Silha Center for the study of media ethics and law

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Sixth, Third Circuit Courts Split on Deportation Hearings Question

The Sixth and Third Circuits have split on whether it is constitutional for immigration judges to automatically close "special interest" deportation hearings. On Aug. 26, 2002, the Sixth Circuit Court of Appeals ruled, in *Detroit Free Press v. Ashcroft*, 303 F. 3d 681 (6th Cir. 2002), that closed deportation hearings violate the First Amendment presumption of public access to judicial proceedings. One month later, in *North Jersey Media Group v. Ashcroft,* 308 F.3d 198 (3rd Cir. 2002), the Third Circuit decided the issue in favor of the government, distinguishing immigration proceedings as "administrative," and therefore not subject to the First Amendment presumption of access.

In the wake of the September 11 attacks, the Justice Department has arrested hundreds of aliens as part of the on-going investigation of terrorism. A memorandum, issued to all immigration judges on Sept. 21, 2001 by Chief Immigration Judge Michael Creppy, directs that all "special interest" cases are to be closed to the public and the press.

Rabih Haddad, a Lebanese national, was arrested in Ann Arbor, Mich. on Dec. 14, 2001 on charges that his visa had expired, and subsequently the Department of Justice accused Haddad of terrorist fundraising through a Chicago-area charity he co-founded.

Immigration Judge Elizabeth Hacker held a closed bond hearing for Haddad in Detroit on Dec. 19, 2001, it having been determined that Haddad's was a "special interest" case. Haddad was denied bail, transferred to Chicago and remained in government custody.

Haddad, the *Detroit News*, the *Detroit Free Press* and the Metro Times, Inc., together with Rep. John Conyers, Jr. (D-Mich.), challenged the closure of the hearing, seeking injunctive and declaratory relief. Among the several claims asserted before the federal District Court for the Eastern District of Michigan in Detroit, the attorneys for the plaintiffs argued that the closure violated the First Amendment. Attorney General John Ashcroft, Creppy, and Hacker were named as defendants ("the government") in the case.

The newspaper plaintiffs moved, separately from Haddad, for declaratory relief and injunctive relief, claiming that the Creppy directive violated their First Amendment right of access. The newspapers also sought release of all transcripts and documents from previous proceedings.

District Court Judge Nancy G. Edmunds granted the newspapers' motion for an injunction against automatic closure in "special interest" cases on Apr. 3, 2002. In *Haddad v. Ashcroft*, 221 F. Supp. 2d 799 (E.D. Mich. 2002), issued Sept. 17, 2002, Edmunds ruled that the blanket closure procedure was a violation of the First Amendment right of access to court proceedings, citing *Richmond Newspapers, Inc. v. Virginia,* 448 U.S. 555 (1980). The government appealed to the Sixth Circuit Court of Appeals in Cincinnati.

On Aug. 26, 2002, a three-judge panel affirmed the order granting the injunction, ruling that the Creppy directive violated the First Amendment presumption of access to judicial proceedings.

Judge Damon J. Keith, writing for the court, admonished the government in a critical opinion. "The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors. The First Amendment, through a free press, protects the people's right to know that their government acts fairly, lawfully and accurately in deportation proceedings."

In rejecting the government's argument that the court should defer to the government's complete power over immigration, the court distinguished between substantive and non-substantive immigration law. The court acknowledged that the government is largely immune from judicial review of immigration laws that define the rights and powers of parties, but found that immigration laws, such as the Creppy directive, that have no effect on the outcome of decisions, are limited by the Constitution.

On the issue of whether immigration proceedings are subject to the First Amendment right of access, the government argued that immigration proceedings are administrative, not judicial, and therefore the First Amendment guarantee does not attach to deportation hearings. The court rejected this argument, stating that, "a deportation proceeding, although administrative, is an adversarial, adjudicative process, designed to expel non-citizens from this country."

Deportation proceedings are subject to the First Amendment right of access, the court concluded. Applying the two-part "experience and logic"

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Richmond Newspapers test, the court decided that deportation hearings have traditionally been open to the public, and that public access plays a significant positive role in the process, ensuring that the proceedings are conducted fairly, checking error and as a cathartic outlet. In addition, the court observed, "openness enhances the perception of integrity and fairness," fostering public confidence in the judiciary and allowing citizens to inform themselves by observing the judicial process. The court concluded that although the government provided compelling interests for closure, the Creppy directive did not require particularized findings justifying across-the-board closure and because Creppy directive is a blanket rule, rather than case-by-case; it is not narrowly tailored.

The Justice Department sought an *en banc* ruling before the U.S. Court of Appeals for the Sixth Circuit on Oct. 24, 2002. At the time the *Bulletin* went to press, the court had not yet acted on the government's request.

The Third Circuit Court of Appeals in Philadelphia, contrary to the Sixth Circuit opinion, upheld the Creppy directive's blanket closure of "special interest" deportation hearings on Oct. 8, 2002, reversing the District Court for the District of New Jersey.

