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Major U.S. Newspapers Report On Classified Financial Tracking Program

Several newspapers, including *The New York Times*, *The Washington Post*, *The Wall Street Journal*, and the *Los Angeles Times*, ran stories in June 2006 revealing a classified program that tracks international financial transactions as part of the “War on Terror.” Reaction to these stories has been very strong, with some calling for treason charges to be brought against the newspapers and the United States House of Representatives passing a resolution critical of the media.

The New York Times was the first paper to publish the story on its Web site on the evening of June 22. *The Times* posting was almost instantly followed online by a similar story by *The Wall Street Journal*, with the *Los Angeles Times* and *The Washington Post* following quickly thereafter. These four newspapers, as well as several other papers subscribing to stories from them, ran the story in their June 23 print version.

The articles revealed a program conducted by the Central Intelligence Agency (CIA) and overseen by the Treasury Department utilizing the Society for Worldwide Interbank Financial Telecommunications (SWIFT) as a method of tracking financial transactions by suspected terrorists. According to the initial *New York Times* article, the SWIFT monitoring program began shortly after the Sept. 11, 2001 attacks as the Bush administration sought to trace and eliminate al-Qaeda’s financial backing. This program is separate from the program of domestic wiretaps on which *The Times* reported in late 2005. (See “Federal Electronic Surveillance Updates: Administration’s Domestic Spying Program Raises Constitutional Questions” in the Winter 2006 issue of the *Silha Bulletin*, and “NSA Roundup” on page 7 of this issue of the *Silha Bulletin*.)

Following the disclosure of the SWIFT program, privacy advocates questioned its legality. *The New York Times* quoted executive director of the American Civil Liberties Union (ACLU) Anthony Romero condemning the program as “another example of the Bush administration’s abuse of power.”

According to its Web site, SWIFT is a Brussels-based banking consortium that provides software to over 7800 financial institutions in more than 200 countries to facilitate financial services processing. A letter from SWIFT CEO Leonard Schrank on the Web site includes information about SWIFT’s compliance with Treasury Department subpoenas, as well as its discussions with Treasury officials to ensure confidentiality and control of the data subpoenaed. The Web site is available online at www.swift.com.

According to its article, *The New York Times* discussed the SWIFT program with more than 20 current and former government officials and industry executives on condition of anonymity. In addition, editors talked with members of the Bush administration and the Treasury Department for more than a month before the story appeared. Bill Keller, executive editor of *The Times*, acknowledged in the article that the administration asked *The Times* not to run the story, but *The Times* declined to abide by the administration’s wishes because the newspaper determined that the story was a matter of public interest.

The Times published a letter on June 25 by Keller explaining why the newspaper published the story, stating “Our default position – our job – is to publish information if we are convinced it is fair and accurate, and our biggest failures have generally been when we failed to dig deep enough or to report fully enough.”

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Bush administration reaction to the stories

The publication of these articles quickly drew criticism from politicians and members of the Bush administration, as well as from other members of the media. Officials credit the SWIFT program with helping to capture Riduan Isamuddin, an al-Qaeda operative believed to be responsible for a 2002 bombing in Bali, as well as assisting in identifying a Brooklyn man convicted of laundering money for al-Qaeda.

At a fundraising luncheon on June 23, the day the stories first appeared in print, Vice President Dick Cheney said that national security programs such as the finance tracking program are “good solid programs” that are “absolutely essential in terms of protecting us against attacks.” The Vice President also stated that media organizations that disclose these programs “offend” him because doing so makes it more difficult to prevent attacks against the American people.

During a photo session in the Roosevelt Room of the White House on June 26, President Bush expressed similar sentiments, contending that disclosing this program “does great harm to the United States of America.”

Former Treasury Secretary John Snow also condemned those who ran the article. Three days prior to his resignation on June 29, Snow posted a letter written to *The New York Times* on the Treasury Department’s Web site, available online at <http://www.ustreas.gov/press/releases/4339.htm>, stating that he was “deeply disappointed” in *The Times*, and expressing his belief that publishing the story was “irresponsible and harmful to the security of Americans.”

Snow’s letter attacking only *The New York Times* typified much of the official reaction to the articles. Most of the criticism was directed against only *The Times* even though articles on the same subject were published in other media outlets. These included an editorial in *National Review* calling for *The Times*’ press credentials to be revoked, library dean Mendell Morgan Jr. at the University of the Incarnate Word temporarily canceling the library’s subscription to *The Times*, and Congressman Peter King (R-N.Y.) calling for *The Times* to be prosecuted for violating the 1917 Espionage Act.

At his June 26 press briefing, White House Press Secretary Tony Snow claimed *The Times* “was in the lead on this one,” justifying the specific criticism. Keller, however, contended on CBS News’ “Face the Nation” on July 2 that criticizing *The Times* was an effort to mobilize conservative voters before the November mid-term elections.

The press reacts

An unusual subplot developed concerning *The Wall Street Journal*. *The Journal* was one of the original papers which published a story

about the SWIFT program. Washington Bureau Chief Gerald Seib claimed in an e-mail to *Editor & Publisher* that *The Journal* paper published its story “virtually at the same time” as *The New York Times*. Despite *The Journal*’s nearly simultaneous publication, the editorial section of *The Journal* has been extremely critical of *The Times*.

In an editorial entitled “Fit and Unfit to Print” published June 30, *The Journal*’s editorial section tried to distance itself both from its own news department, as well as *The Times*. The editorial attacked the credibility of *The Times*, claiming that *The Journal* article was a “straighter” story than the one in *The Times*, and that the *Journal* editors have greater credibility on national security matters with Americans in general. The editorial emphasized that, unlike *The Times*, *The Journal* was not asked by the administration to hold the story and that had it been asked, the newspaper would have abided by the administration’s wishes.

Following the appearance of the “Fit and Unfit to Print” editorial, John Harwood, a senior writer for *The Journal*, appeared on “Meet the Press” on July 2, stressing the separation between the news and editorial sections at *The Journal*. He also defended *The New York Times*, stating he did not know anyone at *The Journal* who believed *The Times* did not act in good faith in deciding to publish the story. *The New York Observer* reported further dissension at *The Journal*, with staff members contemplating a letter of protest to managing editor Paul Steiger about *The Journal* editorial department’s assertions about its news department.

Although some politicians and media outlets criticized *The Times* for publication, others defended the decision to run the story. The Society of Professional Journalists (SPJ) issued a press release applauding the papers, with its president David Carlson describing the media as “an essential ingredient in self government and as a check against abuse of power.” The American Society of Newspaper Editors also issued a statement, describing these papers as having done their work “professionally, accurately, and with careful consideration of the balance between the needs of security and openness that exist in a free society.”

Individuals have also responded to the demands for treason charges to be brought against the newspapers that published stories about the SWIFT program. In an article published July 2 in the *St. Petersburg Times*, Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Law and Ethics, said “If we’re going to allow prosecution of the press for publication of certain facts, what we’ve done is create an Official Secrets Act, like

“Our default position – our job – is to publish information if we are convinced it is fair and accurate, and our biggest failures have generally been when we failed to dig deep enough or to report fully enough.”

–Bill Keller,
Executive Editor,
New York Times

Great Britain.” Kirtley continued, “I think the founders of this country would be horrified at the notion that the government would classify publication of information as a crime.”

Defending their publication

Following the publication of the “Fit and Unfit to Print” editorial, *Los Angeles Times* managing editor Dean Baquet and *The New York Times*’ Keller co-authored an op-ed piece that ran in both papers on July 1. Their op-ed described the decision-making process for sensitive articles, explaining that the newspapers do not publish an article concerning a classified program until officials have been given an opportunity to comment. It also provided instances where the papers have withheld stories or portions of stories they believed may have put lives at risk had they been published. The piece closed by acknowledging the great responsibility editors face when deciding whether or not to publish an article, and how that decision is one they will not surrender to the government. The article is available online at http://www.nytimes.com/2006/07/01/opinion/01keller.html?ei=5070&en=2d0548a2a845e87f&ex=1156737600&pa_gewanted=all.

After the co-authored op-ed ran on July 1, *Editor & Publisher* reported that Paul Steiger, managing editor of *The Wall Street Journal*, and Leonard Downie Jr., executive editor of *The Washington Post*, had been asked if they wished to join Baquet and Keller’s column. However, both declined. Steiger said that his paper’s position on the issue differed from that of the op-ed piece, and Downie said he did not want to participate in order to preserve the independence of his paper.

Prior knowledge of the SWIFT program

Another justification the papers have offered for writing a story about the SWIFT program is that the Bush administration previously stated that it is attempting to track the finances of suspected terrorists. In a speech two weeks after the 9/11 attacks, President Bush said that the United States was going to work with banks and financial institutions to freeze or block terrorists’ ability to acquire finances.

The Boston Globe also unearthed reports specifically mentioning use of SWIFT. *The Globe* quoted former U.S. diplomat Victor D. Comras stating that “A lot of people were aware that this [the SWIFT program] was going on.” Comras co-authored a report for the United Nations Security Council in 2002 mentioning that the United States has used SWIFT to gather intelligence about terrorist financing, and suggested other countries do the same.

Notwithstanding both general references to tracking money and specific references to SWIFT itself, there are still those who claim disclosing the program is detrimental to its

effectiveness. National Intelligence Director John Negroponte has ordered an investigation to see what effect these stories have on the SWIFT program’s effectiveness, but newspapers like *The New York Times* speculated that such an investigation will take a long time.

House Resolution praising SWIFT and condemning press

Many members of Congress condemned the media’s disclosure of the SWIFT program. On June 29, the House passed House Resolution 895 (H. Res. 895) by a largely party-line vote of 227-183.

The resolution, drafted by Rep. Michael Oxley (R-Ohio) endorsed efforts to track foreign terrorists and their financial supporters through the program, describing it as “rooted in sound legal authority.” Without singling out any by name, the resolution also condemned the media organizations for their disclosure, stating that the House “expects the cooperation of all news media organizations in protecting the lives of Americans and the capability of the government to identify, disrupt, and capture terrorists by not disclosing classified intelligence programs such as the Terrorist Finance Tracking Program.”

The floor debate for H. Res. 895 was extensive, involving a wide range of statements, with some members of Congress supporting an uninhibited press, others calling for grand jury investigation of leaks and possible treason charges, and others upset that an alternative resolution was not given an up-or-down vote and accusing Republicans of partisan politics. The debate was also peppered with references to the leaking of Valerie Plame’s identity as a CIA operative, with some representatives wondering why no treason charges and uproar over leaks immediately followed Robert Novak’s article exposing her. (See “Reporters Privilege News: New York Times’ Judith Miller Released After 85 Days; Dole Suggests Identities Law Not Violated in the Fall 2005 issue of the *Silha Bulletin*; see “Reporters Privilege News: Supreme Court Denies Cert in Miller/Cooper Cases” in the Spring 2005 issue of the *Silha Bulletin*; see “*In re: Grand Jury Subpoena*, 397 F.3d. 964 (D.C. Cir.)” and “Plame Update: Journalists Miller and Cooper Appeal Their Sentences” in the Winter 2004 issue of the *Silha Bulletin* and “Reporters Privilege: *In re: Special Counsel Investigation*” and “Columnist’s Story Prompts Investigation into Government Leaks” in the Fall 2003 issue of the *Silha Bulletin*.)

Although the resolution and its language condemning the media easily passed the House, representatives from both sides of the aisle expressed their respect for and the importance of the media during the floor debate of the resolution. Rep. Ron Paul (R-Texas) urged

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his colleagues to vote against the resolution because of the role media reports play in ensuring Americans are secure. Rep. John Dingell (D-Mich.), the longest serving member of the House with over 50 years in office, summarized the sentiments of opponents of the measure, stating “it is the press that informs the public, and we should have nothing to fear from an enlightened population.” The full text of the floor debate is available online at http://www.fas.org/irp/congress/2006_cr/h062906.html.

Two additional resolutions were not granted a vote. House Resolution 900 (H. Res. 900) was an alternative to H. Res. 895. It supported the tracking of terrorists but did not specifically praise the SWIFT program. The other, House Resolution 904 (H. Res. 904), introduced by Dingell, commended the press for its history of keeping the public informed about government activities, and described the news industry as “indispensable to the health of our democratic institutions.”

The resolution passed by the House was non-binding, meaning it is without any legal force.

In the Senate, Sen. Jim Bunning (R-Ky.) was quoted in the (Louisville) *Courier-Journal* saying that when *The Times* published the SWIFT story, it gave “aid and comfort to the enemy, [and] therefore it is treason.” A resolution proposed by Sen. John Cornyn (R-Texas) similar to H. Res. 895 was not endorsed by Chairman of the Judiciary Committee Arlen Specter (R-Penn).

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Media Leaks

Ruling in Lobbyists Case May Carry Implications for Journalists

Although the case involved lobbyists and not journalists, the ruling in *U.S. v. Rosen and Weissman*, 2006 U.S. Dist. LEXIS 56443 (E.D. Va., August 9, 2006) has implications that may affect the news media, especially those who face accusations of receiving classified information and disseminating it to others. (See “House Permanent Select Committee on Intelligence Holds Hearings on Information Leaks; Silha Center Director Jane Kirtley Submits Statement” in the Spring 2006 issue of the *Silha Bulletin*.) Aspects of the case have already affected one reporter, Jack Anderson. Although Anderson died in December 2005, the Federal Bureau of Investigation is seeking access to approximately 200 boxes of his notes and papers.

The case

Steven J. Rosen and Keith Weissman were both employees of the American Israel Public Affairs Committee (AIPAC) in Washington, D.C. AIPAC is a pro-Israel organization that lobbies the United States executive and legislative branches on issues of interest to Israel, particularly with regard to U.S. foreign policy in the Middle East. According to the opinion by Judge T.S. Ellis, III, Rosen was AIPAC’s Director of Foreign Policy Issues and was primarily engaged in lobbying executive branch officials who had policy-making authority. Formerly a RAND employee with security clearance, his security clearance had been terminated when Rosen left the company in the early 1980s.

Weissman was AIPAC’s Senior Middle East Analyst and worked closely with Rosen in lobbying the executive branch. Unlike Rosen, Weissman never had any sort of security clearance.

According to the indictment, Rosen and Weissman are charged with orally passing classified information, including information about the al-Qaeda network and the bombing of the Khobar Towers in Saudi Arabia, to the media and to foreign embassy workers. Rosen and Weissman are charged with violation of the Espionage Act, currently codified at 18 U.S.C. § 793(d), (e) and (g), which covers unauthorized possession of information relating to national defense. The Act creates penalties for passing on the information to any other unauthorized person, or for refusing to turn over information to the proper United States authorities.

Rosen and Weissman attacked the constitutionality of § 793 in their motion to dismiss, arguing that the statute is not only constitutionally vague but also abridges their First Amendment rights to free speech and to petition the government. Rosen and Weissman also claim that § 793 is overbroad and that the statute should be interpreted to apply only to the transmission of tangible items, such as documents, tapes, discs, and maps.

Judge Ellis wrote that cases decided by the U.S. Supreme Court and the Fourth Circuit have not found the language contained in § 793(d) and (e) to be vague. Ellis discussed the system currently used by the government to classify documents into one of three categories – Top Secret, Secret and Classified – and concluded, “[W]hile the language of the statute, by itself, may lack precision, the gloss of judicial precedent has clarified that the

statute incorporated the executive branch’s classification regulations, which provide the requisite constitutional clarity.”

Ellis noted that the defendants’ First Amendment challenge “exposes the inherent tension between government transparency so essential to a democratic society and the government’s equally compelling need to protect from disclosure information that could be used by those who wish to do this nation harm.” Ellis cited Justice Oliver Wendell Holmes’s opinion in *Schenck v. United States*, 249 U.S. 47 (1919), who wrote, “The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.” Ellis added, “Indeed, subsequent Supreme Court decisions have confirmed that while the First Amendment must yield at times to the government’s interest in national security, at other times, the First Amendment interests at stake must prevail.”

Citing the “Pentagon Papers” case, *New York Times v. United States*, 403 U.S. 713 (1971), involving publication of classified information during the war in Vietnam, Ellis wrote, “The collection and discussion of information about the conduct of government by defendants and other in the body politic is indispensable to the healthy functioning of a representative government.”

But Ellis found that Rosen and Weissman “are not accused merely of disclosing . . . government secrets, they are accused of disclosing . . . government secrets the disclosure of which could threaten the security of the nation. And, however vital an informed public may be . . . it is obvious and arguable that no governmental interest is more compelling than the security of the Nation. . . . Thus, the right to free speech and the value of an informed citizenry is not absolute and must yield to the government’s legitimate efforts to ensure the environment of physical security which a functioning democracy requires.”

Finally, Ellis addressed Rosen’s and Weissman’s argument that two classes of people are subject to prosecution under § 793(d) and § 793(e). Section 793(d) generally applies to government employees, military personnel or defense contractors who have access to classified information by virtue of their official position, and are bound by contractual agreements not to disclose that information. Section 793(e) generally applies to anyone who has no such contractual relationship to the government, and, Ellis wrote, “therefore [has] not exploited a relationship of trust to obtain the national defense information they are charged with disclosing, but instead generally obtained the information from one who has violated such a trust. . . . In essence, [Rosen’s and Weissman’s] position is that once a government secret has been leaked to the general public, the first line of defense is thereby breached, and the government has no recourse but to sit back and watch as the threat to the national security caused by the first disclosure multiplies with every subsequent disclosure.” Ellis concluded that “[B]oth common sense and the relevant

“The right to free speech and the value of an informed citizenry is not absolute and must yield to the government’s legitimate efforts to ensure the environment of physical security which a functioning democracy requires.”

–Judge T.S. Ellis III

precedent point persuasively to the conclusion that the government can punish those outside of the government for the unauthorized receipt and deliberate transmission of information relating to national defense.”

Ellis further found that, had the issue behind the Pentagon Papers been framed in the context of § 793(e), the ruling in that case might have been different. And although § 793(e) did not specifically come before the high court in that case, Ellis observed that “a survey of [the Justices’] opinions indicates the likelihood that they would have upheld a criminal prosecution of the newspapers . . .”

With Ellis’ ruling, the trial against Rosen and Weissman will proceed, although no trial date had been set when the *Bulletin* went to press.

Jack Anderson’s papers

On March 3, 2006, two FBI agents appeared at the home of Mark Feldstein, a former investigative reporter who once worked with Jack Anderson, but who is now the director of the journalism program at George Washington University. In doing research for a book about Anderson, Feldstein was allowed access to Anderson’s papers that have been donated to the university by Anderson’s family. Anderson was a longtime reporter and syndicated columnist, writing the “Washington Merry-Go-Round” from 1969 until 2004. He won a Pulitzer Prize in 1972 for his coverage of relations between the United States and Pakistan. Other notable stories included the plot to kill Cuban president Fidel Castro and investigations into the Iran-Contra scandal. Anderson was also famous for his role in reporting on the Nixon administration. Learning that Feldstein was in possession of Anderson’s documents, FBI agents came to his home and demanded to see the papers.

“I asked what crimes the agents were investigating,” Feldstein wrote in an April 29, 2006 *Washington Post* article. “Violations of the Espionage Act,” the agents responded, saying that they were looking for documents marked “classified” that might be used as evidence in the case against Rosen and Weissman. In a written statement prepared for a June 6 hearing before the Senate Committee on the Judiciary, Feldstein wrote that the FBI agents told him that finding documents about the AIPAC case in Anderson’s files might “demonstrate a pattern and practice of leaking.”

The New York Sun reported that the FBI wanted to see if any of the papers had fingerprints belonging to Weissman or Rosen. Bill Carter, a special agent with the FBI, told *The New York Sun* that the federal government has the power to obtain classified documents from any individual. “There is no legal basis under which a third party can retain as part of an estate classified documents,” Carter told the newspaper. “The documents remain the property of the U.S. government. They contain information such as sensitive sources and methods. The U.S. government has reasonable concern over the prospect that these classified documents would be made available to the public at the risk to national security and in violation of the law.”

The FBI also contacted the Anderson family on April 5 requesting access to Anderson’s papers. On April 18, Don Goldberg of Qorvis, a public relations firm, posted a letter to the FBI written on behalf of the Anderson family denying the FBI’s request, which they thought would

have been Jack Anderson’s wish. The family’s letter is available online at http://www.qorvis.com/2006/04/fbi-outrage-bureau-attempts-to_18.html. Describing Anderson as “a patriot with a deep and abiding love for his country and its people,” the family’s letter stated that Anderson believed “[Our government] is a government of the people. The people are the sovereigns; those who work in government are our servants. We the people have the right to know what our servants are doing when they act in our name. . . . The stakes are too high in a democracy where everything rests on an informed people. . . . I have tried to break down the walls of secrecy in Washington [D.C.] . . . More and more of our policymakers hide behind those walls. Only the press can stand as a true bulwark against an executive branch with a monopoly on foreign policy information. It has all the authority it needs in the First Amendment.”

Calling the scope of the government’s review “too broad,” the family criticized the FBI’s intention “to remove all material marked as ‘classified’ in any form and either permanently retain it or return it in some redacted or edited form.” To do so, they wrote, “would destroy the historic, political and cultural value of Mr. Anderson’s papers.” Furthermore, a search of Anderson’s papers “could still expose the identity of sources of the ‘Washington Merry-Go-Round.’ As the family understands the government’s interpretation of existing laws, this could expose those sources to criminal prosecution.”

Finally, the family wrote that the dates of the activities leading to the indictment against Rosen and Weissman began in 1999, at which time Anderson was suffering from failing health and was “no longer actively engaged in reporting.”

The story first broke nationally in a *Chronicle of Higher Education* article written by Scott Carlson and published April 18. Carlson wrote, “Observers of academic freedom and libraries say that the FBI’s request is part of a renewed emphasis on secrecy in government, which has focused on libraries and archives in particular. Recently, librarians have been concerned about scores of documents that have been reclassified at the National Archives . . .” See “Government Restrictions on Information: Reclassification Policies Revised at National Archives” in the Winter 2006 issue of the *Silha Bulletin*.)

Carlson quoted Tracy V. Mitrano, an adjunct assistant professor of information science at Cornell University, who characterized the FBI’s request for Anderson’s papers as “utterly alarming,” and who said, “Once you begin taking records out of library archives that researchers rely on for free inquiry and research purposes, it would be very difficult not to see it as a slippery slope toward government controlling research in higher education and our collective understanding of American history.”

On June 6, the Senate Judiciary Committee held a hearing questioning FBI officials about their interest in the Anderson papers. Witnesses included Feldstein; Anderson’s son Kevin; Matthew Friedrich, Chief of Staff for the Criminal Division of the U.S. Department of Justice; Rodney Smolla, Dean and Professor of the University of Richmond School of Law; and Gabriel

Federal Electronic Surveillance Update

Judge Finds NSA Domestic Wiretapping Program Violates Statutory and Constitutional Law

The first federal court to address the constitutionality of the National Security Agency's (NSA) domestic wiretapping program, which was authorized by President Bush shortly after the September 11, 2001 terrorist attacks, ordered the executive agency to abandon the program. District Judge Anna Taylor, who issued the order on August 17, 2006 in the federal District Court for the Eastern District of Michigan, found that the NSA's practice of engaging in domestic surveillance without first obtaining warrants violated statutory law, the Separation of Powers doctrine, and the First and Fourth Amendments. In reaching her decision, Taylor rejected the government's argument that the case, *ACLU v. NSA*, should be dismissed because it would require the government to disclose state secrets and threaten national security. Civil Action No. 438 F.Supp.2d 754 (E.D. Mich. 2006).

"Implicit in the term 'national defense' is the notion of defending those values and ideas which set this Nation apart," Taylor wrote, quoting former Chief Justice Earl Warren, *U.S. v. Robel*, 389 U.S. 258 (1967). "It would indeed be ironic if, in the name of national defense, we would sanction the subversion of . . . those liberties . . . which make the defense of the Nation worthwhile."

The American Civil Liberties Union (ACLU) and the organization's Michigan-based affiliate filed the lawsuit on January 17, 2006, after an article published in *The New York Times* on December 16, 2005 broke the domestic wiretapping story. *The Times* reported that, following the September 11, 2001 terrorist attacks, President Bush authorized the NSA to search for evidence of terrorist activity in the United States through domestic wire surveillance. According to the article, NSA personnel listened to domestic phone calls and screened e-mails exchanged between individuals in the United States and individuals believed to be affiliated with terrorist groups outside the country. The surveillance was conducted without a warrant as required by the Foreign Intelligence Surveillance Act (FISA), 50 U.S.C. Chapter 36 (2006).

According to the complaint, the action was brought on behalf of scholars, lawyers, journalists and nonprofit groups who claimed that the NSA program violated Americans' rights to free speech, association and privacy under the First and Fourth Amendments. The program, the ACLU claimed, interfered with the ability of United States citizens to communicate with sources, locate witnesses, conduct scholarship and engage in advocacy. "Persons abroad who before the program spoke with [plaintiffs] by telephone or internet will no longer do so," Taylor wrote in the August 17 opinion.

On March 9, 2006, the ACLU filed a motion for partial summary judgment, asking the court to declare the NSA domestic wiretapping program unconstitutional, illegal and exceeding the scope of executive authority under FISA and the Administrative Procedures Act, which implements the administrative

procedures of FISA, 5 U.S.C. § 702. The ACLU also requested attorneys fees and a permanent injunction preventing the NSA from continuing to monitor domestic communications without warrants. The ACLU also filed a Statement of Undisputed Facts, offering evidence that the government has publicly acknowledged the existence and scope of the program. The information contained in the complaint and the evidence already admitted by the government, the ACLU argued, were enough for Taylor to enter declaratory and injunctive relief.

On May 26, 2006, the government filed a response and requested that Taylor dismiss the case before considering any of the ACLU's arguments, claiming that the case would require the government to disclose state secrets. The "state secrets" doctrine, which allows government agencies or officials to assert a privilege to prevent the disclosure of information that may threaten national security, requires courts either dismiss a lawsuit that requires the government to disclose state secrets under *Totten v. United States*, 92 U.S. 105 (1875) (reaffirmed in *Tenet v. Doe*, 544 U.S. 1 (2005)), or exclude evidence related to privileged information under the state secrets doctrine of *United States v. Reynolds*, 345 U.S. 1 (1953). See "Court Rules in 50-Year-Old Secrecy Case" in the Fall 2004 issue of the *Silha Bulletin*.

