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Tribal Officials Limit Media Access In Aftermath of Red Lake Shooting

Following the March 21, 2005 school shootings by sixteen-year-old Jeff Weise at the Red Lake reservation, the Red Lake Band of Chippewa Indians limited media access in an exercise of tribal authority. Weise, a student at the Red Lake High School, killed nine people before committing suicide, prompting a flood of media to the northern Minnesota reservation. Members of the press faced territorial limitations and even physical detention at the Red Lake Reservation, raising questions over the scope of First Amendment rights in Indian country.

At first, reporters based nearby, like Molly Miron, editor of the Bemidji *Pioneer*, who arrived at Red Lake by 4 p.m. on the day of the shootings, had unfettered access to the reservation. But by 5 p.m., Red Lake tribal officials had closed down the reservation borders. Rona Johnson, columnist for the Grand Forks *Herald*, reported that after making the two-hour drive to the reservation, it was already impossible to get near the high school. Instead, police directed Johnson and colleagues to go to the fenced-in parking lot at the tribe's new detention complex, and told them to await a briefing from tribal officials.

Red Lake borders reopened the next morning, but tribal officials continued to confine members of the press to the detention center parking lot. The St. Paul *Pioneer Press* reported that officers of the Bureau of Indian Affairs arrived in squad cars to stand outside the complex as satellite dishes and media crew milled the parking lot. Any activity outside of the parking lot was restricted.

The director of public safety for Red Lake, Pat Mills, told the *Pioneer Press* that the tribe had made the decision to prohibit the reporters from wandering the reservation in order to "defuse the situation and not get people riled up." Media activity outside the parking lot was limited to the main highway. Tribal officials distributed a flyer that read, "Exiting this road constitutes trespassing. Repeated attempts to interview witnesses is viewed as interfering with a federal investigation. Under the authority of the Red Lake Tribal Chairman, you may be removed from the Reservation." One reporter for the (Minneapolis) *Star Tribune* described Red Lake Tribal Chairman, Floyd Jourdain, Jr., speaking directly to the press, continually repeating: "This is Indian land. You are our guests."

According to reports from the Associated Press, Jourdain's restrictions did not solely apply to the tribe's "guests." Tribal member Victoria Brun, the sister of Derrick Brun, a Red Lake High School security guard who had been killed in the shooting, told the AP that her cousin was stopped and questioned by Jourdain before being allowed to make a statement to the press. Brun's family was critical of the strict limits that the tribe had placed on the media, and wished to speak to the press freely about their loved one.

The AP also reported that tribal law enforcement pulled over two photographers from the reservation's main highway. The photographers reportedly stopped to take pictures of a roadside memorial along the highway. The officers had guns drawn as they approached the photographers' vehicle, and one officer reportedly said he believed there was a gun inside the car. Instead, there was only camera equipment, which police confiscated and held until the following day. Officers briefly handcuffed the photographers, one employed by the AP and one by Getty Images, before releasing them. The Reporters Committee for Freedom of the Press reported that the AP was considering legal action in response to the incident.

A legal claim against the tribe would pose unique challenges. The media restrictions at Red Lake raise questions as to how the First Amendment applies on Indian reservations. In *Talton v. Mayes*, 163 U.S. 376 (1896), the Supreme Court held that the U.S. Bill of Rights does not apply to Indian tribal governments. Although the Bill of Rights restrains federal and state governments from infringing on the freedom of the press, it does not pose a similar constitutional restraint on Indian tribes. Congress statutorily imposed the Bill of Rights on Indian tribes in 1968, however, when it passed the Indian Civil Rights Act, 25 U.S.C. § 1301 et seq.

Although the Indian Civil Rights Act (ICRA) generally means that tribes cannot infringe on freedom of the speech and of the press, parties challenging such infringement will likely have to try their claims in tribal court. In

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Red Lake, continued from page 1

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the Supreme Court held that a claim arising under ICRA can only be heard in federal court if it is a *habeas corpus* claim – one that seeks the release of a detained prisoner. It is also unclear whether ICRA would trump the general principle that Indian tribes have autonomous authority to keep trespassers off the reservations.

Once in tribal court, tribal judges are free to apply a narrower interpretation of the press rights guaranteed by ICRA, even if tribal courts apply ICRA language that mirrors the freedom of speech and press clauses of the First Amendment. Not only are tribal courts not required to follow interpretations of federal courts, judicial review by federal courts is unavailable with ICRA freedom of press claims. Moreover, tribes also have the authority, in most cases, to dictate whether court proceedings will be open to the press, potentially closing another avenue of judicial oversight.

Nor is there any potential for state review. Although it is located within Minnesota state boundaries, the Red Lake reservation is technically not a part of the state, and the state has no jurisdiction over Red Lake. Traditionally, only tribal courts or federal courts had jurisdiction over conflicts arising on Indian reservations. In 1953, however, Congress shifted civil and criminal jurisdiction over Indian country to a number of enumerated states, under Public Law 280, PL 83-280, 28 U.S.C. § 1360, 18 U.S.C. § 1162. Minnesota is included in the states enumerated by Public Law 280, but the Red Lake reservation is the only area within Minnesota borders that is specifically exempt from Minnesota's jurisdiction over Indian land.

As a sovereign tribal government, the Red Lake band can dictate who may or may not enter the reservation. The tribe has the sovereign authority to deny access to any non-tribal members, including members of the press. Passage through the reservation has not typically been restricted in recent years, but that has not always been the case. Monte Draper, photographer for the Bemidji *Pioneer* and

long-time visitor to Red Lake, told the Twin Cities City Pages' blog "The Blotter," that he still has an old passport from the days when Red Lake had a rule requiring passports for entry to the reservation.

Another, more extreme demonstration of shielding the reservation from the media occurred in Red Lake in 1979. Gary Hill, special projects manager for KSTP-TV, an ABC affiliate serving the Twin Cities metro region, told the *Star Tribune* that during a 1979 attempt to gather news coverage of a violent outbreak on the reservation, a news helicopter was hit by gunfire. It is uncertain whether the 1979 gunfire was instigated by tribal officials, but the *Star Tribune* reported that among Minnesota reporters, Red Lake is not known for welcoming media coverage.

Policies protecting tribal autonomy at Red Lake, such as the old system of passport entry, and Red Lake's exception under Public Law 280, were largely attributed to the leadership of former tribal chairman, Roger Jourdain, a distant relative of current Chairman Floyd Jourdain, Jr. According to *The New York Times*, Roger Jourdain ruled the tribe for 31 years beginning in the late 1950s. Floyd Jourdain, Jr., who was elected Tribal Chairman last year, is the father of sixteen-year-old Louis Jourdain, who was arrested on March 27 for allegedly conspiring with Weise in planning the shootings.

The arrest of Jourdain's son could change the landscape of the Indian autonomy and the freedom of press debate. Jourdain's personal involvement in the recent events might lend a political aspect to the debate, taking it out of a pure question of tribal authority. For example, if Jourdain were to impose tribal restraints on the press that begin to look more like a personal opportunity to chill speech, it may raise more traditional issues of First Amendment jurisprudence. Since Louis Jourdain's arrest, however, proceedings have largely been closed to the press because of federal law, not tribal law, due to Jourdain's juvenile status.

—KELLY J. HANSEN MAHER
SILHA FELLOW

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Reporters Privilege News

Federal Shield Law Introduced in 109th Congress

New legislation proposed in Congress would shield journalists from being forced to reveal the identities of confidential sources. The “Free Flow of Information Act” was introduced in the House of Representatives as H.R. 581 on Feb. 2, 2005 by Reps. Mike Pence (R-Ind.) and Rick Boucher (D-Va.) and in the Senate as S. 3440 on Feb. 9, 2005 by Sen. Richard Lugar (R-Ind.) A second bill, titled “The Free Speech Protection Act of 2005,” S. 369, was subsequently introduced by Sen. Christopher Dodd (D-Conn.). Dodd’s bill is a re-introduction of legislation he proposed before the 108th Congress adjourned in December, 2004 (See “Senator Dodd Introduces Federal Shield Law” in the Fall 2004 issue of the *Silha Bulletin*.) Both the Lugar and Dodd bills would provide journalists with an absolute privilege – meaning that the privilege could not be trumped by a demonstration of competing interests under any circumstances – against compelled disclosure of confidential sources. The bills also provide a qualified or limited privilege against disclosure of other information, and would, if passed, set national standards for all federal entities in subpoenaing reporters in any government case, criminal or civil. The bills differ, however, on the issue of which journalists may qualify for the privileges the bills provide.

The Congressional sponsors of both bills said they were motivated to introduce the legislation in response to the recent spate of cases in which reporters have been sanctioned for refusing to reveal the identities of confidential sources. “Compelling reporters to testify and, in particular, compelling them to reveal the identity of their confidential sources is a detriment to the public interest,” Pence said on the House floor when he introduced H.R. 581. Lugar stated, in prepared remarks, “It is important that we ensure reporters certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment.” He continued, “Without such protection, many whistleblowers will refuse to step forward and reporters will be disinclined to provide our constituents with the information that they have a right to know.” Pence’s remarks are available online at <http://mikepence.house.gov/News/DocumentSingle.aspx?DocumentID=6643>; Lugar’s statement is available online at <http://lugar.senate.gov/pressapp/record.cfm?id=231858>.

A March 17, 2005 *USA TODAY* editorial co-authored by Dodd and Lugar referred specifically to the recent ruling by the U.S. Court of Appeals for the District of Columbia that journalists Judith Miller of *The New York Times* and Matthew Cooper of *Time* magazine must testify about their confidential sources before a federal grand jury in the ongoing Valerie Plame investigation. (See “Appeals Court Rules That Reporters Must Testify About Confidential Sources” on page 5 of this issue of the *Silha Bulletin*.) Dodd and Lugar stated, “The cases

of Miller, Cooper and others make it clear that a federal shield law is needed to protect the public’s right to know – which is the ultimate check on abuses by those in power.” While 31 states and the District of Columbia currently have shield laws in place, those laws have no force in federal courts.

In addition to providing an absolute privilege for reporters against compelled disclosure of confidential sources, both bills would also recognize a qualified privilege for other information. Under The Free Flow of Information Act, reporters could not be subpoenaed to testify in court unless “clear and convincing evidence” is provided that all alternative sources of information have been exhausted and unless the material or testimony sought is “essential to the investigation, prosecution or defense” in a criminal case or is “essential to a dispositive issue of substantial importance” in a civil case. Under the Free Speech Protection Act, the qualified privilege may be overcome upon a finding by a court that the information sought is “critical and necessary to the resolution of a significant legal issue,” the information cannot be otherwise secured, and “there is an overriding public interest in the disclosure.”

In their March 17, 2005 *USA TODAY* editorial, Dodd and Lugar stated that an effective federal law which proscribes the forced disclosure of journalists’ confidential sources would serve to balance the public’s right to know and the needs of law enforcement. They wrote, “If there is clear and convincing evidence that a reporter has exclusive information that is essential to solving a crime or other important legal matter, then that reporter would be compelled by law to disclose that information — but never a source’s identity.”

The conditions the bills set out for compelled disclosure are patterned upon existing Department of Justice (DoJ) guidelines, adopted in 1973, for the issuance of subpoenas to members of the media. The guidelines, published in the Code of Federal Regulations at Title 28, Part 50.10, state, “Because freedom of the press can be no broader than the freedom of reporters to investigate and report the news, the prosecutorial power of the government should not be used in such a way that it impairs a reporter’s responsibility to cover as broadly as possible controversial public issues.” Specifically, the guidelines require the DoJ both to pursue all available alternative sources of information and to negotiate with a reporter before issuing a subpoena. The Reporters Committee for Freedom of the Press (RCFP) notes that “where negotiations fail, the guidelines require the attorney general to consider a number of principles before authorizing a subpoena.” RCFP’s report is available online at <http://www.rcfp.org/news/mag/28-4/cov-aproblem.html>. The Free Flow of Information Act would implement those guidelines as a statute at the national level, making them mandatory.

Shield Law, continued on page 4

“The cases of Miller, Cooper and others make it clear that a federal shield law is needed to protect the public’s right to know - which is the ultimate check on abuses by those in power.”

—Senators
Christopher Dodd
and Richard Lugar

Shield Law, *continued from page 3*

The bills also protect journalists' third-party records. The Free Flow of Information Act covers telephone records or "other records held by a telecommunications service provider, Internet service provider, or operator of an interactive computer service for a business purpose;" these records would be protected to the same extent as material held by journalists. The proposed legislation further requires that journalists be notified before such subpoenas are issued and provided with an opportunity to challenge the subpoenas before the record(s) are turned over. The full texts of both bills are available online at <http://thomas.loc.gov/>.

The two bills differ, however, on the issue of which journalists may qualify for the protections and the privileges the bills provide. The Free Flow of Information Act explicitly defines "covered persons" as publishers, broadcasters and wire services and to employees of publishing, broadcasting and wire service agencies. Freelance reporters who are employed by a publisher or broadcaster are also covered under the Act, but those without contracts and those publishing only on the Internet would not qualify. The Free Speech Protection Act includes a more expansive definition, covering anyone who "engages in the gathering of news or information" and "has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the public."

If history is any guide, the prospects for the bills' passage are far from assured. Federal reporter's shield laws have often been introduced in Congress, but none has ever passed. The first known proposal, according to RCFP, was introduced in the Senate in 1929. The shield law campaign gathered momentum in the 1970s following the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972) which denied the press any privilege to refuse to testify about confidential sources in a grand jury context. RCFP reports that by September 1972, at least six federal shield laws were introduced in the House of Representatives. Between 1973 and 1978, RCFP reports, 99 bills establishing a federal shield law were introduced in the House and Senate. Despite the momentum, the drive failed because of disagreement among journalists over the extent of the privilege provided and the question of what the laws should cover. Whether the campaign of 2005, spurred by a string of recent cases in which nearly a dozen reporters have been cited for contempt and fined or threatened with jail, represents a historic opportunity revisited, remains to be seen. RCFP's report is available online at <http://www.rcfp.org/news/mag/28-4/col-backtosq.html>.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

photo of man with "gun" goes here

During the Spring 2005 Silha Forum, "The Constitution, Digital Media and Expectations of Privacy," Professor Stephen Cribari demonstrates a device that can measure heat inside a building, revealing the possible use of lamps to enhance drug production. For a complete story about the forum, turn to page 43 of this issue of the *Silha Bulletin*.

Reporters Privilege News

Appeals Court Rules That Reporters Must Testify About Confidential Sources

A unanimous three-judge panel of the U.S. Court of Appeals for the District of Columbia ruled on Feb. 15, 2005 that reporters Judith Miller of *The New York Times* and Matthew Cooper of *Time* magazine must testify about their confidential sources before the grand jury investigating the leak of CIA agent Valerie Plame's identity to the press or face contempt. (See "Reporters Privilege: In Re: Special Counsel Investigation" in the Summer 2004 issue of the *Silha Bulletin* and "Reporters Privilege News: Plame Update: Journalists Miller and Cooper Appeal Their Sentences" in the Fall 2004 issue of the *Silha Bulletin*.)

The decision in the case *In Re: Grand Jury Subpoena, Judith Miller*, 397 F.3d 964 (2005), affirmed an October 2004 order by District Judge Thomas F. Hogan of the District of Columbia citing both reporters with civil contempt for refusing to comply with subpoenas served on them in the federal probe by Special Counsel Patrick Fitzgerald. The panel ruled that there is no First Amendment privilege allowing the reporters to shield the identities of their confidential sources. However, the panel was divided as to whether a basis for reporter's privilege exists in the common law.

"We agree with the District Court that there is no First Amendment privilege protecting the evidence sought," Judge David B. Sentelle wrote for the Court, relying upon the Supreme Court's decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). In *Branzburg*, the Supreme Court ruled that reporters who may have witnessed a crime have no constitutional right to refuse to disclose confidential sources before a grand jury investigating the crime's commission. Concluding that the facts of the present case were "materially indistinguishable" from the facts in *Branzburg*, the Court ruled that *Branzburg* was controlling in the case. "Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source," Sentelle wrote. "The Highest Court has spoken and never revisited the question. Without doubt, that is the end of the matter." *The Washington Post* reported that the panel's decision marks the first time in over 30 years that a federal appeals court has ruled on the question of whether reporters can be compelled to identify confidential sources in a criminal case.

Since *Branzburg* was handed down in 1972, most federal courts have recognized at least a qualified reporter's privilege based upon the concurring opinion of Justice Lewis B. Powell, who suggested that the privilege may be invoked in certain circumstances, such as when a reporter is subpoenaed to provide information that is "remote and tenuous" to a case. But the panel flatly rejected the plaintiffs' argument that Powell's opinion

provided the basis for reporter's privilege. Sentelle wrote, "The Constitution protects all citizens, and there is no reason to believe that Justice Powell intended to elevate the journalistic class above the rest."

In presenting their case to the Court, the plaintiffs had advanced four lines of argument. Besides their assertion of a reporter's privilege arising from the First Amendment to protect confidential sources, they also claimed a separate basis for reporter's privilege under the common law. They further argued that their due process rights were violated by the submission of secret evidence to the grand jury to which neither the reporters nor their attorneys were permitted access. Finally, they argued that Fitzgerald's failure to comply with Department of Justice (DoJ) guidelines for issuing subpoenas to members of the press constituted grounds for quashing the subpoenas and voiding the citations for contempt. Three of these four claims were unanimously rejected. The panel dismissed the claim that Miller's and Cooper's rights to due process were violated by the grand jury's *ex parte* and *in camera* proceedings as "without merit," since secrecy is standard protocol in grand jury investigations.

"Indeed," the panel wrote, citing *In Re: Sealed Case*, 199 F.3d 522, 526 (D.C. Cir., 2000), "the rule of grand jury secrecy is so well established that we have noted that 'there is a plethora of authority recognizing that the grand jury context presents an unusual setting where privacy and secrecy are the norm.'" The panel also ruled unanimously that DoJ regulations of the conditions under which reporters may be subpoenaed are not legally binding and create no "enforceable right" in court. The panel wrote that the guidelines "exist to guide the Department's exercise of its discretion in determining whether and when to seek the issuance of subpoenas to reporters, not to confer substantive or procedural benefits upon individual media personnel."

The panel was divided, however, on the issue of whether a separate basis for reporter's privilege exists in common law. Although Sentelle rejected the existence of a common law reporter's privilege, Judge David S. Tatel argued for the adoption of a qualified common law privilege. Citing Federal Rule of Evidence 501, a 1975 Congressional directive authorizing federal courts to recognize privileges from common law "in light of reason and experience," as well as the Supreme Court's decision in *Jaffee v. Redmond*, 518 U.S. 1 (1996), in which the Court recognized a common law privilege for communications between psychotherapists and their patients, Tatel wrote, "I find support for the privilege at least as strong for journalists as for psychotherapists." The third judge on the panel, Karen L. Henderson, declined to decide on the issue.

In refusing to recognize a common law privilege, Sentelle focused on what he deemed the necessary

"We will challenge today's decision and advocate for a federal shield law that will enable the public to continue to learn about matters that directly affect their lives."

—Norman Pearlstine,
Editor-in-Chief,
Time

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but problematic task of defining who is a journalist, and who, in the current media universe, should be eligible to claim common law privileges. He asked, "Does the privilege also protect the proprietor of a web log: the stereotypical "blogger" sitting in his pajamas at his personal computer posting on the World Wide Web his best product to inform whoever happens to browse his way? If not, why not?" Tatel responded that "definitional conundrums" which "unconventional forms of journalism . . . may raise" need not be a pressing concern.

Despite their differences over the existence of a common law privilege, the panel unanimously agreed that any privilege that might exist had been overcome by Fitzgerald's demonstration of the need for Miller's and Cooper's testimony. The Court wrote, "We further conclude that if any such common law privilege exists, it is not absolute, and in this case has been overcome by the filings of the Special Counsel with the District Court." Approximately nine pages of Tatel's concurring opinion were redacted. The Reporters Committee for Freedom of the Press (RCFP) reported in a February 15 news release that the redacted pages discussed Fitzgerald's demonstration that the testimony he seeks from Miller and Cooper is "critical and unobtainable from any other source." RCFP's news release is available online at <http://www.rcfp.org/news/2005/0215-con-federa.html>

Both news organizations appealed the panel's ruling to the full, nine-member appeals court, but on April 19, the court rejected the request and refused to review the panel's decision. Following the appeals court ruling, the news organizations stated that they would seek a stay of the contempt order while they petition the Supreme Court to hear the case. *The Washington Post* reported that Toby Usnik, a *New York Times* spokesman, stated, "We are disappointed with the court's decision and we will seek a stay in order to have sufficient time to seek U.S. Supreme Court review." According to *The Post*, Time Inc. similarly stated that the magazine was "disappointed but not surprised by the decision." Without a stay of the contempt order, the case would be sent back to Hogan, and the reporters ordered to submit to questioning or be sent to jail without further delay. The RCFP reported that an emergency petition to stay the order would be decided by Chief Justice William Rehnquist in his capacity as Circuit Justice for the D.C. Circuit. The RCFP report is available online at <http://www.rcfp.org/news/2005/0419-con-courtr.html>

The order by the full appeals court stated only that a majority of the judges had voted against a

rehearing. Two of the court's nine judges did not participate in the voting; none of the judges participating dissented. In a concurring opinion, Tatel wrote that the case "presents no question of 'exceptional importance'" as required for a rehearing before the full court. He cited "factual similarities" between *Branzburg* and the present case as grounds for denial of the news organizations' rehearing request, writing, "Only the Supreme Court can limit or distinguish *Branzburg* on these facts." Tatel further charged the news organizations with "attempting to manufacture a circuit conflict" on the issues presented. *The New York Times* has previously reported that competing interpretations of the *Branzburg* ruling between different circuits raise the likelihood that the U.S. Supreme Court may review one of the cases, since the Court often accepts appeals to resolve such "circuit splits."

As the *Bulletin* was going to press, *Editor & Publisher* reported that Abrams' office had filed an appeal on April 25 in the D.C. Circuit court, seeking a stay for both Miller and Cooper. The motion included an agreement with Fitzgerald that neither reporter would go to jail until the U.S. Supreme Court has an opportunity to rule on the case, if it decides to grant review.

"We have an agreement with Mr. Fitzgerald that he won't take any steps against Judy and Matt until the Supreme Court makes a decision," Abrams told *Editor & Publisher*. "One way or another, we will wind up, effectively, with a stay."

Editor & Publisher further reported that Abrams will no longer represent Cooper, although he will still serve as Miller's counsel. Cooper's attorney is now former U.S. Solicitor General Ted Olson. Abrams told *Editor & Publisher*, "It was *Time's* decision, but certainly with my acquiescence. That would be good to add [Olson] to the team."

