 hearing of the Massachusetts Joint Committee on the Judiciary.

Massachusetts House Bill 1672, or the "Free Flow of Information Act", would prevent judges from forcing journalists to reveal the identity of their sources or turn over notes, tapes, and other news gathering materials. The bill allows for limited exceptions including the prevention of terrorism and cases where the information is of critical importance to the resolution of a pending case, it cannot otherwise be found, and disclosure outweighs protection.

Supporters called the proposed statute necessary to protect reporters and ensure unfettered public access to information, but some lawmakers gave the bill a cool reception. They raised concerns about its definition of a journalist and limiting the ability of courts to compel disclosure. Sen. Robert Creedon (D-Brockton), the democratic co-chairman of the committee, predicted the bill had little chance of passing without significant changes, *The* (Quincy, Mass.) *Patriot Ledger* reported June 13.

The bill protects "Covered Persons," which it defines as all those engaged in gathering news with the intent, when they begin the process, to disseminate the information. "News or Information" includes all "written, oral, pictorial, photographic, or electronically recorded information" concerning "events or other matters."

The (Springfield, Mass.) *Republican* reported June 13 that Creedon was particularly concerned that the proposed statute would protect bloggers, whom he called "the loosest of loose cannons."

Rep. Eugene L. O'Flaherty (D-Suffolk), the other co-chairman of the committee and a trial lawyer, said he worried the statute would stand in the way of a court's search for the truth by limiting judicial power to subpoena witnesses and compel disclosure, *The Republican* reported. He also raised concerns that the statute would protect journalists who reveal trade secrets.

Both lawmakers also asked witnesses why the law was necessary. Massachusetts case law already provides for a limited reporter privilege, but supporters argued that recent cases show that protection is not enough.

In *Ayash v. Dana-Farber Cancer Institute*, 443 Mass. 367 (2005), the Massachusetts Supreme Judicial Court upheld a $2.1 million default judgment against a Boston newspaper and reporter. The default judgment was entered as a sanction for a reporter's refusal to reveal a source during discovery. (See "*Boston Globe* loses appeal in $2 Million Libel Suit" in the Winter 2005 issue of the Silha *Bulletin*.)

James Taricani, a Rhode Island television reporter who was confined to house arrest for six months in 2004 for refusing to reveal the source of a videotape showing a local government official accepting a bribe, testified at the June 12 hearing. (See "Reporters Privilege News: Journalist Sentenced to House Arrest for Refusing to Reveal Source" in the Fall 2004 issue of the Silha *Bulletin*.)

"Sending journalists to prison flies in the face of the First Amendment," Taricani told legislators, according to *The Republican*. "We need shield laws, both on the state and federal levels, in order to do our jobs."

If the bill passes, Massachusetts would become the 34th state with a shield law.

"Sending journalists to prison flies in the face of the First Amendment. We need shield laws, both on the state and federal levels, in order to do our jobs."

– James Taricani
Television reporter
sentenced to six months
house arrest in 2004

Texas shield law dies on technicality after passing in Senate

A bill that would have provided for a limited reporters' privilege in Texas died because of a technicality in the House, just weeks after passing the Senate, the Associated Press (AP) reported May 22, 2007. (See "Shield Laws on Agendas in Other States and at the Federal Level" in the Spring 2007 issue of the *Silha Bulletin*.)

According to *The Houston Chronicle*, Rep. Debbie Riddle (R-Tomball) pointed out a sentence that had been added to the bill by committee counsel that was not referenced in the legislative analysis. The bill was therefore ruled out of order, and the Texas Legislature adjourned May 28, 2007 without taking further action.

The failed bill would have created a qualified privilege for people or companies engaged in gathering and disseminating news. According to *The Chronicle*'s May 23 story, Sen. Rodney Ellis, (D-Houston), a sponsor of the bill, expressed disappointment at the bill's failure. "To fight so long and to move this bill so far and to have it snatched away on something that is completely non-substantive is neither good government, nor good for the people of Texas," Ellis said.

Ellis told the AP that he and other sponsors will fight for passage of the bill again during the 2009 legislative session. The Texas legislature meets every other year.

– Michael Schoepf
Silha Research Assistant

Reporter Privilege News

Update: BALCO Leaker's Plea Deal Rejected

The lawyer who admitted leaking grand jury testimony about athlete steroid use to the *San Francisco Chronicle* was sentenced to 2 1/2 years in prison July 12, 2007. The judge had rejected an earlier plea agreement that allowed for a two-year maximum sentence as too lenient.

Troy Ellerman's guilty plea kept two *Chronicle* reporters from going to prison for refusing to divulge a confidential source, but neither reporter would confirm that Ellerman, a former defense lawyer for two defendants in the Bay Area Laboratory Co-Operative (BALCO) steroid distribution case, was his source. Mark Fainaru-Wada and Lance Williams wrote a series of newspaper stories and a book in 2004 about steroid use in Major League Baseball based on grand jury testimony from players including Barry Bonds and Jason Giambi. (See "Attorney Admits Leaking Information to BALCO Reporters" in the Winter 2007 issue of the Silha *Bulletin*.)

> "If you can't believe what the lawyers say, you have no basis for finding the truth, no basis to follow the law, and the system breaks down."
>
> – Judge Jeffrey White
> U.S. District Court for the District of Northern California

Under the agreement with prosecutors, Ellerman pleaded guilty to four felonies, including obstruction of justice and contempt of court, and agreed to a maximum 33-month prison term and a $250,000 fine. U.S. District Judge Jeffrey White sentenced Ellerman to 30 months in prison, but dropped the fine, citing the hardship it would impose on the lawyer's family. Ellerman also will have to speak at 10 California law schools after his prison term about the importance of being "fair and honest" as a lawyer, the *Chronicle* reported July 13, 2007.

The *Chronicle* reported that Ellerman argued that the 30-month sentence was too harsh based on President George W. Bush's recent commutation of the 30-month sentence issued to I. Lewis Libby for lying to a grand jury about his role in leaking the identity of former CIA operative Valerie Plame. The only differences, Ellerman argued, were that Libby took the case to trial while Ellerman admitted his crime, and Libby divulged information relating to national security while Ellerman divulged information relating to professional athletes.

White rejected Ellerman's arguments, relying on federal sentencing guidelines and the contention that lawyers, as officers of the court, should be severely punished for lying to the court. Ellerman had argued the case against his clients should be dropped because prosecutors had leaked the testimony.

"If you can't believe what the lawyers say, you have no basis for finding the truth, no basis to follow the law, and the system breaks down," White said, according to the *Chronicle*. "Under the president's reasoning, any white-collar defendant should receive no jail time, regardless of the reprehensibility of the crime."

Ellerman must report to prison by Sept. 13, 2007, the *Chronicle* reported. With good behavior, Ellerman could be released in about two years.

– Michael Schoepf
Silha Research Assistant

Silha Center Staff

Jane E. Kirtley
Silha Center Director and Silha Professor

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Silha Research Assistant

Sara Cannon
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Newspaper's FOIA Request Granted After Nearly Three Years; Congress Passes Bill to Prevent Similar Delays

The U.S. Marshals Service released 230 pages of documents to the *Hattiesburg* (Miss.) *American* on June 13, 2007, nearly three years after the newspaper made its original Freedom of Information Act (FOIA) request. The documents describe the results of an internal investigation into an April 2004 incident where a marshal forced two journalists to erase audio tape recordings of a speech by U.S. Supreme Court Justice Antonin Scalia.

When Scalia gave a speech at Presbyterian Christian High School in Hattiesburg, U.S. Marshal Melanie Rube ordered two reporters sitting in the front row, one from the *American* and the other from the Associated Press (AP), to erase tapes they were making of the speech in accordance with her understanding of Scalia's longstanding refusal to allow public broadcast of his comments. (See "U.S. Marshal Orders Reporters to Erase Scalia Speech Tapes" in the Spring 2004 issue of the Silha *Bulletin*.)

Scalia later issued written apologies to the journalists and clarified his policy. According to the apology letters, he allows reporters to record speeches to ensure accuracy in their reports, but not for public broadcast on television or radio news programs.

In May 2004, the *American* and the AP filed suit against the U.S. Marshals Service and won. The Marshals Service admitted Rube's conduct violated federal laws that prohibit government officials from confiscating journalist work product. The *American* made a FOIA request in October 2004 for documents pertaining to the agency's internal investigation of the incident.

After the Marshals Service refused to turn over the documents, the newspaper appealed to the Department of Justice (DoJ), which ruled in May 2007 that the Marshals Service should turn over the requested documents.

The *American* reported June 14 that the released report found that the marshal's conduct did not violate federal law, even though their lawyers settled the 2004 lawsuit. The report also included an interview with Rube in which she explained her belief that the then-headmaster of the school where Scalia was speaking had asked reporters not to record the speech. Rube learned later that the headmaster had asked other news outlets not to record the speech, but had not made a general announcement that would have been heard by the reporters whose tapes were erased.

A June 16 editorial in the *American* complained that the "almost-three-year-tug-o-war" with the Marshals Service was "unconscionable but not unusual." The Knight Open Government Survey, released July 2 by the National Security Archive, a non-governmental research institute at George Washington University, showed that the current law allows some FOIA requests to drag on for decades. Researchers found six open FOIA requests dating back to the 1980s, including one uncompleted request that was 20 years old. The survey reported five government agencies – the State Department, CIA, Air Force, FBI, and DoJ – had outstanding requests dating back at least 15 years. The State Department alone reported ten 15-year-old requests.

The *American* called for reform and urged passage of the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007. The statute would strengthen the 40-year-old FOIA by instituting strict response time requirements to FOIA requests and adding consequences for failing to respond. The statute would also create a tracking system to monitor requests and an ombudsman position to help people who make FOIA requests understand the law. Finally, the statute would update FOIA's definition of a journalist to include most bloggers, making them eligible for document collection fee waivers.

> "What happened in Hattiesburg happens all over the county, all the time. Agencies feel completely confident in stonewalling because there's no real punishment."
>
> – Charles Davis
> Executive Director,
> National Freedom of
> Information Coalition

The OPEN Government Act passed in the House by a wide margin in March 2007, but stalled in the Senate because Sen. Jon Kyl (R-Ariz.) placed a secret hold on the bill in May 2007. A secret hold is a parliamentary procedure that allows senators to anonymously block legislation from a floor vote using a provision of the Senate Rules that requires "unanimous consent" for a bill to be considered before the full Senate. Any senator may quietly inform party leaders of intent to withhold consent, anonymously keeping the bill in committee. Kyl's identity was discovered after the Society of Professional Journalists surveyed senators to find out why the bill was stalled.

David Carr reported in his July 23, 2007 "Media Equation" column for *The New York Times* that Kyl's press secretary said that the hold was in place to allow for further negotiations between the DoJ and senate staffers about provisions in the bill the DoJ opposes. The DoJ sent a 13-page letter to Sen. Patrick Leahy (D-Vt.), one of the bill's sponsors, on March 26, 2007, outlining concerns with the statute. Kyl's press secretary said at the time that some concerns still needed to be addressed.

The Senate voted unanimously in favor of the bill on Aug. 3, 2007, after a two-month delay started by Kyl's hold. The bill won the support of more than two-thirds of the House and Senate making it "veto-proof." The Senate sponsors told reporters that President George W. Bush was expected to sign it after the conference committee resolves some small differences between the House and Senate versions.

"For more than four decades, FOIA has translated the great American values of openness and accountability into practice by guaranteeing access to government information. The OPEN Government Act will help ensure that these important values remain a cornerstone of our American democracy," Leahy said in a statement after the Senate vote.

Mississippi Newspaper FOIA, *continued on page 13*

Media Access/FOIA

Appeals Court Sides with Newspapers in FEMA Aid FOIA Case

Agency says Ruling will not Alter Policy

The 11th Circuit U.S. Court of Appeals ruled June 22, 2007 that the Federal Emergency Management Agency (FEMA) must turn over the addresses of individuals who received disaster relief funds in response to Freedom of Information Act (FOIA) requests.

Four Florida newspapers sought the records relating to the disbursement of $1.2 billion following the disastrous 2004 hurricane season in which four storms pummeled the state in six weeks. FEMA previously released disbursement records relating to the storms, but redacted the names and addresses of the 605,500 recipients.

In an opinion by Judge Stanley Marcus, the unanimous three-judge panel ruled that FEMA incorrectly withheld the addresses, but not the names, of the fund recipients under the federal Privacy Act and exemption six of the FOIA. Taken together, the exemption and the Privacy Act require federal agencies to withhold personally identifiable information in response to FOIA requests that "would constitute a clearly unwarranted invasion of personal privacy."

"In light of FEMA's awesome statutory responsibility to prepare the nation for, and respond to, all national incidents, including natural disasters and terrorist attacks, there is a powerful public interest in learning whether, and how well, it has met this responsibility," Marcus wrote. "[W]e cannot find any privacy interests here that even begin to outweigh this public interest."

> "In light of FEMA's awesome statutory responsibility to prepare the nation for, and respond to, all national incidents, including natural disasters and terrorist attacks, there is a powerful public interest in learning whether, and how well, it has met this responsibility."
>
> – Judge Stanley Marcus
> 11th Circuit U.S. Court of Appeals

News-Press v. U.S. Department of Homeland Security, 489 F.3d 1173 (11th Cir. 2007), consolidated appeals from two federal district court rulings where opposite conclusions were reached despite similar facts.

In the first case, *The* (Fort Myers, Fla.) *News-Press*, *Pensacola News Journal*, and *Florida Today* (Brevard County, Fla.) sought records detailing the disbursement of housing assistance, "other needs" assistance, and National Flood Insurance Program payments to federally insured properties. FEMA released the records relating to the Florida disbursements, but redacted the names and addresses of the recipients. The three Gannett Co.-owned newspapers filed suit in the Federal District Court for the Middle District of Florida seeking disclosure of the redacted information.

In the second case, the Fort Lauderdale-based *South Florida Sun-Sentinel* filed a FOIA request for the same information and additional information relating to 27 other natural disasters. FEMA again released the information without the names and addresses of the recipients. The *Sun-Sentinel* filed suit in the Federal District Court for the Southern District of Florida.

The Middle District Court concluded that FEMA properly withheld the information under exemption six, but the Southern District Court ruled that FEMA correctly withheld the names but not the addresses. The Gannett newspapers appealed from the Middle District's ruling, and FEMA appealed from the Southern District's decision on the addresses. The *Sun-Sentinel* did not dispute the Southern District's holding on release of the recipients' names.

The court ruled that "learning whether FEMA is a good steward of (sometimes several billions of) taxpayer dollars" is within the public interest. Generally, FOIA requests may be made for any reason and the party seeking documents need not assert a public interest in them, but when the information fits within an exemption the court must balance the interest contained within the exemption against the public interest in disclosure.

Here, suspicions of fraud and mismanagement had arisen from the disbursement of $31 million to residents of Miami-Dade County for damage caused by Hurricane Frances in 2004. According to the opinion, the eye of the storm landed more than 100 miles north of the county and caused little discernible damage in the area.

Press reports eventually led to investigations by the U.S. Senate and the Office of the Inspector General for the Department of Homeland Security. According to the 11th Circuit opinion, both investigations concluded that FEMA made serious mistakes in disbursing funds in Miami-Dade County due to questionable procedures. The reports on the investigations expressed concerns about widespread waste and fraud because the questionable procedures were used in disaster relief disbursements nationwide.

The appeals court ruled that the suspicions of widespread fraud raised by the government reports placed further investigation of FEMA's handling of tax money in the public interest. Marcus held that the only way to evaluate whether disbursements were handled properly was on an individual basis – an evaluation that would require addresses.

The court based its conclusion in part on FEMA's own statements shortly after criticism of the disbursements began appearing in the press. FEMA argued at the time that damage cannot be inferred from the path and strength of the storm. Instead, individual evaluation on a home by home basis would be required.

After finding a clear public interest in disclosure of the addresses, the court moved to a discussion of potential personal privacy interests that could exceed the public interest. Marcus dismissed each of the

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FEMA FOIA, *continued from page 12*

justifications cited by the Middle District Court when it ruled that the privacy interest in withholding the addresses exceeded the public interest in disclosure.

The court acknowledged that release of the addresses would allow the newspapers to discover the names of the recipients using other public records, but dismissed the importance of such a link. FEMA's previously released records were so vague, that even with names attached they contained little information worthy of protection. The likelihood that thieves would seek the information for identity theft or actual theft was quite low, said the court.

FEMA also argued that release of the addresses would subject the recipients of aid to public embarrassment. But the court reasoned that receipt of aid should not cause embarrassment because disbursements are based on the amount of damage, not the economic status of the recipient.

Lastly, FEMA had argued that disclosure of the addresses would subject aid recipients to solicitations from news organizations and commercial enterprises. The court ruled these "modest instrusion[s]" were a small price to pay for the public's interest in disclosure.