In *North Jersey Media Group v. Ashcroft*, a consortium of media groups sought access to "special interest" deportation hearings, and was granted access by the District Court, 205 F.Supp. 2d 288 (D.N.J. 2002), handed down May 28, 2002. The District Court, in an opinion similar to the Sixth Circuit decision, found that immigration hearings are subject to the requirements of the First Amendment, and ruled that under the *Richmond Newspapers* "experience and logic" test, there is a presumptive right of access to deportation hearings. The government appealed to the Third Circuit to stay the District Court order, but the Third Circuit declined to order a stay. The Justice Department then appealed to the Supreme Court for an emergency stay, which was granted on June 28, 2002.

Writing for the Third Circuit panel majority, Chief Judge Edward R. Becker disagreed with the Sixth Circuit, holding that deportation hearings do not meet the "experience and logic" test of *Richmond Newspapers* because the hearings do not have a sufficient tradition of openness. "[W]e conclude that a recently-created regulatory presumption of openness with significant statutory exceptions does not present the type of 'unbroken, uncontradicted history' that *Richmond Newspapers* and its progeny require to establish a First Amendment right of access," the opinion read. The court determined that immigration proceedings are administrative in nature, rather than judicial, and found a tradition of closing many other types of hearings before administrative agencies

The logic prong of the *Richmond Newspapers* test is not satisfied because an open policy would actually hurt the public interest, Becker wrote. "Since the primary national policy must be self-preservation, it seems elementary that, to the extent open deportation hearings might impair national security, that security is implicated in the logic test. When it is factored in, given due consideration to the attorney general's statements of the threat, we do not believe that the *Richmond Newspapers* logic prong test favors the media either."

The court paid special attention to the government's arguments concerning national security, particularly the declaration offered by Dale Watson, the FBI's Executive Assistant Director for Counterterrorism and Counterintelligence. Watson contended that secrecy is justified under the "mosaic theory," which argues that no information should be disclosed because seemingly innocuous pieces of information, when combined with other information, will allow a terrorist organization to thwart government investigations. While acknowledging that the theory is "speculative," the court observed that "We are quite hesitant to conduct a judicial inquiry into the credibility of these security concerns, as national security is an area where courts have traditionally extended great deference to Executive expertise."

Because the court found that the *Richmond Newspapers* test did not apply, it did not need to apply the strict scrutiny standard.

Judge Anthony Scirica filed a dissenting opinion, arguing that the requirements of the *Richmond Newspapers* test had been met. Deportation hearings have a tradition of openness, Scirica wrote, as "Congress has provided for presumptively open deportation proceedings from the moment that it first enacted an immigration statutory framework." Scirica also found that when applied to all deportation hearings, rather than only "special interest" cases, open access has a positive role in the deportation hearing process. At the time that the *Bulletin* went to press, no appeal had been filed in the case.

—Kirsten Murphy
Silha Fellow

"The Executive Branch seeks to uproot people's lives, outside the public eye, and behind a closed door. Democracies die behind closed doors."

—Judge Damon J. Keith

The *Bulletin* is a quarterly publication of:

The Silha Center for the Study of Media Ethics and Law

School of Journalism and
Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
Phone: (612) 625-3421
Fax: (612) 626-8012
E-mail: silha@tc.umn.edu

Please contact the Silha Center at the phone numbers or e-mail above to be added to our mailing list.

Silha Center Staff

Jane E. Kirtley
Director and Silha Professor
Elaine Hargrove-Simon
Bulletin *Editor and Silha Fellow*
Kirsten Murphy
Silha Fellow
Anna Nguyen
Silha Research Assistant

Balancing National Security and Civil Rights

Annual Report on Loss of Privacy Since September 11

Governments around the world have restricted privacy and increased surveillance in response to the terrorist attacks of September 11, according to a report released by Privacy International and the Electronic Privacy Information Center (EPIC). The 393-page annual report covers 50 nations and is the first survey of the changes to worldwide privacy rights since the September 11 attacks.

Titled "Privacy and Human Rights: An International Survey of Privacy Law and Practice," the report details four major trends affecting privacy rights and civil liberties: increased communications surveillance and search and seizure powers, weakening of data protection regimes, increased data sharing, and increased profiling and identification.

According to the report, almost every country that reacted to the terrorist attacks increased police and government powers to intercept communications and to engage in searches and seizures. Due process requirements were loosened in Canada, and in the United States, the USA PATRIOT Act, passed on Oct. 26, 2001, extended federal wiretapping laws and eased the use of Carnivore-style Internet surveillance technology. (See "The USA PATRIOT Act: How Patriotic Is It?" in the Winter 2002 Silha *Bulletin*.)

[A]lmost every country that reacted to the terrorist attacks increased police and government powers.