By adding Olson, Miller and Cooper will now be able to file separate appeals to the Supreme Court. It is possible, under these circumstances, that the High Court could combine both cases into one, or else hear one case and not the other. Conceivably, the court could then rule in favor of one reporter and not the other. The Supreme Court could hear oral arguments in the case before the current session ends on June 27.

Editor & Publisher's story is available online at www.editorandpublisher.com/eandp/search/article_display.jsp?vnu_content_id=1000900797.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Reporters Privilege News

Reporters' Telephone Records Protected From Compelled Disclosure

The telephone records of two reporters for *The New York Times* are protected from compelled disclosure in a federal probe of possible government leaks. Federal District Judge Robert W. Sweet of the Southern District of New York ruled on Feb. 24, 2005. In *The New York Times Co. v. Gonzales*, 2005 U.S. Dist. LEXIS 2642 (S.D.N.Y. 2005), Sweet ruled that the records are protected by a qualified reporter's privilege under the First Amendment and the common law, and that U.S. prosecutor Patrick J. Fitzgerald cannot inspect the reporters' records in an effort to identify their confidential sources.

The case began in 2001, after *The Times* had published a series of articles about the government's investigation of two charities, The Holy Land Foundation (HLF) and The Global Relief Foundation (GRF), which were suspected of aiding al-Qaeda and Palestinian terrorist groups. On Dec. 3, 2001, *New York Times* reporter Judith Miller telephoned HLF for comment on the government's plan — which she had learned about through confidential sources — to block the organization's assets. Fitzgerald claimed that Miller alerted HLF officials to an impending FBI search of HLF's offices, and that her disclosure compromised the investigation by putting the government agents involved at risk by increasing the likelihood that HLF hid or destroyed evidence that would have been seized. Miller denied alerting HLF to the search.

On Dec. 13, 2001, another *New York Times* reporter, Philip Shenon, called GRF seeking comment regarding the government's intended seizure of the organization's assets. Shenon, too, had obtained information about the government's plans through confidential sources. Fitzgerald alleged that Shenon disclosed to GRF that government action against the group was imminent, and that Shenon's tip-off compromised the government's probe. Shenon denied the allegations.

Both Shenon and Miller stated that the organizations had already been aware that they were under investigation, and that seeking comment from the subjects of news articles is a standard journalistic practice.

That same month, the U.S. Attorney's Office for the Northern District of Illinois and the FBI Chicago Field Office launched an investigation to identify possible government leaks to *The New York Times*. Fitzgerald contacted *The Times* in August 2002 to request Miller's and Shenon's telephone records. After *The Times* declined to produce the records, Fitzgerald requested that the DoJ issue a subpoena. The DoJ denied Fitzgerald's request in 2003, but granted the request in 2004, although, as the Reporters Committee for Freedom of the Press (RCFP) reports, "it is unclear what, if anything, changed in

two years." In September 2004, Fitzgerald subpoenaed the reporters' records from a 20-day period after the Sept. 11, 2001 attacks, and the reporters filed suit to block the subpoenas. The RCFP's reports are available online at <http://www.rcfp.org/news/2004/0910fitzge.html> and <http://www.rcfp.org/news/mag/28-4/cov-aproblem.html>. (See also "Reporters Privilege: *In Re: Special Counsel Investigation*" in the Summer 2004 issue of the *Silha Bulletin*.)

In a ruling that acknowledged a qualified First Amendment privilege, Sweet relied on the interpretation by the U.S. Court of Appeals for the Second Circuit of the Supreme Court decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972). The Second Circuit, Sweet wrote, has interpreted *Branzburg* as providing a qualified reporter's privilege under the First Amendment.

Sweet also recognized a separate basis for reporter's privilege under common law, citing both Rule 501 of the Federal Rules of Evidence and the Supreme Court ruling in *Jaffee v. Redmond*, 518 U.S. 1 (1996). Rule 501 is a 1975 Congressional directive authorizing the courts to develop new common law privileges "in the light of reason and experience." In the *Jaffee* case, the Supreme Court recognized a privilege for communications between psychotherapists and their patients in federal courts on the ground that such a privilege had become widespread at the state level. Noting that reporter's privilege has been enshrined into the laws of 48 states and the District of Columbia by state courts and legislatures, Sweet quoted from *Jaffee*, stating, "The public ends achieved through recognition of a reporter's privilege are, thus, vital to our democracy and of 'transcendent importance'." Sweet's opinion is available online at <http://www.fas.org/sgp/jud/nyt022405.pdf>.

Sweet stressed that both the First Amendment and the common law privileges are qualified rather than absolute, requiring a "case-by-case balancing" of competing interests. The government could overcome the privilege by showing that the information it sought was highly material and relevant to the investigation, critical to the maintenance of the claim, and unobtainable from other sources. According to Sweet, however, the government had failed to produce "this threshold showing." Sweet declared, "To deny the relief sought by *The Times* under these circumstances, i.e., without any showing on the part of the government that the sought records are necessary, relevant, material and unavailable from other sources, has the potential to significantly affect the reporting of news based upon information provided by confidential sources."

Floyd Abrams, attorney for *The New York Times*, had claimed that the records sought by the

"The decision is a substantial vindication of the rights of journalists to keep their word to their confidential sources.

—Floyd Abrams,
New York Times
Attorney

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Phone records, continued from page 7

government contain information about dozens of sources, and that they cover confidential communications on a range of issues unrelated to the government's actions against the charities. He had argued that permitting the government to review the records would impair the flow of information to the public, and Sweet agreed. Citing the importance of confidential sources to newsgathering and reporting, Sweet concluded, "The government has failed to demonstrate that the balance of competing interests weighs in its favor."

The New York Times reported that the ruling "considered the relatively untested questions of whether, how and under what legal standards reporters and news organizations are entitled to challenge subpoenas directed to third parties holding records that could reveal their confidential sources." In his ruling, Sweet wrote that the constitutional and common law protections have equal force whether the information is sought from the reporters themselves or from a third party such as the telephone company. "*The Times'* First Amendment interest in records held by third parties is well supported," Sweet stated. It is still not known, however, if subpoenas were in fact issued. RCFP reported that both Fitzgerald and *The Times'* telephone company have refused to comment because of grand jury secrecy rules. RCFP's report is available online at <http://www.rcfp.org/news/2005/0225-con-report.html>.

In their arguments before the court, *The New York Times* had further claimed that the phone records were protected against disclosure by the U.S. Department of Justice's (DoJ) own guidelines, as specified in The Code of Federal Regulations at Title 28, Part 50.10, for the issuance of subpoenas to the news media. Those guidelines specify that before a subpoena is issued, the government is required to exhaust all alternative means of obtaining the information and to negotiate with the media before issuing a subpoena. Furthermore, all subpoenas must be authorized by the attorney general. Sweet rejected *The Times'* position, ruling that the guidelines are only

"touchstones to assist the DoJ in its exercise of prosecutorial discretion" and that they do not create "legally enforceable" rights. He later stated, however, that the government's failure to comply with the guidelines "also weighs against disclosure."

Sweet's decision was an important victory for *The Times*, which hailed the ruling. *The Washington Post* reported a statement by Abrams calling the decision "a substantial vindication of the rights of journalists to keep their word to their confidential sources." The Post also reported a statement by George Freeman, assistant general counsel at The New York Times Co., that the newspaper is "particularly gratified that the judge accepted our arguments that the reporter's privilege ought to be applied on both constitutional and common law grounds."

Sweet's interpretation of the *Branzburg* decision as recognizing a qualified First Amendment privilege against forced disclosure of confidential sources is at odds with a February 15 ruling by a three-judge panel of the U.S. Court of Appeals for the District of Columbia in the Valerie Plame case – another case involving *New York Times* reporter Judith Miller. In the D.C. Circuit decision, *In Re: Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005), the panel ruled that Miller and Matthew Cooper of *Time* magazine must testify about their confidential sources before the grand jury investigating the disclosure of Plame's identity to the press. (See "Appeals Court Rules That Reporters Must Testify About Confidential Sources" on page 5 of this issue of the *Silha Bulletin*.)

The New York Times reported that the differing interpretations of *Branzburg* increase the likelihood that the U.S. Supreme Court will review one of the cases, since the Court often accepts appeals to revolve "circuit splits." Fitzgerald, who is also the Special Prosecutor in the Plame investigation, is reported to be weighing whether to file for an appeal of Sweet's ruling. The Associated Press reported Fitzgerald as saying, "We respectfully disagree with Judge Sweet's decision and are considering our appellate options."

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Reporters Privilege News

Apple Suit Tackles Legal Protections for Bloggers

Law suits and subpoenas initiated by Apple Computer have brought the issue of whether Web log writers, or bloggers, will receive the same protections as traditional journalists into the spotlight of a California district court. Despite an initial ruling denying shield law protection to Web publishers, the California court has not yet determined whether it considers bloggers to be journalists.

Looking to curb Internet leaks on its upcoming products, Apple Computer initiated a lawsuit on Jan. 4, 2005, *Apple Computer, Inc. v. Nick DePlume*, Case No. 1-05-CV-33341, in Santa Clara County Superior Court, California. Nick DePlume is the Web moniker of 19-year-old Harvard University student Nicholas Ciarelli, host of the Web site, ThinkSecret.com. Apple asserts that Ciarelli illegally published company trade secrets when he correctly reported Apple's plans to introduce a new, top-secret \$499 computer. The lawsuit against Ciarelli and ThinkSecret follows a Dec. 13, 2004 suit against two other unnamed defendants over leaks on Web sites PowerPage and AppleInsider, in *Apple Computer, Inc. v. Doe 1*, Case No. 1-04-CV-032178, also filed in Santa Clara County. Simultaneous with the December suit, Apple independently asked the court for subpoenas to all three Web sites, seeking the identities of sources used in preparing and publishing the online articles that allegedly misappropriated Apple's trade secrets. The court authorized Apple to serve the subpoenas on Dec. 14, 2004.

At a March 4 hearing on a motion to quash the subpoenas, attorneys for the defendants continually referred to the Web publishers as journalists. Attorneys argued that the California shield law and the First Amendment protected the defendants from being compelled to divulge their sources. The motion sparked interest among media lawyers, bloggers, and mainstream journalists alike, as it would potentially offer initial jurisprudence on whether bloggers have the same legal protections as traditional journalists. Under current California law, journalists cannot be compelled to reveal their sources if they are connected with a newspaper, magazine, "or other periodical publication." (See Calif. Const. Art. 1, § 2, subd.(b).) Courts have yet to determine whether a blog, as a serially updated Web site, will fit into this legal definition. Judge James P. Kleinberg's March 11 ruling, however, denied the motion without answering that question.

"Movants contend they are journalists," Kleinberg wrote. "They make this claim because they seek the protection of the privilege against revealing their sources of information. Defining what is a 'journalist' has become more complicated as the variety of media has expanded. But even if the movants are journalists, this is not the equivalent of a free pass. The journalist's privilege is not absolute. For example, journalists cannot refuse to disclose information when it relates to a crime."

Kleinberg reasoned that the California statutes protecting trade secrets do not allow exceptions "for journalists, bloggers, or anyone else." Refraining from

determining whether the California shield law covers the defendants, Kleinberg wrote that the question "need not be decided at this juncture for this fundamental reason: there is no license conferred on anyone to violate valid criminal laws."

In Apple's ongoing lawsuit against ThinkSecret and Ciarelli, the court may soon have a reason to address the issue head on. Ciarelli filed a motion to dismiss the suit on March 4, arguing that the suit is without merit, amounting to a "SLAPP" suit – a Strategic Lawsuit Against Public Participation. A 1993 California "anti-SLAPP" law protects defendants against meritless lawsuits designed to stifle public speech with burdensome legal fees. In order to show it is in violation of the anti-SLAPP law, Apple will have to convince the court that it has a probability of winning its case. A hearing on the motion to dismiss is scheduled for April 12.

Ciarelli's pro bono attorney, Terry Gross, insists that Ciarelli did not disclose overly sensitive information on his ThinkSecret site. Gross told Wired News "It's not source code, not some internal formula." In an interview with InternetNews, Gross said that journalists are not liable for publishing such information, even if it is confidential. "You can go after the person who stole [the information] but you can't go after the journalist." Referring to the lawsuit, Gross told InternetNews, "The only thing they say that [Ciarelli] did to induce [his sources] was, one, that he was going to publish the information and, two, he promised some sources anonymity. That's the basis of journalism; that's how it works."

Defending his role as a legitimate journalist, Ciarelli e-mailed a statement to the Student Press Law Center, writing, "I employ the same legal newsgathering practices used by any other journalist. I talk to sources of information, investigate tips, follow up on leads and corroborate details."

Ciarelli has also built legal support for his status as journalist by obtaining an affidavit from technology columnist and high-profile blogger, Dan Gillmor. Ciarelli filed a sworn declaration from Gillmor with the court, supporting his motion to dismiss. The declaration heralds the legitimacy of blogging and the integrity of Ciarelli's journalism. "Online news periodicals are now often the first source for breaking news," Gillmor wrote, attaching, as exhibits to his affidavit, copies of online-only periodicals and articles on the journalistic significance of blogs. Gillmor also wrote that the factual information Ciarelli provided on ThinkSecret is the kind commonly reported in technology press, and "generally considered good journalism."

Electronic Frontier Foundation attorney Kurt Opsahl, counsel for AppleInsider and PowerPage, also insists that the bloggers are protected journalists. Opsahl told *The Christian Science Monitor* that forcing bloggers to disclose their sources means that "the public would lose out on a vital outlet for independent news, analysis, and commentary."

"I employ the same legal newsgathering practices used by any other journalist. I talk to sources of information, investigate tips, follow up on leads and corroborate details."

—Nicholas Ciarelli,
Host,
ThinkSecret.com

Reporters Privilege News

Source Cannot Sue Newspaper For Disclosing Identity

The U.S. Court of Appeals for the Sixth Circuit ruled on Jan. 28, 2005 that *The Cincinnati Enquirer* cannot be held liable for a former reporter's identification of a confidential source to a grand jury investigating the criminal conduct of that reporter and his source in unlawfully obtaining access to the telephone voicemail system of the Chiquita Brands International banana company. The three-judge panel unanimously affirmed a trial court ruling dismissing a lawsuit that George C. Ventura, former Senior Legal Counsel for Chiquita in Ecuador and Honduras, had filed against the newspaper after former *Enquirer* reporter Michael Gallagher identified Ventura as a confidential source in the investigation. In his lawsuit, Ventura had alleged breach of contract, negligent hiring or supervision and negligent disclosure. The case is *Ventura v. The Cincinnati Enquirer*, 396 F.3d 784 (2005.)

The case has its origins in a 1997 confidentiality agreement between Ventura and Gallagher. After learning that Gallagher and another *Enquirer* reporter, Cameron McWhirter, were investigating business practices by Chiquita in Central America, Ventura, who had left Chiquita thirteen months earlier, contacted the reporters and volunteered to aid them. In addition to providing information, Ventura gave Gallagher access codes to the company's voicemail system. Gallagher then used the access codes to tap into the system and listen to messages in the voicemail boxes of company executives. According to their agreement, Gallagher could publicly identify Ventura as a source in his articles about the company, but Gallagher promised Ventura confidentiality regarding the provision of the telephone access codes. In 1998, *The Enquirer* published the first of several articles which were critical of Chiquita and which included excerpts of voice-mail messages from the company system. The company then contacted law enforcement officials in Ohio, and identified Ventura as a principal suspect in the unauthorized access of its voicemail system. The government initiated the grand jury investigation.

Upon discovering that Gallagher had accessed Chiquita's voicemail system, *The Enquirer* fired him in July 1998, issued a public apology for his wrongdoing and paid Chiquita over \$10 million in a settlement. According to the Reporters Committee for Freedom of the Press (RCFP), the grand jury then subpoenaed Gallagher and *The Enquirer* to identify the confidential source used to obtain access to the voicemail system. The RCFP reported that *The*

Enquirer claimed an exemption from testifying under the Ohio Shield Law, §§ 2739.12, which states that editors and reporters working for newspapers cannot be compelled to disclose their sources in most legal proceedings. RCFP's report is available online at <http://www.rcfp.org/news/2005/0131-con-newspa.html>.

In September 1998, Gallagher identified Ventura as part of his plea agreement, leading to Ventura's indictment. Ventura then pleaded no contest, was convicted of multiple counts of Attempted Unauthorized Access to a Computer System, and sentenced to two years' probation. The state of Utah, where Ventura was employed by a law firm, suspended him from practice. Ventura then sued *The Enquirer*, alleging breach of contract and negligent hiring and supervision.

In April 1999, the district court granted *The Enquirer's* motion for summary judgment, dismissing Ventura's claim that the newspaper had broken its promise not to disclose Ventura's identity. The Appeals Court affirmed, ruling that the newspaper could not be held liable for the disclosures of a former employee and that the paper itself did not reveal the identity of any confidential source, including Ventura. The panel also ruled that the confidentiality agreement between Gallagher and Ventura was unenforceable under Ohio public policy because it sought to conceal evidence of criminal activity.

Ventura had also sought to compel *The Enquirer's* testimony in the case. He claimed that since Gallagher had disclosed his identity, he was no longer a confidential source and the newspaper could not invoke Ohio's shield law. In dismissing Ventura's claims and denying his motion to compel, the Court ruled, "Ventura's argument is predicated on the false assumption that that he was the only confidential source for the Chiquita story. If the court had forced the journalist deponents to confirm or deny plaintiff's claim, they would inevitably have revealed information about the existence, or absence, of other unidentified confidential sources. Forcing a newspaper to disclose information about a self-proclaimed source like Ventura would result in the impermissible likelihood that other confidential sources would be identified."

The panel's decision was authored by Circuit Judge Robert B. Krupansky of Cleveland, who died in November 2004. According to *The Plain Dealer*, court officials said the ruling was made before Krupansky's death.

—HOLIDAY SHAPIRO

SILHA RESEARCH ASSISTANT

“Forcing a newspaper to disclose information about a self-proclaimed source would result in the impermissible likelihood that other confidential sources would be identified.”

—Judge
Robert B. Krupansky

Reporters Privilege News

Taricani Given Early Release

Jim Taricani, the Rhode Island television reporter who was sentenced to six months of house arrest for refusing to reveal one of his sources in December 2004, was released two months early on April 9, 2005. The Chief Judge for the federal District Court of Rhode Island, Ernest C. Torres, said that Taricani was released early because he had “fully complied with both the letter and spirit of the conditions of his home confinement.” When Torres sentenced Taricani in December 2004, he told the reporter that his sentence would probably be reduced as long as he adhered to the terms of his house arrest, which barred him from accessing the Internet, working, or speaking with the media, and prohibited him from leaving his home except for medical appointments cleared beforehand or a medical emergency.

Taricani, a reporter with the Rhode Island NBC affiliate, WJAR-TV, was found in criminal contempt of court for refusing to reveal who had given him a tape used as evidence in a city official corruption trial. The tape originally aired in 2001 while the criminal trial was underway and showed Frank Corrente, an aide to then-Mayor of Providence Vincent Cianci, Jr., taking a bribe from a law enforcement official. Both Corrente and Cianci were eventually convicted; however, Torres had issued a gag order barring those involved with the case from speaking to the media or releasing evidence from the trial, including dissemination of the tape later aired by Taricani, to ensure a fair trial for the defendants. (See “Reporters Privilege: In re: Special Proceedings” in the Summer 2004 issue of the *Silha Bulletin* and “Reporter Privilege News: Journalist Sentenced to

House Arrest for Refusing to Reveal Source” in the Fall 2004 issue of the *Silha Bulletin*.)

Laurie White, Taricani’s wife, told the *Providence Journal* that Taricani, who had a heart transplant in 1996, had only left the house three times – twice to visit the doctor and once for an emergency visit to the dentist. White added that Taricani followed a “bland routine,” mostly exercising and reading to pass the time. “He’s read about 35 books,” she said.

On the day of his release, Taricani told the Associated Press that he fought boredom while under house arrest. “It was certainly much better than prison. But it gets to you after a while. When you lose your freedom, it’s a big deal.” However, Taricani made no apologies for refusing to identify his source, maintaining that he had done the right thing. “If reporters can’t have the opportunity to use confidential sources when they need to, we no longer have a free press.”

Before Torres sentenced Taricani to house arrest, he had found Taricani in civil contempt and levied a \$1,000 per day fine against him that eventually totaled \$85,000. On the day of Taricani’s sentencing, Joseph Bevilacqua, Jr., a defense lawyer in the corruption trial who had previously denied being Taricani’s source under oath, admitted he had given Taricani the tape but denied that he ever requested that his identity be kept confidential. Prosecutors have not yet decided whether to charge Bevilacqua for violating Torres’s gag order.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

“House arrest was certainly better than prison. But it gets to you after a while. When you lose your freedom, it’s a big deal.”

—Jim Taricani

Apple Suit, continued from page 9

Recent blogger coups, seen as taking down mainstream media, have demonstrated the increased clout that bloggers have as journalist watchdogs. (See, for example, “Panel Publishes Findings Review of CBS’ 60 Minutes’ Broadcast,” in the Fall 2004 issue of the *Silha Bulletin*, “CNN Chief Executive Undone By Blogs” on page 27 of this issue of the *Silha Bulletin*.) Blog readership is also increasing. A survey by the Pew Internet and American Life Project reports that in November 2004, 27 per cent of online adults in the United States read blogs — up from 17 per cent in February 2004.

Whether bloggers will receive the same legal protections as traditional journalists continues to be a question of growing interest, however, and the issue

is not unique to California. Many state shield laws are ambiguous when it comes to Internet journalism and blogging. One state, Maryland, has considered reshaping its shield law to make a clear inclusion for bloggers. Legislation was introduced on Feb. 11, 2005 in the Maryland House of Delegates, House Bill 1140, that would “extend the privilege against compelled disclosure of news or information sources” to those who gather or disseminate “news or information through an Internet website commonly known as a weblog . . .” (See “Federal Shield Law Introduced in 109th Congress” on page 3 of this issue of the *Silha Bulletin*.)

—KELLY J. HANSEN MAHER
SILHA FELLOW

Dan Rather, Other Staff Members Depart “60 Minutes” in Wake of Ethics Controversy

Dan Rather thanked his viewers, offered courage to tragedy victims, the military, the oppressed and fellow journalists as he said his last good night as anchor of “CBS Evening News” on March 9, 2005, 24 years after taking that chair following the departure of Walter Cronkite. Rather told *The New York Times* that he wanted to be remembered as a reporter, a role he still fulfills for CBS’s “60 Minutes” Wednesday series.

“I have my weaknesses,” he said in a CBS News Special. “I’ve made my mistakes. But the one mistake I’ve tried hard not to make is to say, OK, I know which way the wind is blowing and I’m going to tailor my reporting to fit that. Ain’t going to do it. Haven’t. Don’t. Won’t.”

