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## Accuracy, Privacy Issues Raise Questions for Wikipedia

Two recent incidents have brought the online encyclopedia Wikipedia under close scrutiny. Widely used by journalists and students, Wikipedia encourages visitors to the site to add information to existing entries. The new information may later be checked for accuracy and changes made. Nevertheless, the original entry is still available, changes and errors archived and intact, for the visitor who knows how to access it.

Based in St. Petersburg, Fla., Wikipedia was founded in 2001 by Jimmy Wales and Larry Sanger. According to *USA TODAY*, Wikipedia was rated as the top reference site by Hitwise, an online marketing research service. Available in 82 languages, Wikipedia contains more than 850,000 articles in English. According to Nielsen/NetRatings, it received more than 16.3 million visitors in October 2005.

The first of the two incidents involved John Seigenthaler, founder of the First Amendment Center at Vanderbilt University, chairman emeritus of *The Tennessean*, and a former editorial page editor at *USA TODAY*, who claims he was defamed by false information posted on the site. The other incident involved a German computer hacker whose family claims a posting was a violation of their privacy.

In the fall of 2005, Seigenthaler learned that he was described in an entry in Wikipedia as “thought to have been directly involved in the Kennedy assassinations of both John and his brother, Bobby. Nothing was ever proven.”

Parts of the biographical article about Seigenthaler were true, including that he had worked for Bobby Kennedy in the early 1960s. But other inaccuracies, including the statement that Seigenthaler had “moved to the Soviet Union in 1971, and returned to the United States in 1984,” apparently slipped through Wikipedia’s checks. Originally posted on May 26, 2005, the article was checked by a Wikipedia volunteer on May 29, whose only change, according to Seigenthaler, was to correct the spelling of one word. The article was removed on October 5, but not before it was copied and posted on other Web sites, including Answers.com and Reference.com.

Individuals have little legal recourse against an Internet Service Provider for defamatory postings. The Communications Decency Act, 47 USCS § 230, states that “No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider,” effectively making entities such as BellSouth, America Online and Wikipedia immune from libel lawsuits. Seigenthaler explained in a November 30 *USA TODAY* article. (See “Defamation News: *John Doe No. 1 v. Patrick Cahill and Julia Cahill*” on page 2 of this issue of the *Silha Bulletin*.)

In his *USA TODAY* article, Seigenthaler recounted trying to learn the identity of his “biographer” by tracing the registered Internet Protocol number of the computer used to edit his biography. Seigenthaler was able to learn that the biographer was a customer of BellSouth Internet, but that was all. When Seigenthaler sent a complaint to the BellSouth Internet’s Abuse Team, he was informed that “the company would conduct an investigation but might not tell [Seigenthaler] the results.”

Daniel Brandt, whom Seigenthaler described in a December 30 *Tennessean* article as “a San Antonio Internet guru who also had been hit with a Wikipedia biography he resented,” uncovered the identity of Seigenthaler’s “biographer” as Brian Chase, an operations manager with a Nashville delivery service called Rush Delivery. Chase later appeared at Seigenthaler’s office with a hand-written letter of apology, explaining that he had posted the information as a joke on a coworker, a friend of the Seigenthaler family, who did not believe that just anyone could edit information on Wikipedia.

Chase subsequently resigned from his job, but Seigenthaler urged Rush Delivery not to accept Chase’s resignation. Seigenthaler has also said he will not sue Chase for defamation. Following Seigenthaler’s public criticism of Wikipedia for the inaccuracies in his biography, the article was further vandalized. Recent users’ additions have identified him as a Nazi and his photograph was replaced by one of Adolf Hitler with a caption that read: “Press photo of Seigenthaler.” In a December 6 interview with National Public Radio (NPR), Seigenthaler described additional entries as “vicious, vindictive, almost violent stuff.”

According to a *St. Petersburg Times* article, vandals have been known to corrupt other Wikipedia entries. Others indulge in “vanity editing” – changing an entry to give oneself more credit than is warranted. For example, Wales himself has faced accusations of downplaying contributions by Wikipedia cofounder Sanger.

Since the incident, Wikipedia has made some changes to policies, requiring users to register before they can create new articles, “giv[ing] the site’s 600 volunteer editors a better chance of catching and removing offensive

**Wikipedia**, continued on page 4



# Defamation News

*John Doe No. 1 v. Patrick Cahill and Julia Cahill*

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Chief Justice  
Myron T. Steele  
ruled that allowing  
defamation plaintiffs  
to compel disclosure  
of their critics'  
identities easily  
invites public officials  
to "seek revenge or  
retribution" outside  
the courts if they  
cannot succeed  
at trial.

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An anonymous blogger's criticisms of Smyrna, Del. city councilman Patrick Cahill led to an October 2005 ruling by the Delaware Supreme Court that offers significant protection to anonymous online political critics. Though online defamation, like defamation in other mediums, is not absolutely protected under the First Amendment, the Delaware ruling does establish some significant hurdles for public officials who file lawsuits merely to unmask and silence critics.

The disputed criticisms were posted on the "Smyrna/Clayton Issues Blog," a website sponsored by the *Delaware State News*. The blogger used the screen name "Proud Citizen." Cahill took exception to two passages by "Proud Citizen": "Anyone who has spent any amount of time with Cahill would be keenly aware of . . . an obvious mental deterioration," posted Sept. 18, 2004, and "Gahill [sic] is as paranoid as everyone in the town thinks he is," posted the following day.

Councilman Cahill and his wife obtained permission from the Superior Court of Delaware to obtain the IP address of the user from Independent Newspapers, which owns and runs the blog. From that information they found that Comcast owned the IP address of "Proud Citizen." Cahill then obtained a court order that required Comcast to disclose "Proud Citizen's" identity. As required by the Cable Communications Policy Act of 1984 (CCPA), 47 U.S.C. 551(c)(2), Comcast notified "Proud Citizen" of the discovery request, and "Proud Citizen" promptly filed an emergency motion, under the name "John Doe," to prevent Comcast from releasing his name to the Cahills. The Delaware Superior Court held the Cahills to a "good faith" standard to determine whether they, as defamation plaintiffs, could compel the disclosure of Doe's name. (See 2005 Del. Super. LEXIS 229.) That standard required the Cahills to show that they had a legitimate basis upon which to bring the defamation suit; that Doe's name was materially related to their case; and that they could not obtain his name from any other source. Applying these three standards, the trial judge denied Doe's motion for a protective order, and ordered his name to be disclosed. Doe then filed an interlocutory appeal, which the Delaware Supreme Court accepted on June 28, 2005. (See *John Doe No. 1 v. Patrick Cahill and Julia Cahill*, 2005 Del. LEXIS 381.)

Chief Justice Myron T. Steele authored the Delaware Supreme Court's opinion, unanimously reversing the lower court ruling. Steele wrote that "the trial judge applied a standard insufficiently protective of Doe's First Amendment right to speak anonymously." He emphasized the importance and tradition of anonymous political speech, stating that "political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse."

Steele then rejected the Superior Court's use of the "good faith" standard as insufficient, fearing that using such a low standard "will chill potential posters

from exercising their First Amendment right to speak anonymously." Furthermore, allowing defamation plaintiffs to compel disclosure of their critics' identities so easily invites public officials to "seek revenge or retribution" outside the courts if they cannot succeed at trial. "Indeed," Steele wrote, "there is reason to believe that many defamation plaintiffs bring suit merely to unmask the identities of anonymous critics. . . . This 'sue first, ask questions later' approach, coupled with a standard only minimally protective of the anonymity of defendants, will discourage debate on important issues of public concern as more and more anonymous posters censor their online statements in response to the likelihood of being unmasked."

Accordingly, Steele and the Delaware Supreme Court adopted a more stringent, "summary judgment" standard. The Cahills would have to show evidence of the alleged defamation that would be sufficient to avoid a summary judgment ruling in favor of the defendant. The specific standard Steele articulated involves a preliminary step as well: a defamation plaintiff must make a reasonable effort to notify the defendant of the proposed defamation claim. In a blogging case such as this, that effort could be as simple as Cahill making a post on the same website, alerting "Proud Citizen" of his intentions to sue.

After that notification, the Cahills had to pass the summary judgment test, which includes proving that Doe's statements were defamatory expressions of fact and not merely opinion. Steele found that neither of Doe's postings should be interpreted as fact, or even loosely based on fact. Whereas the lower court had found that "[Doe's] statements might give the reader the impression that [Doe] has personal knowledge that Mr. Cahill's mental condition is deteriorating and that he is becoming 'paranoid,'" Steele disagreed. "Given the context, no reasonable person could have interpreted these statements as being anything other than opinion. . . . [given] the normally (and inherently) unreliable nature of assertions posted in chat rooms and on blogs, [the] only supportable conclusion" is that Doe's statements "were no more than unfounded and unconvincing opinion."

Furthermore, though the lower court had found that, "given that Mr. Cahill is a married man, [Doe's] statement referring to him as 'Gahill' might reasonably be interpreted as indicating that Mr. Cahill has engaged in an extra-marital same-sex affair," Steele found no such intimation. "Using a 'G' instead of a 'C' as the first letter of Cahill's name is just as likely to be a typographical error as an intended misguided insult."

Steele concluded that, because the statements should reasonably be interpreted as opinion and not factually-based, they are incapable of being defamatory. The Delaware Supreme Court reversed and remanded the case, with instructions for the Superior Court to dismiss the Cahills' claims.

Cahill, continued on page 5

# Defamation News

## Settlement Reached in *Price v. Time*

On Oct. 10, 2005, Time Inc. announced that it had settled a libel suit filed by Mike Price, former head coach of the University of Alabama football team. Price sued *Sports Illustrated*, a magazine owned by Time, Inc., and its reporter Don Yaeger for libel after a May 2003 article alleged that Price had engaged in a scandalous sexual liaison one weekend in Pensacola, Fla. That article relied on a confidential source (see *Price v. Time, Inc.*, 416 F.3d 1327 (2005); see also “Reporters Privilege News: Magazine Reporters Not Protected under Alabama’s Shield Law” in the Summer 2005 issue of the *Silha Bulletin*).

According to the Associated Press, neither Price nor Time, Inc. would discuss details of the settlement, though the publisher said the suit was “amicably resolved.” Rick McCabe, a spokesman for Time, Inc., refused to tell the Associated Press whether or not Yaeger or his publisher had revealed the identity of his confidential source. Price’s lawyer, Stephen D. Heninger, on the other hand, told the Associated Press by phone that Lori “Destiny” Boudreaux had been the confidential source, and that she had given a sworn affidavit affirming it.

According to *The Wall Street Journal*, Time, Inc.’s settlement allows the publisher to avoid an expensive and high profile lawsuit at a time when the use of confidential sources is under particular scrutiny. Furthermore, Time, Inc. had lost several legal battles throughout the case. Upon announcing the settlement, Price told the Associated Press, “I’m one happy man right now.” Time, Inc., for its part, issued a statement saying, “Mr. Price asserts that certain events were falsely reported in the story. *Sports Illustrated* continues to stand behind its story.”

Prior to the settlement, Time, Inc. and Yaeger sought a rehearing of the case, based on a controversial portion of the July 2005 ruling by the 11<sup>th</sup> Circuit. In that case, Price had expressed his concern that the confidential source might lie under oath during deposition, refusing to confess to being the source when asked. The court ruled that if Yaeger’s lawyer, Gary C. Huckaby, realized the source was lying under oath, he would be obligated by his duty as an officer of the court to alert the judge. In so doing, he would end up revealing the identity of the confidential source, thereby releasing Price from his obligation to attempt to ascertain the source’s identity on his own. After that, the defamation case could proceed.

Huckaby filed a motion for rehearing, (in *Price v. Time, Inc.*, 425 F.3d 1292 (2005) (11<sup>th</sup> Cir.)), claiming that this portion of the ruling put him in a “needlessly

difficult spot.” Specifically, according to the opinion, written by Judge Ed Carnes (who heard the case with Judges William H. Pryor and J. Owen Forrester), Huckaby “[took] the position that a lawyer has no obligation to inform the court if a witness, other than his own client, has lied under oath.” The Appeals panel did not respond favorably to that point, but did not seek to resolve it in the abstract. Carnes pointed out that during the earlier proceedings Huckaby had agreed to inform the court if one of the four women to be deposed lied under oath. Therefore, Carnes wrote, “Even if lawyers cannot be counted upon to inform the court on all occasions when a witness is perjuring herself, we think courts still have the right to hold lawyers to their word. And counsel for the defendants, to be fair, does not suggest to the contrary.”

Nevertheless, the panel ruled that Time, Inc. or Yaeger, instead of Huckaby, could inform the court of the perjury. As Carnes wrote, “. . . if the confidential source falsely denies under oath that she is the confidential source, counsel for the defendants has no obligation to report her perjury to the court if his clients’ disclosure pursuant to our decision reveals her identity as the source.” If, however, the defendants were to fail to inform the court of the perjury, then Huckaby would be obligated to do so. According to the court, “This solution will remove counsel from the difficult situation he is in, unless his clients attempt to defy a court order, and we are confident they will not do that.” Aside from that modification to the original ruling, the motion for rehearing was denied.

This denial was yet another setback for the press in this case. The July 2005 ruling held that a magazine reporter was not covered by the Alabama reporter’s shield law, although the constitutional privilege could apply. This later ruling did not entirely settle the question of whether Huckaby would have to reveal Yaeger’s confidential source, which would not only undermine attorney-client privilege, but, in a future case, could also be used to undermine reporter’s privilege. In addition to concluding the lawsuit, then, the settlement also helped to avoid any further determination on the difficult question of how attorney-client privilege and reporter’s privilege may interact in similar cases.

— PENELOPE SHEETS  
SILHA RESEARCH ASSISTANT

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Time, Inc.’s settlement allows the publisher to avoid an expensive and high profile lawsuit at a time when the use of confidential sources is under particular scrutiny.

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**Wikipedia**, *continued from page 1*

material,” Wales told *The Guardian*. In addition, some entries are now “semi-restricted,” meaning that volunteer administrators for the site can limit access to frequently vandalized entries to registered users who have maintained the same log-on name for a certain length of time, according to the *St. Petersburg Times*. In the long run, Wales told London’s *Financial Times*, Wikipedia will have stable versions as well as live versions of articles. “The stable version will have been reviewed so we can say we have some confidence in [the stable version of the article].”

Nevertheless, the Seigenthaler incident has led to numerous warnings against using Wikipedia as a primary resource. Derek Willis, a research database manager at *The Washington Post*, told *The New York Times*, “We should focus our energies on educating the Wikipedia users among our colleagues.” The *St. Petersburg Times* reported that *New York Times* business editor Larry Ingrassia sent a memo warning his staffers not to use Wikipedia to verify information. “To me, the biggest problem is the [false information] . . . that is done so artfully, that someone who doesn’t have a deep knowledge of a subject might logically assume it to be accurate,” The *St. Petersburg Times* has issued a similar warning to its reporters.

In response to the warnings about Wikipedia’s inaccuracies, Mark Peplow, a reporter for the science journal *Nature*, compared science entries in Wikipedia to those in *Encyclopedia Britannica*. In an interview on NPR’s “All Things Considered,” Peplow stated he found “on average . . . there were maybe about three errors per [Britannica] entry, and with Wikipedia, there were about four per entry.” Peplow further characterized the “majority of [the errors as] very small.” In an article posted on *Nature*’s Web site, the investigation discovered “Only eight serious errors, such as misinterpretations of important concepts, were detected in the pairs of articles reviewed. But reviewers also found many factual errors, omissions or misleading statements: 162 and 123 in Wikipedia and Britannica, respectively.” The article is available online at <http://www.nature.com/news/about/aboutus.html>.

