SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

Bulletin

Volume 12, Number 2 Winter 2007

Inside this Issue

Wolf Sets Jail Time Record for Refusing to Comply with Grand Jury Subpoena

Freelancer could remain in jail until July 2007

Freelance journalist and self-proclaimed anarchist Josh Wolf remains in jail after a judge denied his latest attempt at freedom, and has become the longest-jailed journalist for refusing to comply with a subpoena. Wolf has been imprisoned since Sept. 22, 2006, and on Feb. 6, 2007, he passed Vanessa Leggett's prior record for time in prison for refusing to testify before a grand jury. (For more on Leggett's imprisonment, see "Journalists' Records Subpoenaed in Separate Cases" in the Fall 2001 issue of the Silha *Bulletin* and "Vanessa Leggett Released from Jail" in the Winter 2002 issue.) Wolf could stay there until July 2007 when the grand jury term expires.

Wolf's latest legal setback occurred on January 30 when Federal District Judge William Alsup denied Wolf's motion arguing for his release on the grounds that the civil contempt imprisonment has become a criminal punishment and because he will never surrender the videotape the government is seeking. Alsup subsequently ordered mediation between Wolf and the government before Federal Magistrate Judge Joseph Spero to try to resolve this matter.

Wolf was jailed for civil contempt after refusing to comply with a federal grand jury subpoena seeking a videotape he made at a July 2005 protest that ended with a police officer being struck in the head and the attempted burning of a police car. Federal prosecutors claim they want the tape to identify the perpetrators of the crimes, and Wolf has refused to comply with the subpoena. Alsup found Wolf in contempt for disobeying the subpoena in 2006, and Wolf has been in jail since the U.S. Court of Appeals for the Ninth Circuit denied his appeal of Alsup's order. (See "Blogger Ordered Back to Jail for Refusal to Disclose Videotapes" in the Fall 2006 issue of the Silha *Bulletin*; "Court of Appeals Orders Freelance Journalist To Hand Over Videotape" in the Summer 2006 issue of the Silha *Bulletin*.)

The government disputed Wolf's contention that he will never comply with the subpoena, claiming Wolf offered to turn over the tape if he did not have to identify anyone on it or testify before the grand jury. However, in an affidavit filed with the court, Wolf's lawyer, Martin Garbus, countered the government's contention, stating that the proposal was simply something he would recommend to Wolf if the government accepted it. On Wolf's Web site joshwolf.net, his mother claims that Alsup made his ruling before viewing Garbus' affidavit. Alsup's opinion was only one paragraph in length and stated the imprisonment seemed to be having the intended effect of having Wolf consider turning over the tape.

Wolf also argued that he should be released because the investigation into the attempted arson has stalled. On January 8, the government dropped charges against Gabriel Meyers, the only person being prosecuted in connection with the crimes Wolf allegedly videotaped. The *San Francisco Chronicle* quoted Assistant U.S. Attorney Jeffrey Finigan stating that the dismissal of the charges against Meyers indicates that Wolf's tape may be even more necessary for the prosecution of anyone in connection with the crimes from the protest.

On February 6, the Free Josh Wolf Coalition held a press conference at the San Francisco City Hall in recognition of his 169th day in jail. A benefit designed to raise funds for his legal defense and raise awareness of his jailing followed the press conference.

Despite being imprisoned, Wolf has still been able to make statements to the public. In a February 9 interview with *Democracy Now*, a nationally syndicated radio news program, Wolf questioned the government's motives for seeking his unused footage. Wolf claimed the government hopes to identify the individuals in the video as part of a plan to eliminate protests by intimidating dissidents. Wolf also said he does not regret videotaping the protest but that he might have destroyed the unused footage had he known the FBI was going to subpoena it. Finally, Wolf expressed fear that his imprisonment may discourage individuals from speaking out against the government but hoped that he might "wake people up" to resist what he views as an "impending police state."

– Scott Schraut
Silha Research Assistant

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

Reporter's Privilege News

Attorney Admits Leaking Information to BALCO Reporters
Subpoenas against Chronicle *reporters dropped*

"It's great not to have to go to prison – it's great for our families."

– Lance Williams
Reporter,
San Francisco Chronicle

The government has withdrawn subpoenas issued to *San Francisco Chronicle* reporters Mark Fainaru-Wada and Lance Williams. On Feb. 14, 2007, attorney Troy Ellerman admitted in court documents that he was the source of the grand jury testimony Fainaru-Wada and Williams used in a series of articles and a book about steroids in major league baseball. Ellerman had represented two defendants in the steroid investigation into the Bay Area Laboratory Co-Operative (BALCO), and permitted Fainaru-Wada to view the grand jury transcripts of various athletes given during the BALCO investigation. The day after Ellerman's admissions, prosecutors withdrew all charges against the reporters and the *Chronicle*.

Fainaru-Wada and Williams wrote their book and a series of articles for the *Chronicle* about steroids in Major League Baseball in 2004. Included in those articles was grand jury testimony from baseball stars Barry Bonds and Jason Giambi. After the *Chronicle* published the stories, the U.S. Attorney's office began an inquiry into the leaks, eventually subpoenaing Fainaru-Wada and Williams in June 2006. The two reporters refused to reveal their sources for the testimony and were found in civil contempt by federal district Judge Jeffrey White in September 2006. White ordered the two reporters to prison, but an agreement with prosecutors permitted Fainaru-Wada and Williams to remain free until the U.S. Court of Appeals for the Ninth Circuit reviewed White's order denying the reporters' motion to quash the subpoena. The appellate panel was scheduled to hear the case in March 2007. (See "Court Requires BALCO Reporters to Divulge Anonymous Sources or Face Prison" in the Fall 2006 Issue of the Silha *Bulletin*; "*San Francisco Chronicle* Reveals Grand Jury Testimony in BALCO Scandal" in the Fall 2004 issue of the Silha *Bulletin*.)

Prosecutors and Ellerman reached an agreement that in exchange for Ellerman's guilty plea, he would spend no more than two years in prison and pay a $250,000 fine, but White is not bound by the agreement. White told the *San Francisco Chronicle* he can impose up to a 15-year sentence on Ellerman, and he described the crimes as representing "a corruption of our system by a member of the bar and by an officer of the court." In addition to his criminal penalties, Ellerman may also lose his license to practice law.

Prosecutors learned Ellerman was the source of the leak from Larry McCormack, a former legal investigator who shared a Sacramento office with Ellerman in 2004 and later worked with him at the Professional Rodeo Cowboys Association. McCormack told the Associated Press (AP) that Fainaru-Wada visited their office several times and that Ellerman told McCormack about the leaks. McCormack also told the AP that it was "bothering" him that the government was spending so much money on investigating the leaks and that the possibility of Fainaru-Wada and Williams going to jail "ate [him] alive."

Both reporters declined comment about Ellerman and refused to confirm that he was their source, telling the *Chronicle* that they "do not discuss issues involving confidential sources." However, Williams did express relief that the subpoenas were withdrawn, stating "[i]t's great not to have to go to prison – it's great for our families."

The withdrawal of these subpoenas is not the end of the BALCO controversy. There is still the question of whether Barry Bonds will be indicted for perjury after his 2003 testimony that he never knowingly took steroids. Bonds' attorney Michael Rains told the *Chronicle* that he believes Fainaru-Wada and Williams should be charged as co-conspirators of Ellerman because they knew the grand jury materials were supposed to be secret. Rains unsuccessfully attempted to enjoin the reporters from receiving any profits from their book *Game of Shadows* in 2006. Bonds' former trainer Greg Anderson is currently imprisoned for civil contempt for refusing to testify against Bonds in his perjury case.

In the days following Ellerman's confession, Fainaru-Wada and Williams have been criticized for protecting Ellerman's identity even as he falsely blamed the leak on others in court documents. After Ellerman disclosed the transcripts, he claimed one of his clients, BALCO Vice President James J. Valente, could not receive a fair trial in criminal proceedings related to the BALCO laboratories in 2004. Ellerman blamed the prosecutor for the disclosures and moved for a dismissal of the charges against his client, telling *The New York Times,* "[t]he jury pool has been infected, and our right to fair trial has been jeopardized."

Tim Rutten of the *Los Angeles Times* condemned Fainaru-Wada and Williams in a column stating "[c]onspiring with somebody you know is actively perverting the administration of justice to your mutual advantage is a betrayal of the public interest whose protection is the only basis on which journalistic privilege of any sort has a right to assert itself." Jack Shafer of *Slate* magazine also noted that Fainaru-Wada viewed additional documents after Ellerman filed his motion to dismiss. Shafer wrote that such action "almost seems to be sanctioning the lawyer's blatantly illegal motion." Shafer also provided a list of questions for the *Chronicle* about its reporters' relationship with Ellerman, including whether or not the *Chronicle* wishes it did something to prevent its relation with Ellerman from becoming so "morally ambiguous."

Williams responded to this criticism in *Editor & Publisher* where he was quoted stating, "Do you want the information or not, is what it comes down to." He continued, "As reporters, we have so few

BALCO, *continued on page 3*

BALCO, *continued from page 2*

means to persuade people to talk to us. You can offer confidentiality -- and once you have done that, you have to keep your word." He received support from his *Chronicle* editor Phil Bronstein who told the same publication, "[i]n my experience as a reporter and an editor, sources have motives . . . [a]nd they range from good to bad. People need to, in general, make sure they consider everything."

Jane Kirtley, director of the Silha Center and Silha Professor of Media Ethics and Law, addressed this issue in the *Los Angeles Times,* stating that "[s]ome would say the confidentiality rule applies whether the source is sleazy or not." Kirtley continued, "But if you are going to argue for protection for journalists, isn't there some obligation to ask questions about whether it's justified?" However, Kirtley noted the end result of this matter was two positive results. She stated, "Guess what: The guy who did the wrong thing is going to pay the price . . . [a]nd yet the public still got this important information about steroid use by star athletes."

Prior to the subpoenas being withdrawn, the two reporters received multiple letters of support from legislators while they faced a possible jail sentence. Chairman of the House Judiciary Committee John Conyers, Jr. (D-Mich.) and ranking Republican member of the Committee on Oversight and Government Reform Tom Davis (R-Va.) sent a letter to Attorney General Alberto Gonzales on Jan. 18, 2007 urging him to withdraw the subpoenas issued to the *Chronicle* and Fainaru-Wada and Williams. The following day, Speaker of the House Nancy Pelosi (D-Calif.) sent her own letter to the Attorney General, urging him to abide by Conyers and Davis' request to withdraw the subpoenas. The full text of Pelosi's letter is available online at http://www.speaker.gov/newsroom/pressreleases?id=0043.

Conyers' and Davis' letter emphasized the significance of the *Chronicle*'s work, and specifically that of Fainaru-Wada and Williams, noting that the newspaper published more than 450 articles, columns, and editorials about BALCO and steroids in baseball. The letter closed with a paragraph underscoring the importance of a free press, stating "Some of the greatest change in our nation's history was brought about by the press through the use of confidential sources...." It also recognized the importance of confidential sources for journalists, observing that "the most significant stories will not be told" if confidential sources are not protected. It concluded by requesting that the Attorney General withdraw the subpoenas issued to the *Chronicle* and Fainaru-Wada and Williams. The full text of the letter is available online at http://judiciary.house.gov/media/pdfs/balcosubletter.pdf.

The *Chronicle* and its reporters also received support from Sen. Barbara Boxer (D-Calif.). Boxer told the *Chronicle* that during a telephone conversation with Gonzales she "expressed . . . concern about jailing two fine reporters who did a major public service by exposing the steroid scandal in sports."

Congressman Mike Pence (R-Ind.) told the *Chronicle* he had planned to be another voice on behalf of the reporters. Pence is also a chief sponsor of the proposed federal reporters shield law. Pence's co-sponsor of the proposed shield law, Rick Boucher (D-Va.) told the *Chronicle*, "[t]his was probably the most egregious use of the prosecutorial power of the federal government to extract a confidential source from a reporter that we have seen to date. Because the subject matter did not involve national security, it did not involve imminent harm to anyone. This was a matter of finding out information about steroid use by a professional athlete."

– Scott Schraut
Silha Research Assistant

Reporter's Privilege News

Libby Trial over Leaked Information Ends in Conviction

Reporters testify during trial

Ten journalists were called to testify during the course of the trial.

The criminal trial against I. Lewis "Scooter" Libby, the Former Chief of Staff for Vice President Cheney accused of perjury and obstruction of justice in an FBI investigation into the disclosure of former CIA agent Valerie Plame Wilson's identity in 2003 began in January 2007 and ended in March with a guilty verdict on four of the five charges. Libby was convicted of two counts of perjury, one of lying to the FBI and one of obstruction of justice, but was acquitted of a separate count of lying to the FBI. A number of journalists testified during the course of the trial, and audio recordings of a secret grand jury proceeding were allowed into evidence and later released to the public.

On Feb. 5, 2007, U.S. District Court Judge Reggie Walton ruled that the tapes of the grand jury proceeding conducted by Special Counsel Patrick Fitzgerald would be released to the public. Walton dismissed arguments from Libby's attorneys that public airing of the audio recordings could make it difficult to insulate the non-sequestered jury from news of the case, ordering the tapes released after the jury had an opportunity to hear the recordings. Libby defense attorney William Jeffress, who previously represented President Richard Nixon in *Nixon v. Warner Communications*, 435 U.S. 589 (1978), a Supreme Court case that kept the Watergate tapes from being released to the public, argued here that grand jury tapes are never meant to be entered into the public record.

The New York Times reported on Feb. 5, 2007 that Libby testified under oath that he had not discussed the identity of Plame with fellow administration officials in the summer of 2003. Libby, who previously claimed that he first learned of Plame's identity from NBC News Washington Bureau Chief Tim Russert during a July 2003 telephone conversation, was heard on the tapes saying repeatedly that he could not recall having any conversation with administration officials. But testimony from individuals such as State Department official Marc Grossman contradicted Libby's recorded claims. *The Washington Post* reported that the recordings were intended to substantiate that Libby lied to investigators about his role in disclosing Plame's identity.

Grossman, who was then the Undersecretary of State, testified that Libby approached him in the summer of 2003 after being informed about an investigation into reports that Saddam Hussein possessed uranium for a nuclear weapons program. Grossman said that he told Libby later that summer that the investigation was headed by Plame's husband, Joseph C. Wilson IV. Grossman said he also informed Libby that Plame worked for the CIA and appeared to have played a role in the agency's choice of Wilson to head the investigation.

Although defense attorneys objected to the public airing of audio recordings of the grand jury testimony by claiming that the media's use of the recordings could make it difficult to insulate the non-sequestered jury from news of the case, others dismissed the concerns.

Jane Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center, told the Associated Press (AP) that news accounts of transcripts of grand jury proceedings, which are routinely released during trials, present the same threat of distortion as the public airing of grand jury tapes. Kirtley said that Walton's decision pointed to a "new generation of judges more comfortable" with permitting public access to electronic trial evidence.

Russert and Other Journalists Play Key Role in Libby Trial

Russert took the stand in Libby's criminal trial on Feb. 7 and 8, 2007. He had unsuccessfully argued in previously-sealed court filings in June 2004 that he should not have to disclose to the grand jury what was discussed during a summer 2003 telephone conversation between Libby and himself. According to *Editor & Publisher*, although Libby had released Russert from any obligation of confidentiality, Russert resisted testifying before the grand jury, claiming that doing so would harm Russert's relationship with other sources.

Russert was ordered to testify in July 2004, and the information he provided the grand jury became "important evidence that Special Counsel Patrick J. Fitzgerald used to indict Libby," according to *Editor & Publisher.*

Russert told the jury that he never gave Libby information about Plame. The *Los Angeles Times* reported that Russert recounted receiving a phone call from Libby after Wilson published an op-ed piece in *The New York Times* in July 2003. According to Russert, Libby had called sounding agitated and complaining of the coverage of the then-growing controversy.

Under questioning by Fitzgerald, Russert denied discussing Plame or her connection to the CIA with Libby at the time. "That would be impossible," Russert testified, "because I did not know who that person was until several days later."

Russert was only one of the many journalists to take the stand during Libby's criminal trial. Former *Time* magazine correspondent Matthew Cooper and former *New York Times* reporter Judith Miller also denied accusations made by Libby in testimony. Miller had spent 85 days in jail before agreeing to talk with grand jury investigators about Libby

Libby Trial, *continued on page 7*

Reporter's Privilege News

Wisconsin Circuit Court Rules Journalist's Privilege Protects Documentary Filmmaker's Nonconfidential Sources

A Wisconsin Circuit Court Judge ruled in January 2007 that a student documentary filmmaker did not have to turn over hundreds of hours of tape to the state, determining that even information given to a journalist without the promise of confidentiality is protected under the limited state journalist privilege.

The case centered on the second criminal trial of Steven Avery, who was convicted in 1985 of sexual assault but later exonerated and freed in 2003 after the Wisconsin Innocence Project proved that he did not commit the crime. In 2005, however, Avery was arrested again and charged with murdering a woman after he was released from prison. His case made national headlines, and Laura Ricciardi, a law school graduate and currently a graduate film studies student at Columbia University, decided to create a documentary about the Wisconsin justice system after reading about Avery in *The New York Times*.

Ricciardi traveled to Wisconsin with a small film crew and sought interviews with everyone involved in Avery's trials, including the prosecutors, the defense attorneys, judges, law enforcement, legislators, and family members of the victims and the accused. In November 2006, after Ricciardi and her crew had filmed nearly 255 hours of tape, the prosecution in Avery's murder trial subpoenaed the tapes, arguing that they might contain information regarding his case.