"[T]he disclosure of the addresses serves a powerful public interest, and the privacy interests extant cannot be said even to rival this public interest, let alone *exceed* it . . .. On this record we do not find the balancing calculus to be particularly hard," Marcus wrote.

However, the court ruled that FEMA correctly withheld the names of the fund recipients. Releasing the names of disbursement recipients would add little to the public interest while substantially increasing the risk of adverse effects to personal privacy. The court reasoned that attaching the names to the records would increase the risk of commercial solicitation without substantially improving the analysis of the extent of the fraud. Disclosure of the "names would therefore constitute a clearly unwarranted invasion of personal privacy," the court held.

The News-Press reported in a June 22 story that the case should improve press access to FEMA records following national disasters, including records concerning FEMA's response to Hurricane Katrina in 2005. "No one likes to get sued, not even the government, and you would hope at least if they would get a similar request, they would respond in a different way," said David Greene, executive director of The First Amendment Project.

The News-Press reported August 6 that FEMA said it would release the addresses only because of the court order, and would not change its policy based on the 11th Circuit ruling. FEMA officials said that the court order only calls for the release of information related to aid recipients between 1998 and 2004. A FOIA request seeking data related to a disaster that occurred after 2004 would require a new court order. The newspaper also reported that FEMA would spend an additional $1.1 million to notify the aid recipients that their addresses would be released to the media.

"The public interest in making sure that FEMA is effectively protecting us doesn't change from disaster to disaster, year to year, or region to region," Charles Tobin, a lawyer for the Gannett-owned newspapers, told *The News-Press*. "If FEMA really thinks the court didn't mean for its decision to apply to other disasters, the agency has learned nothing from this exercise, and that's very unfortunate for the public because it may mean more wasteful litigation in the future, at taxpayer expense."

– Michael Schoepf
Silha Research Assistant

Mississippi Newspaper FOIA, *continued from page 11*

The *Hattiesburg American* reported June 14 that strengthening FOIA with reforms like the OPEN Government Act would make FOIA a more useful tool for reporters. "Many [journalists] by and large don't even use FOIA because it's a broken system," Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press, said in the story. "I'm hopeful that if we get meaningful reforms on the law, more journalists will actually use it."

Charles Davis, executive director of the National Freedom of Information Coalition, an organization based at the University of Missouri that supports use of the Freedom of Information Act, told the *American* that until the new statute is enacted, delays like the newspaper faced will continue to be common. "What happened in Hattiesburg happens all over the county, all the time. Agencies feel completely confident in stonewalling because there's no real punishment," he said.

– Michael Schoepf
Silha Research Assistant

Media Access/FOIA

Bill to Exempt British Parliament from FOIA Passes House of Commons, but Unlikely to Become Law

In a move toward government secrecy in the United Kingdom, the British House of Commons approved an exemption for Parliament from the nation's Freedom of Information law in May 2007.

According to *The Guardian* of London, the Freedom of Information (Amendment) Bill, which passed the House of Commons May 18 and now sits in the House of Lords, would make the spending records and communications of Members of Parliament (MPs) confidential and inaccessible to the public.

"[The bill] will be the height of hypocrisy if Parliament, having passed the freedom of information legislation, decided that we should be exempt from it."

– David Winnick
Labour Party MP

The bill was introduced by Conservative MP David Maclean, a chief Tory whip from Scotland, in April 2007. According to *The Guardian*, because Maclean is a "backbencher," and not a party leader, the success of his bill so far is unusual. *The* (London) *Times* reported that Maclean first introduced the measure on the premise that it would protect the privacy of MPs' constituents in their communications with their representatives.

According to *The Times*, The Campaign for Freedom of Information called the broad exemption "unnecessary," since letters between MPs and constituents are already protected by two separate exemptions under the current Freedom of Information Act 2000: one for "disclosures which infringe the Data Protection Act" and another for "those constituting a breach of confidence." According to its Web site at http://www.cfoi.org.uk/, The Campaign for Freedom of Information is a non-partisan, non-profit group "working to improve public access to official information and ensure that the Freedom of Information Act is implemented effectively."

When the bill was first introduced in the House of Commons in April, it received intense criticism from the British press. The bill was not expected to pass the House of Commons because it was unpopular with the British public and highly controversial among MPs.

According to the rules of Parliament, a bill must be brought to the House of Commons for three "readings" before it can be voted on. In addition to the MP introducing it, a bill needs a co-sponsor to be eligible for a vote. When the Freedom of Information (Amendment) Bill was brought to the house for its "first reading," no one agreed to co-sponsor it. However, according to *The Birmingham Post*, the bill received adequate sponsorship when it was reintroduced eight days later for its "second reading," and when the "third reading" of the bill took place in the House of Commons on May 18, the measure passed by a broad majority of 71 votes.

The day after the House of Commons approved the measure, Labour Party MP David Winnick told *The Guardian*, "[The bill] will be the height of hypocrisy if Parliament, having passed the freedom of information legislation, decided that we should be exempt from it."

Opponents of the bill tried to block it before the final vote in the House of Commons by "talking it out," a practice similar to that of the filibuster used in the U.S. Congress. If opponents had been able to keep the vote from being made before 2:30 p.m., May 18, the measure would have been ineligible for a vote, according to *The Birmingham Post*. *The Post* reported that MPs working to block the bill brought up everything from petitions from their constituents about building noise to a bucket placed in the Commons building hallways, which was called a "substantial trip hazard" by Liberal Democrat David Heath. During his speech on the topic, Heath called for an investigation into the matter of the bucket.

Despite these efforts, Maclean and other proponents of the exemption bill managed to stop the delaying tactics by demanding a vote according to established rules of order. *The Birmingham Post* reported that, during the debate on the bill itself, "arguments in the House of Commons were heated and intense." Maclean accused his opponents of "going all out" to destroy his bill, and when Constitutional Affairs Minister Bridget Prentice announced that the government's position with regard to the bill was neutral, the response in the House of Commons was a wave of derisive laughter, according to *The Post*.

Reports in numerous British media including *The Guardian*, *The Times*, and *The Birmingham Post* reflected a widespread suspicion that Maclean has had covert help from the government in passing the exemption. *The Birmingham Post* reported that many MPs had chosen to support it out of fear that if they did not, they would be "forced to reveal details about mortgages on London homes which in some cases are subsidised by the taxpayer." According to *The Post*, the majority vote in the House of Commons suggests that most MPs would rather not be exposed to scrutiny over how they spend public money. Matthew Elliott, chief executive of the Taxpayers' Alliance, a grassroots organization which opposes tax increases, told *The Guardian* that the bill's passage showed that Parliament members "don't think taxpayers have a right to know how their hard-earned money is spent, and in some cases wasted."

MPs opposing the measure have been outspoken.

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Montana High Court Rules School District Must Disclose Student Discipline Records; FERPA Does Not Apply

The Montana Supreme Court ruled in May 2007 that the *Cut Bank Pioneer Press* had standing to enforce the state's open meeting laws, and ordered the Cut Bank School District to turn over discipline records related to a 2005 incident.

In *Bd. of Trustees, Cut Bank Public Schools v. Cut Bank Pioneer Press*, 160 P.3d 482 (Mont. 2007), a unanimous court held that the *Cut Bank Pioneer Press* had a "personal interest" in the records that reached beyond the common interest of all citizens, and that neither federal law nor the state constitution prevented disclosure of the records.

"This ruling is a victory for the public's right to examine what government agencies are doing in its name," said Jim Clarke, the Associated Press (AP) bureau chief for Montana, in a May 9 AP story. "It helps roll back a dark trend toward secrecy in government."

According to the state Supreme Court's opinion, on Sept. 25, 2005 the School District's Board of Trustees closed a portion of its public meeting to determine the appropriate discipline for two students found shooting other students with plastic BBs on school property. LeAnne Kavanagh, an editor at the *Cut Bank Pioneer Press*, asked for records describing the board's disciplinary action. She specifically requested that the disciplined students be identified only by a number and not by name. On the advice of its attorney, the board refused and instead filed a petition in state District Court for the Ninth Judicial District asking for an *in camera* inspection of the records and a ruling as to whether they should be disclosed.

The newspaper filed a petition in the same court seeking records outlining the disciplinary action taken by the board. In a combined hearing on both petitions, the district court concluded that the federal Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232(g) (2006), applied to the student records and prevented the board from releasing them without the consent of the students and their parents. The FERPA conditions the receipt of federal funding by state educational institutions on the availability of student "education records" to parents, and the withholding of those records from most other people or institutions.

While the newspaper's appeal was pending, the Montana Supreme Court decided *Fleenor v. Darby School District*, 2006 MT 31, 128 P.3d 1048 (Mont. Sup. Ct. 2006). In *Fleenor*, the court held that a resident suing to enforce her right to participate in the hiring of a new school superintendent lacked standing because she failed to allege an actual or threatened injury. "While the allegation of membership within the school district is a good start toward establishing standing, it is not, on its own, enough," the court held.

News organizations responded with concern that the ruling would leave them unable to enforce article II, sections 8 and 9 of the Montana Constitution, which guarantee citizen access to government meetings and records. "The problem with this is that it appears to let officials who flaunt [sic] open meeting requirements off the hook big time," argued a March 9, 2006 editorial in the *Helena Independent Record*.

Relying on *Fleenor*, the Cut Bank School Board asserted for the first time on appeal that the *Cut Bank Pioneer Press* lacked standing. The board argued that the paper could not show an injury distinguishable from the injury to the general public. But the Montana Supreme Court disagreed. "The interest was personal to [the *Cut Bank Pioneer Press*] because the records were necessary for [the newspaper's] work," the court held. "[The *Cut Bank Pioneer Press*] clearly stated an interest in the redacted student disciplinary records which extended beyond the 'common interest of all citizens.'" The court agreed with *amici* – the Montana Newspaper Association, Montana Broadcasters Association, and The Associated Press – the board had prevented the *Pioneer Press* from "doing its job" and that constituted a specific injury for the purposes of standing.

> "[The *Cut Bank Pioneer Press*] clearly stated an interest in the redacted student disciplinary records which extended beyond the 'common interest of all citizens.'"
>
> – Montana Supreme Court

In a separate concurrence, Justice James C. Nelson further clarified the *Fleenor* holding. "While denominated as standing problem, *Fleenor*, more accurately, involved a pleading problem. Fleenor's complaint and amended complaint were so poorly drafted that she failed to allege any personal injury or stake in the litigation – the fundamental requirement to begin any lawsuit," he wrote. Justice Patricia Cotter, the author of the *Fleenor* decision, joined in the concurrence.

Moving to the statutory issue, the court ruled that the FERPA does not protect the Cut Bank School District's disciplinary records because they are not "education records" within the meaning of the statute. Education records are those that (1) directly relate to a student, and (2) are maintained by the educational institution. The *Cut Bank Pioneer Press* asked for records with the names redacted or replaced by numbers that do not identify the students. Since the records would not personally identify any student, they do not directly relate to any student and are not protected as "education records" by the FERPA, the court held.

Turning finally to the Montana Constitution, the court examined article II, section 9. Section 9 limits the right to inspect public documents "in cases in which the demand of individual privacy clearly exceeds the merits of public disclosure." The court held that even if the students or their parents had a subjective expectation of privacy, it is not one the public is willing to recognize as reasonable because

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Student Records, *continued from page 15*

the records do not disclose the identity of the students. The privacy interest does not outweigh "the merits of public disclosure."

"This ruling is significant for Montana citizens who care about open government," Mike Meloy, an attorney for the *Cut Bank Pioneer Press* said in a May 16 *Pioneer Press* story. "First, it affirms the proposition that people who disseminate news have standing to challenge government secrecy in court. Second, the court rejected the recent trends of school boards to close meetings and documents for frivolous reasons . . .. The *Cut Bank Pioneer Press* should be commended for pursuing the case. It vindicated constitutional rights for all Montana citizens."

Despite losing the case, Cut Bank Superintendent of Schools Wade Johnson expressed satisfaction with the continuing relationship between the schools and the newspaper. "The legal advice we received did not work out as planned, but we are thankful that the relationship between the Cut Bank Schools and the *Cut Bank Pioneer Press* has remained positive throughout the process," he said in a May 16 *Pioneer Press* story.

– Michael Schoepf
Silha Research Assistant

British FOIA, *continued from page 14*

According to *The Birmingham Post*, MP Winnick stated at the final vote on the bill that there have been no complaints about the release of private information about MPs or their constituents. Tory MP Richard Shepherd concurred, calling the bill "dreadful" and stating that if it was really meant to protect correspondence, the bill was not necessary. Labour MP Mark Fisher said after the vote, "it is inevitable that [the exemption bill] would bring this House into complete contempt and into the ridicule of the public." According to *The Guardian*, Liberal Democrat MP Simon Hughes commented after the vote that "this has been a shameful day for the House of Commons. MPs should set an example of open government, not apply it to everybody but ourselves." The *Guardian* reported that Hughes appealed to the House of Lords to "deliver us from this terrible mistake."

A group of British Non-Governmental Organizations (NGOs) that support freedom of expression worldwide, including English PEN, Index on Censorship, and Article 19, have written a letter to new British Prime Minister Gordon Brown asking him to oppose the bill.

As of press time, no member of the House of Lords had agreed to sponsor the bill, according to the Campaign for Freedom of Information. The House of Lords is in summer recess until Oct. 8, 2007. "It now seems extremely unlikely that the Bill could make progress in anything like its current form" before the legislative session ends in October or November 2007, the Campaign for Freedom of Information reported on its Web site. However, "if a sponsor is found, it is possible that the Bill could still be introduced in October," the campaign said.

The full text of the Freedom of Information (Amendment) Bill is available online at www.publications.parliament.uk/pa/cm200607/cmbills/062/07062.i-i.html#jo1.

– Sara Cannon
Silha Center Staff

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Military Access/Free Speech

New U.S. Military and Iraqi Policies Create Challenges for Journalists Working in War Zone

The U.S. Department of Defense (DoD) and the Iraqi government recently increased restrictions on reporters and photographers, leading some journalists to question whether the changes were motivated by political pressure to hide gruesome images from the public.

DoD Directive 5122.5

DoD Directive 5122.5 requires that embedded photographers and reporters obtain "prior written consent" to include "[n]ames, video, identifiable written/oral descriptions or identifiable photographs" of wounded soldiers in their reports. The DoD added the language last year to an agreement journalists must sign before they are embedded with U.S. troops in Iraq. The agreement also prohibits release of any image depicting a dead soldier. The new version of the directive dated May 5, 2006 is available at http://www.iraqslogger.com/downloads/mnf_i_media_ground_rules5may06_1.pdf.

Military spokeswoman Lt. Col. Josslyn L. Aberle told David Carr of *The New York Times* that the new restrictions arose from a desire to increase privacy for military personnel and their families, not to curtail the flow of negative war images back to the states. Carr wrote about the new restrictions in his "Media Equation" column published May 28, 2007.

"The last thing that we want to do is to contribute to the grief and the anguish of the family members," Aberle said. "We don't want the last image that the family has of their soldier to be a photo of him dying on a battlefield. You have to ask how much value is added."

But some journalists say that the requirement of prior consent functions as a complete ban on depictions of wounded service members.

"They are basically asking me to stand in front of a unit before I go out with them and say that in the event that they are wounded, I would like their consent," veteran photographer Ashley Gilbertson said in *The Times* column. "We are already viewed by some as bloodsucking vultures, and making that kind of announcement would make you an immediate bad luck charm."

Gilbertson also told *The Times* that the ban seems more like a political effort to hide "the reality of war" from the public than a humanitarian effort to protect soldiers and their families. Prior to the change in Directive 5122.5, images of a wounded soldier could be released only after the soldier's family had been informed of the incident.

In a May 29, 2007 posting on the "Public Eye" blog at cbsnews.com, Brian Montopoli argued that the public's right to information should be balanced against the soldier's right to privacy. But even if the new policy is justified, it makes the job of an embedded journalist more difficult.

"Journalists have a responsibility to be sensitive to the privacy and personal concerns of soldiers and their families, but they have an obligation to tell the story of a war that has become increasingly difficult to cover. The military's guidelines limit journalists' ability to weigh these two considerations on a case by case basis, making it harder for them to generate the kinds of powerful and enduring images that can become icons of a conflict" Montopoli wrote. The posting is available at http://www.cbsnews.com/blogs/2007/05/29/publiceye/entry2863489.shtml.

The tighter regulations for embedded journalists comes at a time when their numbers are steadily decreasing. Carr reported in the May 28 column that there were 92 embedded journalists in Iraq in May 2007, compared with 126 the previous month.

New Iraqi government regulation

On May 13, 2007 the Iraqi government banned photographers and reporters from bombing scenes for a one-hour period following explosions.

