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Branzburg v. Hayes Still Casts Uncertainty On Journalists' First Amendment Rights

The image of American reporters sitting in jail cells because they have refused to reveal the identities of their confidential sources seems contrary to everything the First Amendment stands for. Yet in *Branzburg v. Hayes*, 408 U.S. 665 (1972), the nation's highest court ruled that the U.S. Constitution provides no privilege allowing journalists who have actually witnessed a crime to refuse to testify before a grand jury.

It was a controversial ruling at the time, and more than 30 years later, judges and lawyers still argue about what *Branzburg* really means. In a concurring opinion, Justice Lewis Powell emphasized that the decision was narrow, and did not strip journalists of all of their constitutional rights. Four justices dissented. An opinion by Justice Potter Stewart, joined by two of his colleagues, proposed a three-part balancing test. He wrote that journalists should be compelled to testify only if there is probable cause to believe that they have information relevant to a specific violation of the law; that there are no other means to obtain the information; and that a compelling and overriding interest in the information journalists could provide has been demonstrated.

Thirty-one states and the District of Columbia have passed statutes providing some form of testimonial privilege for reporters. But Congress has never passed a federal shield law.

Although the Supreme Court has not chosen to explain further what it intended in the years since the *Branzburg* decision, other federal courts, as well as state courts, have considered the issue, sometimes in contexts quite different from those presented in *Branzburg*. The result has been a crazy quilt of rulings which are often inconsistent and irreconcilable.

Starting with last year's Seventh Circuit ruling in *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003), however, the trend seems to be towards greater skepticism towards the existence of any constitutionally-based privilege. That case arose from a trial in Ireland concerning whether the defendant, Michael McKevitt, was a member of an offshoot of the Irish Republican Army called the Real IRA. Three journalists had tape recorded interviews with an FBI informant named David Rupert whose biography they were writing. McKevitt hoped their tapes would assist in his cross-examination of Rupert, a witness for the prosecution.

Judge Richard A. Posner ruled that the reporters had to surrender the tape because the identity of the source was already known and Rupert did not object to the disclosure. But Posner went on to discount the existence of any common law privilege for journalists, and specifically rejected the idea that *Branzburg* might create one. (See "*McKevitt v. Pallasch*" in the Fall 2003 Silha *Bulletin*.)

The summer of 2004 has been particularly remarkable for the number of cases seeking to compel journalists to testify about their confidential sources. Many of those reporters have been held in contempt and face the prospect of imprisonment or fines, or both. A few have chosen to testify. This issue of the Silha *Bulletin* presents four of these cases: *In re: Special Counsel Investigation* (seeking the identity of the individual who leaked the identity of CIA operative Valerie Plame), *Lee v. U.S. Department of Justice* (seeking the identity of the government officials who may have violated the federal Privacy Act), *In re: Special Proceedings* (seeking the source who provided a reporter with a sealed investigatory videotape), and *Weinberger v. Maplewood Review* (seeking the identity of the source of defamatory statements in a libel suit).

—Jane E. Kirtley
Silha Professor and
Director of the Silha Center

This Issue's Highlights

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Reporters Privilege

In re: Special Counsel Investigation

"This story, about potential government misuse of power, is precisely the sort of thing that is impossible to do without the benefit of confidential sources."

– Attorney Floyd Abrams

On May 21, 2004, *Time* magazine reporter Matthew Cooper as well as Tim Russert, host of "Meet the Press" and NBC Washington Bureau Chief, were subpoenaed to testify before a grand jury as part of the Justice Department's effort to discover who had disclosed the identity of CIA operative Valerie Plame. Under certain circumstances, the intentional disclosure of an undercover agent's identity is a felony under the Intelligence Identities Protection Act of 1982 (50 U.S.C. §§ 421 et. seq.), and any government or administration official responsible could face criminal charges if identified. The reporters refused to testify, and filed motions to quash the subpoenas. The case came before Federal District Chief Judge Thomas F. Hogan (D.D.C.) who ruled *In re: Special Counsel Investigation*, 2004 U.S. Dist. LEXIS 15360, that the reporters must testify before the grand jury investigating the incident. Hogan's opinion was written July 20, 2004, but remained sealed until August 9.

The Plame investigation was launched after Robert Novak, citing two anonymous Bush administration officials as his sources, revealed Plame's identity in his July 14, 2003 syndicated column carried by *The Washington Post* and other newspapers. Plame is married to former U.S. diplomat Joseph C. Wilson IV, who served as a CIA envoy to Niger in 2002 to investigate claims that Iraq was trying to purchase uranium for its weapons program. Wilson stated upon his return that the claims were false. Novak's disclosure came just days after Wilson criticized Bush administration statements on the uranium issue. (See "Columnist's Story Prompts Investigation Into Government Leaks" in the Fall 2003 issue of the Silha *Bulletin*.) *The Washington Post* reported on Sept. 28, 2003 that disclosure of Plame's identity by Bush administration officials was made to as many as six journalists, including Cooper and Russert.

Cooper's and Russert's motions to quash their subpoenas were based on First Amendment and common law grounds, the District of Columbia's shield law (D.C. Code Ann. § § 16-4702(1), 4703(b) (2001)), as well as the Department of Justice's guidelines regarding the issuance of subpoenas to members of the press (28 C.F.R. § 50.10). But Hogan denied their motions, writing, "Cooper and Russert have no privilege, qualified or otherwise, excusing them from testifying before the grand jury in this matter." Hogan cited the Supreme Court's ruling in *Branzburg v. Hayes*, 408 U.S. 665 (1972), in which five justices held that there was no constitutionally-based testimonial privilege before grand juries when a reporter has witnessed a crime. Hogan quoted Justice Byron White's opinion in *Branzburg* that "we cannot accept the argument that the public interest in possible future news about crime . . . must take precedence over the public interest in pursuing and prosecuting those crimes." Hogan continued, "In the absence of a grand jury acting in bad faith or with the sole purpose of harassment, *Branzburg* makes clear that neither the First Amendment nor common law protect reporters from their obligations shared by all citizens to testify before the grand jury when called to do so."

Cooper and Russert asserted in their motions that the *Branzburg* decision recognized a qualified privilege for journalists under the First Amendment and that, as Hogan summarized in his opinion, "courts should employ a balancing test when faced with a reporter subpoenaed before a grand jury." But Hogan rejected the reporters' argument, stating that the Supreme Court in *Branzburg* "expressly refused to find that the press has any qualified privilege against testifying before a grand jury."

Hogan further stated that although Cooper and Russert claimed reporters privilege under the District of Columbia's shield law, the present case is a federal matter, so the local statute does not apply.

Although the Department of Justice's guidelines direct that "a journalist can be subpoenaed only after all other potential sources of the information are exhausted," Special Counsel Patrick Fitzgerald's *ex parte* affidavit claimed, "The information requested from Mr. Cooper and Mr. Russert is very limited, all available alternative means of obtaining the information have been exhausted, the testimony sought is necessary for the completion of the investigation, and the testimony sought is expected to constitute direct evidence of innocence or guilt." Furthermore, Fitzgerald contends that his position as special counsel exempts his subpoenas from prior approval by the Justice Department.

Hogan concluded, "Whatever extent lower courts around the country have eroded the periphery of the *Branzburg* opinion, the core of the opinion stands strong." The present case, Hogan said, "fell entirely" within the *Branzburg* core, and was controlled by that case.

Russert agreed to be interviewed on August 7, but Cooper and Time refused to comply with Hogan's order, resulting in a contempt citation by Hogan on August 9. Cooper could have faced both jail time until he agreed to appear (for a maximum of 18 months) and a running fine of $1,000 per day for his refusal. Hogan's order against Cooper was stayed pending Cooper's and *Time's* appeal to the U.S. Court of Appeals (D.C. Cir.), but on August 23, Hogan vacated his contempt order after Cooper had consented to an interview with the DoJ after his source, Lewis I. Libby, Chief of Staff to Vice President Dick Cheney, released Cooper from his confidentiality agreement that same day. (See *In re: Special Counsel Investigation*, Misc. No. 04-296 (TFH)).

Journalists and their advocates have condemned Hogan's ruling, citing its harmful impact on

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Reporters Privilege

Dr. Wen Ho Lee v. United States Department of Justice

On August 18, 2004, Federal District Judge Thomas Penfield Jackson found five reporters in contempt of his Oct. 9, 2003 ruling ordering them to reveal their sources for a 1999 *New York Times* story. The story claimed that scientist Wen Ho Lee stole U.S. nuclear secrets for China. Subsequently, Lee was indicted on 59 felony counts of allegedly copying classified information onto computer tapes. Little evidence against Lee materialized, however, and he eventually pleaded guilty to only one charge of mishandling classified information concerning nuclear weapons. He was cleared of the other charges.

Lee brought suit against the U.S. Departments of Energy and Justice under the Privacy Act (5 U.S.C. § 522a(b)), alleging that personal information about him had been released to the press. Subpoenas *duces tecum* were issued for the reporters – Jeff Gerth and James Risen, both of *The New York Times*; Robert Drogin of the *Los Angeles Times*; H. Josef Herbert of the Associated Press; and Pierre Thomas, formerly of CNN, but who is now with ABC – in order to learn their sources. Although the reporters filed motions to quash the subpoenas, Jackson ruled in his 2003 order that the reporters had to reveal their sources. (See "Reporters Refuse to Reveal Sources in Spy Case" in the Fall 2003 Silha *Bulletin.*)

Depositions of the journalists began the week of Dec. 15, 2003, but each declined to reveal his sources.

In the August 2004 ruling, *Dr. Wen Ho Lee v. United States Department of Justice*, et al., Civil Action No. 99-3380-TPJ, (D.C. Cir.), Jackson found the five reporters in civil contempt of his 2003 order, and decided that each would be fined $500 a day, payable to the United States, until each complied with the October order. However, Jackson ordered that the fines were to be stayed for 30 days or until the reporters had a chance to file a timely appeal.

Each of the reporters stated his own reasons why he should not reveal his sources.

Gerth claimed that many of his confidential sources referred to a different scientist, Peter Lee, not Wen Ho Lee. But Jackson did not find his claim convincing, saying Gerth had asked for clarification as to the identity of the person he was being questioned about, and also invoked reporters privilege instead of answering questions addressed to him. Finally, Jackson wrote, "[I]t is worth noting that Gerth subsequently stated that his 'intention [was] not to divulge' confidential sources – period."

Risen claimed that none of the questions put to him specifically called upon him to "divulge the identity of an officer or agent [of the government] who provided information to [Risen] against Dr. Lee . . . or implicate[d] the Privacy Act." But, referring to Risen's deposition, Jackson found that the questions put to Risen did indeed specifically address the identities of government agents.

Herbert claimed that any information he was called upon to reveal had already been published in his stories and so was already available. Herbert also stated that there were alternative sources to the information. Jackson responded that he had rejected similar arguments in his 2003 order.

Thomas stated that finding the press in contempt is a form of punishment for refusing to reveal information that has been legally obtained. But Jackson wrote that Lee was seeking a contempt order to prompt the journalists to reveal the identities of those who violated his rights under the Privacy Act, not to punish them.

Thomas further stated that he determined the information he was asked to divulge was not "personal or private, much less acutely hurtful," and was therefore outside the scope of Lee's Privacy Act suit. But Jackson found that Thomas was putting his own interpretation on the October 2003 order. The aim of the subpoena was to compel him to reveal the names of the sources, Jackson wrote.

Drogin also claimed that the information asked of him was beyond the scope of Jackson's 2003 order. Drogin's attorney, Lee Levine, told the *Los Angeles Times*, "The [reporters'] answers would have shed no light on Wen Ho Lee's Privacy Act claim against the government."

Jackson decided the amount of the fine by splitting the difference between what each side in the case requested. The reporters had asked for a fine of $1; Lee had asked for a fine of $1000.

Organizations such as the American Society of Newspaper Editors (ASNE) and Reporters Without Borders (Reporters sans Frontieres; RSF) expressed concern over Jackson's ruling. ASNE president Karla Garret Harshaw and Freedom of Information chair Andrew N. Alexander released a statement saying, "When our courts threaten journalists with imprisonment or heavy fines if they refuse to reveal their confidential sources, they are giving comfort to the forces of repression. The effect of these court rulings is that the press is in danger of becoming merely an investigative tool for prosecutors and litigants."

Paul McMasters, an ombudsman for the First Amendment Center, told *The New York Times*, "In effect, all these developments [in the several reporters' privilege cases currently in the courts] work to thwart the ability of the press to do a good job of bringing vital information to the American public."

But in an interview with *The Boston Globe*, Silha Professor and Silha Center Director Jane Kirtley cautioned that there may be less public sympathy for journalists who may be perceived as putting themselves above the law. "The public is skeptical, and judges are skeptical. What I think they see is that the press are demanding special privileges. . . . It rings hollow because we are seen as people who abuse the confidential source privilege."

Geneva Overholser, a former *Washington Post* ombudsman who is now a professor at the University of Missouri School of Journalism, agreed. She told *The Boston Globe* that journalists "cannot allow the abuse of anonymity. We've allowed people to attack others [anonymously] and that's a totally inappropriate thing to do. We in the press cannot simply do those things and expect the lawyers to save us."

The reporters are expected take their case to the federal Court of Appeals for the D.C. Circuit.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

"The reporters' answers would have shed no light on Wen Ho Lee's Privacy Act claim against the government."
– Attorney Lee Levine

Reporters Privilege

In re: Special Proceedings

A unanimous three-judge panel of the U.S. Court of Appeals (1st Cir.) upheld a trial judge's order holding a Providence, R.I. television reporter in contempt of court on June 21, 2004, after he refused to divulge the name of a source who provided him with a videotape at the center of a criminal case. Jim Taricani, a reporter for the NBC affiliate WJAR-TV, had been leaked the videotape allegedly showing an aide to the former Mayor of Providence, Vincent Cianci, Jr., taking a bribe from an undercover FBI agent in February 2001. The panel also upheld a $1,000 per day civil contempt fine against Taricani until he reveals the identity of his source. *In re: Special Proceedings*, 373 F.3d 37 (1st Cir. 2004)

"There is no doubt that the request to Taricani was for information highly relevant to a good faith criminal investigation."
– Chief Judge Michael Boudin

The videotape aired by Taricani was part of evidence obtained in a criminal corruption investigation of Cianci and other local government officials in 2000. Judge Ronald R. Lagueux of the federal District Court in Providence entered an order prohibiting the lawyers from disclosing the contents of the surveillance recordings, including the videotape Taricani received.

After WJAR-TV aired the videotape during a segment reported by Taricani on Feb. 1, 2001, Marc DeSisto, a special prosecutor appointed by the District Court, initiated an investigation to determine who had provided Taricani with the videotape. When DeSisto interviewed Taricani, the reporter refused to answer any questions that would reveal his source, claiming a "newsman's privilege." Taricani argued that the First Amendment protected him from providing the information relating to his source.

The federal district court granted DeSisto's motion to compel Taricani's testimony in October 2003. After Taricani refused to answer questions about his source at a deposition, he was held in civil contempt on March 16, 2004, and ordered to pay $1000 a day in fines until he complied. According to the *Providence Journal*, Chief Judge Ernest C. Torres initially considered sending Taricani to jail, but elected not to because of concerns about the reporter's health.

Chief Judge Michael Boudin wrote the appellate opinion in which Judges Kermit Lipez and Jeffrey Howard joined. The panel noted at the outset of its analysis that Taricani's "First Amendment argument is an uphill one in light of the Supreme Court's [*Branzburg v. Hayes*, 408 U.S. 665 (1972)] decision." In *Branzburg*, the Supreme Court held that the First Amendment provided no general privilege for news reporters who witness criminal activity to withhold information regarding their sources from grand jury investigations.

Although the panel opinion found that Taricani's claim merited "heightened sensitivity [due] to First Amendment concerns," it ultimately determined that "in this case there is no doubt that the request to Taricani was for information highly relevant to a good faith criminal investigation," and that reasonable efforts had been made to obtain the information elsewhere. Because DeSisto had interviewed 14 other people prior to Taricani, and still had not determined who released the videotape in violation of the District Court order, the panel ruled that there was a special need for Taricani to answer DeSisto's questions. Although the Court of Appeals had suspended enforcement of the contempt fine until it rendered a decision, since Aug. 12, 2004, the $1,000 per day contempt fine has been enforced against Taricani.

Claire Eckert, vice president of advertising and promotions at WJAR, told the Associated Press after the Court of Appeals ruled, "We maintain our position that if the courts can compel reporters to break their promise of confidentiality, many sources will withhold newsworthy information that is important to share with the public."

Cianci was eventually convicted in 2002 of racketeering conspiracy in which he was accused of taking bribes to grant tax breaks and jobs within Providence. His top aide, Frank Corrente, the individual allegedly shown accepting the bribe in the leaked videotape, was also convicted.

—Andrew Deutsch
Silha Research Assistant

Reporters Privilege

Weinberger v. Maplewood Review

When *Maplewood Review* reporter Wally Wakefield refused to comply with a subpoena ordering him to reveal the sources he quoted in a story about the firing of local high school coach Richard Weinberger, Minnesota's Supreme Court ordered him to pay a $200-a-day fine, beginning April 12, 2004. (See "Courts Rule in Reporter Privilege Case: *Weinberger v. Maplewood Review* in the Summer 2003 Silha *Bulletin*; "Minnesota Shield Law Facing Test" in the Winter 2002 issue of the Silha *Bulletin* and "Reporters Subpoenaed, Detained: Wally Wakefield Subpoena Update" in the Summer 2002 issue of the Silha *Bulletin*.)

Because Wakefield quoted unnamed school officials who allegedly stated that Weinberger intimidated his players, Weinberger brought a defamation suit against the school district and school officials in October 1998, then subpoenaed Wakefield in July 2000 to learn the identities of the officials he quoted in his January 1997 article. Although Minnesota has a state shield law, it contains an exception for defamation cases (Minn. Stat. § 595.025 (2002)). The Minnesota Supreme court ruled in *Weinberger and Independent School District no. 622 v. Maplewood Review*, 668 N.W.2d 667 (2003), that the defamation exemption applied in the case, even though Wakefield himself had not been sued.

Wakefield, a retired school teacher who works part-time as *Maplewood Review's* sports reporter, had "an unfaltering insistence that a promise made [not to reveal his sources] is a promise kept," according to Wakefield's attorney, Mark R. Anfinson, writing for the *Bulletin*, Minnesota Newspaper Association's (MNA) newsletter. "Despite his respect for the court system, he would not go back on his word," Anfinson stated. The fines, running from April 12, 2004 until July 19, 2004, when Weinberger's libel trial was scheduled to begin, could have cost Wakefield up to $20,000.