An article published on July 11, 2006 by *The New York Times*, reported that Anthony J. Coppelino, a government attorney, also cited a congressional resolution passed in 2001, Authorization For Use of Military Force in Response (AUMF) to the 9/11 Attacks, P.L. 107-40, 115 Stat. 224 (2001), as authorization for the President to engage in electronic surveillance throughout the war against terrorism, refuting the ACLU's claim that the President exceeded his constitutional authority when he ordered the NSA to engage in domestic surveillance.

The issues were addressed by Taylor in her August 17 decision. Taylor first considered the government's argument that the state secrets privilege barred the court from hearing the ACLU's case because, without the use of state secrets, the ACLU could not establish a claim. After discussing the historical development of the "state secrets" doctrine, Taylor wrote: "Defendants' assertion of the privilege without any request for answers to any discovery has prompted this court to first analyze this case under [*Totten*], since it appears that Defendants are arguing that this case should not be subject to judicial review." The "state secrets" doctrine under *Totten* and its progeny, however, applies only where there exists a "secret espionage relationship between the Plaintiff and the Government," typically a kind of contractual relationship. No such relationship existed between the government, the ACLU, or any of the co-plaintiffs. Taylor, therefore, was not barred from reviewing the case and declined to dismiss the ACLU's lawsuit.

Taylor wrote that the President undisputedly violated the Fourth Amendment in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment Rights of these Plaintiffs as well.

Taylor did, however, find that “because a reasonable danger exists that disclosing the information in court proceedings would harm national security interests,” the privilege did apply to undisclosed materials submitted to the court by the government, which would mean that they could not be offered as evidence in the case under *Reynolds*. But in this case, the ACLU was not seeking additional discovery of privileged information. It was undisputed, Taylor wrote, that the program exists, that it operates without warrants and that it targets communications where only one party to the communication is outside the United States and is expected to have ties to terrorist organizations. Taylor wrote, “As the Government has on many occasions confirmed the veracity of these allegations, the state secrets privilege does not apply to this information.” With the exception of the ACLU’s claim that the NSA was involved in the wholesale “datamining,” or searching, compiled databases of telephone calls made to or from the United States, the information made available in earlier court documents, Taylor said, was not privileged.

Taylor then considered the ACLU’s constitutional and statutory claims. She recounted the history of electronic surveillance in the United States. “In 1972, the court decided *U.S. v. U.S. District Court*, 407 U.S. 297 (1972) (the *Keith* case) and held that, for lawful electronic surveillance even in domestic security matters, the Fourth Amendment requires a prior warrant.” FISA, according to the opinion, was enacted in 1978 and was intended to provide the “exclusive means by which electronic surveillance of foreign intelligence communications may be conducted,” 18 U.S.C. §2511(2)(f). Taylor wrote that FISA recognized the importance and value of electronic surveillance in gathering foreign intelligence but with due regard to “our national commitment to the Fourth Amendment.”

“[T]he Fourth Amendment, about which much has been written, in its few words requires reasonableness in all searches. It also requires prior warrants for any reasonable search, based upon prior-existing probable cause, as well as particularity to persons, places, and things, and the interposition of a neutral magistrate between Executive branch enforcement officers and citizens,” Taylor wrote. In enacting FISA, Congress made concessions to the needs of foreign surveillance, including delaying applications for warrants in certain situations, reducing the probable cause requirement to a less stringent standard, and extending the duration of approved wiretaps. It did so with the knowledge that searches conducted without prior approval by a court warrant were unreasonable *per se* under the Fourth Amendment. See *Katz v. U.S.*, 389 U.S. 347 (1967). Accordingly, Taylor found, the NSA’s domestic wiretapping program was implemented “without regard to FISA,” and therefore “obviously in violation of the Fourth Amendment.”

Taylor proceeded to consider the ACLU’s First Amendment claims. Quoting the Supreme Court opinion in *Marcus v. Search Warrants*, 367 U.S. 717 (1961), Taylor wrote “The Bill of Rights was fashioned against the background of knowledge that

unrestricted power of search and seizure could also be an instrument for stifling the liberty of expression,” presenting unique concerns for the Fourth and First Amendments. FISA, Taylor wrote, explicitly admonishes executive attempts to monitor individuals who qualify as “United States persons” based on their exercise of First Amendment rights. 50 U.S.C. §1805 (a)(3)(A). The President, Taylor wrote, “undisputedly violated the Fourth [Amendment] in failing to procure judicial orders as required by FISA, and accordingly has violated the First Amendment rights of these Plaintiffs as well.”

By violating not only the constitutional rights of the plaintiffs but also engaging in domestic surveillance without following the procedures required by FISA, Taylor wrote, the President exceeded the scope of his constitutional authority. Under *Youngstown Sheet & Tube v. Sawyer*, 343 U.S. 579 (1952), in which the court held that an executive order issued by Harry S. Truman to stabilize the faltering steel industry by seizing private steel mills was not within the executive power of the President, Taylor found that President Bush acted without congressional authorization on a matter that involved the constitutional powers of Congress.

When the President takes measures that are incompatible with the express or implied will of Congress, Taylor wrote, his power limited to only matters over which Congress has no constitutional authority. “In [the present] case, the President has acted, undisputedly, as FISA forbids. FISA is the expressed statutory policy of our Congress. Taylor found that the (AUMF) was not authorized by Congress to engage in domestic surveillance in violation of FISA as well as the First and Fourth Amendments. Rather, the AUMF was a broad grant of power that did not take the place of specific statutory provisions. “Even if that Resolution superseded all other statutory law, Defendants have violated the Constitutional rights of their citizens including the First Amendment, Fourth Amendment, and the Separation of Powers doctrine.” Taylor wrote: “The presidential power, therefore, was exercised at its lowest ebb and cannot be sustained.”

The executive director of the American Civil Liberties Union (ACLU), Anthony D. Romero, described the decision as a “landmark victory against the abuse of power that has become the hallmark of the Bush administration” in a press released issued on August 18, 2006. Government lawyers, however, indicated that they would appeal to the Sixth Circuit Court of Appeals. According to a Joint Stipulation filed by the government on August 17, 2006, the parties have agreed to a stay of the district court’s judgment pending Taylor’s upcoming decision on the government’s motion for a stay pending appeal. *The Washington Post* reported on September 2 that the Bush administration asked Taylor to suspend her ruling while the government appeals. If Taylor grants the request, the NSA will be allowed to continue the domestic surveillance program.

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Federal Electronic Surveillance Update

NSA Roundup

USA TODAY retracts portion of surveillance story

On June 30, 2006, *USA TODAY* retracted a portion of the National Security Agency (NSA) domestic surveillance story published in May 2006. The newspaper was the first to report that the NSA, with the cooperation of AT&T, Verizon, and BellSouth, had compiled a database of domestic phone calls.

Days after the story was published, BellSouth and Verizon denied having contracted with the NSA. According to the newspaper's retraction, "[t]he denial was unexpected" because reporters at the paper had spoken with sources at each company for several weeks and had even read portions of the story to representatives at each prior to publication asking for a confirmation or denial.

After follow-up reporting, the newspaper said in its retraction that "*USA TODAY* has now concluded that while the NSA has built a massive domestic calls record database involving the domestic call records of telecommunications companies, the newspaper cannot confirm that BellSouth or Verizon contracted with the NSA to provide bulk calling records to that database."

An adjoining article reported that five members of the House and Senate intelligence committees said they were told in secret briefings that BellSouth did not participate in the program, and three members said they were told Verizon also did not turn over call records. However, four said Verizon's subsidiary MCI did participate.

President Bush and Senator Specter agree on deal to review the constitutionality of domestic wiretapping

In July 2006, President Bush agreed to a deal negotiated by Senate Judiciary Committee Chairman Arlen Specter (R-Pa.) which requires the president to submit the warrantless surveillance program to a court for constitutional review. (See "Administration's Domestic Spying Program Raises Constitutional Questions" in the Winter 2006 issue of the *Silha Bulletin* for more information.) The review would consider the constitutionality of the program overall and would not focus on individual cases. The deal would require consolidating more than 100 lawsuits filed against the surveillance operation into a single case before the Foreign Intelligence Surveillance Court (FISA Court). One of the most well-known of that group is a class-action suit filed by the Electronic Freedom Foundation (EFF) against AT&T in January 2006, alleging that the company gave secret, direct access to the phone records and e-mails of millions of Americans. The government intervened in the case and asked that it be dismissed because it would expose "state secrets." In July, U.S. Chief District Court Judge for the Northern District of California Vaughn Walker rejected that argument and denied both the government's and AT&T's motions to dismiss the suit, writing that "[t]he compromise between liberty and security remains a difficult one. But dismissing this case at the outset would sacrifice liberty for no apparent enhancement of security." In another well-known case, Judge Anna Diggs Taylor of the federal district court in Detroit decided in August 2006 that the entire wiretapping program was unconstitutional. For more on that case, *ACLU v. National Security Agency*, see "Judge Finds NSA Domestic Wiretapping Program Violates Statutory and Constitutional Law" on page 6 of this issue of the *Silha Bulletin*.

Although Specter said the bill was a result of "tortuous negotiations" with the White House, the Judiciary Committee's senior Democrat, Sen. Patrick Leahy (D-Vt.) called the legislation "an interesting bargain."

The Center for National Security Studies director Kate Martin was critical of the deal. "They would set up a system of sham judicial review," she said. *FindLaw* columnist Edward Lazarus was equally critical. "[T]his legislation is no compromise," he wrote. "It aims to render the Executive's compliance with FISA voluntary - and that's Attorney General Gonzales's interpretation, not just my own. It also aims to ensure that no meaningful judicial evaluation of the Bush program will ever take place."

Lazarus noted that under the current Foreign Intelligence Surveillance Act, only the FISA Court can grant permission for foreign intelligence wiretaps without warrants. The new legislation, however, includes a disclaimer that it "shall not be construed to limit the constitutional authority of the president to collect" foreign intelligence and also permits wiretapping "under the Constitution." Lazarus characterized that statement as "a clear reference to the President's purported independent power to surveil, which the Administration claims stems straight from our founding document." He concluded by noting, "If Congress wants to endorse what Bush has been doing, it should do so honestly and not pretend that it is setting up a genuine judicial evaluation of the President's power to do what he's been doing." The column is available online at <http://writ.news.findlaw.com/lazarus/20060720.html>.

Word of the compromise came after hearings regarding the surveillance program were held in Congress on July 19, 2006. Judge Richard A. Posner, who sits on the United States Court of Appeals for the Seventh Circuit, told the House Intelligence Committee that the requirement for court warrants under the FISA was "obsolete" and stated, "The challenge for intelligence is not to track down known terrorists. It's to find out who the terrorists are."

But Michael S. Greco, president of the American Bar Association, disagreed. He told the Committee, "The awesome power to penetrate Americans' most private communications is too great a power to be held solely by the executive branch of government."

— ASHLEY EWALD
SILHA FELLOW

Bush Signs Broadcast Decency Enforcement Act; May Increase Fines for Indecent Programming

On June 15, 2006, President Bush signed into law the Broadcast Decency Enforcement Act of 2005 (S. 193), which increases tenfold the penalties that television and radio broadcasters can be charged for the transmission of obscene, indecent, or profane language. Previously the maximum penalty that the Federal Communications Commission (FCC) could assess was \$32,500 per incident, but the new bill raises the maximum penalty to \$325,000 for a single violation. Although some groups touting “family values” championed the new law, which does not apply to cable or satellite operators, broadcasters and some media researchers warn of its potential chilling effect on the broadcast industry.

According to the *Los Angeles Times*, the signing of the bill ends a battle begun by lawmakers and family groups following the now infamous “wardrobe malfunction” of singer Janet Jackson during CBS’s broadcast of the 2004 Super Bowl. (See “FCC Updates: FCC Crackdown on Indecency Leads to Historic Fines” in the Winter 2004 issue of the *Silva Bulletin*.) That incident precipitated a rash of complaints to the FCC, with the *Times* reporting that there were as many as 13 calls per minute after the broadcast. At that time, the maximum indecency fine was \$27,500, which was assessed against 20 CBS-owned stations that broadcast the incident, for a total of \$550,000.

In September 2004, the maximum fine increased to \$32,500 per incident, and at the end of 2004 another CBS broadcast again triggered a spate of fines, this time for sexual content in an episode of the television drama, “Without a Trace.” The total fines for that episode, which were assessed to 111 stations, added up to more than \$3.6 million, though that sum was reduced to roughly \$3.3 million after eight stations’ fines were cancelled because those stations, which are in Indiana, aired the show after 10 p.m. Stations are prohibited by FCC rules from airing indecent content between the hours of 6 a.m. and 10 p.m. local time. As the *Times* reported, had the violation occurred after the new law was passed, those fines could have reached as much as \$36 million.

Most of the arguments in support of the bill have focused on what its proponents see as the intended benefits for families and children. Calling it “a good bipartisan bill,” Bush told the audience present as he signed the bill, “By allowing the FCC to levy stiffer and more meaningful fines on broadcasters who violate decency standards, this law will ensure that broadcasters take seriously their duty to keep the public airwaves free of obscene, profane and indecent material. American families expect and deserve nothing less.” Senator Sam Brownback (R.-Kan.), who sponsored the Senate version of the bill, told the *Times* in a statement, “This is a victory for children and families.”

Another supporter of the bill is the Parents Television Council (PTC), which describes itself on its Web site as a “nonpartisan organization that works with elected and appointed government

officials to enforce broadcast decency standards.” The PTC’s Web site can be found online at www.parentstv.org. According to both the *Times* and the *Wall Street Journal*, the PTC has been responsible for sending thousands of complaints to the FCC in recent years for alleged decency violations. L. Brent Bozell is the PTC’s president and also president of the Media Research Center, a conservative organization calling itself “the leader in documenting, exposing, and neutralizing liberal media bias,” according to its Web site, which can be found online at www.mediaaresearch.org. Regarding the Broadcast Decency Enforcement Act, Bozell told Cox News Service, “We hope that the hefty fines will cause the multibillion-dollar broadcast networks finally to take the law seriously.”

But critics of the bill are concerned not only that higher fines will have a potentially chilling effect on all broadcasters, but also that the fines may place a disproportionately high burden on smaller stations and broadcasters, which are responsible for any network programming they air. Jeff Stein, a media professor at Wartburg College in Iowa, agreed, telling Cox News Service that the potential fines will likely lead to increased censorship. “Let’s say I’m running a station. If I’m previewing a program, even if the producer or the network did not censor something, I may impose greater censorship just to be careful, because if there’s a fine, it’s coming out of my budget,” Stein said. Louis Wiley Jr., executive editor of PBS’s “Frontline,” echoed Stein’s sentiments, telling Cox News Service, “I don’t see how anyone could take the risk of fighting a fine that could be \$325,000.”

Wiley wrote an article for *Current* on July 17 detailing the way the increased fines have already affected his work at PBS, which he said recently instituted two new requirements for editors when their programs contain “coarse language.” First, Wiley wrote, if a word is “bleeped or wiped (silenced), the entirety of the word must be bleeped or wiped, meaning that ‘mother-F-word’ would now have to be ‘bleep bleep.’” Second, “if the F-word or the S-word were uttered to camera so that viewers could recognize it from the speaker’s mouth, the lips must be pixelated,” Wiley continued. If mouths are pixelated, Wiley argued, some viewers and media critics will likely find humor in otherwise serious content. And, he wrote, “If public television producers are forced to not only bleep words but also to pixelated lips, most will simply cut the scenes, no matter how powerful or relevant, rather than see them turned into a joke.” The article is available online at <http://www.current.org/fcc/fcc0613indecency.shtml>.

Expressing more general concerns, Marjorie Heins, founder of the Free Expression Policy Project in New York, told Cox News Service that the bill “will have a chilling effect across the board,” and viewers should expect “more bleeps [and] more delayed rather than instantaneous news and feature reporting.”

Although some groups touting “family values” championed the new law, broadcasters and some media researchers warn of its potential chilling effect on the broadcast industry.

Government Restrictions on Information

FEMA Reconsiders Policy on Media Access To Victims of Hurricane Katrina

When Baton Rouge *Advocate* reporter Sandy Davis tried to interview residents of post-Katrina Federal Emergency Management Agency (FEMA) trailer parks in July 2006, she was interrupted by security guards who told her that FEMA regulations prohibited her from speaking with residents. But following intervention by the Society of Professional Journalists (SPJ), FEMA officials revamped their policy within ten days.

Davis's July 15 story focused on the failings of the trailer parks as seen by the residents. Residents said that some parks were well-equipped with electric, sewer, and water service, while others lacked amenities such as pay phones and public transportation. Some trailers remained unused, even though many families were still on waiting lists for shelter. And although there are some parks that are both well-equipped and filled to near-capacity, some have expressed concern about money "wasted" on them. For example, it was alleged that bids were awarded to more costly, out-of-state companies when local companies had offered lower bids.

Davis reported that during her interview with resident Dekotha Devall in her trailer in Morgan City, a security guard knocked on the door and ordered Davis and a photographer to "leave immediately," yelling, "You are not allowed to be here. Get out right now." Davis and photographer complied, but the guard nevertheless forbade Davis to give Devall a business card as she left.

Later that same day, Davis and the photographer visited another trailer park in Morgan City, speaking with resident Pansy Ardeneaux through a fence surrounding the park. The same security guard appeared, telling Ardeneaux that "You are not allowed to talk [to Davis]. Return to your trailer now." Ardeneaux obeyed.

FEMA spokesman Rachel Rodi told *The Advocate* that the matter with the security guard was under review, but that FEMA policy prohibited the media from initiating conversations with residents in their trailers. "If a resident invites the media to the trailer, they have to be escorted by a FEMA representative who sits in on the interview," Rodi said. "That's just a policy."

Other reporters have also experienced problems in interviewing evacuees. The Associated Press reported that at Zirlott Park, an unidentified reporter and photographer from Mobile's *Press-Register* were denied access to the park by a security guard on June 2, 2006. After complaining to FEMA officials, the reporter and the photographer were allowed into the park to interview a resident, but only with a security guard accompanying them. FEMA officials told the Associated Press that more "stringent security rules" had recently been implemented at the park since drug and prostitution issues had become a problem.

But residents told the Associated Press that family and friends have also been denied entrance, and

that these restrictions, allegedly in place to protect residents' privacy, makes them feel like third-class citizens. "I think they're just trying to make it hard on us so that we'll leave sooner," one resident told the Associated Press.

FEMA has cited the Federal Privacy Act, 5 U.S.C. §552(a), for refusing to give out addresses for those residents who were relocated in Katrina's aftermath. Lynn Keating, a FEMA spokeswoman, told the Associated Press, "These people have a right not to have the media or solicitors knocking on their door whenever they want to." But these privacy concerns have led to other problems as well. *The Advocate* reported that Plaquemines Parish President Benny Rousselle said there were "hundreds of trailers" available for former residents of the parish who were forced to move away following Katrina, but FEMA will not disclose how to contact those residents now. "I think a lot of them would come back here if they knew we had places for them to live," Rousselle told *The Advocate*.

Only days after learning about Davis's difficulties in interviewing the trailer park residents, SPJ began its own inquiry into FEMA's policy. SPJ's National Freedom of Information Co-Chairman Charles Davis wrote a letter outlining his concerns to FEMA director David R. Paulison. "We are outraged by the arrogance and contempt for public discourse on display in Louisiana. . . . Now FEMA is banning reporters from public property, even as the reporters try to provide scrutiny of the agency. These journalists are attempting to access public property, in broad daylight, and to speak with consenting residents of a trailer park paid for with federal tax dollars. . . . We request that your office review the constitutionality of any policy that dictates how and when those affected by FEMA's work may speak to the press. . . . The residents of the region – who have suffered so mightily – surely deserve nothing less than the freedom to tell their stories." SPJ's July 26 press release with excerpts from Davis's letter is available online at <http://www.spj.org/news.asp?ref=601>.

By July 25, FEMA had released a new policy. The new policy requires any reporter visiting a trailer park or other group site to show photo identification and matching press credentials, and also requires them to sign in and out with a security officer, but allows reporters to speak with residents without a security officer present. Public information officers also do not need to be present. The new guidelines are available online at http://www.rcfp.org/news/documents/extra/fema_policy.html.

The Advocate's Executive Editor Linda Lightfoot wrote in an e-mail to the *Bulletin*,

"Sandy's story proves that the press should write about interference with news-gathering. Too often, we consider access disputes 'inside baseball,' something our readers don't care about. But people

"The residents of the region - who have suffered so mightily - surely deserve nothing less than the freedom to tell their stories."

– Charles Davis,
National Freedom of
Information
Co-Chairman, SPJ

Katrina, continued on page 14

AIPAC, Anderson, continued from page 6

Schoenfeld, senior editor of the conservative magazine *Commentary*. Senators on the committee included Chairman Arlen Specter (R-Pa.), Patrick J. Leahy (D-Vt.), and Charles E. Grassley (R-Iowa).

During the hearing, Friedrich frequently refused to answer questions, according to *The Chronicle of Higher Education*. At one point, a frustrated Leahy asked him, “Why were you the one picked to come up here?”

Feldstein’s written statement before the Judiciary Committee contended that the FBI’s actions in seeking access to the Anderson files raises several questions. He asked: “Who authorized the FBI to pour through the Anderson archives? Were Justice Department prosecutors, intelligence agencies, or other branches of the government involved? What program or policy guidelines – with what parameters and objectives – were FBI agents executing when they sought these records?” Feldstein continued, “What other papers of living or deceased journalists have similarly been sought by the federal government? Have congressional archives been targeted? What is the underlying program and rationale for these efforts?”

Feldstein also addressed larger issues raised by such searches, such as gaps created for academic research when archival records are damaged or lost; the reluctance of reporters to engage in investigative journalism when they face the potential of an abuse of power; and the loss of trust by the public when it realizes the press could be an arm of law enforcement.

On September 7, the *GW Hatchet*, a newspaper serving the George Washington University community in downtown Washington, D.C., reported that the university continues to deny the federal government access to the Anderson papers, which are stored at an undisclosed location on campus. The *Hatchet* also reported, however, that the university’s media relations office last had contact with the FBI about the Anderson papers in the spring of 2006. Feldstein told the *Hatchet*, “I am hoping that all the criticism has caused the FBI to back off and realize that the benefit is less than the cost for doing this.”

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Decency Enforcement Act, continued from page 10

The fines remain substantially lower for individuals who violate the Act, however. They can be charged a maximum of \$11,000 per incident, according to Backstage.com, a Web site devoted to news and casting information for actors. According to Backstage.com, a proposed House version of the law included much higher fines for individual artists, but both the Screen Actors Guild and the American Federation of Television and Radio Artists fought to have that part of the bill changed. Alan Rosenberg, national president of the Screen Actors Guild, told Backstage.com in a statement that the final version of the Act is “a victory for artists, broadcasters, and members of the public because of what it did not include: increased fines on individual artists and individual broadcasters.”

In addition to that perceived victory, some analysts are optimistic about other aspects of the bill. Media studies professor Douglas Gomery of the University of Maryland told the *Times* that he thought the new fines are not so high as to deter the largest media companies from continuing to run more controversial content in a bid to attract viewers. Instead, he thinks “they’ll see it as the cost of doing business,” Gomery told the *Times*. And *The Wall Street Journal* reported in May 2006 that the stricter policies may lead to a “backlash, with broadcasters showing a new willingness to take the fight to the courthouse.” According to *The Journal*, broadcasters can appeal fines to the FCC, and if those appeals are denied, they can then challenge those fines in federal court – an expensive process, but one that, if successful, may end up costing less than the record new fines.

In fact, on July 28, 2006, CBS appealed its \$550,000 fine for the Super Bowl incident. Although that fine was imposed under the previous maximum penalty, CBS argued that the fine was “unconstitutional, contrary to the Communications Act and FCC rules and generally arbitrary, capricious and contrary to law,” the Associated Press reported. FCC spokesperson Tamara Lipper disagreed, telling the Associated Press, “Millions of parents, as well as Congress, understand what CBS does not: Janet Jackson’s ‘wardrobe malfunction’ was indeed indecent.” In order to fight the fine in court, CBS first had to pay it, but if successful, the network could receive a full refund, according to *Communications Daily*. CBS filed its challenge to the fine in the Federal Court of Appeals for the Third Circuit. As the *Bulletin* went to press, no ruling on the challenge had been issued.

– PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Government Restrictions on Information

Reporters Forced to Leave Guantanamo Bay

Three days after three detainees at the United States military detention facilities on Guantanamo Bay, Cuba committed suicide, the Department of Defense (DOD) informed reporters from the *Los Angeles Times*, the *Charlotte Observer*, and the *Miami Herald* that they were no longer allowed access to the detention center. Citing a directive from the office of Secretary of Defense Donald Rumsfeld, an e-mail received by the reporters on June 13, 2006 instructed all media personnel to return to the United States on a military flight scheduled for the following day. By mid-day on June 14, 2006, all four journalists were back in Miami, Fla.

On the morning of June 10, 2006, reporter Michael Gordon and photographer Todd Sumlin were the only journalists at Guantanamo Bay with access to the detention facilities. Gordon and Sumlin planned to profile North Carolina native and base commander Army Col. Mike Bumgarner for the *Charlotte Observer*. According to an article, "Military Probes Release of Guantanamo Information," available online at <http://www.charlotte.com/mld/charlotte/news/14821438.htm>, editor Rick Thames of the *Observer* said that Gordon and Sumlin had arrived on base at the invitation of Bumgarner and planned to stay for six days while profiling the base commander.

The afternoon of June 10, reporters from a number of media organizations were scheduled to arrive on base at the invitation of military officials to cover upcoming military commission hearings. But when military personnel discovered that three detainees hanged themselves early that morning, the hearings were postponed. Reporters planning to arrive at the base that afternoon were told that they would not be allowed access. However, Carol Rosenberg of the *Miami Herald* and Carol Williams of the *Los Angeles Times* arrived at the base later that afternoon after chartering their own commercial aircraft to take them to the island.

Gordon's story on the suicides and the immediate military reaction in the hours after the detainees's deaths was published on June 11. Rosenberg and Williams also covered the story after their arrival midday. According to a June 14 article in *Editor & Publisher*, Gordon's "eye-opening" dispatches were widely carried by other newspapers across the nation in the days following the suicide. "Obviously, my mission changed once the suicides occurred," Gordon told a colleague at the *Observer* for an article available online at <http://www.charlotte.com/mld/charlotte/14819585.htm>. "I was very clear with the military and their attaches that I was writing daily stories."