On Dec. 1, 2006, Ricciardi's attorney, Robert J. Dvorak, submitted a motion to quash the subpoena, arguing that the federal and state constitutional journalist privilege protected her from being compelled to disclose information, that the subpoena was overbroad, and that Ricciardi's interest "as a journalist and of society in insuring the free flow of ideas outweighs the need articulated by the state for the items sought."

In an accompanying affidavit, Ricciardi testified that the majority of her footage concerned historical events and that she had "diligently sought to avoid any discussion concerning the facts of the pending cases against Steven Avery" and a codefendant. She also stated that dubbing the tapes would take 255 hours and an additional 1,195 hours would have to be spent logging and transcribing them. She noted such an expenditure would "effectively derail this documentary" and that the good will she had built up with her interviewees would be destroyed.

The state responded by arguing that after reviewing the information made available to Ricciardi, she "begins to appear as an 'investigative arm' of Steven Avery's defense team and less a journalist," pointing to the fact that she had filmed a blood sample located by the defense attorneys as proof. It also argued that Wisconsin did not recognize a privilege for non-confidential sources and that even if such a privilege was recognized, it should be overcome here because Ricciardi had access to members of Avery's family who refused to speak with the state.

Ricciardi was given time to reply and argued that the assertion that she was working as an arm of the Avery defense team "borders on recklessness." Dvorak argued that simply because members of Avery's family were willing to talk to Ricciardi and not the prosecution did not mean Ricciardi was working for Avery. He reiterated that Ricciardi was an independent filmmaker and that if her film aired, it would not do so until well after the completion of Avery's trial. Dvorak also argued that Ricciardi qualified for the journalist privilege and that the balancing of interests fell in favor of protecting a journalist from compelled disclosure.

The Silha Center submitted a friend of the court brief supplementing Ricciardi's arguments. The Silha brief focused on the fact that the state had not demonstrated any concrete need for the tapes other than the fact that they might be helpful, and that Wisconsin's journalist privilege applied regardless of whether the information given to a journalist was done so with the promise of confidentiality or not and should be upheld in criminal as well as civil cases. It also argued that the subpoena was overbroad and that enforcing it would turn Ricciardi into an investigative arm of the state. Additionally, it argued that Wisconsin state courts are not bound by the Seventh Circuit Court of Appeals' ruling in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), which characterized cases extending the journalist's privilege to nonconfidential materials as "skating on thin ice."

The Silha brief concluded by urging the court to quash the subpoena by focusing on the effect a contrary ruling would have on the public's right to know. "Threatening the media with contempt for failing to comply with subpoenas such as the one in the instant case will create yet another barrier to the free flow of information that the public need to govern themselves," it argued. The full text of the brief is available online at the Silha Center's "Resources" link or by entering http://www.silha.umn.edu/Resource%20Documents/STATE%20OF%20WISCONSIN.pdf.

On Jan. 18, 2007, Judge Patrick L. Willis of the Manitowoc Circuit Court of Wisconsin issued his ruling, *In re subpoena to Laura Riccardi, et. al.,* No. 05CF381 (Wis. Cir. Ct. Jan. 18, 2007). He began by acknowledging that the state of Wisconsin grants a limited journalist privilege to withhold confidential information in a criminal case and a similar privilege to withhold either confidential or nonconfidential information in a civil case. The issue of whether a journalist could withhold nonconfidential information in a criminal case was an issue of first impression for the court, however. Willis held that journalists were indeed entitled to such a privilege.

Wisconsin Ruling, *continued on page 7*

"Threatening the media with contempt for failing to comply with subpoenas such as the one in the instant case will create yet another barrier to the free flow of information that the public need to govern themselves."

– Silha Center *Amicus* Brief

Reporter's Privilege News

Pennsylvania Court Rules Reporter Need Not Reveal Source

Appellate court refuses to create "crime fraud" exception to state shield law

A Pennsylvania appellate court has ruled that a reporter does not have to reveal the identity of her source used in an article that prompted a defamation lawsuit. In *Castellani v. The Scranton Times,* 2007 Pa. Super. 2 (Penn. Sup. Ct. 2007), a Pennsylvania Superior Court reversed an opinion from the Court of Common Pleas of Lackawanna County that granted Randall Castellani's and Joseph Corcoran's motion to compel disclosure of the source's identity, holding that the trial court was prohibited from creating a "crime-fraud" exception to the state shield law, 42 Pa. C.S. § 5942 (2005).

The action arose after *The* (Scranton) *Times* and its sister publication *The Tribune* each ran a front page article on Jan. 12, 2004, stating the plaintiffs, Randall Castellani and Joseph Corcoran, were evasive and irritated jurors during their testimony to a grand jury empanelled to investigate possible wrongdoing at Lackawanna County Prison. Other than their headlines, the two articles were nearly identical and both were written by a former staff writer for the two newspapers, Jennifer Henn. The articles' descriptions of the plaintiffs' testimony and jurors' reactions to that testimony strongly suggest that Henn relied on a source that was present during the grand jury proceeding. The articles attributed the information to "an unnamed source close to the investigation." At the time of publication, Castellani and Corcoran were members of the Lackawanna County Prison Board and Lackawanna County Majority Democratic Commissioners.

Castellani and Corcoran filed their action in the Court of Common Pleas in early January 2005, alleging the articles were false and defamatory because both a grand jury presentment and a memorandum by the judge supervising the grand jury proceedings stated the newspaper articles were incorrect in their assertions about the plaintiffs' testimony. Soon after filing the suit, the plaintiffs brought their motion to compel disclosure of the source's identity against the defendants, contending that the newspapers and reporter are the only ones who know the identity of the source. The defendants opposed the motion, asserting a journalist's privilege under the state shield law and First Amendment. After Judge Robert A. Mazzoni granted the plaintiffs' motion to compel, the newspapers appealed to the Superior Court of Pennsylvania, an intermediate appellate court that hears cases from several locations across the state.

The court initially concluded that it could properly rule on an interlocutory discovery order prior to a trial on the merits. It found that the order could be considered separately from the main cause of action, that the journalist's privilege was too important to be denied review, and that irreparable harm would be caused if it delayed judgment. The court noted that a journalist's privilege is "deeply rooted in the public policy of this Commonwealth and the public policy of the United States," and that the privilege promotes "free flow and exchange of ideas and information to the news media and that such intercourse is essential to the existence of a democratic republic."

The court then considered whether it was proper for the trial court to create a new exception to the Pennsylvania shield law. Mazzoni's opinion for the trial court emphasized the importance of grand jury secrecy and noted how that secrecy is compromised when an individual leaks information from a grand jury proceeding to the media. He also found it irrelevant that the current case is a civil suit, because protecting a source that leaked confidential grand jury information harms the integrity of the system regardless of whether that source is being sought for either criminal or civil actions. Therefore, he ordered the newspapers to disclose the identity of their source.

The appellate court, however, subsequently overturned Mazzoni's order on Jan. 3, 2007. Judge Zoran Popovich's opinion for the court identified the recognized exceptions to the state's shield law, and found it improper for Judge Mazzoni to create another one simply because the source the plaintiffs are seeking may have committed a crime by his disclosure.

Popovich distinguished this case from *Hatchard v. Westinghouse Broadcasting Company,* 532 A.2d 346 (Pa. 1987), a Pennsylvania Supreme Court decision ordering a news organization to disclose unpublished information to a plaintiff in a defamation action. The *Hatchard* court ruled that the shield law does not protect documentary materials from discovery that are relevant to the action but would not lead to the disclosure of an unnamed source. Because the plaintiffs in this case were seeking the identity of the source relied upon by the newspapers in this case, Popovich ruled the *Hatchard* decision inapplicable to the present suit.

Popovich also acknowledged the trial court had legitimate concerns about grand jury secrecy and possible related criminal violations, but nevertheless ruled that neither the trial or appellate court could create a new exception to the shield law not approved by the state Supreme Court or legislature. Finally, Popovich observed that the state Supreme Court addressed a similar question to the present case in *In re Taylor,* 193 A.2d 181 (Pa. 1963), which held that the public interest is "benefited more extensively and to a far greater degree by protection of all sources of disclosure of crime, conspiracy, and corruption that it would be by the occasional disclosure of the sources of newspaper information concerning a crime[.]"

Judge Debra Todd concurred with the result but wrote separately to emphasize that preservation of grand jury secrecy would be furthered only

Pennsylvania Ruling, *continued on page 7*

"The purpose of the Shield Law is not only to protect the media's right to protect confidential sources, but to guarantee [that] the free flow of information through the media continues unabated."

– Melissa Melewsky
Attorney for the Pennsylvania Newspaper Association

Libby Trial, *continued from page 4*

because she considered him a confidential source. (See "Judith Miller Resigns from *The New York Times*" and "*New York Times*' Judith Miller Released After 85 Days" in the Fall 2005 issue of the Silha *Bulletin*; "Supreme Court Denies Cert in Miller/Cooper Cases" in the Spring 2005 issue; "In re: Grand Jury Subpoena, 397 F.3d. 964 (D.C. Cir.);" "Plame Update: Journalists Miller and Cooper Appeal Their Sentences" in the Winter 2004 issue; and "In re: Special Counsel Investigation" and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue.)

On Feb. 16, 2007, the Reporters Committee for Freedom of the Press (RCFP) reported that ten journalists had been called during the trial to testify. Three journalists, Russert, Cooper and Miller testified for the prosecution. Seven other journalists, including *Washington Post* editor and reporter Bob Woodward, testified on behalf of the defense. According to the RCFP, Woodward agreed to testify after his source, Richard Armitage, waived confidentiality and permitted Woodward to disclose a tape of a conversation between the two men in which Armitage refers to Plame's identity.

David Sanger, reporter for *The New York Times*, testified despite his efforts to fight a subpoena by claiming a hardship in gaining access to confidential sources in the future. Walton refused to quash the subpoena, and Sanger later testified that Libby never discussed Plame during an interview in the summer of 2003.

Libby's trial concluded on Feb. 20, 2007. According to the *Financial Times,* prosecutors accused Libby of concocting a "ludicrous" story about how he learned of Plame's identity. Defense attorneys argued that the case centered on the credibility of two men, Libby and Russert. According to the *Financial Times,* Libby was "taken aback" when Russert allegedly disclosed Plame's identity to him on July 10, 2003. Russert, who testified that such a conversation never took place, was described as having "memory problems" and suffering from "public memory lapses."

Shortly after the verdict was issued, Libby's attorneys said they would appeal.

– Christopher Gorman
Silha Research Assistant

Wisconsin Ruling, *continued from page 5*

Willis quoted extensively from *Kurzynski v. Spaeth*, 196 Wis. 2d 182 (Ct. App. 1995), which established a limited privilege to withhold information in civil proceedings regardless of its status as confidential or nonconfidential. It established a balancing test to follow when determining whether the privilege should be overcome, weighing the "need to insulate journalists from undue intrusion into the news-gathering activities and . . . litigants' need for every person's evidence."

Willis also reviewed the test for overcoming privilege of confidential information in a criminal case set forth in *Green Bay Newspaper Co. v. Circuit Court*, 113 Wis. 2d 411 (Wis. 1983). In that case, the Wisconsin Supreme Court held that the party seeking the information must make a showing "by a preponderance of the evidence that he has investigated other sources for the kind of information he seeks and there are no reasonable and adequate less intrusive alternate sources where he can obtain the information."

Willis applied those tests to Ricciardi's case and found her to be an "independent film maker" who qualified for the privilege. He held that while the state had raised suspicion that "relevant, material, and exculpatory evidence may exist [in Ricciardi's tapes], the proof is not particularly strong. … There is simply no firm reason to believe that the evidence sought by the State exists."

After Willis' order was issued, Dvorak called the ruling "important."

"The judge reaffirmed the privilege in Wisconsin, despite adverse 7th Circuit precedent, and extended the privilege to nonconfidential sources in criminal cases," Dvorak said.

Jane Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center at the University of Minnesota also applauded the ruling. "At a time when federal courts are challenging the existence of any reporter's privilege, it is imperative that the states reaffirm their commitment to protecting the public's right to know."

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

Pennsylvania Ruling, *continued from page 6*

tangentially by requiring disclosure of the source because this was a defamation action. She emphasized that the plaintiffs were not seeking the identity of the source to demonstrate a breach of grand jury secrecy, but instead to assist their defamation action. The fact that a crime may have occurred was merely coincidental. Todd also noted that the journalist's privilege may have to yield during the criminal prosecution of a grand jury leak.

Melissa Melewsky, media law counsel for the Pennsylvania Newspaper Association, told the (Wilkes-Barre, PA) *Times-Leader* that the ruling was a significant victory for the public and news media, stating, "[t]he purpose of the Shield Law is not only to protect the media's right to protect confidential sources, but to guarantee [that] the free flow of information through the media continues unabated."

– Scott Schraut
Silha Research Assistant

Reporter's Privilege News

Supreme Court Rejects *New York Times*' Motion to Block Access to Reporters' Phone Records in Leak Investigation

In November 2006, the U.S. Supreme Court denied *The New York Times*' motion to temporarily prevent the government's review of its phone records.

The court's one-sentence opinion, issued November 27, allows prosecutors to begin reviewing the phone records for reporters Judith Miller and Philip Shenon, despite the newspaper's argument that to do so will threaten the confidentiality of sources unrelated to the purpose of the subpoena.

The case, *New York Times Co. v. Gonzales*, 127 S. Ct. 721 (2006), is now likely to return to the Second Circuit U.S. Court of Appeals to determine what specific records prosecutors may review, according to a *Times* attorney.

Government prosecutor Patrick Fitzgerald is seeking 11 days of the reporters' phone records from September and December 2001. The government believes the reporters may have contacted two Islamic charities, the Holy Land Foundation and the Global Relief Foundation, during that time and alerted them to government plans to search their offices and freeze their assets. Fitzgerald is trying to track down the government source that leaked the plans to Miller and Shenon.

Fitzgerald wrote to *The Times* in August 2001 and July 2004 requesting they voluntarily turn over the records and threatening to subpoena them from the newspaper's phone service providers if they did not cooperate. *The Times* refused, filing suit in August 2004 seeking a declaratory judgment that prevented the compelled disclosure based on a constitutional reporter's privilege. Both parties moved for summary judgment.

"There seems to be a constant hostility on the part of the [C]ourt towards these issues and towards journalists' and First Amendment issues."

– Judith Miller former *New York Times* reporter

In February 2005, Judge Robert W. Sweet of the Southern District of New York granted *The Times*' motion. In *New York Times v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005), Sweet said that the phone records were protected by qualified privileges derived from federal common law under Federal Rules of Evidence 501 and under the First Amendment. (See "Reporters' Telephone Records Protected From Compelled Disclosure" in the Winter 2005 issue of the Silha *Bulletin*.)

That decision was vacated and remanded in an Aug. 1, 2006 ruling by a three-judge panel of the Second Circuit U.S. Court of Appeals in *New York Times Co. v. Gonzales*, U.S. App. LEXIS 19436 (2d Cir. Aug. 1, 2006).

In the split decision, Judges Ralph K. Winter, Jr. and Amalya Lyle Kearse reasoned that while reporter's privilege should extend to telephone records that are "in the possession of a third party provider," no such privilege was available to *The Times* in this case. If any common law privilege was available to journalists here, argued the majority, it would be outweighed by the government's interests in law enforcement and preventing obstruction of justice.

In a dissent, Judge Robert Sack said that the government had not proven that it had exhausted all other available options to discover the leaks, nor had it proven that Miller and Shenon had actually alerted the groups to the impending government action. (See "Reporters' Privilege News: Prosecutor May Subpoena *New York Times*' Phone Records" in the Summer 2006 issue of the Silha *Bulletin*.)

The Times' asked Justice Ruth Bader Ginsburg of the U.S. Supreme Court to prevent the government from gaining access to the records while the court considered the newspaper's petition for writ of *certiorari*. Emergency motions are filed with the single justice who has jurisdiction over the circuit where the case originates.

The government countered that it needed immediate access because the statute of limitations on some of what it is investigating would soon expire. Ginsburg referred the matter to the full court, which denied *The Times*' motion on November 27.

Although Fitzgerald and Miller are involved in both this action and the investigation over Miller's source in the scandal involving the possible unauthorized disclosure of Valerie Plame's identity as an undercover CIA agent, the two actions are unrelated to each other. (See "Libby Trial Over Leaked Information Ends in Conviction" on page 4 in this issue of the Silha *Bulletin*, "Court rules that Libby's Use of Journalists' Evidence Must be Limited" and "Identity of Leaker in Plame Case Revealed" in the Summer 2006 issue; "Judith Miller Resigns from The New York Times" in the Fall 2005 issue; "*New York Times'* Judith Miller Released After 84 days" in the Summer 2005 issue; "*In Re: Grand Jury Subpoena,* 396 F.3d 964 (D.C. Cir.)" and "Plame Update: Journalists Miller and Cooper Appeal their Sentences" in the Winter 2004 issue; "Reporters Privilege: *In re: Special Counsel Investigation"* and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue).

Reacting to the Supreme Court's denial in this case, Judith Miller told *The New York Sun* that "[t]here seems to be a constant hostility on the part of the [C]ourt towards these issues and towards journalists' and First Amendment issues." *The Sun* also quoted Jane Kirtley, director of the Silha Center and Silha professor of media ethics and law, stating that the government's actions in this and other similar cases is "a multifaceted attack" that constitutes "a war against the press."

– Patrick File & Scott Schraut
Silha Research Assistants

Reporter's Privilege News

FBI Ends Investigation into Anderson Files

The FBI has decided to abandon its investigation into the files of deceased investigative reporter Jack Anderson. Government officials originally sought to search Anderson's files because they believed the files may contain classified information, but after intense criticism, they discontinued their inquiry.