In a story on the network’s Web site CBS Chief Leslie Moonves acknowledged that “CBS Evening News’s” consistent third-place ratings has encouraged the network to move forward with format changes. Additionally, the turbulence following the September 2004 airing of a “60 Minutes Wednesday” story involving documents concerning President Bush’s military service may have damaged the network’s credibility with its viewers.

That story centered on purported National Guard documents showing that Bush had dismissed an order to undergo a physical in 1972, did not fulfill his drill requirements while serving in the Texas Air National Guard, and was given other preferential treatment. Webbloggers picked up the story, questioning the authenticity of the documents, resulting in an investigation by an independent panel headed by Attorney General Dick Thornburgh and retired Associated Press Chief Louis Boccardi. Four people were fired, and one person was assigned other duties after the report was issued. (See “Panel Publishes Findings Following Review of CBS “60 Minutes Broadcast” in the Fall 2004 issue of the *Silha Bulletin*.)

Producer Mary Mapes, one of the four staff persons fired for her involvement in the flawed segment, told the *New York Observer* that she is writing a book detailing an inside account of CBS News during the memo scandal and supporting the veracity of the four memos allegedly typed by President Bush’s former National Guard squadron commander Lt. Col. Jerry Killian.

Veteran CBS News producer Kartiganer, who had worked for CBS for more than 40 years, was reassigned elsewhere within the network. On March 9, she filed a defamation lawsuit in New York’s State Supreme Court over her reassignment. She told *The New York Times* that CBS President Leslie Moonves allegedly said that she had not fulfilled her responsibilities, including reviewing unedited transcripts from interviews with several people involved in the story.

Kartiganer is also suing CBS for age discrimination related to a separate incident in May 2004 after being demoted from her post as senior producer of “60 Minutes” and replaced with someone 20 years younger.

Executive Producer Josh Howard, who was initially asked to resign with two other colleagues, finally did resign from CBS News on March 22, two months after the report from the independent panel was issued.

In late February, CBS News senior vice president Betsy West and senior broadcast producer Mary Murphy left their jobs, signing nondisclosure agreements upon their departures, according to the *New York Observer*.

—KRISTINE SMITH

SILHA RESEARCH ASSISTANT

“The one mistake I’ve tried hard not to make is to say, OK, I know which way the wind is blowing and I’m going to tailor my reporting to fit that. Ain’t going to do it. Haven’t. Don’t. Won’t.”

—Dan Rather

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INTERNET LINKS.

Libel News

Silha Center Joins Student Press Law Center in *Amicus* Brief

A University of Northern Colorado (UNC) English major has found himself in the middle of a legal battle that challenges the constitutionality of that state's criminal libel law. Thomas Mink, publisher of an online Web site containing satirical material, had his computer seized under Colorado's criminal statute, Colo. Rev. Stat. § 18-13-105 on Dec. 12, 2003 after a UNC professor complained about the material on the Web site. The American Civil Liberties Union (ACLU) and other groups are pursuing the matter in the Tenth Circuit U.S. Court of Appeals. The Silha Center, together with the Student Press Law Center, has filed an *amicus* brief in the case.

Colorado's criminal libel statute reads in part, "A person who shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel." Unlike civil libel, in which the defamed person can be awarded money for damages, criminal libel is a felony and can result in jail time if the accused is found guilty. Colorado is one of only 17 states that still has criminal libel statutes on its books, according to the Media Law Resource Center.

Mink has been operating his Web site, The Howling Pig, available online at www.geocities.com/thehowlingpig, since the fall of 2003, according to an ACLU news release. Mink told the Associated Press that the purpose of the site was to "draw attention to community issues related to [UNC]." Mink and a friend had gotten the idea for the Web site after spending an evening complaining about problems with "campus and northern Colorado politics." They decided to develop an online newsletter after considering other ideas such as vandalizing UNC's administration building. Mink told *The Denver Post* that at the time he thought, "Cool, this won't be illegal."

Mink posted two altered photographs of Monfort School of Business professor Junius Peake on the Web site, giving Peake the persona of "Junius Puke." In one of the photos, Mink added make-up similar to that of KISS guitarist Gene Simmons. The caption under the photo read that "Mr. Junius Puke" was a former KISS roadie who had made his fortune by riding "the tech bubble of the nineties like a \$20 whore" and who was taking time off "from his well-earned, corporate endowed sinecure at a small western university in order to assist in the publication of The Howling Pig."

Mink included a disclaimer which, according to the Associated Press, advised visitors to the site not to confuse Puke with Peake, whom he described as an "upstanding member of the community as well as an asset to [Monfort]." Mink wrote in a Jan. 12, 2004

column in UNC's Online Mirror that "Junius Puke was adopted as our fictional editor simply to add visual interest to the paper and to make it immediately obvious that the goal was satire and irony, since it was a pretty transparent lampoon of professor Junius Peake." That article is available online at <http://mirror.unco.edu/modules.php?name=News&file=article&sid=2277>.

In both photos, Mink electronically erased Peake's beard and part of his moustache, but left a portion under Peake's nose because that area was too difficult to modify, resulting in a resemblance to Adolf Hitler. Mink said he did not mean to connote anything by the alteration, and told the *Greeley* (Colorado) *Tribune* that he thought Peake "looked more like Oliver Hardy than Adolf Hitler."

Peake, an outspoken conservative member of UNC's faculty who has published opinion pieces with the *Greeley Tribune* and also, according to that newspaper, regularly sent "ramblings" to students and faculty via e-mail, filed a complaint on Nov. 14, 2003 with the district attorney's office. The Online Mirror reported that an affidavit filed by Peake stated that the statements about him on Mink's Web site were false and "brought him embarrassment and exposed him to public hatred, contempt and ridicule . . . and impeached his honesty, integrity, virtue, and reputation within the community." That article is available online at <http://mirror.unco.edu/modules.php?name=News&file=article&sid=2281>.

After investigating the source of the Web site, police identified Mink as its publisher and opened the case against Mink. On Dec. 12, 2003, armed with a search warrant, Greeley police went to the home Mink was sharing with his mother and confiscated their computer and its electronic files. The confiscation caused problems for both family members; the computer contained not only documents Mink needed to complete his classes for that term, but also records of his mother's embroidery business.

On Jan. 8, 2004, aided by the ACLU of Colorado, Mink filed a federal lawsuit, asking for a declaratory judgment finding the criminal libel statute unconstitutional and seeking an emergency order to block prosecution of Mink. According to an ACLU press release, the lawsuit alleges that the search of Mink's home and seizure of his computer violated his privacy and his rights against unreasonable searches and seizures as guaranteed by the Fourth Amendment. The lawsuit further requested that Mink's computer be returned to him. The ACLU's press release is available online at www.aclu.org/FreeSpeech/FreeSpeech.cfm?ID=14692&c=42.

On Jan. 9, 2004, U.S. District Judge for the District of Colorado (Denver) Lewis Babcock ordered Weld County law enforcement authorities not to prosecute

At the time Thomas Mink developed his Web site, he thought, "Cool, this won't be illegal."

Mink, continued on page 14

Mink, continued from page 13

Mink. The restraining order stopped criminal libel charges from being filed against Mink until a later hearing to determine the constitutionality of the law. Babcock also granted a temporary restraining order requiring Greeley police to return Mink's computer.

The (Denver) *Rocky Mountain News* reported that, speaking from the bench, Babcock said that satire was written even by the ancient Greeks and Romans, and that he cited a pamphlet, "Praise of Folly" in which 16th century Dutch humanist Desiderius Erasmus ridiculed church dignitaries. Stating that he had visited Mink's Web site, Babcock declared, "The articles constitute satire in the classic sense." According to the Associated Press, Babcock continued, "Even our colonists of America engaged in this type of speech, with great lust and robustness. So I'm going to sign the temporary restraining order."

But Babcock suggested that Mink read Erasmus in order to "improve his rhetoric, because as written it is crass and vulgar – but makes it no less protected by the First Amendment." Mink said that "crass and vulgar" suited his audience, consisting of college students. "That's what we're aiming for," Mink told the *Rocky Mountain News*.

On Jan. 20, 2004, after reading a packet of printouts from The Howling Pig, Weld County District Attorney Al Dominguez said that he could find nothing on Mink's Web site actionable since Peake is a public figure by virtue of his expertise in financial matters and also because he has written articles appearing in the *Greeley Tribune*, according to *The Denver Post*. This set the stage for Babcock to dismiss the lawsuit on Oct. 27, 2004, on the grounds that, since Mink was never charged under the law, he lacks standing to challenge it. But Babcock did not rule on the constitutionality of Colorado's criminal libel law.

The American Civil Liberties Union is appealing the dismissal of the lawsuit in an effort to challenge that law. The case, *Mink v. Buck*, Case no. 01-1496, will now move forward to the Tenth Circuit. In addition to naming Kenneth R. Buck, District Attorney for the 19th Judicial District, the case also

names John W. Sutters, Attorney General of Colorado, and Susan Knox, a Deputy District Attorney also with the 19th Judicial District as defendants.

Mark S. Goodman and Adam Goldstein, writing for the Student Press Law Center, and Jane E. Kirtley, writing for the Silha Center, authored the amicus brief in support of Mink and The Howling Pig. Among their arguments:

- ◆ The existence of criminal libel is antithetical to the First Amendment's guarantee of free speech and a free press.

- ◆ Criminal libel laws chill freedom of speech, especially those of the "political fringes of society . . . [who] are most vulnerable to the intimidation such laws bring."

- ◆ As "the last vestige" of seditious libel, criminal libel laws are "fundamentally and irreconcilably inconsistent" with the First Amendment. In the United States, seditious libel ended once it was seen to be a "wholly unjustifiable and much to be regretted violation of the First Amendment."

- ◆ Since 1964, sixteen states and the District of Columbia have repealed their criminal libel laws, and courts in ten other states have struck down libel statutes.

- ◆ Supreme Court rulings such as *Garrison v. Louisiana*, 379 U.S. 64 (1964) and *New York Times v. Sullivan*, 379 U.S. 254 (1964) have found that many criminal libel laws are unconstitutional.

- ◆ A standard of strict scrutiny in such cases is necessary because criminal prohibitions on speech are seen by the Supreme Court as "especially suspect."

- ◆ Criminal libel, unlike civil libel, provides no compensation for the victim and is therefore, less effective.

- ◆ Criminal libel statutes are not the least restrictive means to protect personal reputations.

The *amicus* brief is available online at <http://www.silha.umn.edu/resources.htm>.

–ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Libel News

Boston *Globe* Loses Appeal in \$2 Million Libel Suit

The Massachusetts Supreme Judicial Court decided that \$2 million in libel damages was not clearly excessive, and on Feb. 9, 2005, affirmed a jury verdict in *Ayash v. Dana-Farber Cancer Institute*, 2005 Mass. LEXIS 14 (2005), requiring *The Boston Globe* and a former reporter to pay the hefty sum. Dr. Lois J. Ayash, plaintiff in the suit, won the award after *The Globe's* refusal to reveal confidential sources resulted in default judgment against the paper on all Ayash's libel charges.

The case arose from a series of articles written by reporter Richard A. Knox, and published in *The Globe* in March of 1995. Knox's articles covered an investigation into the deaths of two patients enrolled in an experimental breast cancer treatment and study program at the Dana-Farber Cancer Institute. During the program, the two patients – one of whom was *The Globe's* former health columnist, Betsy A. Lehman – died after they had been mistakenly administered four times the correct amount of a highly toxic chemotherapy drug. Confidential sources at the Dana-Farber Institute provided Knox with personnel information supporting the Institute's disclosure that Ayash was chief of the team responsible for the overdoses. *The Globe* published an article on March 23, 1995, stating that "Five or six other doctors and nurses countersigned the mistaken order, including Dr. Lois J. Ayash, leader of the team." Although Knox admitted in his deposition that he knew within four days of the initial publication that Ayash did not countersign the overdose orders, *The Globe* did not publish a correction until June 4, 1995. Ayash commenced a lawsuit in the Superior Court of Massachusetts, Suffolk County, naming the Dana-Farber Cancer Institute, then physician-in-chief Dr. David M. Livingston, *The Boston Globe*, and Knox as defendants. Ayash asserted in her complaint that the Dana-Farber and Livingston intentionally "scapegoated" her, and that Knox and *The Boston Globe* "improperly spotlighted" her role in the deaths in order to publicly censure her. Ayash stated claims against Dana-Farber for invasion of privacy, breach of the implied covenant of good faith, and unlawful retaliation, and against Livingston for intentional interference with contractual relations. Ayash stated claims against *The Globe* for libel and defamation, and against Knox for intentional interference of contractual relations and negligent infliction of emotional distress.

Throughout the discovery phases of the litigation, Ayash had sought the identity of Knox's confidential sources. Both Knox and *The Boston Globe* refused to obey court orders requiring them to reveal the identities the sources, and, as a result, the superior court issued an order holding them in contempt of court. On Feb. 26, 1999, the Appeals Court of Massachusetts, however, vacated both the orders to disclose and the judgment of contempt. The appeals court reasoned that *The Globe* had made "some showing" that disclosing Knox's sources would present a danger to the free flow of information. The appellate court then remanded the issue back to the superior court, directing the trial court to weigh Ayash's need for the information against the public's interest in free flow of information.

On remand, the superior court allowed Ayash to renew her motions to compel disclosure of the sources after determining that her need for the information was "tangible and substantial" outweighing the public's interest in the protection of the free flow of information. When *The Globe* again refused to comply with the court's orders to disclose, the court made use of a different sanctioning option under the Massachusetts Rules of Civil Procedure, Mass. R. Civ. P. 37(b)(2). Instead of holding the paper and Knox in contempt, the court ordered a default judgment against them on April 4, 2001, entering a judgment of liability in favor of Ayash for all her claims against them.

The entry of default judgment precluded *The Globe* from defending against any of Ayash's libel claims, leaving the jury to assess damages. The jury awarded Ayash a total of \$1,680,000 against *The Globe* – \$240,000 for economic damages and \$1,440,000 for emotional distress damages. Against Knox, the jury awarded Ayash a total of \$420,000 – \$60,000 for economic damages and \$360,000 for emotional distress.

On appeal to the state's highest court, the default judgment was upheld, and the jury award was affirmed. Writing for a unanimous court, Justice John M. Greaney wrote that the superior court's order of default judgment was properly within the court's discretion. The high court further explained it would set aside the jury determination only upon a finding that the damages are "clearly excessive in relation to what the plaintiff's evidence has demonstrated damages to be." In a successful Massachusetts defamation case, the plaintiff is entitled only to actual damages – including emotional distress, harm to reputation, and any special damages. The high court found that the jury had properly calculated its award.

"Although the damages awarded the plaintiff for the defaulted claims against *The Globe* defendants may appear high," Greaney wrote, "they were based on evidence that *The Globe* articles impugning the plaintiff affected her career and caused her a great deal of emotional and psychological anguish." Greaney noted that Ayash was independently able to confirm her pain and suffering at trial, and held that there was no basis on which to overturn the jury's awards as excessive.

The Supreme Judicial Court, however, overturned the jury decision finding Dana-Farber liable on all counts and requiring the institute to pay Ayash a like total of \$1.25 million. Unlike *The Globe*, Dana-Farber was able to appeal the merits of the judgment, and the high court reversed liability on the privacy and breach of contract claims. Since the court held that the only viable charge against Dana-Farber was for unlawful retaliation, it ordered the issue back into the hands of a new jury to reassess the proper damages.

—KELLY J. HANSEN MAHER
SILHA FELLOW

"Although the damages awarded the plaintiff may appear high, they were based on evidence that the *Globe* articles impugning the plaintiff affected her career and caused her a great deal of emotional and psychological anguish."

—Justice
John M. Greaney

Libel News

Public Official Status Does Not Apply In *Boston Phoenix* Libel Case

“There is a tension in libel cases, and the tension is crystallized in the skepticism many people have about the media.”

—Stephen Cullen,
Attorney
for Plaintiff

On Dec. 17, 2004, a jury in a Massachusetts U.S. District Court awarded a former Maryland prosecutor, Marc E. Mandel, \$950,000 in a libel suit against the weekly publication *The Boston Phoenix* for an article that suggested Mandel was a child molester. The large judgment against the paper came after a judge determined that, although Mandel was a state prosecutor, he was not a public official for purposes of defamation.

The case, *Mandel v. The Boston Phoenix Inc.*, Civil Action No. 03-10687-EHF, stemmed from an article entitled “Children at Risk” that appeared in the January 9-16, 2003 issue of *The Phoenix*. The article described allegations that arose in Mandel’s custody and divorce litigation that depicted Mandel as having sexually abused his children. The Massachusetts jury, however, found that *The Phoenix* had negligently published false facts about Mandel.

Mandel was a Baltimore County state attorney at the time the article was published, but his Maryland position did not create “public figure” or “public official” status for determining the proper burden of proof in this case. In a Memorandum and Order dated June 9, 2004, Judge Edward F. Harrington ruled that Mandel was not a “public official” by virtue of his job, but was instead a “private individual” for defamation purposes. Harrington applied a three-pronged test from the First Circuit (see *Kassel v. Gannett Co.*, 875 F.2d 935, 939 (1st Cir. 1989)) and held that since Mandel did not serve as policy maker, administrator, or supervisor, did not have access to the press as a means of defending himself, and had not assumed the risk of diminished privacy by becoming a government employee, he was not a “public official” under First Amendment jurisprudence.

Harrington’s determination greatly shaped issues that resulted in the jury’s Dec. 17, 2004 decision. If the judge had determined that Mandel was a public official, the jury would have had to find that *The Phoenix* published defamatory statements about Mandel with actual malice in order to award Mandel damages, according to standards set forth in *New*

York Times v. Sullivan, 376 U.S. 254, 279-80 (1974). Under an actual malice burden, Mandel would have to prove that *The Phoenix* published statements with knowledge that they were false, or with reckless disregard for their truth. Instead, as a private citizen, Mandel had a much lower burden of proof; the jury had to answer whether *The Phoenix* acted with negligence in publishing statements that were false.

The January 2003 article was written by *Phoenix* staff writer Kristen Lombardi, who was also named as a defendant in the suit. Lombardi’s article attempted to expose failures in family courts in dealing with allegations of child abuse. The jury found that Lombardi had defamed Mandel by titling a subsection profiling Mandel as: “Losing custody to a child molester.” The jury also found that Mandel had been defamed by false portions of the article stating that he “had assaulted” a daughter from his first marriage, and that he was a “man who Baltimore, Maryland child protection workers believe is a child molester.” Mandel has consistently denied allegations that he sexually abused his children. Mandel filed the Massachusetts lawsuit in April 2003 claiming personal humiliation and harm to his career and reputation. He left his job at the state attorney’s office in August 2003.

Mistrust of the media can play a part in high jury verdicts like Mandel’s. A few weeks after the verdict, Mandel’s attorney Stephen Cullen commented to *The Boston Globe* that “there is an undercurrent of suspicion” underlying libel cases. “There is a tension in these cases,” he said, “and the tension is crystallized in the skepticism many people have about the media.”

Following the verdict, Dan Gleason, attorney for *The Boston Phoenix*, told *The Globe* that he did not believe the jury’s verdict was “consistent with the evidence,” suggesting that there may be evidence in support of Lombardi that the jury overlooked. *The Boston Phoenix* indicated it would appeal.

—KELLY J. HANSEN MAHER
SILHA FELLOW

Libel News

Minnesota Weekly Will Appeal Libel Decision

The jury in a libel case involving a small Minnesota weekly newspaper has decided that the *Chanhassen Villager* and its previous editor Eric Serrano must pay former Chairperson for the (Minn.) Carver County Board of Commissioners Tom Workman \$665,000 for statements contained in one of Serrano's editorials. The *Villager* has said that it will appeal the decision.

Workman, who was a State Representative for the Chanhassen area from 1991 to 2003 before beginning his term with the Board of Commissioners that same year, brought suit against the *Chanhassen Villager* following publication of the Jan. 16, 2003 editorial entitled "The Right Foot." Four articles were mentioned in the original complaint, but Workman's attorney Julianne Ortman told Minneapolis' *City Pages* newspaper that there were "hundreds" of others that were libelous.

Two passages in Serrano's editorial were at the center of the trial. One of them was the following sentence: "We won't go so far as some residents in wondering whether [Workman's firing of County Administrator Dick Stolz] was rooted in some ancient grudge between county officials and [Workman] (the latter was sued by the former a few years back, and lost) – we like to think our elected officials are above such petty motives."

That statement was found to be false in part because Workman himself had never been sued by the county. Complicating matters further, a letter to the editor on the same page as Serrano's editorial allegedly contained a more accurate account of the suit between Workman and county officials. On January 30, the newspaper printed a retraction, stating, "Contrary to what the editorial stated, the county was involved in legal proceedings against AW Disposal, *not* (emphasis in the original) Workman . . . Workman was employed as AW Disposal's general manager at the time, but was not an owner of the company. Furthermore – and also contrary to what the editorial stated – neither Workman nor AW Disposal lost any court action brought by the county."

The retraction concluded: "For the errors, and any distress they may have caused Mr. Workman, the *Villager* apologizes." Despite the retraction, *City Pages* reported that Workman still considered the editorial libelous because the *Villager* did not retract Serrano's statements regarding the alleged grudge Workman held for Stolz. Ortman told *City Pages* that the retractions also did not go far enough to remedy the harm that the accusation had done to her client's reputation.

Mark Anfinson, who has advised the *Villager* and other local newspapers, called Serrano's statement about the lawsuit a "simple mistake," telling *City Pages*, "If [Serrano] was out to harm Tom Workman by publishing a lie, would he pick something as innocuous as that he was sued and lost?"

Another issue with the editorial centered on Serrano's implication that Workman's alleged grudge against Stolz had led Workman to violate Minnesota's Open Meeting Law, Minn. Stat. §13D.01 et seq., enabling him to sway the rest of the board to oust Stolz. "What we do worry about," Serrano wrote, "is the manner in which the decision was made and whether or not it will become the common

practice of this [board] to reach consensus after discussing public business one-on-one out of the purview of the public. . . . What is the difference between two commissioners discussing county business and one of those parties discussing the same business with another commissioner at a later date, and yet another commissioner days – if not hours – after that? In our mind there's not much. . . . If [Workman] has a plan for the future of this county, better to expose it to the light of public discourse where it can be shaped with the assistance of those it will affect the most – the general public – than to give the plan an air of scheme and self-service."

But during the trial, in emotional testimony, Workman's wife testified that Serrano's allegations estranged her husband from neighbors, friends and family, according to a posting by WCCO.com, available online at http://wcco.com/localnews/local_story_354175530.html. "Your paper tried to destroy him," she told the *Villager's* attorney, Paul Hannah.