On June 12, Gordon was allowed to attend a staff meeting held by Bumgarner and other base commanders. In an article that appeared in the *Observer* the following day, available online at <http://www.charlotte.com/mld/charlotte/news/14804763.htm>, Gordon reported that Bumgarner "ordered his staff to assess and curtail existing policies on detainee

clothing, meals, recreation time, prison lighting and discipline. He ordered more frequent patrols in the cellblocks. He said existing rules on detainee behavior must be enforced quickly and fully," Gordon wrote. Concerned that other detainees may attempt suicide as what military officials called an act of war, Bumgarner instructed guards on how to cope with such threats from over 450 detainees at the prison, saying, "There is not a trustworthy son of a ... in the entire bunch."

Following publication of Gordon's account of the meeting, Rosenberg and Williams were notified by e-mail that they were to leave the base on a military flight scheduled the following morning. According to a June 15 article in the *Observer*, Gordon was told by officials at the Pentagon that the journalists from the *Observer* would be permitted to accompany Rosenberg and Williams on June 14 or remain on the island but without access to the detention facilities, until the following Saturday. Military officials gave no reason why Gordon and Sumlin would be allowed to stay while other journalists on the island were ordered to depart on June 14.

J.D. Gordon, a Pentagon spokesman for the Department of Defense, denied that the order to remove outside media from the island was issued in response to the article written by the *Observer* reporter. The Pentagon spokesman explained that access to Guantanamo Bay had been suspended in light of new security risks and complaints from other media organizations that had not been allowed access to the military base. According to an *Editor & Publisher* article published on June 14, the Department of Defense was threatened with legal action if it did not allow major media organizations equal access to the detention facilities. "Some of the things [Gordon] wrote caused controversy, about changing detainees' clothes and forced entry," Gordon said on behalf of Pentagon officials. "But we are not into content management. The issue was that other media were threatening to take us to court."

On June 15, the day after the journalists arrived in Miami, however, *Editor & Publisher* reported that military officials at Guantanamo had begun investigating whether officers at the prison improperly revealed classified or sensitive material to the press.

Following the removal of the reporters, a Department of Defense spokesman explained at a press conference that access to Guantanamo Bay had been suspended in light of new security risks and because of legal action threatened by media organizations that had not been allowed on base. But, while administration officials faced continuing attacks on the legitimacy and secrecy of the Guantanamo detention center, the Department of Defense's decision to expel reporters fueled criticism from civil liberties advocates and media organizations. On June 18, the *Observer* reported that attorneys and at least some reporters would again be allowed access to the military prison on Guantanamo on June 19.

Guantanamo, continued on page 14

"If the United States wants to restore its credibility as a democracy in the eyes of the world, it should be inviting journalists in, not kicking them out."

-Anthony D. Romero,
Executive Director,
ACLU

Katrina, *continued from page 11*

do care. They do understand our role and they support us. Readers need to be told when government tries to prevent us from affording people an opportunity to be heard or when government tries to prevent us from bringing them news. The ‘good news’ is that readers reacted to FEMA’s restrictions on the residents and the press. They were appalled. This was still another instance of a government entity’s misplaced reliance on the Privacy Act.” Lightfoot is also a member of the advisory board of the Silha Center for the Study of Media Ethics and Law.

This is not the first time reporters have been restricted when trying to cover issues related to Hurricane Katrina. See “Media Repulse Ban on Katrina Coverage” in the summer 2005 issue of the *Silha Bulletin*.

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Guantanamo, *continued from page 13*

“[I]f the United States wants to restore its credibility as a democracy in the eyes of the world, it should be inviting journalists in, not kicking them out,” a statement issued by Anthony D. Romero, executive director of the American Civil Liberties Union (ACLU) said. “Our government insists it has nothing to hide, but its actions show otherwise.”

The Society of Professional Journalists (SPJ) also condemned the decision to expel reporters as “unconscionable” in light of the public interest, according to a press release issued by the organization on June 21. “At a time when the United States military fights for the cause of democracy and works to strengthen the credibility of Guantanamo, the removal seems inappropriate and counterproductive. If ever a moment called for greater transparency, it is when the United States government insists that it has nothing to hide,” the SPJ release said.

On June 14, *Editor & Publisher* reported that executive editor of the *Herald*, Tom Fiedler, expressed his disapproval directly to the Pentagon. “Ms. Rosenberg arrived at Guantanamo and proceeded to report on the suicides with the full support of base personnel and with the direct knowledge of Gen. John Craddock, who arrived Sunday,” Fiedler wrote in a letter to military officials. “Neither Ms. Rosenberg nor the *Miami Herald* seek to remain indefinitely at Guantanamo nor to have exclusive or special access. However, we respectfully suggest that, while aspects of the suicides remain undetermined, it is in the best interest of the DOD and the public that the news media be present.”

The expelled reporters were among those whose reactions were widely captured by the press following the incident. On June 18, Williams wrote a column in which she described the challenges faced by reporters attempting to cover Guantanamo Bay and a reluctant administration. “In the best of times, covering Guantanamo means wrangling with a Kafkaesque bureaucracy with logistics so nonsensical that they turn two hours of reporting into an 18-hour day, with hostile escorts who seem to think you’re in league with Al Qaeda, and with the dispiriting reality that you’re sure to encounter more iguanas than war-on-terror suspects,” Williams wrote.

For additional information about the treatment of the press at Guantanamo Bay, see “U.S. Government and the Media: Media Attending Detainee Hearings Must Follow Rules,” in the Summer 2004 issue of the *Silha Bulletin*; “Access to Government: CIA Ordered to Release Detainees’ Treatment Records,” in the Winter 2005 issue of the *Silha Bulletin*; “Media Ethics Update: Newsweek Caught in Unnamed Sources Controversy,” in the Spring 2005 issue of the *Silha Bulletin*; and “Freedom of Information Act News: Transcripts of Guantanamo Tribunals Released,” in the Winter 2006 issue of the *Silha Bulletin*.

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Government Restrictions on Information

New Jersey Media Ban in Prisons Reversed

New Jersey Acting Prison Commissioner George Hayman reversed a little-known ban on one-on-one interviews in state prisons one day after a Newark paper's report made it public. Hayman had instituted the ban after being named Acting Commissioner in January 2006, but it was not until June 14, 2006, when *The Star-Ledger* printed a story about the ban, that it gained notoriety. According to that article, the ban was "one of the nation's tightest restrictions on media access to state prisons." New Jersey briefly joined California as one of the only states banning inmate interviews until the policy was reversed.

As part of the ban, reporters could only write letters to inmates and were not allowed to call or visit in person. A spokesperson for the prison system said the ban had been implemented due to security concerns.

Media watchers and others took issue with the ban. *The Star-Ledger* quoted Edward Martone, a director at the non-profit Association on Correction, stating, "The Department of Corrections is a public institution funded by tax dollars. The public has a right to know how its money is being spent."

Director of the American Civil Liberties Union (ACLU) of New Jersey Edward Barocas said that "[s]uch a practice would appear to violate freedom of speech and freedom of the press, which are crucial to ensuring government accountability. When journalists are not allowed into a prison, you have to wonder what could be covered up and why."

And the Bridgewater, NJ *Courier News* published an editorial calling the ban a "dumb policy" and vowed that "[j]ournalists will fight for the public's right to know at every turn, even over something as relatively inconsequential as prison access, because government officials are forever trying to keep the public out of their business." It went on to say that "Hayman isn't closing off the prisons from public view for any reason other than he can – corrections officials have discretion over the granting of inmate interviews, among other things. And that's the wrong reason to slam another door shut on public access."

The media's criticism provoked a swift response from the prison system. On June 15, 2006, one day after *The Star-Ledger* first reported the ban, it was reversed. Hayman decided that he would instead personally review every media interview request and decide whether or not to grant it. Reporters were also allowed to be added to prisoners' visitation lists, although they could not bring writing materials or recording equipment to those visits without Hayden's approval.

The executive director of the New Jersey Press Association, John O'Brien, was quoted in a June 15 *Star-Ledger* article as saying that prison officials had "seen the light" and that he thought they made the "right decision."

– ASHLEY EWALD
SILHA FELLOW

As part of the ban, reporters could only write letters to inmates and were not allowed to call or visit in person.

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FOR RESEARCH ON MEDIA ETHICS AND LAW
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Government Restrictions on Information

Ohio Mayor's Restriction of Employees' Speech Does Not Violate Media's First Amendment Rights

On June 27, 2006, the United States Court of Appeals for the Sixth Circuit vacated a district court decision which found that a Youngstown, Ohio mayor had not violated the First Amendment when he ordered city workers not to speak with reporters from a local newspaper. In *Youngstown Publishing Co. v. McKelvey*, Case No. 06a0444n.06, 2006 U.S. App LEXIS 16586 (6th Cir. June 27, 2006), a three-judge panel declined to address the constitutional questions raised by the newspaper's lawsuit, finding that the newspaper's claims against the mayor were rendered moot when a new mayor took office on January 1, 2006 and rescinded the bar to media access.

The lawsuit was originally filed in federal court on Feb. 22, 2005 by *The Business Journal*, a bi-monthly newspaper that regularly reports on the city government of Youngstown, Ohio. The newspaper claimed that the city's mayor, George M. McKelvey, violated its First Amendment rights by banning city employees from speaking to the newspapers reporters. Shortly before the suit was filed, McKelvey sent a letter to Andrea Wood, publisher and editor of *The Business Journal*, notifying her that city employees were not allowed to communicate with reporters from the newspaper, but stating that the city would continue to honor requests for public records under Ohio's Public Records Act, Ohio Rev. Code Ann. 149.011 (2006).

The newspaper's claims were based on a federal Civil Rights statute that makes it illegal for government officials to deprive citizens of their constitutional rights, in this case the First Amendment guarantee of free speech, 42 U.S.C. § 1983 (1996). The Associated Press reported on Feb. 23, 2005 that McKelvey instructed city workers not to speak with *The Business Journal* only after the newspaper began criticizing the mayor in 2003 for planning to purchase land for a convocation center without first having that land formally appraised. "Such retaliation is illegal," Wood later wrote in an article published in the summer 2005 issue of *Nieman Reports*, a publication of The Nieman Foundation for Journalism at Harvard University. She described McKelvey's order as "nothing more than the mayor's personal animus" directed at *The Business Journal's* exercise of its First Amendment rights.

On May 16, 2005, District Judge Peter C. Eonomus of the United States District Court for the Northern District of Ohio dismissed the newspaper's claims. The opinion, *Youngstown Publishing Co. v. McKelvey*, Case No. 05-3842, 2005 U.S. Dist. 9476 (N.D. Ohio May 16, 2005), filed that same day, found that *The Business Journal* was denied access to "individual comments and off-the-record statements" that are generally not available to the public and to which the media is not entitled. Access to statements made by public employees on public matters, Eonomus wrote, was a privilege rather than

a right. "A reporter may achieve privileged access to government information," Eonomus wrote, "but a reporter does not have a constitutional right to maintain privileged access."

Eonomus wrote in his opinion: "The Court concludes that the right of access sought by *The Business Journal* is to information not otherwise available to the public, and, therefore, is a privileged right of access above that of the general public to which no constitutional right of access applies. The No-Comment Policy does not impede *The Business Journal* from engaging in a constitutionally protected activity and Plaintiffs cannot establish this element of their First Amendment Retaliation claim. Consequently, Plaintiffs have failed to demonstrate a likelihood of succeeding in prevailing on the merits of the claim."

Eonomus found that McKelvey's instruction to city workers did not adversely affect the newspaper's ability to report on the policies or actions of city officials in Youngstown, even if McKelvey had restricted access in retaliation for the newspaper's earlier criticism.

On August 8, 2005, *The Business Journal* appealed to the Sixth Circuit. *The Business Journal* reported on August 15, 2005, that attorneys for the newspaper argued that Eonomus "steered off course" in reaching his decision to dismiss the newspaper's claims. A memorandum brief filed along with the appeal argued that Eonomus erred in refusing to reach the real issue in the case: whether McKelvey punished *The Business Journal* for exercising its constitutional right to criticize the mayor.

The brief argued that McKelvey's directive to city workers "was an adverse act sufficient to chill an ordinary journalist from criticizing the mayor for fear of a similar banishment," requiring the court to consider the First Amendment implications in the case. *The Business Journal's* lawsuit, according to the brief, presents the same legal issues raised by *Baltimore Sun Co. v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006), in the Fourth Circuit Court of Appeals. Like McKelvey, Maryland Gov. Robert Ehrlich instructed public employees not to talk to two reporters from *The Baltimore Sun*. (See "Government Restrictions on Information: Governor Prevails in Suit Filed by *Baltimore Sun*" in the Winter 2006 issue of the *Silha Bulletin*; "Access to Government: Maryland Governor Forbids Employees to Speak to Reporters" in the Fall 2004 issue of the *Silha Bulletin* and "Access to Government: Judge upholds Maryland Governor's Ban on State PIOs Speaking to Two *Baltimore Sun* Reporters" in the Summer 2005 issue of the *Silha Bulletin*.)

Although the Fourth Circuit dismissed *The Baltimore Sun's* claims in 2006, *The Business Journal's* brief urged the Sixth Circuit to consider the broader First Amendment implications raised by

Judge Peter C. Eonomus found that McKelvey's instruction to city workers did not adversely affect the newspaper's ability to report on the policies or actions of city officials in Youngstown, even if McKelvey had restricted access in retaliation for the newspaper's earlier criticism.

Government Restrictions on Information

Federal Court Orders Additional Detainee Photos Released

On June 9, 2006, United States District Judge Alvin K. Hellerstein ordered the U.S. Department of Defense (DOD) to release 22 additional photographs of detainee abuses in Iraq and Afghanistan to the American Civil Liberties Union (ACLU) in *ACLU v. Dep't of Defense*, slip op. 2006 WL 1638025 (S.D.N.Y. June 9, 2006). The images were not among the original 74 photographs and three videos that Hellerstein had previously ordered to be turned over to the ACLU in a Sept. 29, 2005 decision, *ACLU v. Dep't of Defense*, 389 F. Supp. 2d. 547 (S.D.N.Y. 2005). Those images, which included the controversial photographs and video footage turned over to military officials by Spc. Joseph M. Darby, a military policeman assigned to Iraq's Abu Ghraib prison, were released after the Department of Defense (DOD) withdrew an appeal to the order on March 28, 2006. (See "The Media and the Photos from Abu Ghraib Prison" in the Spring 2004 issue of the *Silha Bulletin*, and "FOIA Updates: *ACLU v. Dep't of Defense* in the Fall 2005 issue of the *Silha Bulletin*.)

The ACLU had requested videotapes, photographs and other records of abuse from the several executive agencies, including the DOD and Central Intelligence Agency (CIA), on Oct. 7, 2003 under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. After the DOD and CIA were slow to respond to the FOIA request, Hellerstein first ordered the government agencies to produce or identify all documents relating to the ACLU request in 2004, months after Darby turned over the controversial images of detainee abuse at Abu Ghraib. See *ACLU v. Dep't of Defense*, 339 F.Supp.2d 501 (S.D.N.Y. 2004). The decision required the government agencies to either disclose the documents or provide a declaration explaining why the requested documents should be exempt from disclosure. Motions of summary judgment could then be filed by either party, allowing Hellerstein to resolve disputes over whether particular documents should be exempted.

The Fall 2005 *Silha Bulletin* article reported that the DOD offered "several theories to justify withholding the photographs and videos. It argued that FOIA exemption 6 applied, which exempts 'personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.' The agency also cited exemption 7(C), which protects records compiled for law enforcement purposes." The DOD also argued that releasing the Darby photographs would conflict with U.S. treaty obligations under the Geneva Conventions which require detainees to be protected against "acts of violence or intimidation and against insults and public curiosity."

Hellerstein rejected those arguments in his Sept. 29, 2005 opinion, saying that appropriate redactions could protect individuals' privacy. According to Hellerstein's 50-page opinion, the public's interest in the items outweighed any remaining privacy

concerns. "The interest at stake arises from pictures of flagrantly improper conduct by American soldiers – forcing prisoners under their charge to pose in a manner that compromised their human dignity," Hellerstein wrote. "[T]he pictures are the best evidence of what happened, better than words, which might fail to describe, or summaries, which might err in their attempt to generalize and abbreviate. Publication of the photographs is central to the purposes of FOIA because they initiate debate . . ."

The DOD had intended to appeal the decision, but withdrew the appeal on March 28, 2006. As a result, the agency was bound to the terms of Hellerstein's September 2005 order, which mandated the release of any additional documents relating to the FOIA request that could be authenticated.

On April 11, 2006, the *Washington Post* reported that although government lawyers had authenticated and disclosed the 74 images and three short video clips turned over by Darby, they refused to provide 29 recently-discovered photographs, which had not yet been authenticated, to the ACLU. In the Spring 2006 edition of *The News Media & The Law*, the Reporters Committee for the Freedom of the Press (RCFP), which had formed a coalition of 14 media organizations that filed an *amicus curiae* brief in the litigation leading to the September 2005 decision, reported that the DOD refused to release the additional images for the same privacy and security concerns it had expressed while withholding the Darby photographs. The RCFP also reported that, unlike the images which were made public after the appeal was withdrawn, the additional images related to abuse at facilities outside Abu Ghraib prison.

Both parties filed a motion for summary judgment to determine whether the additional images would be released or exempted under the FOIA. In response to the motions, Hellerstein ruled that 20 of the images, which depicted detainee abuse in Iraqi and Afghani facilities, were of "great public interest" and were to be disclosed for the same reasons he ordered earlier documents, including the "Darby" photographs, released. Hellerstein reserved judgment on two additional photos, but the parties later agreed that one of them was nonresponsive and the other could be released with some redaction of facial features. Hellerstein memorialized that agreement in *ACLU v. Dep't of Defense*, 2006 U.S. Dist. LEXIS 40894 (S.D.N.Y. June 21, 2006). The remaining images were found to be exempt or outside the scope of the FOIA request. The RCFP also reported that the government is continuing to process the ACLU's request to identify and authenticate any additional images that are responsive to the FOIA demand.

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

"Publication of the photographs is central to the purposes of FOIA because they initiate debate."

–District Judge
Alvin K. Hellerstein

both cases. “Both papers are asking the courts to call it what it is – retaliation in violation of federal law – before we’re faced with a situation where the public learns about their government only from the ‘government sanctioned’ media, those who report what the public officials like to hear about themselves.”

Before the Sixth Circuit was able to consider the newspaper’s claims, McKelvey left office. On January 1, 2006, Mayor Jay Williams took office. Two weeks before the court was to hear oral arguments in the case, Williams sent a memorandum to city personnel that rescinded the order not to speak with reporters from *The Business Journal*. Williams also sent a copy of the memorandum to the newspaper, assuring *The Business Journal* that the policy no longer exists.

On June 27, 2006, a three-judge panel found that, because Williams had rescinded McKelvey’s policy, the newspaper’s claims could no longer be heard in federal court. Quoting the decision in *Church of Scientology of California v. United States*, 506 U.S. 9 (1992), a case involving an appeal to the court-ordered disclosure of recorded conversations between Internal Revenue Service officials and the Church of Scientology, the court opined that if “an event occurs while a case is pending on appeal that makes it impossible for the court to grant any effectual relief whatever to a prevailing party, the appeal must be dismissed” as moot. The new mayor’s change in policy, according to the decision, prevented the court from granting the injunctive relief sought by *The Business Journal* in its original complaint.

The Business Journal had argued that Williams revoked the policy simply to avoid litigation and that the policy was capable of being re-implemented, yet evaded judicial review at this time. The Sixth Circuit panel rejected these arguments and refused to address the underlying First Amendment claims. “In this case there is simply no indication that the new mayor of Youngstown, Mayor Williams, will return to the ‘old ways’ of Mayor McKelvey and issue a similar edict,” Circuit Judge Cornelia G. Kennedy wrote.

The Sixth Circuit panel also refused to consider the claims under an exception that allows courts to entertain moot claims when one litigant voluntarily ceases to engage in the conduct being challenged. “Had Mayor McKelvey – rather than Mayor Williams – revoked the edict during this litigation, then we would be more inclined to find that such an act was done to defeat judicial review,” Kennedy wrote. “Yet we find the edict was revoked not to defeat litigation, but simply due to a change in circumstances.”

The Sixth Circuit’s decision to dismiss the claims also vacated the earlier judgment entered by Economus. Jill P. Meyer, an attorney for *The Business Journal*, said that the panel’s decision to vacate the district court decision leaves no precedent in the Sixth Circuit for public officials to cite when restricting access to media organizations. According to an article posted by the Reporters Committee for Freedom of the Press on July 5, 2006, Meyer said “At the very least, we’re back to where we were before the bad McKelvey decision.” The article is available online at www.rcfp.org/news/2006/0705-new-suitch.html.

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

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FOIA Updates

FOIA Turns Forty

July 4, 2006 marked the fortieth anniversary of the signing of the Freedom of Information Act (FOIA). Amid reports demonstrating a steep rise in backlogged requests, media scholars, organizations, and even a former U.S. president marked the date with commentary calling for less government secrecy and a stronger FOIA.

In June 2006, the Coalition for Open Government reported that in 2005, the backlog of unprocessed FOIA requests grew from 20 percent in 2004 to 31 percent, even though there was a decline in the overall volume of requests made. According to the Coalition, “[h]ad these departments and agencies maintained their 2004 level of processing requests, there would have been no significant backlog.”

The backlog at some agencies was years long. The National Archives reported its median time for processing backlogged requests was 1,631 working days or more than six years (there are only 261 federal working days in a year). The Treasury Department said its median backlog time was 648 days, or about 2.5 years. Despite the increase in processing time, the government cut both funding and the number of employees working on FOIA requests, the Coalition said.

The number of FOIA requests denied by agencies is increasing, according to the report. The agencies reported releasing all or part of information requested only 63 percent of the time, down from 67 percent in 2004. Moreover, the government prevails in most FOIA cases when appealed in court. It won 240 trials in 2004, compared to 14 won by requesters. The full report is available online at <http://www.cjog.net/documents/.pdf>.

However, a Government Accountability Office report issued to the House of Representatives in late July 2006 found that agencies reported that responsive answers – those that actually included the records requesters asked for – were provided in full in 87 percent of the requests processed in 2005. But it also found that “the number of pending requests carried over from year to year has been steadily increasing, rising to about 200,000 in fiscal year 2005 – 43 percent more than in 2002. The rate of increase in requests pending is also growing: the increase from fiscal year 2004 to 2005 is 24 percent, compared to 11 percent from 2003 to 2004.” The full report is available online at <http://www.gao.gov/new.items/d061022t.pdf>.

In a report published in July 2006, the Coalition of Journalists for Open Government found that media requests comprised only six percent of the total number studied. More than 60 percent of FOIA requests come from commercial interests, with one-fourth of those filed by professional data brokers working on behalf of clients. The second largest group of requesters was comprised of private citizens

and those designating their requests as “other.” That group submitted about a third of the requests. The Coalition said that FOIA requests generally take too long to be useful for newsgathering, although reporters working on long-term investigative studies utilize the FOIA. The Coalition’s report is available online at http://www.cjog.net/documents/Who_Uses_FOIA2.pdf.

OpenTheGovernment.org, in collaboration with a number of groups including the American Association of Law Libraries, the National Newspaper Association, and the National Security Archive, issued its own report on July 4, 2006. It specifically reviewed agency responses to President Bush’s Executive Order 13,392, issued Dec. 14, 2005. (See “Bush Issues Executive Order to Increase FOIA ‘Efficiency’” in the Fall 2005 issue of the *Silha Bulletin*.) That order was ostensibly designed to improve FOIA request response time. The OpenTheGovernment.org report found wide variations in response plans at each agency, ranging from “thorough” (the Small Business Administration) to “does not appear to set any ambitious goals” (the CIA). The report is available online at <http://www.openthegovernment.org/otg/FOIAPlans.pdf>.

Editor & Publisher commemorated the anniversary with a piece entitled, “FOIA Getting ‘Flabby’ – As It Turns 40 on July 4th.” In it, Mark Fitzgerald wrote, “this most important law is showing all the worst signs of middle age. It’s flabby and out of shape, insufficiently exercised – and slowing down dramatically.”

Former President Jimmy Carter wrote an op-ed piece in the *Washington Post* on July 3, 2006, calling for increased openness in government. “Our government leaders have become increasingly obsessed with secrecy,” he wrote. “Obstructionist policies and deficient practices have ensured that many important public documents and official actions remain hidden from our view.”

Carter noted that nearly 70 countries now have freedom of information laws but that the United States was moving against international trends by restricting the free flow of information. He noted that although FOIA covers only the executive branch, modern legislation in other nations often includes all branches of government and even extends to private companies. He concluded, “We cannot take freedom of information for granted. Our democracy depends on it.” Carter’s commentary can be read in full online at <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/02/AR2006070200674.html>.

– ASHLEY EWALD
SILHA FELLOW

“Our government leaders have become increasingly obsessed with secrecy. Obstructionist policies and deficient practices have ensured that many important public documents and official actions remain hidden from our view.”

– Former President
Jimmy Carter

FOIA Updates

Government Grant to Study FOIA and Security Questioned

One day after FOIA's fortieth anniversary, July 5, 2006, *USA TODAY* reported that the federal government planned to make a \$1 million grant to St. Mary's University School of Law in San Antonio to conduct research "aimed at rolling back the amount of sensitive data available to the press and public through freedom-of-information requests." However, one month later, the Air Force Research Laboratory said it would not administer the grant, and it was unclear what agency would do so.

A law professor at the school, Jeffrey Addicott, said in July that he planned to use the research to develop a national model statute to restrict the release of sensitive information. Addicott directs the school's Center for Terrorism Law, which originated the proposal, and he formerly served as a legal adviser in the Army Special Forces. The Center had been prepared to analyze recent laws passed in 41 states and the District of Columbia that have closed some meetings and restricted records ostensibly to curtail access by terrorists. "There's the public's right to know, but how much?" Addicott was quoted as saying. "There's a strong feeling that the law needs to balance that with the need to protect the well-being of the nation." He also told the *San Antonio Express-News* that "[t]he mission is to balance increase in security with civil liberties, which are precious." But, he continued, "in a time of war, balance goes toward security." The article is available online at <http://www.mysanantonio.com/news/education/stories/MYSA070706.1A.FOI.16f38e9.html>.

But Randy Sanders, president of the Freedom of Information Foundation of Texas and retired editor of the *Lubbock Avalanche-Journal*, was critical of the project. "It seems like we're just losing all our freedoms in the name of homeland security, and I just wonder where the real threat is," he said. "We're not going to keep terrorists from finding out about power plants and water supplies by tightening the Freedom of Information Act."