After his death in December 2005, the FBI contacted Anderson's family asking permission to search his files for any classified documents. According to *Time* magazine, Anderson's family considered allowing the government to do so, but refused the request after learning the FBI wished to search every document. Anderson's children told the FBI that Anderson would not have wanted to grant the government access to his papers and that doing so could decrease the "historic, political, and cultural value" of his documents.

Two FBI agents also went to the house of Mark Feldstein, director of the journalism program at George Washington University and biographer of Anderson, and requested access to the documents. Anderson's family donated the documents to the university in Washington, D.C., where they will eventually be made available to the public. Feldstein claims there are no classified documents anywhere in Anderson's archives, with the exception of Anderson's old FBI file. According to Feldstein, the agents were seeking classified documents that could be used as evidence against two lobbyists accused of violating the Espionage Act, 18 U.S.C. § 793, which criminalizes unauthorized possession of classified information relating to the national defense. (For more information, see "Ruling in Lobbyists Case May Carry Implications for Journalists" in the Summer 2006 issue of the Silha *Bulletin*.)

Although the exact reasons why the government dropped the inquiry are unclear, the FBI was heavily criticized for pursuing the files. After a May 2, 2006 Senate Judiciary Committee hearing questioning the FBI's interest in the papers, the same committee submitted a 147-page questionnaire to the FBI seeking information about the government's actions related to this situation. Acting Associate Attorney General James H. Clinger's November 30 response to the questions indicated that the FBI was no longer seeking to review any of the documents.

Also included in the questionnaire is Clinger's response to questions about the FBI's position on prosecuting journalists under the espionage statutes. In it, Clinger simply referred to the June 6 committee hearing testimony of Principal Deputy Assistant Attorney Matthew Friedrich, who reminded the committee of the Supreme Court's decision in *New York Times v. United States,* 403 U.S. 713 (1971) (also known as the "Pentagon Papers" case) in which five justices suggested such prosecutions would be possible. But Friedrich also noted steps taken by the Justice Department to avoid such prosecutions, and added that the department's primary focus is on prosecuting the actual leakers. The full text of the questions and responses is available online at www.fas.org/irp/congress/2006_hr/fbi-qfr.pdf, and Friedrich's statement to the committee is available online at http://www.fas.org/irp/congress/2006_hr/060606friedrich.html.

Anderson's family expressed relief that the government was dropping its investigation. In a Jan. 4, 2007 article co-authored by Associated Press reporter Lara Jakes Jordan and (Salt Lake City) *Deseret Morning News* reporter Wendy Leonard, Anderson's son, Kevin N. Anderson, stated "[t]his takes the pressure off, and now we can proceed with the plan of archiving them and making them available for scholarly research."

In an article published by the *Deseret Morning News* in Salt Lake City, Feldstein said "I'm relieved to hear they have backed away from what I think was a pretty egregious overreach, to be going after papers of a dead reporter for classified documents from decades ago." The article is available online at http://deseretnews.com/dn/view/0,1249,650220234,00.html.

– Scott Schraut
Silha Research Assistant

"I'm relieved to hear they have backed away from what I think was a pretty egregious overreach, to be going after papers of a dead reporter for classified documents from decades ago."

– Mark Feldstein
Director, GWU Journalism Program and Anderson biographer

Reporter's Privilege News

Reporters Excused from Testifying at Military Tribunal

On Jan. 29, 2007, two reporters were spared from testifying at the court-martial of the first Army officer to publicly oppose the war in Iraq and refuse deployment. The court-martial was expected to raise a number of First Amendment issues, including whether reporters should be compelled to testify on behalf of the government during a military proceeding and whether an Army officer could be penalized for publicly speaking against the armed services or the President.

A subpoena seeking the testimony of Sarah Olson and Gregg Kakesako was dismissed January 29 after Army prosecutors and 1st Lt. Ehren Watada stipulated that the reporters accurately quoted his criticism of the Iraq war and President George W. Bush in June 2006. But before the issue of whether an Army officer could be disciplined for engaging in public criticism was addressed at trial, Army prosecutors requested a mistrial in the court-martial after resting their case.

Lt. Col. Judge John Head, the presiding military judge at Watada's February 2007 court-martial, granted the prosecution's motion, a decision that Watada's attorney, Eric Seitz, predicted could end the government's case altogether.

"The mistrial is very likely to have the consequence of ending this case because a retrial would be a case of double jeopardy based on the military rules for courts martial and applicable case law," Seitz told a reporter from Courage to Resist, a Web site committed to advocacy for troops who refuse to fight in combat.

The case against Watada, who has been charged with four counts of conduct unbecoming an officer as a result of his criticism, began when Olson and Kakesako, as well as other reporters, quoted comments made by Watada in interviews and public speeches following a June 7, 2006 news conference.

In a comment Olson attributed to Watada in June, Watada said, "as I read about the level of deception the Bush administration used to initiate and process this war, I was shocked. I became ashamed of wearing the uniform. How can we wear something with such a time-honored tradition, knowing we waged war based on a misrepresentation and lies?" That comment, according to a Jan. 3, 2007 article in the *San Francisco Chronicle*, is the basis of one of the four counts of conduct unbecoming an officer that Watada faced at his Feb. 5, 2007 court-martial. The full transcript of the interview can be accessed online at http://www.truthout.org/cgi-bin/artman/exec/view.cgi/61/20326 where it was first published.

On Dec. 14, 2006, Olson received a subpoena from Army prosecutors, requiring her to take part in a pretrial hearing in January 2007 and to testify at the court-martial that the statements she attributed to Watada in June were accurate. Kakesako confirmed that he had been subpoenaed to testify at Watada's court-martial on Dec. 15, 2006, but declined to comment publicly on the subpoena.

The *Chronicle* reported that, although Olson had no legal basis for refusing to testify, she viewed the subpoena as an ethical dilemma. Reporter Bob Egelko wrote: "normally, [Olson] said, 'no one, myself included, has any problem verifying the veracity of their reporting.' The ethical problem in this case, she said, is that she would be aiding the prosecution of one of the dissidents and war critics who regularly trust her to tell their stories to the public."

"Building a case against my own source exceeds the realm of press neutrality and fair and unbiased journalism," Olson told the *Army Times* on Jan. 8, 2007. "In this case, you're asking a journalist to build a case against free speech itself, which is profoundly ironic."

The *Chronicle* reported on Jan. 3, 2007 that Army officials, who declined to accept an offer by Watada to spend six months in prison and accept a dishonorable discharge in exchange for having the charges dropped, subpoenaed the journalists only to verify the accuracy of their reporting. The Army did not seek information about unpublished material or confidential sources.

"The Army would like to verify with the reporters that the story or stories they have written are accurate representations of the interview that they had with Lt. Watada or what was said at his public appearances," Joseph Piek, a spokesman for the Army base at Fort Lewis, Wash., told the *Chronicle* on Dec. 18, 2006. Piek also told *Chronicle* reporters that the Army was considering summoning other journalists to testify, but Piek did not know how many subpoenas had been issued at that time.

Seitz told *Chronicle* reporters on Jan. 3, 2007 that his client did not dispute the accuracy of the quotes in any of the articles. But if the Army were to insist on their testimony, Seitz said, he would be obliged to question the reporters about their interviews. "The circumstances and context [of the interviews] are as important as anything he actually said," Seitz said. Those circumstances, he said, could be the difference between free speech, even as an officer in the Army, and speech for which his client may be held liable.

Although an Army judge excused the reporters from attending a pretrial hearing in early January, public reaction to the subpoenas swelled as hundreds of prominent journalists and thousands of citizens joined Defend the Press, a coalition launched by the Free Press Working Group and the Center for Media and Democracy in response to the subpoenas. The coalition's Web site can be accessed online at http://www.prwatch.org/ defendthepress/faq.html.

Other media organizations publicly opposed Army prosecutors' efforts to subpoena reporters in military tribunals. The National Press Club announced on Jan. 25, 2007, that it "vehemently opposes any effort to subpoena reporters over their work," according to a statement by the organization's president, Jerry Zremski. "Subpoenaing reporters in an effort to make the prosecution's case—particularly when

Reporters Avoid Testifying, *continued on page 11*

"Building a case against my own source exceeds the realm of press neutrality and fair and unbiased journalism. In this case, you're asking a journalist to build a case against free speech itself, which is profoundly ironic."

– Sarah Olson
Reporter

Reporters Avoid Testifying, *continued from page 10*

the charge involves free speech issues—is abhorrent and grossly perverts the foundation of press freedom this nation is built on."

On January 29, in the wake of increasing opposition to the subpoenas and growing controversy over the issues of an Army officer's right to free speech, Watada and Army prosecutors stipulated that Olson and Kakesako accurately quoted Watada in their reports.

According to an article published in the *Chronicle* the following day, the Army agreed to dismiss the subpoenas against the reporters and dropped two charges against Watada in exchange for the agreement, reducing Watada's potential sentence from six to four years if convicted. The *Chronicle* reported that Olson declined to say whether she would have testified or faced fines and imprisonment for refusing to appear at the court-martial. In a statement that appears on the Defend the Press Web site, Olson described the agreement as a "great victory for the principles of a free press that are so essential to this nation."

"Personally I am pleased that the Army no longer seeks my participation in their prosecution of Lieutenant Watada. Far more importantly, this should be seen as a victory for the rights of journalists in the U.S. to gather and disseminate news free form government intervention, and for the rights of individuals to express personal, political opinions to journalists without fear of retribution or censures," Olson said.

One week after the subpoenas against Olson and Kakesako were dismissed, the court-martial ended in a mistrial on Feb. 7, 2007. According to the *Seattle Post-Intelligencer*, Head declared a mistrial after determining that Watada did not understand a 12-page statement relating to the remaining counts against the officer, which included two counts of conduct unbecoming an officer and one count of missing a troop movement for refusing to deploy to Iraq. Although Watada signed the statement, Head would not permit its use by Army prosecutors as an admission of guilt.

"We expect to be doing the court-martial over in the future," Piek told the *Seattle Post-Intelligencer*, and a tentative retrial date has been scheduled for March 2007. It is unclear, however, on what charges the Army will retry Watada.

Seitz has expressed his intentions to challenge the retrial under the Fifth Amendment, arguing that retrying Watada would place him in double jeopardy, or being tried on the same charges twice. According to the *Seattle Post-Intelligencer* some legal experts agree.

Others have pointed to differences between the rules of criminal procedure in civilian courts and those applicable to military courts. John Strait, a Seattle University law professor, told the *Seattle Post-Intelligencer* that military law has stricter standards against self-incrimination than civilian courts, leaving the possibility for a retrial in such a case.

– Christopher Gorman
Silha Research Assistant

Reporter's Privilege News

Judith Miller Testifies in Hamas Funding Trial

Former *New York Times* reporter Judith Miller, once jailed for 85 days for refusing to reveal a source to government prosecutors, testified on the government's behalf in November 2006 in an obstruction of justice trial in Federal District Court for the Northern District of Illinois.

Miller took the stand in the racketeering conspiracy and obstruction of justice trial of Muhammad Salah, a former grocer and used-car salesman from the Chicago area, and Abdelhaleem Ashqar, a former Howard University business professor.

According to the Associated Press (AP), the government indicted the two men for allegedly trying to help finance the Palestinian group Hamas, which now controls a majority in the Palestinian government but is recognized by the U.S. to be a terrorist organization. On Feb. 1, 2007, a jury acquitted both men of the racketeering conspiracy charge, but they were found guilty of obstruction of justice. The case is *U.S. v. Marzook,* 383 F. Supp. 2d 1056 (N.D. Ill. 2005).

Miller's role as a witness was related to her having watched a 1993 interrogation of Salah at an Israeli prison, according to *The New York Sun*.

Salah's defense argued that he admitted ties to Hamas only after two weeks of constant questioning and sleep deprivation, according to *The New York Sun*.

Miller, who was *The New York Times*' Cairo bureau chief in 1993, was investigating Israel's claims that money for Hamas operations was coming from the United States. She testified that she had arranged to view the interrogation of Salah to confirm that he had not been coerced into admitting a relationship with Hamas, according to the AP.

Miller said she had arranged the meeting through the office of then-Israeli Prime Minister Yitzak Rabin, who the AP said she described as a longtime friend. Miller said Israeli officials allowed her to watch the interrogation on a closed-circuit television with the assistance of a government-provided translator under the condition that she not reveal that she had been there or seen the questioning, according to the AP.

"I saw no signs of [Salah] being tortured or mistreated during the time that I was there and witnessing his behavior," Miller said, according to *The New York Sun*. She said Salah was not handcuffed and "he seemed very relaxed and at ease."

According to *The New York Sun*, the defense tried to discredit Miller's testimony on cross-examination.

Although Miller testified that she did not remember having tape-recorded the interrogation, a defense attorney pointed out a 1998 radio interview in which she said she tape-recorded the interrogation and had it translated independently.

The defense also asked Miller which editor had approved the arranged visit to the prison, and she said she could not remember.

According to *The New York Sun*, a defense attorney suggested Miller agreed to "cover up" her visit to the interrogation center so that her readers would not learn of it.

"I did not 'cover up' the fact. I did not disclose it," she said. "We often in journalism do not disclose specific sources of information presented as long as they do not contradict the information presented."

Miller's February 1993 story for *The New York Times* cited Israeli officials and documents as her sources for details about the interrogation. She later disclosed her sources and discussed her experience at the interrogation, including being prompted to suggest questions interrogators should ask, in a 1996 book, *God has Ninety-Nine Names*.

She told defense attorneys that her decision to reveal such details in the book was because Rabin had since died and Salah had been convicted and sent to an Israeli prison, according to *The New York Sun*.

Defense attorneys asked whether Miller had ever been used as an "asset" for the Israeli intelligence service, to which she answered "no," according to the AP.

The defense also asked if Miller had made an agreement with U.S. Attorney Patrick Fitzgerald that she would not be indicted for perjury in the Valerie Plame investigation if she cooperated in the Salah case, according to the *Chicago Tribune*. She again said no.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told *The New York Sun* that although it may have been futile for Miller to resist the subpoena in this case, her unusual access and the testimony she gave in court could increase a perception that reporters collaborate with government officials. "Journalists working in this part of the world really need to make it clear they're not part of the government," Kirtley said, according to *The New York Sun*. "It's a cautionary tale of how engaging in this kind of newsgathering can eventually come back to haunt you."

– Patrick File
Silha Research Assistant

Media Ethics

Marketing Stunt Causes Terror Scare in Boston

Leads to Cartoon Network head's resignation and $2 million reparation payment to City of Boston and Department of Homeland Security

A marketing stunt gone awry in February 2007 led to the resignation of Cartoon Network's general manager, Jim Sample, and an agreement that the advertising agency responsible for the stunt and the network's corporate parent would pay $2 million in restitution to the City of Boston and the Department of Homeland Security in February 2007.

The guerrilla marketing campaign involved the placement of dozens of small blinking circuit boards around ten cities with the intention of garnering publicity for the show "Aqua Teen Hunger Force." Instead, the circuit boards alarmed some members of the public and resulted in a series of calls to authorities from citizens reporting suspicious packages. Although the boxes were around for weeks, the scare occurred only in Boston, where police shut down bridges and roadways. Bomb squads were called to several sites where they blew up at least two of the circuit boards before being informed by Cartoon Network's corporate parent, Turner Broadcasting System, Inc., that they were harmless. The network removed all of the remaining boxes after the incident.

In exchange for the payment, city, state and federal authorities agreed not to press charges against the network. Two men who planted the circuit boards, however, were arrested and have pled not guilty to planting a hoax device and disorderly conduct.

Sample resigned on February 9, ten days after the stunt first came to light. He said in an e-mail to staff members that he felt "compelled to step down, effective immediately, in recognition of the gravity of the situation that occurred under my watch." He also stated, "It's my hope that my decision allows us to put this chapter behind us and get back to our mission of delivering unrivaled original animated entertainment for consumers of all ages."

Boston Mayor Thomas Menino issued his own statement. "The resignation of their top Cartoon Network executive should serve as a message to all that these types of marketing tactics will not and should not be tolerated," Menino said.

According to *The Washington Post*'s TV columnist Lisa de Moraes, however, Sample's resignation raised eyebrows in the industry. She wrote that Sample's announcement "revved up rumors his resignation had as much to do with Cartoon Network's mediocre ratings as with the little 'Aqua Teen Hunger Force' juvenile delinquent 'mooninite' character that scared the stuffing out of Boston that fateful day" and pointed out that nobody at CBS resigned after the Janet Jackson "wardrobe malfunction" at the 2004 Super Bowl halftime show.

The Associated Press reported that the extra buzz generated by the incident did not substantially increase "Aqua Teen Hunger Force" ratings. During the week following the media's coverage of the events, the show averaged 386,000 viewers in the coveted 18-24 year old market, an increase of only 6,000 from the previous week.

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

"The resignation of their top Cartoon Network executive should serve as a message to all that these types of marketing tactics will not and should not be tolerated."

–Thomas Menino
Mayor of Boston

Media Ethics

CNBC Anchor's Ties to Former Citigroup CFO Scrutinized

Financial reporter flew on company jet, worked closely with executive

"When you accept hospitality, you have to ask yourself how it looks when the viewers or readers find out – and, these days, they will find out."