As evidence of further damage to his reputation, Workman's attorney, Julianne Ortman, said that Workman received nearly 80 per cent of the vote in a primary before Serrano's editorial was printed, but less than 50 per cent of the vote in the election that followed. But WCCO also reported that both Workman and his attorney are so popular in the region that the *Villager* tried to get the trial moved to another county.

Anfinson said in an interview with the *Bulletin* that he thought the newspaper lost the case not only because of Workman's wife's testimony, but also because of the testimony by an expert witness for the plaintiff, Mike Cowling, a professor of journalism at the University of Wisconsin at Oshkosh. According to Hannah, Cowling testified that "acceptable journalistic practices" had not been followed by Serrano when writing the editorial and that "a good journalist would have done it differently." Furthermore, Serrano himself said in a deposition prior to the trial that he might have seen another reporter's file concerning Workman that contained the correct information. But when Serrano took the stand, he told the court that he had reconsidered his position and had never seen such a file. Put together, these factors may have influenced the jury to find that Serrano had published the editorial knowing it contained false information; therefore an actual malice standard applied.

The jury awarded Workman \$225,000 in past compensatory damages and \$200,000 in future compensatory damages. The jury further determined that the Chanhassen Villager and its parent company, Southwest Suburban Publishing, should be assessed \$200,000 in punitive damages, and Serrano \$500.

Hannah said in an interview with the *Bulletin* that he believed the jury awarded such large amounts because they "personalized" the incident, meaning that they thought about the implications of the alleged libelous passages on their own reputations, or on the reputations of their loved ones. In addition, Hannah commented that the members of the jury were very young. Citing a recent survey by the University of Connecticut and the John S.

"This type of decision encourages more elected officials to go after local papers that criticize them."

–David Heller,
Media Law
Resource Center

Villager, continued on page 18

Libel News

Dismissed U.K. Libel Suit Could Strengthen Media Protections

An English high court has overruled a libel verdict against an American Web publisher, finding that it was improper for the case to continue because only five people in the United Kingdom had read it online. On Feb. 3, 2005, the Court of Appeal (Civ. Div.) found that Yousef Jameel, a Saudi businessman, could not prove that a Wall Street Journal Online article had caused him substantial harm and dismissed the case without addressing whether it was proper for Jameel to sue in the U.K. rather than a U.S. court, where the article had been uploaded.

The case, *Jameel v. Dow Jones & Co, Inc.*, [2005] EWCA CIV 75, [2005] All ER (D) 43 (Feb), was brought against Dow Jones & Co. Inc., publisher of the *Wall Street Journal* and the Wall Street Journal Online, for an article published online. Lord Phillips, writing for the court, found “that it would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and possibly jury time, to an action where so little is now seen to be at stake.”

Jameel had originally sued after the Wall Street Journal Online published an article online that contained a link to a document showing that Jameel had contributed or been approached to contribute money to the terrorist organization al-Qaeda. The article, entitled “WAR ON TERROR, List of Early al Qaeda Donors Points to Saudi Elite, Charities,” had been posted on www.wsj.com on Mar. 18, 2003, and was archived shortly thereafter but remained available until July 2003 when it was removed altogether. The article included a link to a document that had been recovered from a terrorist group in Bosnia. That document showed what was called “the Golden Chain”: a list of twenty names

“It would not be right to permit this action to proceed. It would be an abuse of process to continue to commit the resources of the English court, including substantial judge and jury time, to an action where so little is now seen to be at stake.”

—Lord Phillips

of prominent Saudi individuals who had either contributed or been approached to contribute money to al-Qaeda in 1988 when the group was fighting against the invasion of Afghanistan by the Soviet Union.

Jameel’s lawyers elected to sue in the United Kingdom where libel laws make it easier for defamation plaintiffs to prevail because of a lesser burden of proof. Speaking to the court, James Price, Jameel’s lawyer, acknowledged that “we obviously face a somewhat tougher legal regime in the United States” and also noted that Jameel was better known in the United Kingdom.

In deciding the case, the court considered how many people had accessed the online article in the United Kingdom. The court said that the Wall Street Journal Online, which allows only subscribers access to its articles, had about 6,000 subscribers in the United Kingdom. However, technical research by Dow Jones showed that only five subscribers had actually accessed the article and, presumably, seen Jameel’s name on the list of al-Qaeda contributors. In addition, Dow Jones informed the court that three of those five who had accessed the article were associated with Jameel. They were Andrew Stephenson, one of Jameel’s lawyers; Edward McCabe, director of a company associated with Jameel; and Jonathan Edwards, a consultant who worked for Jameel for seventeen years. The other two subscribers’ identities were not released for privacy reasons; however, neither had any knowledge of or connection to Jameel. In essence, the court ruled that without a “substantial” publication in England, there was no damage to Jameel’s reputation and no way for him to collect damages.

Phillips also rejected the argument that an injunction against Dow Jones would provide an adequate remedy

UK Libel, continued on page 24

Villager, continued from page 17

and James L. Knight Foundation that found that many high school students believe the press has too much freedom, Hannah said he wonders if the members of the jury shared that conception. (See “Survey Reveals That Some High School Students Think Press Has ‘Too Much Freedom’” on page 41 of this issue of the *Silha Bulletin*.)

David Heller, staff attorney at the Media Law Resource Center in New York, told *City Pages* that this type of decision sets a dangerous precedent. “Local community papers are able to go in-depth about local politics in a way larger papers can’t. This [type of decision] encourages more elected officials to go after local papers that criticize them.”

Heller further told *City Pages* that Serrano’s editorial doesn’t carry any defamatory “sting,” and there is no proof of reckless disregard. “[The jury] used the fact that the newspaper had endorsed [Workman’s] opponent as evidence that the paper was against him,” Heller told *City Pages*. “It’s ridiculous that they would use the endorsement as proof of malice.”

Anfinson told *City Pages* that the lawsuit was not really about the Serrano editorial, but instead about politics,

explaining that Workman believes there is a long history of negative coverage of him by the *Villager*. “Damages are supposed to be about harm to reputation,” Anfinson told *City Pages*. “Workman still won the election in a landslide.”

The *Villager* has already filed post trial motions with First Judicial District Judge John S. Connolly, who denied each of them on March 3 in *Workman v. Serrano*, District Court, First Judicial District, CV-03-579. Anfinson told the *Silha Bulletin* that local attorneys for the newspaper are now preparing an appeal.

Even if the *Villager* does not win the appeal, it is likely that the amount the newspaper will have to pay Workman will be reduced. Eric Robinson, a staff attorney for the Media Law Resource Center, told the Associated Press that since 1980 nearly half of such awards have been greatly reduced. The median final outcome for public officials and public figures is \$87,500 as opposed to initial awards of \$380,000, according to Robinson.

—ELAINE HARGROVE

SILHA FELLOW AND BULLETIN EDITOR

Libel News

Certiorari Denied in Neutral Reportage Case

The U.S. Supreme Court declined to review the Pennsylvania Supreme Court's October 2004 decision in *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004), which held that a newspaper cannot be shielded from defamation when it accurately reports on a public official's defamatory statements about another public official.

Norton v. Glenn arose from a news article in the West Chester *Daily Local News* that described infighting among two members of the Parkesburg Borough Council. (See "In Pennsylvania, No 'Neutral Report' Privilege Recognized" in the Fall 2004 *Silha Bulletin*.) The news article accurately reported on accusations of homosexual activity and child molestation that one council member made against another in written comments to the council. Asserting that the slurs were false and damaging to his reputation, the council member targeted by the accusations then sued the paper, its owners, and the author of the article for defamation. Although the newspaper defendants maintained that they were

protected by a "neutral reportage privilege," which should provide immunity from defamation suits for all accurate reports of public proceedings, the Pennsylvania Supreme Court unanimously ruled that neither Pennsylvania nor the U.S. Supreme Court recognizes such a privilege.

Pennsylvania reasoned that the Supreme Court has never declared, "that the media, because of their special role in our democracy, enjoy a blanket immunity from suit . . ."

In order to recognize a "neutral reportage privilege," Pennsylvania's high court indicated it would need clear indication from the U.S. Supreme Court that the First Amendment creates such a privilege. The newspaper petitioned the Supreme Court for review, and several national press organizations urged the Court to hear the case, but on March 28, the Supreme Court denied the petition without comment. See *Troy Publ'g Co. v. Norton*, 2005 U.S. LEXIS 2911 (2005).

—KELLY J. HANSEN MAHER
SILHA FELLOW

In order to recognize a "neutral reportage privilege," Pennsylvania's high court indicated it would need a clear indication from the U.S. Supreme Court that the First Amendment creates such a privilege.

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Access to Courts

Army Rules That Proceeding Must Be Open to Public, Press

U.S. Army Court of Criminal Appeals Judge Kenneth Clevenger has ruled that a hearing investigating the death of an Iraqi general during interrogation must remain open to the public. Clevenger's Feb. 23, 2005 ruling cited an earlier army superior court ruling that provides a method for witnesses to give testimony involving classified information while still maintaining public access to the majority of the proceedings.

The Article 32 hearing, the military equivalent to a civilian preliminary hearing, was part of an investigation into the death of Major General Abed Hamed Mowhoush, an Iraqi air force commander who, according to *The Denver Post*, was the head of Saddam Hussein's air-defense forces and was suspected of financing attacks against U.S. forces in Western Iraq. He was captured by Fort Carson's 3rd Armored Cavalry Regiment during a raid in Qaim in November 2003.

Mowhoush reportedly died of asphyxiation from chest compression during an interrogation in Qaim, Iraq on Nov. 26, 2003. But the *Rocky Mountain News* reported that Army investigative documents stated that two warrant officers allegedly placed Mowhoush in a sleeping bag and then tied it to prevent him from moving. One of the warrant officers sat on his chest, then turned him over and sat on his back. It was during this interrogation episode that Mowhoush reportedly died.

Chief Warrant Officers Jefferson Williams and Lewis Welshofer, Jr., Sgt. 1st Class William Sommer and Spc. Jerry Loper are charged with murder and dereliction of duty. All four soldiers were assigned to the 3rd Armored Cavalry Regiment at Ft. Carson at the time of Mowhoush's murder. According to the Associated Press, Williams, Welshofer and Sommer are with military intelligence. The results of the hearing will determine if the four soldiers will have to face a court martial. If convicted, the soldiers may be sentenced to life in prison without a chance for parole.

The hearing was underway when Investigating Officer Captain Robert Ayers decided to close the entire proceeding to the public. Ayers read the soldiers their rights and listed the witnesses he expected would be called in the course of the proceeding, then announced the hearing would be closed. "The disclosure [of testimony] would cause serious damage to national security . . . and the safety of those involved," Ayers told those present, according to *The Denver Post*. He then cleared the room of spectators, including the media and the families of the soldiers.

The Denver Post filed a motion to stop the proceedings with the Army Court of Criminal Appeals in Alexandria, Va. on December 3, which the appeals court granted the same day. On December 4, the Army Appeals Court ordered Ayers to show why the Article 32 hearing should

be closed, giving him ten days to respond. *The Denver Post* then had seven days to respond, after which the Army Appeals Court would make a decision on the matter.

Steve Zansberg, *The Denver Post's* attorney, told *Rocky Mountain News* that Ayers should close only those portions of the hearings that deal with classified information and leave the rest of the hearing open to the public. But Ayers had said that "It would be difficult, if not impossible, to separate classified information from nonclassified information."

The Reporters Committee for Freedom of the Press (RCFP) filed an *amicus* brief in the case, arguing that even courts of military justice have a tradition of openness, based on U.S. Supreme Court precedents. The RCFP further cited the Army's own rulings on the matter, including *United States v. Anderson*, 46 M.J. 728 (A.C.C.A. 1997), quoting, "One aspect of the nature of an open trial forum is to ensure that testimony is subjected to public scrutiny and is thus more likely to be truthful or to be exposed as fraudulent." The RCFP further cited *United States v. Hood*, ARMY 9401841, (A.C.C.A. Feb. 20, 1996), stating, "[p]ublic scrutiny of the courts-martial reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process."

The RCFP further cited a four-part "stringent test" for closure of proceedings, taken from *United States v. Hershey*, 20 M.J. 433 (C.M.A. 1985): "[The] party seeking closure must advance an overriding interest that is likely to be prejudiced; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable alternatives to closure; and it must make adequate findings supporting the closure to aid in review." The RCFP argued, among other things, that the closure was not "narrowly tailored," advocating for the decision to keep portions of testimony secret on a witness-by-witness basis. The RCFP's *amicus* brief is available online at <http://rcfp.org/news/documents/20050216-amicusbrie.html>.

In his opinion dated February 23, Clevenger ruled that Ayers' decision to "completely close the evidence taking proceedings was unlawful," characterizing it as a "usurpation of authority." Ayers was ordered to release a copy of the classified transcript as well as the classified Criminal Investigation Division Command report of the investigation over to *The Denver Post*.

Clevenger cited *ABC, Inc. v. Powell*, 47 M.J. 363 (C.A.A.F. 1997) which held that "absent 'cause shown that outweighs the value of openness,' the military accused is . . . entitled to a public Article 32 investigative hearing." In such a public hearing, Clevenger continued, the press has the same right as the accused to attend the proceedings and may complain if denied access.

As for the problem of revealing classified information, Clevenger relied on the ruling in *United States v. Grunden*, 2 M.J. 116 (C.M.A. 1997) which requires the Investigating Officer to analyze witnesses' "expected testimony" and determine how it might touch on classified information. Then (quoting Powell), on a

"Public scrutiny of the courts-martial reduces the chance of arbitrary or capricious decisions and enhances public confidence in the court-martial process."

—*Amicus* Brief,
Reporters
Committee For
Freedom of the
Press

Denver Post, continued on page 22

Access to Courts

Mississippi Supreme Court Affirms Camera Access Rights

The Mississippi Supreme Court has ruled that before banning TV cameras from their courtrooms, judges must determine that the accused's right to a fair trial would be violated. The 5 to 3 opinion, *Re: WLBT, Inc.*, 2005 Miss. LEXIS 39 (2005), issued on Jan. 20, 2005, held that restrictions on television cameras are comparable to complete closure of courtrooms. The opinion developed broad initial case law interpreting Mississippi's new court access rules for cameras.

The case arose when television station WLBT-TV gave timely notification of its intent to cover sentencing proceedings before the Circuit Court of Madison County. Defendant David H. Richardson had entered a guilty plea on conspiracy charges, and his sentencing was scheduled for Dec. 1, 2004. The station's request to cover the proceeding conformed to the Mississippi Rules for Electronic and Photographic Coverage of Judicial Proceedings (MREPC), which governs camera coverage of court proceedings. The station was notified by the circuit court's administrator, however, that its request had been denied.

Circuit Judge Marcus Gordon explained that he denied the station's request because he was concerned that the television coverage of Richardson's sentencing hearing might affect the fair trial of James Butler, a separate defendant charged with conspiracy in a companion case. Gordon indicated that he was not concerned that the coverage would impact the dignity of the proceedings or harm courtroom decorum.

Only days before the sentencing hearing, the station appealed the denial to the Mississippi Supreme Court. The state's high court remanded the case back to the circuit court with instructions to either approve the station's request or issue a formal order denying the request with express reasons for the denial. The circuit court complied with the high court's instructions by formally denying the request. WLBT-TV then filed an emergency writ of mandamus with the state's highest court, seeking an order to compel the circuit court to allow its cameras at the December 1 hearing. Due to the time constraints, the state supreme court issued an order without opinion on November 29, to allow the station camera access to the hearing, with the WLBT opinion explaining the high court's rationale following in January.

In weighing WLBT's interests against the lower court's expressed concerns for Butler, the supreme court balanced "the paramount concern" for a fair trial against the fundamental right, of both the public and the accused, to have open judicial proceedings. Although Gordon's order denying WLBT's request for cameras in the courtroom would not have completely closed the hearing to the media, Justice William L. Waller, Jr., writing for the majority, held that barring television cameras was nevertheless a restriction on the public's access to the proceedings. The court announced that judicial orders that exclude courtroom cameras would be held to the same legal standard as judicial orders that completely close proceedings.

Waller explained that an order excluding courtroom cameras could only stand if the exclusion was a last resort. Citing an earlier ruling in *Gannett River States Publ'g Co.*

v. Hand, 571 So.2d 941 (Miss. 1990), the court held that, just as with orders completely closing access courtrooms, cameras could be excluded only after less restrictive means had been considered and found inadequate to address the threatened harm. The holding amounts to a rebuttable presumption in favor of allowing cameras.

Holding judicially-imposed camera restrictions to this rigorous standard, Waller wrote, is the dominant purpose of the MREPC. The rules, Waller explained, envision allowing limitations or terminations on camera coverage only when real and substantial rights are at risk. The court concluded that Gordon's articulated concerns – that the coverage of Richardson's hearing "may" affect Butler's companion case – did not reflect a "substantial probability" that the accused would be deprived of a fair trial.

Waller noted that "each case must be judged according to its own merits and the privilege of using electronic technology in the courts is not absolute." In WLBT, however, the court found that Gordon had "failed to articulate sufficient reasons to deny television coverage."

Three justices dissented in the decision, calling for improvements to the process by which the court would apply the MREPC. Justice Kay Cobb's dissent departed from the majority's characterization of restriction on cameras as a restriction on public access to the proceedings. "Although it may restrict the convenience of the public being able to 'access the proceedings' in the comfort of its homes," Cobb wrote, "that is certainly not the same." Cobb then chastised the majority for neglecting to address Gordon's primary concern about fairness in Butler's related case. Cobb wrote that the court should not read the MREPC rules so narrowly as to exclude consideration of rights of parties in related cases. Cobb argued that the court's interpretation of the rules went too far in favor of fettering judicial authority, "almost to the point where it appears we only give 'lip service' to the authority of the presiding justice or judge."

The WLBT ruling echoes the tone expressed in the high court's permanent adoption of the MREPC governing media coverage of courtroom proceedings. The high court initially approved the MREPC for trial-basis in April 2003. In December 2004, the supreme court permanently adopted the rules, amending them to expand the number of cameras allowed in the courtroom. Originally, the rules allowed only one "pool" camera to feed coverage to the media, but the amended rules permit any number of cameras in the courtroom, so long as they do not disturb courtroom proceedings. The rules govern the use of courtroom cameras only in the state supreme court, the court of appeals, the chancery, county and circuit courts. Cameras remain barred from the state's municipal and justice courts. The MREPC, according to the Mississippi Supreme Court, put Mississippi "in accord with states which have elected to allow coverage of court proceedings by the use of still cameras, television, and other electronic technology."

—KELLY J. HANSEN MAHER
SILHA FELLOW

The court announced that judicial orders that exclude courtroom cameras would be held to the same legal standard as judicial orders that completely close proceedings.

“case-by-case, witness-by-witness, and circumstance-by-circumstance” basis can the decision be made to close portions of the proceedings to the public, a practice labeled in Grunden as a “bifurcated presentation of a given witness’ testimony.” In addition, witnesses can be instructed not to divulge classified information during their testimony. If classified information is revealed, the written record of that portion of the proceedings can be sealed. Furthermore, a security specialist can be present at the hearing and cut off any witness’ testimony should it seem to contain classified information.

A February 25 editorial in *The Denver Post* read, “Fortunately, the Army’s appeals court upheld the service’s proud legal traditions, safeguarding constitutional rights and the rights of our armed forces personnel.”

The Mowhoush case was not the first time that *The Denver Post* and Fort Carson authorities have clashed. On Dec. 5, 2004, *The Denver Post* published a story about the problems National Guard and Reserve soldiers face when trying to obtain medical care upon their return from Iraq and Afghanistan, claiming that the care those soldiers receive is often

substandard to that given to soldiers who are of regular or active status. National Guard and Reserve soldiers often have to wait longer for treatment, are delayed getting home to their families while waiting for treatment, and at times do not receive the disability pay they are owed, *The Denver Post* reported. On December 8, Army officials “suspended relations” with *The Denver Post* “as a direct result of Fort Carson not being given fair and balanced treatment,” according to a statement issued by Lt. Col. David Johnson, Fort Carson’s chief public affairs officer. The newspaper was barred from receiving official statements from the base as well as eliminated from an e-mail list used to send out invitations to upcoming events. Other local news organizations, however, were still informed of events on base.

But on December 9, Fort Carson lifted the restrictions after speaking with *Denver Post*’s editor Greg Moore. “This was never about impeding the First Amendment,” Johnson told *The Denver Post*. “This was about us not being able to tell our side of the story.”

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

*photo of blonde woman talking with
person with back to viewer*

FBI Program Manager and Senior Computer Forensic Examiner Mary Horvath speaks to an audience member at “The Constitution, Digital Media and Expectations of Privacy,” the Silha Center’s Spring 2005 Forum. For a complete story about the forum, turn to page 43 of this issue of the *Silha Bulletin*.

Access to Government

CIA Ordered to Release Detainees' Treatment Records

On Feb. 2, 2005, U.S. District Court Judge Alvin K. Hellerstein (S.D.N.Y.) ruled that the Central Intelligence Agency (CIA) must release records containing information relating to the treatment or death of detainees while held in United States custody. Additionally, Hellerstein ruled that similar records concerning detainees whom the United States turned over to countries known to employ torture must also be released.

The American Civil Liberties Union (ACLU) had filed a Freedom of Information Act (FOIA), 5 U.S.C. § 552, request for those records relating to detainees held by the CIA in the wake of the Sept. 11, 2001 terrorist attacks. The CIA had argued in its court brief that the documents were exempt from release because they related to an ongoing "criminal investigation of allegations of impropriety in Iraq" and because the records sought by the ACLU were exempt from public disclosure under the CIA Information Act, 50 U.S.C. § 431, as "operational files." Hellerstein disagreed with the CIA's arguments, however, and issued an opinion and order requiring that the records be released in the case, *American Civil Liberties Union v. Dept. of Defense*, 351 F.Supp.2d 265 (S.D.N.Y. 2005).

The ACLU had originally asked the CIA for the records in an October 2003 FOIA request. Citing the CIA Information Act, the CIA claimed the records were exempt from public disclosure. The CIA Information Act, enacted by Congress in 1984, allows the director of the CIA to exempt CIA records from release under FOIA when they are determined to be "operational files." "Operational files" are defined in the CIA Information Act as files that "document the conduct of foreign intelligence or counterintelligence operations," "document the means by which foreign intelligence or counterintelligence is collected through scientific and technical systems," or "document investigations conducted to determine the suitability of potential foreign intelligence or counterintelligence sources."

However, the Act also provides an exception, allowing operational files to be released when they are part of a search of records relating to investigations of improper or illegal conduct undertaken by "congressional intelligence committees, the Intelligence Oversight Board, the Department of Justice, the Office of General Counsel of the [CIA], the Office of Inspector General of the [CIA], or the Office of the Director of National Intelligence . . ." In this case, the ACLU argued that since the Office of Inspector General had begun investigating CIA actions in Iraq relating to the treatment of detainees, all of the records in the investigation, including operational files, should be available for public release.