In Australia, attempts to pass a law that would allow police to intercept e-mail and voice mail messages without a warrant failed, although the Government plans to continue to push for this type of provision in future legislation. In addition, the report observes that France expanded police search powers to allow warrantless searches of private property and Germany expanded police authority to intercept communications.

Data protection laws in Europe were also weakened, the report states. The European Union adopted the Electronic Communications Privacy Directive in June 2002, which allows EU member states to enact laws requiring Internet Service Providers to retain communications data. Such data includes mobile phones, text messaging, land-line telephones, faxes, e-mails, chat rooms, the Internet, and any other electronic communications device. Several countries have adopted such laws, including Belgium, France, Spain and the United Kingdom. (See "European Union and Web Site Users," in the Summer 2002 Silha *Bulletin*.)

Data sharing also increased, the report observes, both within and across government agencies, and within the private sector. In the United States, data sharing has increased between the Federal Bureau of Investigation and the Central Intelligence Agency. Efforts to increase data sharing also occurred in Canada and the United Kingdom. The report notes that "Germany has recommended to the European Union the creation of a database of 'known trouble-makers.'"

Profiling and identification efforts have also increased, in tandem with the increased data sharing, says the report. Some airports have installed face-recognition technologies, and identification cards have been proposed in both the United States and the United Kingdom.

The report singles out Great Britain because of what it calls an "anti-privacy 'pathology' within government," and reported mass surveillance of the general population in that country.

Privacy is not suffering worldwide, according to the report. Efforts to pass data protection laws and amend current laws to strengthen protections continue in Eastern Europe, Asia, and Latin America. The report also documents the bolstering of workplace privacy laws within the past year. Finland, Sweden, the United Kingdom, the European Union and Hong Kong have either passed or are working on laws that will protect privacy in the workplace.

EPIC is a public interest research center in Washington, D.C. Privacy International is a human rights group based in London. The survey is available online at http://www.privacyinternational.org/survey/phr2002/.

—Kirsten Murphy
Silha Fellow

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Balancing National Security and Civil Rights

Reporters Test U.S. Security

Investigating the state of airport security in the United States after the Sept. 11, 2001 terrorist attacks, reporters from the *New York Daily News*, ABC News and CBS News have smuggled various potentially dangerous weapons and materials through U.S. security check points. These investigations have succeeded in exposing weaknesses in security and in aggravating U.S. officials.

These reports have stirred controversy over whether it is ethical for journalists to break laws during the course of undercover investigation. The Department of Transportation and other government agencies expressed anger over the media organizations' reporting methods, claiming that the reporters diverted resources away from protecting the nation against genuine threats.

[R]eporters should not engage in "surreptitious" investigative methods except where other methods are not available.
—SPJ Ethics Code

In a story published on Sept. 4, 2002, the *New York Daily News* journalists reported smuggling knives, razors and pepper spray in carry-on bags 14 times through 11 different U.S. airports, including Los Angeles International Airport and Boston's Logan Airport. The potential weapons passed through security undetected.

CBS News sent journalists through airport security at various airports in January and February 2002, with X-ray blocking lead-lined bags. The bags were detected only 30 percent of the time. CBS reported that in a second series of tests, after the Bush Administration and the federal government promised to tighten airport security, the bags still passed through security unchallenged 70 percent of the time. In the report, which aired on the CBS Evening News on Sept. 3, 2002, investigative correspondent Vince Gonzales states that, "Screeners could not clearly see what was in our carry-ons and should searched them because a weapon could be hidden in or under the film bags."

ABC News, testing international and U.S. customs security, shipped 15 pounds of depleted uranium through seven countries over a period of 25 days. Uranium can be used to create a so-called "dirty bomb." ABC claims that the depleted uranium was safe, containing less radiation than a chest X-ray, and that it borrowed the material from the Natural Resources Defense Council, an environmental advocacy organization.

The report aired as part of ABC's September 11 anniversary coverage. ABC correspondent Brian Ross reported shipping the uranium from an address in Istanbul, Turkey, a known black market, to an address in New York City. The uranium was clearly marked, yet made the trip nearly undetected. The package was tested for radiation by U.S. Customs officers. However, because it emitted a low level of radiation it was not tested further. Ross argued that the package the same amount of radiation that regular uranium would emit through a lead-lined bag, and concluded that the package should have been searched.

The Society of Professional Journalists (SPJ) ethics code states that reporters should not engage in "surreptitious" investigative methods except when other methods are not available and that these methods should be clearly explained to readers or viewers. However, the SPJ code also states that the journalist's obligation is to seek the truth and to provide a fair and comprehensive account of events and issues.

Although the *New York Daily News* acknowledged that its reporters smuggled illegal items through airport security, ABC News contends that its reporters complied with both U.S. and international law in shipping the depleted uranium. CBS News claims it did not break any laws by passing lead-lined bags through airport security.