– Jane Kirtley
Silha Professor and
Director of the
Silha Center

The most recognizable anchor for CNBC has found herself the subject of controversy, and some have questioned her relationship with the people and entities she covers. Maria Bartiromo, anchor of *Closing Bell with Maria Bartiromo* and host and managing editor of *Wall Street Journal Report with Maria Bartiromo* has been linked to the firing of former Citigroup executive Todd Thomson, with some commentators speculating that their relationship led to Thomson's dismissal.

Prior to being fired in late January 2007, Thomson was the chief financial officer of Citigroup and was serving as chief executive of the company's $1.4 trillion wealth-management unit. According to the *Financial Times,* Thomson's lavish spending habits, including a plush office known as the "Todd Mahal" and spending great sums to fly Bartiromo on the company's private plane, angered Citigroup's chief executive officer Chuck Prince. According to CNBC, Bartiromo paid the "prevailing commercial rat[e]" of approximately $3,000 to $4,000 for the flight, and the *New York Post* reported that the length of the flight and operating costs for the jet cost Citigroup around $50,000. An additional expenditure by Thomson involving Bartiromo included his approval of $5 million for Citigroup to sponsor a television show on the Sundance Channel that Bartiromo was set to co-host. Since Thomson's firing, Bartiromo has been replaced as co-host of the show.

Bartiromo and Thomson have also appeared together several times on panels at financial conferences, and both sit on an advisory board for the Wharton School of Business at the University of Pennsylvania. This board formed after Thomson and his wife donated $500,000 to the school's Center to Support Leadership and Change Management.

Bartiromo, commonly referred to as "Money Honey" due to her financial reporting fame and movie-star good looks, became the first journalist to report from the floor of the New York Stock Exchange in 1995 and has since become a regular contributor to *Business Week* and *Reader's Digest* in addition to her work on CNBC. She published her first book in 2001, *Use the News: How to Separate the Noise from the Investment Nuggets and Make Money in Any Economy,* which reached bestseller lists on *The New York Times, The Wall Street Journal,* and *USA TODAY*.

After Citigroup fired Thomson, stories began to emerge that the company had banned Bartiromo from its plane. According to the *International Herald Tribune,* a Citigroup executive phoned CNBC to inform it that Bartiromo was no longer permitted on the corporate jet. CNBC officials deny ever receiving a call from Citigroup about Bartiromo's travel habits. The *New York Post* also quoted two sources at Citigroup saying that Bartiromo had made at least six trips on the plane. However, a CNBC executive told *The New York Times* Bartiromo has made "no more than two" trips on the corporate jet. Also, various organizations have reported about an incident last year when Thomson wanted a company plane to fly Bartiromo to his home in Montana, but the company official who was asked to approve the request rejected it.

The Wall Street Journal explained in a Jan. 26, 2007 article about Bartiromo that news organizations often permit their reporters to fly on corporate jets if there is a journalistic reason to do so, and the organization will generally reimburse the company with the equivalent of the price of a commercial first-class ticket. When contacted by *The Journal,* CNBC said that all of Bartiromo's trips were pre-approved and were covered by the "source development" section of its code of ethics.

In addition to her time on the company jet, some commentators have questioned Bartiromo's close ties with Citigroup. *The New York Times* reported that in 2006, Bartiromo made three appearances on behalf of Citigroup, one of CNBC's biggest advertisers. Also, *The Wall Street Journal* reported that its review of CNBC transcripts show Bartiromo has reported substantial pieces on Citigroup 11 times since 2004, including four interviews with Thomson. However, CNBC officials are quick to point out that Bartiromo made 46 appearances on behalf of the channel last year, and that her status as the on-air figure most associated with the channel makes her an attractive personality for promotional events.

CNBC has been very supportive of its star anchor. It released a statement saying that all her travel "has been company-related and approved, and involved legitimate business assignments." It continued, "[h]er record and reporting speak for themselves." *The Washington Post* also quoted one executive defending Bartiromo, stating, "I don't think there's even the appearance of a conflict of interest."

Jane Kirtley, director of the Silha Center and Silha Professor of Media Ethics and Law, without rendering judgment on Bartiromo's actions, described the proper relationship between a journalist and his source in a quote in the *Guardian Unlimited*, stating, "[t]he general view among ethicists is that ideally speaking, a relationship between a reporter and a source should be friendly, cordial but distant." Kirtley continued, "[w]hen you accept hospitality, you have to ask yourself how it looks when the viewers or readers find out – and, these days, they will find out. Here in America, we've got squadrons of bloggers hoping to blow the whistle on the remotest suggestion of a conflict of interests."

This is not Bartiromo's first controversy involving Citigroup. In 2003 she disclosed that she owned 1,000 shares of Citigroup stock. According to *The New York Times,* many news organizations consider it a breach of ethics to own shares of a business in which their reporters are covering.

Bartiromo also made news in 2006 when she reported allegedly off-the-record comments made by Federal Reserve chairman Ben Bernanke about his position on interest rates that caused a dip in stock prices.

– Scott Schraut
Silha Research Assistant

Media Ethics

"To Catch a Predator" Criticized after Suspect's Suicide

Dateline NBC's popular "To Catch a Predator" series returned to air in January 2007, fueling an ongoing debate over journalism ethics and public service crime coverage.

Criticism has come from journalism ethicists and criminal defense attorneys as well as the sister of a suspected predator who killed himself as arresting police entered his Terrell, Texas home and *Dateline NBC* cameras were rolling outside.

Louis "Bill" Conradt Jr., a chief felony assistant district attorney, was one of the subjects of a sting operation arranged by *Dateline NBC*, police from the nearby town of Murphy and the Internet watchdog group Perverted Justice.

Police were attempting to serve Conradt with an arrest warrant on Nov. 5, 2006 for soliciting sex from a decoy associated with Perverted Justice who had posed as a 13-year old boy. Texas adopted a law in 2005 making it a second-degree felony to have explicit sexual conversations online with anyone under the age of fourteen, whether or not any physical contact occurs.

According to the Associated Press (AP) and *The New York Times*, Conradt refused repeated requests for entry from the police. He shot himself with a small-caliber semi-automatic handgun as a tactical team forced their way into the house. He died in a Dallas hospital shortly thereafter.

Allison Gollust, a spokeswoman for NBC News, told *The New York Times* that the *Dateline NBC* crew had no contact with Conradt and "there's absolutely no evidence that would suggest that he was aware of us."

However, Conradt's sister Patricia has charged that *Dateline NBC*, Perverted Justice and Murphy Police "have blood on their hands." In a statement to the Murphy City Council, she said, "I will never consider my brother's death a suicide. It was an act precipitated by the rush to grab headlines where there was no evidence that there was any emergency other than to line the pockets of an out-of-control group and a TV show pressed for ratings and a deadline."

Dateline NBC's sting operation was set up to lure men seeking sex with children to a house in Murphy.

Murphy police told the AP that they chose to arrest Conradt at his home because, while he had not gone to *Dateline NBC*'s sting house, they believed that he would.

Galen Ray Sumrow, the criminal district attorney of Rockwall County, Texas, and head of the office where Conradt worked, told the *Columbia Journalism Review*'s Douglas McCollam that he believes the case was sloppily handled. He said police could have tried to talk Conradt out of the house, or arrested him at work. "You generally like to do an arrest like that away from the home to avoid things like what happened," Sumrow said.

According to the *Columbia Journalism Review*, an affidavit supporting the search warrant claims that the information about Conradt's online activities was given to the Murphy police by Perverted Justice a few hours before they went to arrest him. Sumrow told McCollam an investigator told him the police were in a rush to pick up Conradt because the *Dateline NBC* staff had plane tickets to fly home that afternoon and wanted to record the bust on film for the show.

Sgt. Snow Robertson of the Murphy police, quoted in the same *Columbia Journalism Review* story, said accommodating *Dateline NBC*'s schedule "wasn't a factor at all." And the series' host, Chris Hansen, confirmed that he was scheduled to fly out later that day but said that he had not yet checked out of his hotel.

Texas police are still investigating the events around the Terrell arrest procedure, which deviated from the typical "To Catch a Predator" sting format.

So far, nine *Dateline NBC* investigations have caught about 200 potential predators since the series debuted in fall 2004, according to the network's Web site. Generally, men are lured through suggestive conversations in an online chat room to a house that is rigged with hidden cameras. When a man arrives, an actor portraying the young person the man met online invites him in, assuring him that they are alone.

Hansen then appears, followed by a camera crew. Hansen introduces himself and queries the startled man about his intentions before he is allowed to leave, whereupon the alleged would-be predator is arrested by local police officers.

The original two *Dateline NBC* investigations, filmed in a town near New York City and in Fairfax, Va., did not end in police arrests.

Subsequent stings have included what *Dateline* calls "parallel investigations" by local law enforcers, who, in at least one instance in Ohio, actually deputized the decoys from Perverted Justice in order to strengthen their case against targeted predators.

In an interview January 16 on National Public Radio's "Talk of the Nation," Hansen said the format change serves "the greater good."

But critics have questioned NBC News' ability to be a watchdog while working so closely with the police and an advocacy group, for whose services they reportedly have paid between $100,000 and $150,000 per episode.

Hansen defended the arrangement, drawing a connection between *Dateline*'s relationship with Perverted Justice and news organizations that pay retired generals or FBI personnel for their expertise. In the January 16 interview, Hansen said, "We're paying for [Perverted Justice's] decoys and their ability to do this kind of work, which is something that not very many people can do. We are very

"To Catch a Predator," *continued on page 16*

"How do you have any chance at securing that person the presumption of innocence, due process or the right to a fair trial? They are being tried on TV from a purely prosecutorial prospective."

– Blair Berk
Attorney

Media Ethics

Nancy Grace Sued over Interviewee's Suicide

CNN Headline News host Nancy Grace was sued in November 2006 by the family of Melinda Duckett, a woman who committed suicide one day after being interviewed by Grace about the disappearance of Duckett's son.

The suit claims that Duckett agreed to appear on Grace's show with the understanding that it would raise awareness about her missing two-year old son, Trenton Duckett. In court documents, the family accuses the network of luring Duckett to appear, "knowing that they intended to surprise Melinda Duckett with accusations, questions and verbal assaults clearly intending to intimate that she murdered her child."

"The spitfire questioning, fist-pounding and cross-examination tactics, all in hopes of obtaining a public confession, were despicable."

– Kara Skorupa
Attorney

Grace interviewed Duckett in September 2006 and asked her where she was the day her son vanished. When Duckett replied that she did not want the details made public, Grace asked, "Why aren't you telling us and giving us a clear picture of where you were before your son was kidnapped?" and later accused Duckett of not disclosing her whereabouts "for a reason." The suit alleges that Duckett suffered severe emotional stress after Grace's aggressive questioning, and as a result, she took her own life.

In a written statement, Duckett's family's attorney Jay Paul Deratany said, "Within minutes of Melinda's phone interview, it became quite obvious that Nancy's questions weren't about finding Trenton at all, but rather about impliedly accusing Melinda of murdering her beloved son."

Another family attorney, Kara Skorupa, said, "The spitfire questioning, fist-pounding and cross-examination tactics, all in hopes of obtaining a public confession, were despicable."

Duckett left behind a suicide note stating in part, "I do not bleed my emotions to the public and throughout this situation you did not understand that." She also expressed her love for her son, writing, "He was and always will be my essence and as he grows, I want him to know that." Based on that statement and other evidence in the case, police believe the boy is still alive and consider Duckett a prime suspect in the case. According to the Associated Press, their theory is that she conspired with another person to keep the boy away from his father, Joshua Duckett.

Duckett's family also took issue with the fact that Duckett killed herself hours before the interview was set to air, yet the network decided to run it anyway without consulting them.

Headline News issued a statement after the suit was filed, saying, "We stand by Nancy Grace and fully support her, as we have from the beginning of this case."

In an interview with MSNBC, Grace said Duckett's family's allegations "are hateful, they are spiteful and they are also ridiculous."

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

"To Catch a Predator," *continued from page 15*

transparent about this in our stories," Hansen said.

Dr. Robert Steele, a senior ethics faculty member at The Poynter Institute and member of the Silha Center Advisory Board, said there is a distinction between paying retired experts as sources and paying an active advocacy group. "It's different from hiring a retired general who is no longer involved in a policy-making role," Steele told McCollam for the *Columbia Journalism Review*.

Hansen has said the show serves an important public service, and that it is important that the show's subjects are taken into custody, "facing justice" as opposed to being free to walk away after being caught by *Dateline NBC*'s cameras in front of a viewing audience of millions.

Although "To Catch a Predator" has become a steady ratings winner for NBC News, the show's huge popularity has raised complaints from criminal defense attorneys, who say it compromises Miranda rights, search and seizure rules and the ability to seat an unbiased jury.

In a November article for the *National Law Journal*, Blair Berk of Tarlow & Berk in Los Angeles, who is representing a doctor featured on the show, compared "To Catch a Predator" to "trying someone in [the] town square without giving them due process."

"How do you have any chance at securing that person the presumption of innocence, due process or the right to a fair trial?" Berk said. "They are being tried on TV from a purely prosecutorial prospective."

In January, 20 Georgia men were arrested on charges related to a *Dateline NBC* sting held there last summer. As of February 14, ten of the men had pled guilty, according to the Columbus, Ga. *Ledger-Enquirer*. All who pled guilty were sentenced to between four and six years in prison plus probation. Under Georgia law, the men must register with authorities upon their release from prison and give notice when they plan to move, according to the *Ledger-Enquirer*.

Steven Harmon, of Harmon and Harmon in Riverside, Calif., is defending five California men who were caught on the show. He told the *National Law Journal* that he doubts it will be possible to get a fair trial. "I'm just anticipating that dreadful moment of being in the courtroom when the judge informs the prospective jurors that this is one of those '*Dateline NBC*' cases. It's going to be very difficult to find a jury that will be able to listen to the whole story."

– Patrick File
Silha Research Assistant

Media Ethics

O.J. Simpson Book, TV Special Cancelled Amid Controversy

O.J. Simpson, who was acquitted in 1995 of criminal charges of murdering his wife, Nicole Brown Simpson and her friend Ron Goldman, returned to the public eye in the fall of 2006 when News Corporation, parent company of HarperCollins and the FOX Network, agreed to publish a book he wrote about the murders and later cancelled it. Simpson's book, entitled, *If I Did It*, was to be released on Nov. 30, 2006 following a two-part accompanying television interview on the FOX Network on November 27 and 29, during the middle of "sweeps week." Waves of disapproval followed, including protests by the families of the victims of the 1995 murders. The subsequent cancellation on November 20 of both the book and the television interview by News Corporation has raised questions.

Simpson's book is a "hypothetical" description of what he would have done if he had killed Nicole Brown Simpson and Ron Goldman.

Simpson's book is a "hypothetical" description of what he would have done if he had killed Nicole Brown Simpson and Ron Goldman. Public response to the book was a mix of interest and anger; the book was criticized in weblog posts and on editorial pages. The industry trade magazine *Broadcasting & Cable* called the sweeps week television special an "evil stunt" by News Corporation.

Prior to the cancellation, 12 FOX affiliate stations had already decided not to air the TV special. One station manager, Bill Lamb of WDRB in Louisville, Ky., stated that his station would not air the special because it would be "profiting from the murders." Borders Books issued a public statement promising to donate all proceeds from the book to charity.

Judith Regan, who approved publication of the book for HarperCollins, came under fire by critics amid protests by the Brown and Goldman families over the book and planned interviews. Fred Goldman, Ron Goldman's father, wrote to News Corporation along with members of the Brown family asking that the book's publication be cancelled along with the interviews. He also appeared on ABC, saying that Simpson "destroyed my son" and "took his future and life." Regan issued a statement detailing her reasons for choosing to publish the book and the nature of her own interviews with Simpson. In the statement, entitled, "Why I Did It," Regan stated that she considered the book to be O.J. Simpson's confession to the murders. She described her own life as a survivor of domestic abuse and claimed that she wanted the book published because it would give Simpson the chance to say, "I did it, and I am sorry."

"To publish," Regan wrote in her statement, "does not mean 'to endorse;' it means 'to make public.'" Regan also stated that she did not pay Simpson for the book, but contracted through a third party with the understanding that the money would go to Simpson's children. "That much I could live with," Regan wrote.

In 1997, the family of murder victim Ron Goldman won a civil judgment of $33.5 million against Simpson for the deaths, but has been unable to collect on it. Following the judgment, Simpson moved from California to Florida, where his NFL pension and home are protected from seizure by state law.

News Corporation announced the cancellation of the book and interviews on November 20. Rupert Murdoch, News Corporation president, issued a statement the same day apologizing to the families of Nicole Brown Simpson and Ronald Goldman. Murdoch wrote, "I and Senior Management agree with the American public that this was an ill-considered project."

Simpson told the Associated Press that he "would like to straighten things out that have been mischaracterized" but cannot because he is "legally muzzled at this point."

An article covering the book's cancellation on FOXNews.com stated that for a book to be cancelled solely due to "objectionable content" is "virtually unheard of in the publishing industry."

Regan was fired from HarperCollins in December 2006. The scandal surrounding Simpson's book, the *New York Daily News* reported, had raised tensions between Regan and HarperCollins' CEO Jane Friedman, with whom Regan reportedly had an adversarial relationship. *The New York Times* reported that she was fired over anti-Semitic comments she allegedly made in a conversation with a company lawyer. Her division, ReganBooks, was shut down after her departure.

– Sara Cannon
Silha Center Staff

Media Ethics

Minneapolis *Star Tribune* Reviews Writer's Work for Plagiarism

Accusations of plagiarism in December led the Minneapolis *Star Tribune* to review a year's worth of work by an editorial writer before allowing him to remain on staff. According to an editor's note published in the *Star Tribune* Dec. 17, 2006 the internal review found "two instances of nonattribution" within the last year by Steve Berg, a 30-year veteran of the staff.