After the article appeared, members of the media and others widely criticized the grant. While Addicott told *USA TODAY* that "[t]here's too much stuff that's easy to get that shouldn't be," the *Detroit Free Press* responded in a July 26 editorial that there is "plenty of stuff that should be easy to get that isn't." It concluded, "Instead of spending a million bucks to figure out what else can be kept secret, the federal government instead ought to reaffirm the public's right to know. That wouldn't cost a thing." The *USA TODAY* article is available online at http://www.usatoday.com/news/washington/2006-07-05-foia-research_x.htm.

The editorial can be read online at <http://www.freep.com/apps/pbcs.dll/article?AID=/20060726/OPINION01/607260347/1069>.

Senator John Cornyn (R-Texas), who sponsored the addition of the grant to a defense department

appropriations bill, responded to criticism in a statement published on the St. Mary's University website. He said the *USA TODAY* "erroneously allege[d]" that the study would cut back on sensitive data available to the public and stated, "In fact, the exact opposite is true. The research will make certain that free flow of information is not unnecessarily hindered by security-driven laws approved by states after Sept. 11, 2001." He said the research will be aimed at studying the states' laws and noted that "anecdotal evidence indicates some laws may well be overbroad and excessively restrictive. The study will help determine if that is the case." In contrast to *USA TODAY*'s analysis, Cornyn said, "I'm convinced this project will provide us with valuable analysis on whether current laws are serving us well, or are instead undermining our bedrock open-government principles." His statement is available online at <http://www.stmarytx.edu/ctl/display.php?go=cornyn>.

St. Mary's issued its own statement, saying the story was reported prematurely because, "while the funding for the study has been appropriated, St. Mary's has not yet completed the process of submitting a final proposal, which is required before funds can be received or awarded by the sponsoring agency."

The university further noted, "The study is not designed to assist the Department of Defense, Pentagon or individual States to weaken either State or Federal Freedom of Information Act laws. It is intended as an independent information gathering initiative to compile and study all of the various State legislation that has been enacted (particularly since 9/11) related to how various State governments have chosen to balance the issue of increased security concerns and the protection of civil liberties." The full text of the school's statement is available online at <http://www.stmarytx.edu/ctl/>.

The Federation of American Scientists (FAS), which publishes a website detailing "Secrecy News," reported on Aug. 9, 2006 that an Air Force Research Lab spokesman, Dan Emblin, said his organization would not administer the grant because it "doesn't fit with the information research and development that we do." He said the grant "was more of a [policy] 'project' than bona fide research . . . so the [AFRL] Director decided 'We're not going to do it.'" FAS noted that since the \$1 million grant has already been appropriated by Congress, it is possible that another agency could decide to administer it, although it is not yet clear which agency might get involved. The Secrecy News article is available online at http://www.fas.org/blog/secrecy/2006/08/air_force_lab_will_not_fund_co.html.

"The study is intended as an independent information gathering initiative to compile and study all of the various State legislation that has been enacted related to how various State governments have chosen to balance the issue of increased security concerns and the protection of civil liberties."

– Statement,
St. Mary's
University School
of Law

– ASHLEY EWALD
SILHA FELLOW

Reporters Privilege News

Identity of Leaker in Plame Case Revealed

After nearly three years of speculation, *Hubris: The Inside Story of Spin, Scandal, and the Selling of the Iraq War*, a book by Michael Isikoff and David Corn, has disclosed that Richard Armitage, Colin Powell's deputy at the State Department during George W. Bush's first term, was the as yet unidentified source who revealed the identity of CIA operative Valerie Plame to syndicated columnist Robert Novak and *Washington Post* reporter Bob Woodward. In late August and early September 2006, articles about Armitage's role in events appeared in *Newsweek* (by Isikoff) and *The Nation* (by Corn) prior to the book's release September 8. The Corn article is available online at <http://www.thenation.com/blogs/capitalgames?pid=116511>; the Isikoff article is available online at <http://www.msnbc.msn.com/id/14533384/site/newsweek/>.

Novak's July 14, 2003 column in *The Washington Post* addressed the controversy surrounding the administration's assertion earlier that year that Iraq had attempted to purchase uranium from Niger in order to make weapons of mass destruction, an assertion that was later proven to be based on false information. Novak's column specifically noted the criticism of former U.S. ambassador Joseph Wilson who, upon returning from an investigatory trip to Niger, reported that the uranium purchase claim was specious, a belief Wilson later detailed in an op-ed piece in *The New York Times*, which was also critical of the Bush administration's pre-war intelligence.

Novak's column named Wilson's wife, Valerie Plame, as the CIA operative who had suggested that Wilson be sent to Niger in the first place. Novak has said that he "learned of the CIA operative's identity from two senior Bush administration officials in the course of preparing a piece on Wilson's conclusions."

Revealing the name of a covert agent is a federal crime under the Intelligence Identities Protection Act (50 USCS §§ 421 et seq.). Wilson has stated that he believes the leak was designed to discredit him for his open disapproval of the administration's pre-war intelligence in his op-ed article. Special prosecutor Patrick Fitzgerald was appointed to conduct an investigation into the leaks. Novak, along with journalists Matt Cooper of *Time* magazine and Judith Miller of *The New York Times*, were subpoenaed in an effort to learn their sources. Miller ultimately spent 85 days in jail before agreeing to disclose the identities of her sources, and resigned from the paper shortly after her release. See "Judith Miller Resigns from The New York Times" in the Fall 2005 issue of the *Silha Bulletin*; "Reporters Privilege News: *New York Times*' Judith Miller Released After 85 Days; Dole Suggests Identities Law Not Violated" in the Summer 2005 issue of the *Silha Bulletin*; "Reporters Privilege News: Supreme Court Denies Cert in Miller/Cooper Cases" in the Spring 2005 issue of the *Silha Bulletin*; "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 of the *Silha Bulletin*; "Reporters Privilege: In re: *Special Counsel Investigation*" and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue of the *Silha Bulletin*.

Corn wrote in his *Nation* article that according to Fitzgerald, a memo about Wilson's trip referring to Plame and her CIA connection had been written at the request of I. Lewis Scooter Libby, the vice president's chief of staff. According to Corn, "Libby had asked for the memo because he was looking to protect his boss from the mounting criticism that Bush and Cheney had misrepresented the [weapons of mass destruction] intelligence to garner public support for the invasion of Iraq." Corn further alleges that the memo was based on notes that "were not accurate." Nevertheless, Corn wrote, "senior White House aides wanted to use Valerie Wilson's CIA employment against her husband." Isikoff reported that the classified memo "made no reference to [Plame's] undercover status."

Armitage, who Corn reported described himself as a gossip when he testified before an Iran-Contra grand jury in the late 1980s, met with Novak in Armitage's State Department office on July 8, 2003. According to Isikoff, it was at that meeting that Armitage revealed Plame's identity as a CIA agent.

Corn wrote that "[S]hortly after Novak spoke with Armitage, he told [Senior White House adviser Karl] Rove that he had heard that [Plame] had been behind her husband's trip to Niger, and Rove said he knew that, too. So a leak from Armitage (a war skeptic not bent on revenge against Wilson) was confirmed by Rove (a Bush defender trying to take down Wilson). And days later – before the Novak column came out – Rove told *Time* magazine's Cooper that Wilson's wife was a CIA employee and involved in his trip." Isikoff observed that, "[T]he initial leak, seized on by administration critics as evidence of how far the White House was willing to go to smear an opponent, came from [Armitage] who had no apparent intention of harming anyone."

Isikoff wrote that on Oct. 1, 2003, after reading Novak's second column about what was becoming known as "Plamegate," Armitage called Powell. Novak wrote that his source was a "senior administration official" who was "not a partisan gunslinger." Armitage told Powell, "I'm sure he's talking about me."

Isikoff reported that the State Department's legal adviser, William Howard Taft IV, was called. Although Taft subsequently informed White House counsel Alberto Gonzales that the State Department had passed some information to the Justice Department, he did not mention Armitage, perhaps out of concern that State Department officials who had not been enthusiastic about Bush's Iraq policy might suffer embarrassment if the truth

"I'm afraid I may be the guy who caused the whole thing."

– Richard Armitage

Leaker Identified, *continued from page 21*

were known. Therefore, the three men, Armitage, Powell, and Taft, Isikoff wrote, “never breathed a word of [Armitage’s disclosure] and Armitage’s role remained a secret.”

Corn reported that Armitage was called to testify before the grand jury investigating the leak case. Armitage told Carl Ford Jr., the head of the State Department’s intelligence branch at the time, “I’m afraid I may be the guy that caused the whole thing.” However, *The Wall Street Journal* reported on August 30 that the Fitzgerald investigation has not led to an indictment of anyone for leaking Plame’s name. Even though Fitzgerald knew that Armitage was Novak’s source, *The Wall Street Journal* wrote that President Bush “was apparently kept in the dark, even as he was pledging publicly to find out who the leaker was.”

On October 28, 2005, Libby was indicted by Fitzgerald on one count of obstruction of justice, two counts of false statements, and two counts of perjury. Libby resigned later that same day. The text of the indictment is available online at http://www.usdoj.gov/usao/iln/osc/documents/libby_indictment_28102005.pdf. See “Reporters Privilege News: Court Rules that Libby’s Use of Journalists’ Evidence Must be Limited” on page 23 of this issue of the *Silha Bulletin*.

As recently as July 12, 2006, Novak maintained his silence about Armitage’s role in events, writing, “My primary source has not come forward to identify himself.”

On September 7, Armitage himself spoke to *The New York Times*. Armitage told *The New York Times* that telling Novak about Plame “was a terrible error on my part. There wasn’t a day that went by that I didn’t feel that I let down the president, the secretary of state, the Department of State, my family and friends and for that matter, the Wilsons.”

Armitage explained his three-year silence by saying that Fitzgerald requested he remain silent. Armitage further explained that he testified three times before the grand jury. “I was never subpoenaed,” he told *The Times*. “I was a cooperating witness from the beginning.” He also never hired an attorney. “I made an inadvertent mistake . . . I deserved whatever was coming to me.”

In a September 14 *Washington Post* article, Novak broke his silence, challenging Armitage’s account of events. Novak wrote that there were inaccuracies in Armitage’s recollection of what happened during the interview between them. “First, Armitage did not, as he now indicates, merely pass on something that he had heard and that he ‘thought’ might be so. Rather, he identified the CIA division where [Plame] worked and said flatly that she recommended the mission to Niger by [Wilson]. Second, Armitage did not slip me this information as idle chitchat, as he now suggests. He made clear that he considered it especially suited for my column.”

Novak further wrote that the two and a half years of Armitage’s silence on the matter “caused intense pain for his colleagues in government and enabled

partisan Democrats in Congress to falsely accuse Rove of being my primary source.” Furthermore, Novak wrote, “Armitage’s tardy self-disclosure is tainted because it is deceptive.”

The press’s handling of Plamegate has been heavily criticized. On September 7, *Washington Post*’s David Broder characterized the reporting as “overblown” and wrote, “no one behaved well in the whole mess.” Broder further wrote that the media ought to “can the conspiracy theories and stick to the facts.” Although Broder himself did not write extensively on the matter, he did “caution reporters who offered bold First Amendment defenses for keeping their sources’ names secret that they had better examine the motivations of the people leaking the information to be sure they deserve protection.”

Jack Fuller, in a September 12 column for the *Chicago Tribune*, wrote that the long-held assumption that the leak of Plame’s identity as a CIA operative was from someone in the Bush administration who wanted to get back at Wilson for his *New York Times* op-ed piece was erroneous. “Armitage is not considered one of the administration’s attack dogs,” Fuller wrote, and therefore, “The premise that the administration was willing to give up a spy for narrow, vindictive political ends fell apart.”

Fuller maintained that Armitage’s identity was part of the story, and implied that Novak should have disclosed Armitage’s name from the beginning. Although most times using the information provided by anonymous sources does increase the public’s knowledge about events impacting their lives, at others “A reporter’s whole professional purpose is to reveal information that has significance to the public. In the absence of a compelling reason not to, a reporter should make important facts public, not hide them,” Fuller wrote. “The strategic leaking of information by the government and its critics is so widespread that it has become central to the political process. But because journalists rarely examine it (and even then their searchlight is usually dim), they are not presenting a complete picture of the way politics work. . . . Reporters should try to reveal the identities of competitors’ sources when the disclosure would significantly add to public understanding. The unwritten journalistic rule against this needs to be repealed.”

Despite the revelation of Armitage’s role in the disclosure of Valerie Plame’s identity, Libby’s trial is scheduled to begin in January 2007. Moreover, a civil lawsuit filed July 13, 2006 in federal District Court in the District of Columbia by Plame and Wilson, which claims that disclosures by Libby, Rove, Vice President Richard B. Cheney and ten other unidentified persons were designated to discredit Wilson and to destroy Plame’s CIA career, is still pending.

— ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Reporters Privilege News

Court Rules that Libby's Use of Journalists' Evidence Must be Limited

In an effort to bolster the defense in his perjury lawsuit, attorneys for former chief of staff for Vice President Dick Cheney, I. Lewis "Scooter" Libby, have subpoenaed numerous reporters and media organizations. But a May 26, 2006 ruling by U.S. District Judge Reggie B. Walton in *U.S. v. Libby*, 432 F. Supp.2d 26 (D.D.C. 2006), found that there were limits to the evidence Libby could obtain from journalists.

Libby is charged in a five-count indictment for obstruction of justice, two counts of false statements and two counts of perjury, arising from a criminal investigation into a possible unauthorized disclosure of classified information – that Valerie Plame, the wife of ambassador Joseph Wilson, was an undercover CIA agent. (See "Judith Miller Resigns from The New York Times" in the Fall 2005 issue of the *Silha Bulletin*; "Reporters Privilege News: *New York Times*' Judith Miller Released After 85 Days; Dole Suggests Identities Law Not Violated" in the Summer 2005 issue of the *Silha Bulletin*; see "Reporters Privilege News: Supreme Court Denies Cert in Miller/Cooper Cases" in the Spring 2005 issue of the *Silha Bulletin*; see "*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 of the *Silha Bulletin*; see "Reporters Privilege: *In re: Special Counsel Investigation*" and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue of the *Silha Bulletin* see also "Reporters Privilege News: Identity of Leaker in Plame Case Revealed" on page 21 of this issue of the *Silha Bulletin*.)

The charges against Libby are based on statements that he allegedly made to the FBI in October and November 2003 as well as testimony he gave before the grand jury investigating Plame's disclosure during conversations with NBC Bureau Chief Tim Russert, *The New York Times*'s Judith Miller, and *Time* magazine's Matthew Cooper in June and July 2003.

Libby now seeks additional information from reporters and news organizations under Federal Rule of Criminal Procedure 17(c)(1). Subpoenas were served on March 14, 2006. During a May 16 hearing that followed motions by the journalists and media companies to quash the subpoenas, Miller, *The New York Times*, NBC and *Time* magazine agreed to turn over the subpoenaed material for Walton to review privately before ruling, according to a press release from the Reporters Committee for Freedom of the Press. Motions to quash are pending from NBC News, Andrea Mitchell, Time Inc., Matthew Cooper, *The New York Times*, and Judith Miller.

Judith Miller's motion was granted, and all others were granted in part and denied in part.

Walton began by discussing Federal Rule of Criminal Procedure 17(c). Turning to *Nixon v. United States*, 418 U.S. 683 (1974), Walton cited "three hurdles that must be cleared regarding the production of documents under Rule 17(c). If all

three hurdles are not cleared, the subpoena is considered "unreasonable or oppressive and must be either quashed or modified."

First, the evidence sought – in this case, the reporters' documents – must be relevant to the case. To be relevant, a document must contain evidence that is important to the final determination in the case. Walton noted that an *in camera* inspection of the subpoenaed items would allow him to determine whether they met the relevance test.

Second, the evidence must be admissible.

Finally, the subpoena must fully describe the documents being sought rather than seeking "broad categories" of material." Citing *United States v. Noriega*, 764 F. Supp. 1480 (S.D. Fla. 1991), Walton wrote, "[I]f the moving party cannot reasonably specify the information contained or believed to be contained in the documents sought but merely hopes that something useful will turn up, this is a sure sign that the subpoena is being misused."

In addressing the existence of a reporters' privilege in the case, Walton considered the particular roles of Miller, Cooper, and Russert, because these three "did not simply report on alleged criminal activity but rather they were personally involved in the conversations" with Libby that are central to the case.

Because the parties "disagree sharply" as to whether a First Amendment privilege applies, Walton looked at two questions: whether the First Amendment protects news reporters from divulging information during a criminal investigation, and whether defendants' rights in such a case trump those of the other parties involved.

Although Walton looked at two cases – *Zerilli v. Smith*, 211 U.S. App. D.C. 116 (D.C. Cir. 1981) and *Branzburg v. Hayes*, 408 U.S. 665 (1972) – he found *Zerilli* to be of little help because it involved a civil case. Criminal cases are different, Walton wrote, because "the need for information in the criminal context is much weightier because our historical commitment to the rule of law . . . is nowhere more profoundly manifest than in our view that the twofold aim of criminal justice is that guilt shall not escape or innocence suffer."

Because *Branzburg* involved a grand jury investigation, Walton found that case more relevant, because, as Libby's defense had argued, "it would be absurd to conclude that a news reporter, who deserves no special treatment before a grand jury investigating a crime, may nonetheless invoke the First Amendment to stonewall a criminal defendant who has been indicted by that grand jury and seeks evidence to establish his innocence." Because the evidence sought passed the three-prong test in *Nixon*, Walton ruled that the evidence could not be excluded based on a reporters' privilege.

Walton found that there was no common law privilege. First, common law did not address the situation in this case because the existence of a

"It would be absurd to conclude that a reporter may invoke the First Amendment to stonewall a criminal defendant."

– Judge
Reggie B. Walton

privilege during the pre-indictment stage of a criminal trial has never come before any court in the United States. In addition, the Libby case is not a situation where reporters' sources are at risk of disclosure. Instead, the case involves Libby's charges of obstruction of justice, perjury, and making false statements.

Furthermore, Walton wrote, common law cases involve a "balancing test" that examines whether documents are central to the case at hand and whether the information they contain could be found from any other source. The media documents sought by Libby, Walton wrote, "are crucial to the defendant's case and go to the heart of his defense. Moreover, the very nature of these documents, i.e., reporters' notes and their draft articles, could only be obtained from the movants; thus there are no alternative sources for acquiring these documents."

Walton granted Miller's motion to quash because the documents requested from her did not relate to any conversations with Libby. Walton granted in part but denied in part the remaining motions, requiring that documents relevant to the case be produced for Libby's trial.

— ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

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Reporters Privilege News

Prosecutor May Subpoena *New York Times* Phone Records

The U.S. Court of Appeals (2d Cir.) held in August 2006 that federal prosecutor Patrick Fitzgerald may subpoena the cell phone records of *New York Times*' reporters Judith Miller and Philip Shenon from phone companies. The case, *New York Times Co. v. Gonzales*, 2006 U.S. App. LEXIS 19436 (2d Cir. August 1, 2006), is the "other Judith Miller leak case" and unrelated to the Valerie Plame leak case for which Miller famously spent 85 days in jail before disclosing her source with his permission.

In *New York Times Co. v. Gonzales*, Fitzgerald is seeking the information as part of his investigation into who leaked plans of an imminent government freeze of assets and search and seizure to the reporters. The government believes that in the fall of 2001, Miller and Shenon called representatives at two Islamic charities, Holy Land Foundation (HLF) and Global Relief Foundation (GRF), seeking comment about the possibility of a government search of their organizations' offices and a freeze placed on their assets. The calls, the government maintains, tipped the organizations off to the government's plans and gave both time to prepare for visits from federal agents.

On October 1, 2001, the *Times* published an article co-written by Miller discussing the possibility that the government might place GRF on its terrorism watch list. Miller later said she received this information from "confidential sources." Miller then called an HLF representative on Dec. 3, 2001, seeking comment about government plans to block their assets. Miller wrote a story about the impending search the same day, and it was published on the *Times*' website and in late edition papers Dec. 3, 2001. The search did not take place until the next day.

Shenon, meanwhile, contacted GRF on Dec. 13, 2001, to ask for a statement regarding government plans to search its office. The government contends that this call alarmed GRF and alerted them to the impending search and asset freeze. By the time federal agents arrived on December 14, the organization was expecting them. Shenon's story on the search was published Dec. 15, 2001.

In August 2002, Fitzgerald wrote to the *Times* and requested an interview with Shenon and voluntary production of his phone records from late September to early October 2001 and from Dec. 7-15, 2001. Fitzgerald's request stated that the records were essential in his investigation into "leaks which may strongly compromise national security and thwart investigations into terrorist fundraising." The *Times*, however, refused to cooperate, citing First Amendment protections against having to divulge confidential information to the government.

In July 2004, Fitzgerald again wrote to the *Times* requesting an interview with Shenon and access to his phone records and included a new request for the same information from Miller. Fitzgerald wrote that if The *Times* refused to cooperate, he would seek the records from the *Times*' telephone

providers. The *Times* responded by arguing that the government needed to exhaust all alternative sources first and also objected to giving the government total access to phone records that may contain information regarding unrelated stories, calling the request "a fishing expedition well beyond any permissible bounds." The *Times* also asked its phone companies not to produce any information without first alerting the newspaper, although according to the opinion, the companies refused to agree to this request.

In August 2004, *Times* attorneys Floyd Abrams and Kenneth Starr sent a letter to Deputy Attorney General James Comey requesting a meeting to discuss the government's request for reporters' phone records, however, Comey refused. Five days later, the *Times* filed suit seeking a declaratory judgment "that reporters' privileges against compelled disclosure of confidential sources prevented enforcement of a subpoena for the reporters' telephone records in the possession of third parties." In October, both parties moved for summary judgment, with the government seeking to dismiss the case and the *Times* opposing and requesting a judgment that protected the phone records.

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

In their August 1, 2006 ruling, Judges Ralph K. Winter, Jr., and Amalya Lyle Kears of the Second Circuit vacated that decision and remanded the case, holding that "whatever rights a newspaper or reporter has to refuse disclosure in response to a subpoena extends to the newspaper's or reporter's telephone records in the possession of a third party provider." The majority opinion continued, however, by determining that "no First Amendment protection is available to the *Times* on these facts."

The majority first analyzed the Declaratory Judgment Act, which allows a district court to "declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). It decided that the lower court did not abuse its discretion in concluding it should exercise jurisdiction over the case.

The majority then reviewed the reporters' privilege and the government's argument that it did not extend to third party telephone records. Quoting from *Local 1814, International Longshoremen's Ass'n, AFL-CIO v. Waterfront Commission*, 667 F.2d 267 (2d Cir.1981), the court determined that First Amendment rights are implicated whenever

"Whatever rights a newspaper or reporter has to refuse disclosure in response to a subpoena extends to the newspaper's or reporter's telephone records in the possession of a third party provider."

– Judge
Ralph K. Winter, Jr.

a third party plays an “integral role” in reporters’ work and third party records detailing that work are therefore privileged. In *Local 1814*, a union had sought to and succeeded in enjoining a subpoena issued to a third party by the Waterfront Commission because the information involved the union’s political action committee. By analogy, the court in *New York Times v. Gonzales* determined “that so long as the third party plays an ‘integral role’ in reporters’ work, the records of third parties detailing that work are, when sought by the government, covered by the same privileges afforded to the reporters themselves and their personal records.”

However, the court declined to rule on whether, as the *Times* argued, a common law privilege also protects from disclosure the identity of a reporter’s confidential sources. It determined that if a common law privilege exists, it would be qualified rather than absolute, meaning it could be overcome when certain factual scenarios require it. Here, the court ruled that the facts required disclosure. “At stake in the present investigation, therefore, is not only the important principle of secrecy regarding imminent law enforcement actions but also a set of facts – informing the targets of those impending actions – that may constitute a serious obstruction of justice.”

In dismissing the *Times*’ argument that allowing the government access to the full telephone records was overbroad, the majority determined that redactions could protect confidential sources not relevant to the case at hand. It also found that the government had exhausted all alternative sources of information, writing that “the only reasonable unavailed-of alternative that would mitigate the overbreadth of the threatened subpoena is the cooperation of the reporters and the *Times*.” However, the judges did limit their holding to the facts of this case, noting, “we in no way suggest that such a showing would be adequate in a case involving less compelling facts. In the present case, the unique knowledge of the reporters is at the heart of the investigation, and there are no alternative sources of information that can reliably establish the circumstances of the disclosures.”

The judges noted, “We see no danger to a free press in so holding. Learning of imminent law enforcement asset freezes/searches and informing targets of them is not an activity essential, or even common, to journalism.”

In his dissent, Judge Robert D. Sack emphasized that the majority “confirms the ability of journalists to protect the identities of their sources in the hands of third-party communications-service providers” and also the “role of federal courts in mediating between the interests of law enforcement . . . and the interests of the press.” The real question, as he saw it, was “which branch of government decides whether, when, and how any such [reporter’s privilege] protection is overcome.”

In determining the answer to that question, both the majority and Sack reviewed the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), which limited the First Amendment protections reporters can claim in the grand jury context. Unlike the majority, Sack found that the government did not prove that it had exhausted all alternative sources and disagreed that the privilege was overcome based on the facts. He also noted that the government had no proof that Miller or Shenon had actually alerted the organizations to the impending government raid, but only that they had called both requesting comments.

In an article published August 2, 2006, in the *Times*, the newspaper’s vice president and assistant general counsel said that Miller and Shenon “were conducting their journalistic duties by getting reaction to an ongoing story.” He said the *Times* had not yet decided whether to appeal. The article also quoted Miller, who has since retired from the paper, stating, “That this was 2-to-1 showed how close these issues are and the need for a federal shield law to protect journalists, their telephone numbers and hence their sources.”

Abrams, meanwhile, who represented the paper in both cases involving Judith Miller, and who was the Silha Lecture in 2005, noted, “There is a lot more to be heard from the courts before this issue is resolved one way or the other.” See “2005 Silha Lecture Features First Amendment Attorney Floyd Abrams” in the Fall 2005 issue of the *Silha Bulletin*.