Despite the incorrect posting in his biography, Seigenthaler had said that the answer does not lie in restricting Wikipedia’s speech or even in suing people such as Chase. When asked by NPR host Neal Conan on December 6 if he would sue someone who defamed him, Seigenthaler answered, “I’ve founded a First Amendment center at Vanderbilt University and obviously the First Amendment protects outrageous speech. . . . My theory is that the best way to respond to outrageous speech is to answer it with better speech, and I tried to do that with [my] column in *USA TODAY*.”

The second incident involved an entry on Wikipedia’s German site about a computer hacker known as “Tron.” In the Wikipedia article, the hacker was identified by his real name, Boris Floricic. According to a translation of the article, Floricic was found to be the victim of an apparent suicide in 1998 in a park in Berlin. However, various conspiracy theories have since arisen.

According to Alexander Peukert, Senior Research Fellow at the Max Planck Institute for Intellectual Property, Competition and Tax Law in Munich, German privacy rights do not end with the death of the person, and relatives can sue for violation of privacy for seven years following the individual’s death. Wikipedia’s English version article about Tron, available online at [http://en.wikipedia.org/wiki/Tron\\_%28hacker%29](http://en.wikipedia.org/wiki/Tron_%28hacker%29), stated that Floricic’s parents obtained a temporary restraining order from a Berlin court that prohibited Wikipedia from mentioning their son’s full name “on any website under the domain ‘wikipedia.org.’” A second preliminary injunction prohibited the Web site for Wikimedia Deutschland e.V, an association that promotes the use of Web sites that allow the kind of online editing by visitors as does Wikipedia, from linking to the German version of Wikipedia. The Wikipedia article further stated that Wikimedia Deutschland e.V. has stated it intends to fight the injunction, “arguing that no valid case was presented and the freedom of the press must be defended.”

The Associated Press reported that on January 17, a Berlin court issued an injunction against the site <http://de.wikipedia.org>, preventing visitors from obtaining access. But on January 20, the Wikimedia Foundation reached a temporary settlement, permitting visitors to reach the article through a different Web site, <http://www.wikipedia.org>, then clicking on the German language link. The Berlin court declared the injunction unenforceable pending the decision of the judges in the case, stating, according to the Associated Press, that it “was not proper to block access to all of [Wikipedia’s] entries because of concern about just one.” The Associated Press further reported that Wikimedia Deutschland attorneys paid a 500 Euro (approximately \$600) security deposit until a final ruling is handed down.

Mathias Schindler, who identified himself as “a German Wikipedia,” explained in a blog posting that the injunction was “suspended” when the municipal court of Charlottenburg, Berlin found it to be “too harsh and without proportion.” Schindler’s blog is available online at <http://technollama.blogspot.com/2006/01/truth-about-wikipedia-german-story.html>.

However, in a posting on the CyberProf listserv, Wales wrote that the <http://de.wikipedia.org> site was “never shut down not even for a single instant” and that “The Wikimedia Foundation has never been served process about any action against us in German court.” However, Wales did acknowledge that visitors to the site were directed to <http://de.wikipedia.org> only “very briefly” due to “a rather stupid order which was quickly reversed . . .”

As the *Bulletin* went to press, Peukert stated that oral arguments regarding the merits of the case should begin early in February.

– ELAINE HARGROVE  
SILHA FELLOW AND *BULLETIN* EDITOR

# Defamation News

## *Franklin Prescriptions, Inc. v. New York Times Co.*

The *New York Times* published an article about purchasing prescription drugs over the Internet with reckless disregard for its falsity, but is not responsible for damages, the United States District Court of Appeals in the Third Circuit decided on Sept. 12, 2005.

The jury in *Franklin Prescriptions, Inc. v. New York Times, Co.*, 32 Media L. Rep. 2238, found for Franklin Prescriptions in the libel suit on Aug. 5, 2004, finding the article was both false and defamatory. But the jury awarded no damages because Franklin Prescriptions showed no actual harm and *The Times* did not publish the article with actual malice, meaning with knowledge of falsity or reckless disregard for the truth.

In an opinion by Judge Anthony J. Scirica, joined by Supreme Court nominee Samuel A. Alito Jr., the Third Circuit affirmed that decision in *Franklin Prescriptions, Inc. v. New York Times, Co.*, 424 F.3d 336, despite the judge's omission of a jury instruction about presumed damages.

"The jury charge was explicit that 'actual injury can include impairment of reputation,' that Franklin Prescriptions should be compensated for 'all harm it suffered,' and that the jury could compensate for the 'actual harm to the plaintiff's reputation,'" Scirica wrote, referring back to the jury's decision. "We see no error. The District Court accurately charged that the jury could award compensation based on harm to reputation alone."

The suit arose after *The Times* published an article on Oct. 25, 2000, illustrated by a graphic listing safety tips for buying online. The graphic, which warned customers against purchasing from companies that did not list a United States address and phone number on their Web sites, included Franklin Prescriptions, a Philadelphia pharmacy that specializes in fertility medicine. Franklin Prescriptions does provide such information, but the graphic omitted it.

Franklin Prescriptions has marketed its products via the Internet since 1996, though the company does

not offer customers the option to purchase its products online.

Under Pennsylvania defamation law, applied in this case based on diversity jurisdiction, presumed damages may not be awarded unless actual malice is shown. "'Presumed damages' allow a plaintiff to recover compensatory damages without proving the defamatory statement caused actual harm," the court explained. These damages are available because damage to reputation may be difficult to prove and measure.

Diversity jurisdiction occurs in cases where the parties are from different states and the amount in controversy is more than the statutory minimum. It applied in this case despite the First Amendment implications of a defamation lawsuit, the court said, citing *Schiavone Constr. Co. v. Time Inc.*, 847 F.2d 1069 (3d Cir. 1988).

In supporting its claim that the pharmaceutical company suffered no actual damages, *The Times* presented evidence that Franklin Prescriptions had shown increased sales of \$100,000 per year after the article ran, The Reporters Committee for Freedom of the Press (RCFP) reported. The RCFP's article is available online at <http://rcfp.org/news/2004/0324frankl.html>.

Franklin Prescriptions sought a new trial, arguing that the court erred in not sustaining its objection to a lack of a presumed damages instruction under Fed.R.Civ.P. 51(c)(1). Franklin Prescriptions' objection, the facts and details of which were contested and conflicting, came during a preliminary meeting and therefore were not on the record; however, Fed.R.Civ.P. 51(c)(1) requires that the party make an objection on the record. Because Franklin Prescriptions did not take the opportunity to address the issue of proposed jury instruction regarding presumed damages, the court found that the District Court's decision overruling the objection was not "plain error."

—JESSICA MEYER  
SILHA RESEARCH ASSISTANT

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"The jury charge was explicit that actual injury can include impairment of reputation, that Franklin Prescriptions should be compensated for 'all harm it suffered,' and that the jury could compensate for the 'actual harm to the plaintiff's reputation.'"

— Judge  
Anthony J. Scirica

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### Cahill, continued from page 2

Even though the ruling ostensibly offers greater protection to anonymous internet posters, Steele's characterization of blogs and chat rooms as "not a source of facts or data upon which a reasonable person would rely" is likely to vex many bloggers and Internet users. However, even if it compromises credibility to a degree, anonymity is still a valuable tool for government critics and whistle-blowers. As Jonathan Zittrain, chair of Internet governance and regulation at Oxford University and co-founder of the Berkman Center for Internet and Society at Harvard Law School, told *The New York Times*, "There are some conversations that are undeniably improved when the rule going in is that you have to stand behind what you say and have to wear a name tag when you do it. But that's certainly not all conversations. People might be prepared to ethically stand behind what they say, but might be in a position that they can't afford to lose their house over it. Speech shouldn't just be for people with lawyers."

Another component of the opinion raises the interesting point that the advantages the Internet affords bloggers are also available to those who are targets of anonymous criticism. Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law, told NPR's "On the Media" that Steele also emphasized "that one of the unique aspects of the Internet is that the ability of people to respond to critical comments is much easier than in the mainstream media. So I think the Delaware Supreme Court would suggest a little self-help might be in order. Do your own blog. Make your own posting. Take the person on in his own environment, in cyberspace."

— PENELOPE SHEETS  
SILHA RESEARCH ASSISTANT

## Bill That Would Have Excluded Blogs From FEC Regulation Fails to Gain Votes Necessary for Passage

The House of Representatives voted 225-182 on Nov. 2, 2005 for a bill that would have excluded blogs, e-mails and other Internet communications from regulation by the Federal Election Commission (FEC), but the tally was short of the two-thirds majority needed to pass it in the expedited form Republican leaders were promoting. The bill, known as the Online Freedom of Speech Act, would have excluded blogs, e-mails and other Internet communications from regulation by the FEC and campaign finance rules. It was proposed by Jeb Hensarling (R-Texas).

Hensarling and other supporters of the bill said it would have protected online political speech from the potentially crippling effects of campaign finance law, but its detractors said it would have created a major loophole in the 2002 McCain-Feingold campaign finance reform act by allowing bloggers to become paid mouthpieces for campaigns.

A Nov. 3, 2005, *Boston Globe* article explained, “Under current law, the same campaign-finance laws that apply to traditional media such as print and broadcasting also apply to the Internet: campaigns can’t use unlimited donations from corporations, labor unions and other organizations to pay for ads that promote a candidate, and all individual and corporate contributions to a candidate must be publicly reported.

“But the bill would have treated Internet ads differently, allowing corporations, labor unions and individuals to spend unlimited amounts on Internet ads supporting candidates. Since there would be no public reporting requirement, it would be impossible to know who bought the ad, according to government watchdog groups.”

But many bloggers – liberal and conservative alike – said that if the blogosphere becomes regulated by the FEC, only the wealthiest among them would be able to afford to continually pay attorneys to help them navigate the rules.

In fact, Markos Moulitsas of the blog DailyKos and Duncan Black, known by his penname Atrios at his blog called Eschaton, have both hired attorney Adam C. Bonin to represent them. In an Oct. 22, 2005 letter to the editor of *The Washington Post*, Bonin wrote, “In 2004 a vibrant blogosphere empowered millions of citizens to influence national politics, leveling the effect of wealth on the electoral process.” He explained that the low start-up and maintenance costs of blogging make it easy for citizens to use and stand “as a counterweight to the political action committees and other entrenched interests. This citizen participation, however, would be chilled by poorly drafted or complex regulations designed to thwart a threat that remains theoretical.”

Mike Krempasky of RedState.org testified at a June 2005 FEC hearing that bloggers deserve the same exemption from campaign-finance laws that the mainstream media get. “What goal would be served by protecting Rush Limbaugh’s multimillion-dollar talk radio program – but not a self-published blogger with a fraction of the audience?” Krempasky asked.

Congress’ lack of guidance left the issue to be determined by the FEC. On Nov. 18, 2005, the FEC issued an Advisory Opinion on the subject, finding that bloggers from FiredUp!, a blog whose stated purpose is to promote Democratic and progressive candidates, qualified for a media exemption. The FEC applied a two-step test to determine that the press exception applied, first asking whether the entity engaging in the activity is a “press entity” as described by the Federal Election Campaign Act of 1971 and FEC regulations. Here, the FEC Commissioners found that that Fired Up! qualified since “[i]ts websites are both available to the general public and are the online equivalent of a newspaper, magazine or other periodical publication as described in the Act and Commission regulations.” It referenced previous Advisory Opinions holding that two different websites specializing in webcasts were press entities “even though [they] lacked a traditional ‘offline’ media presence.”

In the second part of the test, the FEC considered “(1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue (i.e., whether the entity is acting in its ‘legitimate press function’).” For the latter, it looked to whether the “entity’s materials are available to the general public and are comparable in form to those ordinarily issued by the entity.” Because Fired Up! is not owned or controlled by any political party, political committee or candidate and because its site is accessible and free to anyone using the Internet, the FEC found that the blog met the second test as well. The result of its opinion is that any costs incurred by Fired Up! “in covering or carrying a news story, commentary, or editorial on its websites are exempt from the definitions of ‘contribution and ‘expenditure.’”

Two of the FEC Commissioners issued a concurring opinion that cautioned, “we do not believe it is appropriate to give some sort of blanket press exception to any entity that sets up a website,” but still agreed that the facts in FiredUp! did qualify the blog as a press entity.

—ASHLEY EWALD  
SILHA FELLOW

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“What goal would be served by protecting Rush Limbaugh’s multimillion-dollar talk radio program – but not a self-published blogger with a fraction of the audience?”

– Mike Krempasky,  
RedState.org

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# Reporters Privilege News

Judith Miller Resigns from *The New York Times*

Writing in a Nov. 10, 2005 article that she was resigning because “I have become the news, something a *New York Times* reporter never wants to be,” Judith Miller, the reporter who spent 85 days in jail rather than reveal her confidential sources in the Valerie Plame leak case, ended her 28-year career with the newspaper. *Times* publisher Arthur Sulzburger, Jr., released a statement that read, “We are grateful to Judy for her significant personal sacrifice to defend an important journalistic principle [when she went to jail]. I respect her decision to retire from *The Times* and wish her well.”

The relationship between Miller and her colleagues at *The Times* had begun to deteriorate even before her decision to testify before a federal grand jury on Sept. 30, 2005. Miller said her source, Lewis “Scooter” Libby, Vice President Dick Cheney’s chief of staff, had called her while she was imprisoned in the Alexandria Detention Center, urging her to testify. Some speculated that Miller’s decision may have been influenced by concerns that, as a September 30 *Washington Post* article reported, special counsel Patrick Fitzgerald had the authority to extend the grand jury investigation another 18 months, and could have asked the judge to hold Miller another six months if she had not agreed to testify when she did. (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*.)

An October 16 *Times* article detailed some of the problems between Miller and *Times* editors. Labeling Miller as “A Decisive Newsroom Figure,” the article stated that “[a] few colleagues refused to work with her” and that Miller once called herself “Miss Run Amok.” When former investigative editor Douglas Frantz asked Miller what she meant by that, she reportedly responded, “I can do whatever I want.” When questioned about the incident, however, Miller said she must have meant the comment as a joke.

The October 16 article labeled as “flawed” the stories Miller wrote about Iraq’s alleged weapons of mass destruction leading to accusations that Miller helped the Bush administration’s case for going to war with Iraq. “I got it totally wrong,” Miller said. “The analysts and the experts and the journalists who covered [the weapons of mass destruction story] – we were all wrong. If your sources are wrong, you are wrong. I did the best job I could.”

Finally, there are the many questions surrounding the Valerie Plame affair. According to the October 16 article, Miller visited Libby on June 23, 2003. Her assignment was to write an article about the failure to find weapons of mass destruction in Iraq. But instead, Libby talked about diplomat Joseph Wilson’s fact-finding trip to Niger.

Wilson’s mission was to determine whether Iraq had bought uranium from that country. The following month an article by Wilson himself accusing the Bush administration of manipulating intelligence to justify the war with Iraq was published by *The New York Times*. Two days after the publication of that article, Miller and Libby met again. Miller’s reporter’s notebook from that day contains the name “Valerie Flame.” Valerie Plame is Wilson’s wife, who at the time was also an undercover CIA agent. At the heart of the grand jury’s investigation is the identity of the administration official who leaked Plame’s name to the press. But Miller contends it was not Libby who identified Plame to her that day, saying the name was written in a different portion of her notebook than she had used during the Libby interview. At a later date, Miller had also written the name “Victoria Wilson” in her notes.