—Kirsten Murphy
Silha Fellow

Cameraman detained by military

Reporters sans Frontieres (RSF) and the Committee to Protect Journalists (CPJ) are investigating reports that a Sudanese assistant cameraman was arrested in December 2001at the Afghanistan-Pakistan border. Sami Muheidine Muhamed Al-Haj, an employee of Qatar-based satellite television station Al-Jazeera, had been assigned to cover the U.S. military operation in Afghanistan, according to a story posted on the RSF Web site. No one knew of Al-Haj's whereabouts until his wife received a letter from him in April 2002 saying that he was being held at the Naval base at Guantanamo Bay. The television station claims that Al-Haj had lost his passport in 2000, and that it may have been used fraudulently by others, resulting in a possible case of mistaken identity.

In June 2002, the U.S. embassy in Qatar confirmed that Al-Haj was being held "by the American forces without any clear or specific charges," according to a Sept. 17, 2002 story appearing in the *San Diego Union-Tribune*. That same month, Al-Jazeera contacted the U.S. embassy, seeking assistance in Al-Haj's release. The embassy promised to contact the State Department on Al-Haj's behalf, but did not respond to letters sent by Al-Jazeera in subsequent months, according to the *Ottawa Citizen*.

"The way that the American authorities have treated Al-Haj is not compatible with international norms and what is expected when dealing with members of the media," Al-Jazeera wrote in a Sept. 17, 2002 statement, according to the Reporters Committee for Freedom of the Press.

Al-Jazeera has repeatedly broadcast video recordings of al-Qaida leader Osama bin Laden. RSF has stated that on Oct. 3, 2001, U.S. Secretary of State Colin Powell contacted Qatari ruler who also is the main shareholder of Al-Jazeera, Sheikh Hamad bin Khalifa al-Thani, to ask that the station change its allegedly biased reporting. According to a story posted on the RSF Web site at www.rsf.org/print.php3?id_article=3843, the station's offices in Kabul were bombed by the U.S. military in November 2001.

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

Center for National Security Studies v. U.S. Department of Justice

A federal district judge for the District of Columbia has ordered the United States Department of Justice to release the names of over 1000 people detained as a result of the government's investigation into the Sept. 11 terrorist attacks on New York and the nation's capital.

The case, *Center for National Studies v. U.S. Department of Justice,* 215 F. Supp. 2d 94 (2002), arose out of federal Freedom of Information Act (FOIA) requests submitted on Oct. 29, 2001 to the Office of Information and Privacy (OIP), the Immigration and Naturalization Service (INS), and the Federal Bureau of Investigation (FBI). Additional plaintiffs in the case included members of Congress, civil liberties and human rights organizations such as the American Civil Liberties Union, Amnesty International USA, and the First Amendment Foundation, and representatives of the media, including the Reporters Committee for Freedom of the Press.

The requests sought not only the names of those detained by the government for the investigation, but also the circumstances of their detention, the charges, if any, brought against them, their current location, the dates of their arrests, the identities of their attorneys, and information about any governmental policies that were developed with regard to the detainees. (As of June 13, 2002, the government claimed that only 74 detainees remained in custody of the INS. The others had been released or deported.) The plaintiffs further requested that their FOIA request be given expedited processing.

The OIP granted the request for expedited processing on the grounds that the information was a matter of "widespread media interest." The INS granted the request, but asked that the plaintiffs narrow the scope. The FBI denied the plaintiffs' request on the grounds that the information fell under FOIA's exemptions 7 (a) (c) and (f), which are law enforcement exemptions covering enforcement proceedings, possible invasions of personal privacy, or records, that if disclosed, could endanger the life or safety of an individual. Claiming these exemptions puts the burden of proof on the government to make the case that the exemptions apply.

Kessler's opinion reflected skepticism that the government could make a strong case for withholding most of the information. "Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law. The Court fully understands and appreciates that the first priority of the executive branch in a time of crisis is to ensure the physical security of its citizens. By the same token, the first priority of the judicial branch must be to ensure that our government always operates within the statutory and constitutional constraints which distinguish a democracy from a dictatorship."

Under exemption 7 (a), the government argued that detainees may be "knowledgeable witnesses" who, if their names were disclosed, might be deterred from further cooperating with the investigation. Additionally, the government was concerned that releasing the names of the detainees might provide information to terrorist groups, enabling them to piece together information and give them clues as to where and how the investigation is proceeding – the so-called "mosaic theory." The mosaic theory holds that if several pieces of seemingly innocuous information are revealed, a terrorist group could piece that intelligence together to form a larger, more cohesive picture. However, Kessler ruled that the government had failed to show convincingly that the mosaic theory posed any real threat to the ongoing investigation. Moreover, Kessler wrote, the government itself has already released some of the information – for example, the names of 26 individuals – related to the investigation. If the mosaic theory posed a real threat, the government presumably would have kept the information confidential.