Iraqi officials say the ban is necessary to preserve evidence at bomb sites, but journalists worry that the ban is an attempt to prevent dissemination of violent images around the world.

"We do not want evidence to be disturbed before the arrival of detectives, the [I]nterior [M]inistry must respect human rights and does not want to expose victims and does not want to give terrorists information that they achieved their goals," said Brig. Gen. Abdel Karim Khalaf, the director of Iraq's Interior Ministry, according to a May 14 Agence France-Presse report. "The decision does not imply a curtailment of press freedom, it is a measure followed all over the world." The report does not indicate whether Khalaf substantiated his claim that similar practices occur "all over the world."

Reporters sans Frontieres (RSF or Reporters Without Borders), an international free-press advocacy group, said in a May 16 statement that the increasing restrictions imposed by the Iraqi authorities would eventually lead to a complete press blackout.

"It is vital that journalists can report on the security situation throughout the country without it being seen as incitement to violence. When the streets become impassable and the authorities provide no information about the attacks in real time, the role of the reporter becomes essential. Coverage of these attacks allows people to evaluate the security risk and to avoid dangerous areas," RSF said in the statement.

Photo District News (PDN) reported May 16 that the ban may be related to Iraqi government suspicions that journalists have advance knowledge of bomb attacks. According to the PDN story, photographs of bomb sites are one reason photojournalist Bilal

Journalists in Iraq, *continued on page 19*

"They are basically asking me to stand in front of a unit before I go out with them and say that in the event that they are wounded, I would like their consent. We are already viewed by some as bloodsucking vultures, and making that kind of announcement would make you an immediate bad luck charm."

– Ashley Gilbertson
New York Times
photographer

Military Access/Free Speech

Military Internet Regulations Raise Concerns Over American and British Soldiers' Free Speech Rights

An update to Army rules on operations security (OPSEC) and a Department of Defense-wide ban on use of Web sites like YouTube and MySpace have fueled an ongoing debate over soldiers' use of the Internet to express themselves freely.

On May 2, 2007, *Wired* magazine's Noah Shachtman reported on Army Regulation 530-1, "Operations Security (OPSEC)," which was updated April 19, 2007, and directs all military personnel on protecting "sensitive" information that, though not classified, can "be useful to adversaries," if disseminated publicly.

Section 2-1 of the regulation requires that "all Department of the Army personnel…and [Department of Defense] contractors…consult with their immediate supervisor and their OPSEC Officer for an OPSEC review prior to publishing or posting information in a public forum." The regulation says such information "includes, but is not limited to letters, resumes, articles for publication, electronic mail (e-mail), Web site postings, web log (blog) postings, discussion in Internet information forums, discussion in Internet message boards or other forms of dissemination or documentation." The rules can be found at http://blog.wired.com/defense/files/army_reg_530_1_updated.pdf.

Some commentators and military bloggers said the new rule was so restrictive it would effectively end blogging, and possibly even e-mail, for active soldiers in Iraq and Afghanistan.

Shachtman's article, posted in *Wired*'s Danger Room blog, quoted Matthew Burden, a retired paratrooper, founder of the military blog Blackfive, and editor of the anthology "The Blog of War," who said, "this is the final nail in the coffin for combat blogging."

"The soldiers who will attempt to fly under the radar and post negative items about the military, mission, and commanders will continue to do so under the new [regulations]," Burden said. "The soldiers who've been playing ball the last few years, [who are] the vast… majority will be reduced,"

Steven Aftergood, director of the Federation of American Scientists' Project on Government Secrecy and editor of *Secrecy News*, was critical of what he called "a serious conceptual muddle" in the regulation.

"The new regulation conflates OPSEC, which is supposed to be a defense against adversaries of the United States, with [Freedom of Information Act] restrictions, which regulate public access to government information," Aftergood said. "As a result, it appears that OPSEC procedures are now to be used to control access to predecisional documents, copyrighted or proprietary material, and other FOIA-exempt records."

Responding to the criticism, U.S. Army Public Affairs released a fact sheet on May 2 titled "Army Operations Security: Soldier Blogging Unchanged." The fact sheet said that while Army Regulation 530-1 was updated on April 17, 2007, "the wording and policies on blogging remain the same from the July 2005 guidance first put out by the U.S. Army in Iraq for battlefield blogging."

The fact sheet said that, as in 2005 and 2006, soldiers who wish to establish blogs should inform an OPSEC officer "to allow the OPSEC officer an opportunity to explain to the soldier matters to be aware of when posting military-related content in a public, global forum." Soldiers do not need to consult with an OPSEC officer if they do not use government equipment in order to post to their blogs, and if the blogs are not military related and do not appear to represent the Army in any way, according to the fact sheet.

The fact sheet also said that soldiers do not have to seek permission from a supervisor to send personal e-mails because they are considered private communication. "However," the fact sheet said, "if someone later posts an e-mail in a public forum containing information sensitive to OPSEC considerations, an issue may then arise."

In a May 3 follow-up story in the Danger Room blog, Shachtman said the fact sheet gave the appearance that the Army was "backing away from new regulations." Aftergood said that although the fact sheet expressed "a much more sensible approach to the issue," it was also "significantly at odds with the language of the regulation."

A month after the regulation was initially disclosed, the Associated Press (AP) reported that little had effectively changed in soldiers' online communication from the front.

A June 2 article profiled an Iraq-based 82nd Airborne Division corporal who halted his blog, Eighty Deuce on the Loose in Iraq, after learning of Regulation 530-1. The corporal decided to continue blogging, however, after a discussion with his platoon leader.

The AP also reported the Army has said it does not have enough staff to screen all public communication on military networks and that "there has been no indication that soldiers, whose families rely on the Internet for daily reports on their safety, have faced any new systematic obstacles."

"The new regulation conflates OPSEC, which is supposed to be a defense against adversaries of the United States, with FOIA restrictions, which regulate public access to government information."

– Steven Aftergood
Director, Federation of American Scientists' Project on Government Secrecy

Web sites banned on military computers

On May 14, a Department of Defense (DoD) rule went into effect which bans the use of 13 video, music, and social networking Web sites by military personnel on military computers.

The rule bans video-sharing sites YouTube, Metacafe, IFilm, StupidVideos, and FileCabi; social networking sites MySpace, BlackPlanet, and Hi5; music sites Pandora, MTV, 1.fm, and live365, and the photo-sharing site Photobucket. According to the AP, personnel were notified of the upcoming rule change in February.

Pentagon spokesman Col. Gary Keck told the AP the ban was instituted in order to preserve network bandwidth and to "enhance and increase network security."

Soldiers' Free Speech, *continued on page 19*

Soldiers' Free Speech, *continued from page 18*

Some soldiers and family members expressed concern about limits on their ability to use the Internet to keep in touch.

Corey Robinson, a 20-month veteran of Afghanistan and Iraq, told *The New York Times* that Web sites like those that were banned are "like modern-day forms of writing letters."

"When we were able to use the Internet, there was a huge difference in our morale," Robinson said.

Becky Davis, whose son is serving in Iraq, helps maintain a blog on the Military Families Voice of Victory Web site. According to *The New York Times*, Davis said she was unsure whether links she provided to YouTube videos would be blocked.

"I am concerned about how this directive is going to impact the families," Davis said.

The AP reported that officials from YouTube said they were trying to work with the Pentagon in order to resolve bandwidth concerns or partially repeal the ban.

YouTube officials said they were puzzled by the rule because it came just days after the military launched its own channel on YouTube offering what it calls a "boots-on-the-ground" perspective of scenes of combat, according to the May 18 AP story. Chief Executive Chad Hurley expressed doubts that the military's massive computer network could be tied up by soldiers uploading or viewing videos.

Mike Thiem, a spokesman for the Defense Information Systems Agency, told *The New York Times* that the ban was unlikely to limit communication between soldiers and the home front.

Thiem cited "alternative ways of communicating with loved ones," including private Internet cafes on military bases and soldiers using their own personal computers instead of government equipment as ways around the ban.

British Ministry of Defence enacts restrictions

On Aug. 10, 2007, *The Guardian* of London reported that the British Ministry of Defence (MoD) had issued new guidelines pertaining to soldiers' ability to speak about service activities.

Under the new rules, "soldiers, sailors and airforce personnel will not be able to blog, take part in surveys, speak in public, post on bulletin boards, play in multi-player computer games or send text messages or photographs without the permission of a superior if the information they use concerns matters of defense," *The Guardian* reported.

Military personnel are also forbidden from receiving money for interviews, conferences, or books based on their military service. Two sailors on the HMS Cornwall who were held captive in Iran in March 2007 were reportedly paid for their stories after they were released.

According to *The Guardian*, the rules state that "all…communication must help to maintain and, where possible, enhance the reputation of defence."

The Guardian reported that the announcement sparked angry responses from soldiers, many in online forums, saying their freedom of speech was being stifled.

Human rights lawyer Geoffrey Robertson told *The Guardian* that the guidelines probably conflict with the Human Rights Act.

"It's increasingly important, given Britain's escalating foreign troop engagements, often in conjunction with less-disciplined forces, that soldiers, officers and officials can speak frankly to the media about their engagements without having their honest briefing subject to any spin," Robertson said.

MoD Director General of Media Communications Simon McDowell said the rules were meant to "give straightforward, clear guidance that is up to date," not to censor soldiers, adding that the rules applied to communication about defense matters, "not personal things."

– Patrick File
Silha Fellow and *Bulletin* Editor

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Hussein has been detained by the U.S. military for more than a year. (See "CPJ Urges Defense Department to Release or Charge" in the Winter 2007 issue of the Silha *Bulletin*.)

Iraqi police enforced the ban on May 15 after a bomb in Baghdad's Tayaran Square killed seven people and wounded an additional 17. The Associated Press reported in a story printed in the *International Herald Tribune* that the police officers fired warning shots into the air to disperse reporters and photographers who arrived to cover the incident.

The ban, along with the unusual enforcement method, prompted the Committee to Protect Journalists (CPJ) to issue a protest letter addressed to Prime Minister Nouri Kamal al-Maliki on May 21.

"While we recognize security concerns at scenes of violence, the Interior Ministry's ban appears to be an attempt to limit press coverage of unwelcome news. Journalists, not governments, should determine whether a story is too dangerous to cover. The ministry's assertion that perpetrators rely on the media for confirmation of an attack is not supported by any factual evidence and, in any case, is no justification for obstructing the news reporting. Neither does the Interior Ministry offer any evidence supporting its insinuation that journalists tamper with evidence at crime scenes," Joel Simon, CPJ executive director, wrote in the letter.

– Michael Schoepf
Silha Research Assistant

Defamation/Libel

Newspaper, Columnist Sue State Supreme Court Chief Justice in Federal Court

Novel Media Suit Alleges Illinois Supreme Court Libel Ruling Violates Civil Rights

A small Chicago-area newspaper and a former columnist have filed a federal civil rights lawsuit against the Chief Justice of the Illinois Supreme Court, arguing that his position and influence in the state court system has denied them a fair chance to appeal a $4 million libel judgment.

According to a press release from the plaintiffs' lawyers, the suit was brought June 12, 2007 in the U.S. District Court for the Northern District of Illinois in Chicago under 42 U.S.C. § 1983, which allows citizens to sue government officials for violations of their civil rights. The suit names Illinois Supreme Court Chief Justice Robert Thomas along with the six other state Supreme Court justices, three appellate judges and a trial judge who presided over the case.

> "The complaint is precedent-setting because this suit is the first in the nation to challenge the fairness of a personal lawsuit brought by a judge controlling a state court system."
>
> – Bruce W. Sanford
> Media attorney representing the plaintiffs

Thomas sued the *Kane County* (Ill.) *Chronicle* and then-columnist Bill Page for libel *per se* and false light invasion of privacy in March 2004. In a series of columns in 2003, Page wrote that, according to confidential sources, Thomas had been lenient in a disciplinary action against a state's attorney in return for political favors. Thomas argued that the statements put him in a false light before the public, injured his reputation as an officer of the court and did harm to his chances to be appointed to higher courts or hired at a prestigious law firm.

In the November 2006 trial, Thomas produced state Supreme Court justices and appeals court judges as witnesses on his behalf. None of Page's confidential sources were called to testify in support of the allegedly defamatory statements. The jury awarded Thomas $7 million in damages, but that figure was dropped to $4 million on appeal. (See "Illinois State Supreme Court Justice Awarded $7 Million Libel Judgment Against Newspaper" in the Winter 2007 issue of the Silha *Bulletin* for more details.)

The federal case is *Shaw Suburban Media Group Inc., et al. v. Chief Justice Robert R. Thomas, et al.*, No. 07 C 3289, (N. Dist. Ill., 2007). Shaw Suburban Media Group Inc. owns the 14,000 circulation *Chronicle*. The other judges named in the suit are Supreme Court Justices Charles E. Freeman, Thomas R. Fitzgerald, Thomas L. Kilbride, Rita B. Garman, Lloyd A. Karmeier, and Anne M. Burke. Three First District appellate justices, designated to hear the case when the Second District recused itself, are named: Thomas E. Hoffman, Sheila M. O'Brien, and Robert Cahill, along with Donald O'Brien, the trial judge.

Plaintiffs Shaw Inc. and Page, according to their complaint, are asking the federal district court to "permanently enjoin the judiciary of Illinois from taking any further action in the state defamation case (including consideration of the appeal or enforcement of the judgment) until Chief Justice Thomas and all the non-party justices are no longer serving as Illinois state court judges." The complaint also asks the court to throw out the libel verdict and its $4 million award of damages, and to stay the 9 percent daily interest that is accruing on the award while the newspaper appeals.

The underlying suit is one of several cases in recent years that have gained national attention because they involve judges suing media organizations. In 2006 and 2007, high court judges in separate cases in Massachusetts and Pennsylvania were both handed libel awards in the millions of dollars. (See "Judges Sue Newspapers for Libel" in the Winter 2007 issue of the Silha *Bulletin* for more on these stories). A June 26, 2007 article in *The New York Times* cited a Media Law Resource Center survey showing that libel suits filed by judicial officers represented fewer than 1 percent of all such suits in 1998. In 2005, according to the survey, they represented 6 percent. *The New York Times* said these data demonstrate a "real enough" trend in judges suing the media who cover their courts.

Despite the apparent trend, the argument put forward by the plaintiffs Shaw Inc. and Page is unusual, according to some commentators and the attorney representing them.

Stephen Gillers, a law professor and expert in legal ethics at New York University, told the *Chicago Tribune* that he had never heard of a case in which a plaintiff tried to avoid the appellate process by suing the appeal system.

"One way of looking at it is to say that this is a desperation move on the part of the newspaper and Mr. Page," Gillers said. "But another way is they have no alternative for protecting what they allege is ... fundamental constitutional rights that are being violated every day the case remains in court."

In the 50-page complaint filed with the court, Bruce W. Sanford, a media law attorney from Washington, D.C. who is representing the plaintiffs, underlined the unique significance of the case.

"In a broader sense, the complaint is precedent-setting because this suit is the first in the nation to challenge the fairness of a personal lawsuit brought by a judge controlling a state court system," wrote Sanford.

Joseph A. Power Jr., a personal injury attorney who represented Chief Justice Thomas, called the suit "frivolous" and an "abuse of process" in an article appearing in the *Chicago Tribune* on June 13.

"I don't think the losing of a case constitutes a violation of one's civil rights," Power said.

Power said the state's attorney general's office will be defending the judges in the federal suit.

The suit asks the court to rule that the case may only be retried once Thomas is a private citizen. According to the *Chicago Tribune*, Thomas' court term expires in 2010, but he could seek retention for another 10-year term. Supreme Court justices in Illinois are elected from their judicial districts. The other justices named in the suit have served on the court a shorter time and could still be in place beyond 2020.

Illinois Libel, *continued on page 23*

Defamation/Libel

Massachusetts Supreme Court Will Not Reconsider $2 Million Libel Verdict Awarded to State Trial Judge

Judicial Commission, Newspaper File Ethics Complaints Against Judge

The Massachusetts Supreme Judicial Court has refused to reconsider its ruling against the *Boston Herald* that upheld an award of more than $2 million to a defamed judge.

In a June 4, 2007 order, the court refused to reconsider a unanimous ruling in *Murphy v. Boston Herald, Inc.*, 865 N.E.2d 746 (Mass. 2007), upholding the $2.01 million award for Massachusetts Superior Court Judge Ernest B. Murphy. The court corrected three factual errors in its opinion, but affirmed that the "substantial factual and legal premises underpinning" the opinion remained correct.

The case, originally decided May 7, 2007 arose from a series of stories published by the *Boston Herald* in 2002 that were critical of Massachusetts Superior Court Judge Ernest B. Murphy for "coddling" criminals and "heartlessly demean[ing]" victims. It is one of a number of successful libel suits filed recently by judges against newspapers. (See "Judges Sue Newspapers for Libel" in the Winter 2007 issue of the Silha *Bulletin*.)