In ruling against the CIA, Hellerstein's opinion noted that the CIA Information Act was meant to be compatible with the general spirit of full agency disclosure embodied in FOIA and was passed by Congress for two reasons. "First, the Act was intended to curb wasteful searches of material that was likely ultimately to be withheld; second, the Act was intended to expedite searches that Congress deemed more productive."

Hellerstein, quoting from a 1983 Senate Report on the CIA Information Act, found that the Act's exception allowing the disclosure of operational files satisfies "the comparable public interest in investigations of allegedly illegal or improper intelligence activities." Hellerstein also rejected the CIA's contention that the investigation must have concluded before operational files relevant to that investigation can be disclosed. Instead, Hellerstein found that the language and legislative history of the CIA Information Act meant that unless the CIA could claim a specific exemption under FOIA, once operational files are released as part of an investigation, they become public records. Declining to give the agency more time to consider its next move, on February 18 Hellerstein denied the CIA's request to stay his order while it considered whether to appeal.

Treatment of detainees in United States custody became a contentious issue after the exposure of abuses at the Abu Ghraib prison. (See "The Media and Photos from Abu Ghraib Prison" in the Spring 2004 issue of the *Silha Bulletin*.) Additionally, Alberto Gonzales, recently appointed as Attorney General, faced harsh questions during his nomination hearings for his role in drafting a Bush Administration memorandum suggesting that the United States could legally torture detainees. During the congressional hearings, Gonzales said that he would seek to ensure that detainees are no longer tortured.

On the day of Hellerstein's ruling, Sen. Patrick Leahy (D-Vt.) criticized the shifting policies of the Bush Administration on treatment of detainees. "Somewhere in the upper reaches of this Administration, a process was set in motion that rolled forward until it produced scandalous results," he said. "We may never know the full story, because the Administration has circled the wagons and stonewalled on requests for information. What little we know we owe to leaks, to the initiative of the press, to international human rights organizations, and to a few internal Defense Department investigations, and to Freedom of Information Act litigation."

Jameel Jaffer, an ACLU lawyer, told the Associated Press that CIA records should be released because of the possibility that the CIA had participated in the torture and mistreatment of detainees. "What we want is to get this information into the public domain as quickly as possible," he said. "I'm hopeful that just bringing some of this activity to light will convince the government to change its policies." Jaffer also said that the FBI has already provided documents showing that Department of Defense employees participated in the torture of detainees at Guantanamo Bay in Cuba, and said that the Department of Defense has continued to refuse requests by the ACLU to release any documents it might have on detainee abuse.

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"We may never know the full story, because the Administration has circled the wagons and stonewalled on requests for information. What little we know we owe to leaks, to the initiative of the press, to international human rights organizations, and to a few internal Defense Department investigations, and to Freedom of Information Act litigation."

—Sen. Patrick Leahy

for Jameel. “In these circumstances, if this litigation were to proceed and to culminate in judgment for the claimant, it seems to us unlikely that the court would be able, or prepared, to formulate and impose an injunction against repetition of the defamation in terms that would be of value to the claimant. We do not believe that a desire for this remedy has been what this action has been about, or that the possibility of obtaining an injunction justifies permitting this action to proceed.”

Stephenson told *The (London) Guardian* that Jameel will review the case before deciding whether or not to sue in another country.

The *Jameel* case may have toughened the traditional standard for plaintiffs in English libel law, requiring them to show something more than minimal harm. The court in *Jameel* also signaled potentially more favorable legal standards for news media defending against international defamation claims by choosing not to follow the reasoning of a previous libel case brought against Dow Jones in Australia.

The earlier Dow Jones case, *Dow Jones & Co. Inc. v. Gutnick* (2002) HCA 56, was brought in Australia in 2001 by mining magnate Joe Gutnick. Gutnick had sought damages for an online article in *Barron's* magazine, published by Dow Jones. Gutnick, who filed the case in his home town in Australia, claimed that the article showed him in a false light when it suggested he had ties to criminal organizations. Dow Jones attempted to have the case dismissed, arguing that the proper venue for the case was in the United States, since the article was uploaded in New Jersey and only nine people in Australia had accessed it.

However, Gutnick argued that he had a right to bring the case anywhere the article was available – including Australia. Australia’s highest court eventually agreed with Gutnick, finding that the article was “published” anywhere it could be accessed, and allowed Gutnick’s suit against Dow Jones to go forward. Subsequently, Dow Jones chose to settle the suit in November 2004. (See “Internet Updates: Settlement Reached in Dow Jones v. Gutnick” in the Fall 2004 issue of the *Silha Bulletin* and “Recent Developments in Defamation Law: Dow Jones & Company Inc. v. Gutnick” in the Winter 2003 issue of the *Silha Bulletin*.) In contrast to the *Gutnick* case, Jameel has been seen as stepping away from allowing online publishers to be sued anywhere an article could be accessed.

In a related case also decided on February 3, the U.K. appeals court dismissed an appeal by the *Wall Street Journal Europe*, which had sought to invoke a “responsible journalism” defense in another libel action, *Jameel and Another v. Wall Street Journal Europe*, [2005] EWCA CIV 74, [2005] All ER (D) 38 (Feb). A separate article published by the *Wall Street Journal Europe* had discussed Mohamed Jameel’s, Yousef’s brother and also a prominent Saudi businessman, possible ties to terrorism. The article claimed that the Saudi government froze Mohamed Jameel’s accounts after the September 11, 2001, terrorist attacks because of his suspected ties to al-Qaeda.

Lord Phillips, also writing for the court in the *Wall Street Journal Europe* case, rejected the claimed defense and upheld a jury verdict awarding damages for defamation to Mohamed Jameel. At trial, Wall Street Journal Europe had attempted to argue that either the facts in the case were true or that they were reasonably believed to be true by the reporter when they were published. Information subsequently released by the Saudi government revealed that Mohamed Jameel had never had his accounts frozen. The trial judge rejected the defense and allowed the jury to consider the case even though Mohamed Jameel had not shown that he suffered any specific damage as a result of the article being published. Phillips, again writing for the court, dismissed the appeal, finding that the newspaper had failed to establish that it qualified for the responsible journalism defense and that no specific damage need be shown in order for Mohamed Jameel to recover damages.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

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In a related development, on Feb. 9, 2005, U.S. District Judge Ricardo M. Urbina (D.D.C.) dismissed a lawsuit, *Aftergood v. Central Intelligence Agency*, 2005 U.S. Dist. LEXIS 1772, seeking to compel disclosure of the CIA’s historical budget totals. Steven Aftergood, project director for the Federation of American Scientists, brought the suit, according to his court brief, seeking “historical U.S. intelligence budget information from 1947 to 1970, to include aggregate figures as well as subsidiary agency budget totals.”

Dismissing the suit in favor of the CIA, Urbina ruled that the CIA had properly claimed exemptions to FOIA for the budget information. Urbina wrote that “the requested information is exempt from disclosure [under FOIA]” because the budget information “relates to intelligence sources and methods.” However, Urbina did conclude that since the CIA had already mistakenly released budget information for 1963, the budget figures for that year were no longer exempt from public release.

According to the Reporters Committee for the Freedom of the Press, Aftergood pointed out that many other developed countries provide budget figures for their intelligence operations. He also said the budget figures were important for the public to compare “how much are we spending on intelligence versus how much we are spending on health care or education or defense. Even if I had no interest in making those comparisons, our position is that no government records should be secret unless there is a valid reason for keeping it secret.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Access to Government

TSA Continues to Expand Government Secrecy

The Transportation Security Administration (TSA) and the Office of the Secretary of Transportation (OST) in early January 2005 made two amendments to the federal government rules relating to the protection of sensitive security information (SSI). Under the interim final rule proposed by the OST and TSA currently in force, SSI is defined as information that would be detrimental to transportation security, most often records pertaining to security screening procedures and related matters at airports and maritime facilities. (See “Access to Government: Failed Highway Bill Would Have Increased Government Secrecy” in the Fall 2004 issue of the *Silha Bulletin*; “Media Access: TSA Publishes Guidelines to Protect Sensitive Security Information” in the Summer 2004 issue of the *Silha Bulletin*; and “Proposed Rules on Critical Information Infrastructure Elicit Comments from Silha Center, Others” in the Summer 2003 issue of the *Silha Bulletin*.)

According to the Federal Register, one of the amendments, effective January 7, was put in place to “remove an unintended limitation of parties that need to know [SSI].” One example, according to the amendment, was that certain entities and individuals involved with land transportation of hazardous materials were barred from sharing SSI or gaining access to SSI due to the limiting phrase “aviation or maritime” in several places throughout the TSA and OST rules. In order to facilitate the distribution and management of this information, the restriction of “aviation or maritime” was removed to include all forms of transportation. Because the amendment is considered a technical amendment to remedy an unintended consequence of the interim final rule, it was not subject to public comment before becoming effective.

The other amendment, also considered a technical amendment, became effective on January 5. According to the Federal Register, that amendment allows the Secretary of Transportation to delegate responsibility for designating information SSI, and effectively withholding it from the public, to “the Administrators of all Department of Transportation . . . agencies, the General Counsel, and the Director of Intelligence and Security . . .” TSA said in a public statement that “information previously available to the public, such as environmental impact statements and safety statistics, will continue to be accessible according to laws protecting public access.”

According to a January 26 Scripps Howard News Service article, Steven Aftergood, project manager for the Federation of American Scientists, who monitors government secrecy, said that the amendments to the rules allow TSA to broadly construe its powers. Aftergood said, “It’s another move toward a ‘trust me’ government. They tell us they don’t intend to withhold . . . information, but the regulation permits them to do so.” He added,

“It minimizes checks and balances and maximizes government authority.”

Increasing government secrecy has also drawn notice from members of Congress. On March 2, Rep. Christopher Shays (R-Conn.), a member of the House Government Reform committee and chairman of the subcommittee on National Security, held a hearing on the proliferation of government information that is not considered classified but is still withheld from the public. The hearing, entitled “Emerging Threats: Overclassification and Pseudo-classification,” was a follow-up to another hearing held by Shays in August 2004, entitled “Too Many Secrets: Overclassification as a Barrier to Critical Information Sharing.”

In a March 1 letter to Rep. Tom Davis (R-Va.), chairman of the Government Reform committee, Shays wrote that his staff had found several instances where the Bush administration had designated records as “sensitive but unclassified” to hide potentially embarrassing facts instead of protecting legitimately sensitive information. One of the examples listed by Shays noted that the Department of Homeland Security (DHS) had initially withheld the identity and contract information of a TSA ombudsman who was to discuss airport security measures with the public. In another example, Shays pointed to the Central Intelligence Agency’s concealment of the names of American companies that had conducted business with Saddam Hussein under the Oil for Food program.

At the March 2 meeting, William Leonard, director of the Information Security Oversight Office, said that more than 16 million classification decisions on government records had been made in 2004 – an increase of 2 million from the year before and considerably higher than the 9 million such decisions made in 2001.

The public seems to agree that more government secrecy is not a good thing. According to a March 13 Associated Press story, a recent public opinion poll found that a majority of people think that the government should provide greater access to its records. The survey, conducted by Ipsos-Public Affairs Sunshine Week, a coalition of media and other groups urging greater access to government records, also found that 70 percent of those polled said that they were either “somewhat concerned” or “very concerned” about government secrecy. A similar amount said that access to public records was “crucial” to good government. Just more than half of respondents felt that there was too little access to government records, compared to 36 percent who thought that current levels of access was adequate. The poll of 1,003 people had a margin of error of plus or minus 3.1 percentage points.

In a related development, the Department of Energy (DoE) issued a new rule, 10 C.F.R. Part 824, effective February 25 that provides civil penalties for anyone working with DoE who releases “highly

“It’s another move toward a ‘trust me’ government. They tell us they don’t intend to withhold information, but the regulation permits them to do so.”

—Steven Aftergood,
Federation of
American Scientists

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Media Ethics

Media's Role in BTK Case Questioned

"I wonder now whether we did the right thing editing the evidence. Would the police have been able to find the suspect sooner? Did we do the public a disservice?"

—Hurst Laviana,
Reporter,
Wichita Eagle

After decades of seeking the identity of the BTK killer, police officials have charged suspect Dennis Rader with 10 murder counts in Wichita, Kansas. News of the killer broke over thirty years ago, and since then media organizations have played key roles in the investigation. For years, the BTK killer has attempted to bait the public and law enforcement via the media, and police have asked media organizations for cooperation in editing disclosures to the public and communicating to the killer. Now that Rader has been charged, Wichita city officials are demanding that the media refrain from reporting information from anonymous sources, and have ordered city employees not to speak to reporters about the case.

The BTK killer had long perceived Wichita media as a tool for publicity. BTK communicated directly with journalists so frequently that some anchors and reporters were, at times, on the list of possible suspects. The BTK's first alleged communication was in a 1974 letter to *The Wichita Eagle*. Throughout the 1970s, the BTK killer sent letters to several media outlets as well as to police, apparently in an attempt to taunt the public and bait officials. In fact, it was in a letter directed to *The Eagle* that the serial killer dubbed himself BTK – for "Bind them, Torture them, Kill them." The BTK killer frequently demanded media attention, writing, "How many do I have to kill before I get my name in the paper or some national attention?"

Throughout the long search for BTK's identity, journalists often debated how much information to release, for fear of compromising police investigations or inciting further killings. Tim Rogers, assistant managing editor at *The Eagle*, told the Associated Press that it was important that the media not be viewed as an arm of the police. Nevertheless, he said, "there are cases – and BTK is clearly one – where we have to be mindful not only of what we can do, but what is the right thing to do."

According to the *Los Angeles Times*, Cathy Henkel was a reporter for the *Wichita Sun* in the 1970s when she received a letter confession to killing a family of four, signed by the BTK, "Yours, Truly, Guiltily . . ." Henkel complied with police requests not to publish certain details in the letter, such as the kinds of knots used in strangling the victims. Henkel told the *Times*, "Was it right? I don't know. . . . We felt like if we didn't work with the police someone would get killed."

After more than twenty years of silence, BTK sent another letter to *The Wichita Eagle* in March 2004. The letter included a driver's license that belonged to a Wichita woman whose death police had not linked to BTK. Eagle reporter Hurst Laviana broke the story of the BTK killer's return, ignoring requests from detectives that the newspaper withhold information about the driver's license. But the newspaper and television stations did withhold some details from BTK letters at the request of police investigators,

such as a word puzzle encrypting "DRADER" and "6220," Rader's house number. Laviana told the *Los Angeles Times*, "I wonder now whether we did the right thing editing the evidence. Would the police have been able to find the suspect sooner? Did we do the public a disservice?"

Television station KAKE-TV, an ABC affiliate in Wichita, reported on finding a package in a Wichita park in December of 2004, initially revealing only that the package contained a driver's license from a BTK victim. The station later revealed that the package also contained a plastic doll that had a pantyhose. According to the Associated Press, police told KAKE-TV that showing the doll in a television news broadcast might incite another murder. KAKE-TV news director Glen Horn told the Associated Press, "Before we released information we asked [police] if it would compromise or hurt their investigation in any way." Horn said that there was always some "give and take" with law enforcement over what it would report to the public.

Kansas authorities acknowledged that they may not have been able to make an arrest without BTK's communications to the media. One piece of evidence that clinched the arrest of Rader arose from information contained in a computer disk that BTK sent to KSAS-TV, a Fox affiliate in Wichita. FBI analysts were able to trace the disk to prior use on a computer housed at Rader's church.

After Rader's arrest on February 25, representatives from KAKE and *The Wichita Eagle* told the *Los Angeles Times* that there was no longer any reason to withhold their information from the public. News of Rader's arrest rapidly spread beyond Kansas, however, and now Wichita police and courts have once again tried to put the brakes on some BTK media coverage.

On February 28, one day before Rader was due to make his first court appearance in Sedgwick County, Wichita Police Chief Norman Williams held a press conference to correct perceived misquotes and inaccurate reports since Rader's capture. Williams said he would leave the media briefing that morning to meet with the Sedgwick County District Attorney's office in order to explore possible legal actions against "individuals and media organizations that disseminate inaccurate information." Williams indicated the police chief's office would be the only official source of information before Rader was formally charged, and that following the formal charges, the media should get their updates from the district attorney's office Web site.

Presiding over the state's case against Rader, Sedgwick County District Judge Gregory Waller has also expressed his anger at inaccurate media reports and described the news coverage as "a bunch of mad dogs after a piece of meat." Waller has not issued a gag order, but following his censure of the media, county officials in Sedgwick County and

BTK, continued on page 30

Media Ethics

CNN Chief Executive Undone by Blogs

Attendees at a Jan. 27, 2005 panel discussion at the World Economic Forum in Davos, Switzerland heard panelist Eason Jordan, then the CNN chief news executive, make comments that suggested U.S. troops had deliberately pointed targets at U.S. journalists killed in Iraq. One attendee, Rony Abovitz, a Hollywood, Fla. businessman, posted his account of Jordan's comments on the Internet on January 28. Following Abovitz's posting, more than 400 Internet Web logs, or blogs, developed the story for a week before mainstream media carried full coverage of the controversy. As a result of the controversy, Jordan resigned from CNN on February 11, after 23 years with the network.

January 28 marked Abovitz's foray into blogging. Forum attendees were invited to post comments on the World Economic Forum's Official blog, forumblog.org, and at 2:21 a.m. local time Abovitz submitted a post entitled "Do U.S. Troops Target Journalists in Iraq?" Abovitz said that Jordan's remarks at the panel had bothered him. He later told *The Miami Herald*, "He was going on and on about it. My first thought was, gee, have I been missing something? And I stood up and asked, 'Is this documented?'" Abovitz said Jordan "kind of froze, and then he started backpedaling. But the crowd included a lot of people from the Middle East who were cheering him on, so then he wiggled back and forth."

It did not take long for conservative blogs to denounce Jordan for his alleged comments. Rebecca MacKinnon, the organizer of the Forum's blog, and a former colleague of Jordan's at CNN, e-mailed Jordan on February 2 to alert him to the Internet criticism. She told *The New York Times*, "I e-mailed him and said the same people who were after Rather appear to be after you." (See "Panel Publishes Findings Following Review of CBS '60 Minutes' Broadcast," in the Fall 2004 issue of the *Silha Bulletin*.) That same day, MacKinnon posted a response from Jordan on forumblog.org, indicating that his comments were taken out of context. Jordan explained that he had only meant to distinguish so-called "collateral damage" deaths of journalists, killed by wayward bombs, from the deaths of journalists killed because coalition soldiers aimed and fired without being certain of their identity.

Despite Jordan's attempts to correct the implications of his comments, bloggers reported corroborating accounts from other attendees at the panel, including information from Representative Barney Frank (D-Mass.) who also sat on the panel. Frank acknowledged that Abovitz's posting was essentially correct.

Bloggers also made repeated demands for a videotape of January 27 panel session. Although the World Economic Forum officials initially agreed to release the tape, the requests were later thwarted when officials said the panel's ground rules

prohibited direct quotations. Bloggers then pressured CNN to ask the World Economic Forum for a videotape of the panel discussion. CNN told *The New York Times* that it had no tape or transcript because the conference organizers considered the panel session to be off the record, and that CNN did not believe Jordan's comments were in dispute. The denial of access to a tape or transcript only fueled the criticism of bloggers, prompting assertions of a cover-up by "MSM" – blogger shorthand for mainstream media – and by CNN.

On February 2, CNN attempted to deflect blogger criticism by sending e-mail messages to many of those writing on the controversy, and by posting an unsigned message on several blogs. The message read: "Many blogs have taken Mr. Jordan's remarks out of context. Eason Jordan does not believe the U.S. military is trying to kill journalists. Mr. Jordan simply pointed out the facts: While the majority of journalists killed in Iraq have been slain at the hands of insurgents, the Pentagon has also noted that the U.S. military on occasion has killed people who turned out to be journalists. The Pentagon has apologized for those actions." A spokesperson for CNN indicated that the network was trying to head off the speed with which news travels on the Internet.

Bloggers challenged mainstream media to cover the story for a week before editorials began to appear in *The Wall Street Journal* and *The Washington Times*. Jordan said he resigned "to prevent CNN from being unfairly tarnished" by the controversy.

Many considered Jordan to be the victim of conservative bloggers who viewed Jordan's comments as liberal anti-patriotism. David Gergen, editor at large at *U.S. News & World Report* and moderator of the January 27 panel in Davos, admitted to *The Washington Post* that he had gasped at Jordan's initial comment on journalists being "deliberately killed," but said Jordan immediately realized he had gone too far and "walked it back." Gergen indicated to *The New York Times* that Jordan's resignation was an alarming sign of news media being increasingly dragged into culture wars. Remarking on the largely conservative backlash to Jordan's comments, Gergen told *The Times*, "I think he was attacked because of what he represented as much as what he said."

Others welcome the bloggers' "pack journalism" as a call for media transparency and accountability. Even Jonathan Klein, President of CNN/U.S., insists that the instantaneous feedback of the internet is valuable. Klein told *USA TODAY* that the media can avoid becoming targets of bloggers "by being as transparent as possible."

–KELLY J. HANSEN MAHER
SILHA FELLOW

"Many blogs have taken Mr. Jordan's remarks out of context. Eason Jordan does not believe the U.S. military is trying to kill journalists."

–CNN
Press Release

Media Ethics

Tsunami Coverage Raises Ethical Concerns

The Dec. 26, 2004, earthquake in the Indian Ocean that spawned a tsunami left hundreds of thousands dead or missing in its wake. In the months after the tsunami devastated Asian and African countries, the death toll for the tsunami has surpassed 280,000, including the 135,000 people still missing and believed to be dead. Most of the dead and missing were from Indonesia which suffered the most losses by far of any country in the tsunami's path. While the tsunami generated substantial and wide media attention internationally, some have raised concerns over the coverage provided by the American media.

In early January, *USA TODAY* published a story describing the late start of American media coverage of the disaster. Many of the large television networks and newspapers did not have comprehensive coverage of the tsunami until a few weeks after the initial landfall. The article attributed the slow reaction in getting reporters on the ground in the most devastated regions to difficult logistical problems caused by the scope of the disaster as well as the timing of the tsunami, which occurred the day after Christmas.

According to *USA TODAY*, Bob Woodruff, an ABC news correspondent who reported from Sri Lanka, said that complicating matters was the fact that the full grasp of the story had eluded many people, both those inside and outside of the media. "The White House didn't understand it, journalists didn't understand it, and aid organizations didn't understand it," Woodruff said. Members of the media from the other major news networks, including CBS, NBC, and Fox seemed to agree. CNN, however, noted that it had many reporters already posted around the world and was quickly able to get 75 reporters to the affected regions, which allowed it to begin the first big push in the American tsunami coverage.