Berg did not write for the paper during the review. Because only two instances were found in what Editorial Page Editor Susan Albright called otherwise "exemplary" performance, Berg was cleared to return to the staff on Jan. 2, 2007.

The review was launched in response to questions initially raised on November 11 by the blog Power Line, whose authors, Scott Johnson and John Hinderaker, are based near Minneapolis. Johnson reported on similarities in original phrases between a November 10 editorial critical of the Bush administration and a November 6 *New Yorker* comment by Hendrik Hertzberg. The editorial, said Johnson, "displays the kind of intellectual fraudulence associated with plagiarism." He said former law partner Norm Carpenter had raised the issue with both Power Line and the *Star Tribune*. (Coverage of Power Line's role in the August 2006 Reuters photo controversy can be found in the Fall 2006 issue of the Silha *Bulletin*. The blog also played a role in the 2004 CBS News "60 Minutes" memo controversy. Coverage can be found in the Winter 2005 and Fall 2004 issues of the Silha *Bulletin*.)

Star Tribune reader representative Kate Parry wrote about the issue and interviewed Carpenter in her weekly column on November 18, but she did not name Berg as the author. Further investigation by the bloggers uncovered another instance of "cribbing or copying" particular phrases and ideas from a Hertzberg comment in a March 27, 2006 editorial, which Power Line and the Associated Press reported on November 30, both of which then named Berg as the author of the editorials in question. Although Albright's December 17 note said the *Star Tribune* investigation "discerned no intent to deceive on the part of Berg," the newspaper said that it plans to take further steps to prevent future plagiarism, whether it is intentional or unintentional.

According to Parry, Albright and then-editor Anders Gyllenhaal "have discussed the need for clear guidelines on sound practices for compiling and attributing information."

– Patrick File
Silha Research Assistant

Student Press News

High School Paper Told to Remove Photograph or Lose Funding

A public high school principal in St. Francis, Minn., suspended the school newspaper's funds and threatened legal action because he found an image that student editors planned to publish was offensive.

The January 12, 2007 edition of St. Francis High School's *The Crier* was meant to include a photograph and story about the fall play, "The Children's Story," a Cold War-era story about an imaginary takeover by the Soviet Union, according to the St. Paul *Pioneer Press*.

The photo depicted a student ripping up what appeared to be an American flag, but was actually red, white and blue decorative bunting. According to *The Crier*, the photo had been posted on a wall near the school's performing arts center, but Principal Paul Neubauer had removed it out of consideration for veterans and others who might be offended by the image.

Student editors informed Neubauer they planned to publish a story about the play and his decision to take the photo down, as well as the controversial image itself, in the paper's January 12 issue, according to Don Heinzman, a columnist for HometownSource.com.

Editor-in-chief Eric Sheforgen said that Neubauer warned the student editors that there would be consequences, including legal action, if the photo were published. Neubauer then froze the newspaper's financial accounts to prevent it from being published, according to Heinzman's column.

According to the *Pioneer Press*, *The Crier* was printed Friday, January 19 and distributed the following Monday, where readers found a blue box in place of the picture along with the words: "Originally a photo was to be placed here, but was censored by the administration."

A front page story discussed the censorship issue, and an editorial inside criticized the administration. Editors contended in a statement to the *Pioneer Press* that the staff opted to omit the image rather than exercise their legal rights, "out of fear that the future of the newspaper could be in jeopardy if we choose to take this path."

Neubauer did not comment to the press, but Edward Saxton, superintendent of the Anoka school district that includes St. Francis, said he supported the principal's decision. "It's like a quote being taken out of context," Saxton told the *Pioneer Press*. "That particular picture, although it's a snapshot of what was in the fall play, standing in isolation, it could be taken in many different ways. It could be pretty offensive to veterans or people who served in the military. It's kind of a community-standards thing."

The American Civil Liberties Union of Minnesota stated that it might be interested in taking up the students' cause.

In the meantime, the St. Francis School Board has created a committee, comprised of two school board members, Saxton, Neubauer, *The Crier's* adviser and two students, to review the school's policy regarding censorship of student publications according to the Student Press Law Center. The current policy states that "Official school publications are free from prior restraint by officials except as provided by law."

The U.S. Supreme Court ruled in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), that school administrators may censor a school-sponsored publication only in the interest of promoting the school's educational mission.

Moreover, when a school has established, through a written policy or past practices, that a publication is considered a forum for student expression, administrators' ability to practice prior restraint can be further limited.

Under the *Hazelwood* ruling, political viewpoints remain protected from censorship.

"If this was a photo of a play and if this took place on campus, I'm mystified by what the legitimate educational concerns would be," said Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota.

Beyond the legal implications, Chuck Samuelson, Executive Director of the American Civil Liberties Union of Minnesota, told the *Pioneer Press* that the principal's actions send "a really bad message to students" about the rights and responsibilities of free speech and free press.

"It was a teaching moment," said Samuelson, "and he blew it."

– Patrick File
Silha Research Assistant

"It was a teaching moment, and [the principal] blew it."

– Chuck Samuelson
Executive Director,
ACLU of Minnesota

Defamation/Libel

Illinois Supreme Court Justice Awarded $7 Million Libel Judgment Against Newspaper

"The journalism attacked by the Chief Justice consists of core political speech – editorial columns that report and comment on pervasive community concern over the politicization of the judiciary."

– Excerpted from the *Kane County Chronicle*'s appellate brief

After deliberating for nine hours over two days, a jury awarded Illinois Supreme Court Chief Justice Robert Thomas $7 million in damages after finding a Kane County, Ill., newspaper liable for four separate counts of libel against the state's highest-ranking judicial officer. The trial court verdict was entered on Nov. 14, 2006, but Thomas later offered to accept a reduced settlement in the case provided that the *Kane County Chronicle* retract claims that the judge had exchanged leniency in a disciplinary hearing for political favors. The newspaper and its former columnist allowed the November 22 deadline for negotiation pass without responding and filed an appeal in the Second Appellate Court District on Jan. 12, 2007. Thomas served as a judge on that court from 1994-2000.

"We pride ourselves on being a watchdog for the community," Thomas D. Shaw, president of Shaw Newspapers, which owns the *Kane County Chronicle* and other newspapers in Illinois and Iowa, told *The New York Times*. "This is too important for us to roll over."

The controversy began in 2003, when former *Chronicle* columnist Bill Page wrote three columns claiming that Thomas was "out for blood" in a disciplinary proceeding against former Kane County State's Attorney Meg Gorecki, who admitted to leaving an answering-machine message suggesting that a friend could retain a job by making campaign donations to a county official.

In May 2003, the *Kane County Chronicle,* a suburban Chicago newspaper with a circulation of approximately 14,000, published the first of Page's three articles. In his first column, Page claimed that "GOP committee members from most of Kane's townships, county officials, state bureaucrats, judges, county board members, defense attorneys, prosecutors, those who like Gorecki and those who emphatically do not, all expressed the opinion that Justice Thomas was not impartial when it came to Gorecki."

After the Illinois Supreme Court suspended Gorecki's license to practice law in November 2003, *In re Gorecki,* 208 Ill.2d 350 (Ill. 2003), Page wrote a third article relating to the disciplinary proceeding, claiming that Thomas had improperly influenced the decision of the court. In a May 15, 2003 column, Page wrote that Thomas recommended that the Illinois Supreme Court disbar Gorecki during judicial conferences relating to the case. In his later columns, Page claimed that Thomas reversed his position in exchange for political favors and agreed with the other justices on a four-month suspension.

"And why, after demanding a year's suspension, did he agree to four months?" Page wrote. "In return for some high profile Gorecki supporters endorsing Bob Spence, a judicial candidate favored by Thomas, he agreed to the four-month suspension."

In March 2004, Thomas filed a complaint in Kane County circuit court against the columnist, the *Kane County Chronicle* and the newspaper's owners, claiming that Page's statements were false, defamatory *per se* and placed him in a false light before the public. Under Illinois case law, false statements are considered actionable *per se*: if they impute the commission of a criminal offense, an inability to perform or lack of integrity in the discharge of duties of office or employment or if they prejudice a party, or impute lack of ability, in his or her trade, profession or business. *See, e.g. Van Horne v. Muller,* 185 Ill.2d 299 (Ill. 1998).

Thomas claimed that Page's statements were false and defamatory because, if true, they could have resulted in disciplinary proceedings by the Illinois Courts Commission or criminal charges for official misconduct. "As a proximate cause of Page's statements," Thomas' attorney Joseph A. Power, Jr. wrote, "Justice Thomas was placed in a false light before the public and sustained an injury to his reputation as an officer of the Court."

Thomas, who alleged four libel counts against the Kane County newspaper and columnist, sought an award for an amount in excess of $50,000. After an Illinois appellate court ruled on several interlocutory motions in 2005, a trial date was set for November 2006.

During the November trial, Page testified that confidential sources told him that Thomas changed his position in the Gorecki proceeding after local Republican leaders agreed to support Spence in upcoming elections. But Page never revealed his sources, and the newspaper could present no other evidence at trial to support the columnist's claims as truthful. Several Illinois state judges and Supreme Court justices testified in support of the plaintiff.

On November 15, following the verdict, the *Chicago Tribune* reported that juror Kelly Groves of Aurora, Ill., said that the jury found in favor of Thomas because the *Kane County Chronicle* should have done more to verify the information. "We all understand confidential sources," she said. "We just feel if [the newspaper] would have done a little work they should have been able to substantiate this without confidential sources."

Ultimately, the jury awarded Thomas $1 million in economic loss resulting from Page's defamatory statements, $1 million for personal embarrassment and humiliation and $5 million for impairment of personal and professional reputation and standing. The multi-million dollar judgment is the latest and largest award in a series of recent trial court decisions that have pitted judicial officers against members of the media. (See "Judges Sue Newspapers for Libel" on page 21 of this issue of the Silha *Bulletin*.)

The newspaper has retained Bruce Sanford, a nationally-recognized First Amendment attorney and former *Wall Street Journal* reporter, to represent it throughout the appellate process. Sanford told the *Suburban Chicago News* in January that jurors should have been allowed to see the hard copies of pages where Page's columns appeared because they were labeled as "Opinion," thus giving writers more latitude. "This is the sort of thing community newspapers do all the time when they convey pervasive community sentiment about what's going on," Sanford said.

Judge Wins Libel Case, *continued on page 21*

Judge Wins Libel Case, *continued from page 20*

The sentiment was echoed in the appeal the *Chronicle* filed in January. "The journalism attacked by the Chief Justice consists of core political speech – editorial columns that report and comment on pervasive community concern over the politicization of the judiciary," it argued. "Opinion is what they were, and opinion is protected speech under the Constitution."

The appeal accused the case of proceeding "solely by the power of [the Chief Justice's] position as the state's top judicial officer." It called the $7 million verdict "unthinkable" and said that it came "from a jury within the friendly confines of the court system [Thomas] oversees." It argued that the size of the award was out of proportion to the actual claimed damages and that the evidence did not support the award in any event.

The New York Times reported that the appeal by the *Kane County Chronicle,* Shaw Suburban Media Group, and Page could be expensive, daunting and time-consuming. Similar cases have taken years, even decades, to work their way through the courts. A three-judge panel in the Second District Appellate Court of Illinois earlier denied the newspaper and Page's attempts to subpoena notes of private conversations between the Supreme Court justices, recognizing an "absolute" judicial deliberation privilege against disclosure of confidential communications between judicial officers and their staff. *Thomas v. Page,* 837 N.E.2d 483 (Ill. App. 2nd Dist. 2005).

An appeal could raise novel legal issues involving the proper venue for the appeal and the effect of judicial involvement in litigation. As it winds its way to the Illinois Supreme Court, where the matter would come before a number of justices who have already testified on behalf of Thomas at the trial level, the *Kane County Chronicle* is expected to challenge whether the case should be before Illinois courts at all.

"The case has been pursued in state courts that the plaintiff oversees, and the Illinois Supreme Court, where an appeal would normally wind up, is occupied by Thomas himself and a lot of justices who testified for him during the November trial," reporter Michael Miner wrote for a Dec. 8, 2006 edition of the *Chicago Reader.*

"If Page or Thomas are unhappy with the appellate court's decision, to whom can they appeal? Can they leapfrog over the state Supreme Court to the U.S. Supreme Court or the federal courts?" the *Chicago Sun-Times* asked on Nov. 16, 2006. "Not unless they can find a federal issue. And this case deals with state libel/defamation law, experts say."

"It is uncharted territory – there's no precedent for this," Bruce Ottley, a DePaul University law professor, told the *Chicago Sun Times*.

– Christopher Gorman
Silha Research Assistant

Judges Sue Newspapers for Libel

The $7 million judgment awarded to Illinois Supreme Court Justice Robert Thomas on Nov. 14, 2006 by a Kane County, Ill. jury for defamatory statements made by a local columnist is one of a number of recent cases across the nation entangling judges and the media, including two notable verdicts that awarded a Pennsylvania Supreme Court justice and a local Massachusetts judge millions of dollars in damages for libel.

In June 2006, Bucks County Court Senior Judge Edward G. Biester, Jr., dismissed a decades-long libel case against *The Philadelphia Inquirer.* Biester, who was specially appointed to hear a pending retrial of the case, overturned a jury's award of $6 million to the late Pennsylvania Supreme Court Justice James T. McDermott in 1990. The dismissal came 23 years after McDermott filed a libel lawsuit against reporter Daniel R. Biddle and *The Philadelphia Inquirer*, which had questioned the conduct of members of the high court in a number of articles in 1983. In 1990, a Philadelphia jury found that the justice was not libeled by the original reports, but awarded the late justice the multi-million dollar judgment after concluding in what *The Philadelphia Inquirer* described as a "seemingly inconsistent verdict" that a later reprint of the story was false. According to an article published by *The New York Times* on Nov. 20, 2006, by the time the June 2006 decision was entered, Justice McDermott, the lawyer representing the McDermott and the lawyer representing *The Philadelphia Inquirer* had all died.

In 2005, a Massachusetts trial court awarded Massachusetts Superior Court Judge Ernest B. Murphy more than $2 million in a libel lawsuit against the *Boston Herald*. A jury in Suffolk, Mass., found that the newspaper and reporter David Wedge libeled Murphy in a number of stories published in 2002. According to an article published by the *Boston Globe* on Nov. 29, 2005, the stories portrayed Murphy as "a lenient judge who had made inflammatory and insensitive remarks about two crime victims." The same article noted that Suffolk Superior Court Judge Charles R. Johnson upheld the jury's finding that the *Herald* libeled Murphy, but reduced the jury's award by $85,000. The *Herald* filed an appeal with the Massachusetts Supreme Judicial Court in October 2006, asking the state's highest court to review the libel verdict. A Nov. 13, 2006 article published in the *Herald* noted that more than a dozen of the nation's top media companies are taking an interest in the *Herald's* appeal, including ABC, CBS Corp., the E.W. Scripps Co., the Associated Press, and *The Washington Post.* Each of the media organizations has filed a friend-of-the-court brief with the Massachusetts court in support of the *Herald* and its reporter.

– Christopher Gorman
Silha Research Assistant

Defamation/Libel

Illinois Supreme Court Upholds Innocent Construction Rule

Finds book authors and publishers defamed plaintiff under rule's standard

The innocent construction rule holds that where allegedly libelous material is capable of being read innocently, it must be so read and declared nonactionable as a matter of law.

In December 2006, the Illinois Supreme Court upheld the "innocent construction rule," solidifying the state's status as one of the few remaining jurisdictions where such a rule exists. The rule was first discussed in *John v. Tribune Co.,* 24 Ill.2d 437 (Ill. 1962), in which the court defined it as holding "that the article is to be read as a whole and the words given their natural and obvious meaning, and requires that words allegedly libelous that are capable of being read innocently must be so read and declared nonactionable as a matter of law."

In the recent case, *Tuite v. Corbitt*, No. 101045, 2006 LEXIS 1668 (Ill. 2006), an attorney bringing a defamation action against the authors and publishers of the 2003 nonfiction book *Double Deal* urged the court to overturn the innocent construction rule, to instead adopt the more widely used "reasonable construction rule," and reverse the lower courts' application of it in finding the defendants not liable. The reasonable construction rule holds that where a disputed statement can be reasonably read to be defamatory, a jury must decide whether it is or not. Although the court decided to uphold the innocent construction rule, it ultimately overturned the lower courts' dismissal of the case, instead finding the statements to be defamatory even under the innocent construction standard.

Patrick A. Tuite originally brought suit against *Double Deal*'s authors, Michael Corbitt, a former police officer with alleged mob ties, and Sam Giancana, a nephew of a now-deceased Chicago mafia don. The book includes a passage about Corbitt's dealings with alleged mob boss Joey Aiuppa, who Tuite defended against criminal charges in 1985. Corbitt wrote that Tuite had demanded a $1 million retainer and that he had been given the money in cash inside of duffel bags. He wrote that Aiuppa and his co-defendents thought "it was like it was a done deal, like they were all going to be acquitted. So you can imagine their reaction when they were all found guilty . . . for the life of me, I've never understood why Pat Tuite didn't get whacked."

Tuite took issue with the statement that he had represented Aiuppa, instead saying he served only as a consultant in the trial. He also disputed receiving the million-dollar cash retainer and said he had never knowingly received illegally obtained funds. In his lawsuit, he alleged that the statements *per se* defamed him because they implied that he would use the retainer for bribes to make the acquittal "a done deal."