When Miller and other reporters were subpoenaed in the Valerie Plame case, Miller’s reputation did not hinder *The Times*’ decision to support her. “The default position in a case like that is you support the reporter,” editor Bill Keller said. Of all the reporters subpoenaed, Miller was the only one to go to jail. While she was in jail, *The Times* elected not to reveal Libby as Miller’s source, even though Keller himself knew.

One of *The Times* managing editors, Jill Abramson, characterized *The Times*’ coverage of the case as “constrained,” saying in the October 16 article that it would have been “unconscionable . . . to out [Miller’s] source in the pages of the paper” while Miller was still in jail.

By mid-September, Libby had released Miller from their confidentiality agreement, and she testified before the grand jury on September 30. But according to *The Times* October 16 article, *The Times* was “consumed by discussions about how the newspaper handled the case, how *Times* journalists covered the news of their own paper – and about Ms. Miller herself.”

The Associated Press reported that on October 21, Keller sent an e-mail to *Times* employees saying he wished he had interviewed Miller more carefully about her sources. He stated he had “missed what should have been significant alarm bells” that she had been the recipient of the leaked information. In addition, Keller noted that Miller had apparently misled *Times* Washington bureau chief Phil Taubman about the extent of her involvement. “This alone,” Keller wrote in his e-mail, “should have been enough to make her probe deeper.”

In a later memo to the staff, Keller characterized Miller’s relationship with Libby as an “entanglement” and an “engagement.”

As part of Miller’s departure agreement, Keller clarified in a later memo that he actually could not say whether Miller had misled Taubman. He also said that in questioning Miller’s relationship with Libby, he did not mean to insinuate that there was anything “improper” about it.

Katharine Q. Seelye wrote in a November 10 *New York Times* article that since Miller’s departure, she has received several offers of employment, but her immediate plans involve taking time off.

In Miller’s own farewell article, also published November 10, she wrote that she “will continue speaking in support of a federal shield law [and her future writing will] call

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“I have become the news, something a *New York Times* reporter never wants to be.”

– Judith Miller

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Miller, continued on page 11

# Reporters Privilege News Shield Law Update

The Free Flow of Information Act of 2005 continues to progress through Congress since its proposal in July 2005, and members of Congress expressed hope throughout the fall that it might pass. Speaking at a conference of newspaper association managers, lobbyists and lawyers in Washington, D.C. in October, Representative Mike Pence (R-Ind.), a sponsor of the law in the House, said the bill will receive full consideration in the House if its partner bill moves through the Senate.

“It is possible in this Congress to achieve some reinvigoration within the U.S. Code of the First Amendment freedom of the press,” Pence said. “For someone who believes in limited government, the only check on government power in real time is a free and independent press.”

Pence also said that he believes that some bloggers would be covered by the proposed shield law. He cited Matt Drudge as an example of a blogger who would be covered and said courts would have to take up the issue on a “blogger-by-blogger basis.”

This contradicted what his counterpart in the Senate, bill sponsor and Indiana Republican Richard Lugar, had said two weeks earlier. Speaking at a conference of the Inter-American Press Association, Lugar rhetorically asked whether bloggers would be considered journalists and said, “Probably not, but how do you determine who will be included in this bill?”

The Senate Judiciary Committee held a second hearing on the bill on October 19, 2005 (The first round of testimony occurred in July 2005. See “Reporters Privilege News: Federal Shield Law Debated in Hearing before Senate Judiciary Hearing in the Summer 2005 issue of the *Silha Bulletin*).

Senator John Cornyn (R-Texas), speaking to fellow senators before the testimony began, also touched on the bloggers-as-journalists debate. “At our last hearing, one of our witnesses described bloggers as the modern day equivalent of the revolutionary pamphleteer who passed out news bulletins on the street corner. However, the relative anonymity afforded to bloggers, coupled with a certain lack of accountability, as they are not your traditional brick-and-mortar reporters who answer to an editor or publisher, also has the risk of creating a certain irresponsibility when it comes to accurately reporting information,” he said. “Therefore as we consider what protections to afford, it is also important to consider whether bloggers, or reporters for entities such as al Jazeera, or others whose associations perhaps are questionable or even cause for concern, ought to be covered under this type of law,” Cornyn concluded.

Giving testimony were Chuck Rosenberg, United States Attorney for the Southern District of Texas on behalf of the Justice Department; former *New York Times* reporter Judith Miller; David Westin, President of ABC News; Joseph E. diGenova, former federal prosecutor from Washington, DC; Anne Gordon, Managing Editor of the *Philadelphia Inquirer*; Dale Davenport, Editorial Page Editor for *The Patriot News* (Harrisburg, Penn.); and Steven D. Clymer, a professor of law at Cornell.

Rosenberg testified that, “The Department opposes the bill as presently drafted primarily because the bill would create serious impediments to the Department’s ability to effectively enforce the law, fight terrorism, and protect the national security.” He then cited five separate problems the Justice Department has with the bill. “First, the bill imposes inflexible, mandatory standards in lieu of existing voluntary guidelines that can be adapted to changing circumstances,” he said.

“Second, the bill would bar the Government from obtaining information about media sources even in the most urgent of circumstances affecting the public’s health or safety except in a very narrow category of cases involving ‘imminent and actual harm to national security.’ This is simply too late and too narrow,” Rosenberg stated.

He also objected that “the bill would give courts the authority to evaluate requests for subpoenas to members of the media in an on-going criminal investigation and place an unreasonable burden on the Government . . . and pose serious threats to grand jury secrecy and the confidentiality of on-going criminal investigations.”

He then contended that “the bill would bar not only subpoenas issued to reporters for their sources but also any subpoenas issued to certain third parties that reasonably could be expected to lead to the discovery of the identity of a source. The standard is impractical and would effectively prevent law enforcement from obtaining material that has nothing to do with media sources.

Finally, he noted the Department’s objection to “the broad definition of ‘covered person’ in [the bill] that, *inter alia*, encompasses foreign media and foreign news agencies (including government-owned and -operated news agencies), some of which are hostile to the United States and some of which can, and have, acted in support of foreign terrorist organizations.”

Judith Miller, whose recent imprisonment for refusing to reveal her confidential source in the Valerie Plame case until she received an explicit waiver, also testified. She urged the senators to pass the legislation, saying, “If journalists cannot be trusted by sources to guarantee confidentiality, then journalists cannot function and there cannot be a free press.” She noted that since Sept. 11, 2001, there has been an increase in the amount and type of documents that have been made classified and that confidential sources are thus increasingly important for journalists to do their jobs. Miller also said that she supports the amendment to the bill that would provide an exception to the shield when “the disclosed identity of the source is necessary to prevent imminent and actual harm to national security.” (See “Judith Miller Resigns from *The New York Times*” on page 7 of this issue of the *Silha Bulletin*.)

Referring to her own case, Miller stated, “the recent hand-wringing should not prevent us from recognizing the most enduring truth: reporters, even flawed reporters, should not be jailed for protecting even flawed sources.”

—ASHLEY EWALD  
SILHA FELLOW

“It is possible in this Congress to achieve some reinvigoration within the U.S. Code of the First Amendment freedom of the press.

For someone who believes in limited government, the only check on government power in real time is a free and independent press.”

— Representative  
Mike Pence (R-Ind.)



# Reporters Privilege News

## Judge in McGraw-Hill Case Enforces Rare Administrative Subpoena; Energy Information Publisher Must Turn over Data

The United States District Court for the District of Columbia directed a reporter to reveal confidential sources on Oct. 4, 2005, and also ordered publisher McGraw-Hill to turn over to government regulators data regarding possible manipulation in the natural gas market.

“News gatherers are not entitled to an absolute privilege,” District Judge Royce Lamberth wrote in *In re An Application to Enforce Administrative Subpoena of the Commodity Futures Trading Comm’n v. McGraw-Hill Cos., Inc.*, 390 F.Supp. 2d 27 (D.D.C. 2005). “The privilege to protect the confidentiality of one’s sources or information received therefrom may be abrogated by a strong showing by the party seeking the information.”

McGraw-Hill challenged the administrative subpoena, which was issued by the Commodity Futures Trading Commission (CFTC). The subpoena demanded information gathered from an unnamed energy marketing company that the CFTC had been investigating since 2003. After receiving information that the company attempted to affect natural gas prices by reporting false information to Platts, a division of McGraw-Hill, the CFTC sought release of the information McGraw-Hill collected.

Although Platts, which publishes energy indices and price ranges based on data provided by participating companies, is not a traditional news gathering company, Lamberth found that the reporter’s privilege applied broadly and that Platts engaged in journalistic analysis and judgment in addition to reporting data. This privilege, however, is a qualified one, he ruled.

Courts apply a balancing test to evaluate whether the privilege should prevail. Two factors considered are “the need for the information and whether the party seeking the information has exhausted all reasonably available alternative sources.”

The reporter’s privilege generally is not overcome in a civil action “because any interest in overcoming the privilege is by definition a private rather than a public interest,” but this case was neither criminal nor civil. “The CFTC is a federal agency authorized to investigate violations of law” . . . but because “the CFTC is not investigating criminal wrongdoing, its work does not reach the level of public interest afforded to a grand jury investigation,” Lamberth wrote.

The court found that the weight of the public interest in this administrative action warranted finding for the government. The court presumed the CFTC, a federal agency that acts “within congressionally determined parameters,” undertook investigations in the public interest.

Lamberth held that the information Platts received and gathered “clearly goes to the heart of proving that the data was false.” Lamberth also found that the information the energy company provided the CFTC was incomplete and that there was no reasonable alternative source of the information. Therefore, Platts’ information was essential to determining whether the allegedly false reports the energy company provided did, in fact, have an effect on natural gas prices and the reporter’s privilege could be overridden.

“To the extent that Platts’ publications were erroneous, the public interest in truthful news reporting – the very interest safeguarded by the privilege – is threatened,” Lamberth said.

However, pursuant to Federal Rule of Civil Procedure 45(c)(3) and relevant case law, the court modified aspects of the subpoena which it found to be overly burdensome.

McGraw-Hill unsuccessfully challenged the court’s holding with a request to amend and clarify its prior order. On Dec. 2, 2005, Lamberth denied McGraw-Hill’s request that the court “limit the subpoena to information that the Opinion deemed was necessary to the CFTC’s investigation . . . and to issue a protective order . . .” because failure to do so would result in an “unjust intrusion” on McGraw-Hill’s reporter privilege. *In re Application to Enforce Admin. Subpoena of the CFTC v. McGraw-Hill Cos.*, 2005 U.S. Dist. LEXIS 30336 (D.D.C. 2005). Lamberth said the subpoena was consistent with the investigatory needs of the CFTC and that much of the arguments presented in the request to clarify were reiterations of arguments already presented to and ruled on by the court.

—JESSICA MEYER  
SILHA RESEARCH ASSISTANT

“The privilege to protect the confidentiality of one’s sources or information received therefrom may be abrogated by a strong showing by the party seeking the information.”

– District Judge  
Royce Lamberth

## Citizen Journalists Compete with Major News Outlets

Journalists employed by the New York Times Company, Knight Ridder, and the Associated Press have encountered several million new competitors. They are called “citizen journalists,” but the term encompasses everyone from the guy next door who submits a picture of his holiday light display to the local newspaper to the professional blogger who has a reserved seat at political conventions and whose own personal site gets over a million hits a day.

As Brian Montopoli wrote in a September 2005 entry for the blog CBS News Public Eye, “Basically, a citizen journalist is someone from outside the news business who engages in the kind of journalism that is traditionally the purview of the professionals.” Montopoli added that he does not consider himself a true citizen journalist because he is a paid employee of CBS. His blog is available online at <http://www.cbsnews.com/blogs/2005/09/21/publiceye/entry870890.shtml>.

Traditional media outlets have utilized the services of citizen journalists for years, publishing their photos and personal accounts of events like September 11, 2001, in their own pages. More recently, disasters like Hurricane Katrina and the July 2005 terrorist attacks in London subways have been covered by witnesses on the scene – regular people with cell phone and digital cameras handy who just happened to get the right shot.

Savvy business people have realized there is a growing market for what citizen journalists can offer. Companies like Scoopt (Glasgow, Scotland), Cell Journalist (Nashville, Tenn.), and Spy Media (San Jose, Calif.) offer citizen photojournalists the opportunity to upload photos to their sites where the hope is that they will be viewed by mainstream media organizations and sold with profits split between the site and the photographer. The online company agrees to host excerpts of the works online while the photographer grants the company a license to distribute and display the content. The photographer selects the price and terms of purchase and once the content is purchased, the site takes a commission (35 percent, for example, at Spy Media).

Writers are also making money by selling stories to collaborative sites run entirely by citizen journalists. Probably the most well-known and financially successful site thus far is the South Korean-based OhmyNews where the motto is “every citizen is a reporter.” According to a Sept. 18, 2005, *San Francisco Chronicle* article, OhmyNews averages between 1.7 and 2 million site hits per day.

Its revenue is projected at \$10 million this year, with 70 percent of that coming from advertising, 20 percent from syndication and 10 percent from subscriptions, the *Chronicle* reported. In May 2005 the organization launched an English-language edition and has published article from citizen reporters spread across the globe.

“OhmyNews readers can offer instant feedback online and – if they really like a piece – monetary tips. Readers poured nearly 30 million Won (\$30,000 U.S.) into columnist Kim Young Ok’s account in increments of \$10 or less in one week after he criticized the constitutional court of South Korea last year,” the *Chronicle* noted.

The article quoted an OhmyNews company brochure which declared, “So here we hoist our flag and declare war on the old media system . . . We are overthrowing the

basic principles of news reporting, which for many years has been taken for granted by many of the world’s newspapers.”

OhmyNews has a professional staff of over 50 copy editors, reporters and editors who vet everything before publication. The same cannot be said for the millions of bloggers who try their hand at citizen journalism. This has led to criticism from some media watchers.

“One of the tenets of ‘real’ journalism is that you don’t distribute information that hasn’t been checked,” David Coursey, a columnist for Publish.com, an online publication covering Web publishing and print news, wrote in a Sept. 22, 2005 opinion piece, “Citizen publishers are under no such obligation, so the information that winds up in blogs and distributed on mailing lists must always be considered suspect, even if sent with the best of intentions. Why does this matter? Because false information, once distributed, can never really be called back. You can distribute a correction, but some number of people will never see it,” Coursey wrote. The article is available online at <http://www.publish.com/article2/0,1895,1861979,00.asp>.

Nevertheless, mainstream media are taking note of citizen journalism’s rise and some traditional outlets are embracing it. The *Austin American Statesman* launched a community blogging group on its media sites in September 2005. According to a Sept. 12, 2005 article, Jim Debth, the *American-Statesman*’s Internet general manager, said the paper hopes the addition of citizen journalists will supplement coverage of large, multifaceted stories, and eventually boost site traffic as well as ad revenue. “This is very new for us and our advertisers, so it might be a while before the blogs create real revenue,” said Debth. “But from the start, we’re sure this will significantly broaden coverage of big stories, and add real value for readers.”

The Associated Press (AP) hosted an October 2005 conference on citizen journalism organized by The Media Center, a media think tank located in Reston, Va. Director of BBC World Service and Global News Division Richard Sambrook spoke on his organization’s increasing use of video and other materials contributed by regular citizens. “We don’t own the news any more,” Sambrook was quoted as saying in an AP article. “This is a fundamental realignment of the relationship between large media companies and the public,” Sambrook said.

But Larry Kramer, the head of digital operations for CBS cautioned, “If Yahoo puts up blogs, that’s one thing. They are not making any representations [but] we as a news organization have to live with the fact that people look at us as an organization that reports credible information.” Public submissions to CBS’s Public Eye blog are therefore never posted without editorial review.