As a result of the slow start from major media outlets, video taken by those at the scene provided some of the first glimpses of the disaster. Before lead anchors were in areas devastated by the tsunami, recordings from camcorders often provided first-hand accounts of the gigantic wave that swept through the region. Since then, many of those recordings have ended up on the Internet in so-called "video logs" or "vlogs." One of the more popular vlog Web sites is Waveofdestruction.org, an Australian Web site. Originally dedicated to hosting several home videos, it has now grown to include photographs and satellite images providing before-and-after shots of areas in the tsunami's path. Geoffrey Huntley, founder of Waveofdestruction.org, said the Internet provided a vehicle for instant access around the world to the first hand accounts of the tsunami. "At a media company, I'm sure there are channels you have to go through – copyright, legal, editorial, *et cetera*," Huntley told *The Wall Street Journal*, noting that online, "Blogging is instant."

Some additional criticism has come from those in the most devastated regions such as Indonesia's

Aceh province and Sri Lanka, portraying American and European media coverage of the tsunami as failing to capture the true nature of the disaster. In early January, Ashok Malik, a columnist for *The Indian Express*, a Bombay newspaper, told *The Washington Post* that Western media coverage had been insensitive to the victims of the tsunami, saying that "Asia's tsunami is open season" for the Western press. "Why has Southeast Asia's biggest tragedy become every American network's ghoulish Disneyland party?" he asked. "Has disaster finally found its paparazzi?"

Paul Janensch, a journalism professor at Quinnipiac University, assessed the American news media coverage of the tsunami in his Jan. 7, 2005, column for *The Hartford Courant*. In his column, Janensch wrote that the media had been "[g]reat on explaining what a tsunami is. But otherwise I can see why the rest of the world thinks Americans care about death and destruction only when Americans are involved." He noted that a disproportionate amount of the reporting was focused on American and European tourists who had died, despite the fact that nearly all who were killed were "poor local people."

Janensch was also critical of what he suggested was a double standard in American coverage. "If it's OK to show us images of dead Indians, Sri Lankans, Thais and Indonesians killed by a giant wave, then isn't it OK to show us images of dead Americans? We see virtually no images of Americans killed in Iraq. The U.S. government will not even allow us to see images of flag-draped coffins of American soldiers. Why is that? Do we think that only Americans deserve privacy in death?"

Not all shared such a negative view of media coverage, however. Mark Jones, editor for Reuters AlertNet, the humanitarian news portal run by Reuters, said that the reporting had managed to get beyond the death toll to discuss the impact of the tsunami in a way deeper and more substantive than typical disaster coverage. In a Jan. 14, 2005, *Press Gazette* article, Jones said that meaningful discussion about how many people had been displaced by the giant wave and discussion of the challenges of future reconstruction in Asia helped to fill a gap typically left open in mainstream media disaster coverage. Jones wrote, "With the luxury of time and resources, a sense of history in the making, and the oxygen of sustained public interest in their lungs, journalists dug much deeper than is traditional in humanitarian crisis reporting." Jones concluded by observing that the coverage of the tsunami would prompt better coverage of disasters in the future.

Addressing another potential lasting impact of the tsunami media coverage, Marc Lynch, a political science professor at Williams College, discussed the role that Arab media outlets played in influencing Arab countries in the Middle East to help provide

"Why has Southeast Asia's biggest tragedy become every American network's ghoulish Disneyland party? Has disaster finally found its paparazzi?"

—Ashok Malik,
Columnist,
The Indian Express

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Media Ethics

Veteran Sports Writer Fired for Plagiarism

Ken Powers, a reporter who had worked 20 years for the Worcester, Mass. *Telegram & Gazette*, was fired Feb. 3, 2005 after filing a story that he had allegedly plagiarized from *Sports Illustrated's* Web site. The *Sports Illustrated* National Football League (NFL) story, posted online on January 24, was so similar to Powers' January 30 column in the *Telegram* that two readers alerted the newspaper.

A correction was printed in the February 2 edition of the *Telegram* that read: "Substantial portions of a column originally written by Peter King [of *Sports Illustrated*] were printed . . . in the Sunday *Telegram* under the byline of Ken Powers. . . . The *Telegram & Gazette* takes plagiarism seriously and is conducting a full investigation. We apologize to our readers and to *Sports Illustrated*." Powers was recalled from his assignment of covering preparations for the Super Bowl game in Jacksonville, Fla., and was placed on paid leave pending the outcome of the investigation, the *Telegram* reported.

According to an article published February 4 in the *Telegram*, the investigation into the allegations was led by the *Telegram's* editor Harry T. Whitin and sports editor David P. Greenslit. Powers' story and the *Sports Illustrated* story were compared. Both stories covered the Sept. 14, 2003 game between the New England Patriots and the Philadelphia Eagles, and was the last time the two teams faced one another during the regular season. The story of that game was revisited because the teams were facing one another in the upcoming 2005 Super Bowl.

Portions of both King's and Powers' columns have been published by media organizations such as the Associated Press and *The Boston Herald* showing how closely the stories matched. Variations between the two versions were slight, consisting of the change of an occasional word here and there. In some instances, even the use of punctuation was identical. For example, the Associated Press published one of King's paragraphs, which read:

"Each team was 0-1, and each had fallen to 0-1 in rather humiliating fashion. The Patriots got shut out in Buffalo 31-0, just four days after whacking every popular defensive captain Lawyer Milloy because he wouldn't take a major pay cut."

Powers' version read:

"Each team was 0-1, and each had fallen 0-1 in rather humiliating fashion. The Patriots had been shut out in Buffalo, 31-0, just four days after releasing very popular defensive captain Lawyer Milloy because he refused to take a substantial pay cut."

In the process of the investigation, Whitin and Greenslit met several times with Powers and with staff reporter Kathleen A. Shaw, chairwoman of the Worcester unit of the Providence Newspaper Guild, who represented Powers. On February 3, Powers was fired, despite a phone call from King to Whitin asking the editor to "show compassion," urging him not fire Powers, according to *The Boston Globe*. The Associated Press reported that *Sports Illustrated* spokeswoman Alison Keane stated that King's call "was not an official plea, not said with any knowledge of the facts, just a comment from one human being to another."

Whitin apologized to King for the incident, but did not change his mind regarding Powers' termination. Members of the New England Patriots also called the newspaper asking that Powers be allowed to continue covering sports with the *Telegram*.

In announcing Powers' termination, Whitin also issued a statement saying that Powers' January 30 column "did not constitute his own work. [Powers] does not dispute that. Further investigation has revealed that this was not an isolated incident and that he has previously used the work of others without proper attribution. We have terminated his employment and our investigation into his past work continues." The *Telegram* reported that 19 of Powers' Sunday columns were being reviewed as part of the investigation, dating from Sept. 12, 2004.

"He broke our compact with our readers," Whitin told *The Boston Globe*. "And that is a very serious offense."

In an interview by phone with the *Telegram*, Powers said, "I just think my record at the paper and my 20 years of spotless service up to this point speak for itself. Regarding my termination, I think a terrible injustice has been done."

According to the *Telegram*, Whitin afterwards met with reporters and editors, reminding them that they had all been given a policy statement in 1998 entitled, "Our Principles" following several high-profile incidents of plagiarism. "Our Principles" reportedly "reviewed the cornerstones of journalism," noting that "the reuse of others' material not obviously in the public domain or in the public's mind without attribution is plagiarism and is not permitted."

"In itself, plagiarism is a cardinal sin of journalism," Whitin told the *Telegram*.

Boston Sports Media Watch published an online article February 3 entitled "Ken Powers under Investigation for Blatant King Rip Off," stating, "What [Powers did] was egregious beyond any offense to Mr. King for using his material. It was offensive to his employers, who expect honest work from him, offensive to his readers, who need to be able to trust that what they're reading is what it is claimed to be, and offensive to media colleagues everywhere who spend the time and effort to come up with their own material." The article is available online at http://www.bostonsportsmedia.com/archives/2005_02.php

The move to fire Powers may have been so swift and decisive because the *Telegram's* owner is the Times Company, which also owns *The New York Times*. In 2003, *The Times* faced the Jayson Blair scandal, where a reporter was found to have plagiarized material and falsified information in several dozen stories, and resulted in the resignations of *Times* editors Howell Raines and Gerald Boyd. (See "Developments in Media Ethics: Jayson Blair and *The New York Times*" in the Summer 2003 issue of the *Silha Bulletin*, and "Journalists Grapple with Issues of Ethics: Jayson Blair Update" in the Fall 2003 issue of the *Silha Bulletin*.)

—ELAINE HARGROVE
SILHA FELLOW AND BULLETIN EDITOR

"He broke our compact with our readers. And that is a very serious offense."

—Harry T. Whitin,
Editor,
Telegram & Gazette

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classified information regarding atomic weapons and other weapons of mass destruction; nuclear naval propulsion; intelligence related to terrorism and other topics of great sensitivity.” In 2000, Congress amended the Atomic Energy Act of 1954, 42 U.S.C. § 2282b, to allow DoE to penalize anyone releasing such information after they have entered into a contract or agreement with DoE. The rule provides that anyone releasing restricted information will face a civil penalty of up to \$100,000 per violation.

In May 2004, DHS had instituted a similar nondisclosure agreement policy for its employees who had access to SSI. That policy, however, did not have express statutory approval from Congress and was withdrawn in early January 2005 after it drew criticism from open government advocates.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

BTK, continued from page 26

city officials in Wichita and Park City (a Wichita suburb where Rader lives and works) have issued memos warning employees to refrain from discussing the case.

Citing a defendant’s right to a fair trial, Wichita and Park City officials have threatened employees with judicially imposed jail time or fines if they discuss the case with reporters. In Sedgwick County, employees were not threatened, but they were asked not to talk to reporters because the county would have to fund a trial in another location if Rader could not get a fair trial in Sedgwick County. The memo to Sedgwick employees warned that moving the trial “would be expensive for the taxpayers of this County.” The Sedgwick County district attorney’s office also disseminated a kind of “do not call” list of BTK victims’ family members to media outfits, indicating that such family members did not want to talk to reporters.

—KELLY J. HANSEN MAHER
SILHA FELLOW

Tsunami, continued from page 28

relief for the victims of the tsunami and the regions hardest hit. Underscoring the fact that many Indonesians were also Muslims, several media outlets decried the treatment of the disaster by Arab governments.

In a Jan. 31, 2005, article in *The Christian Science Monitor*, Lynch noted that coverage by Arab media outlets such as *Al Quds al Arabi*, a London-based Palestinian newspaper, and the Qatar-based Al-Jazeera and Dubai-based Al-Arabiya satellite television stations, had prompted criticism of Arab Middle East countries’ initial failure to provide relief for victims of the tsunami or even acknowledge the disaster. Lynch found that some of the coverage included pleas from Arab Muslim leaders asking others to help relief efforts, which ultimately lead to changes in government relief provided by Arab countries. One such example was Saudi Arabia. “Saudi Arabia, which initially offered only token sums of relief,” Lynch wrote, “launched a high-profile telethon to which senior members of the royal family ostentatiously contributed large sums; at last count, more than \$82 million had been raised.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Media Ethics

Newsweek Draws Fire for Alteration Of Martha Stewart Cover Photo

The cover of the March 7, 2005 issue of *Newsweek*, which read “Martha’s Last Laugh: After Prison She’s Thinner, Wealthier & Ready for Prime Time,” showed Martha Stewart, former chief executive officer of Martha Stewart Living Omnimedia, looking thinner and smiling as she parted a curtain, ready to get back to work after leaving federal prison. On page three of the magazine, however, the credit for the photo read, “Cover: Photo illustration by Michael Elins . . . head shot by Marc Bryan-Brown.” Even before that week’s magazine had made its way to newsstands, the *Newsweek* cover picture was widely criticized. *Newsweek* subsequently admitted that the cover was actually Stewart’s face superimposed on the body of a model.

Although the practice of using illustrations for covers is fairly common, the *Newsweek* cover did not indicate that it was not an actual photograph of Stewart. Kelly McBride, who teaches and writes on ethics at the Poynter Institute, told *USA TODAY* that *Newsweek* had gone too far by not making it clear the cover was an illustration. “If it takes longer than a second or two for the readers to realize it’s an illustration, then it’s not right,” McBride said. “And this one isn’t obvious at all.”

In March 2004, Stewart was convicted of obstructing justice and lying to federal prosecutors while being investigated for the sale of her stock in a biotechnology company, ImClone Services, Inc. She is currently serving the remainder of her sentence, five months of house arrest, at her home in Katonah, N.Y. *Newsweek* initially maintained that it simply wanted to provide an interpretation of what Stewart would look like after completing her five-month sentence in a minimum-security federal prison in Alderson, W. Va., on March 4.

Newsweek’s assistant managing editor, Lynn Staley, told *USA TODAY* on March 1, “Anybody who knows the [Stewart] story and is familiar with Martha’s current situation would know this particular picture” was a “photo illustration.” Staley also told *The New York Times* on March 3, “The piece that we commissioned was intended to show Martha as she would be, not necessarily as she is. In this case, we identified this piece as a photo illustration.” However, she added, “I wish we had maybe been even less successful in conjuring up Martha and maybe a little more over the top.”

Janice E. Castro, director of graduate journalism programs at the Medill School of Journalism at Northwestern University, said the decision to print the cover without clearly explaining it as an

illustration was a mistake but did not amount to a lapse in ethics. “They fumbled, they blundered, but this is not like misrepresenting the news,” she told *The New York Times*. “They just did a dumb thing.” The National Press Photographers Association (NPPA), an organization representing professional photojournalists, however, called *Newsweek*’s decision to run the cover “a major ethical breach.” In a March 9 press release, NPPA president Bob Gould said, “NPPA finds it a total breach of ethics and completely misleading to the public. The magazine’s claim that ‘there was a mention on Page 3 that it was an illustration’ is not a fair disclosure. The average reader isn’t going to know that it isn’t Martha Stewart’s body in the photograph.” The press release is available online at http://www.nppa.org/news_and_events/news/2005/03/newsweek.html.

Apparently responding to the negative attention, *Mediaweek.com* reported that Mark Whitaker, editor of *Newsweek*, made the decision to put bylines for cover photos and illustrations directly on the cover, beginning with the March 14 issue. Whitaker said the original decision to use the Stewart cover was “just dumb and badly executed,” while insisting that no one at *Newsweek* had intended to mislead readers.

McBride, speaking to *Mediaweek.com*, said that the change in *Newsweek* policy, the first for a magazine, was a step in the right direction. “In addition to labeling [photo illustrations], you’ll do a greater service to readers if you give them a definition to the label,” McBride says. “These are words we use all the time in the journalism world but they might not be clear to readers.” The *Mediaweek.com* article is available online at http://www.mediaweek.com/mw/news/recent_display.jsp?vnu_content_id=1000829271.

A reaction similar to that over the Stewart cover occurred when *Time* magazine used a mug shot of O. J. Simpson on its June 27, 1994 cover. *Time* later admitted that it had darkened the photograph, although it continued to defend the alteration even after it drew substantial criticism. *Newsweek* had also used the Simpson mug shot, in its unaltered form, on its cover.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

“The average reader isn’t going to know that it isn’t Martha Stewart’s body in the photograph.”

—Bob Gould,
President, NPPA

Broadcast Regulation

Congressional Bill Would Reinstate Fairness Doctrine

"The airwaves should be used for public benefit. It's broadcasters' one obligation for condition of license."

—Rep.
Louise Slaughter

Representative Louise Slaughter (D-N.Y.) introduced legislation on Feb. 1, 2005 to reinstate the Fairness Doctrine, the now-defunct Federal Communications Commission (FCC) policy which mandated balanced coverage of controversial public issues on the nation's airwaves. Slaughter's bill, "The Fairness and Accountability in Broadcasting Act," H.R. 501, was presented in response to the spate of recent scandals involving members of the news media, which Slaughter and her supporters are hoping will help to mobilize support for the measure; however critics are calling the Fairness Doctrine anything but fair.

Originating from the philosophy that the nation's airwaves are a public trust, and that broadcasters operate as "public trustees," the Fairness Doctrine required broadcasters to "afford reasonable opportunity for the discussion of conflicting views of public importance." The doctrine was first unveiled in 1949 and remained in effect until the FCC repealed it, over the objection of Congress, in 1987.

Slaughter's bill would renew the Fairness Doctrine to ensure equal airtime for different points of view. Specifically, the bill proposes to amend the Communications Act of 1934, 47 U.S.C. §309 by adding a new subsection requiring the implementation of a public interest standard. The proposed standard is intended to achieve four purposes: 1) to restore fairness in broadcasting, 2) to ensure that broadcasters comply with their public interest obligations, 3) to advance "diversity, localism, and competition" in media and 4) to be accountable to local communities through attention to local issues and the provision of diverse perspectives and opportunities for dialogue. The text of the bill is available online at <http://thomas.loc.gov/cgi-bin/query/D?c109:1:/temp/~c109ZnNDst:>

Slaughter said in a press release, "Partisan, biased material marketed as 'news' is increasingly contaminating our airwaves and democracy." Slaughter continued, "Our democracy depends on an informed electorate. The media is crucial to supporting the free exchange of ideas and providing thorough coverage of the important issues facing our nation. The American public owns the airwaves. Reinstating the Fairness Doctrine would return integrity to the media and ensure that the American public is adequately informed on all points of view."

Slaughter's initiative has won the support of several media watchdog groups, some of whom have even launched a Web site, www.fairnessdoctrine.com, to mobilize support for the bill. Tom Athans, Executive Director of Democracy Radio and one of the Web site's creators, told the Washington news service U.S. Fed News, "Political discussion on our nation's airwaves has reached an all-time low. Divisiveness and the politics of demonization and personal destruction dominate our airwaves and only serve to divide our nation

deeper and deeper. For this reason alone, we should fully consider reinstating the Fairness Doctrine."

Slaughter's proposed bill follows a spate of recent scandals involving members of the news media. The scandals include the revelations that conservative commentator Armstrong Williams and syndicated columnist Maggie Gallagher failed to disclose that they were paid to promote Bush Administration policies, the airing of a program criticizing the war record of former presidential candidate John Kerry by the Sinclair Broadcasting Group, and CBS News' flawed report on President Bush's service in the Texas Air National Guard in fall 2004. (See "Problems in Media Ethics: Commentator's Promotion of NCLB Leads to Questions of Ethics" and "Panel Publishes Findings Following Review of CBS '60 Minutes' Broadcast," both in the Fall 2004 issue of the *Silha Bulletin*.) Slaughter and her supporters are hoping that public outrage over the scandals will translate into support for her bill and help to fuel its passage through Congress. "It's a lot different now since Armstrong Williams," Slaughter told Salon.com. "The airwaves should be used for public benefit. It's broadcasters' one obligation for condition of license. There's no question they don't operate in the public good."

The Sinclair scandal also demonstrates both the consequences of media consolidation, a development which Slaughter blames for the decline of fair and balanced broadcasting, as well as what some see as a general rightward shift of the media environment after the Fairness Doctrine was jettisoned. Eric Boehlert of Salon.com has written that the dissolution of the Fairness Doctrine saw the onset of a new age of conservative broadcasting, personified by the talk radio phenomenon and also set in motion a larger trend towards deregulation. Sinclair has 62 stations in major markets, enabling it to reach an estimated 25 per cent of the population. Current FCC rules allow a single broadcaster to reach as much as 39 per cent of the U.S. market. Supporters of the new bill allege that the convergence of these developments produced the Sinclair scandal, an instance of abuse of power and of the public trust that may justify the Fairness Doctrine's reinstatement.

Speaking at a panel discussion that she convened in Washington D.C. on January 26, Slaughter said, "Sinclair and other broadcasters use the public airwaves free of charge. It's their responsibility to serve the public interest and adhere to the highest standards of broadcasting. Airing blatantly political programming is a breach of the public's trust." At the panel, Slaughter also took aim at the consolidation trend, saying, "The public owns the airwaves, not the mega media corporations. Today, ground zero for what every American sees on television and in the news is the boardrooms of 4 or 5 corporations. They make decisions about content based not on fairness, not on balance, not

Broadcast Regulation

Powell Ends Tenure With FCC

Michael K. Powell ended his high-profile tenure as chairman of the Federal Communications Commission (FCC) in March 2005, two years short of his original 2007 departure date.

Powell had been promoted from commissioner to chairman in 2001 when George W. Bush first took office. Powell notified the President on January 21, 2005 of his plans to depart. "It's logical to leave between administrations if you're not really interested in staying [the entire second term]," Powell said in an interview with *The Washington Post*.

"Chairman Powell has been a valued member of the administration," White House spokesperson Erin Healy told the Associated Press. "He has shown a strong commitment to expand the reach of new communications technologies and services and has helped advance the president's goal that all Americans should have access to affordable broadband by 2007."

As chairman, Powell steered the FCC on a largely deregulatory path during a very rapidly changing telecommunications landscape. "I think the free market really has lost a friend in Michael Powell," Adam Thierer, a telecommunications analyst at the Cato Institute said in a CNET News.com story available online at http://news.com.com/2102-1033_3-5545030.html. "This was a man who really did believe in the superiority of markets over Band-Aids. It didn't always translate well. But make no doubt about it, this was a man with a clear vision that generally stressed the benefits of capitalism over central planning."

However, Powell may have been better known for his assault on broadcast obscenity and indecency. He was responsible for more than \$8.5 million in fines issued to television and radio broadcast stations during his four years as Chairman, more than \$7.7 million of which was collected in 2004 alone, according to the Associated Press.

"I'm a big believer in the First Amendment, but often I'm incredibly uneasy about lines we have to draw," Powell said on the subject of indecency fines in an interview with the *Seattle Post-Intelligencer*. "No one takes pleasure in trying to decide whether this potty-mouth word or that potty-mouth word is a violation of the law."

The FCC's attack on broadcast indecency gained momentum after singer Janet Jackson's breast was exposed during the halftime show of the 2004 Super

Bowl. During his tenure, Powell also campaigned against shock jock Howard Stern, who is employed by Viacom Inc.'s Infinity Broadcasting Corp., and his nationally syndicated, often provocative, radio show, according to *The Washington Post*.

"Thank God he's gone," said Stern in an article on MTV News Headlines available at <http://www.mtv.com/news/articles/1496132/20050121/index.jhtml?headlines=true>. "This is a great day in broadcasting."

Powell was also at the heart of a 2003 fight over media ownership rules and was criticized as being favorable to big business.

"His tenure was marked by some of the lowest moments in the history of the FCC. . . . Powell's record has been one of avoiding the public he was meant to serve," Robert W. McChesney, a critic of the corporate media and a Powell adversary said in a *Washington Post* story. "He had to be dragged, kicking and screaming to the few public hearings he attended, yet he made countless appearances before industry groups and trade associations."