The trial court originally granted the defendants' motion to dismiss the case in November 2003, and the state appellate court affirmed in June 2005 on grounds that the statements, when read under the innocent construction rule, simply meant Tuite had been retained to provide "better representation" and that Tuite had received the retainer simply to ensure payment in advance due to the risk of nonpayment after trial. The appellate court also determined that because the defamation claim failed per se, Tuite's false light invasion of privacy claim also failed and that the statements were not sufficiently extreme and outrageous to warrant a finding of intentional infliction of emotional distress. The appellate decision is *Tuite v. Corbitt*, 358 Ill. App. 3d 889 (Ill. App. Ct. 2005).

Tuite argued to the state Supreme Court that the innocent construction rule should be overturned for five reasons: (1) the rule had already been rejected in most other jurisdictions; (2) rulings subsequent to *John v. Tribune Co.* had created other protections for defendants charged with defamation and thus the rule was no longer needed; (3) the rule improperly eliminated the jury's role in determining what constitutes defamation; (4) the rule conflicted with Section 2-615 of the Illinois Code of Civil Procedure, 735 ILCS 5/2-615; and (5) the rule was continuously misapplied by lower courts in Illinois.

Justice Thomas L. Kilbride, writing for himself and three Justices who concurred and one who concurred in part and dissented in part, dismissed all of Tuite's arguments. He noted that despite difficulties in application, the innocent construction rule is "now well established, with a long history in this state" and that Tuite's arguments did not overcome the doctrine of *stare decisis*, under which courts stand by precedent and uphold previously settled points of law. He also found that the rule did not contradict with the state's Code of Civil Procedure and that it did not eliminate the jury's role in defamation proceedings.

Kilbride then considered the statements at issue under the rule of innocent construction and reversed the lower courts' finding that they could be innocently construed. He "reemphasized" to lower courts that statements must be reviewed in context and that "[c]ourts are not required to strain to find an unnatural innocent meaning for words when a defamatory meaning is far more reasonable." He then held that "[g]iven the overwhelming focus on corruption in this book, these statements cannot reasonably be given an innocent construction."

He continued, "The context of the book as a whole significantly colors those terms. Importantly, this book is not about hiring a lawyer or complimenting Tuite's skills as an attorney. The book is a series of stories about corruption, including corruption within the judicial system." Given those facts, he concluded that "[i]t is not reasonable to believe defendants intended to convey a story about Tuite's trial skills given the context of the book as a whole. It is far more reasonable to believe defendants intended to convey a story about corruption."

Kilbride reinstated Tuite's false light invasion of privacy claim, but because Tuite had not pursued the intentional infliction of emotional distress claim at the Supreme Court level, it was dropped.

Justice Charles E. Freeman concurred with the result of the case but dissented with Kilbride's determination to uphold the innocent construction rule. Although he wrote that he placed great importance on the doctrine of *stare decisis*, Freeman said that the Court was "out of step with the First Amendment jurisprudence of the Supreme Court" and that the innocent construction rule was "inherently flawed" and "outdated."

Innocent Construction Rule, *continued on page 23*

Defamation/Libel

Suit Against *The New York Times* over Kristof's Columns about Anthrax Investigation Dismissed

A federal judge has dismissed a defamation action filed against *The New York Times*. Judge Claude M. Hilton of the Eastern District of Virginia granted *The Times'* motion for summary judgment in an action arising from a series of columns by Nicholas Kristof relating to the FBI's investigation of the 2001 anthrax mailings. This is the second time Hilton has dismissed this lawsuit, but his first dismissal on the grounds that the articles were not defamatory was overturned by the U.S. Court of Appeals for the Fourth Circuit. In the columns that are the subject of this lawsuit, Kristof criticized the government for not sufficiently investigating an individual he referred to as "Mr. Z" in connection with the mailings. After Steven Hatfill held a press conference declaring he was under investigation by the FBI, Kristof revealed that "Mr. Z" was indeed Hatfill. Hatfill filed his lawsuit on June 13, 2004, alleging two counts of defamation and one of intentional infliction of emotional distress. After its original dismissal and disputes over whether Kristof was required to disclose anonymous sources on which he relied in writing his article, the case was set for trial on January 29. However, Hilton dismissed the case on January 12, and released his opinion explaining the dismissal on January 30. (See "Federal Judge Says *New York Times'* Kristof Must Disclose Source in Civil Defamation Suit" in the Fall 2006 Issue of the Silha *Bulletin*).

Hilton's opinion initially detailed Hatfill's employment and reputation relating to infectious diseases and bioterrorism. Some highlights of Hatfill's history include interviews with *The Washington Times, Insight* magazine, and appearances on nationally-syndicated radio and television. Hilton also wrote of Hatfill's reputation in his field as an expert and provided examples of his consulting work serving on panels. Finally, Hilton noted Hatfill's employment since 1999, with both of his jobs involving significant work for the federal government.

After providing the relevant facts of the case, Hilton then considered whether Hatfill was a public official or public figure. Because this was a defamation action, if Hatfill is either a public official or figure, he must establish Kristof acted with actual malice in writing his columns. The legal standard of actual malice requires the author had either knowledge of falsity or acted with a reckless disregard for the truth in writing the allegedly defamatory statements. Hilton's order said that Hatfill qualifies as a public official for this action because his participation in government training and decision making placed him in a position of public trust. Hilton also said the public had "an independent interest in [Hatfill's] qualifications and performance given the highly sensitive nature of his work and its importance to national defense." Hilton also said that even if Hatfill is not a public official, he qualifies as a limited public figure. Hatfill has access to channels of communication, he had a role of special prominence through his work and consulting and he had spoken with an ABC news reporter after the mailings but prior to Kristof's columns.

Because Hilton identified Hatfill as a public official or figure, he needed to show actual malice to prevail on his defamation action. Hilton stated that *The Times* was entitled to judgment on this matter because there was no evidence that Kristof knew his articles were false or that he had a high degree of awareness of probable falsity of the columns. Prior to writing the columns, Kristof knew Hatfill was a person of interest in the investigation, he spoke with many of Hatfill's colleagues that believed Hatfill should be investigated further, and Kristof reviewed hundreds of documents that confirmed his belief in Hatfill's ability to make or access anthrax. Therefore, Hatfill failed to establish an element of his action entitling *The Times* to summary judgment.

Hatfill originally had two separate counts of defamation in his complaint, the first directed at the columns generally and the second pointing to 11 specific allegations in the columns that he claimed incriminated him as the anthrax mailer. Hilton's reasoning for the first count applied to the second count under the "subsidiary meaning doctrine," which means that a defendant entitled to dismissal for the overall implication of allegedly defamatory articles is also entitled to dismissal for the implications of specific statements within those articles. Having prevailed on the first count, *The Times* was also entitled to dismissal on the second.

Finally, Hilton disposed of Hatfill's third count of intentional infliction of emotional distress. Hilton observed Kristof made efforts to avoid conveying Hatfill was guilty of the anthrax mailings, because he had reminded his readers to assume Hatfill was innocent. Also, Hatfill made no showing Kristof acted in a sufficiently outrageous manner.

In a January 13 article in *The Times,* one of its lawyers, David E. McCraw, stated, "[w]e are gratified by the judge's ruling today. In making our summary judgment motion, we believed that the plaintiff had failed to come up with the evidence necessary to bring this case to trial, and we are pleased that the court agreed."

At the time of publication, Hatfill had not indicated whether he planned to appeal the decision.

– Scott Schraut
Silha Research Assistant

"[W]e believed that the plaintiff had failed to come up with the evidence necessary to bring this case to trial, and we are pleased that the court agreed."

– David E. McCraw
New York Times attorney

Innocent Construction Rule, *continued from page 22*

Freeman wrote that "The rule is wholly insensitive to the complex context-sensitive balance between the public's interest in free speech and the individual's interest in his good name, unsullied by falsehood. So far as I can see, the innocent construction rule is nothing more than a thumb on the scale on the side of the defendant in every *per se* defamation case."

He also called the rule "a sledgehammer where a scalpel is called for."

In January 2007, the defendants petitioned the court for a rehearing, arguing that the justices misapplied the rule they upheld. At press time, no ruling on that petition had been issued.

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

Information Access

New York Sun Reporter Joshua Gerstein Wins FOIA Victory

Judge rules various federal agencies must respond to his request for records regarding leak referrals

On Nov. 29, 2006, Judge Maxine M. Chesney of the United States District Court for the Northern District of California ordered the Department of Defense (DOD), Department of Justice (DOJ), and the FBI to process *New York Sun* reporter Joshua A. Gerstein's Freedom of Information Act (FOIA) requests and produce, within 30 days, non-exempt responsive records to his request for information regarding unauthorized disclosure of classified information. In a separate order, Chesney also ruled that the CIA and the National Security Agency (NSA) violated the FOIA in denying Gerstein's request for expedited processing under the Act and ordered the agencies to produce non-exempt responsive records within 30 days.

Gerstein originally filed his request with the agencies in March 2006, seeking any information regarding criminal referrals sent from the CIA to the DOJ relating to unauthorized disclosure of classified information to the press or public since 2001 and damage assessments of the disclosures. He also requested any information pertaining to reports that in August 1998, the United States government was aware of or tracking a satellite telephone used by Osama bin Laden. The DOJ, DOD, FBI and Department of State (DOS) initially granted Gerstein's request for expedited processing, but when Gerstein filed suit some eight months later, he had been given no records. The CIA and NSA denied Gerstein's request for expedited processing, and both rejected Gerstein's administrative appeal.

"It is both sad and somewhat comical that it can take more than a year to get an answer to a FOIA request that the government concedes is entitled to expedited treatment."

– Joshua Gerstein

In her rulings, Chesney noted that the FOIA requires an agency receiving a FOIA request to make a determination to comply or not with the request within 20 business days, except in "unusual" or "exceptional" circumstances. In addition, the FOIA requires agencies to set up procedures to follow when expedited requests are made.

Gerstein argued that there is "an urgency to inform the public concerning actual or alleged Federal Government activity," noting that President Bush, Vice President Cheney and CIA Director Porter Goss had all complained about leaks of classified information to the press and public. The CIA and NSA argued that Gerstein had no "compelling need" for an expedited response. The FOIA requires a showing of "urgency to inform the public concerning actual or alleged Federal Government activity" in order to receive expedited review. 5 U.S.C. § 552(a)(6)(E)(v).

The CIA and NSA argued that "because the issue has been the subject of 'ongoing' and 'sustained' interest . . . it cannot also be 'urgent' and 'exigent,'" but Chesney rejected that argument and found Gerstein had met the standard. She wrote, "A delay in processing Gerstein's FOIA requests, as he contends, 'could preclude any meaningful contribution to the ongoing public debate and render any disclosure little more than a historical footnote.'"

After the ruling, some agencies or parts of agencies responded, according to Gerstein, but others sought extensions by citing the need for internal coordination. The Office of Information and Privacy within the DOJ was given until Jan. 29, 2007, the CIA until Feb. 28, 2007 and the FBI, DOD and DOJ's criminal division until April 27, 2007.

The FBI told Gerstein in December 2006 that although it had investigated 94 information leaks since 2001, 22 of its investigative files were missing. In an article Gerstein published in *The New York Sun* about the missing files, Athan Theoharis, a professor emeritus of history at Marquette University, called that "an amazing number" and said that in the 1960s the FBI would purposely not file sensitive documents in the central filing system in order to avoid judicial or congressional requests for information. "There's no reason to think they're not doing the same thing today," Theoharis said. "I don't want to sound conspiratorial but I don't think one can discount this." The full text of the article is available online at http://www.nysun.com/article/45755?page_no=2.

Gerstein told the Silha Center that he is seeking the information to determine and write about how the DOJ investigates leaks of classified information. "From the outside, the decision-making process looks haphazard and highly contingent on who at DOJ is doing the investigating," he said. "Some leaks of closely-held national security information seem to receive only a cursory investigation, while leaks about crackdowns on Islamic charities and about steroid use in baseball get a full court press."

He published an article Jan. 10, 2007 in the *Sun* based upon documents he received showing that the FBI had abandoned some leak investigations due to a lack of cooperation among intelligence agencies. That article is available online at http://www.nysun.com/article/46407?page_no=1.

Gerstein said that the FOIA process is "deeply flawed and in need of repair." He told the Silha Center, "It is both sad and somewhat comical that it can take more than a year to get an answer to a FOIA request that the government concedes is entitled to expedited treatment." Gerstein continued, "It's also unfortunate that with some agencies, but not all of them, it takes filing a lawsuit to get a substantive response."

Gerstein stressed the importance of the FOIA, noting that despite all of the obstacles, reporters still manage to gain important information through it each year, something he called "a testament to the law and American Democracy."

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

Information Access

Budget Cuts Lead to Closures, Reduced Access at EPA Libraries

The Environmental Protection Agency's (EPA) Library system suffered drastic funding cuts in 2006 and was forced to shut down several of its regional libraries and even its headquarters library. By the year's end, members of Congress were speaking out against the closures, even as the EPA quickly sold off some of the libraries' furniture and lighting for pennies on the dollar, in a move that some said was aimed at making reopening more difficult or even impossible.

The EPA's library system was established in 1971, and its collection contains information on environmental protection and management; basic sciences such as biology and chemistry; applied sciences such as engineering and toxicology; and topics featured in legislative mandates, such as hazardous waste, drinking water, pollution prevention and toxic substances. Until last year, it maintained a Washington, D.C. headquarters and operated 10 regional libraries across the nation in addition to over a dozen smaller libraries.

President Bush's 2006 budget changed all that, after 80 percent of the system's $2.5 million budget was slashed. By spring 2006, the Region 5 library serving Illinois, Indiana, Michigan, Minnesota, Ohio and Wisconsin was closed, and Regions 6 and 7 libraries, which served Arkansas, Louisiana, New Mexico, Oklahoma, and Texas and Iowa, Kansas, Missouri, and Nebraska, respectively, were shut down as well. Other libraries had significant reductions in hours and staff, and some were closed to the public. At the Region 4 library in Atlanta, only one staff member, an interlibrary loan technician, remains.

According to the *Seattle Post-Intelligencer*, the libraries were "well used." The newspaper reported that over "20,000 requests for quick reference and another 20,000-plus requests for extended research were filled by EPA librarians in fiscal year 2005, the latest statistics available. The figure for database and literature searches exceeded 85,000. Of those, the three now-closed EPA libraries in Chicago, Kansas City and Dallas handled more 32,000 requests, records show."

The closures increased the burden placed on other libraries in the region. A former librarian at the University of Illinois-Chicago, Aimee Quinn, told EPA officials that when the Region 5 library closed, the university received a sudden increase in calls from EPA employees with research questions. "The burden you put on my library was very difficult," Quinn said.

Mike Flynn, the EPA's director of its Office of Information Analysis and Access, said that the closures would not damage the public's access to information because all the paper materials would be digitized and available online. According to the *Seattle Post-Intelligencer,* some EPA officials said that was not the case because copyright restrictions would only allow documents created by the EPA to be made available online. Critics also said the digitization was poorly planned and underfunded.

Francesca Grifo, a botanist and the director of scientific integrity at the Union of Concerned Scientists, an advocacy group for the environment and other scientific issues, said "Nobody is against modernization, but we don't see the digitization. We just see the libraries closing."

A group of House Democrats sent a letter September 19 to Government Accountability Office Comptroller David Walker stating, "Due to inadequate planning and lack of funding for digitizing documents, access to many documents will be temporarily or permanently lost." They also wrote, "It appears that EPA plans to shut libraries first and digitize documents later . . . It is unclear from the budget proposal of the plan what funds will be allocated to ensuring that paper and microfiche documents will be digitized and made available electronically."

Despite complaints from lawmakers and members of the scientific community and public, the system's headquarters library was closed in October after just 10 days notice to the public. A specialized library on chemicals was closed as well. According to officials at Public Employees for Environmental Responsibility (PEER), the EPA's Headquarters Library contained 380,000 documents on microfiche, 5,500 hard copy EPA documents and more than 16,000 books and technical reports produced by other government agencies. PEER Executive Director Jeff Rush called the closures "positively Orwellian."

PEER reported that when the agency closed its only specialized research repository on health effects and properties of toxic chemicals and pesticides in the fall, library staffers were reportedly ordered to destroy its holdings and throw the collection into recycling bins. Rush reacted, stating, "EPA's leadership appears to have gone feral, defying all appeals to reason or consultation."

On Nov. 30, 2006, after the midterm elections gave Democrats control of the House and Senate, four incoming House Democratic committee chairs sent a letter to EPA Administrator Stephen Johnson asking for assurances "that the destruction or disposition of all library holdings immediately ceased upon the Agency's receipt of this letter and that all records of library holdings and dispersed materials are being maintained." According to PEER, however, the very next day the EPA "de-linked thousands of documents from the Web site for the Office of Prevention, Pollution and Toxic Substances (OPPTS) Library."

PEER also reported that after the Chicago Region 5 library was closed, the "EPA ordered that all furniture and furnishings (down to the staplers and pencil sharpeners) be sold immediately." It

EPA Libraries, *continued on page 26*

"We have a deep concern with limitations these closings would place on the public's access to EPA library holdings and the public's 'right to know.'"

– Leslie Burger
American Library Association President

EPA Libraries, *continued from page 25*

noted that, "[d]espite an acquisition cost of $40,000 for the furniture and equipment, a woman bought the entire lot for $350. The buyer . . . estimates that she will re-sell the merchandise for $80,000." The group characterized the sale as an attempt to "limit Congressional options" and prevent the library from reopening.

Congressional pressure did appear to halt the closure of the Region 2 library to the public, as it was scheduled to be closed Jan. 2, 2007 but was not.