Steve Brandt and Randy Furst, both reporters with the Minneapolis *Star Tribune*, created the Wally Wakefield Defense Fund. Soon they were joined by the Minnesota Professional Chapter of the Society for Professional Journalists (SPJ), which issued a press release urging SPJ members to help raise money for Wakefield. According to a story posted on SPJ's Web site, the Wally Wakefield Defense Fund received 179 contributions "from journalists and supporters of freedom of the press around the nation." Eighty-three *Star Tribune* employees donated a total of $9,043 and the newspaper itself donated $5,000. The St. Paul *Pioneer Press* donated $3,000, and the Reporters Committee for Freedom of the Press and the Minnesota Newspaper Association encouraged their constituents to donate. By May 31, the fund held $22,566. (SPJ's article is available online at www.mnspj.org/wakefield.asp.)

But before Weinberger's defamation trial began, the former coach settled with the school district on July 9. The settlement includes a $184,000 payout from the district as well as a written apology. At that point, Wakefield's subpoena became moot, and the fines halted after reaching $18,200. "The four years of litigation imposed an enormous strain on Wakefield and his family," Anfinson wrote in MNA's newsletter. "Yet he never wavered, demonstrating throughout his good humor and conviction he was doing the right thing."

Anfinson praised Minnesota's journalists and news organizations for their solidarity for Wakefield, not only for their donations, but also their "encouragement and editorial support. . . .This all made an incalculable difference to Wakefield and his family, especially during the past few months as the fine mounted ever higher."

However, Anfinson was critical of the Minnesota judicial system saying that it "failed Wakefield miserably. . . . [I]t also failed to protect the vital policies served by the reporter's privilege under both the Free Flow of Information Act and the First Amendment. . . . The [Minnesota Supreme Court] grotesquely misread and misapplied established principles of libel law, especially those that govern lawsuits by public officials such as Weinberger. In the end, its decision led directly to the school district's eventual conclusion that its best course was to settle – to the tune of $184,000, a sum that is grossly out of proportion to the merits of Coach Weinberger's libel claims."

As for Wakefield, Anfinson wrote, "Nonetheless, when it was all over, Wally Wakefield was standing tall, his sources undisclosed. According to an [Associated Press] story about the settlement published on Saturday [July 10], Wakefield described his position in characteristically succinct terms: 'I'm still right.' That was always enough for him."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

"Wakefield had an unfaltering insistence that a promise made is a promise kept."
– Attorney Mark Anfinson

Reporters Privilege

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investigative journalism. Floyd Abrams, an attorney for Cooper and for *Time*, was quoted in *The New York Times* as saying, "that sort of story, about potential government misuse of power, is precisely the sort of thing that is impossible to do without the benefit of confidential sources."

Reporters without Borders (Reporters sans Frontieres, RSF) stated, "once again, the right not to reveal sources, which is the cornerstone of press freedom, is being threatened by a U.S. court. Forcing journalists to disclose them undermines one of the key elements of investigative journalism, which is vital for democracy." RSF's statement is available online at http://www.rsf.org/print.php3?id_article=11123.

On September 3, *USA TODAY* reported that two additional journalists – Judith Miller of *The New York Times* and Walter Pincus of *The Washington Post* – have also been subpoenaed in the Plame case. Miller and Pincus appeared before Hogan that day, requesting that subpoenas served on them be quashed on First Amendment grounds, claiming that a constitutional privilege protects reporters from forced disclosure of their confidential sources. *USA TODAY's* story is available online at http://www.usatoday.com/news/washington/2004-09-02-media-sources_x.htm. As the *Bulletin* went to press, Hogan had not yet ruled on their motion.

If their motions to quash the subpoenas are rejected, Miller and Pincus would also be faced with the choice between testifying and being cited for contempt, which could result in fines or prison sentences. Pincus has also been subpoenaed in the civil lawsuit filed against the U.S. government by former Department of Energy scientist Wen Ho Lee, (See "*Dr. Wen Ho Lee v. United States Department of Justice*" on page 3 in this issue of Silha *Bulletin*.)

On September 10, *The Washington Post* reported that the telephone records for Miller, along with those of another *New York Times* reporter, Philip Shenon, have been subpoenaed. The subpoena is part of an FBI investigation into the possibility that a government official may have told the reporters about a federal plan to seize assets from Global Relief Foundation, an Islamic charity believed to provide funding to al Qaeda. FBI officials speculate that after receiving the information from the government official, one of the reporters may have informed the foundation that the seizure was imminent, resulting in the destruction of documents that could have been useful to the investigation.

Experts in media law maintain that the subpoenaing of journalists in the Plame investigation as part of a dangerous, developing pattern: the chipping away by the court system of long-established constitutional safeguards enabling the gathering and dissemination of news and the conduct of public interest journalism. Sandra Baron, executive director of the Media Law Resource Center, told *Editor & Publisher*, "my fear is they will continue to subpoena reporters looking for sources. Whenever you have that, it puts the entire reporting community and sourcing community on edge. It suggests open season for prosecutors who are looking for a short cut for answers in a grand jury investigation."

As the *Bulletin* went to press, United Press International (UPI) reported that the House Committee on Government Reform recommended that administration officials be required to sign waivers releasing journalists from their confidentiality agreements, thus allowing the journalists to testify in the probe. UPI reported that the committee's recommendation is based on the assessment of the Congressional Research Service that "making signed waivers a condition of continued White House employment does not violate the Constitution's ban on self-incrimination." According to UPI, committee Chairman Tom Davis (R-Va.), and ranking member Rep. Henry Waxman (D-Calif.), sent a letter to White House Counsel Alberto Gonzales on August 30, which read, "the value of these waivers to the investigation appears to be considerable." UPI reported that the only administration official known to have signed a waiver to date has been Libby, and that the White House has not yet responded to the committee's recommendation. UPI's article is available online at: http://washingtontimes.com/upi-breaking/20040901-024208-5021r.htm.

As the *Bulletin* went to press, *The Washington Post* reported that Pincus' source has now revealed his or her identity to Fitzgerald. However, that person has not released Pincus from his confidentiality pledge. Pincus stated that he believes that Fitzgerald has dropped his demand to reveal the source's name. But Pincus told *The Washington Post*, "I will not testify about his or her identity."

In another development, Fitzgerald has subpoenaed *Time's* Cooper for a second time. *The Los Angeles Times* reported on September 16 that Fitzgerald is seeking information about other sources Cooper used in the story.

—Holiday Shapiro
Silha Research Assistant

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Prior Restraints

Justice Breyer Upholds Publications Ban

On July 26, 2004, U.S. Supreme Court Justice Stephen Breyer denied a request from seven media groups seeking to stay court orders forbidding publication of transcripts of pretrial *in camera* hearings in the Kobe Bryant rape case, *People v. Bryant*. See *The Associated Press v. District Court for the Fifth Judicial District of Colorado*, 2004 U.S. Lexis 4785 (2004). Ultimately, however, the media groups' petition was rendered moot when the bulk of the transcripts were released in early August.

In one of a string of accidental disclosures from the court, a court reporter mistakenly e-mailed the transcripts to the seven organizations (the Associated Press, CBS, the *Denver Post*, ESPN, FOX News, the *Los Angeles Times*, and the television show "Celebrity Justice") on June 24. The *Los Angeles Times* reported that court reporter Michelle Goodbee intended to e-mail the transcripts only to the judge and the parties' attorneys, but instead sent the transcripts to all media organizations that had previously requested records of open proceedings. Within hours after discovering the mistake, Colorado State District Court Judge Terry Ruckriegle threatened to hold the media organizations in contempt of court if they published contents of the transcripts. Ruckriegle also ordered the media groups to destroy their copies of the released information.

The seven media organizations did not destroy the e-mails, but refrained from publishing any content from the transcripts while challenging the constitutionality of Ruckriegle's order before the Colorado Supreme Court. The media organizations argued that Ruckriegle's order was a prior restraint on the press, and unlawful under the First Amendment to the U.S. Constitution and under Article II, § 10 of the Colorado Constitution. But in a 4 to 3 vote, the Colorado Supreme Court upheld Ruckriegle's order as necessary to protect the state's interest in providing a confidential evidentiary proceeding as required by the Colorado rape shield statute. In a majority opinion delivered by Justice Gregory Hobbs, the Colorado Supreme Court weighed the interests of freedom of the press and victim's privacy, and ultimately decided that, in this case, victim's privacy was more important.

Since the high court determined that Ruckriegle's order was a prior restraint, it reasoned that the restraint must seek to protect a state interest of the "highest order." The court looked to the U.S. Supreme Court opinion in *Florida Star v B.J.F.,* 491 U.S. 524 (1989), for support that privacy of rape victims may suggest such a vital state interest. Under the Colorado rape shield statute, prosecution and defense are to debate the relevance of proffered evidence of a victim's sexual history in secret (Colorado Statute § 18-3-407). The statute dictates that evidence of a victim's sexual conduct shall be presumed irrelevant, and therefore inadmissible, except in certain circumstances. The high court emphasized the importance of keeping potentially "irrelevant" information secret. The documents that Ruckriegle's court inadvertently e-mailed to the media groups were transcripts of a hearing protected by the rape shield statute.

After identifying a state interest of the "highest order," the high court then held that Ruckriegle's order could only pass constitutional muster if it was narrowly tailored to satisfy the state's interest. The court therefore struck down Ruckriegle's directive to destroy copies of the transcripts, and ordered the district court to "make its rape shield rulings as expeditiously as possible and promptly enter its findings of facts and conclusions of law." It recognized that if the district court determined that some of the evidence was relevant, it would become public record, making the order moot.

Three dissenting judges would have reversed Ruckriegle's order, noting that the district court had not overcome the "heavy presumption against the constitutionality of prior restraints." According to the dissenters, tailoring the order was not a solution because the circumstances of the case were "not so extraordinary" that the court should "overlook the fundamental importance of the media's right to decide for itself what it may or may not publish."

The original seven media groups, supported by 16 other media organizations that filed an *amicus* brief, submitted an emergency petition to the U.S. Supreme Court. Breyer, who is the circuit justice who hears emergency cases arising in Colorado, avoided the constitutional question altogether. Anticipating that the district court's ruling on the relevance or admissibility of the evidence would "significantly change the circumstances that have led to this application," he allowed the district court additional time to rule on issues presented in the *in camera* hearings. Breyer's denial of the petition was without prejudice, meaning that he would be willing to rehear the appeal at a later date. In fact, Breyer specifically allowed the petitioners to file another petition in two days if they were not satisfied with the content made available after Rukriegle's admissibility rulings. Breyer made clear that a renewed application would force the district court to answer for its decisions.

On July 28, just as Ruckriegle was prepared to discuss the release of transcripts with the parties' attorneys, his court made another accidental disclosure. For the second time, reminiscent of a similar mistake in September 2003, the court administrator accidentally posted the accuser's full name on the Internet. According to the *Denver Post*, the accidental posting appeared on a Web site designed to make it more convenient for media groups and court staff to access filed public documents. The Associated Press reported that on July 30, Ruckriegle apologized to the "people of Eagle county, the people of Colorado, and all the people who have come here from far away" and "all of those who come through

Bryant, *continued on page 10*

The Colorado Supreme Court ruled that victim's privacy outweighed freedom of the press.

Prior Restraints

Florida Judge Bars Publication of Transcripts Released to Media

The assistant state attorney interpreted Florida law as saying that the transcripts were public record.

After transcripts of grand jury testimony in a first degree murder case were released to Florida news channels, a Florida State Circuit Court judge in St. Augustine threatened the stations with criminal charges if they aired further reports on the testimony.

In his grand jury testimony, Justin Barber, on trial in St. Augustine, Fla. for the first-degree murder of his wife, revealed possible motivations for murder. Barber testified, among other things, that he had at least five extramarital affairs in the year before his wife's murder. Afterward, Barber requested a transcript of his testimony. Judge Robert Mathis ordered that the testimony be transcribed, and Assistant State Attorney Maureen Sullivan Christine provided the transcript to Barber's attorney on July 14. On July 28, a reporter for First Coast News, a Gannett television news network operating on two Florida television channels, contacted Christine requesting a copy of the 164-page transcript.

Receiving no objection from Barber's attorney, Christine furnished a copy of the grand jury transcript to First Coast News. Christine's interpretation of Florida laws affecting public records, including state constitutional, statutory and civil procedure laws, was that the transcript became a public record after it was released to Barber. Public record laws aside, Mathis focused on the Florida law governing grand jury testimony, asserting that Christine acted in violation of F.S. 905.27, which requires grand jury proceedings to be secret.

On July 28, First Coast News reported on the content of the Barber transcript. On July 29, Mathis asked the Florida Department of Law Enforcement to investigate the matter. Mathis told the *St. Augustine Record* that "the law is very clear that no one is allowed to divulge the testimony before the grand jury." Christine, however, told the *Record* that she was "absolutely 100 percent sure" she was right to furnish the transcripts to First Coast News.

On July 30, Mathis went a step further, and entered an order sealing the transcript and barring any party from disclosing the contents. In the order, Mathis put broadcasters "on notice" that any further report on the contents of the transcript would be punishable as a misdemeanor in violation of the Florida grand jury statute, and would also constitute grounds for criminal contempt of court. After filing the order, Mathis left town for a week's vacation.

Upon receiving the order, First Coast News immediately moved to intervene in Barber's case to have the order set aside as an unconstitutional prior restraint of the press. The Reporters Committee for Freedom of the Press (RCFP) quoted First Coast News attorney, George Gabel, as saying "the documents were furnished by the state attorney. They're in our possession and now the judge is saying we can't use them." RCFP's report is available online at http://rcfp.org/news/2004/0803barber.html. On August 2, however, First Coast News attorneys were stalled when they learned of Mathis' absence. The chief district judge told them that they would have to await Mathis' return in order to have their motion heard.

Instead, on August 4, the First Coast News stations filed an emergency petition for a review of the order with the Fifth District Court of Appeal, in *Multimedia Holdings Corp. v. State of Florida*, Case No. 5D04-2650. That same day, in Daytona Beach, Fla., the appellate court issued a "show cause" order, requiring First Coast News to serve a copy of their motion on the State Attorney General so that the State could respond.

Rather than responding, the State Attorney General's Office filed a "Notice of Non-Appearance," and deferred to the local prosecutor's office as the State's representative on the matter. The State Attorney's office then hired an attorney who regularly counsels the *Daytona Beach News-Journal* as its special counsel. In response, Mathis filed a "Suggestion of Disqualification" with the appellate court to call for the removal of the State Attorney's office and its special counsel. On August 9, Mathis wrote to Florida Governor Jeb Bush, requesting that he appoint a special prosecutor to investigate Christine's apparent violation of the grand jury secrecy law.

Mathis also filed a second order on August 9, responding to the First Coast News' motions from a week earlier. Mathis denied both the motion intervene and to set aside his original order. Mathis reiterated that the transcript was not a public record. He contended that even though First Coast News obtained the transcript legally, the State acted in violation of Florida law by furnishing the transcript. Mathis also stated that his former order in no way "precluded or restrained" First Coast News "from publishing matters which are public record." Mathis again warned that First Coast News was "placed on notice" that the publication or broadcast of non-public records is a crime. He emphasized that the Court's order did not prevent First Coast News from "publishing or broadcasting materials that it wishes to broadcast, but rather solely points out that so to do might constitute further violations of criminal law." Mathis claimed, therefore, that there was "no necessity for a hearing in this case."

In an *amicus* brief filed on August 12 in the appellate court, several media groups supported First Coast News' petition, asking for reversal of both Mathis' orders. The State had also urged the appeals court to vacate Mathis' original order, conceding, "[t]he State cannot defend the Order. The State agrees with First Coast News that the Order is a prior restraint which cannot overcome the heavy presumption of constitutionality under the First Amendment." The State then asked the appellate court to go beyond the constitutional question in order to "resolve the core question of the public right of access to important records of the criminal justice system." As the *Bulletin* went to press, the appellate court had yet to rule on the motions.

—Kelly J. Hansen Maher
Silha Fellow

Prior Restraints

Former CIA Agent's Book Banned

On July 7, 2004, Federal District Court (D.D.C.) Judge Thomas Penfield Jackson ruled in *Wendy Lee v. Central Intelligence Agency*, C.A. 03-206 (TPJ) that a former CIA agent may not publish her memoirs. Wendy Lee, a pseudonym used to keep her real identity secret, claimed that the CIA had unlawfully imposed a prior restraint on her speech by improperly declaring large portions of her memoir as classified and unpublishable. She had filed a lawsuit seeking injunction and declaratory relief against the CIA under the Administrative Procedure Act (APA) (5 U.S.C. § 701 (2004)), the CIA's internal regulations, and the First Amendment.

The CIA had filed a motion for summary judgment. However, Lee did not file an opposition to the agency's motion because her attorney, Mark S. Zaid, was not permitted to view any of her memoir due to its classified status. In his opinion, Jackson acknowledged that the only classified information available to Zaid was Lee's real name and her affiliation with the CIA. Although Zaid suggested ways the court could enable him to better assist his client – that he be allowed to view the documents in question, provided he obtained the proper security clearance; to allow Lee to meet with the court in private to present her argument for publication; or to allow the court its own *in camera* examination of the documents – Jackson ruled out all three, citing the decision in *Stillman v. Central Intelligence Agency*, 319 F.3d 546 (D.C. Cir. 2003). In that case, the court sought to balance its own *in camera* examination of the documents in question and the "appropriate degree of deference owed to the Executive Branch concerning classification decisions" against the "concomitant intrusion upon the Government's interest in national security" that might occur when the plaintiff's attorney was involved.

Lee also claimed that in blocking publication of her memoirs, the CIA was violating her First Amendment rights without demonstrating a "substantial government interest" that would be harmed by the publication, and that there was no "logical connection" between the information to be deleted and the reasons for classification. Second, Lee argued that the CIA's refusal to declassify her cover status was "unreasonable, arbitrary and capricious, and a violation of the APA."

Jackson wrote, "CIA classification decisions are entitled to substantial deference," and that courts "are ill-equipped to become sufficiently steeped in foreign intelligence matters to serve effectively in the review of secrecy classifications," citing cases such as *Salisbury v. United States*, 690 F.2d 966 (D.C. Cir. 1982) and *United States v. Marchetti*, 466 F.2d 1309 (4th Cir. 1972). The information in Lee's memoirs, Jackson wrote, was properly classified according to the protocol outlined by Executive Order No. 12958 and its subsequent revision, Executive Order No. 13292, 68 Fed. Reg. 15315 (2003). Further, an affidavit submitted to the court by the Information Review Officer for the Directorate of Operations of the CIA William H. McNair, "convincingly" and "painstakingly" explained why each piece of information in Lee's memoir could present a threat to national security if published.