David Yas, publisher of *Massachusetts Lawyers Weekly*, was quoted in a May 8 *Boston Herald* story, saying that he hoped the ruling would not "chill" reporting. Massachusetts reporters should continue to aggressively cover judges because they are not elected by the public, he said.

The most controversial statement first appeared in a Feb. 13, 2002 story headlined "Murphy's Law." Reporter David Wedge, citing anonymous sources, quoted Murphy as saying of a 14-year-old rape victim, "She can't go through life as a victim. She's 14. She got raped. Tell her to get over it." The sources were later revealed to be prosecutors with second-hand knowledge of Murphy's alleged statement whom the jury disbelieved "with absolute certainty," according to the court order denying a rehearing. Murphy actually said "[s]he's got to get on with her life. She's got to get over it," and suggested counseling for the victim, the court found. The ruling said the actual remarks demonstrate Murphy's compassion for the victim rather than the callous disregard portrayed in the story.

The court further held that Murphy had shown by "clear and convincing" evidence that the statements were published with "actual malice." Actual malice requires that the reporter, Wedge, knew the statements were false or acted with "reckless disregard" as to their probable falsity. The court relied on a variety of factors in upholding the jury's finding of actual malice, including Wedge's willingness to accept second-hand information from anonymous sources, inconsistencies in his testimony, destruction of his notes, and statements he made during a March 7, 2002 appearance on "The O'Reilly Factor."

The court also noted that Patrick J. Purcell, publisher of the *Herald*, admitted that he knew the "[t]ell her to get over it" quote would create a media frenzy. "[A] 'media frenzy' was, in fact, exactly what the defendants intended," Justice John M. Greaney wrote in his opinion for the court.

In its petition for rehearing, the *Herald* alleged that the court had misquoted the testimony of David Crowley, a prosecutor who claimed to have heard Murphy's controversial statement. Crowley later shared the information with two senior lawyers in the district attorney's office who became the sources for the Feb. 13, 2002 story.

The *Herald* argued that the opinion portrayed Crowley's testimony in a light sympathetic to the judge, when in fact Crowley testified that he believed Murphy's comments were insensitive. "Thus, when the [r]uling states that the 'get over it' comment in the *Herald* was false because it would lead one to believe that Murphy was 'indifferent' and perhaps 'even callous' to crime victims, [citation omitted] it errs because indifference is precisely Crowley's point," the petition said. The *Herald* called the factual error "fundamental to the outcome" of the case in its petition, but the court dismissed the mistake, stating the "substantial factual and legal premises underpinning" the decision remain correct.

The newspaper also suggested in the petition that Greaney, the justice who wrote the opinion for the court, was biased against judicial reporters prior to considering the case. He and an appeals court judge wrote an Op-Ed piece for the *Herald* that appeared on July 16, 1997 suggesting that judicial reporters should take a more careful approach to criticizing judges because of their importance to the criminal justice system.

The opinion piece responded to a then-recent article assailing the leniency of a district judge who had released an accused rapist on $1,000 bail. In it, Greaney also praised the importance of judges as "referees between the government and persons accused." As a solution, he suggested "[t]he press could start by examining judicial performance with a lens rather than a hand grenade."

The court rejected the allegation of bias. "This accusation is not unexpected, but it is completely unsupported," the court wrote in its order denying a rehearing. "It, undoubtedly, will become an argument in the defendants' petition for certiorari to the Supreme Court of the United States."

The *Herald* declined to comment on whether it would appeal to the U.S. Supreme Court in a May 8

Massachusetts Libel, *continued on page 23*

"We're not in a position as judges to really do much when we're assailed and I think it kind of sent a message . . . that the independence of the judiciary is a very important consideration for any media in connection with any reporting on a judge."

– Judge Ernest B. Murphy
Mass. Superior Court

Defamation/Libel

New Hampshire High Court Rules Some Police Communication Not Protected by 'Fair Report' Privilege

Court Also Rules Convicted Criminal, Repeat Offender not 'Libel-Proof'

New Hampshire's highest court ruled May 1, 2007 that some communication between police officers acting in their official capacity and reporters is not protected from defamation suits by the "fair report" privilege. The court also held that a plaintiff's status as a convicted criminal and admitted repeat offender does not make him "libel-proof."

The unanimous ruling in *Thomas v. Telegraph Publishing Co.*, No. 2005-751, 2007 WL 1299870 (N.H. May 1, 2007), means that quoting police records and statements made by police officers may expose media outlets to tort liability for defamation if those statements later prove to be false, said Dave Solomon, Telegraph Publishing Co.'s vice president for news in a May 3, 2007 *Concord* (N.H.) *Monitor* story. Potential liability for the officers themselves could also make police reluctant to discuss cases with reporters, he said.

The suit alleges that 58 statements in a Dec. 22, 1999 story in *The Telegraph* of Nashua, N.H. defame Terry Thomas. Thomas has been incarcerated in the New Hampshire State Prison since Jan. 1, 2002 for receiving stolen property, according to the prison's Web site. In addition to Telegraph Publishing Co., the newspaper's owner, Thomas's suit named as defendants the publisher, the reporter, four police officers, a town employing one of the officers, and a university professor. The police officers and the professor were quoted in the story.

The opinion lists all the alleged defamatory statements in an appendix. They include a statement in the sub-head attributed to police and court records that Thomas is "suspected" in more than 1,000 home burglaries. Thomas claimed in-depth information describing his alleged crimes, methods, and target areas also defames him. The reporter quoted the four police officers named in the suit several times when describing the burglaries and Thomas's suspected involvement.

Telegraph Publishing argued in its brief that information from police reports and interviews with police officers acting in their official capacities is protected by the fair report privilege. Under New Hampshire law, fair reports of official proceedings or actions by government officers and agencies are protected from defamation suits. According to the state Supreme Court's opinion, a report must be an accurate account of the "gist" of the official proceeding or government action, but need not precisely "duplicate" the proceeding to be considered fair. The fair report privilege protects media organizations and encourages dissemination of important public information.

The court recognized that most other jurisdictions extend the privilege to cover all information obtained from police. But despite the contrary precedent in other jurisdictions, the New Hampshire Supreme Court agreed with the trial court that the privilege should be limited.

"While we recognize the importance of the flow of information to the public, we are reluctant to expand the fair report privilege to allow publication of material – no matter how injurious – simply because it is located in, or comes from someone who works at, a police department," Justice James Duggan wrote in his opinion for the court.

The New Hampshire court held that the fair report privilege protects only official actions, proceedings, public meetings, and records pertaining to those official actions. Arrests are official actions, so media reports based on arrest records are protected, but police investigation records do not constitute official actions and therefore reports based on those records are not privileged, Duggan wrote.

The court also dismissed the libel-proof argument offered by the defendants. A libel-proof plaintiff is a person with such a damaged reputation that even a successful suit would merit only a nominal recovery. The case presented the New Hampshire Supreme Court with its first opportunity to decide whether to recognize a class of plaintiffs as libel-proof.

Duggan's opinion discussed two forms of the libel-proof doctrine: the "incremental harm" and "issue specific" doctrines. The incremental harm doctrine focuses on the plaintiff's depiction in the defendant's specific article, taken as a whole. "If the challenged statement harms a plaintiff's reputation far less than unchallenged statements in the same article or broadcast, the plaintiff may be held libel-proof," the opinion said. The issue specific doctrine focuses on the plaintiff's reputation in a particular context prior to publication of the article. "A[n issue specific] libel-proof plaintiff is one whose reputation on the matter in issue is so diminished that, at the time of an otherwise libelous publication, it could not be further damaged," Duggan wrote, quoting *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6 (Tex. App. 1994).

The court ruled that the incremental harm doctrine did not apply in this case. The court stated that more than half of the 90 assertions in the article were challenged by the plaintiff, and not all of them were deemed non-actionable by the trial court. Because the plaintiff challenged a majority of the statements, it cannot be said that the article would have been equally harmful had they not been included.

Since the incremental harm doctrine did not apply in the case, the New Hampshire Supreme Court did not have to decide whether to adopt the rule in the state.

Moving to the issue specific doctrine, the court followed the majority of courts in other jurisdictions and adopted it in a limited form. Duggan's opinion articulated a two-part test. First, the defendant must show that the plaintiff engaged in criminal or anti-social behavior in the past, and second, that those activities were widely publicized. "The evidence on the nature of the conduct, the number of offenses, and the degree and range of publicity received must make it clear, as a matter of law, that the plaintiff's reputation could not have suffered from the publication of the false and libelous statement," the court held.

Despite admitting 20 criminal convictions in 15

New Hampshire Libel, *continued on page 23*

"While we recognize the importance of the flow of information to the public, we are reluctant to expand the fair report privilege to allow publication of material – no matter how injurious – simply because it is located in, or comes from someone who works at, a police department."

– Justice James Duggan
N.H. Supreme Court

New Hampshire Libel, *continued from page 22*
years, Thomas is not libel-proof because those convictions received almost no publicity prior to the article in *The Telegraph*, the court held. "In other cases where courts have most persuasively applied the doctrine and deemed plaintiffs libel-proof, both the publicity surrounding the crimes and the attendant level of notoriety are quite high," Duggan wrote. Signaling that the threshold for publicity would be extremely high, the court cited cases involving notorious criminals including James Earl Ray, the convicted killer of Dr. Martin Luther King Jr.

Duggan rejected an argument by the police defendants that Thomas was a limited-purpose public figure based on similar reasoning. Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), persons who "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" may become limited-purpose public figures. Public figures must prove "actual malice" to win a defamation suit, while private individuals may succeed with proof of lesser fault, like negligence.

The court held Thomas was not a limited-purpose public figure because the burglaries had not created a "public controversy," nor had they received any publicity prior to publication of *The Telegraph* story.

The state Supreme Court upheld the trial court's grant of summary judgment for a single defendant on alternative grounds. The court granted summary judgment for Edith Flynn, a professor of criminal justice at Northeastern University in Boston, holding that her statements were non-actionable as opinions. "A statement of opinion is not actionable unless it may reasonably be understood to imply the existence of defamatory fact as the basis for the opinion," the court held.

Flynn discussed the habits and patterns of burglars in the story. Among the challenged statements in the story is a quote from Flynn stating "[t]he evidence clearly shows that he'll keep going until he's stopped." The court held her statements were opinions based on the facts disclosed in the story and did not imply knowledge of any undisclosed defamatory facts.

Gregory Sullivan, a media lawyer not involved in the case, said in the May 3 *Concord Monitor* story that the ruling will endanger New Hampshire reporters and news organizations that quote police blotters and sworn statements from police officers. "When that officer signs that affidavit back at the police station and puts it in the file, why is that not also an official action?" he said.

Thomas, who submitted a brief on his own behalf as a *pro se* litigant, has not commented publicly on the court's ruling. He remains unavailable due to his continued incarceration.

– Michael Schoepf
Silha Research Assistant

Illinois Libel, *continued from page 20*
U.S. District Judge Blanche M. Manning of the Northern District of Illinois was assigned the federal case, but according to the *Chicago Tribune*, Manning recused herself on June 15.

Manning said that she had served on the state appeals court with three of the judges named in the suit.

"Given the complainant's allegations of judicial collusion, it is possible that these prior relationships could cause a reasonable person to question the court's impartiality," wrote Manning in the June 15 order.

Sanford praised the judge's decision, according to the *Chicago Tribune*, saying the case is about public confidence in a fair system.

"She got the message," he said.

– Patrick File
Silha Fellow and *Bulletin* Editor

Massachusetts Libel, *continued from page 21*
Boston Globe article. The *Globe* reported on June 12 that the *Herald* had paid Murphy $3.4 million – the $2.01 million judgment plus interest.

Following the court's ruling in May, Murphy expressed satisfaction with the outcome of the case. "We're not in a position as judges to really do much when we're assailed and I think it kind of sent a message . . . that the independence of the judiciary is a very important consideration for any media in connection with any reporting on a judge," Murphy said in a May 8 *Boston Herald* story.

Purcell, the *Herald* publisher, said he continued to stand behind Wedge's reporting. "We are disappointed with the Supreme Judicial Court's relentlessly one-sided view of Dave Wedge's reporting on a public controversy within the judicial system, and are unwavering in our complete confidence in Wedge's journalistic skills," he said in the *Herald* story.

The Associated Press (AP) reported July 10 that the Massachusetts Commission on Judicial Conduct filed ethics charges against Murphy related to settlement talks conducted with the *Herald*. According to the story, Murphy sent a note, hand-written on court stationery, to Purcell demanding a meeting and a check for $3.4 million. A single page postscript warned Purcell that disclosing the letter would be "a BIG mistake."

The *Herald* also filed an ethics complaint. If disciplined, Murphy could face a variety of sanctions including a public or private reprimand, a fine, limitations on his judge's duties, discipline as an attorney, and retirement.

In a statement quoted by the AP Purcell said, "[i]f the publisher of one of the region's major newspapers can be threatened by a member of the judiciary in this way, then who is safe?"

Murphy, apparently upset that the *Herald* published excerpts of the letters, also issued a written statement calling their release by the newspaper "a breach of a personal agreement" between Purcell and him. He called his use of official letterhead an "inadvertent use of judicial stationery in a private, privileged and confidential communication," the AP reported.

– Michael Schoepf
Silha Research Assistant

Endangered Journalists

Kidnapped BBC Reporter Released After Nearly Four Months in Captivity; Palestinian Journalists Protested at Parliament

The captors of BBC reporter Alan Johnston released him to Hamas officials July 4, 2007, 114 days after he was kidnapped in the Gaza Strip.

"The last 16 weeks were by far the worst days of my life. It was like being buried alive, removed from the world. It was occasionally terrifying," Johnston told reporters gathered in former Palestinian Prime Minister Ismail Haniyeh's office shortly after his release. "And now it really is over, and it really is indescribably good."

> "The last 16 weeks were by far the worst days of my life. It was like being buried alive, removed from the world. It was occasionally terrifying. And now it really is over, and it really is indescribably good."
>
> – Alan Johnston
> BBC reporter

When he was kidnapped, Johnston was the only western journalist reporting permanently from Gaza. Reports say he was widely respected for his intelligent and fair reporting on the region. A group called Jaish al-Islam, or Army of Islam, kidnapped Johnston March 12, 2007 in Gaza City. Jaish al-Islam's power stems from Gaza's Dagmoush clan. The group claims to act in the "spirit" of al-Qaida, but consists of hired guns motivated as much by money as ideological beliefs, the *Washington Post* reported July 4.

During the first half of Johnston's captivity no group publicly claimed responsibility for the kidnapping or made any demands, prompting speculation that he had been killed. Although kidnappings are not uncommon in Gaza, most are quickly followed by demands for ransom money or the release of prisoners, and end within hours or days, the *Post* reported. Observers compared Johnston's kidnapping with those perpetrated by al-Qaida-linked groups in Iraq that have ended in the death of the victim.

On April 20, al-Jihad al-Tawheed, or the Brigades of Holy War and Unity, further raised concerns by claiming Johnston was dead. (See "BBC Reporter Alive Despite Extremists' Claims" in the Spring 2007 issue of the Silha *Bulletin*.) Though the report was quickly discredited by Palestinian officials, they offered no evidence that Johnston remained alive. More than 200 Palestinian journalists converged on the parliament building in Gaza to call on Palestinian officials to turn over any information they had.

The Guardian of London reported July 5 that Johnston had been pleased and surprised when he learned of the protest at the parliament building while listening to the BBC World Service on a radio provided by his captors.

On June 1 Jaish al-Islam released a video of Johnston on an Islamist Web site. The video showed Johnston criticizing Israel, as well as U.S. and British policy in the region. It also provided the first evidence that Johnston remained alive and well.

Later in June, after Hamas had defeated rival group Fatah in a battle for control of Gaza, Hamas issued a 48-hour ultimatum for Johnston's release. The deadline passed without action, but Johnston later credited the group for increasing security in Gaza and pushing for his release. "The whole mood began to change," Johnston said in a July 5 *Financial Times* story. "Hamas is a controversial organization . . . but I'm pretty sure if Hamas hadn't come and stuck the heat on in a big way I would still be in that room."

On June 25 as Hamas increased the pressure for Johnston's release, Jaish al-Islam released a second video. This one showed Johnston wearing a belt filled with explosives and warned that any attempt to rescue him by force would lead to his death.

Ignoring the threat, 6,000 Hamas fighters surrounded the area where Johnston was being held in the days before his July 4 release. Hamas captured 10 members of Jaish al-Islam before arranging for Johnston's release.

Time magazine reported July 16 that Johnston's release served as a way for Haniyeh and other Hamas leaders to showcase their control over Gaza and attempt to find more support in the international community. The United States and Israel consider Hamas a terrorist organization for its involvement in suicide bombings and other armed conflicts with Israel. The United States does not recognize the Hamas-led government in Palestine.