Michael Tippett, founder of the citizen journalism site NowPublic.com brushes aside criticism of his growing niche in the world of media. “The big news organizations always say, we have journalism school grads and Pulitzer Prize winners and people trained in the craft. Fair enough, but you have two people on the story, and we already may have 20 or 50. What happens when we have 2,000 people covering that story? There will come a point where they can’t compete.”

“A citizen journalist is someone from outside the news business who engages in the kind of journalism that is traditionally the purview of the professionals.”

– Brian Montopoli

– ASHLEY EWALD  
SILHA FELLOW

# Access to Courts

## Rhode Island Discards Controversial Draft Proposed Court Rule

Labeled as a “blanket gag order” by *The Providence Journal*, Proposed Local Rule of General Application (“PLR Gen”) 110, court rule that would have affected the U.S. District Court in Rhode Island, has been discarded. Chief U.S. District Judge Ernest C. Torres made the announcement concerning the rejection of PLR 110 on Dec. 12, 2005, saying, “The Court agreed that the draft rule was worded too broadly and could be construed in a manner that was not intended.” Federal law and professional codes of conduct, Torres told the Associated Press, already prohibit attorneys and court workers from releasing confidential information such as grand jury proceedings.

The discarded draft of PLR 110, originally unveiled June 21, 2005, read in part: “Unless authorized to do so by the Court, no counsel, party, court employee, intern, court security officer, United States Marshal or Deputy United States Marshal shall disclose or disseminate to any unauthorized person information relating to any pending case that is not a part of the public record.” Torres told *The Providence Journal* on August 18 that the proposal was meant to prevent the release of confidential information. “I agree we could have worded it better,” Torres told the newspaper.

Comments had been filed against the adoption of the proposed rules by a number of media groups, including the Associated Press, the Rhode Island Press Association, The Reporters Committee for Freedom of the press, and Rhode Island newspapers. The Silha Center also filed comments on the draft rules, available online at <http://www.silha.umn.edu/Resource%20Documents/commentsrhodeisland.pdf>. The Silha Center’s comments criticized PLR Gen 110, saying that it would restrict the First Amendment speech rights of attorneys; created incentives for court employees and other personnel to withhold public information and records contrary to the public interest, and was an unconstitutional prior restraint upon members of the public who are litigants because it is not narrowly drawn to serve compelling interests. The Rhode Island Bar Association had argued that PLR Gen 110 would have prevented lawyers from interviewing witnesses or using mock juries to prepare for trials, according to the Associated Press.

However, another part of the proposed court rules, PLR Gen 111(c) that restricted the taking of handwritten notes without the authorization of the presiding judicial official, was not discarded, although it was amended to read, “No authorization is necessary for note-taking by any persons seated inside the bar of the court or located outside of the courtroom.” The rule had been proposed in an effort to avoid disruptions during proceedings, and to prevent jury members from thinking that a portion of testimony was particularly significant because they saw a reporter suddenly writing intensely. The Silha Center comments criticized these prohibitions, however, stating that the rule “fails to preserve the long-standing tradition of media note-taking during court proceedings, and goes against the trend of greater media access to court proceedings.” The Silha Center further noted that Rhode Island’s rule was more restrictive even than the U.S. Supreme Court, which in 2002 allowed members of the public to bring writing implements to take notes in the public gallery.

The updated rules are available online at [www.rid.uscourts.gov](http://www.rid.uscourts.gov).

—ELAINE HARGROVE  
SILHA FELLOW AND *BULLETIN* EDITOR

“The Court agreed that the draft rule was worded too broadly and could be construed in a manner that was not intended.”

— District Judge  
Ernest C. Torres

*Miller*, continued from page 7

attention to the internal and external threats to our country’s freedoms.” Miller’s statement is available online at [www.judithmiller.org](http://www.judithmiller.org).

On October 28, Fitzgerald indicted Libby 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](http://www.usdoj.gov/usao/iln/osc/documents/libby_indictment_28102005.pdf).

Meanwhile, the case against Libby continues to move forward. The Associated Press reported on January 21, 2006 that Libby’s attorneys told federal Judge Reggie B. Walton that they want to subpoena journalists and news organizations for notes and other documents related to the Plame leak. No reporters’ names were released, however. The Associated Press article states that filing the subpoenas “provides the most concrete indication yet that a large part of Libby’s trial strategy will be identifying other government officials who knew Plame was a CIA operative and told reporters about it.”

On January 20, 2006, the New York Times News Service released a story stating that NBC’s bureau chief, Tim Russert, and Libby “had the conversation that is at the heart of the perjury case against Libby.” Russert and Libby “have said contradictory things about whether they discussed . . . Valerie Plame during that conversation.” The two men further disagree over the “ground rules under which they spoke,” leading to questions in the journalism community about the shape of confidential relationships between sources and reporters. Russert had been originally subpoenaed on May 21, 2004 to testify before the grand jury in the Plame case. He never did appear before the grand jury, but did answer “a limited number of questions” in an interview with Fitzgerald in August 2004, according to *The Washington Post*. (See “Reporters Privilege: In re: Special Counsel Investigation” in the Summer 2004 *Silha Bulletin*.)

“It will be, if not a master class, at least a law school exam on the reporters’ privilege,” Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota, told the Times News Service. “The practice should be that everything is on the record unless you agree otherwise.”

—ELAINE HARGROVE  
SILHA FELLOW AND *BULLETIN* EDITOR

# Access to Courts

## Cameras in Federal Courtrooms Continue to Spark Debate

C-SPAN has already announced it would televise all Supreme Court proceedings should the measure pass.

United States Supreme Court justices may soon become C-SPAN stars if Congress decides to enact a proposed law that would allow oral arguments to be televised. Sen. Arlen Specter (R-Pa.), the Chairman of the Senate Judiciary Committee, introduced the bill in September 2005 and predicts the bill will pass. In a November 10, 2005, *Legal Times* article he said, "It's a question of when, in my judgment, not if."

His colleague on the Judiciary Committee and a co-sponsor of the bill, Sen. Charles Schumer (D-N.Y.), said "I think this is the year to make this law."

Sen. Patrick Leahy (D-Vt.), the ranking Democrat on the Judiciary Committee, agreed, saying, "The time is ripe."

During his confirmation hearings before the Senate Judiciary Committee, Samuel A. Alito said that although "it would be presumptuous for me to talk about it right now," he thought that permitting television cameras in the courtroom was "useful [and] educational." Alito also mentioned that he had supported allowing cameras in the courtroom when he sat on the bench in the Third Circuit.

During John Roberts' confirmation hearings, the current Chief Justice signaled that he was open to the idea of televised proceedings, which gave new hope to advocates for camera access. On November 17, 2005, he responded to a letter from the president of the Radio-Television News Directors Association (RTNDA), Barbara Cochran, that offered to assist in televising coverage of the Court's proceedings. Roberts thanked Cochran for her offer and indicated that he would "keep [it] in mind."

The Roberts Court allowed the immediate release of audio tapes following two oral arguments before it in late November and early December 2005. Those cases involved abortion and the Solomon Amendment, the law that allows the federal government to withhold funding from schools that ban military recruiters based on their "don't ask, don't tell" policy regarding sexual orientation. The Supreme Court has occasionally offered such same day releases of audio since it heard *Bush v. Gore*, 531 U.S. 98 (2000) to decide the 2000 presidential election.

Other justices have not been as open minded about television coverage. In 1996, Justice David Souter told a congressional panel, "I can tell you the day you see a camera come into our courtroom, it's going to roll over my dead body."

More recently, Justices Sandra Day O'Connor, Antonin Scalia, and Stephen Breyer expressed their own reservations. Speaking in November 2005 at an American Bar Association event, O'Connor pointed to the O.J. Simpson trial as a situation she was "very uncomfortable with."

Breyer also brought up the Simpson trial and concluded, "I think I'm not certain I would vote in favor of having [cameras] in every criminal trial in the country."

Speaking at a separate event in October 2005, Scalia said, "We don't want to become entertainment." He continued, "I think there's something sick about making entertainment out of real people's legal problems. I don't like it in the lower courts, and I particularly don't like it in the Supreme Court."

Cochran, the RTNDA president, testified before Congress November 9, 2005, and urged passage of the bill. "Nominees for the Supreme Court are widely seen in televised hearings conducted by this committee, only to disappear from view the moment they are sworn in as justices," Cochran said.

C-SPAN has already announced it would televise all Supreme Court proceedings should the measure pass.

### Cameras in the Lower Federal Courts

The House of Representatives voted in November to give federal appellate and trial judges the power to televise court hearings. The 2nd and 9th Circuits already allow broadcast coverage of appellate hearings upon request and panel approval.

*Legal Times* noted that "Ninth Circuit Judge Diarmuid O'Scannlain reported that few if any problems have arisen since access was first allowed in 1991. Neither judges nor attorneys have shown any greater tendency to "grandstand" before the cameras, he said."

But *Legal Times* also quoted Jan DuBois, a trial judge in the Eastern District of Pennsylvania, expressing concern about intimidation of jurors and witnesses should cameras be allowed. "The cameras do more than report the proceedings; they affect the proceedings," he said.

2005 Silha Lecturer Floyd Abrams has represented CNN in its requests for televised coverage. Speaking on a November 30, 2005 broadcast of *The News Hour with Jim Lehrer*, Abrams said that 48 of the 50 states allow televised coverage of state appellate proceedings and have found that it has not distorted the proceedings or affected the participants or the administration of justice. He also said that the best way for the public to become knowledgeable about a Court proceeding is to see it. "And if we don't trust them to understand it, if we don't trust them really to make head or tail of it, we are reflecting, I think, a profound distrust for democracy itself," Abrams said.

—ASHLEY EWALD  
SILHA FELLOW

# U.S. Supreme Court Chief Justice John Roberts Reveals Little On The First Amendment During Confirmation Hearings

When a First Amendment case comes before the U.S. Supreme Court, Chief Justice John Roberts admits he will have some research to do.

“I haven’t dealt with a lot of First Amendment access cases . . . And so I’m not terribly familiar with the precise levels of scrutiny that apply,” Roberts told Senator Patrick Leahy (D-Vt.), ranking member of the Senate Judiciary Committee when speaking to members of the Committee during his confirmation hearings on Sept. 14, 2005. Portions of this conversation are available online at [http://www.editorandpublisher.com/eandp/news/article\\_display.jsp?vnu\\_content\\_id=1001137019](http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1001137019).

“And I obviously, if I were in a position as a judge and had to decide a particular case, would study [the precedents] and become aware.”

Despite an unwillingness to speak specifically about the First Amendment, Roberts did express some views on how the Court should handle the First Amendment as well as media rights.

“[T]he values of the First Amendment, obviously, are something that have to be given careful weight by the court, for the very reasons that you have discussed. Because the First Amendment serves a purpose,” Roberts said. “It’s not there just because the framers thought this was in general a good idea. It serves a purpose with respect to government. It provides access to information and allows the people in a free society to make a judgment about what their government is up to.”

Roberts also indicated that when the public has access to information, the media should as well.

“[I]f it’s a situation in which the public is being given access, you can’t discriminate against the media, and say, as a general matter, that the media don’t have access, because their access rights, of course, correspond with those of the public,” Roberts said.

Although Roberts did not establish a record of First Amendment jurisprudence during his time as a judge for the United States Court of Appeals for the District of Columbia, he has been involved in many First Amendment cases as a public and private attorney, the First Amendment Center reported.

Roberts represented several clients in addition to co-authoring a number of *amicus* briefs for cases that contained at least some First Amendment implications. As deputy solicitor general, Roberts argued before the United States Supreme Court in *U.S. v. Kokinda*, 497 U.S. 720 (1990), a case questioning whether the government could ban solicitation on the sidewalks near a post office. Roberts also worked on *amicus* briefs for cases before the Supreme Court involving, among others, middle school graduation prayer (*Lee v. Weisman*, 505 U.S. 577 (1992)), commercial speech (*U.S. v. Edge Broadcasting Co.*, 509 U.S. 418 (1993)), and flag burning (*U.S. v. Eichman*, 496 U.S. 310 (1990)).

The First Amendment Center further reported that in private practice, Roberts represented a parochial school in a zoning case, contending that a zoning ordinance represented a permissible accommodation of religion (*Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000)). He also represented Nebraska Cattlemen, Inc. in a lawsuit involving generic price ads that were argued to violate the First Amendment rights of those beef producers who objected to the ad (*Livestock Marketing Association v. U.S. Dept. of Agriculture*, 335 F.3d 711 (8th Cir. 2003)) (See also “*Johanns v. Livestock Marketing Association*,” in the Spring 2005 Issue of the *Silha Bulletin*).

“Given an advocate’s duty to represent one’s client zealously, position taken in those cases may not reflect Roberts’ persona views on the First Amendment,” David L. Hudson warned in his article for the First Amendment Center. The article is available online at [www.firstamendmentcenter.org/analysis.aspx?id=15567](http://www.firstamendmentcenter.org/analysis.aspx?id=15567).

—JESSICA MEYER  
SILHA RESEARCH ASSISTANT

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“The First Amendment is not there just because the framers thought this was in general a good idea. It serves a purpose with respect to government. It provides access to information and allows the people in a free society to make a judgment about what their government is up to.”

– U.S. Supreme  
Court Chief Justice  
John Roberts

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## CPB Releases Report on Former Chairman

On Nov. 15, 2005, Kenneth Konz, inspector general of the Corporation for Public Broadcasting (CPB), released a report detailing his investigation into controversial actions of the CPB's former chairman, Kenneth Y. Tomlinson, who was accused of interjecting partisan politics into public broadcasting. Konz found that Tomlinson violated CPB ethics codes, CPB by-laws, and on two occasions, federal law – specifically, the Public Broadcasting Act (PBA) 47 U.S.C. § 396.

Konz found that Tomlinson violated CPB ethics codes, CPB by-laws, and on two occasions, federal law – specifically, the Public Broadcasting Act (PBA) 47 U.S.C. § 396.

Konz investigated five of Tomlinson's actions: his use of CPB money to hire a consultant to monitor the objectivity of NPR and PBS programming; his role in recruiting CPB's current president and CEO, Patricia Harrison, who is a former co-chairwoman of the Republican National Committee; his involvement in the creation of a new public affairs program called "The Journal Editorial Report;" his role in hiring two in-house ombudsmen to monitor NPR and PBS news programming; and his alleged hiring of lobbyists to defeat legislation that would have restructured CPB. Konz's investigation, begun in May 2005, was intended to assess whether any of these actions violated the PBA. Konz's report is available online at: [http://www.cpb.org/oig/reports/602\\_cpb\\_ig\\_reportofreview.pdf](http://www.cpb.org/oig/reports/602_cpb_ig_reportofreview.pdf).

Tomlinson had created controversy by asserting that there was a liberal bias in public broadcasting programs. He undertook what *The Washington Post* characterized as a "high-profile campaign" to combat this alleged bias. (See "Prior Restraint: CPB, PBS, and NPR Face Controversy over Funding and Focus of Public Broadcasting" in the Spring 2005 issue of the *Silha Bulletin*.) In June 2005, before the conclusion of the investigation, Tomlinson told *The New York Times*, "I am confident that the inspector general's report will conclude that all of my actions were taken in accordance with the relevant rules and regulations and the traditions of CPB." However, Konz's report stated that in all five of the actions investigated, Tomlinson violated CPB codes or by-laws, and in two of the five actions, he violated the PBA. Konz released the contents of his report to the CPB board on Nov. 3, 2005, and Tomlinson resigned the same day. Since his resignation and the public release of the report, the discussion has focused on Konz's findings in relation to the five specific actions detailed above.