With regard to exemption 7 (c), Kessler found that some detainees might find that their association with the September 11 attacks might bring embarrassment. For those detainees, Kessler suggested that they might choose to "opt out" of public disclosure. But that decision belongs to the detainee, not to the government, she wrote.

Kessler ruled that the government correctly applied exemptions 7 (a) and (c) to the dates and locations of arrests. She found that the release of that information could result in attacks on the facilities where the detainees are held, either by those angered by the original terrorist attacks on America or retaliatory attacks by terrorist groups. But Kessler rejected similar government arguments applied to detainees' attorneys. She wrote that "lawyers are a hardy brand of professionals" and that the legal profession has a history of fighting for civil liberties and civil rights of "unpopular individuals and political causes." She further stated that lawyers do not have an expectation of anonymity, and concluded that the government's concerns were "totally speculative."

With regard to the final question – did the government conduct an adequate search for documents relating to the development of policy regarding public statements or disclosures about the detainees or sealing information surrounding the proceedings involving them – Kessler ruled that the government did not fulfill its obligation. There must have been some sort of directive stating how information regarding the September 11 detainees ought to be handled, Kessler reasoned, yet no such documents were produced by the OIP, the INS or the FBI. She ordered the government to "conduct another search."

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"Difficult times such as these have always tested our fidelity to the core democratic values of openness, government accountability, and the rule of law."

— Judge Gladys Kessler

Balancing National Security and Civil Rights

Foreign Intelligence Surveillance Appeals Court Reverses Lower Court

On Nov. 18, 2002, for the first time in its history, the Foreign Intelligence Surveillance Court of Review (FISCOR) decided a case. The court reversed a May 17, 2002 ruling of the Foreign Intelligence Surveillance Court (FISC), which restricted cooperation between federal law enforcement and intelligence agencies in investigations.

In *In re: Sealed Case No. 02-001*, the three judges of the FISCOR decided that the lower court impermissibly placed restrictions on information-sharing among foreign intelligence and law enforcement. The FISC decision, according to the FISCOR, is unsupported by the Foreign Intelligence Surveillance Act (FISA), as amended by the USA PATRIOT Act.

[The FISC opinion] criticized federal agents for misleading the court in applications for secret search and surveillance warrants.

In the May 17 decision, the FISC, in a rare publicly-available opinion, criticized federal agents for misleading the court in applications for secret search and surveillance warrants during the past three years, and denied the Justice Department's request for increased information sharing between prosecutors and intelligence officials. The decision was publicly released on Aug. 22, 2002, becoming only the second public opinion in the FISC's 25 year history.

The FISC was created in 1978 under the Foreign Intelligence Surveillance Act (FISA). The main function of the court is to review wiretap warrant applications by the National Security Agency and the Federal Bureau of Investigation. The 11 members of the ultra-secret court, increased from seven by the USA PATRIOT Act, preside on the top floor of the Department of Justice building in Washington, D.C. The judges hear arguments only from the government's side; no outside parties are allowed to be present during the hearings.

Under FISA, government agencies must provide evidence of probable cause that the target of a search or surveillance is either a "foreign power" or an "agent of a foreign power" in order to obtain a warrant. However, the standard used to judge the sufficiency of the evidence for searches and seizures under FISA is less rigorous than the standard used in normal federal courts. In 1994, Congress extended FISA's reach to physical searches of homes and computers, in addition to the Act's grant of electronic surveillance powers.

Traditionally, evidence found by searches using FISA warrants could be used in criminal cases, but the warrants could only be granted for intelligence purposes. After the events of September 11, 2001, Attorney General John Ashcroft issued controversial new policies that allow federal authorities to seek FISA warrants "primarily for a law enforcement purpose, so long as a significant foreign intelligence purpose remains." Introducing the new guidelines in March 2002, Ashcroft claimed that the USA PATRIOT Act allows FISA warrants to be granted for law enforcement purposes. The FISC rejected the new protocol in a unanimous opinion.

Judge Royce Lamberth, writing for the FISC, struck down the new DOJ policies. The court found that the new guidelines exceed the Act's scope by using FISA searches and surveillance outside the realm of foreign intelligence gathering. Furthermore, the court opined, FISA's more generous warrant standards may be used to advance shaky criminal investigations by allowing criminal prosecutors a greater role in directing FISA searches and surveillance.

The court instructed the Justice Department to prevent officials from using FISA warrants to enhance criminal prosecutions. Lamberth also chastised the Justice Department for misleading the court in more than 70 cases involving warrant applications in the late 1990s. The court noted that one FBI agent was barred from appearing before the court as a FISA affiant because of the frequency of his misstatements and omissions.