"This liberation of Alan Johnston is first of all a message for all Palestinians that Hamas will support their rights and support their security and a message for all Arab and Islamic and world nations that we are Hamas . . . our enemy is only Israeli occupation," Fawzy Barhoom, a Hamas spokesman, said in the *Financial Times* story.

The Independent of London reported on July 5 that Johnston planned to leave Gaza after three years there and return to his native Scotland. Despite his ordeal, he said he would leave with fond memories of the Palestinian people. "I know very well what Palestinian culture is, and the extraordinary warmth and hospitality - especially of Gaza," he said.

– Michael Schoepf
Silha Research Assistant

Endangered Journalists

Uzbek Journalists Denounce Actions to Avoid Imprisonment

International concern over the treatment of journalists in Uzbekistan has intensified following the imprisonment and recent sentencing of two Uzbek journalists, Umida Niyazova and Gulbakhor Turayeva. Both women reported on events in Andijan in 2005, when Uzbek government forces reportedly killed hundreds at an anti-government protest.

Niyazova was sentenced to seven years in prison in May 2007 by authorities in Tashkent, but the sentence was suspended after she apologized to the state and condemned the human rights organizations she reported for. Another journalist and human rights activist, Turayeva, was sentenced to six years in prison in April 2007, but she also received a suspended sentence when she confessed to all charges and apologized in court in June 2007.

On May 1, 2007 Niyazova was officially charged with illegally crossing the border to neighboring Kyrgystan, smuggling, and fostering unrest with the help of foreign funding. She had been in jail since January 22, when she was arrested by Uzbek authorities as she reentered Uzbekistan from Kyrgystan. According to Agence France-Presse, the United States denounced her arrest as "politically motivated." Amnesty International called Niyazova a "prisoner of conscience. "

Niyazova had been working for the Central Asian news website *Oasis*, a project of the Moscow-based Center for Journalism in Extreme Situations. According to the Committee to Protect Journalists (CPJ), she also wrote and worked as a translator for Human Rights Watch and worked with Freedom House and Internews Network.

Niyazova also reported on the Andijan massacre in May 2005, where, according to the Associated Press (AP), hundreds of civilians gathered to protest against the government of President Islam Karimov. Karimov has ruled Uzbekistan since before the 1991 collapse of the Soviet Union, and his government has become notorious for suppressing opposition and silencing dissent. Survivors of the massacre and human rights groups have reported that hundreds of people were killed when government troops opened fire on the crowd of mostly unarmed protesters. The Uzbek government claimed Islamic militants fomented the Andijan uprising, and reported to various media outlets, including the AP, that the death toll was 187.

On May 8, Niyazova's sentence was suspended by a judge when she confessed to all charges, apologized, and publicly rejected the organizations she had worked for, saying to Human Rights Watch representatives present at her hearing, "The work that you and I did was tendentious and potentially damaging to my country" according to Agence France-Presse. At her original trial on May 1, she pleaded not guilty. But on May 7, she stated before the court, "I plead guilty and deeply regret what I unwittingly did. I am deeply disappointed with some international organizations."

According to BBC News, the Moscow-based news agency Web site Fegana.ru reported the court ruling as read by the judge: "The verdict of the Sirgali District Court is to be overturned and the punishment is to be replaced with a seven year suspended sentence." Niyazova will now serve three years of probation, during which she must regularly report to the police and observe a 10 p.m. to 6 a.m. curfew.

German journalist Marcus Bensman told Radio Free Europe that he was happy that Niyazova was free, but that her arrest and trial demonstrated that "Uzbekistan has no justice" and that its government would jail or free people as it wished for political purposes.

U.S. State Department deputy spokesman Tom Casey called Niyazova's trial "hasty" in a statement to the AP in May. The Uzbek government gave Niyazova's attorney only 30 minutes to prepare for her original hearing, and her appeal was heard just seven days later. Since Niyazova's sentence, the European Union has considered renewing sanctions it imposed after the 2005 Andijan massacre. In his official statement to the Uzbek government, Casey wrote, "The United States calls again upon Uzbekistan to uphold its commitments to internationally protected human rights."

On June 12, 2007 Gulbakhor Turayeva's original sentence was replaced by a three-year suspended term after she too confessed to all charges and apologized, according to Reporters Sans Frontieres.

According to the AP, she received a six-year prison sentence on April 24, 2007 for "defamation, distributing documents liable to disturb the peace and trying to overthrow constitutional rule" under article 159 of the Uzbek criminal code, and on May 7 was also fined the equivalent of $648.

When her suspended sentence was handed down, Turayeva made a statement criticizing other journalists and international human rights

Uzbek Journalists, *continued on page 26*

The U.S. State Department has called upon Uzbekistan to "uphold its commitments to internationally protected human rights."

Endangered Journalists

Update: Jailed Chinese Reporter Joins Suit Against Yahoo! Inc.

A Chinese journalist currently serving a 10-year prison term for disseminating state secrets has joined a U.S. lawsuit that accuses Internet company Yahoo! Inc. of assisting Chinese authorities with abuses of human rights.

Shi Tao, a former editor with the *Dandai Shang Bao* (Contemporary Business News), was convicted April 30, 2005 for sharing online an internal government message that warned of civil unrest during the 15th anniversary of the 1989 Tiananmen Square protests and massacre and that recommended media restrictions. (See "Endangered Journalists: Yahoo! Assists China in Arresting Journalists" in the Fall 2005 issue of the Silha *Bulletin*, and "Chinese Journalists Battle Censorship, Yahoo!" in the Winter 2006 issue of the Silha *Bulletin*.)

On May 29, Shi added his name to the two other named plaintiffs in the suit, Wang Xiaoning and his wife Yu Ling. Wang has been incarcerated since 2003 on a charge of "incitement to subvert state power" because he allegedly distributed pro-democracy articles through a Yahoo! e-mail account and subscriber list.

> The suit claims that Yahoo! Inc. has "knowingly and willfully aided and abetted…the commission of torture and other major abuses violating international law that caused Plaintiffs' severe physical and mental suffering."

The suit claims that Yahoo! Inc., along with subsidiary Yahoo! Hong Kong and partner Alibaba.com, Inc., have voluntarily provided e-mail content, e-mail addresses, and user account information to Chinese authorities, thus "knowingly and willfully aid[ing] and abet[ting]…the commission of torture and other major abuses violating international law that caused Plaintiffs' severe physical and mental suffering."

According to the Associated Press, Yahoo! has acknowledged turning over information on Shi, citing a policy that requires employees to operate within the guidelines of local laws. The company has denied any involvement of Yahoo! Hong Kong in Shi's case.

The suit was originally filed April 18, 2007 by the Washington D.C.-based World Organization for Human Rights U.S.A. on behalf of Wang and Yu. It was filed in the U.S. District Court for the Northern District of California under several statutes, including 28 U.S.C. § 1350, the Alien Tort Claims Act of 1789, which allows non-U.S. citizens to file civil suits in U.S. district courts for "violation of the law of nations or a treaty of the United States;" 28 U.S.C. § 1350, the Torture Victims Protection Act of 1991; and 18 U.S.C. § 2701 *et seq*., the Electronic Communications Privacy Act.

The suit asks for relief in the form of compensatory, punitive and exemplary damages, "affirmative action" by Yahoo! in attempting to secure the release of the imprisoned plaintiffs, and "injunctive relief to prevent similar actions to be taken in the future."

Morton Sklar, Executive Director of the World Organization for Human Rights U.S.A. who filed the suit on the plaintiffs' behalf, told *Inside US-China Trade* that the addition of Shi to the suit may delay or postpone the case's progress, including a procedural hearing set for August 7.

Shi was recently awarded the "Golden Pen of Freedom," an annual press freedom prize from the World Association of Newspapers. Shi's mother, Gao Qinsheng, accepted the award on her son's behalf on June 4, 2007, at the opening ceremonies of the World Newspaper Congress and World Editors Forum in Cape Town, South Africa, according to an event press release.

On accepting the award, his Shi's mother said "he has only done what a courageous journalist should do."

– Patrick File
Silha Fellow and *Bulletin* Editor

Uzbek Journalists, *continued from page 25*

organizations. The AP reported that the formerly outspoken critic of the Uzbek government said in her statement, "I thank the court for its clemency, its humanity and the respect it has shown me. I will now look for a new job and I will probably work for the government. I promise never to break the law again."

According to the CPJ, Turayeva is an Andijan native who gave interviews to foreign media after the 2005 massacre at Andijan, claiming she saw 500 bodies piled up in a schoolyard, which directly contradicts the official government report. She also worked with rights organizations and local underground media to provide information to international media regarding the activities of the Uzbek government.

Turayeva had been in government custody for months before receiving a sentence. According to reports on the Global News Wire, Turayeva was returning from Kyrgystan on Jan. 14, 2007 with the youngest of her four children when she was stopped by Uzbek border police and searched. When she was found to have materials relating to her human rights activities along with books written by people who oppose the Uzbek government, she was arrested and taken into custody on the spot.

– Sara Cannon
Silha Center Staff

U.S. Supreme Court First Amendment Rulings

In *FEC v. Wisconsin Right to Life*, Court Upholds As-Applied Challenge to McCain-Feingold Act

In a contentious 5 to 4 decision, the U.S. Supreme Court ruled June 25, 2007 that the First Amendment protects a Wisconsin right-to-life group's ability to broadcast issue advertisements naming political candidates in the days and weeks leading up to an election.

Section 203 of the Bipartisan Campaign Reform Act of 2002, better known as the McCain-Feingold Act, makes any broadcast of "electioneering communications" paid for by a corporation's general treasury a federal crime. The law defines "electioneering communications" as any broadcast within 60 days before a primary election or 30 days before a general election that refers to a clearly identified candidate for federal office and targets the electorate.

In *Federal Election Commission v. Wisconsin Right To Life, Inc.*, 127 S. Ct. 2652 (2007), the Court upheld the Wisconsin group's as-applied challenge to Section 203 of the McCain-Feingold Act. The act prohibited the group from broadcasting advertisements in the days leading up to Wisconsin's 2004 primary election that named incumbent Senator Russ Feingold, who was seeking re-election, and urged him not to filibuster President George W. Bush's federal judicial nominees.

The right-to-life group filed a motion for declaratory relief in Federal District Court for the District of Columbia on July 28, 2004, arguing that as applied to its ads, the statute violated the First Amendment. The District Court denied the motion for injunctive relief and the group did not run its ads during the blackout period. The court held that *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), a U.S. Supreme Court decision that rejected a facial challenge to the statue, was broad enough to foreclose as-applied challenges. (See "U.S. Supreme Court Rules on Constitutionality of Bipartisan Campaign Reform Act" in the Fall 2003 issue of the Silha *Bulletin*.)

In 2006 the U.S. Supreme Court vacated the lower court decision and remanded, holding that *McConnell* did not resolve as-applied challenges. On remand, the District Court ruled the ads were "genuine issue ads" protected by the First Amendment. The Federal Elections Commission (FEC) appealed, and the case bypassed the Federal Appeals Court and went directly to the Supreme Court.

In his opinion for the court, Chief Justice John Roberts ruled that the case was not moot, even though the election was over, because of the short duration of the controversy and the likelihood that a similar situation would arise in the future.

Moving to the merits, Roberts, joined by Justice Samuel Alito, held that the ads the Wisconsin group wished to broadcast in the days and weeks before the 2004 election were issue ads. Relying on *McConnell*, Roberts held that express campaign advocacy, or its functional equivalent, could be regulated in accordance with the Constitution, but restrictions on genuine issue advocacy could not survive strict scrutiny. When applied to bar issue ads, section 203 of the McCain-Feingold Act violated the First Amendment.

In his opinion, Roberts articulated a new test for deciding whether an advertisement constituted issue advocacy or express advocacy.

"[A] court should find that an ad is the functional equivalent of express advocacy only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate. [The Wisconsin group's] three ads are plainly not the functional equivalent of express advocacy under this test. First, their content is consistent with that of a genuine issue ad . . . . Second, their content lacks indicia of express advocacy . . .."

The right-to-life group's ads named Wisconsin Senators Feingold and Herb Kohl, who was not up for re-election, but they did not address the impending primary or urge Wisconsin voters to vote for or against any candidate. The ads also did not address Feingold's political affiliation, challenger, "character, qualifications, or fitness for office."

The two radio ads and one television ad feature characters waiting for important events, like a decision on a loan application and a wedding. Other characters interrupt the events with stories about fishing trips and hanging drywall, and then a voice-over implies those interruptions are like the Senate filibuster of President Bush's judicial nominees. The ads are available on Wisconsin Right to Life's Web site at www.wisconsinrighttolife.org/befair.htm.

Roberts explained that the question in this case fell outside the scope of the *McConnell* opinion because the Wisconsin group's ads could reasonably be interpreted as issue ads and not the functional equivalent of express advocacy. The McCain-Feingold Act can only be applied to bar the Wisconsin group's ads if the government can show the regulation "is narrowly tailored to further a compelling interest." Roberts found no compelling interest to justify banning issue ads.

Justice Antonin Scalia, in an opinion joined by Justices Clarence Thomas and Anthony Kennedy, went further than Roberts, arguing *McConnell* should be reconsidered. According to Scalia, no test can adequately distinguish between genuine issue ads and the functional equivalent of express advocacy.

Scalia argued that every articulated test to determine whether speech is express advocacy or issue advocacy is impermissibly vague, leaving potential advertisers unsure of whether their ads are prohibited or not. This confusion will chill protected speech until *McConnell* is overruled, Scalia wrote.

Even if there is a compelling interest in limiting corruption and the appearance that large corporations are buying elections with political advertising, section 203 is over-inclusive because it chills protected political speech. The Supreme Court has

***FEC v. Wisconsin Right to Life**, continued on page 28*

"After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear."

– Justice David Souter
U.S. Supreme Court,
dissenting

***FEC v. Wisconsin Right to Life**, continued from page 27*

"rejected the principle that protected speech may be banned because it is difficult to distinguish from unprotected speech," Scalia wrote.

Justice David Souter wrote in dissent; he was joined by Justices John Paul Stevens, Ruth Bader Ginsburg, and Stephen Breyer.

Souter began with an overview of the history of the campaign finance reform movement dating back to the start of the 20th century. He explained in great detail the corrupting influence that money has, or at least is perceived to have, on national elections, and the great lengths corporations have taken to get around past attempts at campaign finance reform.

The dissent also listed modes of political speech not restricted by the McCain-Feingold Act including newspapers, Web sites, and political action committees. Furthermore, the statute only applied to corporations, unions, and non-profits funded by corporate donations – the statute did not apply to non-profit organizations that are not funded by businesses or labor unions.

Souter argued that the right-to-life group, along with other organizations and candidates, made the senate filibusterers an issue in the campaign. The ad tied Feingold's name to support for the filibusters, and urged criticism of his support. In the dissent's view, the criticism functioned as express advocacy to vote against Feingold in the upcoming election. The ads' "content and context" made their "electioneering purpose" clear.

The new test adopted by the majority to distinguish between genuine issue ads and those that are the functional equivalent of express advocacy constructively overrules *McConnell*, the dissent argued. Nearly every add prohibited by section 203 could be "reasonabl[y] interpret[ed]" as an issue ad.

"After today, the ban on contributions by corporations and unions and the limitation on their corrosive spending when they enter the political arena are open to easy circumvention, and the possibilities for regulating corporate and union campaign money are unclear," Souter wrote.

The New York Times reported June 26, 2007 that some election law experts agree with Souter that the 2003 *McConnell* decision was effectively overruled. "Corporations received the victory that they did not achieve in 2003," said Edward B. Foley, a professor at the Moritz College of Law at Ohio State University.

The case had united unlikely allies in support of the Wisconsin group, including the American Federation of Labor (AFL-CIO), the National Rifle Association (NRA), and the National Association of Realtors (NAR). The law restricts those groups from naming specific candidates in their advertisements because the AFL-CIO is a labor union, specifically targeted by the statute, and the NRA and NAR are non-profits receiving some of their funding from corporate donations or dues payments.

"[A] majority of the court has finally and emphatically embraced the simple truth, that the First Amendment abides no law that suppresses independent speech about legislators and candidates, at least absent an explicit call for their election or defeat," said AFL-CIO President John J. Sweeney in a June 26, 2007 *Washington Post* story.

But other organizations, like the League of Women Voters, filed briefs in support of the McCain-Feingold Act. The league, a non-profit organization that does not support or endorse specific candidates, argued the exception adopted by the court "swallows" section 203 and permits "sham" issue advocacy that functions as express advocacy.

"This is a big win for big money," League of Women Voters President Mary G. Wilson said in a statement, according to the *Washington Post* story. "Chief Justice Roberts has reopened the door to corruption."