Although Lee argued that the information contained in her memoir had been published elsewhere, Jackson found the previously published information was not "as specific . . . nor does it mirror the information in [Lee's] memoir in any substantial way."

Finally, Jackson cited the "valid and enforceable secrecy agreement" Lee signed when she was employed by the CIA. "Although the secrecy agreement constitutes a prior restraint on speech," he wrote, "such contracts are generally enforced."

As to Lee's request that her affiliation with the CIA be declassified, Jackson wrote that the CIA's decision to keep her affiliation secret had also been made according to proper protocol, and shared the CIA's concern that revealing her identity would "reveal intelligence sources, methods, and personnel still active in the field." Citing the National Security Act of 1947 (50 U.S.C. § 403-3 (c)(7) (2004) and *Dep't. of the Navy v. Egan*, 484 U.S. 518 (1988), Jackson wrote that such "declassification decisions fall squarely under the CIA's discretion" and "courts have traditionally been reluctant to intrude upon the authority of the Executive in military and national security affairs." Jackson concluded that Lee did not "allege any wrongdoing in the CIA's consideration" of her change of status, and that he could find no "evidence of arbitrary, or capricious behavior" in the CIA's decision, saying the agency "appears to have responded to her request quickly, and with reasoned analysis."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

> Although the secrecy agreement Lee signed when employed by the CIA constitutes a prior restraint on speech, "such contracts are generally enforced."
>
> – Judge Thomas Penfield Jackson

Prior Restraints

Bryant, *continued from page 7*

these doors, victims and defendants alike." Ruckriegle also commended the "responsible media who have abided not only by the spirit of the law, but the intended directions of the court."

On August 2, Ruckriegle issued an order to release the bulk of the transcripts. Ruckriegle indicated that he had weighed the orders from the Colorado Supreme Court and Justice Breyer. He concluded that the district court was "compelled to release these transcripts notwithstanding the concern that the release will compromise the rights of some of the participants." Satisfied with the amount of material released, the media groups did not renew their application to the U.S. Supreme Court.

The New York Times reported that on August 11, the prosecution asked for a delay in Bryant's trial, arguing that the court's mistakes in releasing information about Bryant's accuser had significantly hurt the prosecution and tainted the jury pool. This motion from the prosecution came a day after Bryant's accuser initiated a civil suit against Bryant.

The most recent fight over media access to the Bryant trial ended in an August 24 ruling from Ruckriegle barring cameras from the majority of the trial. (See "Access to Courts: Kobe Bryant" in the Winter 2004 issue of the Silha *Bulletin.*) According to the Reporters Committee for Freedom of the Press, Ruckriegle would only allow one still camera for opening and closing arguments and two broadcast cameras for closing arguments. A coalition of media groups and Court TV filed separate motions for expanded access to the courtroom to enable broader media coverage. Ruckriegle consolidated the two motions, and denied them, citing his belief that expanded camera access would have a negative effect on the witnesses in the trial. Although opening arguments in the trial were expected to begin on September 7, the prosecution dropped the criminal charges against Bryant on September 1.

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Media Access

Cheney v. Supreme Court

Rather than determine whether the government should be required to release documents relating to the National Energy Policy task force, the Supreme Court's decision in *Cheney v. United States District Court*, No. 03-475, issued June 24, 2004, side-stepped the major substantive issues, and instead decided the case on procedural grounds. The Court held that the U.S. Court of Appeals (D.C. Cir.) had prematurely terminated its inquiry in the appeal, remanding the case for reconsideration. The Court's decision ensured that the controversy over President George Bush's National Energy Policy Development Group (NEPDG or "the group") would continue at least until the Court of Appeals hears the case again.

Bush formed the NEPDG in January 2001, just two weeks after taking office. The NEPDG was charged with developing "a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." Vice President Dick Cheney was appointed to head the NEPDG, which also consisted of nine cabinet members and four senior administration officials. The NEPDG released its National Energy Policy report on May 16, 2001, which is available online at http://www.whitehouse.gov/energy/. (See "Access to Information and the U.S. Supreme Court: *Cheney v. United States District Court*" in the Fall 2004 Silha Bulletin.)

Yet even before the report was released, the Natural Resources Defense Council and others accused the NEPDG of being dominated by energy industry interests. The Sierra Club and Judicial Watch, Inc. also believed that energy industry officials participated in the group's discussions and met with the NEPDG prior to the release of its report. The Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 2, requires that any advisory committee which includes private citizens must hold open meetings and disclose the participation of those outside members. Under FACA, advisory committees made up entirely of federal government employees are exempt from the disclosure requirements. Cheney and the group refused to release minutes of the meetings or disclose who had participated in the deliberations and drafting of the National Energy Policy because only federal government employees were appointed to serve on the NEPDG.

The Sierra Club and Judicial Watch, Inc. filed separate suits under FACA against Cheney, the NEPDG, and the members of the group in federal District Court in Washington, D.C., seeking disclosure of details about its membership and meetings. The suit relied primarily on a decision by the U.S. Court of Appeals (D.C. Cir.), *AAPS v. Clinton*, 187 F.3d 655 (D.C. Cir. 1999). In *AAPS*, the court found that although the national health care task force, chaired by then-First Lady Hillary Clinton, consisted of only government employees, many of its subcommittees included private citizens. The court held that those private citizens were sufficiently involved with the task force to be considered de facto members, making the task force subject to the FACA disclosure provisions.

The Sierra Club and Judicial Watch, Inc. argued that the NEPDG was similarly composed of de facto private citizen members, citing an August 2003 report by the General Accounting Office (GAO) on the group. The GAO report found that the group utilized many lower-level meetings, in addition to its ten Principals' Meetings, and that the development of the NEPDG National Energy Policy report "involved hundreds of staff from nine federal agencies and several White House offices." Furthermore, the GAO reported that government officials at all levels "met with, solicited input from, or received information and advice from a variety of nonfederal energy stakeholders while developing the report." The full GAO report is available online at http://www.gao.gov/new.items/d03894.pdf.

District Court Judge Emmet G. Sullivan combined the cases, *Judicial Watch, Inc. v. NEPDG and Sierra Club v. Cheney*, 219 F.Supp.2d 20 (D.C. Cir. 2002), dismissing the NEPDG and private party defendants from the suit, finding that FACA provided no civil remedy against private citizens. Sullivan also granted the plaintiffs' discovery requests for any documents revealing private citizens who had been consulted by the NEPDG to determine whether or not they were *de facto* members and whether FACA's requirements applied to the group. Cheney and the government objected that the discovery request was too broad and would result in granting access to documents protected by executive privilege. Sullivan subsequently ruled that Cheney would need to demonstrate specifically which documents were exempt from discovery by executive privilege; otherwise, discovery would go forward.

Cheney asked the Court of Appeals to direct the District Court to vacate its discovery orders. Judge David S. Tatel, writing for the split court in *In re Richard Cheney*, 334 F.3d 1096 (D.C. Cir. 2003), dismissed the appeal, holding that alternative avenues of relief remained available and that Cheney and the NEPDG members had not met their evidentiary burden. Cheney's request for a rehearing on the issue *en banc* was denied. However, in December 2003, the Supreme Court agreed to take Cheney's appeal and heard oral arguments on Apr. 27, 2004.

Prior to the oral arguments, the Sierra Club, in a highly unusual move, requested that Justice Antonin Scalia recuse himself from the case. The Sierra Club argued that a duck hunting trip Scalia had taken with Cheney in January 2004 rendered Scalia biased and unable to make an impartial decision in the case. Scalia denied the motion on Mar. 18, 2004 to recuse

Cheney, *continued on page 15*

Claims of executive privilege should be accorded greater deference in civil suits.

– Justice Anthony Kennedy

Media Access

TSA Publishes Guidelines to Protect Sensitive Security Information

The rules allow sensitive security information to be withheld from public release.

On May 18, 2004, the Transportation Security Administration (TSA) published interim final rules to protect Sensitive Security Information (SSI) at 49 C.F.R. 1520. The interim rule designates information SSI when its release would constitute an unwarranted invasion of privacy, reveal a trade secret, or be detrimental to the security of transportation, but is not already protected as National Security Information or Critical Infrastructure Information. SSI, a concept created in the 1970s, has become more important and expansive since the Sept. 11, 2001 terrorist attacks on the World Trade Center and the Pentagon. (See "Proposed Rules on Critical Infrastructure Elicit Comments from Silha Center, Others," in the Summer 2003 Silha *Bulletin*; Silha Center Comments, "In re: Notice of Proposed Rulemaking Procedures for Handling Critical Infrastructure Information," available online at: http://www.silha.umn.edu/resources.htm; and "The War on Terrorism: Balancing National Security and Civil Liberties," in the Winter 2003 Silha *Bulletin*.)

Shortly after the September 11 attacks, Congress passed the Aviation and Transportation Security Act (ATSA), Pub. L. No. 107-71, 115 Stat. 597, authorizing TSA to designate as SSI any information that would be detrimental to the security of transportation if disclosed. This permitted TSA to expand its definition of SSI, increasing both the amount and type of information considered SSI. Since ATSA also exempts SSI from public disclosure under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, the rules allow TSA, the Secretary of Transportation and the Coast Guard, all responsible for designating information SSI, to withhold all SSI from public release.

TSA has used its authority to determine, via the interim rule, that SSI includes information such as security assessments of airports and maritime facilities; information on how luggage, cargo and U.S. mail is transported; information relating to security screening for passengers and baggage; and performance or testing data from security systems. Another major provision of the rule defines those with access to SSI, including possibly state and local officials, as "covered persons." The rule prevents such "covered persons" from releasing or discussing SSI with the media or public without getting express clearance from TSA first. The definition of "covered persons," which the government itself concedes is both ambiguous and overly broad, even includes applicants and trainees who might not actually come into contact with SSI. Finally, the rule provides that information no longer needed as SSI normally will be destroyed.

TSA requested public comment on the interim rule upon its publication. The Silha Center submitted written comments, drafted by Professor Jane Kirtley, director of the Silha Center, and Andrew Deutsch, Silha Center Research Assistant, to TSA on July 16, 2004. The Silha Center's comments were based on the presumption that exemptions to FOIA should adhere to the spirit of the statute, which mandates broad public access to government records. The comments are available online at: http://www.silha.umn.edu/resources.htm.

The Silha Center specifically recommended that TSA:

- Interpret the definition of SSI narrowly.
- Reduce the scope of "covered persons" to ensure that only those actually working with SSI fall within the scope of the rule.
- Exclude most state and local officials from the category of "covered persons."
- Allow greater access to information concerning security screening methods and threats.
- Set specific time limits for the review and declassification of SSI, rather than destroying it.

Several other organizations submitted comments to TSA, including the Port Authorities of Massachusetts and New York/New Jersey, the American Trucking Association, Inc. and the Nuclear Energy Institute. Each of these groups asked TSA to clarify whether their employees and contractors would be considered "covered persons" under the rule and to what extent SSI requirements extended beyond air and maritime facilities. Currently, the rules do not specify whether rail or trucking transportation would fall within the rule.

The Coalition of Journalists for Open Government (the Coalition) also submitted comments urging that the rule should be revised to clearly define who can designate information as SSI. The Coalition's comments recommended that "those making SSI designations within TSA, the Coast Guard, and DOT should have special training, much as FOIA officers do, because they are asked to make difficult balancing decisions among competing values."

The Silha Center comments focused on the need to inform the public of security screening procedures to ensure that citizens can provide educated oversight of government policies and work with the government to help better security systems. According to the TSA website, http://www.tsa.gov, the agency estimates that more than 200 million Americans will travel by air this summer. However, the interim rule designates all information pertaining to the efficacy or reliability of the security screening procedures travelers pass through as SSI and blocks its release to the public.

The Minneapolis *Star Tribune* reported in March 2004 that machines used to scan checked baggage and carry-on items nationwide have resulted in false alarms when scanning items such as toothpaste, golf balls, shoe heels and lollipops. InVision Technologies provides two-thirds of the screening machines used at airports around the country. But Steve Neve, spokesperson for InVision, could tell reporter Bob

SSI, *continued on page 15*

Media Access

President's Board on Safeguarding Americans' Civil Liberties Created

President George W. Bush has directed that a new board to "safeguard civil liberties" should be created as part of a package of executive orders designed to reform the intelligence community on Aug. 27, 2004. The President's Board on Safeguarding Americans' Civil Liberties will be composed of high-ranking government officials whose mission will be to ensure that their agencies do not infringe on privacy and civil rights laws. These initiatives are intended to implement the recommendations of the independent 9/11 Commission.

According to the executive order, the Board will be "part of the Department of Justice (DoJ) for administrative purposes." The Board will be run by James Comey, Deputy Attorney General, who will serve as Chair. Asa Hutchinson, the Department of Homeland Security's (DHS) Under Secretary for Border and Transportation Security, will serve as Vice Chair. Other members of the Board include officials from the CIA, the National Security Agency, the Terrorist Threat Integration Center, and the Pentagon. The DHS's chief privacy officer, Nuala O'Connor Kelly, will also serve on the Board.

As outlined in the president's order, the Board's functions include advising the president on civil liberties, making policy recommendations, requesting reports and reviewing agency programs. The board is also charged with undertaking "other efforts to protect the legal rights of all Americans, including freedoms, civil liberties, and information privacy guaranteed by federal law" at the president's direction.

Civil liberties groups were highly critical of the proposed Board. The Electronic Privacy Information Center noted on its Web site that the Board "will not include nongovernmental membership or independent oversight." The Electronic Privacy Information Center's statement is available online at its home page at http://www.epic.org/.

The American Civil Liberties Union (ACLU) issued a statement urging Congress to "reject the model for a civil liberties oversight board" as outlined in President Bush's executive order. The statement read, "despite the president's laudable attention to these matters, the board as proposed would be comprised only of the government officials it is meant to oversee, would have no investigative authority, and would be utterly beholden to the White House." The ACLU's statement is available at online at http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16348&c=206.

"There is a real danger that this will be worse than useless," said Anthony D. Romero, ACLU Executive Director, in the organization's statement. "Not only will it provide the illusion of oversight without any real power to effect change, its membership includes some of the very people in the national security establishment who are part of the problem. Missing are any independent voices who are not beholden to the president or the political establishment." Romero concluded, "It really would be the fox guarding the henhouse."

Laura Flint, a lawyer with the Center for Democracy and Technology, was quoted by *Wired* as saying, "this is not what a civil liberties board should look like if it is intended to be robust, effective, and independent." The *Wired* article is available online at http://www.wired.com/news/privacy/0,1848,64784,00.html?tw=wn_4polihead.

Criticism of the proposed Board was not limited to civil liberties groups. Former 9/11 commissioner Richard Ben-Veniste and former consultant to the commission Lance Cole co-authored an op-ed article about the Board in *The New York Times* on September 7.

Ben-Veniste and Cole wrote, "While it is laudable that a civil liberties board was included in the first set of presidential actions in response to the commission's recommendations, the new board falls short of addressing the concerns that led the commission to recommend the creation of a meaningful oversight board in the first place." The op-ed article is available online at http://www.nytimes.com/2004/09/07/opinion/07benveniste.html.

Among the shortcomings cited by Ben-Veniste and Cole are the Board's large size, the partisanship resulting from its composition of presidential appointees in place of members selected through a "balanced appointments process," and its membership drawn exclusively from those government agencies "whose actions are likely to be the subject of civil liberties challenges and complaints."

They wrote, "only outsiders can supply both the independence and the skepticism that are essential to evaluate the merits of governmental assertions of power that intrude on personal privacy."

Ben-Veniste and Cole cited as problematic the Board's design as an advisory rather an oversight agency. They also pointed out that the Board, as outlined in the president's order, has no obligation to report to the public. "For such a board to be effective, it must be transparent," they wrote.

They concluded, "while the president's proposal is a welcome acknowledgement of the need for civil liberties protections, it seems that it will now be up to Congress to carry out the commission's recommendation for a genuine, effective oversight board."

—Holiday Shapiro
Silha Research Assistant

"The board as proposed would be comprised only of the government officials it meant to oversee, would have no investigative authority, and would be utterly beholden to the White House."
– ACLU

Media Access

Depository Libraries Censored

On July 22, 2004, the federal Government Printing Office (GPO) issued a directive via e-mail to the nation's nearly 1,300 depository libraries ordering them to destroy five publications, including titles such as "Civil and Criminal Forfeiture Procedure" and "Select Federal Asset Forfeiture Statutes." The directive instructed librarians to "withdraw these materials immediately and destroy all copies by any means to prevent disclosure of their content," and concluded that "the Department of Justice (DoJ) has determined that these materials are for internal use only." But eight days later, another e-mail was sent, informing librarians to disregard the earlier notice.

An article in *The Boston Globe* stated that the materials "contain detailed legal research on asset forfeiture law, including statutes and case histories on the legal means of seizing cash, cars, houses, boats, and other property of convicted drug dealers and other criminals," and take prosecutors from "the drafting of the forfeiture allegation . . . to post-trial phases of a criminal forfeiture case."

Bernard A. Margolis, president of the Boston Public Library, told *The Boston Globe* that ownership of such documents is retained by the federal agencies that produce the material and they may ask for the materials to be returned. But Margolis described the pamphlets cited in the directive as the "law of the land" and said they are readily available online and in law books. When Margolis sought an explanation for the directive from the federal Office of Asset Forfeiture and Money Laundering, he was told that some of the information contained in the pamphlets could reveal legal strategy.

Patrice McDermott, the American Library Association's (ALA) deputy director of government affairs, told *The Boston Globe* that most previous recalls were for materials found to contain a factual error or which were out of date. "We are going to push the Department of Justice on this," McDermott told *The Boston Globe*. "This material is already out there. Some of these documents are merely compilations of federal statutes. You can find this stuff in law offices and law libraries across the country. We just don't know the rationale for this."

Margolis echoed McDermott's concerns, telling the *Globe*, "There is a precedent danger that if a handful of documents appear innocuous – the forfeiture statutes – if these become subject to a casual or cavalier yanking, then what is next? Maybe it's things that are really critical and primary to people's livelihood, to their safety, or to their health."