Perhaps the most controversial action by Tomlinson was his hiring of a conservative consultant, Fred Mann, to monitor the political leanings of guests on some NPR and PBS programs, including "NOW with Bill Moyers." According to the Associated Press, Mann was charged with determining whether the guests on the shows were "anti or pro-Bush," and "anti or pro-Tom DeLay." Konz's report found that Tomlinson did not violate federal law in hiring the consultant; rather, his stated goals were consistent with CPB's statutory requirements to review programming for objectivity and balance. However, Konz found that Tomlinson's negotiation of Mann's contract violated CPB by-laws.

Tomlinson's role in recruiting and hiring Patricia Harrison was even more problematic, according to the report. The report stated, "Because recent news reports suggested that CPB was making personnel decisions based on political ideology, we were asked to review personnel actions to determine whether, contrary to PBA Section 396(e)(2), 'political tests' or qualifications were being used to fill senior executive positions. While our review found no evidence that personnel decisions were based solely on 'political tests,' we did find evidence that politics may have influenced some decisions. Specifically, we identified e-mails between the former Chairman and staff in the Executive Office of the President that, while cryptic in nature, their timing and subject matter gives the appearance that the former Chairman was strongly motivated by political considerations in filling the President/CEO position." The report's summary explicitly states that such use of political tests "... violated statutory prohibitions against such practices." Harrison denies that she is motivated by politics, telling *The New York Times*, "Only actions will dispel critics who believe I have a political agenda, which I do not have. I want to define my tenure in as open a way as I can."

According to the report, Tomlinson's actions in the creation of "The Journal Editorial Report," hosted by *Wall Street Journal* editor Paul Gigot, also violated both federal law and CPB ethics codes. Specifically, the report states that Tomlinson "... violated statutory provisions and the Director's Code of Ethics by dealing directly with one of the creators of a new public affairs program during negotiations with [PBS] and the CPB over creating the show." According to a Dec. 1, 2005 article in the *Los Angeles Times*, the show will move from PBS to Fox News in January 2006. Robert Christie, a spokesman for Dow Jones, which owns "The Journal Editorial Report," told the *Los Angeles Times*, "The Journal decided not to pursue a third season on PBS because ... the refusal of many of the top PBS TV stations to carry the program didn't justify the effort." PBS officials disputed that many of the top PBS stations refused to air the program, but Paul Friedman, the show's executive producer, told the *Los Angeles Times*, "I believe this was a concerted campaign to destroy the program on ideological grounds."

The investigation into Tomlinson's creation of the two ombudsmen positions found that he violated CPB codes of conduct by failing to comply with "established CPB procurement processes for consulting services exceeding \$50,000," and by discussing the creation of the positions in secret.

Tomlinson's alleged hiring of lobbyists to consult with CPB regarding pending legislation was also found to violate established CPB procedures.

Konz's report attributed these findings not only to Tomlinson but also to broader problems with CPB's management. "Our review found an organizational environment that allowed the former Chairman and other CPB executives to operate without appropriate checks and balances," the report stated. However,

# FOIA Updates

## Bush Issues Executive Order to Increase FOIA “Efficiency”

On Dec. 14, 2005, President Bush issued an executive order directing federal agencies to be more efficient in handling requests under the Freedom of Information Act (FOIA). He ordered every agency of the federal government to designate a senior officer at the Assistant Secretary or equivalent level to serve as the Chief FOIA Officer of that agency.

According to the order, the officer will be responsible for the agency’s “efficient and appropriate compliance with the FOIA” and will monitor, review and report on the agency’s performance. The officer will also appoint FOIA public liaisons to handle public questions and concerns.

The order is ostensibly aimed at reducing the backlog of FOIA requests. A Dec. 16, 2005 *New York Times* article reported that in 2004, the public filed over 4 million requests under FOIA, double the number of requests for information government agencies received in 1999. A Dec. 14, 2005 article posted by The Reporters Committee for Freedom of the Press noted that federal agencies acknowledged 13 percent fewer FOIA requests in 2004 than they did in 2000 and that “[m]any requests extend beyond the Act’s statutory ‘20 working days’ deadline, and some requesters never receive a response.”

Bush’s order did not signal a change in the administration’s current policy of withholding information if the agency can cite any legal reason for doing so. This policy was put in place in 2001 by then-Attorney General John Ashcroft and has remained under current Attorney General Alberto Gonzales. A Coalition of Journalists for Open Government study found that denials of information increased 22 percent from 2000 to 2004.

A Dec. 15, 2005 *Roll Call* article reported that Rep. Henry Waxman (D-Calif.) sent a letter to chairmen and ranking members of both chambers raising concern about a provision in the fiscal 2006 Defense authorization bill that would exempt the Defense Intelligence Agency (DIA) from FOIA requirements. Waxman noted that the DIA, which sends defense attachés who operate openly to U.S. embassies around the world, is not the equivalent of the CIA and does not need as much secrecy protection. He wrote that new exemptions “should not be created lightly, especially in the absence of a hearing record that demonstrates the need for an exemption.”

Bush signed the executive order while Sen. John Cornyn (R-Texas) and Rep. Lamar Smith (R-Texas) looked on. Cornyn said the order would “get information in the hands of the public more quickly” according to a Dec. 15, 2005 article in *The Atlanta Journal-Constitution*.

The article also quoted Sen. Patrick Leahy (D-Vt.). “The executive order is a constructive step, but it is not the comprehensive reforms we need,” Leahy

said. “For example, it does not impose penalties for agencies that miss deadlines. We can do better.”

In February 2005, Cornyn, Leahy, and Smith introduced legislation intended to strengthen the public’s ability to receive information under FOIA. Their Openness Promotes Effectiveness in our National (OPEN) Government Act would allow the public to recoup legal costs from the federal government for improperly withheld documents, expand the list of those eligible for fee waivers as members of the press to include many nonprofits and blog writers, establish a tracking system for requests, and require agencies to report on their 10 oldest pending requests, fee waivers approved and denied, and other ways FOIA requests are handled. It would also create a system to mediate disputes between those requesting information and federal agencies through the Administrative Conference of the United States and require annual reporting for the next three years on how often industry gives information to the government voluntarily and declares it to be Critical Infrastructure Information (CII), thus immune from public disclosure. Congress has not yet voted on this legislation. (See “FOIA News: Lawmakers Respond to Increasing Government Secrecy with Amendments to Strengthen FOIA” in the Spring 2005 issue of the *Silha Bulletin*; see also “Freedom of Information Act News: Federal Lawmakers Call for Expanded Access to Court Records” in the Fall 2004 issue of the *Silha Bulletin*.)

Cornyn and Leahy held hearings on the OPEN Government Act in March 2005. Also in March they introduced the Faster FOIA Act of 2005 aimed at appointing a commission to study how to increase the government’s speed in responding to FOIA requests. This bill cleared the Senate Judiciary Committee and has been placed on the Senate’s legislative calendar.

In June 2005 another piece of legislation introduced by Cornyn and Leahy passed the Senate. The bill requires any statutory exemption to FOIA, such as the one inserted in the Defense authorization bill, to be stated explicitly within the text of the bill. The Dec. 15, 2005 *Roll Call* article noted that “[i]n the past, FOIA exemptions for federal agencies have slipped through almost without notice because of the cryptic way in which they were drafted.” As the *Bulletin* went to press, the House of Representatives had not yet taken up the bill.

—ASHLEY EWALD  
SILHA FELLOW

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Bush ordered every agency of the federal government to designate a senior officer at the Assistant Secretary or equivalent level to serve as the Chief FOIA Officer of that agency.

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# FOIA Updates

## *ACLU v. Department of Defense*

“Plaintiffs assert that they seek release of the Darby photographs to inform and educate the public, and to spark debate about the causes and forces that led to the breakdown of command discipline at Abu Ghraib prison, and possibly, by extension, to other prisons in Iraq, Afghanistan, Guantanamo, and perhaps elsewhere. These are the very purposes that FOIA is intended to advance.”

– Judge Alvin K. Hellerstein

On Sept. 29, 2005 federal district Judge Alvin K. Hellerstein ordered the release of 74 photographs and three videos which showed abuse of prisoners in Abu Ghraib prison in Iraq. The American Civil Liberties Union (ACLU) had asked for videotapes, photographs and other records of abuse, among other items, from the Department of Defense (DOD) through a Freedom of Information Act (FOIA) request. The DOD refused, citing a number of exemptions to FOIA, and the ACLU took the case to court. Fourteen news organizations joined the ACLU in an *amicus curiae* brief. The full 50-page opinion can be found in *ACLU v. DOD*, 389 F. Supp. 2d 459 (S.D.N.Y. 2005).

The photographs and videos were taken by Spc. Joseph M. Darby, an Army policeman who turned over the images to authorities in 2004. The ACLU sought all 87 photographs and four videos that the government deemed responsive to their request, but after reviewing them *in camera*, Judge Hellerstein decided that 13 photos and one video could not be redacted sufficiently to ensure the privacy of the prisoners depicted.

The DOD had set out 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 cited exemption 7(C), which protects records compiled for law enforcement purposes that “could reasonably be expected to constitute an unwarranted invasion of personal privacy.”

The DOD contended that releasing the photographs would conflict with U.S. treaty obligations under the Geneva Convention which provide that a detaining power must protect a prisoner of war “particularly against acts of violence or intimidation and against insults and public curiosity.” The government argued that release of the photographs could cause the subjects to “suffer humiliation and indignity against which the Geneva Conventions were intended to protect.”

Judge Hellerstein rejected those arguments, saying appropriate redactions could protect individuals’ privacy and that the public’s interest in the items outweighed any remaining privacy concerns.

“Plaintiffs assert that they seek release of the Darby photographs to inform and educate the public, and to spark debate about the causes and forces

that led to the breakdown of command discipline at Abu Ghraib prison, and possibly, by extension, to other prisons in Iraq, Afghanistan, Guantanamo, and perhaps elsewhere,” Hellerstein wrote. “These are the very purposes that FOIA is intended to advance.”

In late July 2005, more than two months after the motions were initially argued, the government added a supplemental argument claiming FOIA exemption 7(F) also applied. That exemption covers information from disclosure that “could reasonably be expected to endanger the life or physical safety of any individual.”

The DOD provided statements from Gen. Richard B. Myers, chairman of the Joint Chiefs of Staff, and other senior officials, who said publication of the images could provoke acts of terrorism against American soldiers.

At the August 30, 2005 hearing on the subject, Hellerstein asked, “How can I ignore the expert opinion of General Myers concerned with the safety of his troops?” He resolved that question in his opinion, writing, “With great respect to the concerns expressed by General Myers, my task is not to defer to our worst fears, but to interpret and apply the law, in this case, the Freedom of Information Act, which advances values important to our society, transparency and accountability in government.”

Earlier in his opinion, Hellerstein wrote, “Our nation does not surrender to blackmail, and fear of blackmail is not a legally sufficient argument to prevent us from performing a statutory command. Indeed, the freedoms that we champion are as important to our success in Iraq and Afghanistan as the guns and missiles with which our troops are armed.”

He conceded that “[t]here is a risk that the enemy will seize upon the publicity of the photographs and seek to use such publicity as a pretext for enlistments and violent acts.” But he added, “[T]he education and debate that such publicity will foster will strengthen our purpose and, by enabling such deficiencies as may be perceived to be debated and corrected, show our strength as a vibrant and functioning democracy to be emulated.”

The judge stayed his order for 20 days to allow for appeals of his decision. The DOD filed an appeal, but at the time the *Bulletin* went to press, no further court action had been taken, and the photographs and videos had not yet been released.

– ASHLEY EWALD  
SILHA FELLOW



# Copyright News

## File Sharing Sites Lose Legal Battles at Home and Abroad

The peer-to-peer file sharing site Grokster shut down in November 2005 after reaching a \$50 million settlement with MGM Studios, its adversary in the August 2005 Supreme Court case, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* 125 S.Ct. 2764 (2005) (See “Supreme Court Rules in *Grokster*,” in the Summer 2005 issue of the *Silha Bulletin*). The shutdown and settlement marked the first, and most likely the final, action taken by the defendant since the court decision was handed down. The court ruled that Grokster and another peer-to-peer file sharing site, StreamCast, could be liable for copyright infringement by their users. Crucial to the case was the admission by the defendants that they were aware that their software was being used to infringe on copyright. The Grokster shutdown comes on the heels of several other gains by the entertainment industry in the ongoing battle against online media piracy.

On Sept. 5, 2005, another file sharing site, Kazaa, lost a similar battle in Australia when Universal Music Australia sued its parent company, Sharman Industries. However, in *Universal Music Australia Pty Ltd and Others v. Sharman License Holdings Ltd and Others* 220 A.L.R 1 (2005), the court went a step further, ruling that the defendant was directly liable for its users’ copyright infringement.

The ruling, authored by federal Judge Murray Wilcox in Sydney, ended an eighteen-month legal battle between Sharman Networks and Australian music companies including EMI, Sony BMG, Universal Music, Festival Mushroom and Warner Music. Nine other defendants faced suit along with Sharman Networks, including Brilliant Digital Entertainment and Altnet.

The plaintiffs could seek millions or even billions of dollars in damages against the defendants, who have already paid approximately \$30 million US in legal fees. Charges brought against Sharman and Altnet CTOs, however, were dismissed by Wilcox, and the music industry plaintiffs are being required to pay their legal fees.

Wilcox ruled that six of the ten defendants in the case had violated copyright law in Australia. Altnet was found to be in violation as well, despite the fact that the company’s product uses Kazaa software to distribute legal copies of digital files over peer-to-peer networks. Wilcox ordered Sharman Networks to modify the Kazaa software to filter out copyrighted files within two months. He expressed a desire that the defendants have a chance to modify their networks in a way that would protect copyright but would do so “without unnecessarily intruding on others’ freedom of speech and communication.” Accordingly, Wilcox ordered Kazaa to use “non-optional keyword filter technology that excludes from the . . . search results all works identified (by titles, composers, performers or otherwise) in such lists of their copyrighted works as may be provided, and periodically updated, by any of the applicants.” In addition, Wilcox required Altnet’s TopSearch tool to limit its results to licensed works to prevent any accidental access to unlicensed ones by users of the service.

Wilcox wrote that “Especially to a young audience, the ‘Join the Revolution’ website material would have conveyed the idea that it was ‘cool’ to defy the record companies and their stuffy reliance on their copyrights.” He also stated that the defendants “have authorised the Kazaa users’ infringements of copyright,” and pointed out that, although some of the files shared over the Kazaa network were legal, the vast majority of the traffic consisted of illegal sound file exchanges, and that the defendants were aware of this.

Wilcox also held that the defendants had failed to utilize available technology that would have reduced illegal file sharing, because that it was not in their financial interest to do so. Kazaa’s website does not specifically instruct users on how to share copyrighted music, as did Grokster, and contains warnings to users and an agreement not to violate copyrights. However, Wilcox stated that these measures and factors were inadequate and “substantially ineffective.”

Kazaa’s popularity began to grow as the groundbreaking original peer-to-peer trading software offered by Napster came under fire by the recording industry and shut down (See *A&M Records v. Napster*, 239 F.3d 1004 (9th Cir. 2001)). Kazaa was started in the Netherlands in 2001, and picked up much of the traffic Napster lost when it was shut down in July of that year. When Kazaa was threatened with legal action in 2002, it shut down, and Sharman Networks, a private company in Australia, purchased and revived it. The site will continue to operate outside Australia and will continue to offer licensed works, but as a result of this ruling its traffic will likely be reduced. Additionally, the financial blows to Sharman Industries as a result of the ruling are substantial.