But Senior Circuit Judge Ralph Guy, writing for the FISCOR, found that the USA PATRIOT Act amendment to the FISA "expressly sanctioned consultation and coordination between intelligence and law enforcement officials" and that by requiring a "wall" between intelligence and law enforcement authorities, the FISC acted without Constitutional or statutory authority. Moreover, the FISCOR agreed with the Department of Justice that the FISC "may well have exceeded the constitutional bounds that restrict an Article III court."

The FISC misunderstood the significance of the USA PATRIOT Act amendment, the FISCOR wrote: "There is simply no question . . . that Congress was keenly aware that this amendment relaxed a requirement that the government show that its primary purpose was other than criminal prosecution."

The FISCOR dismissed the *amicus* briefs, filed separately by the American Civil Liberties Union and others and by the National Association of Criminal Defense Lawyers, as unconvincing, writing that the ACLU argument on the proper interpretation of the FISA based on a statute that predates FISA by 10 years was, "to put it gently . . . hardly an orthodox method of statutory interpretation."

The FISCOR reversed the FISC order restricting the DOJ protocol and remanded the case to the FISC. Because the only party to the case is the government, it is unclear whether anyone, including the *amici*, would have standing to appeal to the United State Supreme Court.

—Kirsten Murphy
Silha Fellow

U.S. Court Rulings Affecting Access to Information

Guidelines for Public Access to State Court Records Released

The Conference of Chief Justices (CCJ) and the Conference of State Court Administrators (COSCA) have released guidelines for public access to state court records. Entitled "Developing CCJ/COSCA Guidelines for Public Access to Court Records: A National Project to Assist State Courts" the guidelines are available on the project Web site at www.courtaccess.org/modelpolicy.

The final draft of the Guidelines was submitted to the CCJ and COSCA in July 2002, and was endorsed by both conferences by resolution on Aug. 1, 2002.

The guidelines were created to aid state courts in choosing and implementing public access policies. They provide an outline of the issues involved in creating and implementing a public access policy for in person and online access. The guidelines are advisory and are not binding on the states.

Designed to balance the interest in public access and promotion of judicial accountability with privacy interests, the guidelines seek to provide a structure for courts to allow access to records while shielding personal information, such as bank account pin numbers and the names and addresses of domestic violence victims. (See "Pilot Program Approved by Judicial Conference to Allow Public Access to Criminal Case Files" in the Spring 2002 Silha *Bulletin.*)

[T]he guidelines seek to provide a structure for courts to allow access to records while shielding personal information.

The guidelines start with a presumption that all court records should be open to public inspection, both in person and online. However, the guidelines state that restrictions on access are acceptable in order to protect privacy interests or historically closed documents, such as those generated by juvenile and grand jury proceedings. The Guidelines state that such restrictions should be narrowly tailored, but that these decisions ultimately belong to each state.

The recommendations also suggest that courts manage their resources wisely and remember that their main task is to solve disputes. "Depending on the manner of public access, unrestricted public access could impinge on the day-to-day operations of the court," state the Guidelines. "Access is not free . . . there may be more than one approach to providing, or restricting access, and some approaches are less burdensome than others." The guidelines remind courts that they do not have to convert records into electronic form or provide remote access to electronic records.

In order to provide an overview of each state's electronic access policy, the Center for Democracy and Technology (CDT) published a report on developments in electronic access to state court records on Sept. 3, 2002. The report, titled "A Quiet Revolution in the Courts: Electronic Access to State Court Records," is available online at www.cdt.org/publications/029821courtrecords.shtml.

The CDT reports that state courts take a variety of approaches to electronic access to court records. The report details each state's electronic access policy. Although some states have a uniform policy that applies in all counties or districts, in other states electronic access varies by county or district.

Common issues for states formulating an electronic access plan, according to the CDT report, include deciding which types of cases to make available online and whether to charge the public for electronic access to documents. For example, California courts allow electronic access to civil records, while limiting access to criminal cases and cases that contain personally identifiable information. Wisconsin courts publish all cases, save certain family law cases, on the Internet via Circuit Court Access, while Nebraska provides very little electronic access to court records. Maryland courts charge for electronic access to court documents and complete case files are not readily available in electronic form.

The Guidelines were developed through a project staffed by the National Center for State Courts and the Justice Management Institute. The joint effort began as a model policy project in January 2002, with funding from the State Justice Institute. The project sought public comments on a "Draft Model Policy" between mid-February 2002 and April 2002. The Silha Center submitted comments on the draft, which are available online at www.silha.umn.edu/draftmodelpolicy.pdf.

After several project Advisory Committee meetings, the original "Draft Model Policy" project was renamed, "Public Access to Court Records: Guidelines for Policy Development by State Courts," reflecting the committee's decision to shift the focus of the project from the creation of a model policy to guidelines for local policymaking.

The guidelines follow on the heels of federal efforts to provide greater public access to judicial records. In March 2002, the U.S. Judicial Conference voted to allow online access to high-profile criminal cases.