– ASHLEY EWALD
SILHA FELLOW

Reporters Privilege News

Freelance Reporter and Human Rights Activist Not Required To Surrender Notes, Other Documents to City

A year-long legal confrontation between the City of Chicago and self-proclaimed human rights reporter Jamie Kalven ended in June 2006 when United States District Court Magistrate Judge Arlander Keys quashed the first subpoena issued against a journalist by city officials in recent memory. The decision in *Bond v. Utreras* (Case Number 04 C 2617) was filed on June 27, 2006. The civil rights case against the city, its police department and individual police officers will proceed to trial in October 2006, but without the notes, materials and information the writer collected while reporting on police abuses at one of Chicago's last remaining public housing projects.

An article published in the August 2006 issue of *Chicago Magazine*, available online at <http://www.freepress.net/news/16700>, reported that Kalven speculated that the purpose of the subpoena was to stifle his efforts to expose police brutality in Chicago public housing. "What the city is doing now – I'm not without sympathy for it," Kalven told *Chicago Magazine's* David Bernstein. "Certainly, if I were on trial for a serious crime and somebody was in a position of having evidence that could bear on my defense, I would want to have access to it, too." There are, however, major First Amendment consequences at stake, Kalven told *Chicago Magazine*.

According to the article, the defense of free speech rights is "intensely meaningful and personal" for Kalven. His father, Harry Kalven Jr., was a prominent First Amendment attorney and a faculty member at the University of Chicago. (This year's Silha Lecturer, Geoffrey Stone, is the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago Law School. See the back page of this issue of the *Silha Bulletin* for additional details about this year's lecture.) After Harry Kalven died in 1974 while working on the first draft of a book on free speech and civil liberties, his son spent 14 years finishing the manuscript. When *A Worthy Tradition: Freedom of Speech in America* was finally published in 1988, it was hailed by *The New York Times* as "an extraordinary act of intellectual and filial devotion." Kalven then returned to his career as a freelance writer. "I didn't want to be the public voice coming to the defense of First Amendment principals," Kalven told Bernstein, "I believe in ultimately defending the First Amendment by exercising it."

After Kalven's wife was brutally beaten and sexually assaulted in the fall of 1988, Kalven wrote a personal memoir, *Working with Available Light: A Family's World After Violence*, which retold not only his personal experiences but also addressed a history of poverty, violence, and racial division in the United States. His work on the memoir brought him to Stateway Gardens, an area that Bernstein described as "one of the poorest and most violent areas of the city." Kalven later accepted a position as an advisor to the housing project's resident council. He kept an office in one of the eight high-rise buildings that once stood on Chicago's South Side and became actively involved in

organizing community projects and helping community residents find jobs.

Like many other housing projects in Chicago at the time, Stateway Gardens was slated for demolition as part of the Chicago Housing Authority's "Plan for Transformation." The plan, first proposed in 1999, was to transform Chicago's public housing projects into "mixed-income" communities, an effort to increase public safety and curb criminal activity in the city. In 2001, the Invisible Institute, a Chicago-based company known for its commitment to collaborative social justice projects, launched a Web site to report on the impact that the housing authority's plan would have on neighborhood communities. Their mission was to chronicle life at Stateway during its transformation into a mixed-income community. To do so, they published stories online that reported on the eight city blocks that once encompassed Stateway and relied on contributions from individuals with close ties to the community. They named the publication "The View From the Ground."

But when Kalven, as one of the Web site's founders, published an account of police abuse at Stateway, he found himself entangled in a civil rights lawsuit against the City. He wrote a multi-part narrative describing one resident's encounter in April 2003 with police officers who were assigned to Stateway during its transformation. "Kicking the Pigeon" was first published online in July 2005 and is available online at www.viewfromtheground.com.

According to the article, Kalven was approached by Diane Bond, a Stateway resident and public school janitor who lived in the building where Kalven kept an office. On April 14, 2003 Bond told Kalven of a brutal encounter with police officers that occurred the day before. Kalven urged Bond to report the incidents to the Office of Professional Standards (OPS), which investigates excessive force complaints against the Chicago Police Department (CPD). Kalven subsequently introduced Bond to Professor Craig Futterman, an attorney working with the Edwin F. Mandel Legal Aid Clinic at the University of Chicago Law School. The clinic agreed to represent Bond in a suit alleging civil rights violations against the City of Chicago, the OPS, the CPD and five of its officers. Kalven later served as a witness for the plaintiff in *Bond v. Utreras* and was deposed on April 12, 2005.

Following his deposition, Kalven was served with a subpoena by the City of Chicago on June 13, 2005. The subpoena demanded that Kalven produce any notes or documents in his possession relating to allegations of police misconduct at Stateway, as well as any notes or documents in his possession relating to 24 individuals who may have provided Kalven with information during his reporting. Kalven refused and on June 24, 2005, wrote in a letter to Susan Sullivan, the attorney for the City who issued the subpoena: "The subpoena seeks information that is privileged or otherwise protected from compelled disclosure by a journalist's privilege that exists and should be recognized under

Judge Arlander Keys found that the City of Chicago had failed to establish that enforcing compliance with the subpoena would serve any real benefit to justify imposing such a burden on Kalven.

Kalven, continued on page 28

Kalven, continued from page 27

federal common law and the First Amendment to the United States Constitution.”

For nearly a year, Kalven waited for the City to respond to his refusal. On May 1, 2006, the City petitioned the federal District Court to compel Kalven to produce any documents concerning the individuals named in the subpoena. Kalven, the City argued, should also be compelled to respond to deposition questions he had refused to answer in April 2005.

According to a response filed with the court by Kalven on May 30, 2006, the City had not shown “any real need for the discovery they seek, much less a need that outweighs the undue burden that compelled disclosure of their discovery requests would impose on Mr. Kalven, and the impairment of First Amendment values that would result.” Not only is a journalist’s ability to ensure confidentiality at stake, according to the response, but his credibility in the community he covers is put at risk as well, he argued.

Responding to the City’s motion to compel, Kalven’s attorney, David B. Sanders, wrote, “Mr. Kalven gathers information that is clearly in the public interest – information about the impact of police activities on the lives of Chicago public housing community residents. His ability to gather this information turns on his independence and the trust community members repose in him.”

Kalven’s argument rested on a recently-decided case from the Northern District of Illinois, *Patterson v. Burge*, 33 Media L.Rep. 1200 (N.D. Ill. 2005). In *Patterson*, a number of media organizations in Chicago were subpoenaed to provide notes, footage and transcripts involving interviews with the plaintiff, who had sued both the City of Chicago and individual police officers for civil rights violations. The subpoenas in *Patterson* were quashed. However, the court refused to recognize a reporter’s privilege. Instead, District Court Judge Gottschall weighed “the need for the material subpoenaed against the burden involved in its production” under Federal Rule of Civil Procedure 45(c), which governs subpoenas applicable to any non-party to a civil suit.

Kalven argued that the subpoena was overbroad and that compliance with it would place an undue burden on him as a journalist. He also urged District Court Judge Joan Lefkow to consider recognizing a qualified reporter’s privilege “protecting against the compelled disclosure of a journalist’s confidential sources and unpublished information in civil cases.”

In an interview with Chicago Public Radio (CPR) on May 30, 2006, Kalven acknowledged that his role as a witness for the plaintiff in Bond’s lawsuit makes him more than just a journalist, complicating his claim to a reporter’s privilege. As in the past however, Kalven suggested that his engagement in the Stateway community was necessary to his work as a human rights journalist and consistent with the tradition of publications like “The View From the Ground.”

“This is the work of art and nonviolent resistance, as well as human rights reporting,” Kalven told Diantha Parker of CPR. He also told *Chicago Reader* reporter Michael Miner in an article published on July 29, 2005, that his claim of privilege differs from claims made by other reporters such as Judith Miller of *The*

New York Times or Matt Cooper of *Time* who refused to disclose sources in a grand jury investigation. (See “Reporters Privilege News: Judith Miller Resigns From *The New York Times*” in the Fall 2005 issue of the *Silha Bulletin*). “He argues that he’s not protecting a secret source,” Miner wrote, “he’s protecting his freedom of association.” Kalven also told Miner, “I blur the distinction between journalists and bloggers. I am a bona fide journalist who is publishing primary reporting (as opposed to commentary) in the blogosphere.” Miner’s article is available online at http://www.chicagoreader.com/hottype/2005/050729_1.html.

On June 27, 2006, Magistrate Judge Arlander Keys, ruling in place of Lefkow, issued an unpublished opinion denying the City’s motion to compel Kalven to disclose any information or documents related to the article. “Initially, although the present motions involve discovery sought from a journalist,” Keys wrote, “the Court’s resolution of the motions does not really implicate questions of privilege.”

“Mr. Kalven is not relying on any claim of privilege – and wisely so; the Seventh Circuit has rejected the notion of a federal reporter’s privilege, see *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003),” he opined. (See “*Branzburg v. Hayes* Still Casts Uncertainty on Journalists’ First Amendment Rights” in the Summer 2004 issue of the *Silha Bulletin* and “*McKevitt v. Pallasch*” in the Fall 2003 issue of the *Silha Bulletin*). Instead, Keys found that the City had failed to establish that enforcing compliance with the subpoena would serve any real benefit to justify imposing such a burden on Kalven, especially considering the breath of the subpoena. The subpoena, which was accompanied by a rider that demanded Kalven produce any documents relating to “any allegations of police misconduct at Stateway Gardens,” included documents and named individuals that Keys said “may not have anything whatsoever to do with the allegations of Ms. Bond’s complaint or with any issue in the case.”

“[T]he Court will not compel Mr. Kalven to discuss the substance of any interviews he conducted with any resident of Stateway Gardens. The one exception is Ms. Bond; as the plaintiff, she can have no legitimate expectation that her discussions with Mr. Kalven would remain off the record.” Keys did find Kalven to be a journalist and noted that “his work at the Stateway Gardens development is ongoing.” Ordering Kalven to produce the documents, Keys said, could harm Mr. Kalven’s credibility among sources. “[H]e fancies himself as being a voice of the people in the projects; if he is seen as being one who hands over people’s stories to the police – especially when those stories sometimes involve allegations that the police have been abusive – people might be less willing to come to him, and his journalistic endeavors, such as they are, would be undermined.” Keys noted that “concerns about the burden imposed on Mr. Kalven might be counterbalanced if the defendants could establish that the evidence they seek is highly probative of issues relevant to the case. But they have not.”

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Reporters Privilege News

Court of Appeals Orders Freelance Journalist To Hand Over Videotape

A three-judge panel of the U.S. Court of Appeals for the Ninth Circuit ruled in an unpublished opinion on Sept. 8, 2006 that freelance journalist Joshua Wolf must turn over a videotape he made of a July 8, 2005 protest demonstration in San Francisco. Wolf has refused to turn over the tape, claiming to do so would violate his First and Fifth Amendment rights.

According to *Inside Bay Area*, Wolf works as an outreach director for Peralta Community College District's cable television station in Oakland. The *SF Weekly* reported that Wolf is a blogger, an activist, and an anarchist, whose videoblog, "The Revolution Will Be Televised," is available online at www.joshnet.net. On July 8, 2005, Wolf was videotaping a protest in San Francisco's Mission District of the G8 Summit taking place in Scotland. According to *SF Weekly*, Wolf had at times attended such protests as a participant in the past, but he attended the July 8 protest as a journalist, intending to post the video on his videoblog.

According to the *SF Weekly*, the portion of Wolf's video that was publicly released shows protesters marching down a street, some carrying signs with anticapitalist and antigovernment slogans or showing the logo of the group Anarchist Action. At dusk, the protest became heated; protesters began setting off fireworks and dragged metal newsstand boxes into the street in an effort to block traffic. Police were called to try to bring matters under control.

Two of the responding officers, the *SF Weekly* reported, were Michael Wolf (no relation to the blogger) and Pete Shields. When they arrived, the protest had escalated to the point that windows were being broken. Protesters blocked their patrol car, and a large foam sign was shoved under the chassis. The two officers left their vehicle, and Josh Wolf began following a man he suspected had pushed the sign under the police car, video camera running. He videotaped Officer Wolf attempting to handcuff the suspect while protesters taunted him.

Meanwhile, Shields had remained with the vehicle, where someone was trying to light fireworks under the car in an effort to ignite the foam sign that was there. Shields was struck from behind by a protester. When Officer Wolf returned to the car, he found Shields bleeding from a fractured skull.

The *SF Weekly* reported that three of the protesters were charged with misdemeanors by local law enforcement. But the federal government has also become involved in an investigation into Shields's injuries and the effort to cause damage to a police vehicle. Because the police vehicle was purchased, in part, with federal funds, a case can be made that damage done to it is a federal crime. (See 18 U.S.C. § 844(f).) Wolf's attorneys, however, say that the subpoena for their client's videotape is an "unreasonable use of federal power."

According to the *San Francisco Chronicle*, some of Wolf's footage was shown on unidentified television stations, including portions showing the

burning police car.

It is unlikely, however, that Wolf's videotape shows anything of Shield's attack or the attempts to set the police car alight because Wolf was at another site, taping Officer Wolf.

FBI agents appeared at Wolf's door a few days after the event, wanting the portion of his recording that was not posted. The *San Francisco Chronicle* reported that grand jury has also demanded the rest of the videos. Wolf refused, claiming California's reporter's privilege Cal. Const., art. I, § 2, subd (b), and state common law that permits the withholding of unpublished material. (For more on California's Shield Law, see "Reporters Privilege News: Appeals Court Finds That Bloggers Have Same Protection as Journalists, Newsgatherers" on page 31 of this issue of the *Silha Bulletin*.) Wolf told the *SF Weekly* that he is concerned that the federal government is monitoring antiwar groups, suspecting them of terrorism, and as a journalist does not want to surrender the unpublished portions of the videotape to support an investigation into the matter. Wolf has not said what is contained on the 15-minute portion of the video that has not been publicly shown, nor is it clear what the federal government is hopes to find on the videotapes.

SF Weekly reported that Wolf's attorneys argued a motion in federal court to quash the subpoena for their client's videotape, saying that California's shield law allows journalists to maintain confidential unpublished information obtained during newsgathering. Wolf, even as a freelance citizen-journalist, has the same rights as a professional journalist; furthermore, turning over the unpublished portions of his videotape would turn him into an arm of the Justice Department. Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Law and Ethics, told the *Sacramento Bee* that because of Justice Department rules set during the Nixon administration, prosecutors were required to exhaust all other options for getting information. "My sense is that's not really happening any more. My sense is that (U.S. Attorney General Alberto Gonzales) simply does not understand that the news media's independence is critical to our democracy."

SF Weekly reported that on April 5, Judge Maria-Elena James denied the motion, noting that the protest took place in public. Because of that, James wrote, there can be no claim of confidentiality.

When Wolf appeared before the court on June 15, he found James replaced by San Francisco District Court Judge William Alsup. According to a posting by the San Francisco Bay Independent Media Center, Alsup was not the judge originally assigned to the case. He was "unfamiliar with prior proceedings" and ordered the proceedings closed, in contrast to James, who had required they be open. The report is available online at <http://indybay.org/newsitems/2006/06/17/18281136.php>.

Wolf's attorneys say that the subpoena for their client's videotape is an unreasonable use of federal power.

Alsup ordered Wolf to produce the video, and Wolf was questioned before the grand jury later that day. Wolf pled his rights under the Fifth Amendment, and was told that he could go. Three weeks later, prosecutors returned to Alsup with a request to hold Wolf in contempt of court. At an August 1 hearing before Alsup, Wolf was found to be in contempt of court. The *San Francisco Chronicle* reported that Alsup said at the hearing that the case was a “slam dunk for the government” and that there was a “legitimate need for law enforcement to have direct images of who was doing what to that police car.” The *Sacramento Bee* also reported that Alsup said, “No confidential sources are involved in this case. Everything that was recorded took place in public.”

Alsup denied Wolf bail. Therefore, Wolf could remain in jail either until he decided to turn over the videotape, until the grand jury finishes its investigation, or until its term ends in July 2007. Wolf was taken into custody and sent to the federal prison in Dublin, Calif. However, 30 days later, on September 1, Wolf was released on bail.

On September 8, a three-judge panel from the Ninth Circuit Court of Appeals handed down a memorandum opinion, No. 06-16403, ruling on Wolf’s appeal, stating that the district court had correctly met its burden of proving by clear and convincing evidence that the request for information made by the grand jury was authorized; that the information sought was relevant to the proceeding, and that the information sought was not already in the government’s possession. The judges, Diarmuid O’Scannlain, Susan P. Graber, and Richard R. Clifton wrote that it was also clear that Wolf failed to comply with the request for the information. The case is available online at [http://www.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/090806/\\$File/06-16403.PDF](http://www.ca9.uscourts.gov/coa/memdispo.nsf/pdfview/090806/$File/06-16403.PDF).

With regard to First Amendment issues, the court cited *Branzburg v. Hayes*, 408 U.S. 665 (1972), writing “Reporters have no First Amendment right to refuse to answer relevant and material questions asked during a good-faith grand jury investigation.” Because there was no question that the present grand jury proceeding was being conducted in good faith, that the inquiry involved did not involve a legitimate need of law enforcement, or had only a remote and tenuous relationship to the subject of the investigation, the court wrote there was “no showing of bad faith.” Wolf, however, argues that the grand jury is being conducted in bad faith because he thinks that the burning of a police car is not a federal concern.

Touching on Wolf’s argument that if forced to testify, it would have a chilling effect on further reporting of events because he could be perceived as an investigative arm of the law, the court again turned to *Branzburg*, writing, “From the beginning

of our country the press has operated without constitutional protection for press informants, and the press has flourished. The existing constitutional rules have not been a serious obstacle to either the development or retention of confidential news sources by the press.”

Finally, regarding Wolf’s claim that turning over the videotape would violate his Fifth Amendment rights because “the act of producing the tape is testimonial and is therefore privileged,” the court wrote that Wolf created the tape voluntarily and therefore the Fifth Amendment does not protect him from disclosing its contents. Because Wolf has failed to explain how turning over the tape will incriminate him, merely possessing it does not in itself violate a criminal statute. Court documents and past news articles are available online at <http://joshwolf.net/grandjury/>.

On September 14, Wolf put a posting on his Web site that read: “I have recently been notified that the Assistant US Attorney, Jeffrey Finnigan has filed a motion to revoke my bail despite the fact that the ruling from the 9th circuit has not yet been finalized and there are still appeal options available to me within the 9th circuit. In other words, The US Attorney’s office is so eager to place me back into jail that he has filed a motion stating that the court should take action to throw back into prison despite the fact that I am not accused of committing a crime, am not a safety risk in any way shape or form, and am not a flight risk.”

Various groups have offered Wolf their support. On July 19, the Society for Professional Journalists provided Wolf \$1,000 in a Legal Defense Fund grant. A press release available online at <http://spj.org/news.asp?ref=598>. On July 31, Reporters without Borders issued a press release protesting attempts by the U.S. attorney’s office to have Wolf held in contempt of court. That press release is available online at http://www.rsf.org/article.php3?id_article=18428.

On September 18, the same three judges who had found Wolf in contempt granted a motion by Finnigan to revoke bail. Wolf’s attorneys told the *San Francisco Chronicle* that the freelancer plans to turn himself in before the September 20 deadline, and will again be held in Dublin, Calif.

Wolf’s attorneys also told the *Chronicle* that they plan to appeal, and will ask for a hearing before the full panel of the court. They are considering taking the case to the U.S. Supreme Court, if necessary.

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Reporters Privilege News

Appeals Court Finds That Bloggers Have

Same Protection As Journalists, Newsgatherers

In May 2006, a California state appeals court unanimously rejected Apple Computer Inc.'s attempt to discover internet bloggers' confidential sources for a story published online in November 2004 that revealed aspects of the company's development plans. The court overruled a March 2005 order by a lower court that the bloggers' internet service providers were obliged to turn over the bloggers' web records. *O'Grady v. Superior Court*, 139 Cal.App.4th 1423 (Cal. App. 2006).

In December 2004, Apple filed suit in California's Santa Clara County Superior Court in *Apple Computer Inc. v. Doe*, Case No. 1-04-CV-032178, claiming that "Does 1-25" misappropriated and disseminated trade secrets. Apple then sought and obtained subpoenas requiring the bloggers' email server company, Nfox.com, to reveal the names, addresses, and internet protocol (IP) addresses and emails of the sources who communicated electronically with the publishers.

The bloggers, Jason O'Grady and Monish Bhatia, of the blog PowerPage, and someone using the pseudonym "Kaspar Jade" and identifying him- or herself as "primary publisher, editor and reporter for [the blog] Apple Insider," sought a protective order in February 2005 to prevent the discovery, citing the California state reporter's shield law (Cal. Const., art. I, § 2, subd (b); Evid. Code § 1070), the federal Stored Communications Act (18 U.S.C. §§ 2701-2712), and state common law. Apple argued that the newsgatherer's privilege did not apply to theft of trade secrets, and even if it did apply, it was overcome by the company's compelling need for the information. It also argued that the state shield law only provides immunity from contempt but does not serve as a ground for opposing discovery. Finally, it argued that the bloggers were not protected by the state shield law in any event because they were not journalists and further argued that there is no constitutional right to anonymous speech.

In March 2005 the lower court denied the bloggers' request for a protective order. It determined that the subpoenas to Nfox and Nfox's lawyer were appropriate because the information posted on the Web sites was "taken from a confidential set of slides clearly labeled 'Apple Need-to-Know Confidential'" and thus "this action has passed the thresholds necessary for discovery to proceed." It assumed that the bloggers were indeed journalists, but it noted that their constitutional privilege assertions were "overstated" because "[r]eporters and their sources do not have a license to violate criminal laws. . . ."

The court observed that their decision "is not the equivalent of a free pass," finding that the bloggers could still be compelled to reveal information relating to a crime. It also questioned what public interest was served by PowerPage and Apple Insider and stated that "an *interested public* is not the same as the *public interest*." (Emphasis in the original.) The lower court's ruling is *Apple Computer, Inc. v. Doe 1*,

No. 1-04-CV-032178, 2005 WL 578641 (Cal. Sup. Ct. Mar. 11, 2005). (See "Reporters Privilege News: Apple Suit Tackles Legal Protections for Bloggers" in the Winter 2005 issue of the *Silha Bulletin*.)

The publishers appealed and on May 26, 2006, the State Court of Appeal (Sixth Appellate District) ruled that the lower court erred because (1) the subpoenas to the e-mail service provider were unenforceable under the federal Stored Communications Act; (2) the California state statutory shield law precluded any subpoenas seeking unpublished information; and (3) state common law created a conditional constitutional privilege against compulsory disclosure of confidential sources.

Writing for the unanimous three-judge panel, Judge Conrad L. Rushing held that although the federal Stored Communications Act enumerates several exceptions to its rule that service providers may not disclose the contents of stored messages, none of them applied in this case. Disclosure is only provided for by statute when it is incidental to the provision of the intended service; incidental to the protection of the rights or property of the service provider; made with the consent of a party to the communication or, in some cases, the consent of the subscriber; related to child abuse; made to public agents or entities under certain conditions; related to authorized wiretaps; or made in compliance with certain criminal or administrative subpoenas issued in compliance with federal procedures. The judges rejected Apple's argument that discovery fell within the "incident to the protection of the rights and property of the service provider." Apple had argued that by not complying with the subpoena, Nfox exposed itself to contempt or other sanctions which could threaten its property. The court called this reasoning unsound and said the only property loss Nfox risked would be costs in defending against an invalid subpoena.

Rushing further affirmed that the bloggers are journalists. "We decline the implicit invitation to embroil ourselves in questions of what constitutes 'legitimate journalis[m],'" he wrote. With regard to application of a shield law, he wrote: "The shield law is intended to protect the gathering of *news*, and that is what petitioners did here." (Emphasis in the original.) He continued, "We can think of no workable test or principle that would distinguish 'legitimate' from 'illegitimate' news. Any attempt by courts to draw such a distinction would imperil a fundamental purpose of the First Amendment, which is to identify the best, most important, and most valuable ideas not by any sociological or economic formula, rule of law, or process of government, but through the rough and tumble competition of the memetic marketplace."

The California shield law extends its protection to a "publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication." Apple argued that

"The shield law is intended to protect the gathering of news, and that is what the petitioners did here."

– Judge
Conrad L. Rushing

Apple v. Doe, continued on page 32

although the law has been amended to include new forms of media, it has never been amended to include posting of information on a Web site. The court dismissed this argument, noting Apple's "pervasive misuse of the verb 'post.'" Unlike Apple, the court differentiated between the "open and deliberate publication on a news-oriented Web site" with a "casual deposit of information" to a newsgroup, chatroom, bulletin board system, or discussion group. It concluded that "[b]eyond casting aspersions on the legitimacy of petitioners' enterprise, Apple offers no cogent reason to conclude that they fall outside the shield law's protection."

Having decided the web publishers were covered by the state shield law, the court turned to the status of the blogs themselves, undertaking an extensive analysis of whether they were considered a newspaper, magazine or other periodical publication under the statute. It held that the legislative intent and the purpose of the statute favored including publications like PowerPage and Apple Insider.

Finally, the court considered the relevant California constitutional precedent. In the leading California case, *Mitchell v. Superior Court*, 37 Cal.3d 268 (Cal. Sup. Ct. 1984), the state's Supreme Court determined that "in a civil action a reporter, editor, or publisher has a qualified privilege to withhold disclosure of the identity of confidential sources and of unpublished information supplied by such sources. The scope of that privilege in each particular case will depend upon the consideration and weighing of a number of interrelated factors." Those factors include (1) the nature of the litigation and whether the reporter is a party; (2) the relevance of the information sought to plaintiff's cause of action; (3) the extent to which the party seeking disclosure has exhausted all alternative sources of obtaining the needed information; (4) the importance of protecting confidentiality in the case at hand; and (5) whether the plaintiff had made a *prima facie* case that the challenged statements were false.

In this case, the court held that the first factor favored nondisclosure because the petitioners are not defendants but that the second factor favored disclosure because the identity of the misappropriator "goes to the heart of [Apple's] claim." The court decided that Apple had failed to establish that there was any information it could not obtain from a third party, let alone that the service providers were the only means of obtaining information, and thus the third factor favored nondisclosure.

The fourth factor also favored nondisclosure, as the court disagreed with Apple's categorical assertion that "the public has no right to know a company's trade secrets."

The court reviewed the precedent set in *DVD Copy Control Association v. Bunner*, 31 Cal. 4th 864 (Cal. 2003). In that case, the California Supreme Court held that an injunction could issue against the online publication of a programming code that would allow users to bypass the copy-protection system of digital disks. There, the high court determined that the plaintiffs' interest in preventing the disclosure of trade secrets overcame the publisher's expression rights.