The entertainment industry giants working against online music piracy face a difficult challenge. Peer to peer software and the web sites that provide it constantly proliferate. In the wake of the Kazaa decision in Australia, several articles pointed out that the site’s popularity was already declining. By the time of the decision, two other sites, BitTorrent and eDonkey, had already surpassed Kazaa in popularity and widespread use. Countless files will be traded on these sites before they can be brought to court. The Kazaa decision will be enforceable only in Australia, and although it is unlikely to set legal precedent internationally, it could influence courts in other countries. Even as the music industry has successfully toppled Napster and Grokster, the music copyright suits of this century amount to a game of hide and seek. The demand for free music, along with the proliferation of devices such as the ipod, designed to store and use digital music, is steadily increasing. Each time one peer-to-peer site folds, others invariably rise to the demand.

In a targeted effort to attack online music sharing at its source, record companies and organizations such as the Recording Industry Association of America

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the report emphasized that it examined “selected consultant contracts and programming grants, as well as executive recruitment actions over the last 34 months,” and stressed that “. . . our observations should not be generalized to the wide ranging activities conducted by CPB . . .”

Despite those qualifications, the report has been treated by many in the media as a serious blow to both Tomlinson and to CPB, which was established in 1967 to protect public broadcasting from governmental influence. The report was released with accompanying responses by Tomlinson and the CPB board. Tomlinson’s response stated, “I am disappointed, but not surprised, by the Inspector General’s report. It was apparent early on that [Konz] would opt for politics over good judgment. . . . Any suggestion by Mr. Konz that I violated my fiduciary duties, the Director’s Code of Ethics or relevant statutory provisions is malicious and irresponsible.” Tomlinson added, “My lawful and sincere objective from the outset in my role at CPB was to help bring balance and objectivity in public broadcasting. . . . Public broadcasting should not be the domain of any particular ideology or party.” Tomlinson concluded, “Unfortunately, the Inspector General’s pre-conceived and unjustified findings will only help to maintain the status quo and other reformers will be discouraged from seeking change. Regrettably, as a result, balance and objectivity will not come soon to elements of public broadcasting.”

Critics of Tomlinson responded differently. Representative David Obey (D-Wis.), one of several Democrats who had requested Konz’s investigation, told the Associated Press, “The report shows that Mr. Tomlinson was willing to ride roughshod over the law to impose his political mind-set on PBS programming.” Senator Byron L. Dorgan, (D-N.D.), who was also involved in requesting the investigation, told *The Washington Post*, “There is no doubt in my mind that Mr. Tomlinson’s legacy at CPB is a negative one and that he has done far more harm to the CPB than good.”

Other commentators have noted that the composition of the remaining CPB board does not bode change. Paul Farhi of *The Washington Post* wrote that even with Tomlinson’s resignation, the CPB board “remains firmly controlled by conservatives.” The two top posts on the CPB board are held by conservatives: Tomlinson’s successor as chairman, Cheryl F. Halpern, is a well-known contributor to Republican political candidates, and the board’s vice chairman, Gay Hart Gaines, was a founder and former chairman of GOPAC, a GOP fundraising group. Furthermore, Halpern, who was appointed by President Bush to the Board in 2003, has known and worked with Tomlinson for over a decade, and is “a close ally” of the former chairman, *The Post* reported.

The CPB board responded to the report on November 15, announcing that it would be making internal changes in response to the concerns raised in Konz’s report. Such changes were described as “. . . meaningful reforms designed to strengthen and enhance governance, accountability, and transparency in the operations of the CPB.” The board announced the creation of a “corporate governance committee” and an “executive compensation committee,” saying “These two committees will be responsible for improving checks and balances within the Corporation; defining the respective roles of the board and senior management; achieving greater transparency to the public; and adopting policies for the hiring and compensation of senior executives, including policies designed to maintain CPB’s tradition of nonpartisanship.” The statement specified that Frank Cruz, the longest-serving board member at CPB, will chair the corporate governance committee. The CPB board’s statement is available online at <http://www.cpb.org/pressroom/release.php?prn=507>.

According to *The New York Times*, Konz said that no sanctions or further action will be taken against Tomlinson because of the report. In fact, *The Washington Post* noted that Tomlinson’s resignation from the board is really more symbolic than practical, because his term would have expired on Jan. 31, 2006, although he could have remained on the board through the end of 2006 had President Bush failed to appoint a replacement. Tomlinson still holds his position as head of the Broadcasting Board of Governors (BBG), the federal agency that oversees the government’s non-military international broadcasting services. According to a Nov. 16, 2005 article in *The New York Times*, the inspector general of the State Department is investigating claims that Tomlinson has misused federal money and used “phantom or unqualified employees” while at the Broadcasting Board. The same article noted a recent letter by Senator Christopher J. Dodd, (D-Conn.), asking President Bush to consider asking Tomlinson to step down from his post until the investigation is complete. As the *Bulletin* went to press, Tomlinson was still chairman of the BBG. More information about the BBG is available online at <http://www.bbq.gov>.

– PENELOPE SHEETS  
SILHA RESEARCH ASSISTANT

# Copyright News

## Creation of Digital Libraries Raises Copyright Issues

Digital libraries promoted by Google, Microsoft, Yahoo and others both gained prominence, and faced criticism, in 2005. The idea of a digital library containing scanned books available via the Internet was first widely promoted by Google after it began discussions with publishers in October 2004. By December of that year, it had launched the Google Print Library Project, pledging to scan the portions or entire collections of its partners, the Harvard, Stanford, University of Michigan, Oxford University, and New York Public Libraries. Scanned books could then be searched for specific portions of text in much the way that Internet users search the Internet using Google's search engine.

Scanning began around that same time, but was temporarily halted between August and November 2005 after some authors and publishers began objecting to the program. Google insists that its Google Print project complies with United States and general copyright law. Books in the public domain (generally texts published before 1923 which no longer fall under copyright protection) are fully accessible online. Items not in the public domain display only a few sentences showing the term or phrase the user searched. Google then provides links to libraries and dealers that have the book available to borrow or purchase.

The company provides an opt-out clause for authors and publishers to ensure that their books are not scanned. However, some copyright holders claim Google has it backwards. A Sept. 26, 2005, *Christian Science Monitor* article by Daniel B. Wood quoted author Lisa Grant as saying, "Copyright law says they have to get my permission, not that I have to go out of my way to opt out."

In September, the Author's Guild and three individual writers brought suit in New York federal court against Google and its Google Print project in *Authors Guild v. Google Inc.*, No. 05 CV 8136 (S.D.N.Y. 2005). In October, the Association of American Publishers followed suit, literally, bringing a separate action in New York federal district court against the Internet giant in *McGraw-Hill et al. v. Google Inc.*, No. 05 CV 8881 (S.D.N.Y. 2005).

The complaint brought by the Authors Guild alleges that "Google knew or should have known that the Copyright Act, 17 U.S.C. §101 *et seq.* required it to obtain authorization from the holders of the copyrights in these literary works before creating and reproducing digital copies of the Works for its own commercial use and for the use of others. Despite this knowledge, Google has unlawfully reproduced the Works and . . . intends to derive revenue from this program by attracting more viewers and advertisers to its site." The Guild seeks damages and a permanent injunction to prevent Google from continuing its current practice.

Google posted a response on its corporate blog on Sept. 20, 2005, defending Google Print. Susan Wojcicki, Vice President, Product Management for

the company wrote, "We regret that this group chose to sue us over a program that will make millions of books more discoverable to the world – especially since any copyright holder can exclude their books from the program. What's more, many of Google Print's chief beneficiaries will be authors whose backlist, out of print and lightly marketed new titles will be suggested to countless readers who wouldn't have found them otherwise." She compared Google Print to "an electronic card catalog" and concluded by writing that "[t]his ability to introduce millions of users to millions of titles can only expand the market for authors' books, which is precisely what copyright law is intended to foster." The statement is available online at <http://googleblog.blogspot.com/2005/09/google-print-and-authors-guild.html>.

Stanford professor of law and copyright expert Lawrence Lessig agrees. Writing on his blog Sept. 22, 2005, he stated that "Google's use is fair use." He analogized the situation to that of property law in the twentieth century.

"Property law since time immemorial had held that your land reached from the ground to the heavens," Lessig explained. "Then airplanes were invented – a technology oblivious to this ancient law. A couple of farmers sued to enforce their ancient rights – insisting airplanes can't fly over land without their permission. And thus the Supreme Court had to decide whether this ancient law – much older than the law of copyright – should prevail over this new technology."

"The Supreme Court's answer was perfectly clear: Absolutely not. 'Common sense revolts at the idea,' Justice Douglas wrote."

The University of Michigan, which has offered its entire library collection to the Google Print project, expressed its support in September 2005. Associate Provost and Interim Librarian James Hilton said, "We continue to be enthusiastic about our partnership with Google, and we are confident that this project complies with copyright law. The overarching purpose of copyright law is to promote progress in society. In doing so, it is always a balancing act between the limited rights of the author and the rights of the public."

Hilton noted that the project will not provide the full text of any copyrighted documents but instead would point potential readers to libraries and bookstores where the works can be found.

In its effort to keep pace with Google and avoid copyright problems, Microsoft announced in early November that it had made an agreement with the British Library to scan 100,000 books. Part of the funding for that effort will come from the Open Content Alliance, a non-profit organization which also boasts the membership of Yahoo Inc. and several universities and other organizations. Members agree to digitize books only after asking for publishers' permission.

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Books in the public domain are fully accessible online. Items not in the public domain display only a few sentences showing the term or phrase the user searched. Google then provides links to libraries and dealers that have the book available to borrow or purchase.

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Google, continued on page 23

**Kazaa/Grokster**, continued from page 17

(RIAA) have pursued some lawsuits against individuals. Kazaa was involved in one such suit in 2003, which was denied review by the Supreme Court in 2004 (see “U. S. Supreme Court Declines to Hear Three Speech-Related Cases” in the Fall 2004 issue of the *Silha Bulletin*). In *Recording Industry Association of America, Inc. v. Verizon Internet Services, Inc.* 351 F.3d 1229 (D.C. Cir. 2003), cert. denied, 125 S. Ct. 347 (2004) the RIAA unsuccessfully sued Verizon Internet Services in an attempt to obtain information about a Verizon subscriber who allegedly had used Kazaa to download hundreds of music files. The RIAA argued that the 1998 Digital Millennium Copyright Act should allow the RIAA such information from Verizon, while Verizon replied that the DMCA provision the RIAA referred to did not cover alleged copyright-infringing material if it resided on an individual’s personal computer. Verizon prevailed.

Despite this precedent, successful suits against individuals for illegal online music sharing have become much more prevalent in recent years. With substantial money and legal resources, record companies and other copyright holders may succeed at generating enough fear of personal liability among consumers to deter online file sharing. However, given the sheer volume of activity, this is unlikely as well. How the battle against online copyright infringement will be waged, and won, remains to be seen.

—SARA CANNON  
SILHA CENTER STAFF

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## Internet Updates

### Yahoo Launches Blog To Cover Conflicts Worldwide

Yahoo, the global Internet force, has made another step into journalism with the launching of “Kevin Sites in the Hot Zone,” a Web site that began in September 2005 with the self-proclaimed goal of covering every armed conflict in the world within a year. Solo journalist Kevin Sites has been traveling the world ever since and has already reported from six countries as of press time. The site is available online at <http://hotzone.yahoo.com>.

Sites has been reporting through the Internet site with audio and video clips as well as blog, document, and photo postings. He previously worked for CNN, NBC, ABC, among others, and also hosted his own blog, [www.kevinsites.com](http://www.kevinsites.com), prior to the launch of “In the Hot Zone.” He received international coverage when he filmed an apparently unarmed Iraqi man being killed by an American soldier in a mosque in Falluja.

This may be Yahoo’s most controversial attempt so far to feature original content. According to an Oct. 5, 2005, *Online Journalism Review* article by Mark Glaser, past examples have included Yahoo FinanceVision, a site that included original video shows before broadband Internet connections became widely available, original sports reporting during the summer 2004 Olympics and its own Suze Orman finance column.

Yahoo News has compiled and posted news stories and content from other sources, including the Associated Press and Reuters for several years. But by producing its own content, Yahoo may be competing against the same organizations with which it partners. Scott Moore, the vice president of content operations at Yahoo, brushed aside such concerns in an interview with Glaser. “We have I think 70 different news publishers who have relationships with us,” Moore told Glaser. “I don’t think any of them will be threatened by this. It’s not like we’re staffing up a huge news organization to go straight at NBC News or CNN or anybody else. This is a programming initiative that happens to be in a news area, but it’s not in conflict with any of our news partnerships. In fact, this might be an opportunity to work with those news partners when something happens, we can make [Sites] available to go on the air for them.”

Glaser reported on Oct. 6, 2005, that Charlie Tillinghast, president of [msnbc.com](http://msnbc.com) told him, “I think that news sites that have distribution deals with Yahoo are in a pact with the devil . . . Yahoo depends on their news partners to attract users today, but they won’t necessarily need them in the future. When that day comes, Yahoo’s partners will be marginalized as news sites.”

In an opinion piece first published Oct. 9, 2005, in the *Los Angeles Times*, Xeni Jardin wrote that Stuart Hughes, a BBC news producer who is himself a warblogger, said, “It seems like the journalistic equivalent of a Simpson and Bruckheimer high-concept movie – all concept and very little content,” Hughes said. “I’ve lost too many friends in war zones – and come too close myself – to have any time for this ‘stamp-collecting’ approach to conflict.”

For its part, “Kevin Sites in the Hot Zone” professes to follow the Society of Professional Journalists’ ethics code, including “to seek and report the truth, to minimize harm, to act independently, and to be accountable.” To that list, the Web site adds pledges to “transparency,” “vulnerability,” “empathy” and “solutions.”

Commenting on the additional criteria, Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota, said that although interesting, they raise the possibility that Sites may have difficulty maintaining his detachment in reporting on what he observes. “Eye-witness accounts from those who are experiencing conflicts first-hand can be compelling. But as embedded reporters covering military operations have learned, they may not necessarily be able to maintain the kind of objectivity that readers usually expect, or to be as rigorous in providing corroborative details from other sources,” Kirtley said. She added, “It may even lead to a kind of Stockholm Syndrome, where the reporter comes to identify so closely with the people he is covering that he loses his ability to maintain any semblance of objectivity.”

Others are concerned about Yahoo’s intentions. In his October opinion piece, Jardin wrote, “Yahoo’s latest experiment reveals that it considers war news just another form of entertainment. This from an online giant that has already shown it is cavalier about press freedom and a friend of oppression.”

Jardin was referring to the jailing of Chinese reporter Shi Tao, who had sent an e-mail through an anonymous Yahoo e-mail account to a colleague in New York asking that a story about his editor be publicized. Yahoo handed over Tao’s name when the Chinese government requested the identity of the user. (See “Endangered Journalists: Yahoo Assists China in Arresting Journalist” on page 23 of this issue of the *Silha Bulletin*.)

—ASHLEY EWALD  
SILHA FELLOW

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“Kevin Sites in the Hot Zone,” is a Web site that began with the self-proclaimed goal of covering every armed conflict in the world within a year.

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2005 Silha Lecture Features First Amendment Attorney Floyd Abrams

Journalists have promised confidentiality to sources since before the American Revolution, Floyd Abrams told the audience at the 20<sup>th</sup> Annual Silha Lecture on Oct. 24, 2005. Today, the controversial question is whether these promises are protected by the First Amendment.

Abrams, a partner in the New York law firm of Cahill Gordon & Reindel, is also the William J. Brennan Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism. He was co-counsel to *The New York Times* in the landmark "Pentagon Papers" case (*New York Times v. U.S.*, 403 U.S. 713 (1971)), and represented *Times* reporter Judith Miller, who spent 85 days in jail in 2005 to protect her confidential source in the Valerie Plame CIA leak investigation. (See "Reporters Privilege News: Judith Miller Resigns from *The New York Times*" on page 7 of this 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*.)

Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law at the University of Minnesota, described Abrams as "one of the most respected First Amendment lawyers in the United States. His vast experience as a litigator, starting with the "Pentagon Papers" case, has encompassed virtually every major media law case that has been heard by the U.S. Supreme Court. Floyd Abrams is a legend among the media bar, and the journalists that those lawyers defend." Abrams' lecture, entitled "Confidential Sources: Protection or Prohibition?" was delivered to an audience of more than 300 students, faculty, and community members in the Cowles Auditorium at the University of Minnesota's Hubert H. Humphrey Center.

According to Abrams, "It goes way back in our history that journalists should have the belief, and act on the belief, that they could promise confidentiality to sources and that they should not reveal those sources." Specifically, Abrams cited John Peter Zenger, a publisher who faced charges of seditious libel in 1734. Zenger was asked to identify his sources for the anonymous articles he published, but he refused to do so. He was jailed for eight months, but eventually acquitted.

To explain the legal history of reporter's privilege, Abrams cited *Branzburg v. Hayes*, 408 U.S. 665 (1972), the only Supreme Court case to consider the question of whether journalists have a constitutional right to protect their sources when they have witnessed criminal activity and are subpoenaed to appear before

a grand jury. Although a plurality of the Court denied such a privilege, dissenting opinions, coupled with Justice Lewis Powell's enigmatic concurrence, have been interpreted by some lawyers as recognizing a qualified constitutional privilege in other situations. More recently, however, lower courts have rejected this interpretation. (See "*Branzburg v. Hayes* Still Casts Uncertainty on Journalists' First Amendment Rights" in the Summer 2004 issue of the *Silha Bulletin*.)

Abrams described his own experiences defending reporters, including Judith Miller, and how those reflect on the larger debate about reporter's privilege. First, it is important not to allow decisions about reporter's privilege to be "clouded" by political considerations, Abrams argued, suggesting that criticism of Miller's reporting should be distinguished from her efforts to protect her confidential source. Second, reporter's privilege must also be unaffected by the nature of the information leaked, Abrams argued. Although the leak of a whistle-blower may seem more "worthy" of protection than a leak like that in the Plame investigation, a journalist does not know what kind of leak it will be (or whether it will even be a "leak" at all) when he or she promises confidentiality to a source. Therefore the amount of protection the source receives should not hinge on the nature of his or her information. Abrams said, "The whole purpose of this protection is to encourage people to talk to journalists so that journalists can report to the public. If we have to wait until a judge decides later on if a leak is a "good leak" or a "bad leak," the public won't know whether they can talk to journalists because journalists won't know what kind of promise they can make."

Although Miller did not prevail in the courts, Abrams asserted that her refusal to compromise her sources has helped the future of reporter's privilege in two ways. First, Abrams argued that Miller's willingness to go to jail to protect a principle should help efforts to enact a federal reporter's shield law. (See "Shield Law Update" on page 8 in this issue of the *Silha Bulletin*; see also "Reporters Privilege News: Federal Shield Law Debated in Hearings Before Senate Judiciary Committee" in the Summer 2005 issue of the *Silha Bulletin*.) Second, Abrams believes the public will now be more inclined to speak to journalists, confident that reporters are prepared to face prison rather than break a promise to a source. In sum, although the law on reporter's privilege is still uncertain, Abrams told the audience that he was optimistic.

The annual Silha Lecture is sponsored by the Silha Center for the Study of Media Ethics and Law, and is designed to stimulate research and debate on topics related to the convergence of ethical and legal principles, media accountability, the First Amendment and freedom of information. The Silha Center was established in 1984 with a generous endowment from Otto and Helen Silha.

-PENELOPE SHEETS  
SILHA RESEARCH ASSISTANT

"The whole purpose of reporters privilege protection is to encourage people to talk to journalists so that journalists can report to the public. If we have to wait until a judge decides later on if a leak is a 'good leak' or a 'bad leak,' the public won't know whether they can talk to journalists because journalists won't know what kind of promise they can make."

- Floyd Abrams

# Endangered Journalists

## Yahoo Assists China in Arresting Journalist

Yahoo admitted in September 2005 that it assisted the Chinese police in identifying a journalist who set up and used an anonymous Yahoo e-mail account to send information that the Chinese government had prohibited to colleagues in New York. The admission came after the verdict in the case was published and showed that the prosecution relied on Yahoo's assistance.

The journalist, Shi Tao, subsequently was convicted of divulging state secrets abroad and is serving a 10-year jail sentence. Tao's editor had read the staff a Communist Party warning that dissidents could use the Internet to spread "damaging information" about the Tiananmen Square anniversary that was then approaching. Tao relayed this information to journalists at an online news service based in New York via the Yahoo e-mail account. The Chinese government then asked Yahoo to identify the e-mail user, and it complied.

Yahoo co-founder Jerry Yang, speaking at an Internet conference in September 2005, responded to a question about the Shi case, saying "I don't like the outcome of what happened with this thing. We get a lot of these orders, but we have to comply with the law and that's what we need to do."

But Tao's attorney, Guo Guoting, was quoted in an opinion piece first published Oct. 9, 2005, in the *Los Angeles Times* by Xenia Jardin as saying, "Shi Tao . . . was legitimately practicing his profession, not committing a crime. The legal entity of Yahoo Holdings [located in Hong Kong] is not in China, so it is not obligated to operate within the laws of China or to cooperate with Chinese police." Jardin also noted that Guoting himself "was detained, placed under house arrest and shut out of his office before his client's trial."

On Sept. 16, 2005, *The New York Sun* reported that Simon Davies, the director of the nonprofit Privacy International, called for a boycott of Yahoo following the news it assisted in Tao's arrest. "The idea 'we're just following orders' is about as ethically corrupt as an organization can be," Davies said. "The argument advanced is essentially the Nuremberg defense. That was ethically discredited decades ago," he said.

In a Sept. 6, 2005 press release, Reporters Without Borders noted that "[f]or years Yahoo has allowed the Chinese version of its search engine to be censored. In 2002, Yahoo voluntarily signed the 'Public Pledge on Self-Discipline for the China Internet Industry,' agreeing to abide by PRC censorship regulations."

*The New York Times* editorialized on September 18 that other American companies, including Microsoft and Cisco, have sold China security tools and firewalls that the country has used to censor and control the Internet there. The editorial criticized the companies' arguments that they are not responsible for how China uses their software and also condemned Yahoo's actions.

"It was the force of capitalist profits, not Communist law, that compelled Yahoo to hand over Shi Tao and its unapologetic response seems to ingratiate Yahoo further with Beijing," *The Times* editorial stated. The editorial further noted that Yahoo spent a billion dollars in August 2005 to purchase a 40 percent share of Alibaba.com, China's largest e-commerce company. "It was the single largest foreign investment in China's Internet sector, and like everything else in China, it would not have happened without the good will of the party," the editorial noted.

An Oct. 9, 2005, *Ventura County Star* opinion piece observed that not all American companies have agreed to China's censorship demands. "Time Warner Inc., for example, turned down a potentially lucrative Internet partnership last year because it would have required the Chinese government to monitor Internet traffic and to block certain words like 'democracy.'"

— ASHLEY EWALD  
SILHA FELLOW

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Google, continued from page 19

Critics of that approach point out that in many cases, publishers and rightsholders of out-of-print books are unknown. Reporting in a Nov. 9, 2005 article in the online magazine *Salon*, Farhad Manjoo wrote, "Not long ago, the Online Computer Library Center, a nonprofit library research group, set out to count and catalog the books Google would capture in its project. The OCLC determined that at the five research libraries with which Google had formed deals, about 80 percent of the books in the stacks were published after 1923 and still under copyright. But only a small number of these books are currently in print." Manjoo's article is available at [http://www.salon.com/tech/feature/2005/11/09/google/index\\_np.html](http://www.salon.com/tech/feature/2005/11/09/google/index_np.html).

Meanwhile Amazon, which already allows its Internet visitors to view a certain number of pages of some of its books for free, has announced a plan to permit people purchase specific pages of books. Profits are divided among the publishers of the books, the books' authors, and Amazon.com.

— ASHLEY EWALD  
SILHA FELLOW

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"I don't like the outcome of what happened with this thing. We get a lot of these orders, but we have to comply with the law and that's what we need to do."

— Yahoo Co-Founder  
Jerry Yang

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# Endangered Journalists

## Ukrainian Journalist Murdered

Gongadze's high-profile career and death sparked a political scandal in the Ukraine, leading the country's current president, Viktor Yushchenko, to issue a campaign promise to solve the case and bring Gongadze's killers to justice.

In a chain of events that could rival the complex intrigue of a John Le Carré novel, the Ukrainian government's 5-year investigation into the 2000 kidnapping and murder of prominent journalist Georgiy Gongadze has reached a milestone. On Dec. 19, 2005, the Kiev Court of Appeal announced that the trial of three policemen accused of killing Gongadze would begin on January 9, 2006. Though this marks a significant breakthrough in the long investigation, Agence France Presse (AFP) reported that the investigation into who actually ordered Gongadze's murder continues. Accounts in international papers not only implicate former Ukrainian president Leonid Kuchma, but also several of his top officials.

Gongadze disappeared in September 2000. Known for investigating high-level government corruption, Gongadze had been openly critical of Kuchma in Gongadze's Internet newspaper, *Ukrainska Pravda*, according to AFP. In a July 2005 article, *The (London) Independent* even characterized Gongadze as "a symbol of opposition against Mr. Kuchma's authoritarian 10-year rule." Two months after his disappearance, Gongadze's decapitated body was found near Kiev. His high-profile career and death sparked a political scandal in the Ukraine, leading the country's current president, Viktor Yushchenko, to issue a campaign promise to solve the case and bring Gongadze's killers to justice, according to *The Independent*.

Shortly after Yushchenko's inauguration, three former police officers were arrested on suspicion of involvement in the murder in March 2005, according to *The Independent*. These are the same three individuals who are currently on trial in Kiev, according to AFP, and were identified by ITAR-TASS as Valery Kostenko, Nikolai Protasov and Alexander Popovich.

The continuing investigation into who ordered Gongadze's death is complicated and politically volatile. Shortly after Gongadze's death, secret tapes were released by Kuchma's former bodyguard, Mykola Melnichenko, allegedly containing Kuchma's voice and linking him to Gongadze's disappearance, according to BBC Monitoring. The Associated Press reported that on the tapes Kuchma can be heard complaining about Gongadze and asking his interior minister, General Yuri Kravchenko, to "drive [Gongadze] out."

Kuchma has repeatedly denied the accusations of involvement since the 2000 release of the tapes. But evidence that the investigation was being suppressed under Kuchma appeared in the summer of 2004, when *The Independent* published leaked documents that pointed to obstruction of the investigation at the highest levels of government. First, a top police official who, according to the documents, had destroyed important papers in the case and was also possibly involved in Gongadze's killing, was released from custody. Second, the leaked documents included the autopsy of Ihor Honcharov, a witness in the investigation who had died in police custody. Honcharov had been slated to be a witness against Kravchenko, who, as interior minister, oversaw the police under Kuchma, and had claimed that Kravchenko ordered Gongadze's murder, according to *The Independent*. Honcharov's autopsy revealed evidence that he had been beaten as well as injected with a drug.

The investigation was further complicated by a dramatic turn of events in March 2005, the same week of the arrests, when Kravchenko was found dead in his home on the morning he was scheduled to be interviewed by the prosecutor-general about Gongadze's murder. Kravchenko, who was not only implicated by Honcharov but also was mentioned on the tapes that implicate Kuchma, is thought to have committed suicide.

Kravchenko was also accused of involvement by a Ukrainian parliamentary commission in September 2005, which was conducting its own investigation into Gongadze's death. The commission claimed that Kravchenko ordered the three policemen now facing trial to commit the murder of Gongadze, ITAR-TASS reported. Of more political significance is the commission's explicit charge that Kravchenko was acting on Kuchma's orders. The commission also implicated Kuchma's former chief of staff and current speaker of parliament, Volodymyr Lytvyn, in the kidnapping, according to *Russian Press Digest*. Lytvyn, like Kuchma, has consistently denied the allegations. AFP reported that after the announcement, the commission voted to pass on its findings to the prosecutor general, though it is not clear what the prosecutor general's office will do next with those findings.

Melnichenko returned to Kiev in early December 2005, having fled to the United States after releasing the tapes that allegedly implicate Kuchma, AFP reported. AFP also reported that Melnichenko testified on Dec. 6, 2005 before the prosecutor general, but later claimed in a news conference that the tapes do not contain a direct order by Kuchma to kill Gongadze, ITAR-TASS reported. The nature of the tapes has consistently been disputed, and is again being discussed now that Melnichenko has returned. It is not clear yet just how the tapes will be treated in the investigation into Kuchma and Lytvyn's alleged involvement, nor whether the tapes will play any role in the trial of the policemen that began this month.

Though Gongadze's death was particularly high-profile, Reporters Without Borders (Reporters Sans Frontières – RSF) detailed the many on-going dangers Ukrainian journalists faced under Kuchma's leadership. According to its 2004 Annual report on Ukraine, RSF reported that "Physical attacks against investigative journalists increased alarmingly throughout the country. At least 11 journalists were assaulted in 2003 while investigating corruption implicating regional authorities or challenging local officials." In its 2005 report, RSF wrote that "Physical attacks, censorship, pressure, unfair dismissals, disrupting distribution of news and blocking access to it were all used to prevent balanced coverage of the presidential election in late 2004." However, the International Press Institute (IPI) offered an optimistic outlook for the media since Yushchenko's inauguration: ". . . the change in leadership in Ukraine brought hope that the media environment will become friendlier for journalists, and they will not have to fear harassment from the authorities." Whether those hopes will be confirmed remains to be seen, but the trial of the alleged killers of Gongadze appears to be one positive step.

— PENELOPE SHEETS  
SILHA RESEARCH ASSISTANT



# Student Press News

## Ball State Students Win Victory for Public Access

Students working for the Ball State University newspaper, the *Ball State Daily News*, won a victory in November 2005, when an Indiana state official, known as the Public Access Counselor, declared that they had a right to publish evaluations of final candidates for the University's Provost and Vice President for Academic Affairs.

The University had attempted to restrict access to the evaluations by requiring all those who reviewed them to sign an agreement not to publicly release the information they contained. According to the complaint the *Daily News* students lodged with Indiana's Public Access Counselor, Karen Davis, the agreement read, "I agree to review the Provost Evaluations for my personal information only. I understand that permission from personnel completing the forms was not obtained for public distribution, and I agree not to distribute this information publicly."

According to the Student Press Law Center, when Justin Hesser, a student reporter covering the Provost search for the *Daily News* visited the President's Office to look over the evaluations, he was asked to sign the agreement. He refused, and was directed to speak with Heather Shupp, Executive Director of University Communication. According to *Daily News* editor David Studinsky, Hesser objected to the document, claiming it restricted the newspaper's legal right to the evaluation information. Hesser told the Student Press Law Center that "[Shupp] kept telling me it was an ethical thing and I said it's a legal thing." Staff from the President's office told Studinsky that they withheld the evaluations out of concern that releasing them would have a chilling effect on the statements of the evaluators. However, according to Studinsky, the forms the evaluators used gave them the option of including their signature or remaining anonymous. Any signatures that were included were later redacted from forms made available for viewing in the President's Office.