—KIRSTEN MURPHY
SILHA FELLOW

U.S. Court Rulings Affecting Access to Information

South Carolina District Court Bans Secret Settlements

South Carolina's federal judges have banned secret settlements, adopting Local Rule 5.03 on Nov. 1, 2002. The ban, which covers all court-sanctioned confidential settlements, is the first of its kind. No other federal judicial district has instituted such a rule.

Settlements are common practice in most federal and state courts, and secrecy is often a bargaining chip in obtaining settlement. In a secret settlement, plaintiffs and plaintiffs' attorneys must agree not to disclose any information learned through the discovery process and/or the amount of the settlement. In return the defendant agrees to pay the plaintiff a sum of money, often termed "hush money."

The ban [on] all court-sanctioned confidential settlements, is the first of its kind.

Lawsuits involving medical malpractice, defective products, corporate wrongdoing, and sexual abuse may be settled on the condition of confidentiality, allowing the defendant to avoid negative publicity. Reportedly, secret settlements have concealed injuries and deaths caused by defective products, including Firestone tires, asbestos, GM trucks (with side-saddle gas tanks), and Dalkon Shield intrauterine devices.

South Carolina District Court Chief Justice Joseph Anderson was the primary advocate for the proposed rule. In a July 11, 2002 letter Anderson wrote to his colleagues on the bench, stating, "Here is a rare opportunity for our court to do the right thing, to take the lead nationally in a time when the Arthur Anderson/Enron/Catholic priest controversies are undermining public confidence in our institutions and causing a growing suspicion of things that are kept secret by public bodies." In a June 24, 2002 letter, Anderson emphasized the consequences of secret settlements: "Arguably, some lives were lost because judges signed secrecy agreements regarding Firestone tire problems."

At a meeting on July 26, 2002, the South Carolina District Court judges proposed the new rule, and published the rule for public comment. The Silha Center filed comments in support of the proposed rule. The comments are available online at www.silha.umn.edu/sccomments.doc. In addition to presenting Constitutional and common law arguments for the presumption of public access to court records, the Silha Center wrote that the proposed rule would prevent the economic waste of repeated discovery efforts by successive plaintiffs and would alleviate the ethical dilemma faced by the plaintiff's attorney, saddled with knowledge of a public hazard and a duty to maintain secrecy on behalf of their client.

Opponents of the proposed rule argued that it would inadequately protect litigants' property and privacy rights. For example, H. Mills Gallivan, the President of the South Carolina Defense Trial Attorneys' Association, wrote, "the proposed amendment would impede the process of protecting the parties' private and/or proprietary information and would therefore run the risk of an unwarranted invasion of personal privacy and a deprivation of property rights protected by the Constitution."

The public comment period ended on Sept. 30, 2002. On Nov. 1, 2002 the District Court judges adopted the new rule, which reads: "No settlement agreements filed with the court shall be sealed pursuant to the terms of this rule." The new rule does not affect private secret settlements entered into without the court's assistance. The entire text of Local Rule 5.03 is available at www.scd.uscourts.gov/Notices/LR503.pdf.

South Carolina's Chief Justice Jean Toal has said that the state courts are expected to adopt a similar rule.

—KIRSTEN MURPHY
SILHA FELLOW

Center for National Security Studies, *continued from page 5*

Kessler gave the government 15 days to disclose the names of detainees arrested in connection with the September 11 terrorist investigation. If information about certain detainees has been, by virtue of a court order, barred from disclosure, Judge Kessler ordered an *in camera* review. She allowed the government to withhold information about the location of the detainees, but ordered that names of their attorneys be released. She further ordered the government to perform a search for documents related to policy directives within 30 days. The government filed a motion to appeal, and Kessler issued a stay of her own order to reveal detainees' names, pending the outcome of that appeal.

In arguments before a three-judge federal appeals panel on November 19, the *New York Times* reported that deputy assistant attorney general Gregory G. Katsas stated that Kessler had "severely underrated the grave law-enforcement, public safety, privacy and national security interests at stake."

But according to the Associated Press, Kate Martin, attorney representing the Center for National Security Studies, argued, "This is the first time the United States government has secretly arrested and detained hundreds of people. The concept of secret arrests is odious to a democratic society." When questioned about the possibility that releasing the names of detainees could hand over information to terrorists, Martin replied that the Justice Department had already released some information about the investigation, and needed to show specifically how publicizing the names would be a detriment to the war on terrorism.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Colorado Rejects False Light Invasion Of Privacy Tort

The Colorado Supreme Court has declined to recognize the tort of false light invasion of privacy, ruling that it is substantially duplicates the tort of defamation and threatens to chill freedom of speech. The Sept. 16, 2002 decision, *Denver Publishing Company v. Bueno*, 54 P.3d 893, 2002 Colo. LEXIS 853, reversed a Court of Appeals decision to recognize a cause of action for "false light" and to uphold a $106,000 judgment.