On July 30, Judith C. Russell, managing director, Information Dissemination for the U.S. GOP sent an e-mail to federal depository libraries stating, "the Department of Justice has requested that I advise depository libraries to disregard the previous instructions to withdraw these publications," and that "the [DoJ] has determined that these materials are 'not sufficiently sensitive to require removal from the depository library system.'" Her e-mail concluded, "Both [the GOP and the DoJ] regret any inconvenience resulting from the initial request for withdrawal."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

> "There is a precedent danger that if a handful of documents appear innocuous [but] become subject to a casual or cavalier yanking, then what is next?"
>
> – Bernard A. Margolis
> President, Boston Public Library

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Media Access

Cheney, *continued from page 11*

in a written memorandum, *Cheney v. United States District Court*, 124 S. Ct. 1391 (2004). Scalia characterized the underlying case as a "run-of-the-mill legal dispute about administrative decision" that did not mandate recusal. Scalia pointed out that Judicial Watch, Inc., which had not joined the Sierra Club in its request, recognized a recusal request was improper and noted that the "Sierra Club was apparently unable to summon forth a single example of a Justice's recusal (or even motion for a Justice's recusal) under circumstances similar to those here."

At oral arguments before the Court, Solicitor General Theodore Olson, arguing on behalf of Cheney, again called this "a case about the separation of powers. The Constitution explicitly commits to the President's discretion the authority to obtain the opinions of subordinates to formulate recommendations for legislation." Olson argued that this prerogative effectively blocked the mandates of FACA since Congress could not legislate around the constitutionally-protected executive privilege. The Sierra Club and Judicial Watch, Inc. maintained that the lower courts had made the right decisions and that the government could claim executive privilege later in the case, if necessary.

Justice Anthony Kennedy, writing for the Court, distinguished this civil case from criminal cases implicating executive privilege. "It is well established that a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any ordinary individual," Kennedy wrote. Because executive privilege is meant to protect the "essential functions" of the executive branch, the Court found that claims of privilege in civil cases deserve heightened consideration. Unlike criminal cases, civil cases against the government are filed more frequently and more often prove to lack merit. In order to ensure that the executive branch is not bogged down by discovery requests seeking documents protected by executive privilege, the Court concluded that claims of executive privilege should be accorded greater deference in civil suits.

The Court recommended that the D.C. Circuit consider the breadth and timing of discovery, along with the separation of powers issues, to determine whether the District Court's discovery order would hamper the "essential functions" of the executive branch. The opinion noted that the Court of Appeals had the authority to "rein in" discovery orders if necessary to protect executive privilege. Kennedy concluded with a suggestion that FACA might not even apply to the NEPDG, hinting that the Court of Appeals might choose to reconsider its de facto membership doctrine from AAPS.

Justice John Paul Stevens filed a concurring opinion. Justice Clarence Thomas, joined by Scalia, concurred in part, and dissented in part, finding that the Court of Appeals should be reversed and ordered to direct the District Court to vacate the discovery orders. Justice Ruth Bader Ginsburg, joined by Justice David Souter, dissented from the majority, finding that the remedy sought by Cheney was one that should be granted only when all other options had been exhausted. She noted that Cheney had failed to request that the discovery orders of the District Court be reduced in scope and had adamantly maintained that no discovery should be allowed at all. Ginsburg agreed with the Court of Appeals and wrote that there was no need to remand the case.

—Andrew Deutsch
Silha Research Assistant

SSI, *continued from page 12*

von Sternberg only that he was not allowed to say what exactly sets the machines off, noting, "Under our agreement with TSA, it's not something we can touch on."

The government itself has found that many security screening equipment and procedures result in high false alarm rates. According to a General Accounting Office (GAO) report released in February 2004, false alarms plague screening systems at airports across the country. The GAO has identified the need to resolve these problems as crucial to providing effective security measures in transportation. The full GAO report is available online at: http://www.gao.gov/new.items/d04440t.pdf. Additionally, in her First Amendment Watch column in the Aug./Sept. 2004 issue of the *American Journalism Review*, Kirtley warns that, "Because civil penalties can be imposed for unauthorized disclosure, the rule has the potential to gag whistleblowers who might reveal weaknesses in the system." Rather than withhold this sort of security information as SSI, the Silha Center comments urged release of this information to make security screening procedures more effective.

The final shape that the TSA rule will take remains to be seen. However, a proposed bill to provide federal funding for highways would allow the definition of SSI to expand even further. The Senate version of bill, which added amendments to the House bill, HR 3550, would allow TSA to withhold information that is "detrimental to the safety of passengers in transportation, transportation facilities or infrastructure or transportation employees." In addition, the Senate version would provide that SSI regulations would preempt open records laws in the states.

A July 1, 2004 article in the *Louisville Courier-Journal* reported that some open government advocates are concerned that the proposed language would allow DOT to avoid publishing "statistics on incidents involving hazardous materials [and b]an disclosures about road and rail routes used for transporting nuclear or other hazardous wastes." Rick Blum, director of OpenTheGovernment.org, told reporter James Bruggers, "Trying to keep the quote-unquote sensitive security information from the public without defining it really undermines the principles of democracy, and the public's ability to make themselves safer." A conference committee last met on July 7, 2004, to consider the differences between the Senate and House versions of HR 3550.

—Andrew Deutsch
Silha Research Assistant

Media Access

Court Advisory Committee Files Online Access to Court Documents Report

The advisory committee settled on a "measured step" towards greater electronic access to court records.

The Minnesota Supreme Court Advisory Committee (advisory committee) released its final report on recommendations to change the Rules of Public Access to Records of the Judicial Branch (Access Rules) on June 28, 2004, online at: http://www.courts.state.mn.us/cio/public_notices.htm. The advisory committee, composed of lawyers, judges, court administrators and others, was created by a Jan. 23, 2003 order of the Minnesota Supreme Court and charged with modifying the Access Rules to allow Internet access to court documents. The advisory committee was to consider a report released by the Conference of Chief Justices and Conference of State Court Administrators entitled "Public Access to Court Records: Guidelines for Policy Development by State Courts" (CCJ/COSCA Guidelines) and recommend which court documents should be available online, what privacy protections should be utilized, and what fees should be charged for remote electronic access. The final report of the advisory committee on the Access Rules marks the culmination of several months of public comments, hearings, and committee deliberations.

The Silha Center filed comments, written by Prof. Jane Kirtley, director of the Silha Center, and Silha Fellow Doug Peters, with the Minnesota Supreme Court in February 2004 (See "Silha Center Files Comments on Records Access," in the Winter 2004 Silha *Bulletin*). Kirtley also testified at a February 12 hearing before the committee. The comments urged broad online access to all documents already publicly accessible at the courthouse. The comments also noted that current technology makes redacting court records to protect privacy feasible, and that online access would ease administrative costs and burdens associated with in-person requests for access to and copies of court records.

The advisory committee ultimately settled on what it called a "measured step" towards greater electronic access to court records. Noting the potential for mischief and misuse of widely available court records, along with the "practical obscurity" enjoyed by court records maintained in paper form, the final report stated that the "recommendations on Internet access should be viewed as the first step in a go-slow approach to providing more remote access information." Rather than allow all documents already publicly available at the courthouse to be accessed via the Internet, the committee determined that only registers of actions and parties, court calendars, judgment dockets, and final judgments and orders should be available online.

Concerns over privacy issues motivated the committee to decide that social security numbers, street addresses, telephone numbers, financial account numbers and specific identifying information of litigant parties, their family members, jurors, witnesses and victims should not be accessible through online records. Additionally, in order to maintain the presumption of innocence and reduce the discriminatory impact of pre-conviction records, the committee suggested limiting access to such records to ensure automated search tools could not be used to search by the defendant's name. Finally, legal and administrative concerns led the committee to modify the proposed Access Rules to shield those who improperly release court records from liability, absent a showing of willful or malicious intent. The committee did not change the fees for accessing court records in the Access Rules. Currently, courts may only charge a fee for records to recover the cost of any copies produced for the requestor. However, if the records are of "commercial value," courts may sell the records for a "reasonable fee" beyond the costs of procuring them.

However, the advisory committee deadlocked on one important issue: the bulk distribution of electronic case records. Bulk records are compilations of court documents maintained in a database for analytical or other purposes. The January 2004 preliminary report from the advisory committee supported bulk distribution of all records otherwise available on the Internet under the proposed Access Rules. However, ultimately the committee split on three alternative proposals for dealing with bulk distribution. Each alternative was promulgated in the final report, which noted that the matter was "contested and that the committee is closely divided on the issue."

The first alternative proposed by the advisory committee embodies the preliminary report position that all records otherwise available on the Internet under the proposed Access Rules should be available for bulk distribution. The second would restrict bulk distribution to "scholarly, journalistic, political, governmental, research, evaluation or statistical purposes where the identification of specific individuals [in the records] is ancillary to the purpose of the inquiry." Under that proposal, the court must grant a request for bulk distribution after the requestor shows that access will benefit the public interest or public education. The final alternative allows bulk distribution of any electronic case records, except those containing pre-conviction data, to any individual or entity. However, those records would be released only if the requestor agrees not to further distribute any records where specific individuals could be identified. Under the proposed Access Rules, each of these alternatives would designate bulk distribution of court records as of "commercial value" and allow sale of such data at "reasonable fees."

The final report also contained several minority reports and one dissenting report. A strongly worded and critical dissenting report was submitted by committee member Donna Bergsgaard, a representative of Thomson West, a legal information services company. Bergsgaard's report accused the committee of failing to be "balanced and thoughtful."

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Media Access

University of Minnesota Must Release Finalists' Names

The Minnesota Supreme Court ruled on July 15, 2004 that the University of Minnesota (university) must release the names of finalists for the office of university president under the Minnesota Data Practices Act, Minn. Stat. §§ 13.01-.90, and must adhere to the Minnesota Open Meeting Law, Minn. Stat. §§ 13D.01-.07, in the future. The court's ruling put to rest what had become a point of contention between advocates for openness in government and the university Board of Regents' (regents) professed desire to attract qualified candidates to fill the positions at the university. The university had argued that it was not required to follow the Minnesota statutes, but Minnesota's highest court made clear that the university could not ignore the laws in its 4 to 2 decision in *Star Tribune Co. v. Univ. of Minnesota Board of Regents*, A03-124 (Minn. 2004).

During its search for a new president to fill the position vacated by Mark Yudof in July 2002, the university regents closed their November 2002 interview meeting to the public and refused to release the names of the interviewees for the position. Three days later, on Nov. 7, 2002, the regents announced that Robert Bruininks, interim president for the university at the time, was the only finalist for university president. Bruininks was elected president of the university the next day.

That same day, Nov. 8, 2002, the *Minneapolis Star Tribune*, *St. Paul Pioneer Press*, *Rochester Post-Bulletin*, the University of Minnesota's student newspaper, the *Minnesota Daily*, and Minnesota Joint Media Committee (collectively, the media) filed suit in Hennepin County District Court against the regents asking that they be required to disclose the names of all the individuals interviewed by the regents under the Data Practices Act. That law requires all state agencies, and specifically the university, to disclose all "finalists for a position in public employment." The media also sought to enjoin the university from future violations of the Open Meeting Law, which requires that meetings of a "public body" must be open to the public.

The district court ruled in favor of the media on their request for partial summary judgment, holding that the Data Practices Act and Open Meeting Law apply to the university and that the names of those interviewed by the regents must be released. The Minnesota Court of Appeals in St. Paul agreed. (See "Court Rules in Access to Meeting Case," in the Summer 2003 Silha *Bulletin*.)

On appeal, the regents argued that their need for confidentiality in the presidential search process and protections in the Minnesota Constitution meant they did not have to adhere to the Open Meeting Law because the Minnesota Constitution provides that the regents have exclusive authority to set academic policies and resolve university management issues. The regents also maintained that a resolution passed by the regents, such as the one that found the university need not comply with the Data Practices Act or Open Meeting Law, should have the same binding effect as Legislative statute.

The Minnesota Supreme Court disagreed, holding that the language of the Data Practices Act requires the regents to release interviewee names. The court further held that although the Open Meeting Law does not expressly include the university as a "public body," the university is subject to its requirements. The court held that making the regents and the university subject to the Open Meeting Law would not significantly hinder the business of the university.

Justice Russell Anderson, writing for the court, said that "neither statute is an intrusion into the internal management of the University. They affect the presidential search process only in its interface with the outside world, that is, the extent to which this public institution, which is funded substantially by public tax dollars, must make the final part of that process accessible to the public." The court also warned that the regents' arguments, "if given full effect, would essentially elevate the University to the status of a coordinate state entity, not answerable to state government except as it chooses . . . ."

Justice James Gilbert's dissent found that "[t]he application of these statutes to the presidential search process interferes with and obstructs the power given to the Board of Regents" and would have reversed the lower courts' ruling. Justice Sam Hanson, also dissenting, would have reversed and remanded to the district court for further factual consideration. Justice Alan Page, a former regent, did not participate in the case.

Mark Rotenberg, the attorney representing the regents, told reporter Tammy Oseid of the St. Paul *Pioneer Press* that the decision would "necessarily impede the Board of Regents' internal control over management of the university." Rotenberg noted, "It's more difficult getting the widest possible pool of candidates with an open process. If you're very successful elsewhere, you aren't eager to make it known that you're ready to jump ship." But John Borger, attorney for the *Star Tribune*, claimed that a victory had been won that extended beyond the immediate case decided by the court. Borger, quoted in a July 16, 2004 *Star Tribune* article, said, "This decision puts the university on the same footing as any other public body in the state."

On August 14, the Minneapolis *Star Tribune* published the names of the three finalists. They were Rodney Erickson, currently executive vice president and provost at Pennsylvania State University; Sylvia Manning, currently chancellor of the Chicago campus of the University of Illinois; and Edward Ray, then-senior vice president and provost of Ohio State University, but who is now president of Oregon State University.

—Andrew Deutsch
Silha Research Assistant

"This decision puts the university on the same footing as any other public body in the state."
– Attorney John Borger

Restraining Order Dropped Against Maplewood Videographer

On June 25, 2004, a restraining order against Minnesota videographer Kevin Berglund was lifted by Judge Michael Fetsch of the Second District Court in St. Paul, Minn., in *City of Maplewood v. Berglund*, File no. C7-03-100725. Berglund, together with host Robert Zick, produced "Inside Insight," a public affairs program airing on local cable television, which often includes footage of Maplewood City Council meetings.

In September 2003, several City of Maplewood employees, Charles Ahl, Melinda Coleman, Daniel Faust, Roberta Darst, Karen Guilfoile, Kathleen Juenemann, Sherrie Le, and Sarah J. Sonsaila, sought the restraining order against Berglund, stating in affidavits that they found his behavior to be "abusive" and "harassing."

"The city is not a private citizen who may insist upon no contacts. The city is required to respond."

– Judge Michael Fetsch

The St. Paul *Pioneer Press* stated in a story posted on its Web site on Oct. 18, 2003 that Berglund had requested a list of the people named in the restraining order from the City of Maplewood. Berglund had left a message on the *Pioneer Press* answering machine after reporters questioned him about his request, saying "there are people in my church who I may have to avoid." Zick, who ran for a seat on the Maplewood City Council during the fall 2003 elections, told the *Pioneer Press* that Berglund had left "Inside Insight" because "the restraining order is so broad it could mean that he can't have contact with me."

In February 2004, Fetsch reduced the number of persons included in the temporary restraining order to four female staffers, Coleman, Darst, Guilfoile and Juenemann. But upon further examination of the evidence, Fetsch decided to vacate the restraining order entirely on June 25, writing that he found that it had originally "been improvidently issued." He wrote that Berglund was "at times offensive" but "has never been intimidating, threatening, or assaultive."

"Granted, Berglund made more inquiries, more insistently, more argumentatively, and less politely than most," Fetsch wrote, "However, the First Amendment is not dependent on any of those qualities."

Fetsch based his decision on whether the safety, security, or privacy of the petitioners was threatened, and found there was no threat. Fetsch wrote that the employees of the city of Maplewood developed "a culture . . . within the city of Maplewood to make Berglund's acquisition of information as difficult as possible and to punish him for perceived transgressions." Fetsch characterized Berglund's "transgressions" as relating "more to social etiquette."

Berglund would call city employees repeatedly at their offices or at home after hours, but such actions, Fetsch decided, did not constitute harassment. Instead, Fetsch acknowledged that Berglund's calls "were necessary because [Berglund's] requests for information were ignored. The city is not a private citizen who may insist upon no contacts. The city is required to respond."

Fetsch also found no evidence existed to support the petitioners' claims of harassment or misconduct. Although the city council had made videotapes of their meetings, none were presented to the court, and the videotapes Berglund presented to Fetsch showed no evidence of misconduct on his part. Fetsch also noted that the petitioners presented "little, if any documentation" of any misconduct by Berglund.

Zick told the Reporters Committee for Freedom of the Press (RCFP) that Berglund plans to return to "Inside Insight" now that the restraining order has been lifted. The RCFP's article is available online at http://rcfp.org/news/2004/0707maplew.html.

The incident is not the first conflict Zick and Berglund have had with the Maplewood City Council. In 1999, Berglund was arrested and charged with misdemeanor offenses of trespass, assault and disorderly conduct when he and Zick were removed from a community banquet honoring outgoing Maplewood city council members, and their videotape confiscated.

Berglund and Zick filed suit against the officers and the City of Maplewood in federal District Court alleging violations of the federal Privacy Protection Act (42 U.S.C. § 2000aa), the Civil Rights Act (42 U.S.C. § 1983) and Minnesota's Open Meeting Law (§ 471.705) and Free Flow of Information Act (§ 595.021-595.025). The court ruled that the banquet did not violate Minnesota's Open Meeting Law, and further decided that Minnesota's Free Flow of Information Act, or reporter's shield law, did not apply in this case. The court further ruled that the City of Maplewood did not violate Berglund's and Zick's rights under the Privacy Protection Act because officials "acted reasonably" under the "criminal suspect" exceptions (§§ 2000aa (a)(1) and 2000aa(b)(1)). As to Berglund's and Zick's claims under the Civil Rights Act, the court ruled that those claims failed because the officers "did not commit any unlawful acts."

Zick and Berglund appealed the decision to the U.S. Court of Appeals for the Eighth Circuit, which affirmed on Nov. 21, 2002, in a *per curiam* decision. (See *Zick v. City of Maplewood; Berglund v. City of Maplewood*, 50 Fed. Appx. 805 (2002).) The U.S. Supreme Court in 2003 denied *certiorari* in the case in 2003. (See *Berglund v. City of Maplewood*, 539 U.S. 965 (2003). See also "Tape Confiscated from Maplewood Journalists" in the Winter 2002 Silha *Bulletin*, and "Local Governments Stifle the Press: Tape Seizure Permissible, Even Without Warrant" in the Winter 2003 Silha *Bulletin*.)

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

U.S Government and the Media

Media Attending Detainee Hearings Must Follow Rules

The trials involving the detainees at Guantanamo Bay mandated by two Supreme Court decisions in late June (*Hamdi et al. v. Rumsfeld*, 124 S. Ct. 2633 (2004) and *Rasul v. Bush*, 124 S. Ct. 2686 (2004)) began on August 23. They are being heard before Combatant Status Review Tribunals, consisting of three military officers, held at the U.S. Naval Station there (GITMO). But media access to the proceedings is being tightly controlled, and violations of the Defense Department's rules could, in some cases, lead to criminal prosecution of journalists.