Studinsky told the *Bulletin* that Hesser returned to the paper and consulted with him and other members of the *Daily News* staff. They discussed their various options, but discarded as unethical the idea of signing the agreement and publishing the information contained in the evaluations. On Sept. 29, 2005, after consulting with the Student Press Law Center, the students submitted a formal written request for the evaluation forms to the University. The University responded the following day by denying the request, citing Indiana Code 5-14-3-4(b)(6), the "deliberative materials exemption" to the state Access to Public Records Act, which exempts from disclosure "intra-agency and advisory or deliberative material that are expressions of opinion or are of a speculative nature, and that are communicated for the purpose of decision-making." The *Daily News* then contacted Indiana's Office of the Public Access Counselor and filed a formal complaint. According to Studinsky, one of the later pieces of correspondence between the University and the *Daily News* actually advised them to contact the Office of the

Public Access Counselor. In an interview with Studinsky, he speculated that the University may have expected the Public Access Counselor to deny the students' request.

Indiana's Public Access Counselor is a unique office, "created in order to provide advice and assistance concerning Indiana's public access laws to members of the public and government officials and their employees." The Counselor provides informal guidance, as well as "written advisory opinions in response to formal complaints." The office's rulings do not have binding authority, and the public access counselor may not issue an advisory opinion on a matter if the lawsuit has already been filed under the Indiana Open Door Law or the Access to Public Records Act.

The students at the *Daily News* hoped an opinion from the Public Access Counselor's Office would persuade officials at Ball State to give them access to the provost evaluations as well as permission to print them without necessitating further legal action. In their complaint, staff at the *Daily News* argued that because students were involved in filling out the evaluations, and because students had the right to review them, the evaluations were not, as the University claimed, truly "intra-agency." Counselor Davis agreed. She wrote that because "the students are not part of the public agency" – in other words, that the students are not state university employees – the deliberative materials exemption does not cover the evaluations. Davis did not address the prior restraint aspect because the students did not raise it in their complaint.

Armed with Davis' opinion, staff from the *Daily News* then submitted another request for the evaluations. They included a copy of her opinion along with their request, which they submitted to the Office of University Communication. The University responded by granting the newspaper full access to the evaluations, which the *Daily News* finally released to the public without restrictions on Dec. 12, 2005.

Ironically, the search for Provost at Ball State was called off shortly thereafter when one of the three final candidates withdrew from the application process. The University is proceeding with a new search, which is being handled by a private search firm. Editors at the *Daily News* say they will continue their efforts to cover the new provost search, but expect that their access to information regarding the new search will be much more limited.

– SARA CANNON  
SILHA CENTER STAFF

– JESSICA MEYER  
SILHA RESEARCH ASSISTANT

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"Shupp kept telling me it was an ethical thing and I said it's a legal thing."

– Justin Hesser,  
Reporter,  
*Ball State Daily News*

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## Student Press News

### Florida Alligator Faces Criticism for Cartoon

The *Independent Florida Alligator*, the University of Florida-Gainesville's student newspaper, experienced a backlash across campus after publishing a cartoon criticizing remarks rapper Kanye West made during a televised fundraiser on Sept. 2, 2005 attacking President George Bush's reaction to relief efforts following Hurricane Katrina.

The cartoon, available online at <http://www.alligator.org/pt2/images/opinion/050913bcartoon.jpg>, shows West handing Secretary of State Condoleezza Rice a playing card that reads "The Race Card." Rice's response in the cartoon is "Nigga Please!"

Following the publication on September 13, the newspaper was denounced across campus. The University of Florida student government pulled its ads from the newspaper and the university president issued a response indicating his disapproval, the First Amendment Center Online reported.

Mike Gimignani, the paper's student editor, and Andy Marlette, the cartoonist, say they were told that, as white men, they should not have run the cartoon.

"I asked someone if Andy and I weren't white, and had said all the same things in the cartoon, would it have made a difference," Gimignani told the First Amendment Center Online. The article is available online at [www.firstamendmentcenter.org/news.aspx?id=15832](http://www.firstamendmentcenter.org/news.aspx?id=15832).

"He said yes, and I don't agree with that. It's not something we condone using . . . But it was useful in this context to juxtapose Condi Rice to West by putting his words in her mouth. We know he uses that word."

Jeremy Watson, the treasurer of the Black Student Union, and Betty Stewart-Dowdell, BSU advisor, wrote a letter to the editor that ran on September 14 saying such negative racial terms have no place in today's society, even if in jest.

"Though likely intended as a joke, we strongly feel that no ethnic minority, black or not, would enjoy or laugh at the public display of such negative words that have been used to slander and defame them," the letter read. "The fact that the word was even used so jokingly only highlights the ignorance that still exists in the world and the blatant lack of knowledge of other people and other cultures."

University president Bernie Machen also provided a statement to the paper criticizing its board for being racially insensitive.

"Such depictions reinforce hurtful and damaging stereotypes," Machen wrote. "They poison the ongoing struggle to overcome the racial barriers that divide our country, and give comfort to bigots who seek affirmation for their racism."

Joe Hice, associate vice president for university relations, said the administration would not pull ads from the paper, which is independently funded through advertising.

"We really disapprove of the cartoon and consider it inappropriate," Hice told the First Amendment Center Online. "We think the newspaper should offer an apology, but we still respect their right of freedom of press."

Gimignani stands behind the decision to run the cartoon and intends to retain his position as student editor.

"Unless the newspaper's independent board of directors decides that I'm not appropriate, which is possible, I am going to stay," Gimignani told the First Amendment Center Online. "Everyone is entitled to their opinion and has a right to say it."

— JESSICA MEYER  
SILHA RESEARCH ASSISTANT

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"We really disapprove of the cartoon and consider it inappropriate. We think the newspaper should offer an apology, but we still respect their right of freedom of press."

— Joe Hice,  
Associate  
Vice President for  
University of Florida-  
Gainesville Relations

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# Student Press News

## Student Newspaper Involved in Two-Year Hoax

The Southern Illinois University School of Journalism has taken no disciplinary action against students or faculty involved in a two-year hoax about a make-believe soldier and a role-playing little girl whose “daddy” was away at war.

Walter Jaehnig, director of Southern Illinois journalism school and an ethics professor, said the university was embarrassed by the episode but hoped to use it as a learning experience.

“I think my other concern here,” Jaehing told the *Chicago Tribune* in October 2005, “is that we find a way to ensure that this incident is a learning experience for our present students and that they understand the importance of fact checking and verification of everything they write.”

Jaimie Reynolds, a former Southern Illinois student from Marion, Ill., admitted she concocted a story about a little girl whose letters sent overseas to her father fascinated readers of Southern Illinois’ student newspaper, *The Daily Egyptian*. She claims the scheme was planned by Michael Brenner, a student reporter at *The Egyptian*, and that she followed through with it because he wanted to boost his career and because she was in love with him, the *Tribune* reported.

Brenner has adamantly denied the accusations.

“Obviously, she is making that up,” Brenner told the *Tribune*. “I swear I’m telling the truth. The last two years of my life, I don’t know what to believe. It’s ridiculous. I feel stabbed in the back. They had an elaborate hoax. I’m telling the truth.”

Reynolds continued to string along the student newspaper, convincing the staff that they had an exclusive contact with Kodee Kennings, an 8-year-old girl whose mother had died and whose father, Sgt. Dan Kennings, was fighting in Iraq. Reynolds

provided *The Egyptian* with letters that Kodee supposedly wrote to her father and other information about the little girl and her father.

For two years, Reynolds, who went by the name Colleen Hastings, said Kodee was her niece and had a friend pose as Sgt. Kennings when necessary, the *Tribune* reported. Reynolds told Kodee, who is actually 10-year-old Caitlin Hadley, she was acting in a documentary about a girl whose father went away to war.

The hoax came to a halt shortly after Reynolds told *The Egyptian* that Sgt. Kennings had been killed. When word of the death reached the *Tribune*, reporters there started digging for information about the death.

But nothing could be confirmed. There was no reference of Sgt. Kennings on the Department of Defense website that lists U.S. casualties. Military officials could find no one named Dan Kennings in the Army or any other branch of the military, the *Tribune* reported.

Shortly after a memorial service at American Legion hall in Orient, Ill. in Kennings’ honor, Reynolds met with a *Tribune* reporter and finally confessed to the hoax. *The Egyptian* reported that once it learned of the hoax, it issued an apology and retraced all stories, letters to the editor and columns regarding the hoax.

Reynolds will not face criminal charges for the intricate hoax, the *St. Louis Post-Dispatch* reported. Jackson County’s State Attorney Michael Wepsiec’s review focused on “whether there was any money involved” because that might have constituted criminal fraud, the *Post-Dispatch* reported.

— JESSICA MEYER  
SILHA RESEARCH ASSISTANT

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# Student Press News

## High School Paper Wins Fight to Publish Stories About Homosexual Students

Mark Goodman, executive director of the Student Law Press Center in Arlington, Va., said the controversy of publishing articles about homosexual students can cut both ways.

Students at East Bakersfield (Calif.) High School, with the help of the American Civil Liberties Union, now have the opportunity to publish articles about homosexual students in their school paper, *The Kernal*.

The school agreed to allow publication of stories about homosexual students run in November after students, their parents and editors of the student newspaper filed a complaint with the Superior Court of California in Bakersfield on May 19, 2005. The complaint is available online at [www.aclu-sc.org/News/Releases/2005/100877/](http://www.aclu-sc.org/News/Releases/2005/100877/).

According to the complaint, the students' challenge aimed at principal John L. Gibson's efforts to hinder open and honest dialog among lesbian, gay, bisexual and transgender ("LGBT") students.

The students produced a series of articles that featured gays on campus, discussed the cultural or genetic basis for homosexual tendencies, reported on the national organization Parents, Families and Friends of Lesbians and Gays (PFLAG), and more, the *Los Angeles Times* reported.

Shortly before the series was to be published, the school administrators told editors at *The Kernal* that the series could run only if the names of the gay and lesbian students were removed to protect their safety while at school. After the redacted version had been laid out, Gibson nevertheless halted its production, the *Los Angeles Times* reported.

"Defendant's censorship of LGBT-focused articles betrays misguided, outdated, and illegal assumptions regarding the incendiary nature of the mere mention of same-sex orientation," the complaint contended. "Such censorship violates the plaintiffs/petitioners' . . . rights to free expression, equal educational opportunities, and non-discrimination."

The complaint relied on several state statutes,

including California Education Code Section 48950, which states that "School districts . . . shall not make or enforce any rule subjecting any high school pupil to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside of the campus, is protected from governmental restriction by the First Amendment of the United States Constitution or Section 2 of Article 1 of the California Constitution."

Mark Goodman, executive director of the Student Law Press Center in Arlington, Va., said the controversy of publishing articles about homosexual students can cut both ways, with some articles criticizing and some supporting. It is the topic, he noted, that was the concern.

"Without a question, it's fair to say that students are more comfortable with the topic than administrators," Goodman told the *Los Angeles Times*. "To prevent violence – if that is the true intention – then I empathize with that. But I wonder if that's really the true intention."

Joel Paramo, the editor-in-chief of *The Kernal* and one of the plaintiffs in the case, which was settled before trial, was one of several students who submitted a statement along with the complaint.

"I know these articles would increase tolerance and awareness of gay people by presenting people's attitudes about homosexuality in a well-researched, honest and fair way," Paramo, said in the statement. Paramo's statement, together with other student statements are available online at [www.aclu-sc.org/News/Releases/2005/100877/](http://www.aclu-sc.org/News/Releases/2005/100877/).

"I wish we didn't need to file a lawsuit against the school to exercise our free speech rights."

—JESSICA MEYER  
SILHA RESEARCH ASSISTANT

# Student Press News

## Catholic School Bans Select Blogs

Students at Pope John XXIII Regional High School in Sparta, N.J. have been ordered to remove and cease posting diaries discussing the school or their personal lives on the Internet. The Roman Catholic school's principal, Rev. Kieran McHugh, told students in an October 2005 assembly that the school would begin strictly enforcing a five-year-old rule that bans students from posting online personal information and information about the school in blogs and other online diaries, *The New Jersey Herald* reported. The ban does not forbid all Internet communications. The rule now will be enforced after the school learned of a student communicating with another person who lied about his or her age, *The Herald* reported.

"I don't see this as censorship," said McHugh in an article by the Student Press Law Center, which is available online at [www.splc.org/newsflash.asp?id=1107&year=](http://www.splc.org/newsflash.asp?id=1107&year=). "I believe we are teaching common civility, courtesy and respect."

Marianna Thompson, a diocesan spokesperson said the directive was aimed at protecting students' safety, not at censoring the communications, the Associated Press reported.

"The Internet is a forum with unrestricted global access," Thompson told *The Herald*. "For minors to be vulnerable in that forum is not acceptable."

Thus far, Thompson said, there has been total compliance with the rule and no students have been suspended in connection with the rule.

Kurt Opsahl, who works with the Electronic Frontier Foundation, an organization that promotes the rights of bloggers, told the Associated Press that several private institutions had attempted to restrict or censor student Internet postings.

"But this is the first time we've heard of such an overreaction," Opsahl told the Associated Press. "It would be better if they taught students what they should and shouldn't do online rather than take away the primary communication tool of their generation."

Parry Aftab, a privacy lawyer and expert on Internet law, told *The Herald* the school has been lucky no one had filed a lawsuit, noting that if the school threatened to suspend students from using particular blogging Web sites from home, it would be an invasion of privacy.

Thompson said the parents of students enrolling in the school sign contracts concerning student behavior and that an item in that contract involves responsible Internet use. This practice could somewhat dilute the students' free speech claims, Ed Barocas, legal director for the American Civil Liberties Union of New Jersey told the Associated Press.

"The rights of students at private schools are far different than those of public schools because administrators at public schools are agents of government," Barocas told the Associated Press. "That's not the case here."

—JESSICA MEYER  
SILHA RESEARCH ASSISTANT

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"I don't see this as censorship. I believe we are teaching common civility, courtesy and respect."

— Rev. Kieran  
McHugh, Principal,  
Pope John XXIII  
Regional High  
School

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## Former Adviser Receives High School Press Freedom Award

Four Texas high school students who challenged the validity of a funding strategy for a program aimed at reducing gang violence in DeSoto High School on Nov. 12, 2005 received the 2005 Courage in Student Journalism Award.

DeSoto's former media adviser Carol Richtsmeier also received the award, which is presented by Newseum, the Student Press Law Center and the National Scholastic Press Association. This is the first year an adviser earned the award. DeSoto is a suburb of Dallas, Texas.

After the DeSoto school board approved \$65,000 for Project JAMS (Just Another Means of Success) aimed at gang-related activity, the students began an investigation into whether this funding actually was needed. Their research into the program and its founder, Amon Rashidi, revealed "years of false claims, unfulfilled contracts and unsubstantiated statistics," the Student Press Law Center reported. The students' efforts, which resulted in accusations of racism and un-American attitudes, led to an ultimate rejection of a additional \$1 million funding request for the program.

"It was very frustrating for them because it took an extra effort to get people to take them seriously," Richtsmeier told the *Star-Telegram* (Fort Worth). "They also faced a lot of nasty comments and criticism from people who didn't like what they were doing."

"This year's awards could not have been given to a more deserving group," Newseum Programs Director Rich Foster told the Student Press Law Center. That article is available online at [www.splc.org/newsflash.asp?id=1118](http://www.splc.org/newsflash.asp?id=1118). "The courage exhibited by these students and their advisor is matched by the superior quality of their research and reporting."

Whitney Basil, Eric Gentry, Zach Kroh and Jeremy Willis, reporters for the school's student paper, will share a \$5,000 student prize and Richtsmeier, who resigned after the school board continued to threaten action against the students, also received a \$5,000 reward.

—JESSICA MEYER  
SILHA RESEARCH ASSISTANT