– Michael Schoepff
Silha Research Assistant

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U.S. Supreme Court First Amendment Rulings

In *Morse v. Frederick*, Court Places Limits on Student Expression

In a June 25, 2007 ruling, the U.S. Supreme Court said that public school officials do not offend the First Amendment rights of their students when they seek to "restrict student expression that they reasonably regard as promoting illegal drug use."

The Court's 5 to 4 ruling in *Morse v. Frederick*, No. 06-278, reversed an earlier decision in the Ninth Circuit U.S. Court of Appeals and said that public high school principal Deborah Morse did not violate 18-year-old Joseph Frederick's First Amendment rights when she reprimanded and suspended him for unfurling a banner reading "BONG HiTS 4 JESUS" across the street from the school during a televised sporting event, because the banner appeared to promote the use of illegal drugs.

Some commentators have said the Court's decision erodes student free speech by creating a "drug exception" to the First Amendment in public schools, but others have focused on the narrow scope of the court's majority and concurring opinions.

Chief Justice John Roberts wrote the majority opinion, which was joined by Justices Antonin Scalia, Anthony Kennedy, Samuel Alito, and Clarence Thomas. Justice Stephen Breyer concurred in part and dissented in part. Justices Ruth Bader Ginsburg and David Souter joined a dissent by Justice John Paul Stevens.

In January 2002, during a parade marking the passing of the Olympic Torch through Juneau, Alaska, Frederick and some fellow students who were standing across the street from Juneau-Douglas High School unfurled the 14-foot long banner. Principal Morse crossed the street and pulled the banner down. Frederick resisted, and Morse responded with a ten-day suspension for violating a school policy against displaying offensive material, including that which advertises or promotes use of illegal drugs.

Frederick appealed the suspension, first to the school district superintendent, and then through a suit in the U.S. District Court for the District of Alaska under 42 U.S.C. § 1983, alleging the school board and Morse violated his First Amendment rights. Both the superintendent and the district court upheld Frederick's suspension.

In March 2006, the Ninth Circuit U.S. Court of Appeals vacated and remanded the district court's ruling, based on the U.S. Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which held that student speech could be restricted only if school officials reasonably "forecast substantial disruption of or material interference with school activities."

The U.S. Supreme Court granted *certiorari* and heard oral arguments in *Morse v. Frederick* on March 19, 2007.

Chief Justice Roberts' majority opinion begins with a brief discussion of Supreme Court precedent on student speech. "Our cases make clear that students do not 'shed their constitutional rights to free speech or expression at the schoolhouse gate,'" said Roberts' opinion, quoting the *Tinker* decision. However, the majority observed that subsequent cases *Bethel School District No. 43 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) have said that students' rights while in public schools are not necessarily "coextensive" with those of adults, particularly "in light of the special characteristics of the school environment."

The majority opinion rejected Frederick's arguments that because he stood on a public street after students had been released to attend the event the case was not "a school speech case," and that the phrase "BONG HiTS 4 JESUS" was "just nonsense meant to attract television cameras."

Because the event happened during "normal school hours" and "was sanctioned by … Morse 'as an approved social event or class trip,'" the majority ruled that the case involved school speech. The court noted that this was also the finding of "every other authority to address the question."

Despite calling the message on Frederick's banner "cryptic," the majority said that the phrase may reasonably be interpreted as promoting or celebrating drug use: "[Take] bong hits…", "Bong hits [are a good thing]…" or "[We take] bong hits…" For this reason, the majority said Morse reasonably believed the banner's message violated the school's policy on material which advertises or promotes use of illegal drugs.

"Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs," Roberts wrote.

Returning to precedent, Roberts' opinion said that the decision in *Fraser* was the most appropriate for determining whether Frederick's punishment violated the First Amendment, relying on "two basic principles" of the *Fraser* decision: that public school students' constitutional rights are not the same as adults or even as students outside of school, and that "the mode of analysis set forth in *Tinker* is not absolute."

The majority also said that previous Supreme Court rulings, recent studies and the 1994 Safe and Drug-Free Schools and Communities Act, 20 U.S.C. § 7114(d)(6) (2000 ed., Supp. IV), all highlight the "important – indeed, compelling interest" of deterring drug use by schoolchildren. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995), and *Board of Ed. of Independent School Dist No. 92 of Pottawattamie Cty. v. Earls*, 536 U.S. 822 (2002) all held that students' Fourth Amendment rights against unreasonable searches and seizures were subject to "schools' custodial and tutelary responsibility for children." The opinion also cited a National Institute on Drug Abuse survey which found that "[a]bout half of American 12th graders have used an illicit drug, as have more than a third of 10th graders and one-fifth of 8th graders."

"It was reasonable for [Morse] to conclude that the banner promoted illegal drug use –- in violation of established school policy –- and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the

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"Gibberish is surely a possible interpretation of the words on the banner, but it is not the only one, and dismissing the banner as meaningless ignores its undeniable reference to illegal drugs."

– Chief Justice John Roberts
U.S. Supreme Court

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school was about the dangers of illegal drug use," concluded the majority. "The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."

Justice Kennedy joined a concurrence written by Justice Alito which sought to emphasize the limited nature of the ruling: that it meant to restrict only "speech that a reasonable observer would interpret as advocating illegal drug use" and that it "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom of the war on drugs or of legalizing marijuana for medicinal use.'"

The concurrence warned against an argument put forward by the petitioners as well as the United States government that the First Amendment allows censorship of any student speech that conflicts with a public school's "educational mission."

"This argument can easily be manipulated in dangerous ways, and I would reject it before such dangerous abuse occurs," Alito wrote.

Justice Thomas concurred with the majority, but argued the standard set forth in *Tinker* "is without basis in the constitution." Thomas wrote that historically, teachers' authority and discipline has been absolute and the legal theory of *in loco parentis* supported teachers' rights "to enforce rules, and to maintain order." Thomas argued that the standard established in *Tinker* deviated from this long-held precedent, and "given the opportunity," he would "dispense with *Tinker* altogether."

Justice Breyer concurred in part and dissented in part, saying that the court "need not and should not decide this difficult First Amendment issue on the merits."

Instead, Breyer said the court should hold that Morse had qualified immunity – that she could not know at the time she pulled down the banner that she was violating Frederick's civil rights. For that reason, the court should rule that the student's claim for monetary damages is barred and "say no more."

Breyer said that the majority's holding that schools may "restrict student expression that they reasonably regard as promoting illegal drug use" was a matter quite different from the issue raised by the specific facts in the case, and that it raised concerns because it was "based…on…viewpoint restrictions."

Justice Stevens' dissent, joined by Justices Souter and Ginsburg, argued that the phrase on Frederick's banner, contrary to the majority's interpretation, did not represent a violation of "a permissible rule" or "expressly advocate[] conduct that is illegal and harmful to students."

Stevens said that the court opinion in *Tinker* as well as Justice Harlan's dissent in that case highlighted two fundamental First Amendment principles: first that censorship of speech based on the speaker's viewpoint is "subject to the most rigorous burden of justification," and second that "punishing someone for advocating illegal conduct is constitutional only when the advocacy is likely to provoke the harm that the government seeks to avoid."

Stevens said the majority opinion in *Morse v. Frederick* "trivializes" these two "cardinal principles" of the *Tinker* decision, by inviting administrators like Morse to discipline students with whose pro-drug speech they disagree, and by refusing to demand that the school "show that Frederick's supposed advocacy stands a meaningful chance of making otherwise-abstemious students try marijuana."

"Instead," wrote Stevens, "the court punts," by both deferring to the principal's "reasonable" judgment that the banner constituted drug advocacy and by using its own reasoning to say that the message was express advocacy.

"To the extent the Court independently finds that 'BONG HiTS 4 JESUS' *objectively* amounts to the advocacy of illegal drug use…that conclusion practically refutes itself," wrote Stevens.

Stevens' dissent said, "… the Court does serious violence to the First Amendment in upholding – indeed lauding – a school's decision to punish Frederick for a view with which it disagreed…. [Its] ham-handed, categorical approach is deaf to the constitutional imperative to promote unfettered debate, even among high-school students…."

Steven R. Shapiro, national legal director for the American Civil Liberties Union, which represented Frederick, was critical of the court's ruling.

"It is difficult to know what its impact will be in other cases involving unpopular speech," said Shapiro in a June 25 story by the Associated Press (AP). According to the Knight-Ridder Washington Bureau, Shapiro said the ruling "creates a drug exception to the First Amendment."

Mark Goodman, executive director of the Student Press Law Center, said in an article posted June 25 on that organization's Web site that although he is disappointed in the decision, he sees it as a narrow ruling that only allows school officials to limit student speech that promotes illegal drug use and not speech relating to discussion of political and social issues.

Kenneth Starr, a former independent counsel known for his role investigating the Clinton-Lewinsky scandal, represented Morse. The June 25 AP story said Starr called the court's decision a narrow ruling that "should not be read more broadly."

The Student Press Law Center reported July 10 that the Journalism Education Association, an organization of journalism teachers, released a statement criticizing the decision in *Morse*, recommending that schools use caution in applying it to avoid excessive censorship. The group called the decision "potentially damaging to robust discussion of a whole range of important issues."

According to the AP, three museums, Washington D.C.'s Newseum, which is set to open later this year, the Juneau-Douglas City Museum, and the Alaska State Museum have expressed interest in acquiring Frederick's butcher paper and duct tape banner. Officials from the Newseum have said that they would like to display the banner next to the black armband a then-13-year-old Mary Beth Tinker was suspended for wearing to school in 1965 in protest of the Vietnam War.

– Patrick File
Silha Fellow and *Bulletin* Editor

Student Press

Roundup: Lawmakers Protect Student Free Speech and Press

California court rules school district violated student columnist's First Amendment rights

A California state appeals court ruled May 21, 2007 that a school district violated a student's First Amendment rights in its reaction to controversial editorials published in a high school newspaper.

Andrew W. Smith filed suit against the Novato Unified School District in 2002, after two of his editorials for the school paper, *The Buzz*, caused a stir at Novato High School. Smith's column titled "Immigration" criticized U.S. immigration policy and made several derogatory remarks about Hispanics. When students and parents complained about the column, the school principal held meetings with them and later issued an apology, saying, "this article should not have been printed in our student newspaper, as it violates our District's Board Policy regarding student publications." The district superintendent ordered remaining issues of the paper to be removed from distribution.

A later column by Smith, "Reverse Racism" was published after being delayed for one issue in order to produce a counter-point column at the principal's suggestion.

Smith's lawsuit alleged violations of his rights to free speech under the U.S. and California Constitutions and California Education Code section 48907, a statute which guarantees student free speech rights in public high schools, and challenged the school district's speech code as facially invalid. Novato Unified School District Board Policy 5145.2, the "Freedom of Speech/ Expression: Publications Code" provides that "students' rights of expression shall be limited only as allowed by law," and prohibits "expressions or materials which constitute harassment, threats or intimidation based on race, national origin, religion, gender, ancestry, disability, sexual preference or the perception that a group or person has those characteristics." Smith sought an injunction prohibiting further abridgements of free speech, as well as damages of $1.

In August 2005, the Marin County Superior Court ruled that the column contained "fighting words," which are not protected under the California Education Code, and ordered Smith to pay the district's legal fees. The May 21, 2007 ruling by the California Court of Appeals for the First Appellate District in San Francisco, in *Smith v. Novato Unified School District*, 150 Cal. App. 4th 1439, (2007), reversed the trial court's ruling. According to the Associated Press, Smith will be refunded nearly $21,000 in legal fees.

The California appeals court found that the state's education code provides students with broad protections of free speech in student newspapers. The court noted that the U.S. Supreme Court ruled in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." However, the court said California courts have ruled that, under the state's education code, "[t]he broad power to censor expression in school sponsored publications for pedagogical purposes recognized in *Kuhlmeier* is not available to this state's educators."

The court rejected Smith's challenge to the school's speech code, however, because it found the list of prohibited "expressions or materials which constitute harassment, threats or intimidation" incorporated a state education code prohibition on "hate violence."

"[The speech code] does not violate [California Education Code] section 48907 because speech amounting to hate violence would present a clear and present danger of inciting the commission of unlawful acts on school premises," the opinion said.

The court ruled that although the district did not expressly discipline Smith for his columns, the attempt to disassociate itself from his speech in the "Immigration" column violated the California education code and his constitutional rights to free speech.

"The District sent the clear message that no further speech similar to 'Immigration' would be tolerated," the opinion said. "In the aftermath of 'Immigration' the District succumbed to the fear of disruption and discontent. While understandable, this was not permissible."

> "The District sent the clear message that no further speech similar to [the column] would be tolerated. In the aftermath of [the column] the District succumbed to the fear of disruption and discontent. While understandable, this was not permissible."
>
> – California Court of Appeals, First Appellate District

States take steps to protect student journalists

Illinois and Oregon lawmakers have passed bills aimed at protecting student journalists.

On July 13, 2007, Oregon Governor Ted Kulongoski signed into law a bill that guarantees free speech and press rights to students in school-sponsored publications in public high schools and universities in that state. The law, which went into effect upon signing, says "student journalists are responsible for determining the … content of school-sponsored media."

The law says that school-sponsored expression may be restricted by high school, community college or university officials only when it is libelous or slanderous, "constitutes an unwarranted invasion of privacy," violates an existing federal or state statute, or "so incites students as to create a clear and present danger of the commission of unlawful acts on or off school premises, the violation of school policies, or the material and substantial disruption of the orderly operation of the school."

According to the law, school officials who restrict publications based on a "forecast of material and substantial disruption" must provide specific facts in support of the restriction and must not base it on "undifferentiated fear or apprehension."

Student plaintiffs who bring civil suits under the law may be awarded damages and injunctive and declaratory relief. According to the Student Press Law Center, an earlier version of the bill also allowed successful student plaintiffs in civil suits to be awarded attorneys fees and court costs, but that provision was later removed. According to the Student Press Law Center the bill passed by a vote of 16 to 14 in the state Senate and 29 to 16 in the House of Representatives.

In Illinois, Governor Rod R. Blagojevich has until

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Update: N.J. College Settles with Dropped Student Paper Adviser

A June 2007 settlement between embattled college newspaper adviser Karen Bosley and her college returned her to teaching journalism classes and handed her $90,000.

Bosley was removed from her position overseeing the *Viking News* of Ocean County College in Toms River, N. J. at the end of the spring term in 2005 and was reassigned to teach English classes, according to the Student Press Law Center (SPLC). Bosley, a 35-year veteran adviser, filed suit in the U.S. District Court for the District of New Jersey on June 19, 2006, alleging that Ocean County College President Jon Larson and several other upper-level college administrators violated her First Amendment rights and discriminated against her on the basis of her age, according to the SPLC. Three student editors filed a separate lawsuit in May 2006 opposing Bosley's removal and claiming unconstitutional censorship.

According to the SPLC, Ocean County College spokeswoman Tara Kelly said in December 2006 that the reassignment was based on adviser competence, but Bosley alleged that her reassignment was retaliation for the *Viking News*' criticism of school officials.

In 2005, under Bosley's guidance, the *Viking News* published stories criticizing Larson. According to the SPLC, the *Viking News* reported on Larson's lavish inauguration ceremony and reception, which cost the college $78,000. The *Viking News* also ran stories and editorials on Larson's payments to a consultant who redesigned the school logo and his decision to reschedule student activities without student input.

Editor & Publisher magazine reported that College Media Advisers, the organization of advisers of student-run media, formally censured Ocean County College in 2006, and a Society of Professional Journalists (SPJ) task force criticized both Bosley and the administration, calling the dispute "a case study in suspicion, frustration, escalation and the hardening of positions on all sides." Despite that criticism, the SPJ also called for Bosley's reinstatement, according to the SPLC.

"[Bosley's settlement] could be a model for other public college newspapers whose administrators attempt to control the content of the newspaper or attempt to dismiss a faculty adviser because of what the newspaper publishes."

– New Jersey Collegiate Press Association

In July 2006, Judge Stanley R. Chesler of the U. S. District Court in Trenton, N.J. issued a preliminary injunction against Bosley's removal, ruling that it violated the students' First Amendment rights and would have a "chilling effect" on future reporting. Ocean County College trustees voted unanimously to reinstate Bosley as newspaper adviser on Aug. 28, 2006. (See "Scholastic Journalism Roundup: New Jersey Newspaper Adviser Reinstated" in the Fall 2006 issue of the Silha *Bulletin*.)

The New Jersey Collegiate Press Association (NJCPA) reported that the June 2007 settlement "resulted in an ideal situation for [the *Viking News*] adviser and future editors of the paper."