In a Defense Department briefing on August 17, John Altenburg, Jr., appointing authority for the Office of Military Commissions, told the media that the military commissions "have been with us since the [1776] Revolution." Similar commissions were last utilized during World War II. Altenburg stated, "[T]here's a presumption of innocence at these commissions for every accused." A transcript of the briefing is available online at http://www.defenselink.mil/transcripts/2004/tr20040817-1164.html.

According to a fact sheet from the Department of Defense included in the Press Kit for media representatives, the military commissions provide a "full and fair trial, protection for classified and sensitive information, and protection and safety for all personnel participating in the process, including the accused."

However, although trial proceedings in the United States are normally open to the public, the military commissions will be held in relative secrecy. The legal advisor to the appointing authority at the Defense Department's Office of Military Commissions, Brigadier General Thomas L. Hemingway, told the American Forces Press Service that secrecy is necessary because the commissions are occurring "while the global war on terrorism is still going on." Because classified information may have to be introduced as part of the proceedings, the government is concerned that disclosure of the information and how it was collected could compromise intelligence operations.

But Hemingway acknowledged that a degree of openness is also necessary for the proceedings. He told *The Boston Globe*, " I think the public has been able to see that these proceedings are open, that there's transparency, that counsel on both sides are capable, and that the government is doing everything we possibly can . . .. "

Members of the press are allowed to observe the proceedings, provided they first sign an agreement created by the Department of Defense's Joint Information Bureau. If any journalist does not sign the agreement prior to departure from Andrews Air Base in Maryland, he or she will not be permitted to observe the proceedings, either from within the courtroom or from a special press area equipped with closed circuit television. A copy of the rules is available online at http://www.nsGITMO.navy.mil/jtfGITMO/media/JTF-GITMO%20Media%20Ground%20Rules.pdf.

Eight seats are to be provided for the media in the courtroom area. Two are for print media, two for television, two for wire and news services, one for radio and one for a sketch artist. Lots are to be drawn among the participating media groups for access to each proceeding. If a proceeding lasts more than one day, a new lottery will allocate seats for each day. If a proceeding only lasts for a few minutes, another lottery will be drawn for the next proceeding. Once a media group is selected, it is removed from the lottery until all the participating media groups have had a chance to attend a proceeding. Trading or transferring courtroom seats is not permitted.

Media representatives who do not win a seat in the courtroom will be provided access to the proceedings by closed circuit television located at a press center on GITMO.

The sessions are classified into three categories: "open sessions," where media lottery winners are permitted to sit in on the proceedings, and the remaining members of the press view the proceedings on closed circuit television from the press center; "open sessions with delay," where the media lottery winners are permitted to sit in on the proceedings, but the media viewing the closed circuit feed will see the proceedings on delay, so that security officers can censor "prohibited information;" and "closed sessions," where no media are allowed in the courtroom and no closed circuit television feed is provided. Reporters who are present in the courtroom when "protected information" is inadvertently disclosed will be "debriefed . . . and will be bound by their agreement not to use the information."

The ground rules include:

- Journalists are not to publish, release, discuss or share information identified by the Commission as "protected information." Protected information includes: classified information; information that is exempted from disclosure by law; information that may result in physical danger to those participating in the commission's proceedings; information concerning intelligence and law enforcement sources, methods, or activities; and information concerning other national security interests.
- If protected information is inadvertently disclosed by participants during a session, the Presiding Officer can order a "media embargo." Military officials can go through reporters' notes and demand that they cross out information while an official looks on. *The Boston Globe* reported

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Violations of the Defense Department's rules could lead to criminal prosecution of journalists.

Gitmo Rules, *continued from page 19*

that, by contrast, military officials can seize the notebooks of human rights observers if their notebooks contain protected information.

- Members of the media are subject to the instructions of the Presiding Officer and must also follow "courtroom etiquette rules." Courtroom etiquette rules deal with dress code and behavior in the proceedings area. For example, the only food permitted is water in a closed container. Any media representative not complying with these rules may be charged with contempt of court.
- No audio, video recordings, photographs or other electronic images may be made of the proceedings or participants without prior release approval of the on-scene senior public affairs officer. This applies to the proceedings both in the courtroom and as they appear on closed circuit television. Although "media will be responsible for screening their own video, photo, and audio coverage of detainee(s) to ensure they comply with these guidelines, [p]ublic affairs officers will be available to assist in reviewing if required."
- Tape recorders, telephones, computers, photographic or any other type of electronic or imaging equipment are not allowed while proceedings are in session. Writing materials and drawing materials for the designated sketch artist will be permitted. The American Forces Information Service reported that the sketch artist must not depict the faces of the detainees or the prosecuting attorneys or panel members. The drawings must also be submitted for review by a government security official before they can be released.
- Although photographs of the grounds or of groups of detainees are allowed, photographs are not allowed that would permit the identification of a particular detainee. Also, no photographs are allowed which show detainees in transit unless approved by the on-scene public affairs officer. No photographs of the detainees inside the courtroom are allowed.
- If the closed circuit television system malfunctions, media representatives who are present in the courtroom will be required to share their notes with those sitting in the television viewing area.
- Identities of detainees may only be published if they are released by the Office of the Secretary of Defense Public Affairs.
- Media representatives "are not permitted to interact" with trial participants, including the Presiding Officer, panel members, prosecutors, defense counsel, the accused, witnesses, guards, court reporters, translators, etc. However, requests to interview such personnel may be granted, provided the request is first submitted to the Commissioners Joint Information Bureau.

Courtroom etiquette rules require that anyone observing the military commissions must wear "appropriate attire," defined as "casual business" wear for civilians. This includes long pants, collared shirts with sleeves, and covered-toe shoes. Anyone not wearing appropriate attire would not be permitted either in the courtroom or the closed circuit television viewing area.

According to the contract, any reporter who does not follow the rules and instructions issued by the Joint Information Bureau may face "restricted access to GITMO, removal from the installation and revocation of press credentials." Failure to comply with directions from the Presiding Officer or the ground rules "may result in permanent expulsion from the courtroom area, and may result in the removal of the parent news organization from the commissions coverage assignment process."

Jane Kirtley, Silha Professor of Media Ethics and Law and the director of the Silha Center, told *The Boston Globe* that she was wary of the arrangement, which allows the military to declare off-limits information that comes out in open trial.

"I'm really troubled by the notion of journalists agreeing to restrictions of this nature in exchange for access," Kirtley said. "It seems to me that this is very different from an ongoing military operation where reporting real-time information would actually endanger the mission. A trial is very different."

Kirtley also stated that the media should alert the public to the limitations of their access to the proceedings. "Every time a journalist makes a concession like this, it means that the public is going to get less information than they normally would," she said.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Internet Censorship

Yahoo! Inc. v. LICRA and UEJF

The U.S. Court of Appeals (9th Cir.) ruled in San Francisco on August 23, 2004 that it could not consider an attempt by Yahoo! to block enforcement of a French court's order because it lacked jurisdiction and the case was not ripe for review. In *Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme (*LICRA*) and L'Union Des Etudients Juifs de France (*UEJF) 2004 U.S. App. LEXIS 17869, the panel reversed a previous ruling by the federal District Court which had held in 2001 that the French court's order seeking to force Yahoo! either to prevent French users from viewing Nazi memorabilia or pay a fine of $13,000 a day was not enforceable in the United States. (See "French Court's Order Against Yahoo! Not Enforceable in United States" in the Winter 2002 Silha *Bulletin*, and "Yahoo! Bans Sales of Nazi Memorabilia After French Ruling" in the Spring 2001 Silha *Bulletin*.)

During 2000, Yahoo! was the subject of a lawsuit brought by LICRA and UEJF, two French anti-racism groups, over Nazi memorabilia offered for sale on Yahoo! auction sites. Postings of such memorabilia are a violation of Section R645-2 of the French Criminal code, which bans exhibition of Nazi propaganda for sale and prohibits French citizens from purchasing or possessing Nazi materials.

Despite the fact that the Yahoo! auction sites are hosted by servers located in California, French Judge Jean-Jacques Gomez ordered Yahoo! to block access to French users or pay a fine. (A translation of the ruling, *LICRA and UEJF v. Yahoo! Inc*. is available online at www.gigalaw.com/library/france-yahoo-2000-11-20-lapres.html.) Following Gomez's ruling, Yahoo! posted warnings directed at French users, prohibited postings on Yahoo.fr that violate French law, and revised its auction policy to prohibit individuals from auctioning any item that "promotes, glorifies, or is directly associated with groups or individuals known principally for hateful or violent positions or acts . . .." Although the order also directed Yahoo! to block access to its other sites that could serve as an apology for Nazism, Yahoo! argued that it would not comply with that aspect of the order, as it constituted a violation of the company's First Amendment rights.

Yahoo! filed a complaint in federal District Court in San Jose, seeking a declaratory judgment that the Gomez's order was not enforceable under U.S. law. Judge Jeremy Fogel granted the motion in 2001, agreeing with Yahoo!'s First Amendment arguments. Although he emphasized that his ruling was not a moral affirmation of Nazism, Fogel wrote, "Internet users in the United States routinely engage in speech that violates, for example, China's laws against religious expression, the laws of various nations against advocacy of gender equality or homosexuality, or even the United Kingdom's restrictions on freedom of the press."

LICRA and UEJF appealed Fogel's decision. Judge Warren J. Ferguson wrote the majority opinion, joined by Judge A. Wallace Tashima. Ferguson ruled that no U.S. court can review the decision of the French court in this case because neither LICRA nor UEJF has as yet asked any U.S. court to enforce the French court's ruling. The only other way a U.S. court could have jurisdiction in the case would be if personal jurisdiction can be proved for LICRA or UEJF. Relying on the Supreme Court's ruling in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), Ferguson wrote that personal jurisdiction would apply only if LICRA or UEJF had "certain minimum contacts . . . such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" Ferguson found that LICRA and UEJF had three connections to the district: they sent a cease and desist letter to Yahoo! in the United States; they used the United States Marshals Service to serve process; and their requests to remove items from its Web site affected Yahoo!'s servers in California. However, he concluded that their contacts were insufficient to grant jurisdiction.

Ferguson concluded, "Yahoo! obtains commercial advantage from the fact that users located in France are able to access its website [sic]; in fact, the company displays advertising banners in French to those users whom it identifies as French. Yahoo! cannot expect both to benefit from the fact that its content may be viewed around the world and to be shielded from the resulting costs – one of which is that, if Yahoo! violates the speech laws of another nation, it must wait for the foreign litigants to come to the United States to enforce the judgment before its First Amendment claim may be heard by a U.S. court."

Judge Melvin Brunetti dissented, citing two bases for his dissent. He wrote that it was not necessary for LICRA and UEJF to attempt to enforce the fines imposed upon Yahoo! by the French court, but that the order to pay the fines itself was enough to establish jurisdiction. He found that LICRA and UEJF had met the requirements for personal jurisdiction because: they had made a transaction that fulfilled the requirement of conducting activities in California; the claim arose out of those activities; and the exercise of jurisdiction was reasonable, "comport[ing] with fair play and reasonable justice." Brunetti wrote, "United States courts are in a unique position to interpret their own constitution and render determinations regarding their citizens' rights thereunder."

The French order, Brunetti said, required Yahoo! to remove Nazi memorabilia and any references to revisionist theories regarding the Holocaust from its server in California. Because the court did not resolve the present case, the fines against Yahoo! will continue to mount. "The threat to Yahoo! is concrete and growing daily," he said.

The (San Jose) *Mercury News* reported that the attorney for LICRA and UEJF, Richard Jones, has stated that his clients believe Yahoo! is "foisting American speech values on the rest of the world." Robert Vanderet, the attorney for Yahoo!, told the Associated Press that the Ninth Circuit's ruling "really doesn't mean much," and told *Mercury News* that it was narrow enough to "avoid major free speech obstacles."

The next possible step for LICRA and UEJF is to sue Yahoo! in a U.S. court to enforce Gomez's order. Vanderet told the Associated Press, "It doesn't disturb the [Ninth Circuit's] ruling – it just says that you have to wait until they come into this country to enforce it."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Because the court did not resolve the present case, the fines against Yahoo! will continue to mount.

Internet Censorship

Ashcroft v. ACLU

Justice Kennedy found that the original challenge to COPA had not taken into account important technological advances in filtering software.

The Supreme Court determined that the Child Online Protection Act (COPA), 47 U.S.C. § 231, is probably unconstitutional in *Ashcroft v. ACLU* [*II*], 124 S. Ct. 2783 (2004). The 5 to 4 decision by the Court also said that COPA will continue to be blocked from being enforced until a full trial on the merits takes place. Although the law was enacted in 1998, a challenge to the constitutionality of COPA shortly thereafter and nearly continuous judicial proceedings, has prevented the government from enforcing the law.

COPA provides for possible jail time and fines for anyone who makes available to minors any commercial Web site that depicts sexual content, that is patently offensive and that lacks any serious literary, artistic, political or scientific value. The law also dictates that "community standards" of decency should be used to determine whether or not sexual content is patently offensive. Congress, in an attempt to keep COPA within the bounds of the Supreme Court's First Amendment case law, borrowed this language from the Supreme Court's watershed decision on obscenity and free speech in *Miller v. California*, 413 U.S. 15 (1973). *Miller* set the standards for courts to use in determining whether speech is obscene and therefore falls outside the scope of First Amendment protections. The law also requires that commercial providers of online pornography sites use a mechanism, such as providing personal identification numbers or requiring credit card numbers, to verify the age of each visitor.

Justice Anthony Kennedy, writing for the Court, found that the original challenge to COPA, brought more than five years ago, had not taken into account important technological advances in filtering software in the intervening years, and ordered the case remanded to federal district court in Philadelphia for further consideration on that matter. Although the Court's decision in *Ashcroft II* keeps in place the injunction which has prevented any actual enforcement of COPA since it was passed, it stopped short of making a final determination on whether or not the law is an acceptable intrusion into the freedom of speech guaranteed by the First Amendment. Justices John Paul Stevens, David Souter, Clarence Thomas and Ruth Bader Ginsburg joined Kennedy in the Court's majority opinion.

Kennedy wrote that although COPA is probably overbroad under the First Amendment, the government's goal of blocking access to pornography for minors constitutes a compelling government interest. The opinion noted that if COPA was the least restrictive manner to achieve that goal, then the law might not violate the Constitution. However, the majority found that the federal district court would be the best arena to consider the substantial developments in technology, especially filtering software, which have become available since the case was first heard over five years ago.

Solicitor General Theodore Olson, representing the government, had told the Court in oral arguments that filtering software was not accurate enough to effectively protect minors from online pornography. After the decision was released, Mark Corallo, a spokesman for the Justice Department, told the *Boston Globe* and other media outlets in a prepared statement that the Court had made the wrong decision. "Our society has reached a broad consensus that child obscenity is harmful to our youngest generation and must be stopped," Corallo said. "Congress has repeatedly attempted to address this serious need and the Court yet again opposed these common-sense measures to protect America's children." Conservative and religious groups agreed. Pat Trueman, from the Family Research Council, told reporter Cynthia Webb of *The New York Times*, "It is not too much to ask that Web users who want to access commercial pornographic content prove they are adults."

The ACLU, which argued against COPA and filed the suit in federal district court, claimed that filtering technology, which would allow parents to make decisions on what their children see online, should be used instead of a federal law. The ACLU also maintained that COPA would create a chilling effect on free speech because commercial sites, concerned with inadvertently breaking the law, would self-censor the content they provide.

Justice Stephen Breyer, joined by Chief Justice William Rehnquist and Justices Clarence Thomas and Atonin Scalia, dissented from the majority opinion. The dissenters contended that the burdens COPA imposed on protected speech were modest and fell short of violating the First Amendment rights of adults.

COPA is the most recent in a series of attempts by Congress to restrict access to pornographic material online, and the decision in *Ashcroft II* is only the latest in a long line of obscenity cases dealing with online pornography. Congress first addressed issues of online pornography with the Communications and Decency Act (CDA), 47 U.S.C. § 230. Like COPA, CDA sought to clamp down on online pornography; unlike COPA, it was not restricted to for-profit Web sites. Shortly after becoming law, CDA was declared unconstitutional by the Court in *Reno v. ACLU*, 521 U.S. 844 (1997). The broad applicability of the law, the Court reasoned, did not meet the high threshold required to allow an intrusion on the freedom of speech protected by the First Amendment. The Court determined that CDA, as drafted, was an overbroad intrusion on First Amendment rights because it might keep adults from accessing perfectly legal sites while also potentially stopping children from visiting sites on health issues which contain sexual material that was not pornographic.

In another attempt to ban access to child pornography online, Congress passed the Child Pornography Protection Act (CPPA), 18 U.S.C. § 2256, which was also signed into law in 1996. CPPA made

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Internet Censorship Continued

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it illegal to distribute or access child pornography online, but also included as child pornography images that contained individuals who "appear to be minors" engaged in sexual acts and or "convey[ed] the impression" that minors were in the images. Six of the Justices determined, in *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), that the law was unconstitutional. Although the Court acknowledged that banning the trade in child pornography was a compelling interest of the government, the Court struck down the law finding that the provisions of CPPA banning images that "appear to be minors" or "convey the impression" that minors are in the images was unconstitutionally vague and overbroad. (See "Supreme Court Strikes Down Virtual Child Pornography Act" in the Spring 2002 Silha *Bulletin*.)

The government met with success in addressing the issue of online pornography and Internet access at public libraries, however. Last year, the Court upheld the Children's Internet Protection Act of 2000 (CIPA), 20 U.S.C. § 9134, finding that CIPA was a constitutional exercise of Congress's spending power in *United States v. American Library Ass'n*, 539 U.S. 194 (2003). CIPA gave federal funding to libraries for Internet access only if the libraries agreed to use filtering software that blocks online access to child pornography and prevents minors from viewing obscene images. A plurality of the Justices found that CIPA presented no free speech issues, and two other Justices found that CIPA's requirements did not significantly burden free speech to the point of being unconstitutional. (See "Courts Rule in Internet Cases: *United States v. American Library Association*" in the Summer 2003 Silha *Bulletin*.)

COPA was an attempt by Congress to stay within the bounds set by the Court in *Reno v. ACLU* and *Ashcroft v. Free Speech Coalition*. The law, signed by then-President Bill Clinton, ostensibly sought to achieve the goals of protecting minors from pornographic materials online. President Bush also expressed his support of COPA when the Court first considered the federal law in 2002 in the case *Ashcroft v. ACLU* [*I*], 535 U.S. 564 (2002).