His less controversial accomplishments included the implementation of a "Do not call" list to minimize telephone solicitations, increased Internet accessibility outside the home, and the ability for cell phone users to keep their number when switching service.

Powell earned his law degree from Georgetown University Law Center in 1993. He served as chief of staff, antitrust division for the U.S. Department of Justice before being appointed FCC commissioner by President Bill Clinton in 1997. Powell, the son of former Secretary of State Colin Powell, said in a statement he accomplished a "bold and aggressive agenda" while serving as chairman of the FCC. Powell told CNN he plans to spend three months as a senior fellow at the Aspen Institute, a Washington-based organization.

Kevin Martin, an FCC commissioner since 2001, replaced Powell, and is expected to take on issues such as digital television transmission, media ownership rules, mega-telephone mergers and Internet phone regulation as some of the newly-led agency's biggest jobs, according to the *Houston Chronicle*.

—KRISTINE SMITH

SILHA RESEARCH ASSISTANT

"No one takes pleasure in trying to decide whether this potty-mouth word or that potty-mouth word is a violation of the law."

—Michael Powell

on localism, not on diversity.” Slaughter’s statements are available online at www.slaughter.house.gov.

Just how much momentum the outrage over media wrongdoing will produce for Slaughter’s bill remains to be seen, but what is certain is the staunch opposition of both the broadcast industry, which opposes any efforts to revive regulation, and political conservatives, who claim that the doctrine infringes on broadcasters’ freedom of speech. These critics have called the Fairness Doctrine anything but fair. Dennis Wharton, spokesman for the National Association of Broadcasters, told Salon.com, “We think it’s dangerous for the government to be dictating what’s on radio and television programming.” Adam Thierer of the Cato Institute told Salon, “I’m troubled by this development because the Fairness Doctrine has been found to be unconstitutional.” He added, “Somebody forgot to tell Representative Slaughter the ’80s are over.” The Salon.com article is available online at <http://archive.salon.com/news/feature/2005/02/01/fairness/>.

Despite the claims of its critics, the Fairness Doctrine has withstood constitutional scrutiny. In its landmark decision in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the Supreme Court upheld the doctrine. Finding that broadcasters are “public trustees,” the Court wrote, “It is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write or publish.” Instead, the Court stated, “it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.” The Court also cited spectrum scarcity – the FCC’s rationale for regulating broadcasting in the first place – in declaring, “A license permits broadcasting, but the licensee has no constitutional right to be the one who holds the license or to monopolize a . . . frequency to the exclusion of his fellow citizens. There is nothing in the First Amendment which prevents the government from requiring a licensee to share his frequency with others.”

While the Fairness Doctrine was upheld by the Supreme Court, the erosion over the subsequent decades of the spectrum scarcity rationale – one basis of the Supreme Court’s reasoning in the *Red Lion* case – has intensified debate over its continued viability. The abundance of channels on cable TV ushered in a new media environment and called the Court’s scarcity reasoning into question. Writing for the Heritage Foundation in 1993, Thierer stated, “The doctrine’s supporters seem not to appreciate just how much the broadcast world has changed since 1949. With the proliferation of informational sources and technology, the number of broadcast outlets available to the public has increased steadily. In such an environment, it is hard to understand why the federal government must police the airwaves to ensure that differing views are heard.” Thierer’s article is available online at <http://www.heritage.org/Research/Regulation/EM368.cfm>.

By the 1980s, the combination of the new media environment and a Republican Administration signaled a turning point for the doctrine. In 1981, President Reagan

appointed Mark Fowler, a communications attorney and a former campaign staffer for the president, as chair of the FCC. In 1985, the FCC released its Fairness Report declaring that the doctrine had a “chilling effect” on civic discourse and might run afoul of the First Amendment by requiring broadcasters to air viewpoints against their wishes. “We no longer believe,” the report concluded, “that the Fairness Doctrine, as a matter of policy, serves the public interest.” In 1986, the U.S. Court of Appeals for the D.C. Circuit, which then included future Supreme Court Justice Antonin Scalia and unsuccessful Supreme Court nominee Robert Bork, held in the case *Meredith Corp. v. FCC*, 801 F.2d 501 (D.C. Cir. 1987), that as the Fairness Doctrine had not been mandated by Congress and was only an agency regulation, the FCC was not obligated to enforce it. In August 1987, the FCC voted 4 to 0 to repeal the doctrine.

Congressional efforts to codify the Fairness Doctrine into law were unsuccessful. In 1987, Congress passed such an initiative by a vote of 302 to 103 in the House of Representatives and by a vote of 59 to 31 in the Senate, but President Reagan vetoed the measure. According to the Associated Press, Reagan in his veto message stated, “This type of content-based regulation by the federal government is, in my judgment, antagonistic to the freedom of expression guaranteed” by the First Amendment. Reagan added, “In any medium besides broadcasting, such federal policing of the editorial judgment of journalists would be unthinkable.” Despite broad bipartisan support, Congress did not override Reagan’s veto. In 1989, a second bipartisan drive to revive the doctrine was defeated by President George H.W. Bush’s threat of a veto, and a third attempt launched in 1993 failed as well.

Whatever its prospects on Capitol Hill, recent opinion polls indicate that Slaughter’s timing may have been auspicious, and that the public may be highly receptive to her initiative. Despite a media environment in which news audiences are increasingly polarized along ideological fault lines, polls have shown public support for restoring fairness and balance to broadcasting. An April 2004 poll, conducted by the liberal group Media Matters for America, reveals support across the political spectrum for a restoration of rules to ensure fairness and balance in coverage of controversial public issues.

Whether such public sentiment will enable Slaughter and her Democratic supporters to broaden the base of their campaign and bring congressional Republicans into their tent will be closely watched by the Doctrine’s supporters and opponents alike. “In the uphill battle to restore real fairness and balance to the airwaves,” Salon.com reporter Eric Boehler wrote, “backers will need all the help they can get.”

As of February 1, the bill was referred to the House Committee on Energy and Commerce. At the time the *Bulletin* went to press, no further action had been taken.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Prior Restraint

U.S. Treasury Department Lifts Restrictions on Publishers

Contracting with Writers from Sudan, Cuba and Iran

United States citizens can now freely engage in most ordinary publishing activities with writers living in Cuba, Sudan, and Iran without violating federal law. On Dec. 15, 2004, the United States Department of the Treasury's Office of Foreign Assets Control (OFAC) authorized general licenses for publishing activities with people from Sudan, Cuba, and Iran, revising regulations that impose embargoes against the three sanctioned countries. OFAC has now made clear that it will allow U.S. editors and publishers to commission, collaborate with, and publish articles by writers from these countries without having to first seek special authorization from OFAC.

Since U.S. officials have named Cuba, Sudan, and Iran as nations that pose threats to U.S. national security, they are subject to U.S. sanctions under the International Emergency Economic Powers Act (IEEPA), 50 U.S.C. Ch. 35, and the Trading With the Enemy Act (TWEA), 50 U.S.C. Ch. 106. Both IEEPA and TWEA authorize the establishment of embargoes, prohibiting people in the United States from providing goods or services to people in the sanctioned countries unless first authorized by OFAC. The new OFAC rule adds a "general license" provision pertaining to certain publishing activities. The provision will revise the Cuban Assets Control Regulations, Sudanese Sanctions Regulations, and Iranian Transactions Regulations, 31 C.F.R. Parts 515, 538, and 560, respectively.

OFAC has faced considerable pressure to reform its rules, including a high-profile lawsuit filed against it in September 2004. On Sept. 27, 2004, the Association of American University Presses (AAUP), the Professional/Scholarly Publishing Division of the Association of American Publishers (PSP), PEN American Center (PEN), and Arcade Publishing (Arcade) sued OFAC in the United States District Court in the Southern District of New York. The suit sought removal of OFAC restrictions that required publishers, writers, translators, and editors to seek a license from the government in order to engage in routine services for the publication of foreign literature. Without a prior license, the rules prohibited Americans from publishing works not already published in embargoed countries, prohibited the promotion or marketing of such work, and prohibited "artistic or substantive alterations or enhancements" of such work. According to a PEN press release, plaintiffs in the lawsuit expressed frustration over the "atmosphere of uncertainty and confusion among publishers fearful of incurring prison sentences of up to 10 years or fines of up to \$1,000,000."

On Oct. 27, 2004, Iranian winner of the 2003 Nobel Peace Prize, Shirin Ebadi, and the Strothman literary agency, joined the publishers' suit against OFAC.

Ebadi had hoped to publish her memoirs in the United States. Although she had not yet written her memoirs, she indicated in her suit that she did not want to write them in Iran and have to submit them for official approval by the mullahs – Iranian religious and social leaders – there. Yet under the old OFAC rules, Ebadi would have been unable to work with an American literary agent in developing her manuscript. Wendy J. Strothman, the Boston literary agent hoping to commission Ebadi's memoir, commented on Ebadi's predicament to *The Washington Post*. "It seems ironic," she said, "that a woman who has been honored by the Nobel committee for her work on behalf of free speech and human rights should find herself effectively barred from sharing her ideas with American readers." Numerous American newspapers profiled the suit against OFAC, amplifying the pressure on the agency to revise its rules.

Although publishers view the OFAC changes as favorable, lawyers for the plaintiffs told *The New York Times* that they were not clear as to whether the changes address all the legal concerns they had raised in their claims. For example, although the new rule creates a "general license," the publishing companies have consistently argued that the First Amendment and other laws exempt publishing from regulation, and that any licensing scheme is prohibited.

A spokesperson for the Treasury Department, Molly Millerwise, told *The New York Times* that the new rule was not issued in response to the lawsuit, but that the Department had already been considering creating "more of a clarification" on how the regulations apply to publishing activities. With its new rule, OFAC indicated that it seeks to undo and correct the impression that it discourages the publication of dissident speech from oppressive regimes. In a press release from the U.S. Department of the Treasury, the Treasury's Under Secretary for the Office of Terrorism and Financial Intelligence, Stuart Levey, stated, "[T]his new policy will ensure those dissident voices and others will be heard without undermining our sanctions policy."

Certain restrictions remain under the newly clarified rules. For example, development and marketing of software that is unrelated to a written publication remains restricted. Additionally, OFAC maintains restrictions on publishing activities and certain interactions with the Cuban, Sudanese, and Iranian governments, government officials, or government agents.

—KELLY J. HANSEN MAHER
SILHA FELLOW

"This new policy will ensure those dissident voices and others will be heard without undermining our sanctions policy."

—Stuart Levey,
U.S. Department
of the Treasury

Prior Restraint

Gag Order on Juror Names Ruled Unconstitutional

“The protection against prior restraint carries particular force in the reporting of criminal proceedings.”

—Judge
Sonia Sotomayor

A three-judge panel from the U.S. Court of Appeals (2d Cir.) ruled on March 22, 2005 that a district judge’s order forbidding members of the press to publish the identities of jurors named in open court was unconstitutional. The Court of Appeals held, in *United States v. Quattrone*, 2005 U.S. App. LEXIS 4620 (2d Cir. 2005), that the district court’s order was a prior restraint on the press, in violation of the free speech and press clauses of the First Amendment. The court also held that the order violated the First Amendment by barring the publication of information revealed in open court.

Several media organizations (Forbes, Associated Press, CNN, Daily News, Hearst, McGraw-Hill, NBC, Newsday, the New York Times Company, the Washington Post Company, and the New York Press Club) challenged the order from Judge Richard Owen of the U.S. District Court for the Southern District of New York, which prohibited the press from publishing jurors’ names during the retrial of Frank Quattrone. Quattrone, technology banker and former executive of Credit Suisse First Boston (CSFB), was accused of obstructing a federal Security and Exchange Commission (SEC) investigation into the initial public offerings of certain technology companies. Quattrone was prosecuted for instructing CSFB staff to “clean up” their files in response to SEC subpoenas, but his first trial ended in a hung jury in October 2003. Owen scheduled a retrial in the district court for April 2004, but before the retrial commenced, news broke on the mistrial of a similarly high-profile case against former Tyco executive Dennis Kozlowski.

Near the end of Kozlowski’s trial, the press released the identity of a juror seen to have signaled support for the defendant by making a hand gesture in open court. Due to several media profiles on the juror, and the subsequent harassment that the juror faced outside of the press, the presiding judge declared a mistrial. As a result of Kozlowski mistrial, Owen apparently began to consider the potential media threat to the jurors in Quattrone’s retrial.

Owen denied Quattrone’s last-minute request for an anonymous jury in a final pretrial conference on April 7, 2004. During the same conference, however, Owen expressed a willingness to grant Quattrone’s request to bar the press from publishing jurors’ names. On April 13, Owen again informed counsel of his intent to protect juror identities. Although the government warned the court that media groups would likely challenge the constitutionality of such an order, Owen pressed forward with his position, indicating that he wished to avoid a mistrial like the one in the Kozlowski case. During the jury selection process, Owen read the full names of prospective jurors, then announced that it was “an order of the Court that no member of the press or a media organization is to divulge . . . the name of any prospective or selected juror.”

The next day, several media organizations objected to Owen’s order and requested an opportunity for a hearing. At a hearing held that day, Owen denied the challenge and explained that he did not want a repeat of the Kozlowski mistrial, adding that the press restriction would end “the minute the case is over.” The media organizations then appealed to the Second Circuit.

By the time the Court of Appeals considered the challenge, Quattrone had been convicted and sentenced to 18 months in prison, and Owen’s order had dissolved by its own terms. In spite of a general rule of mootness, which ordinarily requires a court to dismiss cases presenting no opportunity for relief, the appellate court asserted jurisdiction to hear the appeal. The issue remained viable, the court explained, because the appeal arose from a challenged action that was too brief to be fully litigated, and because there was a reasonable expectation that the complaining party would be subject to a similar action in the future.

In an opinion written by Judge Sonia Sotomayor, the Court of Appeals first addressed the doctrine of prior restraints. The court explained that it has “long been established” that suppression of speech before its expression, and based on its content, is the least tolerable infringement on our freedoms of speech and press. “Moreover,” Sotomayor wrote, “. . . the protection against prior restraint carries particular force in the reporting of criminal proceedings” because of the press’ role in ensuring effective judicial administration. Only in exceptional cases may a prior restraint on the press survive constitutional scrutiny, the court reasoned.

When a prior restraint is issued to ensure a fair trial, the appellate court said it must survive the test articulated in *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539 (1976), in order to pass constitutional muster. *Nebraska Press* held that a court should consider (1) whether the nature and extent of the news coverage would impair the defendant’s right to a fair trial, (2) whether a measure other than prior restraint could mitigate the effects of unrestrained publicity, and (3) whether prior restraint would be likely to ensure an impartial jury. Owen’s prior restraint in the Quattrone trial, the court ruled, did not pass this test.

The Court of Appeals indicated that because Owen failed to make factual findings that Quattrone’s right to a fair trial would be impaired, his order failed the first prong of the *Nebraska Press* test. Pointing out that Owen’s decision seemed to be based entirely on fear engendered by news of the Kozlowski mistrial, the court held that Owen’s order was inadequately justified.

Owen’s order also failed to pass the second prong of the *Nebraska Press* test, the appellate court held, because Owen failed to take alternative measures into account. That Owen considered but declined to

Quattrone, continued on page 40

Prior Restraint

Jay Leno Free to Tell Michael Jackson Jokes

Jay Leno, host of the “Tonight Show,” is free to make jokes about the Michael Jackson trial, Judge Rodney S. Melville of Santa Barbara County Superior Court ruled on March 11, 2005. In *California v. Jackson*, Case No. 1133603, Melville issued his ruling in reply to a motion for clarification filed by Leno’s attorneys that the gag order prohibiting persons subpoenaed in the case from speaking about it does not apply to Leno, who has been called as a possible witness for the defense. Jackson has been charged with ten felony counts of child molestation.

According to *The Washington Post*, Melville said at the hearing, “[Leno] makes a living as a comedian and talk show host, and it’s not this court’s intent to stop him from commenting on or making jokes about the case.” In his clarification that the gag order allows Leno to comment freely about Jackson, Melville stipulated only that Leno avoid discussing his possible testimony and own specific role in the case.

The *Los Angeles Times* reported that Leno received a phone call in 2000 from Jackson’s accuser, a young cancer patient, who asked Leno for money to help pay for his treatment. According to the *Times*, Leno believed that he could hear the boy’s mother coaching him in the background and became suspicious. After the conversation, Leno called the police. Jackson’s attorneys are seeking to establish that the accuser’s family used the boy’s medical condition as bait to try to solicit money from celebrities, including Leno, who may be asked to testify about that conversation.

In the motion for clarification, Leno’s attorneys had argued that the gag order was a prior restraint in violation of Leno’s right to free speech as guaranteed by the First Amendment and by Article 1, Section 2(a) of the California Constitution, and they urged the Court to rule that Leno was exempt from the order. The motion stated, “It is simply false that Mr. Leno’s use of humor to engage in social commentary is somehow less valuable and less worthy of First Amendment protection than other forms of speech.” Leno’s attorneys argued that should the Court rule that the gag order does apply to Leno, it should clarify that the order only prevents Leno from discussing “evidence of which he may have direct, first-hand knowledge. . . .” It was this latter position – that the gag order applies to Leno but that it only restricts a narrow category of speech – that Melville endorsed.

Leno’s attorneys further argued that the Jan. 16, 2004 gag order could not have been intended to apply to “public personalities” like Leno, who was not

served with a subpoena to testify in the case until Feb. 17, 2005, over a year after the order was first issued, and whose occupation requires him to deliver commentary on “contemporaneous issues of public interest.” The motion stated, “There is no basis in law or common sense for affecting the ability of an entertainment personality like Mr. Leno to make observations and comments about public information that he believes is of interest to his viewers.” Melville agreed, and, according to the Associated Press, stated from the bench, “I am not attempting to prevent anybody from making a living in the normal way that they make their living.”

Melville rejected arguments by Jackson’s attorneys that the gag order prohibited Leno from making jokes about Jackson and the trial, and that Leno’s silence was necessary to ensure Jackson’s right to a fair trial. In their opposition to Leno’s motion for clarification that Leno was exempt from the order, Jackson’s attorneys wrote, “Heaven forbid that for a few weeks Mr. Leno will not be able to make cruel jokes at Mr. Jackson’s expense.” *The Washington Post* cited a Reuters report that defense attorney Robert Sanger told Melville, “He makes very cruel jokes about Michael Jackson. We’re not putting [Leno] out of business if he didn’t talk about Michael Jackson for a few weeks.” The filing by Jackson’s legal team is available online at <http://www.sbscpubaccess.org/docs/ctdocs/030405opposemotion.pdf>.

Before Melville issued his ruling, Leno had found creative ways to comply with the gag order. According to the Associated Press, Leno claimed, “I’m not legally allowed to tell Michael Jackson jokes, but I can still write them,” and he arranged for guest comedians, including Drew Carey, Dennis Miller, Carrot Top, and Roseanne Barr, to deliver his Jackson jokes for him. He also parodied events from the trial. After Jackson arrived late for court on March 10 in pajamas and slippers, *The Washington Post* reported that Leno, arrived “late” at his studio “in SpongeBob SquarePants pajamas, slippers and sunglasses. . . .”

Finally free to dispense with his substitutes, the AP reported that Leno celebrated his success in court with a spoof of Jackson’s moonwalk, followed by a monologue consisting entirely of Jackson jokes. But in case Leno gets carried away by the ruling, Melville announced one last requirement to keep him in check. “I’d like him to tell good jokes,” Melville said.

—HOLIDAY SHAPIRO

SILHA RESEARCH ASSISTANT

“Leno makes a living as a comedian and talk show host, and it’s not this court’s intent to stop him from commenting on or making jokes about the case.”

—Judge

Rodney S. Melville

Prior Restraint

Key West Weekly Publisher Can Sue Officer For Arrest

A Florida publisher has won the right to sue the Key West police officer who arrested him after the U.S. Court of Appeals (11th Cir.) ruled on March 22, 2005, that a law punishing publication of leaks of internal investigations was an unconstitutional content-based restriction of free speech in *Cooper v. Dillon*, 2005 U.S. App. LEXIS 4703. Dennis Reeves Cooper, publisher of the weekly Key West *The Newspaper*, was arrested in June 2001 for publishing information relating to the police investigation of alleged wrongdoing by Key West Police Department internal affairs officer Robert Christiansen.

Cooper, who had published a series of articles on Key West police misconduct in May and June 2001, filed a formal complaint with the Florida Department of Law Enforcement accusing Christiansen of covering up police abuses and failing to conduct internal investigations in 2001. The investigation of Christiansen was assigned to the chief of police for Key West at the time, Gordon Dillon.

As part of the investigation process, Cooper was notified that Dillon would investigate the allegations against Christiansen and file a report within 45 days. In a June 22, 2001, editorial in *The Newspaper*, Cooper wrote about the fact that the Key West police department had 45 days to conduct the investigation of Christiansen. He also urged Dillon to “tell the truth . . . and let the chips fall where they may.” That same day, Dillon arrested Cooper for violating a Florida law, Fla. Stat. 112.533(4), which made it a misdemeanor to disclose information relating to an ongoing internal police investigation.

Cooper spent three days in jail before being released. The charges against Cooper were dropped after a state prosecutor decided that the law was likely unconstitutional. Cooper, with the help of the Florida chapter of the American Civil Liberties Union (ACLU), subsequently sued Dillon. At the time, Cooper told the Associated Press, “The numerous unacceptable actions of this particular police chief and the failure of elected city officials to curb his abuses made this lawsuit inevitable.” Cooper argued that his First and Fourth Amendment rights had been violated when he was arrested. Dillon asserted that he was acting legally in his capacity of the chief of police when he arrested Cooper.

A federal magistrate initially sided with Cooper, finding that the Florida law, which was nearly identical to another Florida law struck down in 1990, was an unconstitutional content-based restriction on speech. However, a judge with the federal court for the Southern District of Florida determined that the law was constitutional and granted summary judgment for Dillon.

On appeal to the Eleventh Circuit, a three-judge panel unanimously concluded that the Florida law was unconstitutional and that Cooper’s suit against Dillon could go forward. Judge Stanley F. Birch, Jr., writing for the court, noted that the law, which “lies near the core of the First Amendment,” had to be thoroughly reviewed for the possible harm done to the public. “By investigating government abuse and providing a forum for citizens to amplify their complaints against government and inform their fellow citizens,” Birch wrote, “a vigilant, responsible, and, most importantly, free press guarantees that debate on public issues can be uninhibited, robust, and wide-open.”