The NJCPA reported that although Bosley was not reinstated to two communications classes she previously had taught, according to the agreement she was permanently reinstated as the newspaper's adviser, returned to teaching journalism, and awarded a financial settlement. According to the SPLC, Bosley reported in an e-mail that the financial settlement amount was $90,000.

The NJCPA wrote that the settlement "could be a model for other public college newspapers whose administrators attempt to control the content of the newspaper or attempt to dismiss a faculty adviser because of what the newspaper publishes."

– Sara Cannon
Silha Center Staff

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early September to sign a similar measure aimed at protecting the free press rights of student journalists for school-sponsored publications in the state's public universities and community colleges.

The College Campus Press Act passed in the Illinois House of Representatives 112 to 2 and was unanimously passed in the state Senate.

The bill will bolster support for college student journalists following a federal court ruling that said administrators at public institutions of higher learning may have the same authority to censor school-sponsored publications as officials at public high schools. In 2005, the Seventh Circuit U.S. Court of Appeals, which has jurisdiction over Illinois, Wisconsin and Indiana, ruled in *Hosty v. Carter*, 412 F.3d 731, that a dean at Governor's State University did not violate student editors' First Amendment rights by practicing prior review over the student newspaper because it was not clearly a "designated public forum." (See "Supreme Court will not Hear *Hosty* Case" in the Spring 2006 issue of the Silha *Bulletin*, and "Hosty Ruling Could Result in Fewer Freedoms for University Newspapers, Students" in the Summer 2005 issue.)

Section 10 of the Illinois bill states, "All campus media produced primarily by students at a State-sponsored institution of higher learning is a public forum for expression by the student journalists and editors at the particular institution. Campus media, whether campus-sponsored or non campus-sponsored, is not subject to prior review by public officials of a State-sponsored institution of higher learning."

The Student Press Law Center reported June 7 that amendments later made to the bill insulate administrators from being held liable for student produced content and allow them to discipline students for use of unprotected speech. Section 25 of the bill states, "[e]xpression made by a collegiate student journalist, collegiate student editor, or other contributor in campus media is neither an expression of campus policy nor speech attributable to a State-sponsored institution of higher learning." Section 30 says, "Nothing in this Act prohibits the imposition of discipline for harassment, threats, or intimidation, unless constitutionally protected, or for speech that is not constitutionally protected, including obscenity or incitement."

– Patrick File
Silha Fellow and *Bulletin* Editor

Media Ethics

Personal Relationships Raise Ethics Questions for Broadcast Reporters

Two local television news reporters have been disciplined for personal relationships they developed with sources they were covering, raising questions about the ethics of such relationships, their disclosure, and the appropriate punishment.

Amy Jacobsen, a reporter for Chicago NBC affiliate WMAQ-Channel 5, was fired on July 10, 2007, after a rival station broadcast a video showing Jacobsen at the backyard pool at the home of Craig Stebic, whose wife has been missing since April 30, 2007. Jacobsen was covering the Stebic story for WMAQ, according to the *Chicago Sun-Times*.

The video was shot from a nearby neighbor's house on Friday, July 6, and shows a bathing suit-clad Jacobsen, her two children, Stebic, and his sister Jill. The video was broadcast by WBBM-Channel 2, a Chicago CBS affiliate, on the morning of Tuesday, July 10. Stories about the existence of the tape had run that morning in the *Sun-Times* and *Chicago Tribune*. The video can be seen on the WBBM website at http://cbs2chicago.com/topstories/local_story_191075534.html.

Carol Fowler, vice president of news at WBBM, told *Sun-Times* columnist Robert Feder that the station had waited to broadcast the video "because it wasn't germane to anything in the [Stebic] case." Once existence of the tape was public knowledge, Fowler said, the station felt compelled to air it and post it on their Web site. Feder reported that Fowler would not say who shot the video or how it came into the station's possession, saying the tape "fell into our lap."

According to the *Chicago Tribune*'s Phil Rosenthal, sources at WMAQ said a number of factors contributed to Jacobsen's dismissal, including the incriminating video, the fact that she had been briefing police on her contact with Stebic without informing her bosses, and that this was the latest in a number of incidents that caused them to lose faith in her judgment.

In Los Angeles, reporter Mirthala Salinas was suspended Aug. 3, 2007 for two months without pay from KVEA-Channel 52, part of the NBC-owned Telemundo network, for covering Mayor Antonio Villaraigosa while they were romantically involved, according to *Los Angeles Times*. Villaraigosa's marriage was rumored to be in trouble for months, and on July 12 his wife filed for divorce.

According to the *Times*, it is unclear when the relationship between Salinas and Villaraigosa began, but Telemundo President Don Browne said in a statement released on Aug. 2, 2007 that KVEA management agreed to reassign Salinas away from political reporting in late 2006 so she would not be covering the mayor, because "a friendship… had developed between the reporter and the mayor."

In April 2007, said Browne, Salinas was made a temporary anchor for the station, occasionally reading lead-ins to stories involving the mayor, including copy on June 8 and June 11 regarding the mayor's separation from his wife. Browne said this was "a flagrant violation" of the network's news policy guidelines on conflict of interest.

The *Los Angeles Times* reported that three of Salinas' superiors also were disciplined in response to the scandal – KVEA General Manager Manuel Abud was reassigned to another position and News Director Al Corral was suspended for two months without pay. Ibra Morales, President of Telemundo's 16 Spanish-language stations, was reprimanded.

Browne's statement said that Telemundo officials arrived at a course of action after several weeks of investigation, during which they consulted the Poynter Institute, a journalism ethics think tank based in St. Petersburg, Fla.

In a July 20 Associated Press (AP) story, Kelly McBride, ethics group leader at the Poynter Institute, said Telemundo had to balance responsibilities to the reporter and to the public.

"There's what they have to do legally. But then the other issue is what they owe their audience to recover their credibility. That's a completely different question," said McBride.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said in the same AP story that reporters walk a fine line in trying to get close, but not too close, to the subjects of their reporting.

"You have to have [the] ability to get inside the situation, but you have to maintain that detachment." Kirtley said.

According to *Chicago Sun-Times* columnist Feder, Jacobsen said she "can't believe" WMAQ fired her for a "lapse in judgment." Jacobsen said Stebic had never made any advances toward her or acted inappropriately. She said she was taking her children to a different pool on a day off when Stebic's sister called asking if she wanted to come over to discuss the case, so she decided to take her children to Stebic's house to swim instead.

Jacobsen said there were other mothers and children present, Feder reported. "I never would have gone there by myself if [Stebic] were there alone…. And I certainly wouldn't have brought my children there if there weren't other kids around too."

How the scandals will affect the reporters' careers is unclear. According to the *Los Angeles Times*, employees at the headquarters of KVEA and KNBC-Channel 4 criticized the network for letting Salinas off too easy. The *Times* reported that Salinas has been linked romantically to local politicians before, dating State Assembly Speaker Fabian Nuñez (D-Los Angeles) before he remarried his former wife, as well as former Los Angeles City Council President Alex Padilla, who is now a state senator.

In a July 29 story titled "Romancing the Source,"

Reporter Relationships, *continued on page 35*

"[The scandals] could be an enhancement – in certain segments of the media, notoriety of any kind is a good thing. A future as a serious journalist? Probably not, at least not in the short term."

– Jane Kirtley
Silha Center Director
and Silha Professor of
Media Ethics and Law

Media Ethics

BBC Report: Network Should be More 'Impartial'

Apology Issued to Queen for Misrepresentation

Critics of the BBC have praised the report as an acknowledgement of the broadcaster's "deep seated liberalism."

In a report released on June 18, 2007, the British Broadcasting Corporation (BBC) concluded that it had broken its own guidelines for avoiding bias, and "must become more impartial." The report, entitled "From Seesaw to Wagon Wheel: safeguarding impartiality in the 21st century" took more than a year to complete. It can be viewed online at www.bbc.co.uk/bbctrust/research/impartiality.html.

According to the BBC Web site, the report resulted from "a project first commissioned by the BBC Board of Governors in conjunction with BBC management in November 2005 to identify the challenges and risks to impartiality." The report has been endorsed by the BBC Executive Board and the BBC Journalism Board, along with the BBC Trust, an oversight and governing body.

According to the BBC Web site, the BBC Trust "is the sovereign body of the BBC, its independent trustees acting in the public interest." It works to ensure "that the BBC remains independent, resisting pressure and influence from any source." Trustees are appointed by the Queen.

According to *The* (London) *Observer*, critics of the network have praised the report as an acknowledgement of the BBC's "deep seated liberalism." BBC Trustee and former BBC reporter Robin Aitken accused it of "widespread liberal bias." In an article responding to the report, Aitken wrote "the BBC is biased, and it is a bias that seriously distorts public debate."

Among the programming addressed in the report are coverage of the Make Poverty History campaign, the Live8 concert, and the Drop the Debt special, all of which aired in 2007. Dawn French, an actress and writer for two BBC sitcoms, was also cited for her enthusiastic endorsement of the Make Poverty History campaign by a fictional character on the sitcom, "The Vicar of Dibley." A promotional video for the campaign was shown on the sitcom as part of a story line.

The BBC is taking steps to revise its programming and address what the report called its "culture of bias." According to the BBC, the guiding principles published in the report will be used to create an "extensive programme of training, seminars and debates through the BBC's College of Journalism and in conjunction with Editorial Policy." The BBC also announced that it will "liaise closely with PACT – the independent programme-makers professional body – to raise awareness [about impartiality] amongst those who contribute from outside the BBC."

The network will also release regular reports on impartiality to the BBC Trust, and will rely on the trust to make sure the BBC is "avoiding conflict of interest situations by not commissioning from independent production companies who have a direct commercial interest in the programme content" and "encouraging a closer working relationship between independent companies and BBC Editorial Policy earlier in the process." The trust will also appoint a "senior BBC editorial figure to oversee themed seasons" and keep staff aware of "editorial guidelines surrounding campaigns, user-generated content and conflict of interest around outside interests."

Two separate incidents that took place days before the report was released, along with another that emerged shortly after, brought the problems the BBC was attempting to address into relief.

On June 15, the BBC Trust expressed its concern over two episodes of the BBC investigative journalism program "Panorama." According to *The Guardian* of London, viewers contacted the BBC in large numbers regarding an episode that focused on the Church of Scientology, and another on the health affects of wireless technology. A video clip showing "Panorama" reporter John Sweeney screaming in frustration at a Scientology church representative was posted on YouTube in May, prompting bad press for the network throughout the UK and in media outlets in Europe and the United States.

On July 12, the BBC issued an official apology to Queen Elizabeth II for a trailer it produced for the special "A Year With the Queen," scheduled to air in the fall of 2007. According to statements by the BBC, the trailer gave the impression that the Queen had walked out of a portrait sitting with photographer Annie Leibovitz when she was asked to remove her crown.

On the trailer, Leibovitz is shown saying, "I think it will look better without the crown because the garter robe is so ..." and being subsequently cut off by the Queen, who said, "Less dressy? What do you think this is?" gesturing at her formal "Order of the Garter" robes. The trailer then cut to footage of the Queen walking with a lady in waiting, saying, "I'm not changing anything. I've had enough dressing like this, thank you very much." The footage of the Queen making this comment was taken when she was arriving for the photo shoot, but the BBC trailer was rearranged to give the impression that she was leaving angrily.

English tabloids and Web sites in Europe and the United States reported on the trailer as if it was a factual representation of the Queen's behavior. After the trailer was broadcast, the Associated Press (AP) newswire released a story with the headline, "Queen Storms Out of Celeb Photo Shoot."

On June 13, BBC Executives announced that the trailer had been edited incorrectly. According to *The Independent* of London, "palace officials reacted swiftly to the inaccuracy and the BBC was forced to clarify and apologise, saying the trailer was not meant to be shown." The AP reported that in the official statement on the matter, the BBC said, "In this trailer there is a sequence that implies the Queen left a sitting prematurely. This was not the case and the actual sequence of events was misrepresented."

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BBC Impartiality Report*, continued from page 34*

According to *The Independent*, BBC1 controller Peter Fincham called the mistake "human error," and that though it was "regrettable," "things like this can happen." In its statement, the BBC officially apologized to both the Queen and to Leibovitz for "any upset this may have caused."

On August 12, *The* (London) *Telegraph* reported that Farrer & Co., the Queen's attorneys, had written a letter to the BBC and RDF Media Group, the film company that made the trailer for the BBC, warning them that the misrepresentation in the trailer may have constituted a breach of contract. According to *The Telegraph*, officials at Buckingham Palace have called the entire "A Year With the Queen" program "tainted" in light of the problems with the trailer, and are pressuring the BBC to "scrap it." Mark Stephens, senior media lawyer with Finers Stephens Innocent, told *The Telegraph*, "The Queen agreed to appear in a programme subject to standard editorial guidelines and controls. The editorial standards of the BBC require them not to present a false picture. If they do portray someone in a false light, they have breached their contract." *The Telegraph* reported that the BBC does plan to air the documentary once "it has been properly edited."

On June 19, it was announced that the BBC would face fines of up to 300,000 pounds from the British Office of Communications for faked phone-in competitions. *The* (London) *Times* reported that fraudulent competitions had been discovered on three shows: "Comic Relief," "Sport Relief," and "Children in Need." Less than a week prior to that, the BBC was fined 50,000 pounds for falsely reporting the results of a phone-in competition on its children's program "Blue Peter," according to BBC News. The AP reported that, on the other shows, members of BBC production staff had posed as competition winners on several occasions as members of the public called in hoping to win. Participants in the phone-in competitions were being charged for the calls.

BBC Director General Mark Thompson countered rumors that he might resign over the scandal, telling BBC News that he planned to keep his post and that the incidents were "totally unacceptable." He also said that if there was a way of "recompensing" callers who had participated in the fraudulent competitions, "then we will do it." "We are utterly determined to do everything we can to fix this problem," Thompson said.

The British Office of Communications is conducting preliminary investigations, and as of press time a full inquiry into the matter is expected, according to BBC News and *The Times*. According to BBC News, the BBC has suspended all phone competitions until the matter is resolved. *The Times* also reported that the BBC has suspended a small number of staff members in connection with the faked phone-ins.

Despite the recent scandals, *Guardian* columnist Simon Jenkins said reports of widespread bias and calls for reform might be overblown.

"The BBC obviously weakens its claim to public support when it makes mistakes, but it would be far worse if it never ran a risk because its running had passed to state regulators, like most such corporations abroad. There is no danger of the BBC running short of critics, from right or left. But there is a danger of it losing support for its core journalistic function, oppositionalism," wrote Jenkins in a July 20 column.

The BBC adopted a set of new editorial guidelines in 2005, in response to a critical report on the organization released in 2003. These guidelines were reviewed on January 1, 2007, at the start of the most recent BBC Charter. (See "New Editorial Guidelines, Other Changes at the BBC," in the Summer 2005 issue of the Silha *Bulletin*.)

– Sara Cannon
Silha Center Staff

Reporter Relationships*, continued from page 33*

the *Los Angeles Times* cited journalists in similar situations who "haven't just survived. They've thrived."

For example, Matt Cooper was a *Newsweek* deputy Washington bureau chief when, in 1997, he married Mandy Grunwald, a longtime media advisor for Bill and Hillary Rodham Clinton, the *Times* reported. Today, Cooper is the Washington editor for *Portfolio* magazine, and Grunwald is chief ad strategist for Sen. Clinton's presidential campaign.

Christiane Amanpour, chief international correspondent for CNN, dated and later married James Rubin, assistant secretary of state for public affairs, in 1998.

The *Times* also reported that Atlanta Mayor Bill Campbell and local television news reporter and anchor Marion Brooks had a four-year relationship during the mid-1990s. Brooks is now an anchor for an NBC affiliate in Chicago, while Campbell was convicted of tax evasion in 2006 and sentenced to 30 months in prison. According to the *Times*, *The Atlanta Journal-Constitution* reported that some of Brooks' co-workers avoided her when working on stories about City Hall, fearing she would tip off Mayor Campbell.

Although such scandals as Jacobsen's and Salinas' may not ruin journalists' careers, Kirtley said the public may have trouble taking them seriously in the future.

"It could be an enhancement – in certain segments of the media, notoriety of any kind is a good thing," Kirtley said in the July 20 AP story. "A future as a serious journalist? Probably not, at least not in the short term."

– Patrick File
Silha Fellow and *Bulletin* Editor

Media Ethics

Unusual Washington News Council Report Criticizes Spokane *Spokesman-Review* Coverage of Local Project

On May 5, 2007, the Washington News Council released a report based on an unusual independent investigation into the Spokane (Wash.) *Spokesman-Review*'s controversial coverage of a local redevelopment project between 1994 and 2005. The report was critical of the paper on a number of issues. But it also prompted criticism of the news council itself.