A majority of the Justices concluded in *Ashcroft v. ACLU I* that the requirement of COPA that "community standards" govern what is obscene or pornographic was not overbroad under the First Amendment. The decision overruled the lower court's finding that COPA was unconstitutional on that ground, and sent the case back for further consideration.

On remand, the three-judge panel of the Third Circuit again determined that COPA was probably unconstitutional and kept in place the injunction which has blocked application of the law by the government since it was first challenged in federal district court in Philadelphia over five years ago. The government again appealed to the Supreme Court, and this time the Court agreed with the Third Circuit in *Ashcroft v. ACLU II*.

Articles on these issues in the Silha *Bulletin* include: "Courts Rule in Internet Cases: United States v. American Library Association" and "Courts Rule in Internet Cases: Minneapolis Librarians Reach Settlement" in the Summer 2003 Silha *Bulletin*; "Bush Urges Passage of Virtual Law on Child Pornography" in the Fall 2002 Silha *Bulletin*; "Developments in Internet Law: House Passes Amendment to Child Pornography Protection Act" in the Summer 2002 Silha *Bulletin*; "Supreme Court Strikes Down Virtual Child Pornography Law" in the Spring 2002 Silha *Bulletin*; "Librarians File EEOC Complaint in Minneapolis" in the Winter 2001 Silha *Bulletin*; "Zoning the Internet: A Possible Solution to Internet Pornography Problems" and "The Child Online Protection Act of 1998: Will 'CDA II Be Found Constitutional" in the Winter 1999 Silha *Bulletin* and "Cyberporn and Dangerous Judicial Precedent" in the Summer 1998 Silha *Bulletin*.

—Andrew Deutsch
Silha Research Assistant

Family Movie Act May Violate Copyrights

Supporters of movie filtering technology in the U.S. House of Representatives won a victory on July 21, 2004 when the House Judiciary Committee voted 18 to 9 to report the Family Movie Act, HR 4586, to the full House for consideration as proposed legislation. The Family Movie Act was introduced by Rep. Lamar Smith (R-Tex.) to allow the sale and use of technology that skips over "objectionable" material on DVD movies.

However, some opponents say that the bill would violate movie copyrights. Rep. Howard Berman (D-Calif.) told reporter Ted Birdis of the *Dubuque Telegraph Herald* that the bill "gives for-profit companies the right to commercially exploit the copyrights of movies without input from creators." Dan McGinn, a spokesperson for the Directors Guild of America, echoed those concerns, saying that the filtering technology essentially creates a new version of the product which should be licensed separately.

Directors Guild Attorney Ernie Getto maintains that the filtering technology renders movies worthless as an art form.

The Directors Guild is currently involved in litigation against ClearPlay, a company making and distributing the filtering technology for DVD players, in federal district court in Colorado. ClearPlay technology for DVD players enables the filtering of PG-13 and R rated material from hundreds of movies. After purchasing a DVD player equipped with ClearPlay's technology, parents can download or have mailed to them filters created by ClearPlay for individual movies at a cost of $7.95 per month. After the filters are installed, the DVD players then will either automatically skip or mute scenes and content based on customizable settings used by parents.

In a July 21, 2004 Judiciary Committee news release, Smith praised the Family Movie Act for allowing parents to control their children's access to movie scenes depicting sex, violence and profanity. F. James Sensenbrenner (R-Wis.) chairman of the Judiciary Committee, likewise spoke in favor of the bill, saying that it "provides parents with a little more control over what is viewed in their homes."

Ernie Getto, an attorney for the Directors Guild, maintains that the filtering technology renders movies worthless as an art form. Getto was quoted in the *Los Angeles Times* on June 23, 2004 as saying that the ClearPlay filters removed 22 minutes from "Austin Powers in Goldmember." The movie was released as a 94-minute film. Getto maintains the filters so change the movie that it "makes virtually no sense" after being edited. Berman also told the *Los Angeles Times* that he worries that unauthorized editing would allow political censorship. For example, Berman said that an anti-tobacco group could also offer a filter to remove all tobacco use from movies.

The Family Movie Act is the latest outgrowth of anti-indecency legislation taken up by Congress. In June 2004, the Senate attached a "broadcast decency" rider to its annual defense appropriation bill. The proposed legislation, approved 99 to 1, would allow the Federal Communications Commission (FCC) to increase fines for violations of the federal indecency rules from $27,500 to $275,000 per violation, at a maximum of $3 million in fines per day. The House version of the bill, approved 391 to 22, would raise maximum fines to $500,000 and allow the FCC to conduct a hearing after a broadcaster's third offense to determine whether its license should be revoked.

Both measures came in the wake of Janet Jackson's Super Bowl halftime performance last January which resulted in an outpouring of public criticism over the federal indecency rules. (See "FCC Crackdown on Indecency Leads to Historic Fines" in the Winter 2004 Silha *Bulletin*.) Differences between the FCC indecency bills are being worked out in conference committee. The House is currently adjourned and will not be able to consider the Family Movie Act until it reconvenes September 7.

—Andrew Deutsch
Silha Research Assistant

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She wrote that the "majority of the committee appears to have placed heavy emphasis on only one side of the equation – the potential for harm" by needlessly focusing on the negatives of broad Internet access such as the erosion of the practical obscurity, the possibility of identity theft and potential discrimination against minorities. Bergsgaard argued that ensuring open and broad access to the judicial branch, including access to court records online, would promote a better public understanding of the judicial system while also exposing underlying problems and inequalities.

The final report of the committee on the Access Rules was released just before Minnesota criminal records went online. Since July 1, 2004, the Minnesota Bureau of Criminal Apprehension has made its adult criminal history database available electronically. The database contains records on those convicted of felonies and gross-misdemeanors in the state of Minnesota. The criminal conviction of a defendant remains in the database for 15 years from the date the sentence or probation was completed. Anyone can search the database via the Internet for a $5 fee. According to a June 17, 2004 St. Paul *Pioneer Press* article, similar services are offered by at least a dozen other states including Colorado, Maine and Texas ranging from prices of $3.72 up to $23.

A hearing will be held before the Minnesota Supreme Court on Sept. 21, 2004 to consider the final report of the committee on the Access Rules.

—Andrew Deutsch
Silha Research Assistant

Library Freedoms at Risk

South Dakota Governor Pulls Plug on Web Sites

In July 2004, Michael Rounds, governor of South Dakota, called for a review of all state sites linked to any outside Web sites that might contain sexually explicit or politically oriented material. Rounds made the announcement after discovering that the South Dakota teen library center provided a link to a Columbia University-sponsored site and a Planned Parenthood site. The teen library Web site has since been shut down by the governor.

Rounds became aware of the links on the library site after Rev. Robert Carlson, Bishop of the Sioux Falls Catholic Diocese, wrote a letter to the governor on May 12, 2004 objecting to the Planned Parenthood link. Carlson's letter prompted Rounds to ask the State Library Board to remove the link. The State Library Board complied. Rounds told reporter Michelle Herrick of the Sioux Falls *Argus Leader* that the political messages on the Planned Parenthood site, which linked to other sites critical of the Bush administration, violated South Dakota's Web policy guidelines. The state's Web guidelines require that any material on state Web sites should contain only content suitable for all ages and not advocate any political issue or party.

After learning of the Planned Parenthood link, Rounds subsequently discovered that the library's teen center site also linked to the Columbia University site, Go Ask Alice!, online at www.goaskalice.columbia.edu, which contains a large database on issues such as sexuality, physical health and drugs. The Go Ask Alice! site was created by Health Services at Columbia 10 years ago and initially offered only to Columbia students. Today it generates a substantial amount of traffic from visitors to the site, soliciting questions from users and then showing posted responses from a group of paid doctors, nurses and mental health professionals. Some of the questions and answers cover areas topics such as group sex and sexual fetishes.

Rounds then decided to shut down the library's teen center Web site. Mark Johnson, a spokesman for the governor, told reporter Jacob Gershman of the *New York Sun* that the governor's decision to ban the site was necessary after the state library board, which had already removed the Planned Parenthood link, refused to remove the Go Ask Alice! link. Rounds explained that the teen center linked to what he considers obscene material and wanted to set clear Web site policy for all state government sites.

Melissa Kenzig, director of the Alice! Health Education Program at Columbia, told the *New York Sun* in July 2004 that she lamented the governor's decision to remove the link. Kenzig described the site as a place where visitors can get "credible and accessible information to help them make better decisions about their health and well-being."

According to the Associated Press, the ACLU of the Dakotas is investigating the removal of the Go Ask Alice! link from South Dakota's library site to determine whether it is impermissible state censorship. However, an Aug. 4, 2004 *USA TODAY* article, available online at http://www.usatoday.com/tech/news/techpolicy/2004-08-04-sd-gov-censors-teen-site_x.htm, reported that Rounds has told the state Library Board that it could restore the teen center Web site if all the links are appropriate for all ages and it is cleared with Education Secretary Rick Melmer. Rounds maintains that links to organizations that advocate political causes, such as Planned Parenthood, would not be allowed on any state Web site.

A similar decision to remove a link to Go Ask Alice! from the Houston Public Library Web site was made by Lee Brown, mayor of Houston, last year. Brown cited similar concerns at the time and the link has remained off the Web site.

—Andrew Deutsch
Silha Research Assistant

Governor Michael Rounds called for a review of all state sites linked to outside Web sites that might contain sexually explicit or politically oriented material.

Developments in Libel/Disparagement

Consumer Reports and Suzuki Reach Settlement

Settlements like the one between Suzuki and Consumers Union harm free expression.

– Stephen R. Barnett
The Recorder

Automaker Suzuki Motor Corp. and Consumers Union, publisher of *Consumer Reports*, have settled their eight-year-old product disparagement lawsuit in which the car maker claimed the magazine had rigged tests of its Samurai sports utility vehicle, stating that the Samurai was "not acceptable" because it "rolls over too easily." Both Suzuki and Consumers Union filed a joint motion in Santa Ana, Calif., on July 8, 2004 to have the case dismissed. According to a story posted by the Reporters Committee for Freedom of the Press, available online at http://rcfp.org/news/2004/0709suzuki.html, neither company admitted fault or received monetary compensation from the other. Although Suzuki disputes the test findings, *Consumer Reports* still stands by them, according to the Associated Press.

Consumer Reports first published its findings in 1988, then ran the findings again in an anniversary issue in 1996. At that time Suzuki filed a disparagement suit in U.S. District Court for the Central District of California, Southern Division. The court dismissed the suit in 2000, but in 2002, a three-judge panel of the U.S. Court of Appeals (9th Cir.) ruled that the case should go forward to trial. Consumers Union moved for a rehearing by all the 9th Circuit judges, but by a vote of 13 to 11, the court decided not to rehear the case. In *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110 (9th Cir. 2003), the court found that Suzuki had shown that a jury might find that Consumers Union had acted with "actual malice" in its review of the Samurai, and accordingly, dismissal of the case was inappropriate. The Ninth Circuit concluded that Suzuki had raised genuine issues as to whether Consumers Union had purposely avoided information favorable to the Samurai.

On August 13, 2003, Consumers Union petitioned the U.S. Supreme Court to review the decision of the Ninth Circuit, but on Nov. 3, 2003, the U.S. Supreme Court decided, without comment, not to do so. (See "U.S. Supreme Court Decides Not to Review Disparagement Case Against *Consumer Reports*" in the Fall 2003 Silha *Bulletin*.)

Statements issued by both Suzuki and Consumers Union on July 8, 2004 stated, "CU never intended to state or imply that the Samurai easily rolls over in routine driving conditions." They continued, "The parties have acknowledged their mutual respect for each other in that Suzuki recognizes CU's stated commitment for objective and unbiased testing and reporting, and CU recognizes Suzuki's stated commitment for designing, manufacturing and marketing safe vehicles." The *Los Angeles Times* reported, however, that *Consumer Reports* agreed to a "clarification" about the Samurai's safety concerns. The joint statement said that *Consumer Reports'* use of the word "easily" might "have been misconstrued and misunderstood" when tests involving "severe turns" were made on the vehicle.

Consumers Union president Jim Guest told the *Los Angeles Times* that during its 68-year history, the company has never lost or paid damages in a product disparagement case. "We stand behind our test protocol," Guest stated.

Stephen R. Barnett, writing for the legal publication *The Recorder*, claimed that settlements like the one between Suzuki and Consumers Union "harm[s] free expression," and said that such settlements are becoming more and more common. Barnett wrote that such cases chill freedom of expression, citing *White v. Samsung Electronics America, Inc.,* 971 F.2d 1395 (1992), where Vanna White protested the use of a game-show robot that she claimed resembled her; *Dr. Seuss Enterprises L.P. v. Penguin Books USA, Inc.*, 109 F.3d 1395 (1997), where a book written in the style of Dr. Seuss parodied the O.J. Simpson murder trial; and *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003), where Nike categorized its statements in press releases about its overseas labor practices as "commercial speech." Barnett stated that the *White* case chilled the potential use of parody in commercials, while the *Seuss* case chilled the use of parody, satire and fair use of copyrighted and trademarked works. Barnett quoted an unidentified media attorney in the *Nike* case, who said that as a result of that ruling, the court's "sweeping definition of commercial speech" now applies to "all speech by corporations that reaches California." (See "Can Press Releases Be Considered Commercial Speech?" in the Winter 2003 Silha *Bulletin* and "Courts Rule in Freedom of Speech Cases: *Nike v. Kasky*" in the Summer 2003 Silha *Bulletin*.)

When cases such as these are denied *certiorari* or a decision by the U.S. Supreme Court, Barnett claimed that the lower courts' rulings result in chilled speech. He urged the high court to "consider specifically the harm [to freedom of speech] . . . if review is denied," and to give "more weight to the likelihood" that settlements could occur.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

International Media Law - Privacy

Campbell v. MGN, Ltd.

A 3 to 2 ruling by the Law Lords of the British Parliament on May 6, 2004 has provided the United Kingdom with what may be the foundations of that country's newly emerging privacy law. Overturning a Court of Appeals ruling in a London newspaper's favor, the panel ruled that a supermodel was entitled to damages for breach of confidence.

Campbell v. MGN, Ltd. [2004] UKHL 22, centered on the publication of a front-page article on Feb. 1, 2001 in *The Daily Mirror* stating that Naomi Campbell was a drug addict and that she attended Narcotics Anonymous meetings in the United States and the United Kingdom. Photos accompanying the article showed Campbell on a public street in London outside one of the group's meeting place, saying goodbye to other members. *The Daily Mirror's* story was particularly noteworthy because Campbell had, on numerous occasions, declared that she had never been addicted to drugs.

The day following publication of the article, Campbell sued *The Daily Mirror's* publisher, MGN, Ltd. Campbell did not dispute the veracity of *The Daily Mirror's* statement that she was an addict. Instead, she sued *The Daily Mirror* for unlawful invasion of her privacy as well as breach of confidence on three points: publishing the fact that she was attending Narcotics Anonymous meetings, details about her attendance at those meetings, and photographs taken without her knowledge or consent. Although the tone of the original article was sympathetic, there were several inaccuracies: Campbell had been attending meetings in the United Kingdom and the United States for two years, not three months; she did not attend meetings as frequently as *The Daily Mirror* claimed; and the photograph showed her leaving a Narcotics Anonymous meeting, not arriving, as the newspaper stated.

The day following the filing of Campbell's suit, *The Daily Mirror* published another article, this one more critical. One of the headlines read, "If Naomi Campbell wants to live like a nun, let her join a nunnery. If she wants the excitement of a show business life, she must accept what comes of it." Additional stories, similar in tone, followed.

The initial ruling resulted in an award for Campbell in the amount of £2,500 plus £1,000 aggravated damages in *Campbell v. MGN* [2002] EWHC 499 (QB). But *The Daily Mirror* appealed and the Court of Appeal discharged the lower court's order in *MGN, Ltd. v. Campbell* [2002] EWCA Civ 1373, [2003] QB 633. Following that decision, Campbell appealed the case to the House of Lords, which reversed.

Lord Hope of Craighead wrote that "it is hard to beat the habit which has led to [drug] addiction.. . . The struggle . . . is an intensely personal one." Hope acknowledged that a balance needed to be struck between Campbell's denial of ever using drugs and her attendance at Narcotics Anonymous meetings, but he wrote that the publication of the photographs crossed a line. "[L]ooking to the text only, I would have been inclined to regard the balance between these rights as about even," he wrote, but the photographs were "taken deliberately, in secret and with a view to their publication in conjunction with the article." He concluded, "there was here an infringement of Miss Campbell's right to privacy that cannot be justified."

Baroness Hale of Richmond also acknowledged that a balance between the public's right to know and Campbell's privacy needed to be struck, but that a "reasonable expectation of privacy" might serve as a test in such cases. Describing the case as that of "a prima donna celebrity against a celebrity-exploiting tabloid newspaper," Hale said that even "this sort of story . . . is just the thing that fills, sells, and enhances the reputation of the newspaper which gets it first. One reason why press freedom is so important is that we need newspapers to see in order to ensure that we still have newspapers at all."

Although this case centered around news that could be considered little more than gossip, Hale said the issues themselves were not trivial. Other newspapers and magazines have also run stories on addicts and their efforts to overcome their addictions. But the difference between those stories and *The Daily Mirror's* story about Campbell, according to Hale, is that most stories are run with the subject's permission. *The Daily Mirror* had not obtained permission from Campbell.

Although Lord Carswell acknowledged that Articles 8 and 10 of the European Convention on Human Rights needed to be brought into balance – the rights of privacy and freedom of expression – he also agreed that Campbell's appeal should be upheld. Her treatment for addiction by Narcotics Anonymous, as well as the length of time she had been receiving treatment by that organization, should be considered private, and no photographs of her at the door of the meeting place should have been published. Carswell wrote that he was "unable to accept" that the publication of the photographs "was necessary to maintain the newspaper's credibility."

Two members of the Law Lords dissented – Lord Hoffmann and Lord Nicholls.

Although Hoffmann acknowledged that international human rights law has "identif[ied] private information as something worth protecting as an aspect of human autonomy and dignity," he also recognized that there needs to be a balance struck between "freedom of the press and the common law right of the individual to protect personal information." One way to find that balance, he suggested, was to ask "whether there is a sufficient public interest in that particular publication to justify curtailment of the conflicting right." Given that Campbell had not revealed the truth about her drug addiction to the public, Hoffmann wrote that sufficient public interest existed to reveal the information obtained by *The Daily Mirror*. The photos were included, Hoffmann stated, "by way of verification."