However, the appeals court distinguished it from this case, noting that "[h]ere, no proprietary technology was exposed or compromised." It also stated that the trade secret at issue here was of "greater public interest, and closer to the heart of First Amendment protection" than the computer programming code at issue in *Bunner*. The court observed that the release of software that could allow amateurs to create and record music without studio assistance could be "one of the most significant cultural developments since the invention of the printing press." The court noted the possible significance of the existence of Apple's software illustrated "the peril posed to First Amendment values when courts or other authorities assume the power to declare what technological disclosures are newsworthy and what are not." (For further information about the *Bunner* case, see "Silha Center Files Brief in *Bunner* Case" in the Summer 2002 issue of the *Silha Bulletin* and "Recent Developments in Copyright Law: DeCSS Update" in the Winter 2003 issue of the *Silha Bulletin*. The Silha Center submitted a friend of court brief in *Bunner*, available online at <http://www.aclunc.org/cyber/020711-bunner.pdf>.)

The fifth factor, the court determined, favored "disclosure, or more precisely, does not weigh against it," because Apple made an adequate showing of wrongdoing on someone's part in disclosing trade secrets. However, the court concluded that on balance, the factors favoring disclosure were outweighed by those favoring nondisclosure, especially Apple's inability to show that it had exhausted other avenues of information. The court then granted the bloggers' request for a protective order.

The publishers were represented by the lawyers at the Electronic Freedom Foundation (EFF). In an EFF press release, Staff Attorney Kurt Opsahl, who argued the case before the appeals court, called the ruling "a victory for the rights of journalists, whether online or offline, and for the public at large."

Another Staff Attorney, Kevin Bankston, added that "[i]n addition to being a free speech victory for every citizen reporter who uses the Internet to distribute news, today's decision is a profound electronic privacy victory for everyone who uses e-mail. The court correctly found that under federal law, civil litigants can't subpoena your stored e-mail from your service provider." The press release is available online at http://www.eff.org/news/archives/2006_05.php#004698.

Robert Cox, president of the Media Bloggers Association (MBA), which filed a friend of the court brief in the case, said in a posting on his organization's website, "We are pleased that by ruling as it did, the California courts have discarded the obsolete notion that practicing journalism is somehow a function of 'sociological or economic formula.' Bloggers who practice journalism are journalists. Period." The statement is available online at http://www.mediabloggers.org/archives/2006/05/california_apppe.php.

— ASHLEY EWALD
SILHA FELLOW

Newsroom Searches

Newsrooms in Alaska Searched Following Fight in Anchorage

On July 12, 2006, Alaska's Third Judicial District Court (Anchorage) Judge Jack Smith issued a search warrant permitting police to seize a DVD containing photographs from the newsroom of the *Anchorage Daily News*, and a videotape from Anchorage's KTVA-Channel 11. After turning over the DVD to police, *Daily News* editor Patrick Dougherty contacted attorney John McKay. McKay then called Smith and told him that the search warrant was illegal under the Privacy Protection Act (PPA) of 1980, 42 U.S.C. § 2000aa et seq. (2002). Less than two hours after the materials were handed over, Smith ordered the police to return them, unexamined.

The PPA states that "it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize any documentary materials, [i.e., written or printed materials, photographs, motion picture film, negatives, video tapes, audio tapes, etc.] other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication" However, there are exceptions. For example, the PPA does not apply where there is cause to believe the journalist possessing the materials in question took part in a crime that is related to those materials. It also does not apply when there is a possibility that the materials being requested may be destroyed or lost, or when immediate seizure of the materials could prevent the death or serious bodily injury to another person.

The police sought the DVD and the video, believing they might contain information about a shooting that took place on July 9 at multi-field Anchorage Football Stadium. Josh Lopez, one of the teenagers at the stadium that night, told the *Daily News* that various football games and practice sessions were taking place within the stadium. At one point, one person tackled another. The person tackled complained about the force of the blow, and a fight broke out between him and the person who tackled him. A dozen other players joined in the fight. Then one person went to a gym bag, pulled out a gun, and fired it into the air in effort to stop the fight. Lopez said it was at that point that people scattered. There was more gunfire in the confusion, making it impossible to see who or how many people were shooting. Some eyewitnesses told the *Daily News* that one, or perhaps as many as three people, fired guns. Matthew Ellis, a photographer for the

Daily News, took photographs of the incident, including pictures of people running from the stadium, of others tending a victim, and of others simply looking on. When the incident was over, one of the players, Daniel Leituala, had been shot in the face and shoulder.

Local Pastor Matauaina Tali told the *Daily News* that he encouraged young people in his church to report what they saw that night to the police, but that parents might encourage their children to keep quiet, fearing retribution. Tali acknowledged that a member of his congregation was threatened that night at the stadium about what might happen to him if he did not keep quiet about what he saw.

The *Daily News* posted 39 of Ellis' 160 photographs from the incident on its Web site, available online at www.adn.com. Dougherty told the *Daily News*, "Because of intense interest in this event, we've published an extraordinary number of photographs from the shooting. All of those photographs have been offered to police – without a search warrant or a subpoena. I have made clear to police there is no information available in unpublished photos that isn't available in the published ones." Staci Feger, KTVA-TV's news director, told the *Daily News* that the station's video tape also did not contain information that had not already aired.

Dougherty said that although the newspaper shares an interest in seeing that crimes are solved, "[T]he *Daily News* has a policy against providing unpublished material – whether it is notes, photographs, documents or tape recordings – to any external agencies or individuals. That policy allows our journalists to gather information we can deliver to the public, including the police. Without that ability, we cannot fulfill our First Amendment responsibility. It's a principle we must defend, and can defend in this case without preventing the police from doing their job."

Police spokesman Lt. Paul Honeman told the *Daily News* that detectives had simply wanted images of the incident, and understood that the photos would be provided if they had a subpoena. He stated that police in Alaska usually cannot get subpoenas unless the item being sought is connected to a grand jury investigation. "We felt that using the search warrant was tantamount to a subpoena," Honeman told the *Daily News*. "It wasn't like we were going to come in and seize storage equipment."

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

"Because of the intense interest in this event, we've published an extraordinary amount of photographs. I have made it clear to police there is no information available in unpublished photos that isn't available in the published ones."

– Patrick
Dougherty,
Editor,
*Anchorage Daily
News*

Newsroom Searches

Pennsylvania's *Intelligencer Journal*'s Hard Drives Seized

In March 2006, the Pennsylvania Supreme Court declined to reconsider a February 23 ruling finding that the State Attorney General's Office may examine the contents of four hard drives belonging to reporters at the Lancaster (Pa.) *Intelligencer Journal* that were subpoenaed as part of an ongoing grand jury investigation. According to the *Lancaster New Era*, which is owned by Lancaster Newspapers Inc., the same company that owns the *Intelligencer Journal*, no charges have been brought in the investigation. The investigation is based on allegations that Lancaster County coroner Dr. Gary Kirchner gave his password to one or more *Intelligencer Journal* reporters, who then allegedly used it to gain access to a restricted law enforcement Web site. According to the Associated Press, the restricted Web site is operated by the Lancaster County-Wide Communications' Computer Assisted Dispatch Web site. Kirchner has denied giving out his password.

Because grand jury proceedings are closed, published details about the investigation are scant. According to the *Philadelphia Inquirer*, on several occasions the *Intelligencer Journal* allegedly published details about local crimes that were not publicly available, but which had appeared on the restricted law enforcement Web site. *Editor & Publisher* reported that the purpose of the grand jury is to investigate "leaks to reporters."

The *Lancaster New Era* reported that the investigation began when local officials noticed that a newspaper computer had gained access to the Web site in August 2005, between 3 p.m. and 11 p.m., "the designated working hours" of the *Intelligencer* staff. Local officials then contacted the Attorney General's Office. The Lancaster *Sunday News*, another paper owned by Lancaster Newspapers Inc., reported that local law enforcement officials complained about Kirchner to Lancaster County District Attorney Donald Totaro, whose office has reportedly had friction with Kirchner's in the past. Totaro told the *Sunday News*, "In light of the problems between the coroner and this office over the past few years . . . I felt it would have been a conflict of interest for us to pursue this." He instead referred the case to the state Attorney General, Tom Corbett. The *Sunday News* also reported that law enforcement officials have been "angered" on several occasions when details about investigations have been reported in the *Intelligencer Journal*, and that those officials "suspect Kirchner has been the source."

The *Inquirer* reported that, in order to investigate the allegations, prosecutors sought four hard drives from the *Intelligencer Journal* because they might contain Internet histories and cached Web page content that could implicate the *Intelligencer Journal* reporters who may have gained access to the restricted Web site. According to the *Inquirer*, *Intelligencer Journal* editor Raymond Shaw was also compelled to testify before the grand jury, though he declined subsequent comment to the *Inquirer* regarding his testimony.

According to the *New Era*, attorneys for the newspaper offered investigators printed versions of

some of the requested items, including e-mails, in an effort to comply with the investigation without turning over the hard drives that contain notes and other work products of the journalists. But the Associated Press reported that those offers were "rebuffed" by investigators, who then issued a subpoena to examine the hard drives off-site. Newspaper staff and Lancaster Newspapers Inc. filed a motion to quash, citing the Pennsylvania reporter's shield law (42 Pa.C.S. § 5942 (2005)), the federal Privacy Protection Act (42 USCS § 2000aa et seq.), and the First Amendment.

In response to the motion, senior Judge Barry Feudale, who is presiding over the grand jury, ruled on February 23 that Lancaster Newspapers must turn over the hard drives, and that the state could search their contents, but could only view data "relevant to the case." Feudale further stipulated that the government agent who withdraws the data must show the information to Feudale first, before showing it to prosecutors, "to ensure that the journalists' other confidential files are not compromised," the *Inquirer* reported.

Lancaster Newspapers Inc., as ordered by Feudale, turned over the hard drives to prosecutors after the ruling, but according to court documents, Feudale said he would stay the actual search of the hard drives' contents pending the newspaper's appeal. However, despite Lancaster's compliance with the terms of the February 23 ruling, Feudale did not issue the stay. The state Supreme Court instead granted a temporary stay of Feudale's order pending its own review of the appeal.

On March 8, the state Supreme Court issued a *per curiam* (unsigned) opinion declining to consider the appeal, finding that Feudale's interlocutory ruling was not subject to appeal. See *In re: The Twenty-Fourth Statewide Investigating Grand Jury*, Nos. 39 MM 2006 & 23 MAP 2006 (March 8, 2006). Justice Thomas G. Saylor concurred, explaining that the Supreme Court had granted the temporary stay not because Lancaster's appeal warranted consideration, but because of Feudale's "unfulfilled commitment" to stay the search order after the newspaper had complied with the relevant stipulations. Saylor also acknowledged that, because the stay had served its purpose, it could now be "appropriately dissolved." Justice J. Michael Eakin did not participate in the ruling.

After the ruling, Harold E. Miller, president and CEO of Lancaster Newspapers Inc., told *Editor & Publisher* that the company had taken the appeal as far as it could. "It's our concern that the protections afforded by the [law] weren't applied in this case. That's what's disappointing because a lot of our argument hinged on the shield law and privacy protection law."

The *Inquirer* reported that William DeStefano, a lawyer for the newspaper company, wrote in his

"Permitting the attorney general to seize and search unfettered the workstations of the reporters will result in the very chilling of information."

—William DeStefano, Attorney, Lancaster Newspapers

Newsroom Searches

Warrant to Search Reporter's Home Upheld

On May 30, 2006, the U.S. Court of Appeals (4th Cir.) dismissed a lawsuit by a reporter claiming two Virginia police officers illegally searched and seized objects from his home. Judge Karen Williams's opinion for the two to one majority in *Arkansas Chronicle v. Murphy*, 2006 U.S. App. Lexis 13389 (4th Cir. 2006) held that the trial court erred in denying the police officers' summary judgment based on qualified immunity, and dismissed the suit.

John Culbertson and his employer the *Arkansas Chronicle* filed a lawsuit under 42 U.S.C. § 1983, the federal civil rights statute authorizing private lawsuits for constitutional violations, against two Fairfax County officers who executed the search and an Oklahoma City detective who sought the warrant after a Jan. 30, 2004 search of Culbertson's home. The *Arkansas Chronicle*, an Internet publication, is available online at www.arkansaschronicle.com. Since the ruling in the case, there is little information on the Web site about the location of its offices.

The Fairfax County police officers executed the warrant on behalf of Oklahoma City Police Detective Mark Easley who believed Culbertson possessed a videotape and still images of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City. Thomas Mills, an attorney for bombing suspect Terry Nichols, claimed that Culbertson had showed him those images of the bombing on Culbertson's computer before Nichols's trial in 2004. During the search the officers seized 10 computers, more than 600 media storage devices, and other written materials from Culbertson's home but did not find the video or images.

Culbertson alleged that the search was overbroad and without probable cause, and that the officers improperly seized objects outside the scope of the warrant. In a summary judgment motion, the officers contended they could not be sued for their actions, as qualified immunity shields government officials from civil damages liability unless their conduct violates clearly established statutory or constitutional rights. The district court denied the officers' motion, but the appellate court reversed and granted it.

Judge Williams's opinion rejected Culbertson's argument that the warrant needed to specify the objects to be searched for and seized because of the First Amendment implications from this case. Citing *United States v. Torch*, 609 F.2d 1088 (4th Cir. 1979), a case upholding a warrant to search a van and warehouse for obscene material that stated "the particularity requirement is even more stringent where the things to be seized have the presumptive protection of the First Amendment," the court found such specificity was unnecessary because the seizure was not done to suppress the ideas contained in the documents. Instead, this warrant was "incidental to any alleged First Amendment activity and was not used as 'an instrument for stifling liberty of expression.'"

The court also noted in a footnote that even if the heightened standard applied, it would reach the same result because, according to *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978), a case involving the search of a student newspaper's newsroom, the "particular exactitude" requirement is satisfied when the warrant leaves "as little as possible to the discretion or whim of the officer in the field." The court stated the discretion required for the officers to execute this warrant was very low, as they only had to determine whether an item could store electronic, magnetic, or optical data. The court did not mention the Privacy Protection Act, 42 U.S.C. § 2000aa, which governs newsroom searches.

Culbertson also contended that the warrant was overbroad because it allowed the seizure of any and all computer equipment and storage devices in his home, but the court rejected argument as well. Stating that it would not "tie the hands of law enforcement by expecting an investigating officer to know the exact format electronically stored evidence will take place," the court found the warrant described the items to be seized "within a practical margin of flexibility." The search ultimately failed to produce the videotape and photographs involving the Oklahoma City bombing that Easley was seeking.

Judge William L. Osteen, a visiting United States District Judge, dissented. He agreed that the warrant was not overbroad and did not need to satisfy a higher burden of particularity because the search involved a journalist, but contended that the information on which the warrant was based was too stale to constitute probable cause.

— SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

Culbertson contended that the warrant was overbroad because it allowed the seizure of any and all computer equipment and storage devices in his home.

Copyright Updates

District Court Rules That Companies Editing Movies for Family Viewing Violate Copyright Law

On July 7, 2006, the United States District Court for the District of Colorado entered a judgment against four companies that had been editing offensive language, violence and sexual subject matter from major motion pictures in order to offer consumers movies free of “objectionable” content. Known as third-party editing companies, CleanFlicks, LLC, ASR Management Corporation, Family Flix, USA, LLC and Play It Clean Video, LLC were found liable on several counts of copyright infringement in *CleanFlicks of Colorado, LLC v. Soderbergh*, 433 F.Supp.2d 1236 (D.Colo. 2006). Copyright laws, District Judge Richard P. Matsch wrote, were intended to afford artists the right to protect their work in its original form.

Accordingly, Matsch enjoined the third-party editing companies from selling or distributing any unauthorized or altered copies of copyrighted films to prevent “irreparable injury to the creative artistic expression in the copyrighted movies.”

The decision marks the end of a four-year legal battle that began when an owner of seven CleanFlicks outlets filed a lawsuit against several motion picture studios and sixteen film directors, including Martin Scorsese, Steven Spielberg and Robert Redford. The lawsuit was filed in response to threats from the film industry that it would bring legal action for copyright infringement against CleanFlicks and others involved in the practice of third-party editing. CleanFlicks and Huntsman, a patent applicant responsible for the technology that allowed third-party editing companies to sell altered versions of films, filed a preemptive lawsuit. According to the complaint, the plaintiffs asked the U.S. District Court to declare the company’s practice of offering consumers the chance to rent or purchase edited films permissible under existing copyright laws.

Traditionally, copyright law grants authors an exclusive proprietary right in the reproduction, display or distribution of original works of authorship. However, certain exemptions in the Copyright Act, 17 U.S.C. §§ 101-122, limit the exclusive rights of creators and allow others to make permissible, though not authorized, use of a creator’s work. In an October 2002 Second Amended Complaint, CleanFlicks argued that their adaptations of the films were permitted by the First Amendment guarantees of free speech as well as limits on the copyright holders’ exclusive right under the Copyright Act. The company argued that the “first sale” doctrine, 17 U.S.C. § 109, which allows the owner of a particular copy of a copyrighted work to make certain uses of that copy, permitted CleanFlicks to produce a copy of an altered version of the film for every copy of the original work it purchased. Moreover, the company urged Matsch to declare the sale of edited versions of motion pictures as a “fair use” under the statutory analysis of 17 U.S.C. § 107, arguing that the adaptation of the films was a criticism of

objectionable content commonly found in modern movies and that their use offers “socially acceptable alternatives” to a variety of consumers.

In September 2002, Directors Guild of America (DGA) President Martha Coolidge criticized third-party editing companies, including CleanFlicks, promising that the DGA would not stand idly by while companies traded on the names of its members. Coolidge complained that by advertising the edited films under their original titles and crediting the DGA members as directors, third-party editing companies were misrepresenting the edited films as works of the original directors despite the fact that the artistic vision of the film had been changed.

“Is it right to take finished films that have been created by someone else, change them to suit your whims, then profit by the commerce of these grossly altered products – and at the same time portray these versions as still being the works of their original directors?” Coolidge asked. “For directors, and for the DGA, the answer to this question is a resounding no.” Nonetheless, she added, “The rise of digital technology has paved the way for a number of companies to rent or sell unauthorized edited copies of videotapes and DVDs of hundreds of movies,” she wrote.

Much of Coolidge’s statement incorporated concepts often associated with a legal concept known as “moral rights.” The concept of moral rights is internationally-recognized as an intellectual property right, and grants artists a right of attribution to claim displayed works and the right to prevent others from modifying their work. In the United States, however, moral rights are recognized exclusively in works of visual art under the Visual Artists Rights Act (VARA) of 1990, 17 U.S.C. § 106(a) (2006). Because motion pictures do not qualify as works of visual art under VARA, the moral rights of motion picture studios and directors are not protected under federal copyright law. However, courts have often protected moral rights in creative works by allowing artists to prevent others from inappropriately attributing altered versions of the work to the original author under the Lanham Act. For example, in *Gilliam v. ABC*, 538 F.2d 14 (2d Cir. 1976), the Second Circuit permitted members of the Monty Python comedy troupe to assert a Lanham Act claim against ABC for editing the group’s television program when it was televised in the United States.

On Sept. 20, 2002, the DGA intervened in the lawsuit on behalf of the 16 directors named in the original complaint, who were members of the DGA. The organization filed both an answer to the complaint and counterclaims for copyright infringement, under the Copyright Act, 17 U.S.C. §§ 101-122, and unfair competition, under the Lanham Act, 15 U.S.C. § 1501, against CleanFlicks, Huntsman and eight other companies involved in altering the content of films without the permission

“Is it right to take finished films that have been created by someone else, change them to suit your whims, then profit by the commerce of these grossly altered products – and at the same time portray these versions as still being the works of their original directors?”

– Martha Coolidge,
DGA President

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of their copyright holders. December 13, 2002, the motion picture studios joined the DGA in the countersuit against the companies, also arguing that the third-party editing companies were infringing on their copyrights as well as engaging in unfair trade practices under the Lanham Act.

A number of claims and parties were dismissed as the case was pending, including claims related to the Lanham Act. At the time of the July 2006 decision, Matsch addressed each of the studios' remaining counterclaims for copyright infringement. "The Studios claim that CleanFlicks and Family Flix are infringing their exclusive right to reproduce the copyrighted works under § 106(1) [of the Copyright Act]; that CleanFlicks and Family Flix are violating the Studio's right to create derivative works under §106(2); and that all four of the counterclaim defendants are infringing the exclusive right of distribution of copies under § 106(3)," Matsch wrote. Unless any applicable defense exempted a finding for copyright infringement against the third-party editing companies, they would be held liable.

The fact that CleanFlicks, like the other counterclaim defendants, purchased original versions of the motion pictures for every copy it later produced, did not prevent a finding of infringement, Matsch wrote. Though copyright's "first sale" doctrine protects consumers from liability for copyright infringement in making use of a single authorized copy, that protection does not include the right to make additional copies.

Matsch then considered whether the unauthorized editing and resale could be considered a "fair use" under Section 107 of the Copyright Act. The statute requires judges to consider four factors when deciding whether a use is a "fair use," including: (1) the purpose and character of the use; (2) the nature of the copyrighted work; (3) the portion of the copyrighted work used in relation to the work as a whole; and (4) the effect of the use on the commercial market for the copyrighted work.

The third-party editing defendants conceded that their use of the copyrighted works was for commercial gain, but argued that the altered versions of the films amounted to criticism of the objectionable content. The altered versions offered consumers a socially-acceptable alternative that allowed families to view films together, the companies argued. Matsch wrote in response: "This Court is not free to determine the social value of copyrighted works. What is protected are the creator's rights to protect its creation in the form in which it was created." Matsch chose to defer to the judgment of the legislative branch in enacting the Family Movie Act of 2005, Pub. L. No. 109-9, 119 Stat. 218, which exempts third-party edits by members of a private household only if a fixed copy was created.

Moreover, while considering the nature of the third-party editing companies' use, Matsch found that the counterclaim defendants' use of the copyrighted films added little original expression. Under *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569 (1994), a case in which the Supreme Court used the

statutory fair use analysis to determine that a musical group's parody of Roy Orbison's "Pretty Woman" was permissible as a means of social expression, a work can be considered as transformative if it "adds something new, with a further purpose or different character, altering the first with new expression, meaning or message." If a subsequent use can be considered transformative, it is more likely that a court will consider the use as "fair." Matsch, however, found that "The counterclaim defendants add nothing new to these movies. They delete scenes and dialogue from them." Because the nature of the use was non-transformative and the content of the films was copied almost in their entirety, Matsch found that the second and third prongs weighed against allowing the third-party editing companies from asserting the "fair use" defense. But because the works were not transformative, they could also not be considered derivative works under 17 U.S.C. § 101. Matsch, therefore, dismissed the studios' claim for copyright infringement based on the unauthorized creation of derivative works.

The counterclaim defendants argued that, although the first three factors weighed in favor of the studios, the impact on the market for unedited versions of the films was negligible and sufficient for a finding of fair use. Consumers who purchased altered versions, they argued, would not have purchased unedited versions of the film because of the objectionable content. "The argument has superficial appeal," Matsch wrote, "but it ignores the intrinsic value of the right to control the content of the copyrighted work which is the essence of the law of copyright."

Concluding that the counterclaim defendants' practice of editing and distributing unauthorized copies of motion pictures could not amount to a fair use, Matsch granted the studios' motion for summary judgment and enjoined the companies from offering altered versions for sale. Matsch ordered the companies to deliver any unauthorized copies to the studios.

In a July 8, 2006 press release, the DGA warned that "Companies that use technology to electronically edit by skipping and muting portions of films, yet leave the original DVD intact are not covered by this ruling. The DGA remains concerned about this exception to copyright protection and is pleased that this ruling reaffirms the importance of the principles protecting the rights of directors and copyright holders to maintain their artistic vision and integrity of their work." CleanFlicks and the other third-party editing companies considered appealing Matsch's decision but notified consumers by e-mail on July 28, 2006 that the companies would not appeal. A notice posted on CleanFlicks Web site, available online at <http://cleanflicks.com/saleover.php>, stated that the company had closed on August 31.

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Copyright Updates

Settlement Reached in Kazaa Lawsuit

An Australian company responsible for producing peer-to-peer file-sharing software agreed to pay more than \$115 million to members of the entertainment industry in a settlement reached on July 27, 2006. The agreement brought an end to a number of lawsuits filed around the world by industry members claiming the company's software aided consumers in pirating copyrighted work.

Although the entertainment industry has reached settlements with the producers of other file-sharing software following the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster*, 125 S.Ct. 2763 (2005), the *Financial Times* described the July 27 settlement as "one of the biggest legal victories for the recording industry in its efforts to fight piracy."

The out-of-court settlement was announced by the International Federation of the Phonographic Industry (IFPI) and the Recording Industry Association of America (RIAA). The IFPI and RIAA represent members of the recording industry abroad and in the United States. The trade groups had been actively involved in international litigation against Sharman Networks, Ltd., the company behind the popular file-sharing software Kazaa.

Kazaa was developed in the Netherlands by Niklas Zennstrom and Janus Friis and a file-sharing network utilizing the software was launched in 2001. That same year, the United States Court of Appeals for the Ninth Circuit held Napster, a similar file-sharing operation, liable for copyright infringement in *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001). Kazaa later shut down when it was threatened by legal action in 2002. An article published in *The New York Times* on July 28, 2006 reported that Sharman Networks purchased Kazaa in 2002 from its creators. Sharman Networks also operated "Fast Track," a file-sharing network that connected tens of millions of personal computers and enabled users to exchange copyrighted works freely online. In order to earn revenue, the company used the traffic generated by its file-sharing service to attract advertisers. On July 27, 2006, the Associated Press reported that Sharman Networks had boasted to advertisers that Kazaa software had been downloaded more than 389 million times.

Since purchasing Kazaa in 2002, like other companies contributing to the ongoing use of peer-to-peer file-sharing networks to distribute copyrighted works, Sharman Networks became involved in a number of lawsuits in the United States and across the world. (See "U.S. Supreme Court Declines to Hear Three Speech-Related Cases" in the Fall 2004 issue of the *Silha Bulletin* and "File Sharing Sites Lose Legal Battles at Home and Abroad" in the Fall 2005 issue of the *Silha Bulletin*). In 2005, legal decisions in the United States and Australia found that Internet services like Kazaa, which operated a decentralized file-sharing system that safeguarded Sharman Networks from liability

under the *Napster* ruling because its servers did not actually produce infringing copies, could still face liability for copyright infringement.