> "In the newsroom, we accept the findings. And we sincerely apologize for not adequately living up to our journalistic standards."
>
> – Steve Smith
> Spokane *Spokesman-Review* Editor

The *Spokesman-Review* had been broadly criticized for its coverage of Spokane's River Park Square (RPS) redevelopment project. The newspaper's publisher, Cowles Publishing Company (Cowles), was also owner of the RPS property, the downtown shopping mall that was the target of the project. According to the report, critics claimed that the paper had overlooked or ignored the project's financial problems while urging public support for its success. Meanwhile, the report said, the RPS controversy and the resulting lawsuits "tore apart the city's political structure and pulled down its bond rating."

Spokesman-Review Editor Steve Smith, who joined the newspaper in 2002, formally asked the Washington News Council (WNC) in February 2006 to independently investigate the claims of unethical journalism, according to the report. The investigation cost $30,000, split between the WNC and the *Spokesman-Review*, included a freelance investigation by former *Washington Post* and *Wall Street Journal* reporter Bill Richards, and took more than a year to complete. The 29-page document is available at the WNC Web site, www.wanewscouncil.org, and at the *Spokesman-Review*'s Web site, www.spokesmanreview.com. It was published in full in the print edition of the Sunday, May 6, 2007 *Spokesman-Review*.

News organizations have subjected controversial coverage to outside reviews in the past. For example, in 2004, CBS News asked a former U.S. Attorney General and a retired Associated Press president chief executive to form an independent panel to review its controversial reporting on President George W. Bush's National Guard Service. (See "Panel Publishes Findings Following Review of CBS '60 Minutes' Broadcast" in the Fall 2004 issue of the Silha *Bulletin*.) However, according to *The Seattle Times*, it is unusual for a newspaper to request a totally autonomous critique of coverage of its own company.

The report sided with the newspaper's critics. Its findings said that coverage of the RPS project and its legal fallout from 1994 to 2005 lacked thoroughness, balance and transparency. The newspaper self-censored and suppressed important financial information in the interest of Cowles and to the detriment of the public good, the report said. It also found that coverage was negatively affected by an inappropriate "no surprises" arrangement which allowed owner Cowles to control content about the company, as well as by the fact that one attorney, Duane Swinton, was simultaneously advising the *Spokesman-Review* newsroom and the Cowles boardroom on the issue. The report also criticized then-editor Chris Peck for simultaneously overseeing coverage of the RPS project while advocating a particular outcome in his columns.

The news council made recommendations along with its findings. Among them, it suggested an independent outside editor be assigned to oversee coverage of Cowles operations, and treat the company exactly the same as it does any other source for a story, allowing no more or less influence over content. The WNC also recommended that the *Spokesman-Review* find a separate law firm for advice on legal issues in order to avoid conflicts of interest.

Editor Smith apologized to readers and to the Spokane community in a column published the same day as the report, May 6, 2007. "In the newsroom, we accept the findings. And we sincerely apologize for not adequately living up to our journalistic standards," Smith said.

In a column responding to the WNC's recommendations published a week later, Smith said that because he oversaw both the newsroom and the editorial board as editor, he was aware of the appearance that *Spokesman-Review* news decisions might be influenced by editorial positions. "The News Council report tells me that at this time, in this community and with the RPS controversy still percolating, it might be best if I stepped away from the editorial board. So that's what I will do," said Smith.

He also reminded readers that newsroom meetings are now open to the public and "webcast" online, but declined to accept the suggestion to hire a new lawyer, pointing out that the conflict of interest was resolved by other lawyers at Swinton's firm handling Cowles business.

Others were less willing to accept the news council's report. Publisher W. Stacy Cowles said he "reject[s] substantially" the report's findings that he or members of the Cowles family directed *Spokesman-Review* coverage. In a column published the same day as the report and Smith's column, Cowles wrote, "the Editor and the newsroom made and continue to make their own decisions about RPS and all other news coverage."

Peck, who was the paper's editor throughout the controversy and now is editor of the Memphis, Tenn.

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News Council Report, *continued from page 36*
Commercial Appeal, challenged the findings as well as Smith's apology in a May 12 *Spokesman-Review* column. "I must take exception to implications that the *Spokesman-Review* newsroom in the 1990s was somehow orchestrated to turn a blind eye to the problems with River Park Square," Peck wrote. "Not true."

Peck also said the report "inflates" the significance of the RPS controversy, ignoring that there were other major stories editors and reporters were covering, as well as suggesting that Peck did little to respond to critics at the time.

Peck claimed that he brought in Joann Byrd, former *Washington Post* ombudsman, and Bob Steele, an ethicist at the Poynter Institute for Media Studies and member of the Silha Advisory Board, to meet with *Spokesman-Review* staff and talk about ethical journalism, as well as encouraged the staff to draft a new code of ethics, which was finished by the time he left in 2002.

A July 10, 2007 report by *Camas Magazine* said the WNC report "committed major errors and appears to have violated standard journalism ethics and practices." *Camas* is an online publication that reports on RPS issues and Cowles business.

The *Camas* report, which can be found under the title "The Verdict" at www.camasmagazine.com, said that the WNC report downplayed the nature of attorney Swinton's conflict of interest and misrepresented a closing agreement in a 2006 tax case.

The WNC report concluded, "Swinton is probably correct that he did not have a formal conflict of interest since throughout the whole project he was only representing one client – Cowles Co." According to *Camas*, however, Swinton never made this assertion; the term "formal conflict of interest" came from WNC Executive Director John Hamer, and the "one client" explanation came from Richards, the WNC report's author.

Richards defended the assertion in a July 31 e-mail to the Silha *Bulletin*, however, saying the WNC report made clear that although Swinton would probably not have a legal conflict of interest because he was not working for two separate clients in adversarial positions, the perception among reporters and editors in the *Spokesman-Review* newsroom was that Swinton was "serving two masters."

The *Camas* Senior Editor who wrote the magazine's report, Tim Connor, filed a grievance against Swinton with the Washington State Bar Association, according to a July 23 *Editor & Publisher* (*E&P*) magazine story. Swinton told *E&P* that he thought the grievance was unusual because Connor chose to make it public and because Connor had never been one of his clients. Connor said if the *Spokesman-Review* had chosen to follow the WNC recommendation to find a different lawyer, he probably would not have filed the grievance. "The conflict has been long-standing," Connor said in the *E&P* story. "It's been there and it's been publicized – but it's never been resolved."

The WNC report's "other major lapse," according to *Camas*, was in reporting that an Internal Revenue Service (IRS) closing agreement in a 2006 tax case involving the sale of a parking garage in the RPS Complex was a "reversal" of a 2004 IRS determination that the sale was exempt from federal taxes.

Camas reported that an IRS spokesman and a tax attorney who negotiated the closing agreement both said the document did not constitute a "reversal" and said only that the disagreement was resolved.

Camas also reported that the information for the section of the WNC report on the IRS closing agreement came from a redacted version of the agreement. Richards would not disclose who gave him the agreement or who might have redacted it, but *Camas* reported that its research "strongly indicate[d]" that it came from a law firm, K&L Gates. That law firm, according to *Camas*, was a defendant in the RPS litigation and is now a major donor to the WNC; two of K&L Gates' founding partners were also founding members of the news council.

Camas says this raises a question as to whether "a major News Council donor (and a major player in the River Park Square securities fraud fiasco) was able to surreptitiously influence Richards's reporting through the back door of the WNC's project team."

Richards defended his decision not to disclose his source for the IRS document. "This was not a public document and its release could be problematic for the source," Richards wrote in the July 31 e-mail. "I knew the source, as did my editors on this project, and I am comfortable with the validity of the document."

Richards said *Camas*' question of whether his report was influenced from within the WNC is problematic.

"[*Camas*'] critique seems to rely on carefully selected bits and pieces of information, plus [their] own intuition – adding up to a vague conclusion of conspiracy," Richards said.

Stephen Silha, a member of the WNC board of directors and son of Helen and the late Otto Silha, who endowed the Silha Center, said in a July 30 e-mail that the organization decided not to respond to the *Camas* report. "We found [*Camas*'] premise utterly without merit," Silha said.

Silha said the WNC believes the report is "a groundbreaking and important contribution to journalism ethics which will be useful to journalism schools and media organizations for decades to come."

– Patrick File
Silha Fellow and *Bulletin* Editor

Privacy News

Full D.C. Circuit Rules McDermott Had No First Amendment Right to Leak Phone Tape Due to Ethics Committee Rules

In the most recent segment of a 10-year legal battle, the full panel of the U.S. Court of Appeals for the District of Columbia Circuit ruled May 1, 2007 that the First Amendment does not protect Rep. Jim McDermott (D-Wash.) from liability for disclosing an illegally recorded audiotape.

The split 4 to 1 to 4 *en banc* decision in *Boehner v. McDermott*, 484 F.3d 573 (D.C. Cir. 2007), affirmed a March 28, 2006 ruling by a three-judge panel, but on different grounds. (See "Federal Appeals Court Finds McDermott in Violation of Wiretap Law" in the Winter 2006 issue of the Silha *Bulletin*.)

The case began in December 1996 when a Florida couple, John and Alice Martin, used a police scanner to intercept and record a conference call involving several Republican leaders including Rep. John Boehner (R-Ohio), who participated by cell phone, and then-House Speaker Newt Gingrich (R-Ga.), court documents said. In the recording, the officials discussed strategy for dealing with allegations of ethics violations against Gingrich. McDermott, then-ranking Democrat on the House Ethics Committee, acquired the tape from the Martins and shared it with reporters at *The Atlanta Journal-Constitution*, *Roll Call*, and *The New York Times*. Both *The Times* and *The Journal-Constitution* published stories based on the recording in January 1997, but neither named McDermott or the Martins.

> "When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media."
>
> – Judge A. Raymond Randolph
> U.S. Court of Appeals
> District of Columbia Circuit

After the newspaper stories ran, the Martins held a press conference and identified McDermott as the congressman to whom they gave the tape, court documents said. The Martins pleaded guilty to illegally intercepting the telephone conversation under the federal wiretap law, 18 U.S.C. § 2511(1)(a), and were fined $500. McDermott turned the tape over to the House Ethics Committee and resigned from his position on the committee. Shortly after McDermott's resignation from the ethics committee, Boehner filed a civil suit in Federal District Court in Washington D.C. seeking damages for McDermott's disclosure of the illegally intercepted communications.

Federal law, 18 U.S.C. § 2511(1)(c), prohibits intentional disclosure of any communication a person knows or has reason to know was illegally recorded. It also provides for civil liability under 18 U.S.C. § 2520.

In the 2006 ruling on Boehner's suit, a three-judge panel of the D.C. Circuit Court affirmed the lower court ruling that McDermott had illegally disseminated the tape because he knew it was unlawfully obtained. Judge A. Raymond Randolph, writing for the majority of the panel held that "[b]ecause there was no genuine dispute that Representative McDermott knew the Martins had illegally intercepted the conversation, he did not lawfully obtain the tape from them."

The court affirmed the $10,000 damage award along with $50,000 in punitive damages and attorney fees. According to published reports, the total award amounts to more than $600,000.

On June 23, 2006 the court vacated the ruling and agreed to rehear the case *en banc*. (See "*Boehner v. McDermott* Reheard Before Full D.C. Court of Appeals" in the Fall 2006 issue of the Silha *Bulletin*.) After rehearing the case, the full court issued its split decision.

In an opinion written by Randolph, four judges agreed with the majority in the 2006 case that McDermott had illegally disclosed an unlawfully obtained tape. Because the tape was unlawfully obtained, they reasoned, its disclosure was not protected by the First Amendment. Judge Thomas B. Griffith concurred in the result, but on narrower grounds. He wrote in a separate opinion that had McDermott's conduct not been a violation of the U.S. House's ethics rules, he would have agreed with the four dissenters that disclosure of the tapes was protected under *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

In *Bartnicki*, a radio talk show host was sued after broadcasting portions of an illegally recorded cell phone conversation. The U.S. Supreme Court held in 2001 that the First Amendment protected the radio host because the information on the tape was in the public interest and he had played no part in the illegal interception of the conversation.

[Lee Levine, the attorney who represented the media defendants in *Bartnicki*, delivered the Annual Silha Lecture in October 2001. For more on the case see "U.S. Supreme Court Rules In Historic Bartnicki Case" in the summer 2001 issue of the Silha *Bulletin*.]

In the 2006 *Boehner* ruling, the three-judge panel had distinguished *Bartnicki* by holding that McDermott knew, or should have known, that the conversation had been illegally intercepted. In *Bartnicki*, the tape in question was left anonymously in the radio host's mailbox, whereas McDermott received the tape with a letter detailing how it was recorded.

After rehearing the case *en banc*, only four judges agreed *Bartnicki* could be distinguished on that point. A majority of the court agreed that *Bartnicki* controlled and the government may not punish a person for disclosing illegally intercepted communication so long as that person did not participate in the illegal interception. "There is no distinction of legal, let alone constitutional, significance between our facts and those before the Court in *Bartnicki*," Judge David B. Sentelle wrote for the court.

But Randolph, also writing for a majority on a separate issue, held that *Bartnicki* did not apply to the facts before the court because McDermott had

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***Boehner v. McDermott**, continued from page 38*

voluntarily accepted a duty not to disclose the communication and waived his First Amendment protections when he took an oath to comply with House Rules. House Ethics Committee Rule 9 imposes a duty not to "disclose any evidence relating to an investigation to any person or organization outside the Committee unless authorized by the Committee."

Randolph cited confidentiality rules for lawyers and grand jurors as examples of similar prohibitions on disclosure of lawfully acquired communication that do not violate the constitution.

The court further relied on *United States v. Aguilar*, 515 U.S. 593 (1995), where the U.S. Supreme Court held that certain government officials "may have special duties of non-disclosure." In *Aguilar*, a federal judge learned of an investigative wiretap from another judge and told the subject of the wiretap of its existence. He challenged his conviction for violating 18 U.S.C. 2232(c) on First Amendment grounds but lost.

Like Aguilar, the court held, McDermott had a "special duty" of confidentiality based on the House Ethics Committee rule. "If the First Amendment does not protect Representative McDermott from House disciplinary proceedings, it is hard to see why it should protect him from liability in this civil suit. Either he had a First Amendment right to disclose the tape to the media or he did not," Randolph wrote.

The Martins delivered the tape to McDermott because of his position on the House Ethics Committee, so his conduct regarding the tape was bound by House rules. "When Representative McDermott became a member of the Ethics Committee, he voluntarily accepted a duty of confidentiality that covered his receipt and handling of the Martins' illegal recording. He therefore had no First Amendment right to disclose the tape to the media," the court held.

In a short concurring opinion, Griffith emphasized the limits of the court's holding. "I believe it is worth noting that a majority of the members of the Court – those who join Part I of Judge Sentelle's dissent – would have found [McDermott's] actions protected by the First Amendment. Nonetheless, because Representative McDermott cannot here wield the First Amendment shield that he voluntarily relinquished as a member of the Ethics Committee, I join Judge Randolph's opinion in concluding that his disclosure of the tape recording was not protected by the First Amendment," he wrote.

Judge David B. Sentelle and three other judges dissented. Sentelle argued that *Aguilar* and other cases cited by the court were not helpful and that determination of the *Bartnicki* issue should settle the matter.

The dissent recognized that the cases cited by the majority might be persuasive had the court considered the validity of the congressional rules as applied to McDermott's conduct. But the court sat to decide whether a statute imposed civil liability, not whether congressional rules apply. "We are reviewing a case governed by Bartnicki, and *Bartnicki's* holding should prevail," Sentelle wrote.

According to a May 2, 2007 story by Adam Liptak in *The New York Times*, news organizations greeted the ruling with relief. Theodore J. Boutrous Jr., a lawyer for the news organizations, was quoted as saying "[i]t's a huge win in terms of the free speech and free press interests." Had the opinion of the three-judge panel been upheld, the newspapers that printed the stories could have been liable as well as McDermott, he said.

The Associated Press (AP) reported on July 9, 2007 that McDermott will seek an appeal before the U.S. Supreme Court. "With all due respect to the Court of Appeals, the constitutional issues involved here are much too important to be confused by a split decision," McDermott said in a July 6 statement to the AP. The case reached the Supreme Court once before in 2001, but the high court remanded for reconsideration in light of the then-recently decided *Bartnicki* case.

The Seattle Post-Intelligencer reported on May 28, 2007 that if the ruling stands, it could cost McDermott more than $1 million in damages and legal fees. Boehner offered to settle the case early on for $10,000 donated to charity and an apology, but McDermott refused, the *Post-Intelligencer* reported.

The May 2, 2007 *New York Times* story also quoted a statement from Boehner following the ruling. "When you break the law in pursuit of a political opponent, you've gone too far. Members of Congress have a responsibility not only to obey the laws of our country and the rules of our institution, but also to defend the integrity of those laws and rules when they are violated," Boehner said.

– Michael Schoepf
Silha Research Assistant

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