Determining that the law was content-based because it sought to “stifle speech of a particular content, namely, speech regarding pending investigations of law enforcement officers,” the court ruled that the law failed to satisfy the high standard of strict scrutiny – requiring that it be narrowly tailored to serve a compelling government interest. Dillon had maintained that the law served compelling state interests by shielding witnesses in the investigation from information that might bias them, protecting the reputations of investigated officers, and protecting the privacy interests of those involved with the investigation. However, the court dismissed all of these arguments, finding the law unconstitutional. Birch wrote that “the state interests proposed by Dillon are not sufficiently compelling to justify the statute’s abridgment of First Amendment freedoms.”

The court went on to conclude that although Dillon had qualified immunity from Cooper’s claims against him in his personal capacity, because “the City of Key West, through the actions of Dillon, adopted a policy that caused the deprivation of Cooper’s constitutional rights,” Dillon was liable to Cooper in his official capacity.

In a press release, Howard Simon, executive director of the ACLU of Florida, hailed the Eleventh Circuit’s decision. He said, “We all benefit from crusading, questioning and sometimes offending journalists and we’re thrilled Dennis Reeves Cooper and his newspaper have finally been vindicated.” The ACLU press release is available online at http://www.aclufl.org/news_events/index.cfm?action=viewRelease&emailAlertID=921.

After the court’s decision, Cooper told the Key West *Citizen*, “This was just a case of a publisher publishing the truth. I was confident all along that the court would rule that any law that allowed a journalist to be arrested for publishing truthful information had to be unconstitutional.” He added, “I was just covering a news story.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

“I was confident all along that the court would rule that any law that allowed a journalist to be arrested for publishing truthful information had to be unconstitutional.”

—Dennis Reeves Cooper, Publisher, *The Newspaper*

Copyright News

National Geographic CD Compilation

Does Not Violate Freelancers' Copyright

On March 4, 2005, the U.S. Court of Appeals (2d Cir.) ruled against a group of freelance photographers and writers who had claimed that the National Geographic Society violated their copyrights when it published "The Complete National Geographic" (CNG)—a CD collection of the *National Geographic Magazine* going back to 1888. The 18 plaintiffs, all freelancers who had contributed to the *Magazine*, had appealed a decision from a federal district court in New York ruling in favor of National Geographic on its motion for summary judgment. Judge Ralph Winter, writing for the unanimous three-judge panel in *Faulkner v. Mindscape, Inc.*, 2005 U.S. App. LEXIS 3642, (2d Cir. 2005), wrote, "[W]e hold that, because the original context of the *Magazine* is omnipresent in the CNG and because it is a new version of the *Magazine*, the CNG is a privileged revision."

The freelancers claimed that the CNG was a violation of the Copyright Act of 1976, 17 U.S.C. § 101 et seq. The Copyright Act provides in part, "In the absence of an express transfer of the copyright or of any rights under it, the owner of copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series." The freelancers argued that the CNG was not a revision of the collective work in the *Magazine* but an alteration of their original works prohibited under the Copyright Act. National Geographic argued that the CNG was a "revision" of its *Magazine* editions, privileged under the Copyright Act. The district court agreed with National Geographic and the court of appeals affirmed.

Winter noted that although the author of an original work included in a larger publication retains the underlying copyrights to that particular work, the copyright in the collective work belongs to the person compiling the collective work. The court noted that the Copyright Act expressly states that the owner of the copyright in a collective work has the privilege to "reproduc[e] and distribu[e] the [original] contribution as part of that particular work, any revision of the collective work, and any later collective work in the same series." A House of Representatives report from 1976, when the Copyright Act was passed, noted that "a publishing company could reprint a contribution from one issue in a later issue of its magazine, and could [for example] reprint an article from a 1980 edition of an encyclopedia in a 1990 revision of it" as long as the original contribution itself was not revised.

The *Magazine*, Winter observed, has been sold in single bound copies and in microform. The copyrights of both those collective works were not being challenged. Additionally, compiled, bound, paper volumes containing multiple issues had also

been released. In order to put all of the thousands of articles and hundreds of thousands of pictures from the *Magazine* on the CNG CDs, each edition of the *Magazine* was scanned in, two pages at a time, and reproduced exactly as it originally appeared. The CNG also allowed users to either browse through each edition of the *Magazine* or use a search engine to find and retrieve articles by conducting searches by keyword. "The CNG presents an electronic replica of the pages of the *Magazine*," Winter concluded in dismissing the freelancers' arguments. "Pages are presented two at a time, with the gutter (that is, the *Magazine* fold) in the middle, and with the page numbers in the lower outside corners, just as they are presented in the written format." Because the *Magazine* had been reproduced exactly as it originally appeared, the court found that it was a privileged revision under the Copyright Act.

The freelancers had attempted to rely on a previous case against National Geographic to show that the CNG violated their copyrights. That case, *Greenburg v. National Geographic Society*, 244 F.3d 1267 (11th Cir. 2001), began from the same roots as the *Faulkner* case; *Greenburg* was first filed in 1997, as five other suits were filed over the years against National Geographic. Those five other suits were eventually consolidated in the New York trial court, resulting in the *Faulkner* case. The *Greenburg* case, however, had been decided by a federal court in Florida instead of in New York as part of *Faulkner*.

The *Greenburg* decision found that because the CNG contained independently copyrightable elements not present in the original work, it was an original work not privileged as a revision under the Copyright Act. The ability of users to search the CNG for articles, the *Greenburg* court ruled, changed the presentation of the original work and meant that the CNG had violated *Greenburg's* copyright in his original work. The search engine included with the CNG provides captions of the articles along with titles and bylines outside of the article's original context.

The *Faulkner* plaintiffs sought to use the Eleventh Circuit's ruling in *Greenburg* to prevent National Geographic from arguing that it had not violated the Copyright Act. They claimed that because National Geographic had already been found in violation of the Copyright Act for its publication of the CNG in *Greenburg*, National Geographic was now barred from arguing that the CNG did not violate the Copyright Act.

However, the *Faulkner* trial court had concluded, and the appellate court agreed, that *Greenburg* did not control the case brought by the freelancers in New York. Relying on a Supreme Court case decided after *Greenburg*, *New York Times Co. v. Tasini*, 533 U.S. 483 (2001), Winter wrote that it was possible that the ruling against National Geographic in *Greenburg* was

"We hold that, because the original context of the *Magazine* is omnipresent in the CNG and because it is a new version of the *Magazine*, the CNG is a privileged revision."

—Judge
Ralph Winter

Quattrone, *continued from page 36*

require an anonymous jury was an insufficient contemplation of alternative measures, explained the court. Owen could have, for example, postponed the trial, sequestered the jury, or changed the venue. Since Owen did not even consider such alternatives, the appellate court found that Owen was too hasty in issuing a prior restraint.

The Court of Appeals found review of Owen's order under the third prong of *Nebraska Press* to be a "closer question." Concerning the efficacy of the restraint, the appellate court acknowledged that Owen's order would intuitively seem likely to reduce the risk of juror harassment. The problem, the court found, was that the names of the potential jurors were read aloud in court. Although Owen's order presented a restraint on the press, the court reasoned

that any member of the public that happened to be present in the courtroom could have disseminated the names of the jurors, exposing them to the same dangers. "Thus," Sotomayor wrote, "the ability of the [district] court's order to satisfy the third prong of *Nebraska Press* is dubious at best."

In addition to a prior restraint on the freedom of speech, the appellate court held that Owen's order infringed the appellants' freedom to publish information disclosed in open court, constituting a separate constitutional harm. Sotomayor concluded that "[w]hile we appreciate the district court's efforts to avoid an unfair or disorderly trial, the freedoms of speech and press invariably must inform a court's choice of remedy."

—KELLY J. HANSEN MAHER
SILHA FELLOW

National Geographic, *continued from page 39*

incorrect. The uncertainty of copyright law after *Greenburg* as a result of *Tasini*, Winter went on to conclude, meant that National Geographic was not bound by the decision in *Greenburg*.

The court ultimately found that the CNG was a privileged revision under the Copyright Act. "In the case of the CNG," Winter wrote, "some images found in the original version of the *Magazine* are blacked out, and it contains [some] additional elements However, these changes do not substantially alter the original context which, unlike that of the works at issue in *Tasini*, is immediately recognizable. The presentation does not, therefore, affect the CNG's status as a revision."

The appeals court also affirmed the district court on several lesser issues. The court ruled that the CNG copyrights were transferable in part by National Geographic; that it was irrelevant to the decision whether the original articles and photographs were first published prior to the Copyright Act of 1976; and that the trial judge, Judge Lewis A. Kaplan,

properly concluded he did not need to recuse himself from the case. However, the court did find that a few of the original works by some of the freelancers had been originally printed with the restriction that they only appear in the initial publication in the *Magazine*. The appellate court concluded that those works could not be included as a privileged revision in the CNG.

According to the Reporters Committee for Freedom of the Press, Andrew Berger, a lawyer representing one of the freelancers, said that his client was "seriously considering" an appeal to the Supreme Court. Although the Supreme Court typically agrees to hear less than ten percent of requested appeals, the split between the Eleventh Circuit in *Greenburg* and the Second Circuit in *Faulkner* might provide the High Court with enough reason to agree to review the case.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Survey Reveals That Some High School Students Think Press Has “Too Much Freedom”

A recent survey of more than 100,000 high school students found that 32 per cent believe that the press has “too much freedom” and that 36 per cent believe that newspapers should get government approval before publishing stories. Only one in ten believed that the press has too little freedom, while just over two-thirds believed the press has about the right amount of freedom. The survey was part of a study conducted by two professors at the University of Connecticut and commissioned by the John S. and James L. Knight Foundation. Ninth through twelfth graders responded to the survey from 544 high schools around the country. Hodding Carter III, Chairman and CEO of the foundation, expressed surprise at the results, saying “These results are not only disturbing; they are dangerous. Ignorance about the basics of this free society is as much a danger to its future as any terrorist plot.” The study is available online at http://firstamendment.jideas.org/downloads/future_final.pdf.

High school students, though not very supportive of First Amendment rights for the press, expressed considerable support for the freedom of speech generally. Eighty-three per cent of students agreed with the statement “People should be allowed to express unpopular opinions” and 70 per cent agreed, “Musicians should be allowed to sing songs with lyrics others may find offensive.” But only 51 per cent agreed that newspapers should be allowed to publish freely without having the government approve stories first. In addition to those results, 75 per cent of students said that they either do not know how they feel about the First Amendment or that they took it for granted, while 75 per cent incorrectly believed that flag burning is illegal and half of the respondents wrongly believed that the government can censor pornography over the Internet.

In addition to surveying high school students, the study also included survey responses from more than 500 principals and administrators and nearly 8,000 teachers. Those results revealed that high schools often fail to provide journalism opportunities and education to their students. Despite the fact that most administrators said journalism was a priority at their school and that all students should have some exposure to basic journalism skills, only 17 per cent of principals said that journalism was a high priority at their schools and nearly one-third said that it was not a priority at all.

The study also found that about one in five schools had no student media at all. For schools that provide student media activities, the predominant form of student media was a student newspaper, provided by three-quarters of schools with student programs. Student media activities that were less prevalent included student Internet media, student-run television, magazines, and radio. Surprisingly, the study also indicated that, regardless of the level of student media activities available, roughly the same percentage of students participated in media programs in schools with many media activities as those in schools with few media activities. Highlighting the fact that schools facing budget cuts are likely to have dropped student newspapers, the study also reported that rural and urban schools were more likely to have recently dropped student newspapers over the past five years compared with suburban schools.

One interesting result of the study was that students with more exposure to media activities and classes dealing with journalism or the First Amendment had a better grasp of First Amendment issues and were more supportive of press freedoms. Students involved in three or more media-related activities along with those who took more than one class dealing with the media and the First Amendment tended to have a better understanding of First Amendment protections and were more supportive of press freedoms.

The report accompanying the study quoted Richard Holden of the Dow Jones Newspaper Fund, saying “Support for the teaching of student media and First Amendment has to come from the top down, from the superintendent of schools to the principal to the adviser to the student. Too often the newspaper adviser is ‘the new kid on the block’ who is far more interested in getting tenure than rocking the boat. Support among fellow teachers often is lacking as well. It gets disheartening very quickly when you’re one person fighting against many.” The study agreed with Holden’s conclusion that media activities and classes dealing with First Amendment issues or teaching basic journalism skills tended to be under-funded or ignored altogether.

The survey also asked students to rate how much they trust journalists. Over half of the students, 58 per cent, said they trusted journalists some of the time and 4 per cent said they trusted journalists all of the time. However, 23 per cent responded that they trusted journalists little of the time, while an additional 9 per cent said they did not trust journalists at all. The views of students tended to be lower than the views of teachers, though they echoed the results of a survey conducted by the Gallup Organization on public perceptions of journalists conducted last year.

The Gallup Poll, conducted Nov. 19-21 2004, asked randomly sampled respondents to provide information on whether they considered different profession to have “very high” or “high” honesty and ethical standards. Pharmacists, with a rating of 72 per cent of people saying that profession had “very high” or “high” honesty and ethical standards, topped the list along with doctors, and nurses. Reporters received a rating of just 21 per cent, and as a profession, ranked alongside state officeholders, members of Congress, and nursing home operators, but above lawyers and car salesmen. Gallup found that newspaper reporters had climbed up from 16 per cent in 2000, the last time Gallup polled people on that profession. However, newspaper reporters

“These results are not only disturbing; they are dangerous. Ignorance about the basics of this free society is as much a danger to its future as any terrorist plot.”

—Hodding Carter III,
James L. Knight
Foundation

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were still down from an all time high of 30 per cent in 1980. Television reporters received a 23 per cent response compared with 21 per cent in 2000.

The impact of increasing public distrust of the press and the economics of news media organizations today appears to be having an impact on individual reporters as well. An informal poll conducted by the Poynter Institute revealed that more journalists are facing declining morale and greater job burdens than in the past. Summing up the results of the survey, Jill Geisler wrote on PoynterOnline, "The 750 respondents tell a story of long hours, pressure to do more, missed vacations, staff cutbacks, and as a result, a significant number of journalists who are considering leaving the field. Those most at risk of leaving are young journalists, women, and minorities. But others are not far behind them in that consideration." The article is available online at http://www.poynter.org/content/content_view.asp?id=78725. Nearly two-thirds of the respondents said they always had to work more than 40 hours per week and a similar amount said they had seen organizations cut staff in the past two years. Additionally, 46.2 per cent said they had not taken any vacation in the past year and 47.2 per cent have seriously considered leaving journalism.

Although the media has faced a certain amount of doom and gloom in these times, there appears to be at least one bright spot discovered by Lee Wilkins of the University of Missouri School of Journalism and Renita Coleman of the School of Mass Communications at Louisiana State University. Wilkins and Coleman were interested in discovering whether journalists had the ability to reason on moral and ethical issues beyond those of the public. In order to measure the results, they sampled 249 journalists nationwide using a test designed by psychologists and academics to measure ethics and moral development of people in various professions. Among the conclusions, Wilkins and Coleman reported, "Thinking like a journalist involves moral reflection, done at a level that in most instances equals or exceeds members of other learned professions."

Although seminarians and philosophers, medical students, and practicing physicians tended to score better on the test than journalists, the average score for the journalists turned out to be higher than adults in the general public, graduate students, nurses, and dental students. Additionally, the study found that journalists with backgrounds in investigative or civic reporting, or both, outperformed their peers.

The test, known as the Defining Issues Test, was originally developed at the University of Minnesota in the 1970s and has since been administered to more than 30,000 people. The test taken by the journalists consisted of six hypothetical dilemmas, some related to media and publishing and some not. Each situation provided twelve different factors, of which respondents had to choose the top four they used in making their decision on the best course of action. There were no right answers; instead Wilkins and Coleman were more interested in moral and ethical reasoning than discovering any particular outcome reached by the respondents. The results were then determined by calculating the score of each respondent's reasoning ability.

Wilkins and Coleman's study was published in the Autumn 2004 issue of *Journalism & Mass Communications Quarterly* and in the new book "*The Moral Media: How Journalists Reason About Ethics*." It is also available online at <http://www.aejmc.org/pubs/jmcqaut04/coleman.pdf>.

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Silha Forum Examines Privacy in the Digital Age

Constitutional and privacy rights have become murky in the evolving world of digital media due to the rapid growth of cell phone use, e-mail, and computers to send and store massive amounts of data. That uncertainty and the dynamic nature of the law relating to digital technology were at the heart of the Silha Center spring forum, entitled “The Constitution, Digital Media and Expectations of Privacy,” held on March 9, 2005 in the Walter Library on the University of Minnesota campus.

The forum, which was co-sponsored by the University of Minnesota Institute for New Media Studies, featured three speakers: Stephen J. Cribari, a visiting professor at the University of Connecticut School of Law and adjunct professor at the University of Minnesota Law School; Dick Reeve, General Counsel and Deputy District Attorney for Computer Crimes at the Denver District Attorney’s Office and adjunct professor at the University of Denver College of Law; and Mary Horvath, program manager and senior computer forensic examiner at the Federal Bureau of Investigation (FBI).

Cribari addressed the constitutional issues related to digital privacy, specifically focusing on the impact of Fourth Amendment jurisprudence on digital evidence and privacy. “The Fourth Amendment provides the constitutional right of each person not to be unreasonably searched and seized,” Cribari said. However, he pointed out that the Fourth Amendment does not define what is “unreasonable,” explain what remedy a person has if his rights have been violated, or even who is considered a “person” for purposes of the amendment. Cribari explained that this ambiguity has led to a substantial amount of litigation while also heightening the uncertainty of Fourth Amendment legal standards in cases involving digital technology.

The modern legal definition for the reasonableness of a government search or seizure was first stated in the Supreme Court case *Katz v. United States*, 389 U.S. 347 (1967). *Katz* established a two-part test to determine whether a person has a reasonable expectation of privacy for Fourth Amendment purposes. First, the person being searched must demonstrate a subjective expectation of privacy, and second, there must be some agreement in society that such an expectation is legitimate.

The development of new technology complicates the legal landscape. The government search in *Katz* dealt with an eavesdropping device used in a phone booth, whereas today, Cribari noted, phone booths have become a rarity and people are much more likely to talk on cell phones. Use of cell phones to carry on sometimes intimate conversations in public and the relative ease of intercepting cell phone signals transmitted through the air raise new issues not addressed in older cases like *Katz*.

Cribari said that this distinction was important. “Expectation of privacy does not exist [simply] because you’re communicating really private stuff,” he pointed out. “There are ways to diminish and eliminate expectations of privacy.” For example, a diminished expectation of privacy for people in cars exists in the law; the same diminished privacy might be extended to people on cell phones, although such a case has not been decided by courts yet.

Cribari also cited on two other Supreme Court cases, *Wyoming v. Houghton*, 526 U.S. 295 (1999), and *Kyllo v. United States*, 533 U.S. 27 (2001), to speculate as to how the Court might decide a challenge to a search involving digital technology. In *Houghton*, Cribari said the Court ruled that when the reasonableness of a search is at issue and there is no historical precedent to rely on, such as in cases dealing with digital technology, courts must “weigh the government’s need to search against the privacy interests of the person being searched.” Adding to the *Houghton* rule, the Court in *Kyllo* found that once technology used by the government in a search has become widely available to the public, its use would no longer be unreasonable – even if it had been unreasonable for police to use it in a search previously.

Cribari said it was possible the Supreme Court might apply these rules from *Houghton* and *Kyllo* to determine the reasonableness of searches involving digital technology, should such a case come before the Court. Because e-mail is so ubiquitous, and because software to intercept communications is widely available to the public, there might be no expectation of privacy in e-mail or even the information stored on a computer. Without any expectation of privacy in e-mail, the government could conduct such a search without judicially imposed limits. “I think we’re a heartbeat away from that result,” Cribari said. When you choose to use a cell phone or e-mail, he added, “to some extent, you give up, by your own choice, an expectation of privacy in communication.”

Dick Reeve, who has been involved with criminal cases related to computer crimes and digital evidence, discussed the role of computer technology in the cases he has helped prosecute. Reeve said that the extensive nature of digital technology means that trial lawyers prosecuting such cases must find ways to use digital evidence and to explain complex digital processes, such as how computers store data, to inform and persuade juries. Privacy issues can also arise, Reeve said, whenever police seize a computer, forensics investigators recover data from computers, a computer has been password protected, or the information on a computer hard drive has been encrypted.

Although digital evidence and computers present unique problems for the police, Reeve noted that as technology evolves, police understanding and use of technology has evolved as well. Advances in technology have allowed police and prosecutors to discover and recover digital information from computers, to use it effectively in criminal investigations and trials, and to explain those systems to juries. “Rules of law need to evolve with technology,” Reeve said.

“Expectation of privacy does not exist simply because you’re communicating really private stuff.”

–Stephen Cribari

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Reeve also explained that forensics workers can now make a “forensic copy” of a computer hard drive. In effect, it is like “taking a picture of all of the data on a hard drive – whether it’s in a file or not,” Reeve said. Forensics also allows recovery of data that computer user may not even know exists. “There is data on the computer you don’t have control over,” Reeve said. For example, Internet cookies, which are files placed on a person’s computer when they visit a Web site, are almost always placed there without that person’s knowledge and can, in some cases, remain on computers for years.

Mary Horvath, an expert on digital forensics from the FBI, expanded on the practical aspects of digital search and seizures mentioned by Reeve. She was quick to point out that even though Cribari suggested that police might have the legal authority to search and seize computers and e-mail without a warrant, layers of federal regulations, statutes, and other requirements are designed to ensure that the FBI adherence to specific rules in cases using digital evidence. One federal law cited by Horvath was the Electronic Communications Privacy Act (ECPA), 18 U.S.C. § 2510, et seq. Horvath said that ECPA “goes above and beyond a search warrant” requiring special authority for communications that are intercepted while in transit to make sure that the FBI does not violate privacy rights of individuals.

In the 5,000 or so cases involving computer crime that the FBI deals with each year, Horvath said that millions of megabytes of information might be recovered by the FBI. Trying to identify individual files from large amounts of data would normally take a very long time. In order to efficiently get access to the most important data, the FBI uses a database to exclude mundane files, such as those for the operating system and common software programs, while including potentially incriminating evidence. Horvath said this often proves particularly effective in child pornography cases; because pedophiles often trade the same digital photos back and forth, they can be identified in the database and found quickly on the computer.

Horvath also helps the prosecution to create a strong circumstantial link between the defendant, the hardware found at the crime scene, and the files on the defendant’s computer. This can be done by using metadata – the information about files contained within those files. Horvath said that each brand of digital camera leaves a unique identifier in digital pictures it takes, telling her which camera the file came from. When a search warrant is executed, Horvath said, “I want my agents to seize the data and the hardware – the printer, the fax machine, and the floppy drive. [Then] I try to tie the digital camera to a file [on the computer].”

The Silha Forum was attended by approximately 40 students, faculty, and members of the local legal community. The Silha Forum 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.

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