On Feb. 6, 2007, the first Congressional hearing was held on the subject. The Senate Committee on Environment and Public Works heard testimony from American Library Association President Leslie Burger. Burger said that closing the libraries meant that "valuable, unique environmental information will be lost or discarded." She stated, "We have a deep concern with limitations these closings would place on the public's access to EPA library holdings and the public's 'right to know.' In an age of global warming and heightened public awareness about the environment, it seems ironic that the Administration would choose this time to limit access to years of research about the environment."

"We remain concerned that years of research and studies about the environment may be lost forever."

– Leslie Burger
American Library Association President

Burger voiced concern about what she described as a "convoluted and complicated" process by which materials from the closed libraries were being shipped across the country to various sites for storage and slow digitization. "We remain concerned that years of research and studies about the environment may be lost forever," she said.

Burger also worried about the damage the closures would do and had done to the public's right to know, asking "Where will people look for information about their drinking water? Or which pesticides are safe for their grass? Or how much pollution is in the air of their hometown? These issues are of the utmost importance; our national health and safety depend on them!"

She called for an immediate halt to further closings and the dispersing and dumping of library materials, a stabilization of the materials already placed in storage and for the development of a plan and process to meet user needs in designing an effective digitization program.

EPA Administrator Stephen Johnson also testified before the Committee, maintaining that the switch from physical libraries to digital ones was aimed at "modernizing" the EPA library system and would lead to "even greater access to more people, in a more timely and efficient manner."

Chair of the Committee Sen. Barbara Boxer, (D-Calif.) questioned Johnson about e-mails concerning the disposal of library materials, but Johnson said he had no knowledge of such directives. Boxer gave him one month to respond to questions he was unable or unwilling to answer.

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

Information Access

Washington State Courts Reopen Sealed Records

After nearly a year of investigative reporting and legal challenges to sealed court records, *The Seattle Times* says Washington judges and court commissioners are now playing by the rules.

The newspaper first reported in March 2006 that King County Superior Court had approved sealing entire files on at least 420 civil suits, 622 guardianship cases and 692 divorce cases since 1990, often on nothing more than a request by one or both parties.

According to the Washington State Constitution, "Justice in all cases shall be administered [o]penly." Further, state law provides a detailed explanation for secrecy that stresses the public interest in open records, saying court documents can be sealed only if a judge finds "compelling circumstances" to do so.

But *The Seattle Times* reported that court officials had flouted the rules for years, and found that at least 97 percent of the sealing orders the newspaper reviewed violated secrecy rules put in place in the 1980s.

Since the newspaper launched its investigation, however, no civil, guardianship or divorce case has been sealed in its entirety, according to an article published Dec. 31, 2006. (The article and others related to it can be found on *The Seattle Times*' Web site special report section, "Your Courts, Their Secrets" at http://seattletimes.nwsource.com/html/yourcourtstheirsecrets/)

Courts have also corrected past mistakes. *The Seattle Times* reports that hundreds of files in King and surrounding counties have been opened at the newspaper's request. The King County clerk's office opened 294 files after being alerted that they were sealed by mistake.

Other cases required the newspaper to file a formal request or motion to unseal, resulting in legal fees for the newspaper of about $6,000 per case. The newspaper reports that it has filed 40 such motions in King County. Thirty-six have been granted, two denied, and two are pending. Judges also opened six cases without formal motions.

The Seattle Times also reported that the county courts of nearby Snohomish County have initiated a review of more than 1,000 sealed cases, 150 of which are now open.

The newspaper reported on a number of stories found among the cases unsealed in recent months. For example, the newspaper reported on Dec. 13, 2006 that the court had sealed a lawsuit over the rape of a 13-year-old girl by a youth worker while in the state's care at a group-home. According to the unsealed file, the group-home operator had ignored repeated warnings about the worker, and the state had argued in court that the victim herself was partly at fault for the rape.

The Seattle Times reported that a judge granted a motion by the girl's attorney to seal the file. The motion said the lawsuit "demonstrates unfavorable facts" about both the state of Washington and YouthCare and should be sealed "to protect all parties from embarrassment."

Another story on Dec. 17, 2006 covered a lawsuit filed by the family of a diabetic woman who had suffered brain damage caused by an insulin pump. The court file on which *The Seattle Times* based its story was sealed by Judge Richard Jones in October 2003 and then unsealed by Jones in fall 2006. *The Seattle Times* reported that information in the file raised concerns about the device itself and that Medtronic, the pump's manufacturer, had acknowledged in the lawsuit that the case was not reported to federal regulators.

The family also accused the University of Washington Medical Center, a public entity, of medical malpractice. According to *The Seattle Times'* Dec. 31, 2006 story, the university settled the case for $3.2 million, but the settlement required the plaintiffs not to tell anyone how much they were paid or why.

The Seattle Times also reported on Dec. 31, 2006 that state and local federal courts have adopted rules changes since the investigation began. The Washington Supreme Court amended rules to say that parties' desires for files to be sealed does not, by itself, constitute a compelling reason for a court to do so. The U.S. District Court for the Western District of Washington also changed its rules, now requiring a judge's permission before a lawyer can file a pleading under seal.

The Seattle Times also reports that King County judges and commissioners must receive extensive training on sealing restrictions. An old form that misstated the law on sealing records has been thrown out, and the power to seal records has been taken away from substitute court commissioners.

In a November 2006 hearing, Court Commissioner Kimberley Prochnau was asked about the possibility of keeping the terms of a civil settlement confidential. According to *The Seattle Times*, Prochnau responded that the parties desire for secrecy was no longer enough reason to seal a file.

"It's a new day," Prochnau said.

– Patrick File
Silha Research Assistant

The Seattle Times' investigation uncovered at least 97 percent of the sealing orders that the newspaper reviewed violated secrecy rules put in place in the 1980s.

Endangered Journalists

Russian Spy May Have Been Poisoned for Investigating Journalist's Death

Responding to reports that "rogue elements" of Russia's security forces may be responsible for poisoning former KGB officer Alexander Litvinenko, close acquaintances of Litvinenko publicly accused Russian authorities of targeting the ex-spy because of his investigation into the death of Russian journalist Anna Politkovskaya. The reports were published in London newspapers in early December 2006, quoting unnamed sources in British intelligence agencies.

"These latest developments only reinforce our thinking that it was the Russian government or some element of [Russia's] political landscape that was behind this," Alex Goldfarb, Litvinenko's friend and spokesman, told the Associated Press (AP) on Dec. 3, 2006.

"These latest developments only reinforce our thinking that it was the Russian government or some element of [Russia's] political landscape that was behind this."

– Alex Goldfarb, Alexander Litvinenko's friend and spokesman

Litvinenko died after ingesting a high dosage of a radioactive isotope, polonium-210, in London in November 2006. In a statement written shortly before his death, Litvinenko accused Russian authorities, including President Vladimir Putin, of poisoning him. On Nov. 28, 2006, *The* (London) *Daily Telegraph* reported that traces of the radiation that poisoned Litvinenko were found at the offices of Russian exile Boris Berezovsky, a close acquaintance of Litvinenko. According to the Associated Press, investigators have since found traces of radiation at a dozen or more sites across London. An Italian security expert, Mario Scaramella, who met with Litvinenko on November 1 in London also received medical attention for exposure to a small amount of polonium-210.

Newspapers reported on Dec. 1, 2006 that British investigators were searching for a group of five or more men who arrived in London shortly before Litvinenko fell ill. According to a BBC News report on Feb. 5, 2007, available at http://news.bbc.co.uk/2/hi/uk_news/ 6333809.stm, Berezovsky said that Litvinenko had discussed the poisoning with him before his death and said former KGB agent Andrei Lugovoi was responsible for his poisoning. Lugovoi, who met with Litvinenko the day he fell ill, denied any wrongdoing. "Lugovoi said he had been a victim of radiation poisoning himself, accused the British media of 'lies' and said he should be regarded as a witness and not a suspect," BBC News wrote. On January 31, BBC News reported that British authorities turned over the results of their investigation to the Crown Prosecution Service, who will be responsible for prosecuting Lugovoi. However, British authorities have yet to comment publicly on any alleged connection between Lugovoi and the Kremlin.

On Dec. 27, 2006, *The Current Digest of the Soviet Press*, a Russian national news service, reported that Putin dismissed speculation of involvement in Litvinenko's death. "[T]o my knowledge the London doctors' medical report does not say this was a violent death," Putin said. "So there is nothing to discuss in this regard."

At the same press conference, Putin also dismissed claims that the Kremlin and Russian authorities were involved in the October 2006 killing of Politkovskaya, a Russian journalist who often wrote publicly about alleged human rights abuses carried out by the Russian government in Chechnya. Politkovskaya was killed in a contract-style shooting as she entered her apartment, and speculation abounds that her murder was in retaliation for her criticism of Russian authorities and Putin. (See "Famed Russian Reporter Murdered in Contract Killing" in the Fall 2006 issue of the Silha *Bulletin*.)

The Associated Press reported on Dec. 3, 2006 that acquaintances like Goldfarb and others suspect that Litvinenko was targeted by Russian officials because shortly before being poisoned he was investigating ties between the Russian government and Politkovskaya's death. According to an editorial published by the *Times Editorials* service on November 27, Litvinenko was gathering information about the involvement of Russia's Federal Security Service (FSB) in Politkovskaya's death "[a]t the time he was likely poisoned." A report from *Voice of America* on Dec. 2, 2006 also confirmed that Litvinenko had been investigating the journalist's death.

According to the Associated Press, Scaramella gave Litvinenko a classified file at their November 1 meeting in a London sushi bar. The file purportedly showed that the names of both men and Politkovskaya were included on a hit list of Kremlin opponents.

The AP also reported that in a letter to human rights activists in Moscow former Russian intelligence officer Mikhail Trepashkin claimed that the FSB, a post-communist agency likened to the KGB, had created a "hit squad" to kill Litvinenko and other critics of the Kremlin. Trepashkin reportedly warned Litvinenko of such threats as early as August 2002.

Claims that Russian officials, including Putin, have targeted outspoken critics like Politkovskaya and *Forbes Russia* editor Paul Klebnikov have been widely published. (See "Russia's Supreme Court Overturns Acquittals in Klebnikov Case" in the Fall 2006 issue of the Silha *Bulletin* for more information.) However, few of these murders have been solved, leading the Committee to Protect Journalists (CPJ) to send a letter of concern to President George W. Bush in June 2006. Describing the "acute problem of impunity in violent crimes against journalists in Russia," then-CPJ Executive Director Ann Cooper cited over a dozen contract-style killings of journalists in Russia during Putin's tenure.

Putin and the Kremlin have denied any involvement in the deaths of their critics, and some Putin allies have described Litvinenko's death as a "falling out among the government's enemies," according to the AP.

On Jan. 9, 2007, *The New York Times* reported that Goldfarb and Marina Litvinenko, the former intelligence agent's widow, are planning to publish a book describing the life and career of Litvinenko in May.

– Christopher Gorman
Silha Research Assistant

International Updates

CPJ Urges Defense Department to Release or Charge AP Photographer Detained in Prison Camp

The New York-based Committee to Protect Journalists (CPJ) urged former Secretary of Defense Donald Rumsfeld to personally investigate the detention of Bilal Hussein, a freelance photographer and Iraqi citizen who worked for the Associated Press (AP) at the time he was taken into custody by U.S. military forces. Hussein, who has been held in an Iraqi prison camp for over 11 months, has not been charged with or tried for a crime, and the military has not disclosed any evidence implicating Hussein with criminal wrongdoing.

The organization "believes Bilal Hussein has been denied due process," CPJ Chairman Paul E. Steiger wrote in a letter dated Nov. 6, 2006. "Detaining a journalist for seven months without affording him or her due process of the law" represents "an unacceptable infringement on the ability of the press to carry out its work."

"He should either be charged with a crime in a court of law and given a fair trial or released at once," Steiger concluded.

According to an article published by the AP on September 25, Hussein worked as part of a team of AP photographers that was awarded a Pulitzer Prize in 2005 for its coverage of the conflict in Iraq. But on April 12, Hussein was taken into custody by U.S. forces in the Iraqi town of Ramadi. According to the military, Hussein was detained with two insurgents, including Hamid Hamad Motib, a reputed leader of Al Qaeda in Mesopotamia.

The AP also reported that Maj. Gen. Jack Gardner, who oversees the detention of individuals by the American military in Iraq, sent an e-mail to AP international editor John Daniszewski on May 7, shortly after Hussein's detention. "[Hussein] has close relationships with persons known to be responsible for kidnappings, smuggling, improvised explosive device attacks and other attacks on coalition forces," Gardner wrote. The military has continued to detain Hussein, citing "imperative reasons of security" as grounds for his detention.

For five months after Hussein was taken into custody, the AP conducted a review of the photographer's work, finding no indication of inappropriate contact with insurgents. According to a report published by the AP, executives for the organization worked with military officials to try to resolve the matter, then decided to publicly call on the military to transfer Hussein to Iraq's criminal justice system or release him.

But Bryan Whitman, a spokesman for the Pentagon, said that the military had not changed its position. "All indications that I have received are that Hussein's detainment indicates that he has strong ties with known insurgents and that he was doing things, involved in activities, that were well outside the scope of what you would expect a journalist to be doing," Whitman told reporters on September 18.

"Mr. Whitman says it would be 'up to the central criminal court of Iraq to charge Bilal with any wrongdoing.' But the Iraqi court can't do that until the U.S. military hands over Bilal and whatever evidence they have against him to Iraqi authorities," AP Associate General Counsel Dave Tomlin said in response to Whitman's statements. The Pentagon, he claimed, failed to address the AP's concern that Hussein receive due process.

On September 27, the States News Service reported that U.S. Rep. Louise M. Slaughter (D.-N.Y.) sent a letter to Rumsfeld, demanding that he take action in Hussein's case. The letter was cosigned by six other ranking Democrats in the House of Representatives.

"The fact that Mr. Hussein has not been charged with any crime only fuels speculation around the world that he is being held not because of security reasons, but because his work portrayed the situation in Iraq in an unfavorable light," Slaughter wrote.

In the letter sent to Rumsfeld by the CPJ in December, Steiger requested information about Hussein's detention from Assistant Secretary of Defense for Public Affairs Dorrance Smith. On October 5, Whitman provided Steiger with information on the general procedures governing Hussein's detention but "gave no specifics about the basis for his detention or whether the military would charge him with an offense."

According to Steiger, Hussein's detention is not an isolated incident. "Over the last three years, dozens of journalists—mostly Iraqis—have been detained by U.S. troops in the course of their work," Steiger wrote. "While most have been released after short periods, in at least eight cases documented by [the] CPJ Iraqi journalists have been held by U.S. forces for weeks or months without charge or conviction."

To support his claims that Hussein had been denied due process, Steiger pointed to procedures that U.S. military officials adopted in March 2006 to expedite reviews of charges or complaints against journalists detained in Iraq, including a 36-hour review period during which military officials are to examine a journalist's case. Although Hussein is not an American citizen, Steiger said that any denial of due process in his case "is openly at odds with the message of democracy and respect for the rule of law that U.S. officials have publicly espoused in Iraq."

As the *Bulletin* went to press, the Department of Defense had not responded publicly to the letter written by Steiger on behalf of the CPJ.

A copy of Steiger's letter to Rumsfeld is available online at http://www.cpj.org/protests/06ltrs/americas/usa07nov06pl.html.

– Christopher Gorman
Silha Research Assistant

"Detaining a journalist for seven months without affording him or her due process of the law" represents "an unacceptable infringement on the ability of the press to carry out its work."

– Paul E. Steiger
CPJ Chairman

International Updates

Global Internet Censorship on the Rise

Early results from a forthcoming report conducted by Internet watchdog group OpenNet Initiative (ONI) show that censorship on the Web is spreading and becoming more sophisticated.

The study undertaken by nearly 50 free speech and networks experts from around the globe "systematically tested if, when, how and by whom thousands of controversial Web sites are blocked in each nation," according to *Wired* magazine.

In November 2006, ONI researchers met at the Berkman Center for Internet and Society at Harvard Law School where they began to compile their findings. Those results will make up the first-ever comprehensive report on global Internet censorship, due out in Spring 2007. Some results are already posted on the ONI Web site, at http://www.opennetinitiative.net, including an interactive map with information on many countries' censorship schemes.

ONI found that the amount of information blocked, and how it is done, varies from nation to nation. In some cases, like Saudi Arabia, the government uses filtering software to block everything from sites classified as pornography or gambling to religious conversion sites, non-Sunni Islam sites, and sites critical of the Saudi monarchy. ONI says Saudi filtering is "relatively transparent." The government provides a Web site that explains what sites are blocked and why, as well as offering an opportunity for citizens to make suggestions for sites to be blocked.

In Vietnam, the government has claimed that it filters out only sexually explicit content. However, ONI found that although pornography remains relatively unfettered, religious and political sites critical of the one-party government are widely blocked.

Unlike in Saudi Arabia, Web surfers in Tunisia may not even realize the government is blocking access to certain sites. The Tunisian government displays a fake Internet Explorer "page not found" message when users' access is forbidden. ONI researchers discovered this because they do not use Internet Explorer.

Some governments may utilize denial of service attacks, in which a flood of attempts to view a Web site causes the site's server to overload, making the site unavailable to view by anyone. ONI researcher Stephen Murdoch of Cambridge University pointed to recent cases in Belarus and Kyrgyzstan where party opposition Web sites were attacked days before a national election. Proving that government officials were responsible for the denial of service attacks is nearly impossible, which, according to ONI researcher Nart Villeneuve of the University of Toronto's Citizen's Lab, may make it a more attractive means of censorship.