On June 27, 2005, the United States Supreme Court found that companies that operate peer-to-peer file-sharing networks could be held liable for copyright infringement taking place between users on its network. Justice David Souter, delivering the opinion of the Court in the *Grokster* case, wrote "We hold that one who distributes with the object of promoting its use to infringe copyright as shown by clear expression or other affirmative steps take to foster infringement, is liable for the resulting acts of infringement." The affirmative steps described by Souter included a company's attempts to increase use of the software to generate advertising revenue despite being aware that infringement occurred with most downloads. (See "U.S. Supreme Court Rules in *Grokster*" in the Summer 2005 issue of the *Silha Bulletin*). The *Grokster* case held that the file-sharing parties involved could be liable under a theory of contributory liability based on the Court's doctrine of contributory copyright infringement for knowingly inducing users to infringe copyrights under *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), which protects manufacturers of devices that allow infringement but are capable of a substantial non-infringing use, such as Betamax players or video cassette recorders (VCRs).

The Court's holding in *Grokster* was followed by a decision in Australia that held Sharman Networks and six other companies directly liable for copyright infringement committed by Kazaa users. On September 5, 2005, the Federal Court of Australia entered judgment in *Universal Music Australia Ltd and Others v. Sharman License Holdings Ltd and Others*, 220 A.L.R. 1 (2005), ending 18 months of litigation between Sharman Networks and music companies based in Australia. Federal Judge Murray Wilcox ordered Sharman Networks to reengineer Kazaa software to filter out copyrighted material, noting that the Kazaa operator was aware that much of the traffic on their Web site consisted of illegal file exchanges. (See "File Sharing Sites Lose Legal Battles at Home and Abroad" in the Fall 2005 issue of the *Silha Bulletin*).

Following the recent trend resulting from legal decisions relating to digital piracy, including an agreement by the file-sharing service BearShare to pay \$30 million to the RIAA, Sharman Networks agreed to pay damages for copyright infringement to members of the recording industry. According to the settlement announced by the IFPI and RIAA, Sharman Networks offered to pay over \$100 million in damages to four major music companies: Universal Music, Sony BMG, EMI and Warner Music. On July 28, 2006, *The New York Times* reported that executives who were briefed on the agreement said the total payment to the music recording industry

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The *Financial Times* described the settlement as one of the biggest legal victories for the recording industry in its efforts to fight piracy.

Free Speech Stifled

Brigham Young University Professor Fired for Writing Editorial

Jeffrey Nielsen, an adjunct professor of philosophy at Brigham Young University (BYU) was fired because of a June 4, 2006 guest column published in the *Salt Lake City Tribune*.

Nielsen's column described a proposed constitutional amendment banning gay marriage as "immoral" and suggested same-sex attraction may be biologically based. These assertions directly contradict the teachings of The Church of Jesus Christ of Latter-day Saints (LDS) which owns and operates BYU. The LDS church opposes same-sex marriage and has lobbied for its members to encourage their representatives in Congress to pass a constitutional amendment banning it.

Following the editorial, BYU Philosophy Department chairman Daniel Graham sent Nielsen a letter on June 8 informing Nielsen he would not be retained to continue teaching at the university.

BYU spokesperson Carri Jenkins told KTVX-4 in Salt Lake City that, "We do ask that those who do teach here not contradict or oppose official statements by the First Presidency," a group of three individuals who are leaders of the LDS church.

The letter notifying Nielsen of his firing also stated that the university does not "consider it our responsibility to correct, contradict or dismiss official pronouncements of the church."

In his column, Nielsen stated that he respects the leaders of the LDS church as general authorities, but believes they should still be subject to "thoughtful questioning" or "benevolent criticism." He had been a professor at BYU for the past five years, teaching philosophy on a term-by-term basis. The university permitted him to finish teaching his classes for the spring, but not to begin new ones in the summer.

BYU has previously fired professors who advocate positions contrary to the teachings of LDS church leaders. *The Lord's University*, a book by Bryan Waterman and Brian Kagel, details other instances during the past 15 years, including that concerning a former professor who gave speeches advocating a woman's right to choose to have an abortion.

Although some individuals have expressed support for Nielsen, including a former BYU professor fired for criticizing one of the university's missionary program, others have taken the stand that a person directly contradicting his employer in a public forum is likely to be fired. Doug Robinson, a columnist for the (Salt Lake City) *Deseret News*, described Nielsen's actions as "biting the hand that feeds you." *Deseret News* is published by Deseret News Publishing Company, which is owned by the LDS, according to an article posted on Light Planet, a Web site about the Mormon church. The article is available online at http://www.lightplanet.com/mormons/daily/business/Church_EOM.htm.

Nielsen told KTVX-4 that he thought people "should be able to talk about it [gay marriage] without fear or punishment or discipline." As the *Bulletin* went to press, he had not indicated whether he plans to sue BYU for his firing.

— SCOTT SCHRAUT

SILHA RESEARCH ASSISTANT

Doug Robinson, a columnist for the *Deseret News*, described Nielsen's actions as "biting the hand that feeds you."

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appellate brief about the potential ramifications of this ruling, "Permitting the attorney general to seize and search unfettered the workstations [of the reporters] will result in the very chilling of information. . . Confidential tips, leads, and other forms of information will undoubtedly dry up once sources and potential sources learn that Lancaster Newspapers' workstations were taken out of its possession and turned over to investigations."

Lawyers for the newspaper also objected to the suggestion that the journalists may have committed a crime. DeStefano told the *Inquirer*, "Evidence has been presented to the attorney general which makes it clear that the county coroner, an elected official, invited and authorized the paper or reporters access to the restricted portion of the Web site . . . If somebody is authorized to give me a password and does, it's not hacking."

In July 2006, the attorney general's office issued a subpoena demanding two additional computers from *Intelligencer Journal* reporters, the *Intelligencer Journal* reported. However, the newspaper refused to turn over the computers, so the judge presiding over the grand jury held Lancaster Newspapers, Inc. in contempt, and ordered a \$1000-a-day fine for Lancaster's continued refusal to comply with the subpoena, according to the *Intelligencer Journal*. In response, Lancaster filed an emergency petition with the state Supreme Court asking it to reverse the grand jury's order, the *New Era* reported. On September 2, the state Supreme Court responded to Lancaster's petition by staying the lower court order, thus suspending the fines. According to the *Intelligencer Journal*, the state Supreme Court's ruling instructed the newspaper not to move or alter the computers in "any fashion, pending further order of this Court," though it did not specify when further orders might be issued. DeStefano, an attorney for the newspaper, called the ruling a "victory of sorts," and told the *Intelligencer Journal*, "The Supreme Court took the step of staying a court order while it bought some time to consider the merits of our argument more thoroughly." Kevin Harley, a spokesperson for Attorney General Tom Corbett, expressed confidence that the court would give the issues at hand "appropriate scrutiny," the *Intelligencer Journal* reported. To date, no charges have been brought in the investigation.

— PENELOPE SHEETS

SILHA RESEARCH ASSISTANT

Free Speech Stifled

Kansas City Royals Attempt to Stifle Reporters

Major league baseball team the Kansas City Royals revoked the credentials for Bob Fescue and Rhonda Moss, two radio reporters for competing local stations based Kansas City, following a contentious press conference on June 8, 2006.

The press conference had been called to introduce new team general manger Dayton Moore. The reporters began questioning team owner David Glass about the firing of former general manager Allard Baird. According to the Associated Press, both Fescue and Moss have a reputation for asking “tough, confrontational questions” of the Kansas Chiefs and the Royals, the two sports teams they each cover full time.

The Royals, a struggling team with only one winning season the past ten years, fired Baird earlier this year after a month of extensive speculation about Baird’s status with the team. At the beginning of the June 8 press conference, Fescue and Moss began questioning Glass about the team’s handling of Baird’s release.

Royals public relations director Aaron Babcock told Fescue and Moss their credentials were revoked the day following the press conference, and subsequently told the Associated Press that the reporters’ credentials are revoked for the rest of the season.

After almost a week of silence from the team following criticism from media organizations, an unsigned blog for the team responded on June 15. The blog stated that the two reporters’ credentials were not revoked because they asked tough questions of the team owner, but “for reasons of decorum.” The blog continued that, “the tone, the abruptness, and the forcefulness of which their questions and added commentary were presented, offended many at the news conference.” The blog is available online at http://royals.mlblogs.com/around_the_horn_in_kc/2006/06/15/index.html.

Journalism organizations and individual journalists responded quickly to defend Fescue and Moss, with the Society of Professional Journalists (SPJ) and Kansas City Press Club both issuing press releases critical of the Royals and asking that the reporters’ credentials to be reinstated.

The SPJ wrote a letter to Royals owner David Glass as well as Major League Baseball (MLB) commissioner Bud Selig stating that revoking the credentials “smacks of an attempt to control the message and to slap the hands of those who do not play along to your specifications.” Before the letter was sent, vice president of public relations for MLB Patrick Courtney had told *The Kansas City Star* that the league would not get involved with the matter, saying that it is the decision of each team how to handle its credential list.

Courtney indicated that the situation may have been different had Fescue and Moss been sportswriters for a newspaper instead of part of the electronic media. He told *The Kansas City Star* that the MLB does not have the same relationship with journalists from electronic media as it does members of the Baseball Writers of America. However, at least one columnist, Jeffrey Flanagan of the *Kansas City Star*, stated in his June 13 column that baseball needs to adapt to the new type of sports journalist, stating Fescue and Moss “should be given the same amount of slack as any other regular reporter covering Royals home games.”

Fellow *Kansas City Star* and ESPN.com columnist Jason Whitlock has also been quick to defend Fescue and Moss. Whitlock described both revoking the credentials and responding to criticism about it as “cowardly” in separate columns for the *Star*, and defended Fescue and Moss as “simply doing their jobs.” He also praised the two for their closeness to the club by attending games and practices year-round.

– SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

The SPJ said the revocation “smacks of an attempt to control the message and to slap the hands of those who do not play along to your specifications.”

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was \$115 million. *The Times* also reported that a settlement had also been reached with movie studios, but provided no details of the settlement.

Sharman Networks also agreed to take steps to curb any unauthorized distribution of copyrighted material. The Associated Press reported that Sharman Networks’s chief executive, Nikki Hemming, said that the settlement “marks the dawn of a new age of cooperation” between file-sharing services and members of the entertainment industry. Kazaa, according to Sharman Networks, will discourage ongoing digital piracy on its Web site by using “robust and secure” methods of frustrating computer users who attempt to share copyrighted work.

Reactions from members of the recording industry expressed satisfaction with the settlement, but warned that the settlement marks the next step in fighting global piracy. “We are under no illusion that this solves everything,” John Kennedy, chief executive of the IFPI, told *The Times*. “But this is very encouraging.”

David Munns, the vice chairman for EMI Music, told the Associated Press “While the award may seem like a vast pot of money, it will merely offset the millions we have invested – and will continue to invest – in fighting illegal pirate operations around the world and protection the works that our artists create.”

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Libel/Defamation

Anonymous Blogger Sued for Libel

On Dec. 29, 2005, New School Communications, a St. Paul-based public relations firm, filed a libel lawsuit against a then-anonymous political blogger and the Web site on which the allegedly false and defamatory statements were published. Days after the lawsuit was filed, on Jan. 4, 2006, the blogger unmasked himself as Michael B. Brodkorb, a prominent figure in Minnesota politics and the Minnesota Republican Party. The complaint alleged that Brodkorb defamed New School Communications and its president, Blois Olson, in an entry published Dec. 28, 2005 on Brodkorb's weblog, www.minnesotademocratsexposed.com (referred to as MDE).

On June 2, 2006, Judge Timothy J. McManus of Dakota County District Court denied Brodkorb's motion to dismiss New School Communication's claims, and the matter of *New School Corp. v. Brodkorb*, Case No. 19-CX-06-006432, (Minn. Dist. Ct., Dakota County filed Jan. 4, 2005), is set to go to trial on Jan. 10, 2007. The lawsuit could raise novel questions regarding how state courts will interpret long-settled legal principles in the evolving world of online weblogs.

The allegations at the heart of New School Communication's complaint arose after Brodkorb, citing an unknown source "in direct contact" with the congressional campaign of Colleen Rowley, claimed that Olson began publicly criticizing Rowley in retaliation for the campaign's refusal to hire Olson's firm. According to Brodkorb's December posting, Hubert H. Humphrey III solicited Rowley's campaign with a proposal for consulting work while employed as a senior counselor to New School Communications. It was not until after the Rowley campaign decided against hiring New School Communications, Brodkorb said, that Olson openly criticized the candidate and her campaign, pointing to comments made by Olson in October to authenticate his claim. "I think among Democrats it's fair to say they're disappointed that the campaign hasn't created more momentum," Olson told the Associated Press (AP) on October 27. "She needs to develop some discipline in how she talks, and what she talks about."

Olson, who is also a well-known commentator on Minnesota politics and co-publisher of the newsletter *Politics in Minnesota*, denied the allegations later that day and demanded a retraction. New School Communications, according to the complaint, has never performed any political campaign work and never submitted a proposal to work with Rowley's campaign. New School Communications and its founder initiated the lawsuit, seeking \$50,000 in damages for Brodkorb's "reckless disregard" of the truth. The complaint also alleges that Brodkorb's source, who remains unnamed, had no knowledge of New School Communications, has never been involved in the company's solicitations for public relations services, and may even be a fabrication. Olson and New School Communications also asked the court to order the removal of all defamatory statements from Brodkorb's website and enjoin Brodkorb from posting any further statements that could be considered defamatory.

On March 17, 2006, Brodkorb's attorney, Gregory J. Walsh, filed a motion to dismiss all claims made by New School Communications. Brodkorb claimed that the

lawsuit was aimed at chilling the exercise of Brodkorb's First Amendment rights, arguing that New School's claims amounted to a "Strategic Lawsuit Against Public Participation" (SLAPP). "SLAPP suits are brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. Indeed, one of the common characteristics of a SLAPP suit is its lack of merit. But lack of merit is not of concern to the plaintiff because the plaintiff does not expect to succeed in the lawsuit; only to tie up the defendant's resources for a sufficient length of time to accomplish plaintiff's underlying objective," Walsh wrote in the defense motion. SLAPP lawsuits are typically initiated against individuals who speak out to support government measures that a SLAPP plaintiff may oppose. In many states, like Minnesota, any claims brought against individuals for exercising their constitutional right to free speech are barred by anti-SLAPP statutes. Minn. Stat. 554.02, subd. 1 (2002).

On June 2, 2006, Judge Timothy J. McManus of Dakota County District Court disagreed with Brodkorb, finding that the lawsuit filed by New School Communications was not a SLAPP lawsuit. MDE, he wrote in his opinion, is aimed at influencing voters rather than obtaining favorable government action as required by Minnesota law. Minn. Stat. § 554.02. The judge found that, moreover, the issue of whether the claims made by Brodkorb on Dec. 28, 2005 were false was a material aspect of New School Communication's defamation claim. Because this was factually disputed, McManus wrote, he could not dismiss New School Communications' claims against Brodkorb or MDE and was prevented from entering a judgment in favor of the defendants. He did not mention the request for an injunction. The lawsuit is set to continue to trial in early 2007.

As *New School Corp. v. Brodkorb* is pending in Dakota County District Court, a number of suits across the nation have raised novel legal issues that some legal commentators expect to play a role in the Minnesota litigation, the (Minneapolis) *Star Tribune* reported in an article, "Facing suit, anonymous blogger lifts his mask," published Jan. 5, 2006. The lawsuit filed in Minnesota by New School Communications presents an opportunity for the state's courts to decide whether traditional protections, including the prohibition on disclosure of anonymous sources of information found in Minn. Stat. 595.025 and the right to engage in speech concerning a public figure, should be extended to commentary posted on a blog. But some are skeptical that the case will have a significant impact on current law.

"On its face, it's hard to see what [Brodkorb] said as defamatory," Eric Robinson, a staff attorney at the Media Law Resource Center said to Molly Priesmey of the *City Pages*. Mark Anfinson, a Minneapolis attorney specializing in First Amendment law, believes the suit is "more political than anything," according to a Jan. 10, 2006 article published by the (Minneapolis/St. Paul) *City Pages*. "Libel is something that blackens your reputation," he said. "It's not silencing criticism you don't like."

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

"Libel is saying something that blackens your reputation. It's not silencing criticism you don't like."

—Mark Anfinson,
Attorney

Neutral Reportage

Norton v. Glenn Settled

On July 13, 2006, a settlement was reached in *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004). The Pennsylvania Supreme Court had ruled in October 2004 that there no basis in federal or a state constitutional law for an absolute “neutral reportage” privilege to protect news media publications from reporting defamatory statements made by one public official about another. The court ruled that even if the media accurately and objectively report such statements, they may be liable for defamation if challengers can prove they published the statements with actual malice. See “Updates in Libel Law: In Pennsylvania, No ‘Neutral Report’ Privilege Recognized” in the Fall 2004 issue of the *Silha Bulletin*.

The case arose from a newspaper article by Tom Kennedy that was published in the *Chester County Daily Local News* on April 20, 1995. The article, “Slurs, Insults Drag Town into Controversy,” described heated exchanges that occurred between members of the Parkersburg Council both inside and outside council chambers. Kennedy reported that Council member William T. Glenn had claimed that Council President James B. Norton III and Borough Mayor Alan M. Wolfe were homosexuals and child molesters.

Following publication of the article, Wolfe and Norton filed a defamation suit against Glenn, but also named Kennedy, the *Daily Local News*, and the newspaper’s owners as additional defendants. The Court of Common Pleas of Chester County determined that Kennedy and the media defendants were entitled to the protection of the “neutral reportage privilege,” explaining that the privilege provided immunity from defamation suits for all accurate media reports of public proceedings, even though the event did not occur at a formal meeting. Neutral reportage, a constitutional doctrine, protects media organizations from libel claims when they accurately and objectively report on newsworthy charges made by prominent organizations against public figures as part of an ongoing controversy. A jury found the media defendants not liable based on the definition of the neutral reportage privilege provided by the judge.

Norton and Wolfe appealed the decision, resulting in the October 2004 Pennsylvania Supreme Court ruling. The high court ordered another trial to determine the media’s liability under an actual malice standard. That standard, established by the United States Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), is used to determine whether alleged defamatory statements were published with knowledge of falsity or reckless disregard for the truth.

The media parties in *Norton v. Glenn* then appealed the decision to the U.S. Supreme Court. But in March 2005 the high court declined to hear the case. The case was then scheduled for retrial in Chester County. Following three days of testimony, the settlement was announced in July 2006.

David Kairys, a Temple University professor of constitutional law, told *Headlines & Deadlines*, the weekly newspaper of the Pennsylvania Newspaper Association, that it is unfortunate that Pennsylvania does not recognize some form of the neutral report privilege because it can help keep the public informed about the government. “This decision leaves a pall over other reporters. And the people will hear less about their public officials than I think they should. We have laws that require open trials and proceedings. The public loses out because we don’t know what happened here.”

“This decision leaves a pall over other reporters. And the people will hear less about their public officials than I think they should. The public loses out because we don’t know what happened here.”

–David Kairys,
Professor,
Temple University

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

THE SILHA CENTER FOR THE
STUDY OF MEDIA ETHICS AND LAW
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SCHOOL OF JOURNALISM & MASS COMMUNICATION
AT THE
UNIVERSITY OF MINNESOTA

Internet Updates

Global Online Freedom Act

A proposed “Global Online Freedom Act of 2006 (GOFA),” H.R. 4780, has received support from international human rights organizations and the European Parliament. However, several U.S. companies who have been criticized for their compliance with foreign governments’ Internet censorship, including Yahoo, Google, and Microsoft, continue to defend their actions, maintaining that offering limited Internet services to foreign citizens is better than offering no services at all, as certain provisions of the bill would require.

The bill, whose full title is “To promote freedom of expression on the Internet, to protect United States businesses from coercion to participate in repression by authoritarian foreign governments, and for other purposes,” was passed by the House Subcommittee on Africa, Global Human Rights and International Operations on June 22, 2006, and forwarded to the full International Relations Committee for review. It is also under review in the House Subcommittee on Commerce, Trade and Consumer Protection.

GOFA was introduced in February 2006, one day after lawmakers held a congressional hearing criticizing several U.S.-based companies, including Google, Yahoo!, and Microsoft, for cooperating with the Chinese government in censoring Internet content and in turning over records of dissident journalists. (See “Internet Updates: Yahoo, Microsoft, Google, and Cisco Systems Criticized For Complying with Chinese Restrictions” in the Winter 2006 issue of the *Silha Bulletin*; see “Endangered Journalists: Yahoo Assists China in Arresting Journalist” in the Fall 2005 issue of the *Silha Bulletin*.) GOFA, if passed, would prohibit any cooperation between U.S.-based Internet companies and the officials of what the Act calls “Internet-restricting countries.” These countries are to be designated by the President of the United States each year, “if the President determines that the government of the country is directly or indirectly responsible for a systematic pattern of substantial restrictions on Internet freedom during the preceding one-year period.” In the most recent version of the bill, countries currently considered “Internet-restricting” are Burma, China, Iran, North Korea, Tunisia, Uzbekistan, and Vietnam.

Generally, GOFA prohibits any U.S. business from “cooperating with officials of Internet-restricting countries in effecting the political censorship of online content.” More specifically, the law prohibits U.S. businesses that run search engines or host Web content within Internet-restricting countries from having any facilities within that country that store search records or content data which may be seized by local authorities. Similarly, the law explicitly protects Web users by prohibiting U.S. content hosting services from “provid[ing] to any foreign official of an Internet-restricting country information that personally identifies a particular user of such content hosting service, except for legitimate law enforcement purposes as determined

by the Department of Justice.” The law also forbids any alteration of search engine results for protected search terms “relating to human rights, democracy, religious free exercise, and peaceful political dissent,” if that alteration is done in cooperation with officials in Internet-restricting countries or done in a manner that returns different results depending on the location of the user. GOFA further outlines civil and criminal penalties for certain violations. The full text of the bill can be found online at <http://thomas.loc.gov/cgi-bin/query/z?c109:H.R.4780:>

In the five months since its introduction, GOFA has received support both at home and abroad. Reporters Sans Frontières (Reporters Without Borders or RSF) issued a statement on July 18, 2006, expressing its support for the bill, along with 13 other human rights organizations, including Amnesty International and Human Rights Watch. The statement contends that “undemocratic governments” are undermining the informative and liberating power of the Internet, “by making Internet and technology companies allies in their repression. . . . Internet companies argue that people in closed societies such as China are better off if U.S. companies are there to influence the development of this medium. We agree – so long as U.S. companies set a higher standard with respect to privacy and free expression than do local providers in these societies.” Positing that U.S. companies are not currently setting that desired higher standard, the statement argues that GOFA would enable them to do so, in part by providing “clear rules of the road and strong engagement from the U.S. government.” The full text of RSF’s statement can be found online at http://www.rsf.org/article.php3?id_article=18304.

In addition to the support of human rights groups, GOFA was also explicitly mentioned in the European Parliament’s July 6, 2006 “resolution on freedom of expression on the Internet.” The resolution, which cites the U.S. bill among trends and Internet policy, calls for the European Commission and the European Council “to draw up a voluntary code of conduct that would put limits on the activities of companies in repressive countries.” RSF also voiced its support for the European Resolution, telling BBC Monitoring “It is essential that Europe should move forward in this area at the same time as the United States to ensure that all companies respect the same ethical principles and that none of them can take advantage of more permissive legislation to increase their market share.” The resolution includes a list of fifteen nations designated by as “enemies of freedom of expression on-line”: China, Belarus, Burma, Cuba, Iran, Libya, Maldives, Nepal, North Korea, Uzbekistan, Saudi Arabia, Syria, Tunisia, Turkmenistan and Vietnam.

Not all response to the bill has been positive, however. Eric Sinrod, a San Francisco-based attorney specializing in information technology and intellectual property at the law firm Duane

GOFA, if passed, would prohibit any cooperation between U.S.-based Internet companies and the officials of what the Act calls “Internet-restricting countries.”

GOFA, continued on page 44

Morris LLP, wrote in an article for *Mondaq Business Briefing* that GOFA's "attempt to punish U.S. online businesses in other countries could actually lead to less online freedom, if those companies decide to stop doing business in those countries." He continued, "To the extent significant penalties are put in place, it is possible that U.S. businesses will retreat from the online services they are providing in other countries. And then, Netizens [citizens using the Internet] in those countries might have less, not more, freedom." Sinrod's article is available online at <http://www.mondaq.com/article.asp?articleid=40988&searchresults=1>.

Yahoo, Google and Microsoft have continued to defend their actions abroad. Mary Osako, a spokeswoman for Yahoo, told Business Week's Bruce Einhorn, "We believe our presence in a country that restricts freedom of expression significantly benefits a country's citizens through access to services and information. We believe we can make more of a difference by having even a limited presence and growing our influence, than we can by not operating in a particular country at all." Microsoft echoed those sentiments in a statement to Knight Ridder, saying, "It's better to be in these markets with our services and communications tools, as opposed to not being there." Google raised similar arguments during the February 2006 hearing on Capitol Hill looking into the companies' activities abroad, including Google's censored search Chinese search engine, google.cn.

Public discussion about GOFA and the European resolution will continue as the proposals move through their respective legislative processes. In the meantime, instances of the type of conduct these proposals seek to discourage continue to occur. Agence France Presse reported on July 6, 2006 that a blogger's column in Singapore was suspended by his publisher after the government objected to his latest column, which complained about high living costs. K. Bhanvani, press secretary to Singapore's Information Minister Lee Boon Yang, issued a statement saying the column of the blogger, who writes as "Mr. Brown" but whose real name is unknown, "is calculated to encourage cynicism and despondency, which can only make this worse, not better, for those he professes to sympathise [sic] with. It is not the role of journalists or newspapers in Singapore to champion issues, or campaign for or against the government."

India has also reportedly interfered with Internet content, according to a July 19, 2006 *Wall Street Journal* article. India's Department of Telecommunications allegedly ordered Internet service providers to block more than fifteen Web sites, more than a third of which were home to blogs, *Wall Street Journal* reported. The blocked Web sites included parts of GeoCities, owned by Yahoo!, and Blogger, owned by Google. Spokeswomen for both U.S. companies told the *Journal* that the companies were looking into the matter.