"Where the main substance of the story is conceded to be justified, should the newspaper be held liable whenever the judge considers that it was not necessary to have published some of the personal information? Or should the newspaper be allowed some margin of choice in the way it chooses to present its story?. . . . The practical exigencies of journalism demand that some latitude must be given. Editorial decisions have to be made quickly and with less information available to a court which afterwards reviews the matter at leisure," Hoffmann concluded.

Nicholls wrote that the United Kingdom has no "cause of action for 'invasion of privacy,'" but that what privacy

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"This case will inevitably have the damaging effect of deterring newspapers from publishing other stories that impinge on privacy when there are good public interest reasons to do so."

– Attorney David Pannick

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law exists there does so on the basis of the Human Rights Act of 1998. As to Campbell's breach of confidence claims, Nicholls stated that British law has recognized a "'duty of confidence' whenever a person receives information he knows or ought to know is fairly and reasonably to be regarded as confidential," and to publish that information would be a "misuse of private information." But he also acknowledged that "where a public figure chooses to present a false image and make untrue pronouncements about his or her life, the press will normally be entitled to put the record straight." He concluded therefore, that the discussion about Campbell's drug use was a matter of "public domain."

Regarding the photographs *The Daily Mirror* published of Campbell, Nicholls wrote, "They showed nothing untoward. They conveyed no private information beyond that discussed in the article.. . . The group photograph showed Miss Campbell in the street exchanging warm greetings with others on the doorstep of a building. There was nothing undignified or distrait about her appearance."

Charles Gray, a British High Court justice, told *The* (London) *Daily Telegraph*, that this case has created a law of privacy in British law for the first time, saying that Nicholls' "misuse of private information" standard transformed the previous law of confidence, which relied on a prior relationship between two parties. "Editors will [now] have to think long and hard about kiss-and-tell stories," Gray said.

David Pannick, a practicing barrister and a Fellow at All Souls College in Oxford, wrote in *The* (London) *Times*, "[The Campbell] case will inevitably have the damaging effect of deterring newspaper editors from publishing other stories that impinge on privacy even when there are good public interest reasons to do so. *Campbell v. MGN* is not a model judgment."

The *Campbell* ruling runs counter to other British cases where plaintiffs tried to establish a right to privacy. In a case from October 2003, Mary Wainwright was denied damages under a privacy claim after being strip-searched in Armley Prison in Leeds, where she and her son, Alan, had gone to visit her other son and Alan's half-brother, Patrick O'Neill, who was awaiting trial on criminal charges. The manner in which the Wainwrights were searched was more intrusive than allowed by prison policy, but the court ruled that this was not enough to warrant a claim for breach of privacy in the case. However, Alan was awarded a small sum for battery damages because it was proven he suffered post-traumatic stress as a result of the incident. See *Home Office v. Mary Jane Wainwright* [2001] EWCA Civ 2081.

But following the *Campbell* ruling, another case, involving Maxine Carr, a former girlfriend of murderer Ian Huntley, seemed to solidify privacy law in Britain. *The* (London) *Times* reported that Carr had provided a false alibi for Huntley. Charged with conspiracy to pervert the course of justice, she served a prison sentence of three years, receiving death threats while incarcerated. Following her release, Carr sought help from officials to create a new identity and to keep her whereabouts secret. But *The Scotsman* reported that a file with details of her new life was stolen from the vehicle of the civil servant assigned to her case. Information contained in her file fell into the hands of the British press, and Carr sought to enjoin publication.

On May 13, 2004, High Court justice David Eady banned disclosure of her identity and "any detail which could lead to information about the whereabouts, care or treatment of her upon her release [from jail]." He based his decision on the right to life provisions of Article 2 of the European Convention of Human Rights, and her right to privacy and to a family life under Article 8.

But the ruling in the Carr case is not the first of its kind in British law. Another ruling protected the identities of two teenagers after kidnapping and murdering James Bulger on Feb. 12, 1993. Robert Thompson and Jon Venables were recorded by a security camera as they led the toddler out of a shopping center. They later killed him. But in 2001, Thompson and Venables were granted life-long anonymity out of concern that they would be killed upon their release from prison. See V*enables and Thompson v. News Group Newspapers Limited, Associated Newspapers Limited and MGM Limited,* No. HQ 0004986 and HQ00044737.

In 2003, an order was issued protecting the privacy of Mary Bell, who had murdered two boys when she was eleven. Although the ruling was aimed at protecting Bell's daughter's identity, it protected hers as well. See *X and Y v. Stephen O'brien* [sic] *and News Group Newspapers Ltd. and Mgn* [sic] *Ltd.* [2003] EWHC 1101 (QB) (21 May 2003).

Another celebrity case involved Michael Douglas and Catherine Zeta-Jones. In April 2003, Judge Sir John Edmund Frederic Lindsay at the High Court in London (Chancery Division) ruled that when *Hello!* magazine published unauthorized photos of the couple's November 2000 wedding, it had "spoiled" the exclusive publication of wedding photos in *OK*! Magazine, to which the couple had already promised exclusive rights. See *Douglas v. Hello!*, [2003] EWHC 786 (Ch). On Nov. 7, 2003, Lindsay awarded £14,600 to the Douglases and £1,033,156 to *OK!* See *Douglas v. Hello!*, [2003] EWHC 2629 (Ch); see also "Courts Rule in Celebrity Privacy Case : *Douglas v. Hello*!" in the Summer 2003 Silha *Bulletin* and "British Court Issues Historic Privacy Decision" in the Spring 2000 Silha *Bulletin*.

Amber Melville-Brown, a consultant at David Price Solicitors & Advocates, wrote in *The Times*, "That these few unusual cases are an unreasonable infringement on the rights of the press is debatable. While the press, in its role as the watchdog of society, must not be caught sleeping on the job, it should pick its fights carefully . . .."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

International Journalists News

Deportation of Foreign Journalist Prompts Congress to Introduce New Bill

When British journalist Elena Lappin tried to enter the United States at Los Angeles International Airport (LAX) on May 5, 2004, she was detained by immigration officials for not having an I-visa, a special press visa. Her experience caught the attention of organizations such as the Committee to Protect Journalists (CPJ), and Reporters Without Borders (RSF), and has resulted in the introduction of a new bill, H. R. 4823, to Congress.

Lappin wrote of her ordeal in an article published by *The* (London) *Guardian* on June 5. She wrote that she had filled out a green visa waiver form (I-94W) in order to enter the United States to work on a freelance project, something she had done before. When immigration officials asked why she had traveled to the United States, she said she was here to "do some interviews," and told them she was working for *The Guardian*.

Lappin was then sent to an enclosed area where she waited to be processed. After an unspecified time, Lappin wrote that she was finally informed that she was to be deported. Immigration officials pointed out the fine print to Lappin on the I-94W form which read, "You may not accept unauthorized employment or attend school or represent the foreign information media during your visit under this program." After a three-hour session with an unidentified interrogating officer, Lappin was told she would have to return to London to apply for an I-visa there before she could enter the United States.

Lappin was photographed and fingerprinted following a search of her luggage. She then underwent a body search, and was afterwards handcuffed and taken to a detention room where she waited for a return flight to London. In all, her ordeal lasted 26 hours. She told the Associated Press, "I felt angry, helpless, humiliated."

According to an article by Lappin which appeared in *The New York Times*, the I-visa was originally created in 1952, at the height of the McCarthy era, as part of the McCarran-Walter Act. President Harry Truman vetoed the law, but was overridden by Congress. Brent Renison, an immigration law specialist, told *The New York Times* that the I-visa was an effort to curb subversives from entering the United States, classifying journalists as "a class of non-immigrants," and removing them from the "visitor" category. Under the McCarran-Walter Act, Lappin claims that "major intellectual figures" such as Graham Greene and Carlos Fuentes have been prohibited from entering the United States over the years.

Lappin wrote that following the Sept. 11, 2001 attacks on the United States, the passage of the federal USA PATRIOT Act revived much of the McCarran-Walter Act, and brought back wider enforcement of the I-visa under 1986's Immigration and Nationality Act. "There's nothing new with the I-visa," Kevin Goldberg, an attorney for American Society of Newspaper Editors (ASNE) told the Reporters Committee for Freedom of the Press (RCFP). "I think what is new is that [U.S. immigration officials] are enforcing it pretty hard." The RCFP article is available online at www.rcfp.org/news/2003/1126ivisas.html.

As a result of the enforcement of the I-visa requirement, foreign journalists who arrive in the United States, even from those 27 nations deemed "friendly," must apply for the I-visa. According to the U.S. Department of State Web site, application procedures include the completion of a DS-156 form, a valid passport, a photograph, proof of employment the payment of a $100 fee. Information about applying for the visa is available online at http://travel.state.gov/visa/tempvisitors_types_media.html.

RSF states on its Web site that 13 foreign journalists have been deported since March 2003, when the U.S. Immigration Department came under the control of the Department of Homeland Security. The article is available online at http://www.rsf.org/article.php3?id_article=10296. According to an editorial published by the *Los Angeles Times* on July 15, foreign journalists often claim to be tourists, simply to "avoid hassles." Lappin "paid the price for honesty."

The Associated Press reported that U.S. Customs and Border Protection Commissioner Robert Bonner announced a slight change in the visa policy shortly after the incident with Lappin. Foreign reporters without knowledge of the need for an I-visa could enter the country on a one-time basis. But when returning to the United States a second time, foreign journalists would need to apply for the I-visa.

Some media organizations did not believe the policy change went far enough, however. Karla Garrett Harshaw, President of ASNE, sent a letter to Secretary of Homeland Security Tom Ridge on June 23, writing, "Essentially, the current policy amounts to nothing more than a licensing for journalists." CPJ's executive director, Ann Cooper cited incidents where foreign journalists were questioned about who they will be interviewing and for what media outlet in a letter sent to Ridge on August 5. Such questioning, Cooper maintains, can have a "chilling effect" on journalists' work.

The *Los Angeles Times* has also protested the I-visa requirement, stating in the July 15 editorial, "No terrorist with any brains is going to pose as a journalist without a visa when the alternative is waltzing through [customs] as a tourist," and called for immigration rules to be amended, allowing foreign journalists to enter the country "without a visa for a short-term assignment."

On July 17, Rep. Zoe Lofgren (D-Calif.) introduced a bill, H.R. 4823, seeking to amend § 101 (a)(15)(B) of the Immigration and Nationality Act (8 U.S.C. 1101(a)(15)(B). If passed, the bill would "permit foreign media representatives to gain admission as visitors coming temporarily to the United States for business," putting journalists on the same footing as foreign business travelers. At the time the *Bulletin* went to press, the bill had been referred to the House Judiciary Committee.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

The new bill would put journalists on the same footing as foreign business travelers.

International Journalists News

Russian Journalists Fired Over Separate Chechen-Related Incidents

"We are at war. And the public should be awakened to it despite very passive television coverage."
– Former *Izvestia* Editor Raf Shakirov

Two Russian journalists, one the editor of the major daily newspaper *Izvestia*, and the other the host of a television news program, were recently fired in separate incidents, both involving Chechen rebels.

Izvestia's editor, Raf Shakirov, was forced to resign on Sept. 6, 2004, two days after publishing criticism of the government's handling of the Beslan school hostage incident as well as stating that coverage of the event has been censored by state television. Agence France Presse reported that the newspaper's Saturday edition carried a single photo on its front page – that of a man with "an anguished look" carrying a child to safety during the raid on the militants holding the school's occupants hostage.

In an interview with Radio Liberty, Shakirov said, "[*Izvestia's* coverage] was considered too emotional and posterlike, but we did it because our perception of the huge significance of the tragedy for our country." He told the *Los Angeles Times*, "We are at war. And the public should be awakened to it despite very passive television coverage."

An article published in *Izvestia's* September 6 issue by Irina Petrovskaya was critical of the state's coverage of the event. *The* (London) *Guardian* reported that Petrovskaya's article appeared with the headline, "The Silence of the State Broadcasters," and claimed that state channels panicked, turning to their regularly scheduled programs rather than providing viewers with live coverage. By contrast, the relatively independent NTV network began with live coverage of the event, then immediately cut away. But thirty minutes later, the network returned to its reporters at Beslan, providing three hours of live coverage. NTV curtailed its broadcast when troops approached the school. Shakirov told the *Los Angeles Times*, "Oddly enough, BBC and CNN devoted more time to live coverage of what was going on in Beslan than Russian national channels."

Agence France Presse reported that an unidentified *Izvestia* staff member said that executives found the coverage "too radical and negative." But another unidentified *Izvestia* staffer told the *Moscow Times* that the Kremlin was "upset" about the newspaper's coverage of this and other terror attacks on Russia, and that the September 4 issue was "the last straw."

According to the BBC, Vladimir Borodin, who is currently *Izvestia's* managing editor, will run the newspaper until a permanent replacement is found.

On June 2, 2004, Leonid Parfyonov, host of the Russian NTV's "Namedni" program, was fired and the show was cancelled. On May 30, "Namedni" had included a five-minute interview between Parfyonov and the widow of a former Chechen leader. The segment aired in Russia's three easternmost time zones, but NTV's then-Director-General Nikolai Senkevich subsequently decided to pull the segment, preventing the interview from airing in Russia's western time zones.

Parfyonov had interviewed Malika Yandarbiyeva, the widow of former Chechen leader Zelimkhan Yandarbiyev. According to *The* (London) *Guardian*, the Russian government claims that Yandarbiyev was a member of al-Quaida, and that he also helped Chechen terrorists organize the takeover of Moscow's Nord Ost theater in October 2002. Yandarbiyev died when his car was bombed in Qatar in February 2004. Two Russian secret service agents are on trial for his murder, and could face the death penalty if found guilty.

The Moscow Times reported that NTV was under orders not to air any information about the trial until a verdict was reached, but did not identify the source of those orders. *The St. Petersburg* (Russia) *Times* reported that Yandarbiyeva described sitting in on the trial's proceedings during the "Namedni" interview, but did not dwell on the legal issues of the case. Parfyonov told the *Los Angeles Times*, "The piece . . . could not be construed as an indirect innuendo that the assassination of Yandarbiyev may have been the handwork of Russian services. Even indirectly, [Yandarbiyeva] never accused anyone. She just talked about her family's relationships with the emir's family, talked about her son wounded [during her husband's assassination]."

According to the *Los Angeles Times*, Parfyonov was fired not for the interview itself, but allegedly for providing quotes from the interview, as well as disclosing an internal memo concerning NTV's decision to pull the interview, to the Russian newspaper *Kommersant.* The *Los Angeles Times* reported that Senkevich went on the air in place of the interview, telling viewers in Russia's western regions that the decision to fire Parfyonov was related to "a gross violation of the . . . employment contract, and a violation of corporate ethics."

Yevgeny Kiselyov, a former television journalist who is now editor of the newspaper *Moskovskiye Novosti,* told *The St. Petersburg Times* that NTV's decisions to fire Parfyonov and to pull the segment with Yandarbiyeva were "act[s] of censorship, strictly forbidden not only by the media law but by the Russian Constitution."

But Aleksei Venediktov, editor-in-chief of Ekho Moskvy Radio, saw the situation as raising ethical issues. He told *Rossiiskaya Gazeta*, "I believe that for an employee to expose the relationship between a superior and his subordinate to public scrutiny and then stay on at that company would be absolutely inappropriate. As an editor-in-chief, had I been faced with the same situation, I would have fired the person, too."

NTV is Russia's first independent television station, founded by media mogul Vladimir Gusinsky. In 2001, the station was overtaken by state-run Gazprom when Gusinsky fled Russia on charges of fraud, but the station has managed to retain some of its journalistic independence. See "Russian Media Wrestles with Democratization Process" in the Summer 2001 Silha *Bulletin*.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

International Journalists News

President Bush and Irish Media Experience Clash of Cultures

Two separate incidents involving President George W. Bush and the Irish media have raised questions about misunderstandings due to differences in journalistic cultures and interviewing practices.

In Irish television's first interview with an American president in 20 years, Bush spoke with Carole Coleman, Washington correspondent for Radio and Television Ireland (RTE) on June 24, 2004. Taped in the White House library, the interview was broadcast on RTE's program "Prime Time" the same evening.

According to the *Irish Times*, RTE was told its reporter could not question the president about Michael Moore's "Fahrenheit 9/11" film, nor could there be any questions concerning the two Bush daughters. RTE also reportedly submitted a list of questions to White House staff prior to Coleman's interview, something "few if any members of the regular White House press corps would ever agree to," according to the *New York Times.* The *Washington Post* reported, however, that White House spokesman Jimmy Orr stated that Coleman was simply asked for a "heads-up," saying that the request was standard operating procedure for reporters, whether they were foreign or domestic. "When somebody calls and wants to book somebody on a show, we'll ask, what do you want to talk about . . . [Coleman] was asked to let us know what she was interested in speaking to the president about. She was told that she could certainly deviate from those topics. She was not bound by any means," Orr told *The Washington Post*.

But despite meeting these requirements, the Coleman/Bush interview turned controversial. Coleman repeatedly interrupted the president, asking for clarification, or confronting him with information that contradicted his statements. Bush told Coleman several times to stop interrupting him, at one point saying, "You ask the questions and I'll answer them, if you don't mind."

As the interview continued, Bush's frustration with Coleman's frequent interruptions became apparent. (Video of the interview is available online at http://www.rte.ie/news/2004/0624/primetime.html.) When the cameras quit rolling, however, Bush agreed to pose for a photograph with Coleman, putting his arm around her shoulders. The *Irish Times* reported that an unidentified RTE spokesman characterized the president's manner as "very gracious" toward Coleman.

But the next morning, Coleman was informed that an interview she was scheduled to have with First Lady Laura Bush would not take place. The unidentified RTE spokesman said that the fact the interview with Mrs. Bush was cancelled was in "no way" related to the interview with the president the evening before, according to the *Irish Times*. However, the *Irish Independent* reported that the White House lodged a complaint with the Irish Embassy in Washington over the interview. According to Ireland's *Sunday Tribune,* White House representatives called Coleman the following day and admonished her, telling her that she had been disrespectful and had interrupted the president unnecessarily.

RTE, however, issued a statement saying that, "RTE has consistently said about the interview that we were very happy with it, about the way it was conducted, and with Carole's professionalism and journalism," according to *The Washington Post*.

Much of the U.S. and European press have been complimentary of Coleman's efforts, calling her interview "determined and forceful" (Ireland's *Sunday Tribune*); "tenacious; politely combative rather than needlessly rude" (the *Irish Independent*) and characterizing her perspective as "muscular [and] European" (*The New York Times*). *The Irish Independent* reported that Michael Moore called her "my hero."