Another country using a more centralized and comprehensive Internet censorship regime is China, which has used a combination of tactics for controlling Internet content that officials consider obscene or politically subversive. These include implementing filtering software, requiring users and Internet café operators to purchase licenses, and laws and fines which are meant to encourage self-censorship, according to ONI.

China is said to have the second largest population of Internet users after the United States. Estimates from Reporters Sans Frontieres (RSF or Reporters Without Borders) and *The Washington Post* hover around 130 million users, most of whom cannot afford personal computers of their own and therefore frequent Internet cafés.

Accordingly, officials focus censorship efforts on these Internet cafés. *The Washington Post* reported on February 9 that a party leader in Gedong, Shanxi Province, has banned all Internet cafés for the last nine months, calling them a bad influence on the youth of the small town.

Although *The Washington Post* reports that officials in Beijing have found the ban in Gedong extreme, China has generally defended its censorship policy. In November, 2006 the Chinese government responded to criticism from RSF saying it complies with international standards and calling the criticism "groundless."

An annual RSF report on Internet censorship said that out of 61 people arrested worldwide for posting "subversive" content online, 52 were in China. China generally denies these claims.

In at least two cases, American service provider Yahoo! Inc. has drawn criticism for cooperating with Chinese officials in tracking down people who criticized the government or shared information it considered to be sensitive.

Jiang Lijun was sentenced to four years in prison in November 2003 for his online pro-democracy articles in China. According to court documents, Yahoo! Inc. had helped Chinese police identify him. Shi Tao, an editor with the *Dandai Shang Bao* (Contemporary Business News), was sentenced to 10 years in prison for sharing an internal official government memo with foreign news organizations. Shi's lawyer has said he plans to use the Alien Tort Claims Act to sue Yahoo! Inc. for turning him over to authorities. (For more on these and related stories in the Silha *Bulletin*, see "Endangered Journalists: Journalists in China" in the Fall 2004 issue, "Endangered Journalists: Yahoo! Assists China in Arresting Journalists" in the Fall 2005 issue and "Endangered Journalists: Chinese Journalists Battle Censorship, Yahoo!" in the Fall 2006 issue.)

During a February 2006 congressional hearing, American lawmakers leveled criticism at representatives from technology firms Yahoo!, Microsoft, Google and Cisco for self-censoring products and search results in return for the opportunity to offer their services to the world's fastest-growing online market.

Internet Censorship, *continued on page 31*

Internet Censorship, *continued from page 30*

The companies have defended doing business in China, however, saying that it is better that they provide the country's 1.3 billion people with some information rather than none. As an unnamed Google spokeswoman told the *Boston Globe*, "helping users around the world, including those in China, have more access to information is of course something Google fully supports."

But the companies also argue they cannot take on censorship alone. At a Jan. 30, 2007 State Department-sponsored conference on Internet censorship, legal counsel from Yahoo!, Microsoft, and Google urged the government to increase efforts to limit censorship worldwide, according to the Associated Press.

"We do have significant leverage as companies, but the government has the most significant amount of leverage, and we do need the government to be in play," said Michael Samway, deputy general counsel at Yahoo!.

In the meantime, journalists, bloggers, and Internet users in countries with expansive censorship regimes are still using the Internet as a means of expression unavailable to them before.

For example, teenagers in Gedong sneak in to underground Internet cafés that government officials do not know about to chat and play online games, according to *The Washington Post*.

In the Middle East, some outspoken bloggers rely on the strength of online communities when governments seek to block them or shut them down. For example, *The Washington Post* reported that in October 2006, the blog of prominent Bahraini activist Mahmood al-Yousif was blocked for publicizing government corruption. In response, fellow bloggers in Bahrain, Egypt and Saudi Arabia spread the word on their own blogs and urged people to sign a petition addressed to the Bahraini government. Bahraini officials were eventually successful at blocking al-Yousif's blog, but it was back up on another site within hours.

While having a blogging community within one's country or region has been helpful in keeping some dissidents online, it does not remove the danger of being caught and incarcerated. The aggressive pursuit and arrest of bloggers like Abdel Karim Nabil Suleiman by the Egyptian government led RSF to add that country to its "enemies of the Internet" list. Other Middle Eastern countries on the list are Iran, Syria, Saudi Arabia and Tunisia.

The good news for bloggers is that new technology may help them circumvent government censorship. In December 2006, University of Toronto's Citizen Lab released a new anti-filtering tool it developed to help Internet users sidestep the censors. "Psiphon" is a software solution that developer Ronald Deibert, director of Citizen Lab, told Agence France Presse is simple to use and leaves no trace on the user's computer. Users trying to access the Internet in a country that filters content, like China, Vietnam or Saudi Arabia, can login through a proxy server in another country and view content that would be otherwise blocked.

Deibert said users do not need to download any software, so they can use Psiphon from any computer. It requires little, if any, technical know-how and because it does not rely on a centralized server, the system will not be jeopardized if a single user is isolated by censors and blocked.

Citing the spread of censorship on the Web, Deibert said he hopes the software can help "restore the original promise" of free expression through the Internet.

– Patrick File
Silha Research Assistant

International

Al-Jazeera Launches English-Language Channel

The launch of the new channel has proven controversial due to the station's practice of broadcasting messages from terrorist organizations.

After years of speculation and delay, the Arabic broadcasting network Al-Jazeera launched an English-language news channel, Al-Jazeera English (AJE), on Nov. 15, 2006. The launch of AJE came three years after Al-Jazeera began maintaining an English-language news Web site in 2003, and just weeks after the *Financial Times* reported on Nov. 1, 2006 that Al-Jazeera plans to back a pan-Arab newspaper slated to begin publication in 2007.

"Al-Jazeera today is an international media organization. Al-Jazeera English will build on the pioneering spirit of Al-Jazeera and will carry our media model . . . to the entire world," the organization's director-general Wadah Khanfar said in a release that appeared on www.aljazeera.net on November 1. "The launching of the English-based channel offers the chance to reach out to a new audience that is used to hearing the name of Al-Jazeera without being able to watch it or understand its language."

Al-Jazeera, which is funded by Qatari Emir Sheik Hamad bin Khalifa al-Thani, announced that its signal would reach 80 million households across the world through cable and satellite. But despite the broadcaster's efforts to establish a presence in the West and its use of Western reporters, distribution outlets in the United States have largely refused to carry AJE. On November 15, *The New York Sun* reported that no cable operators within the United States have planned to carry AJE, and that the two largest satellite providers in the nation have opted out of carrying the Qatar-based channel. A minor satellite company, which specializes in international television feeds and reaches a number of American consumers, agreed to broadcast AJE at the time of its launch.

On November 27, *The Christian Science Monitor* reported that, in an effort to reach international audiences, Al-Jazeera chose to bypass traditional distribution channels at the time by broadcasting directly through the Internet. *The Monitor* reported that the move has been seen as a "stopgap" until Al-Jazeera can find outlets to carry the station on U.S. television.

The debate over AJE's potential presence in the U.S. has proven controversial, according to *The Monitor*. "Critics argue that allowing Al-Jazeera [English] to air on American television would be essentially giving a megaphone to those who spout anti-American propaganda," reporter Dante Chinni wrote.

Al-Jazeera, which has been criticized by President George W. Bush and officials within his administration for the network's airing of taped messages from Osama bin Laden and often-graphic coverage of conflict in the Middle East, has been described by the Associated Press as "burdened with a reputation among Americans as anti-U.S."

In the past, former Defense Secretary Donald Rumsfeld accused Al-Jazeera of spreading "vicious lies" and as demonstrating "a pattern of playing propaganda over and over," criticisms that have reemerged after the launch of AJE. Many commentators have come to view Al-Jazeera and AJE as "anti-American at best and a terrorist house organ at worst," according to *The Washington Post.*

Cliff Kincaid, editor of *Accuracy in Media Report*, pointed to troubling connections between Al-Jazeera journalists who have been convicted of collaborating with terrorist organizations in Spain and Afghanistan. "We haven't seen any evidence that tells us that [AJE] will be significantly different than Al-Jazeera in Arabic," Kincaid told *The Washington Post.*

Supporters, however, view the launching of AJE as an opportunity for many Americans to become more informed of events and opinions in the Middle East. According to Chinni of *The Monitor* and supporters, the station has a Western feel in both "style and substance" that differs from Al-Jazeera.

AJE, aiming to compete with Western broadcasters, plans to broadcast 24 hours of live news, interviews and features, and analysis programs daily. Broadcasting from Washington, D.C., London, Kuala Lumpur, and the organization's headquarters in Doha, Qatar, AJE plans to employ more than 250 journalists of 47 nationalities, including reputable Western reporters. The organization has already recruited BBC veteran Sir David Frost, former ABC news correspondent Dave Marash, and other Western journalists to host segments of AJE broadcasts.

But, like Al-Jazeera, AJE markets itself as an independent Arab voice on international news and touts its "fearless journalism" as a network slogan. Over the past decade, Al-Jazeera has addressed taboo political, religious and social subjects, angering leaders in the Western and Arab world according to the Associated Press. Although the station's news coverage has resulted in Al-Jazeera being banned from broadcast airwaves in over 18 countries, director general Khanfar hopes to bring the "same ground-breaking news and impartial and balanced journalism" to the Western world.

Richard Porter, who heads BBC News, was supportive of Al-Jazeera's international launch. "Looks like it is going to be a serious competitor for the two established channels, BBC World and CNN. . . They're going to be reporting the south to the north, they say. They won't follow the traditional agenda. I welcome their arrival. Competition is good in any market."

Marash, who will head AJE's Washington-based bureau, has defended AJE and its parent organization. "Al-Jazeera is one of the most positive and significant cultural events in the Arab world in centuries," Marash told reporters. "Do they broadcast hate speech? Yes, they do. Is it put in context and is it discussed as hate speech? Yes, it is. Hate speech is part of the dialogue of the Middle East. To censor

Al-Jazeera, *continued on page 33*

Al-Jazeera, *continued from page 32*

it would be to lose all credibility."

Riz Khan, a former BBC reporter now working for AJE, told *The Washington Post* that objection to Al-Jazeera has arisen because of its frank reporting on American military endeavors but defended the need to hold the U.S. accountable through journalism. "American news channels tend to 'show the missiles taking off,' Kahn said. 'Al-Jazeera shows them landing,' *"The Washington Post* reported.

Unfazed by a lack of support from satellite and broadcast distributors and vocal opposition by American critics, Khanfar expressed confidence that AJE broadcasts would continue to garner larger audiences internationally. "Our launch figure is over double the original target we set for ourselves. This is unprecedented in the broadcasting industry – no other international news channel has launched with such a high number of homes across the world," Khanfar said. "We will continue to build on this figure after launch and will be looking to expand our reach significantly. This is another reflection of the strength of the Al-Jazeera brand."

– Christopher Gorman
Silha Research Assistant

The *Bulletin*

is a quarterly publication of the

Silha Center for the Study of Media Ethics and Law

School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church St. SE
Minneapolis, MN 55455

Phone: (612) 625-3421
Fax: (612) 626-8012
E-mail: silha@umn.edu
www.silha.umn.edu

Please contact us to be added to our mailing list

FCC Update

Broadcasters Challenge Indecency Standards

Television networks and the creative guilds continue to fight the Federal Communications Commission (FCC) over indecency standards and the fines assessed to violators.

A three-judge panel of the Second Circuit U.S. Court of Appeals in New York heard oral arguments in *Fox Television Stations, Inc. et al. v. Federal Communications Commission*, No. 06-1760-ag(L) on Dec. 20, 2006.

Fox is challenging the FCC's finding that broadcasts of the 2002 and 2003 Billboard Music Awards show were indecent because they included profanities uttered by celebrities.

On Nov. 7, 2006, the FCC announced it had reversed its position on two other rulings of indecency: uses of the word "bullshitter" in late 2004 on CBS' "The Early Show" and of the words "dick," "dickhead" and "bullshit" on episodes of ABC's "NYPD Blue" in 2003. (See FCC "Backtracks on Some Indecency Rulings, Continues to Pursue Others in Court" in the Fall 2006 issue of the Silha *Bulletin*. For more information concerning the FCC's actions, see "FCC Crackdown on Indecency Leads to Historic Fines" in the Winter 2004 issue of the Silha *Bulletin* and "Bush Signs Broadcast Decency Enforcement Act; May Increase Fines for Indecent Programming" in the Summer 2006 issue.)

Lawyers argued that the new rules are a major shift for the FCC because in 30 years, the commission had never deemed "fleeting, isolated or inadvertent expletives" to be indecent.

Separate from the merits of Fox's appeal however, is the constitutionality of new indecency standards, implemented by the FCC in 2006.

The networks Fox, ABC and CBS and *amici,* who include the Directors Guild of America, Screen Actors Guild, Writers Guild of America, American Federation of Television and Radio Artists, American Civil Liberties Union and two former FCC commissioners, have called the standards unconstitutionally overbroad and inconsistently applied, and the fines, as high as $325,000 per incident, overly harsh. FCC standards say that "the F-word" in any context "inherently has a sexual connotation" and can be subject to enforcement when used to pander, titillate or for shock value.

Fox lawyers argued that the new rules are a major shift for the FCC. For 30 years, the commission has never deemed "fleeting, isolated or inadvertent expletives" to be indecent, they said in the oral argument.

The judges expressed skepticism about the FCC's ability to enforce the standards, according to an Associated Press (AP) article filed December 20, 2006. Judge Rosemary S. Pooler told FCC lawyer Eric D. Miller that the rules, "seem to be a scheme that depends on what you think, instead of having an objective criteria broadcasters can use."

Judge Pierre N. Leval raised the issue of context and applicability. According to the AP's December 20 article, Leval caused a stir in the courtroom when he asked Miller, "Would you be shocked to hear that a judge on the federal bench said 'fuck'?"

According to the AP, Miller defended the policy's applicability, telling the three-judge panel that news programs could air uncensored quotations from the hearings without FCC penalty, because such use of the otherwise indecent words would be for news purposes and would not meet the FCC's standard for sanctions.

As the *Bulletin* went to press, the court had not yet issued an opinion in the case.

– Patrick File
Silha Research Assistant

Broadcasting News

Public Broadcasting Facing Drastic Budget Cuts

President George W. Bush proposed steep budget cuts for public broadcasting in his fiscal year 2008 budget released in February 2007. His proposal would cut $145 million from the Corporation of Public Broadcasting's (CPB) 2006 budget of $460 million.

The proposal would cut over $53 million in grants to public TV and radio stations and take an additional $50 million from the $400 million CPB budget. It would also eliminate nearly $30 million in funding for TV stations to convert to digital signals, and another $34 million to improve the satellite connections used to connect the national PBS with its local stations. Both of the latter programs had already been approved by Congress.

Last year a Republican plan to cut the CPB's budget by 25 percent was dropped after lobbying and a rally from PBS supporters. This year, viewers and listeners will try the same tactic. John Lawson, president of the Association of Public Television Stations representing over 1,000 local stations, vows his group will begin lobbying to get the money returned to the budget. "We intend to mobilize grass-roots forces across the country to persuade Congress to ignore the president's request," Lawson told Bloomberg news.

Representative Edward Markey (D-Mass.) said, "Oscar the Grouch has been friendlier to the Sesame Street characters than President Bush. I don't understand why President Bush would propose more regressive cuts for this critical children's educational TV programming."

Meanwhile, the proposed budget calls for a 4.3 percent increase to broadcasting funds "targeted to the war on terror," which includes groups like Voice of America, Radio Free Europe/Radio Liberty, the Middle East Broadcasting Networks, Radio Free Asia, and the Office of Cuba Broadcasting. The Broadcasting Board of Governors Chair, Kenneth Y. Tomlinson, said in a statement, "In the post-Katrina budget environment, I believe we are fortunate to get an increase that strengthens our role in the war on terrorism."

Tomlinson made news in 2006 after he resigned from the CPB board chairmanship following an audit that revealed he had added conservative programming and recruited staff members based on their Republican politics. (See "CPB Releases Report on Former Chairman" in the Fall 2005 issue of the Silha *Bulletin*; CPB, PBS, and NPR Face Controversy over Funding and Focus of Public Broadcasting" in the Spring 2005 issue).

– Ashley Ewald
Silha Fellow and *Bulletin* Editor

> "We intend to mobilize grass-roots forces across the country to persuade Congress to ignore the president's request."
>
> – John Lawson
> President,
> Association of Public
> Television Stations

The Silha Center sponsors various events and activities throughout the year.

To learn about past and upcoming events and activities,
visit the Silha Center's Web site at

www.silha.umn.edu

2007 SILHA CENTER SPRING FORUM
SPJ ETHICS IN JOURNALISM WEEK

When Tragedy Strikes, What is the Media's Role?

Featuring: Linda Walker, mother of the late Dru Sjodin

SOCIETY OF PROFESSIONAL JOURNALISTS

April 24, 2007 • 7:00 - 9:00 p.m.

McNamara Alumni Center, Ski-U-Mah Room

University of Minnesota Twin Cities Campus

The Silha Center for the Study of Media Ethics and Law will once again partner with the Minnesota Pro Chapter of the Society of Professional Journalists to produce a program for National Ethics in Journalism Week. The theme of this year's Ethics Week is "Minimize Harm." The Forum will feature a panel of speakers, including Linda Walker, mother of the late Dru Sjodin, a representative from the Wetterling Foundation, and members of the media who worked on coverage of the Red Lake and Cold Spring School Shootings.

Free and open to the public - no reservations required.

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

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

SILHA CENTER
FOR THE STUDY
OF MEDIA ETHICS
AND LAW