Aside from legislative efforts, human rights groups continue their efforts against suppression of speech on the Internet. Amnesty International recently launched a campaign for free speech on the Internet, which is available online at <http://irrepressible.info/>. Amnesty International simultaneously released a report on July 21, 2006, entitled "Undermining Freedom of Expression in China," which criticizes Yahoo!, Microsoft, and Google for their cooperation with Internet censorship in China. An Amnesty International press release regarding the report is available online at <http://rconversation.blogs.com/AmnestyPresser.pdf>. The full Amnesty report is available online at <http://rconversation.blogs.com/AmnestyReport.pdf>.

– PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

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Privacy News

Minnesota Governor Pushes For Stronger Controls of Personal Information

On March 2, 2006, Minnesota Gov. Tim Pawlenty announced his intention to push state legislators for statutory changes designed to offer Minnesotans greater protection against the threat of identity theft, fueling a continuing debate in Minnesota politics over the role of government in collecting personal information.

The announcement came after a number of public exchanges between Pawlenty and Attorney General Mike Hatch, who has been a vocal critic of the administration's handling of state-collected information. Hatch, who accused state agencies on Jan. 4, 2006 of "aiding and abetting" identity thieves by indiscriminately releasing driver's license data to an off-shore Internet service, was endorsed by the Minnesota Democratic-Farmer-Labor (DFL) Party as a gubernatorial challenger in 2006.

Since announcing his intention to run for office on October 24, 2005, Hatch pushed for reform in the state's handling of private information. Pawlenty initially defended his administration's efforts by proposing "face recognition" technology to frustrate identity thieves who attempt to obtain counterfeit driver's licenses.

On March 2, 2006, the debate over personal privacy and data control resurfaced when the Minneapolis *Star Tribune* reported that DFL party officials accused Republicans of improperly collecting information through a CD-ROM sent to supporters of a proposed constitutional amendment banning same-sex marriages. That same morning, Pawlenty announced plans to seek other legislative reforms including further restrictions on access to driver's license records, the commercial use of Social Security Numbers, and the unauthorized sale of phone and utility records. Pawlenty also pressed state lawmakers to upend the existing presumption under Minnesota law that government records are open for public inspection.

"We need to start with the obligation of government to protect all citizens, and that all personal information that government has about individuals is private," Pawlenty said during the news conference at which he announced his proposals." Otherwise, "with a push of the button," he said, "your personal information can be made available to literally millions of people and that should not be the case."

In the short legislative session that ended May 21, 2006, the Minnesota Legislature considered 84 legislative proposals in the House and 238 legislative proposals in the Senate that related to data practices and privacy, according to the state's legislative Web site, available online at www.leg.state.mn.us. Proposals similar to those suggested by Pawlenty were among them. But the governor's most-sweeping reform, restricting public access to information collected by the government, failed to muster enough support among lawmakers to pass and drew strong criticism from advocates of open government. Pawlenty, however, has said that he plans to continue to seek amendments to

the Minnesota Government Data Practices Act (MGDPA) in upcoming legislative sessions.

The current version of the MGDPA, which regulates the collection, and dissemination of and public access to data maintained by state agencies and political subdivisions, "establishes a presumption that government data are public and are accessible by the public for both inspection and copying unless there is a federal law, a state statute, or a temporary classification of data that provides that certain data are not public." Minn. Stat Ann. § 13.01, subd. 3 (2006). Currently there are over 300 statutory provisions classifying specific types of data maintained by the state. Those characterized as private data are accessible only to the individual subject of the data. Minn. Stat. Ann. § 13.02, subd. 12 (2006). Pawlenty's proposed change would create a presumption of privacy, requiring lawmakers to draft new provisions allowing access to certain types of government information, Rep. Mary Liz Holberg (R-Lakeville), a sponsor of the governor's proposals, told the St. Paul *Pioneer Press* on March 3, 2006.

The Associated Press (AP) reported on March 12, 2006 that the governor acknowledged that the task could take years to accomplish. Pawlenty told the AP that this year he would focus his support on more modest changes and allow the Department of Administration to continue conducting a comprehensive review of the MGDPA.

According to the AP, neither Pawlenty nor Hatch explained how existing laws pose a significant risk that the release of state-collected information will lead to identity fraud, despite frequent public debate over the issue of information management and identity theft.

Pawlenty cited a Federal Trade Commission report that found more than 3,000 Minnesotans were victims of identity theft in 2005, or about 60 out of every 100,000 Minnesota residents. However, the report, available online at the Identity Theft Data Clearinghouse through the FTC's website, www.ftc.org, offers no indication that access to state-collected information posed a significant risk to Minnesotans. In a press release, Rep. Paul Kohls (R-Victoria), expressed alarm at the 2,400 reports of identity theft filed by Minnesotans in 2004, but cited credit card fraud and bank fraud as the leading causes of identity fraud.

In *The Privatization of Big Brother: Protecting Sensitive Personal Information from Commercial Interests in the 21st Century*, a position paper available on the attorney general's campaign Web site, Hatch paints an Orwellian picture of the state of privacy and the burgeoning information trade. But the attorney general faults commercial practices rather than government policy for the escalating risk of identity theft. "Today, the greatest threat to privacy may not be Orwell's large government computer, but rather the commercial sector's infinite network of private databases that collect information about everyday business transactions

"We need to start with the obligation of government to protect all citizens, and that all personal information that government has about individuals is private."

— Governor
Tim Pawlenty

Pawlenty, *continued on page 46*

and purchases,” Hatch writes. The article is available online <http://www.hatch2006.org/positionpapers/PPBigBrother.html>.

Advocates for open access to government information have suggested that the failure to identify existing threats indicates that lawmakers may have the right intentions but the wrong approach to offering individuals protection against identity theft. Amendments like those suggested by state lawmakers in Minnesota are frequently proposed in statehouses across the nation where the struggle to balance public and private interests is taking place.

In a report published on March 10, 2006, the AP found that states “have steadily limited the public’s access to government information since the Sept. 11, 2001 terrorist attacks.” Of more than 3,500 bills introduced across the nation, approximately 25 percent of the resulting laws grant the public broader access to records, but more than 60 percent restricted access, according to the AP. “What we see nationwide is states really backing away from their open access laws,” Fred H. Cate, an Indiana University law professor who studies privacy and technology, said in an interview with the AP. Cate, like others, has questioned whether some lawmakers may just be “taking advantage of the public security tide” to undermine legislation in existence since the post-Watergate era, when lawmakers sought to encourage government oversight by the press and public.

Congress and the federal courts have limited authority to regulate how information collected by state agencies should be managed. Apart from limits imposed by the Driver’s Privacy Protection Act (DPPA), 18 U.S.C. §2724 (1997), enacted by Congress in 1994 to curb the practice of selling personal data contained in motor vehicle records, and a series of Supreme Court decisions that attempt to balance the public’s right to access against an individual’s right to privacy, regulation of government information practices is largely left to the states.

For additional information about issues surrounding the Minnesota governor’s race, see “Minnesota Attorney General Files News Council Complaint Over Press Inquiries” on page 47 of this issue of the *Silha Bulletin*.

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

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Media Ethics

Minnesota Attorney General Files News Council Complaint Over Press Inquiries About Gubernatorial Campaign Controversy

One of Minnesota's highest ranking government officials attacked a local newspaper for making inquiries into his personal and family life even though it did not actually run a story.

State Attorney General and gubernatorial candidate Mike Hatch filed a complaint with the Minnesota News Council on Office of the Attorney General stationery on July 23 after receiving e-mailed questions from Minneapolis *Star Tribune* reporters Dane Smith and Mike Kaszuba. In their e-mail, Smith and Kaszuba said they were attempting to clarify some remaining issues following a controversy involving state Representative and former attorney general candidate Matt Entenza's hiring of a Chicago research firm to investigate Hatch and his office.

Hatch responded to the inquiries by filing a complaint with Gary Gilson, Executive Director of the Minnesota News Council (MNC). Hatch complained that the e-mail "constitutes the worst type of innuendo on matters unrelated to the Governor's race" and asked whether the MNC has "any standard of decency as it applies to a public official's family." Hatch's complaint also accused the *Star Tribune* of trying to "swiftboat" him, referring to personal attacks levied against John Kerry during the 2004 presidential election.

However, the MNC declined to handle the complaint because it concerned an e-mail from two reporters instead of an actual published news story. Gilson told the *Star Tribune* that the MNC considers only complaints about published material, and that he told Hatch's office "if after something is published, he has a complaint we'll receive it and forward it to the news organization in question." The MNC is a non-profit organization whose mission is "to promote fairness in the news media by helping the public to hold news outlets accountable for the stories they produce." Its website is available at <http://www.news-council.org/home.html>.

According to their e-mail, Smith and Kaszuba had an appointment scheduled with Hatch before they sent the questions, but the Attorney General cancelled that meeting. Rather than waiting for that meeting to be rescheduled, Smith and Kaszuba elected to make their inquiries via e-mail.

In their e-mail, Smith and Kaszuba questioned the Attorney General about the way Hatch learned of the research conducted by Entenza, whether or not Hatch had impersonated a member of the Chicago research firm and contacted the Entenza campaign, and discrepancies in the story about a parking ticket received by Hatch. The reporters prefaced the body of the e-mail with statements that they were simply seeking Hatch's responses to identify the truth, and

asked him not to take offense if the scenarios they described were incorrect.

The *Star Tribune* declined to publish the questions asked by its reporters, but a copy of the e-mail, along with Hatch's complaint, is available online at <http://www.twincities.com/multimedia/twincities/archive/pdfs/Hatch.pdf>.

Anders Gyllenhaal, Editor and Senior Vice President of the *Star Tribune*, defended his reporters, in statements to the (St. Paul) *Pioneer Press* and in an article in his own paper. Gyllenhaal emphasized that reporters such as Smith and Kaszuba frequently seek to determine the accuracy of the many rumors surrounding a major political campaign, and that most of those rumors are never published. Gyllenhaal also pointed out that Hatch's reaction elevated the message from a private e-mail to a very public matter. He stated that his paper will continue to ask questions to assist voters with their decisions this fall, even if those questions are tough and uncomfortable for the candidates.

The *Pioneer Press* ran an editorial on July 26 in support of the *Star Tribune* reporters. The *Press* acknowledged the "natural tension between those who cover the news and those they cover," but also pointed out the important distinction between gathering information and publishing a report. The editorial also conceded that the media do occasionally "blow things out of proportion," but that reporters have to ask questions to determine whether private behavior has public relevance.

Hatch's actions have been puzzling to many, who, like Gyllenhaal, have wondered why Hatch publicly denounced the actions of one of the Twin Cities' major newspapers. Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Law and Ethics, was quoted in a July 24 Associated Press article stating "[i]t's hard for me to grasp exactly what it is that Attorney General Hatch is trying to accomplish here beyond trying to discourage the *Star Tribune* from pursuing this kind of reporting."

In addition to criticism in the press, the Independence Party of Minnesota released a news release questioning whether it was proper for Hatch to use letterhead from the Office of the Attorney General in filing his complaint. Hatch responded that he used the official letterhead because the e-mail was sent to his office. See "Minnesota Governor Pushes For Stronger Controls of Personal Information" on page 45 of this issue of the *Silha Bulletin*.

— SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

"It's hard for me to grasp exactly what it is that Attorney General Hatch is trying to accomplish here beyond trying to discourage the *Star Tribune* from pursuing this kind of reporting."

—Jane Kirtley,
Silha Professor and
Director of the
Silha Center for the
Study of Media Ethics
and Law

Media Ethics

Closed Meetings Precede Katie Couric's Ascent to Anchor of CBS "Evening News"

CBS "Evening News" incoming anchor Katie Couric embarked upon a six-city "listening tour" in July 2006 with the official goal of "figuring out how to do stories in a way that are valuable and meaningful and relevant to people," according to "Evening News" Executive Producer Rome Hartman. At stops in Tampa, Dallas, Minneapolis, Denver, San Diego and San Francisco, Couric held closed meetings to talk with invited "regular people" about their opinions of and desires for TV news, and also attended charity events.

The Washington Post quoted Couric as saying that she decided to close the meetings to the press because she did not want the individuals who attended the events to think CBS was using them "as some kind of promotional device" and because she "didn't want them to feel nervous about being videotaped." *The Washington Post* article is available online at http://www.washingtonpost.com/wp-dyn/content/article/2006/07/16/AR2006071600961_pf.html. Couric's media ban went beyond videotapes, however. At her stop in Minneapolis, officials from the local CBS-affiliate WCCO attempted to confiscate the notebook of one of the invited guests, Matt Bartel, after realizing he ran a popular blog, MNSpeak. (Available online at <http://www.mnspeak.com>.) Bartel refused, but did turn over his pen. He later told the *Star Tribune* that he did not think anything controversial was said.

Although according to *The Washington Post*, Couric claimed the listening tour "wasn't a photo op or press opportunity," the CBS affiliates in each city on the stop made the most of her visit. Tampa Bay's Channel 10 News Internet story about the event was headlined, "Eye on America: Katie Couric kicks off tour with Tampa Bays [sic] 10!" complete with exclamation point. The story's lead was equally exuberant. It read, "When she walked into the room at Ruth Eckerd Hall, they began clapping. The crowd stood on their feet to give Katie Couric a standing ovation." The story is available online at <http://www.tampabay.com/news/local/article.aspx?s=search&storyid=35056>.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, criticized the fact that the tours were closed to the media and to all but designated guests. She told the Minneapolis *Star Tribune*, "It seems like something [President Bush] would pull. At a time when the news media are trying to gain the trust through transparency, to have a meeting closed to the media and the general public is unbelievable." The article is available online at <http://www.startribune.com/389/story/547854.html>.

Couric told media in Florida that "[o]bviously, we're trying to take advantage of spending some time with our local station in each city, but I really didn't want this to be a huge promotional thing. It really is just – as advertised – an opportunity to hear from everyday Americans."

But Kirtley said that while seeking publicity was fine, "what really offends me is, let's not pretend for a minute this is going to get the pulse of Minnesota."

Couric is scheduled to take over anchoring duties from Bob Schieffer on Sept. 5, 2006. Schieffer has been the interim anchor for the show since Dan Rather's departure in March 2005. Schieffer has said he will still occasionally appear on the "Evening News" as a reporter and commentator. Rather, meanwhile, has left the network altogether after a short time as a reporter on CBS's "60 Minutes." In July he announced that he will file reports for HDNet, a high definition network offered on some cable and satellite systems. Rather said he left before his contract with CBS was due to expire in November because "after a protracted struggle . . . they had not lived up to their obligation to allow me to do substantive work there."

"At a time when the news media are trying to gain the trust through transparency, to have a meeting closed to the media and the general public is unbelievable."

–Jane Kirtley,
Silha Professor and
Director of the
Silha Center for the
Study of Media Ethics
and Law

– ASHLEY EWALD
SILHA FELLOW

Media Ethics

Italian Magazine Editor May Face Jail Time For Publishing Diana's Death Scene Photo

Editor Umberto Brindani may be facing jail time and a fine after publishing a photo of a dying Princess Diana as well as other details of her death in an early July 2006 edition of the Italian magazine *Chi*. The photograph, showing a paramedic trying to assist Diana at the scene of the car crash in a Paris tunnel, accompanied an article about a forthcoming book by French author Jean Michel Cardac'h that details the investigation following the incident. On July 15, Agence France Presse reported that Italian authorities banned the publication of further details from Diana's autopsy.

The photograph also appeared in the Spanish magazine, *Interviu*, and the Italian newspaper *Corriere della Sera*. The German magazine *Bild Zeitung* published a photograph of the cover of *Chi*.

Representatives of the Italian regulatory agency, Autorita Garante Per La Privacy, told London's *Daily Mail* that it will investigate allegations that Brindani's publication of the photo, together with drawings and other details of Diana's autopsy, have violated a 1948 press law that prohibits publication of personal details and images. The *Daily Mail* quoted the group's statement that read: "The basis of [Italy's] press code [art. 17, comma 3] and [Italy's] journalistic code of conduct [art. 5, 6, 8, 10 and 11] forbids the publication of personal details of a deceased person." The regulatory authority characterized the photograph's publication and of the book's details of the French investigation into the accident as "damaging [to] the dignity" of Diana, her companion Dodi Fayed and driver Henri Paul and "unjustified in the need for information."

Both the statement and the text of the Italian code are available online at Autorita Garante Per La Privacy's Web site at <http://www.garanteprivacy.it/garante/navig/jsp/index.jsp>.

Numerous media outlets, including the BBC, reported that Brindani described the photograph of Diana as "touching" and "tender," saying "She is not dead in the picture but looks as if she is a sleeping princess." Brindani continued, "I published the picture for a very simple reason – it has never been seen before."

Diana's sons, Princes William and Henry, issued a statement that read: "Despite the support shown to us and our mother's memory by so many people over the last eight years, we feel that as her sons we would be failing in our duty to her now if we did not protect her as she once did us. Therefore we appeal to the media throughout the world to appreciate that publishing such material causes great hurt to us, our father, our mother's family and all who loved and respected her." The (London) *Daily Express* reported that Prince Charles is also considering legal action.

BBC News reported on July 14 that UK magazine importers were urged not to import the issue of *Chi* carrying the Diana photo. However, *The Daily Express* reported that importers did not comply with the request. Adrian Luxmore-Ball, managing director of IPN, the sole distributor of *Chi* in Britain, told *The Daily Express* that he was contractually obligated to import the magazine. "The publisher has made it plain that he wants it distributed in Britain. We can't set ourselves up as moral censors." *The Daily Express* further reported that customs officials said there were no British laws prohibiting sale of publications carrying such photographs. However, a number of magazine distributors told the (London) *Daily Star* that they "would have nothing to do with the magazine."

Carole Malone, in an article for the *Sunday Mirror* (London), wrote, "Everyone has made money – and is still making money – out of Princess Diana. . . . [W]here Diana is concerned we've all crossed the line of decency, taste and dignity at one time or another. . . . [I]f we're going to rant about intrusiveness and bad taste, if we're going to moralise [sic] and say publishing tasteless pictures of her dead is wrong we must all accept some responsibility for what we did when she was alive. . . ."

The (London) *Times*'s Carol Sarler wrote that at the time of Diana's death in 1997, Sarler took part in a newsroom discussion deciding whether or not to publish photographs of the accident. Although she and her colleagues decided not to do so, Sarler wrote that she found herself asking, "What does [Diana] look like?" Sarler compared the images of Diana's accident to those of the assassination of John F. Kennedy, writing, "Of course her sons are upset. But didn't the doughty heart of Rose Kennedy break over and over every time she saw her son's brains sprayed over the presidential limousine? Yet the familiar grainy footage has been shown countless times without its audience being called . . . 'voyeurs without shame.' Why?"

Sarler argued that no matter how gruesome, images of public figures like Kennedy and Diana serve the purpose of informing the public. But, Sarler wrote, "The crueller [sic] truth is that these pictures pander directly to prurient, morbid and essentially useless curiosity. Most of us, whether journalists or not, would like to think we rise above it; few of us, if any, do."

(The author wishes to thank Penelope Sheets for her assistance in translating information from Autorita Garante Per La Privacy for this story.)

– ELAINE HARGROVE
SILHA FELLOW AND BULLETIN EDITOR

"I published the picture for a very simple reason – it has never been seen before."

–Umberto Brindani,
Editor, *Chi*

Media Ethics

UK Press Complaints Commission Issues Guidelines to Help Prevent Copycat Suicides

The code was amended after the members of the Editors' Code of Practice Committee considered extensive studies on the incidence of copycat suicides following press coverage of suicides.

The Press Complaints Commission (PCC), a self-regulating body established by the newspaper and magazine industries in the United Kingdom, announced new rules designed to help prevent copycat suicides following extensive media coverage of those who take their own lives. The announcement, made on June 29, 2006, followed widespread criticism of how several newspapers covered an attorney's suicide in January 2006. After several London newspapers decided to publish photographs depicting the attorney falling to her death, the PCC adjudicated three formal complaints that the newspapers had breached their ethical responsibilities. Though the PCC later dismissed the complaints, the new rules governing the press coverage of suicide were formally adopted on August 7, 2006.

At noon on Jan. 4, 2006, Katherine Ward, head of the corporate legal department at Rolls Royce International Ltd., stepped onto a fourth-floor ledge of Jurys Hotel in the South Kensington neighborhood in west London. A small crowd gathered outside the hotel witnessed Ward's fall to the ground. She was pronounced dead by paramedics at the scene. According to an article that appeared in *The (London) Times* the following day, a member of the crowd, Jon Bushell, photographed the event as it transpired.

A number of major newspapers in the United Kingdom carried reports of the event, some choosing to publish Bushell's photographs to accompany narrative accounts of Ward's suicide. According to a weblog posting on the World Editors Forum weblog, available online at www.editorsweblog.org/print_newspapers/2006/01/uk_suicide_photos_in_newspapers_pose_eth.php, *The Evening Standard* and *The Sun* published the story on their front pages and included photographs showing Ward standing on the hotel ledge and her descent. The following day, *The Times*, like *The Evening Standard*, carried the story on its front page and included two photographs on inside pages.

An article published on March 31, 2006 in *The Guardian* reported that the PCC received five complaints against the newspapers shortly after the photographs were published. Though the PCC was first established by industry members in the United Kingdom to avoid excessive government regulation of the press, the group later undertook to improve the faltering credibility of U.K.-based magazines and newspapers, according to an article which appeared on the American Society of Newspaper Editors Web site. The article, available online at <http://www.asne.org/index.cfm?ID=4282>, reported that "At the heart of the new commission was a Code of Practice, written by editors and accepted by virtually all the country's newspapers and magazines." The code contains sixteen clauses governing a variety of responsibilities owed by the press to the public or subjects of media coverage, including rules on

personal privacy and payments for stories, and is available at <http://www.pcc.org.uk/cop/practice.html>.

The complaints criticizing the newspapers' coverage of Ward's suicide were brought under Clause 5 of the former version of the PCC Code of Practice. At the time, Clause 5 governed the approach that publications should take when making editorial decisions relating to stories involving grief and shock. The code required that "enquiries must be carried out and approaches made with sympathy and discretion. Publication must be handled sensitively at such times, but this should not be interpreted as restricting the right to report judicial proceedings." Before the June additions to the Code of Practice, there were no provisions specifically governing the coverage of suicide.

The complaints were filed by both friends of Ward and by the Samaritans, a U.K.-based advocacy group which promotes public awareness of emotional health and suicide. Three of the five complaints reached adjudication by the PCC, including complaints lodged by Marina Palomba against *The Sun* and *The Evening Standard* and a complaint lodged by Martine Petetin against *The Times*. Palomba and Petetin, according to decisions published online at <http://www.pcc.org.uk/cases/adjudicated.html>, were friends of Ward who complained that the newspapers' publication of photographs of Ward's suicide "was intrusive at a time of grief in breach of Clause 5."

On March 31, 2006, *The Guardian* reported that the complaints filed by Palomba and Petetin were dismissed by the PCC, which said it "regretted the fact that the publication of the photographs had offended and upset readers." Although the PCC criticized *The Evening Standard* for not ensuring that Ward's family had been informed of her death before publishing the photographs, the PCC said that the code provides rights only to individuals directly affected by coverage rather than serving as a forum for public complaints over editorial coverage. "Editors are best placed to decide what their readers will find acceptable in terms of taste and decency," PCC members wrote in their opinion on the Petetin matter. Although the PCC sympathized with the complainants, the commission found that *The Times*, like the other newspapers, had not sensationalized or trivialized the suicide. Nor did the newspapers present the photographs in a gratuitous manner in the PCC's opinion. Rather, the PCC found that the reportage was appropriate given the public nature of the incident and found no basis to hold the newspapers responsible for breaching Clause 5 of the PCC code.

A complaint filed by David King, chief executive officer of The Samaritans, characterizing the newspapers' coverage as "gratuitously distressing," was dismissed before reaching adjudication. The

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Samaritans, which worked closely with media organizations in the United Kingdom to develop media guidelines for the coverage of suicide, had complained that those guidelines were ignored by the newspapers. “[O]ur guidelines state that ‘press coverage or broadcast footage of a suicide’ should be discreet and sensitive,” King wrote in the complaint filed with the PCC.

According to the BBC, the Samaritans’ complaint also encouraged the press and the PCC to avoid publishing explicit details of the methods used to take one’s life and using dramatic photographs when covering suicides. A June 29 press release posted on The Samaritans’ Web site reported that King also sent a detailed analysis of recent news coverage that the organizations believed could lead to copycat suicides to the Editors’ Code of Practice Committee, an administrative body of the PCC. The release is available online at http://www.samaritans.org.uk/know/pressoffice/news/latest_news.shtm. According to the release, the PCC acknowledged that the Samaritans had raised concerns about the press’s role in copycat suicides in their complaint and in their report to the Code of Practice Committee.

The Editors’ Code of Practice Committee later announced the adoption of a new provision in Clause 5 governing press coverage of suicides. The new provision, subpart 5ii, states that “When reporting suicide, care should be taken to avoid excessive detail about the method used.” According to a press release issued by the PCC on June 29, 2006, the code was amended after the members of the committee considered extensive studies on the incidence of copycat suicides following press coverage of suicides. Committee chairman Les Hinton said that the PCC had “received convincing evidence, from the Samaritans and others, that media reporting of suicide often prompted copycat cases. It is an international phenomenon.” Under subpart 5ii, the release explained, exceptions in certain cases of suicide may be made. The release is available online at <http://www.pcc.org.uk/news/index.html?article=Mzk4Nw>. The recent controversy in the United Kingdom over media coverage of suicide and the adoption to the Code of Practice points to a growing international awareness of the press’s influence on members of the public when suicide is involved in a story. The issue has received attention from media advocates and journalists in the United States as well. A report published online in 1998 by the Center for Disease Control and Prevention, a division of the United States Department of Health and Human Services, reports that as early as suicidologists, public health officials, researchers, psychiatrists, and psychologists met with members of the media to discuss the impact of news reports involving suicide on the general public. Among their concerns, the group expressed concerns that some characteristics of such coverage of may contribute to a suicide contagion. Other organizations, such as the Annenberg Public Policy Center, according to a press release issued August 9, 2001, have continued to report similar findings; and media organizations in the United States continue to confront such issues in making editorial decisions relating to suicide coverage. (See “Guidelines Issued for Coverage of Suicides” in the Fall 2001 issue of the *Silha Bulletin*.)

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

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Geoffrey Stone

The Freedom of the Press versus The National Security

Geoffrey Stone is the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago. His most recent book, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004) received the Robert F. Kennedy Book Award for 2005, and the *Los Angeles Times* Book Prize for 2004 as the Best Book in History. It will be available for purchase at the book signing immediately following the lecture.

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