In a separate story, the *Irish Independent* applauded Coleman's interview, stating, "[I]n the US, both the print and broadcasting media approach their political leaders with a deference that's often indistinguishable from obsequiousness, and that's the antithesis of what journalism should be. You only have to consider the craven line of the once-admirable *New York Times* in its buying into this US administration's justifications for a pre-emptive war in Iraq to see how far American journalism has fallen. Because of this, the US administration knows it will get a meek acceptance from the American media of whatever it chooses to say." (See "The Media and Weapons of Mass Destruction – *The New York Times*" in the Spring 2004 issue of the Silha *Bulletin*.)

But London's *Sunday Times* article characterized Coleman's interruptions of Bush as "clumsy and counterproductive," and said that the interview was "strained."

According to the *Sunday Tribune*, Coleman began her career in broadcasting with Century Radio, Ireland's first commercial national radio station, then joined RTE in the early 1990's. She has served as RTE's Washington correspondent for the past four years. According to London's *Mail on Sunday*, the Coleman/Bush interview was broadcast worldwide, reaching even Baghdad.

The day following the Coleman/Bush interview, President Bush flew to Ireland for a U.S.-European Union summit. The evening of June 26, 2004, Bush was photographed in his undershirt as he closed the windows of the presidential suite in Dromoland Castle in County Clare before retiring. An unidentified cameraman working for an independent production company covering the summit shot the footage, which was then broadcast to "millions" of Sky television viewers, according to London's *Mail on Sunday*. The incident was quickly dubbed "Vest Wing," – t-shirts are called vests in the United Kingdom.

The *Mail on Sunday* reported that an unidentified White House aide contacted Irish Prime Minister Bertie Ahern, telling him to stop the pictures from being rebroadcast. Ahern, who is also head of the European Union, complied, banning further broadcast of the pictures, stating that he "owned the copyright" to the photos because he was the host of the event.

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

> The White House lodged a complaint with the Irish Embassy in Washington over Coleman's interview.
>
> – *Irish Independent* and *Sunday Tribune*

Endangered Journalists

Paul Klebnikov Murdered in Moscow

American journalist Paul Klebnikov was assassinated in Moscow the evening of July 9, 2004. In February 2004, Klebnikov had been appointed editor of Forbes' Russian edition, and had been instrumental in gathering the names of the 100 richest people in Russia, which Forbes had just published in its May 2004 Russian issue. According to Forbes' survey, 33 billionaires live in Moscow, compared with 31 in New York City. Klebnikov's murder, according to *The Toronto Star*, has turned him "into a symbol of the crippled state of Russian democracy."

President Putin must "address the climate of lawlessness that has led to the slayings of more than a dozen independent journalists in Russia in four years."

– Ann Cooper, Executive Director, CPJ

Two persons in a black Lada automobile fired ten shots as Klebnikov stood on the sidewalk outside his office at 16 Ulitsa Dokukina. Klebnikov was hit by four of them. Aleksandr Gordeyev, a *Newsweek* editor whose office was in the same building as Klebnikov's, stayed with Klebnikov until an ambulance arrived, according to *The Washington Post*. However, the ambulance was not equipped with oxygen, and later, at the hospital, the elevator carrying Klebnikov was stuck for 10 minutes between floors. It was there that Klebnikov died.

The investigation into Klebnikov's murder is being led by Russian Prosecutor General Vladimir Ustinov. Police claim to have located the assassins' abandoned vehicle, but according to *Russky Kuryer,* the location is not being disclosed. Interfax reported that an unidentified U.S. embassy official acknowledged that U.S. officials were also involved in searching Klebnikov's apartment for clues, but did not elaborate further, citing the federal Privacy Act.

Klebnikov, born into a family of Russia émigré aristocrats in New York, attended the University of California at Berkeley and the London School of Economics. He began working for Forbes in 1989.

Several theories surround Klebnikov's death. Among them:

- The killing was ordered by one of the entrepreneurs included in Forbes' Russia May 2004 publication listing Russia's 100 wealthiest people. Mikhail Seslavinksy, chief of the Russian Federal Press and Mass Communications Agency told Interfax news agency, "The people who became billionaires in months and who cannot explain where they had gotten this money . . . just cannot stand such reports."
- Klebnikov was murdered by Chechens. He had recently published a book, *Confessions of a Chechen Bandit*, which claimed that Chechen separatists are not fighting for liberation, but are simply, according to *Izvestia*, "running amok."
- Klebnikov may have been killed because he was working on an investigative report on the murders of Russian journalists. *The Times Colonist* (Victoria, British Columbia) reported that attorney Karen Nersisyan had been contacted by Klebnikov, who had told her he intended to write a "series of stories about the killings of journalists in Russia."

On July 15, 2004, CPJ's Executive Director, Ann Cooper, sent a letter via fax to Russian President Vladimir Putin, asking him to "address the climate of lawlessness that has led to the slayings of more than a dozen independent journalists in Russia in four years . . .. Klebnikov's murder is part of a broad pattern in which 15 journalists have been killed with impunity since 2000." Citing the murders of Russian journalists Valery Ivanov in April 2002, and Alexei Sidorov in October 2003, who, according to *The Gazette*, were investigating corruption in the Russian car industry, Cooper characterized the journalists as "a testament to the ongoing lawlessness in Russia and your failure to reform the country's weak and politicized criminal justice system." Cooper's letter is available online at http://www.cpj.org/protests/04ltrs/Russia15july04pl.html.

Other organizations joined in voicing their concern for the safety of journalists in Russia, including Reporters Without Borders, the Glasnost Defense Foundation, and the Organization for Security and Cooperation in Europe (OSCE). Friemut Duve, OSCE's former media envoy, told *The Gazette*, "In terms of the numbers of journalists murdered, Russia is second only to Colombia."

On August 19, 2004, Cooper led a CPJ delegation, meeting with senior U.S. and Russian officials in Washington, D.C., urging them to bring Klebnikov's murderers to justice. Details appear in a CPJ news alert, available online at http://www.cpj.org/news/2004/Russia19aug04na.html#more.

Ten days following Klebnikov's murder, another journalist was killed in Moscow. The editor of *Armyansky Pereulok* (*Armenian Lane*), Pail Peloyan, was found dead with knife wounds to the chest and severe head trauma at the southwestern edge of the city. He had died during the early morning hours of July 19. *The* (London) *Independent* characterized the *Armyansky Pereulok as* an "arts publication" that included prose and poetry by Armenian authors. Little of the magazine's content was controversial. *The Moscow Times* reported that the magazine had not published in two years, due to "financial difficulties." An unidentified source connected with *Armyansky Pereulok* told *The Moscow Times* that Peloyan's death was "connected to his business activities."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Endangered Journalists

Journalists Face Dangers in Iraq

Press freedom and safety issues are increasingly coming under attack in Iraq. Amid a flurry of detentions, harassment and life-threatening situations faced by journalists, French-American journalist Micah Garen was safely returned to U.S. custody on August 22, 2004. Garen was taken hostage by Iraqi insurgents August 13, according to CNN. A group calling itself the Martyrs Brigade reportedly threatened to kill Garen and his Iraqi translator if Americans did not leave the Iraqi city of Najaf. According to CNN, Garen told Al-Jazeera he had been taking pictures in Nasiriya when he was abducted. Garen was working on a documentary about archaeological sites endangered by the war for New York-based Four Corners Media at the time of his capture. The international media organization Reporters Without Borders (Reporters sans Frontieres; RSF) joined other press freedom groups in an appeal to radical Shiite cleric Muqtada al-Sadr to help secure Garen's release.

But Garen's release has not necessarily been the rule in Iraq. The Web site for RSF states that at least 40 journalists and media assistants have been killed since the start of the fighting in the region in March of 2003.

Christian Chesnot, a reporter with Radio France-Internationale and Radio France, and Georges Malbrunot, a reporter with the French daily newspapers *Le Figaro* and *Ouest France*, were abducted by a group calling itself the Islamic Army of Iraq in late August, 2004, according to the International News Safety Institute's Web site, available online at http://www.newssafety.com. The group reportedly threatened that the journalists' lives were at risk unless France would revoke a ban on headscarves and other conspicuous religious attire in its state schools. Top Muslim religious leaders joined Pope John Paul II and the Arab media in condemning the abduction. Jordan's King Abdullah II told French Foreign Minister Michael Barnieh that "kidnapping journalists violates ethics and values of justice, which are part of the principles of Islam" according to the Jordan News Agency's Petra Web site, available online at http://www.petra.gov.jo/Default.asp. As the *Bulletin* was going to press, United Press International reported that three 48-hour ultimatums had passed without incident. Negotiations between French officials and the Army of Islam in Iraq were ongoing. Meanwhile, the law regarding the wearing of headscarves in French schools went into effect September 2.

Italian journalist Enzo Baldoni was murdered Aug. 26, 2004 by kidnappers who also claimed to be from the Islamic Army in Iraq. According to the Committee to Protect Journalists (CPJ), Baldoni was in Iraq working on research for a book on militant groups and had agreed to contribute freelance articles about the situation in Iraq to the Milan-based weekly magazine *Diario della Settimana*. RSF reports Baldoni's kidnappers stated that they could not ensure the reporter's safety unless Italy withdrew its troops from Iraq

Also in late August, United Press International reported journalists from Knight Ridder, BBC, Getty Photo agency and others were detained in the southern city of Najaf, Iraq. Knight Ridder reported that Iraqi police fired shots and detained nearly 60 journalists.

CPJ is one of the many organizations that continues efforts to defend the safety of journalists and media professionals internationally. The "World's Worst Places to Be a Journalist" list posted on the CPJ Web site "represents the full range of current threats to press freedom," available online at http://www.cpj.org. Iraq leads this list, followed by Cuba, Zimbabwe, Turkmenistan, Bangladesh, China, Eritrea, Haiti, the West Bank and Gaza, and Russia. "In all of these places, reporting the news is an act of courage and conviction," said CPJ Executive Director Ann Cooper in a statement posted on the CPJ Web site, available online at http://www.cpj.org. "Journalism is essential in helping all of us understand the events that shape our lives, and our need and desire for information cannot be eliminated by violence and repression."

CPJ reports 36 journalists have been killed around the world so far this year. But that number may be conservative. The Web site for RSF reports that 36 journalists and 13 media assistants have been killed in 2004. In its "Press Freedom Barometer," RSF cites the imprisonment of 127 journalists, 4 media assistants and 69 "cyberdissidents" – publishers of on-line newsletters that disclose governmental corruption – worldwide since the beginning of 2004.

RSF reported that 42 journalists were killed in 2003, up from 25 in 2002. Another 766 were detained, and at least 1,460 journalists were physically attacked or threatened last year, RSF reported. This and other information on endangered journalists is available on their Web site at http://www.rsf.org.

— Kristine Smith
Silha Research Assistant

RSF states that at least 40 journalists and media assistants have been killed since the start of the fighting in March 2003.

Voice of America Employees Request Congressional Investigation

In a petition dated July 6, 2004, nearly half of Voice of America's (VOA) 1000 employees called on Congress to investigate the actions of its Broadcasting Board of Governors (BBG). The petition stated that although the BBG has increased the VOA's broadcast hours in the Middle East and Islamic countries, the content is geared to youth and consists of pop music rather than "comprehensive news reporting and analysis." Further, the petition claims that the new stations did not carry news of the capture of Saddam Hussein.

VOA's content is geared to youth and consists of pop music rather than comprehensive news reporting and analysis
– VOA Petition

The petition also stated that broadcasts in Central Europe have decreased and that VOA is "silent in English . . . during critical hours." Petitioners further expressed concern that Andre De Nesnera, described in the petition as "the highly respected director of VOA Central News," since March 2000, was removed from his position on July 1, 2004. He was reassigned to a reporting job as VOA diplomatic correspondent.

Board Chairman Kenneth Y. Tomlinson responded by issuing a statement defending the policies of the BBG and wrote, "The VOA petitioners cannot be allowed to distort [the] facts." He stated "[Radio] Sawa airs 48 newscasts each broadcast day . . .. Al Hurra, the Arabic-language satellite television network, broadcasts 10 minutes of news at the top of every hour 18 hours a day . . .. U.S. international broadcasting, far from deserving censure, deserves praise for the successful role it is playing in bringing our ideas – most important among them, this nation's commitment to balanced, objective media as a pillar of modern liberal democracy – to a worldwide audience."

Tomlinson also addressed accusations that the new stations had not reported on Hussein's capture, writing, "In fact, Sawa expanded its news coverage on the day of Saddam's capture to include live report from stringers in Iraq, featuring interviews with ordinary Iraqis and Iraqi officials alike."

The original VOA petition, as well as Tomlinson's statement, are available on Public Diplomacy's Web site at http://www.publicdiplomacy.org/31.htm. Public Diplomacy's Web site is sponsored by the United States Information Alumni Association, and posts information related to U.S. foreign affairs.

Alan Heil, former VOA deputy director and author of *Voice of America: A History,* claims that the main problem with Radio Sawa, Al Hurra and the other newly-launched media outlets is that they were created independently of the VOA. Because the networks were created outside the VOA, they are not required to operate within the parameters of the VOA's charter. The charter establishes that VOA broadcasts will be "a consistently reliable and authoritative source of news;" that they will "represent America, not any single segment of American society;" and that broadcasts will present a "balanced and comprehensive projection of significant American thought." The new networks are staffed by nongovernmental employees.

In an interview on National Public Radio's (NPR) "Morning Edition," Heil stated that the BBG had shut down all of VOA's Arabic-language programming, then created the new networks aimed at the same Middle East population. "Radio Sawa and Alhurra [sic] television do not have any kind of congressional mandate for objectivity like VOA."

Tomlinson countered that the BBG created the new media with congressional support in an effort to avoid red tape. "We launched Al Hurra in a matter of months," Tomlinson told *The Washington Post*. If we tried to do it inside VOA, it would have taken years." In an article posted on the Committee to Protect Journalists'(CPJ) Web site, Tomlinson is quoted as saying that the new networks will "have professional standards similar to those of the 1976 VOA charter" and will operate under the "highest professional standards of broadcast journalism," airing news that is "consistently reliable, authoritative, accurate, objective and comprehensive." The article is available online at http://www.cpj.org/Briefings/2004/VOA.7.04/VOA.7.04.html.

Nevertheless, Heil expressed concern that the new broadcasts will not appeal to the upcoming leaders in the Middle East's emerging democracies. In article for *The Daily Star*, an Arab-world newspaper geared toward expatriates, Heil wrote, "Quality audiences – educated and influential leaders and reformers – are 'out.' Mass audiences- youths primarily attracted by entertainment – are 'in.' The losers are not only the U.S., which needs to have a substantive voice in the global marketplace of ideas, but intellectually curious listeners the world over."

—Elaine Hargrove-Simon
Silha Fellow and *Bulletin* Editor

Student Press

Pitt News Can Run Alcohol Ads

A three-judge panel of the U.S. Court of Appeals (3rd Cir.) ruled in late July 2004 that a Pennsylvania law barring student newspapers from running advertisements for alcohol is unconstitutional. The opinion in *Pitt News* [*II*] *v. Pappert*, 2004 U.S. App. LEXIS 15615 (3rd Cir. 2004), written by Judge Samuel A. Alito, Jr., found that the law, 47 *Pa. Stat. Ann.* § 4-498(e)(5)(g), popularly known as Act 199, is "an impermissible restriction on commercial speech" and "presumptively unconstitutional because it targets a narrow segment of the media, and [Pennsylvania] has not overcome this presumption." Act 199 was passed in 1996 as an amendment to the Pennsylvania Liquor Code, preventing student newspapers from receiving advertising revenue from alcoholic beverages.

In December 1997, a Pittsburgh restaurant pulled its advertising from *The Pitt News*, a free-distribution student newspaper at the University of Pittsburgh, after receiving a letter from the Pennsylvania Bureau of Liquor Control Enforcement (PBLCE). The PBLCE informed the restaurant that it was violating Pennsylvania law by paying the student newspaper to run ads featuring information on the sale of alcoholic beverages. *The Pitt News* sued the Pennsylvania attorney general in April 1999 in the federal District Court for the Western District of Pennsylvania seeking a preliminary injunction to prevent the law from being enforced against the newspaper. A three-judge panel of the Third Circuit dismissed the case, *Pitt News* [*I*] *v. Fisher*, 215 F.3d 354 (3d Cir. 2000), concluding that the newspaper was not likely to prevail. The Supreme Court declined to hear an appeal and the case was sent back to federal district court.

After the district court found that Act 199 was not unconstitutional, *The Pitt News* again appealed to the Third Circuit. Alito, writing for the court in *Pitt News II*, noted that although *Pitt News I* held that the student newspaper was not likely to show that Act 199 was unconstitutional, that panel's determination was not binding because *The Pitt News* was now challenging the constitutionality of Act 199 and not merely seeking a preliminary injunction. This cleared the way for the court to consider again whether Act 199 was an unconstitutional restriction on the freedom of speech protected by the First Amendment.

The Third Circuit found Act 199 unconstitutional as "an impermissible restriction on commercial speech" and also presumptively unconstitutional because "it targets a narrow segment of the media" – specifically, only student newspapers. Alito's opinion for the unanimous panel dismissed Pennsylvania's argument that the student newspaper was not being harmed because it could still publish whatever it wanted as long as it did not take money for ads featuring alcohol. Alito wrote, "If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment." Alito went on to find that Act 199 had caused *The Pitt News* to lose $17,000, forcing it to cut the length of its paper to continue providing it for free on campus. The newspaper had argued, and the court agreed, that if it were forced to charge subscription fees, the paper would likely suffer a decline in readership and even more decreased revenue.

The opinion also found that Act 199 was not likely to deter underage drinking, because students still had access to alcohol even when the newspaper was not allowed to print ads for alcoholic beverages. Additionally, Alito noted that over 70 percent of *The Pitt News* readers, which include graduate students and faculty, were of drinking age, and that other papers available at no cost on campus were not prohibited from running alcohol ads. Because it prevented such a broad range of speech and because it was narrowly targeted only to student newspapers, Alito determined that Act 199 was unconstitutional.

Mark Goodman, executive director of the Student Press Law Center (SPLC), said in a July 2004 SPLC news story, online at http://www.splc.org/newsflash.asp?id=859, "Eight years after the law was enacted, a court has finally recognized how irrational and unconstitutional [Act 199] was. The staff of *The Pitt News* deserves much credit for its willingness to fight this over the course of many years. College student newspapers around [Pennsylvania] will be beneficiaries of its courage."

At the time the *Bulletin* went to press, the state attorney general's office for Pennsylvania had not yet decided if it would appeal the ruling of Third Circuit in *Pitt News II* to the Supreme Court.

—Andrew Deutsch
Silha Research Assistant

"If government were free to suppress disfavored speech by preventing potential speakers from being paid, there would not be much left of the First Amendment."

– Judge Samuel A. Alito, Jr.

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