The case began when a Denver newspaper, the *Rocky Mountain News*, published a four-page article headlined "Denver's Biggest Crime Family," on Aug. 28, 1994. The article detailed the criminal history of the Bueno family and included photographs of the 18 children of Pete and Della Bueno. The photographs were accompanied by captions, and the caption under the plaintiff, "Eddie" Bueno, read "Eddie, 55, oldest of the Bueno children." In one edition of the newspaper, the caption under the youngest Bueno sibling read, "Only brother to stay out of trouble," even though the plaintiff, Eddie Bueno, left the family at the age of 13 and lived a life unmarked by crime. The end of the article clarified that the youngest sibling and Eddie were "the only two Bueno boys who stayed out of trouble."

Eddie Bueno sued the *Rocky Mountain News* for damages, stating four causes of action, including defamation and false light invasion of privacy. To recover for false light invasion of privacy, a plaintiff must show that the defendant publicized a false statement about him that would be highly offensive to a reasonable person, which placed him in a false light.

Bueno claimed that the article insinuated that he had the same criminal propensities as his siblings. The jury awarded $106,000 in compensatory and punitive damages. The Court of Appeals upheld the verdict and the newspaper appealed to the Colorado Supreme Court.

Justice Kourlis, writing for the majority, held that the tort of false light invasion of privacy overlaps with the tort of defamation. The court found that both causes of action seek to curb the same conduct, false statements that are damaging to the plaintiff, and protect substantially the same interests – damage to reputation in defamation claims and personal offense in false light claims.

The majority conceded that there might be a narrow class of cases that are not covered by the tort of defamation but that would meet the "highly offensive to a reasonable person" standard of the false light cause of action. However, the court found that the "highly offensive" standard is too ambiguous and subjective because it depends on the plaintiff's perception of the false statements.

The court concluded that defamation actions are more objective than false light claims, and that false light claims do not adequately protect the First Amendment interests at stake. "[I]n the limited area in which false light invasion of privacy and defamation are not coextensive, there is ambiguity and subjectivity that would invariably chill open and robust reporting." wrote the majority.

A dissent joined by three justices argued that false light had been recognized historically in Colorado, and that Bueno had relied on this past case law. The dissent also found the similarity between the two torts creates no problems, provided that the damage awards in cases involving both causes of action are not duplicative.

—Kirsten Murphy
Silha Fellow

[F]alse light claims do not adequately protect the First Amendment interests at stake.

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Recent Developments in Internet Law

FEC Campaign Finance Regulations Exempt Internet

On Sept. 26, 2002, the Federal Election Commission (FEC) issued regulations implementing the Bipartisan Campaign Reform Act (BCRA), which exempt the Internet from the Act's new rules governing political advertising.

The BCRA, commonly referred to as the McCain-Feingold Act, was signed by President Bush on Mar. 27, 2002, and became effective on Nov. 6, 2002, the day after this year's election. The Act prohibits corporations and labor unions from campaigning within 60 days of a general election. Individuals and organizations may continue to campaign during that time period, provided they disclose their expenditures to the FEC.

Regulating the Internet would violate the First Amendment.
— Robert Alt
Claremont Institute

The Act also prohibits political parties from using "soft money" to fund political advertising. The definitions of advertising, broken down into public communications and "electroneering communications," include television, radio and satellite communications, but make no mention of the Internet.

The FEC held hearings in August to consider how the Act should apply to the Internet. The Act's supporters opposed exempting the Internet from the regulations. Senator John McCain (R-Ariz.), Senator Russell Feingold (D-Wis.) and four other members of Congress filed comments urging the FEC to include the Internet in the regulations, arguing that, "[t]he Commission should leave open the possibility . . . of including communications that are, or may be in the future, the functional equivalent of radio and television broadcasts."

Supporters of the Internet exemption raise Constitutional concerns. Robert Alt of the Claremont Institute, who testified at the FEC hearings, urged the FEC to read the statute as excluding the Internet. Regulating speech on the Internet would amount to an unlawful restriction on speech, and said Alt, "With the Internet, its quite clear that Congress may not have intended to actually reach it simply because a lot of Internet communication is, quite frankly, cheap." Alt concluded that regulating the Internet would violate the First Amendment.

The American Civil Liberties Union also filed comments favoring an Internet exemption, stating: "The government does not get to decide how Americans choose to express their political views. And the government does not get to decide what political messages the American public is entitled to hear."

The six FEC commissioners decided that the regulations will interpret the statute to cover broadcast, cable and satellite ads, but not Internet ads, web broadcasts or print ads. Radio and television ads that are simultaneously Webcast are also covered by the restrictions.

Commissioner Bradley Smith has said that the statute makes no mention of the Internet as either public or "electroneering communications." In a June 2002 interview on Fox News Network, he defended the commission's interpretation of the law: "Well, they want us to treat [the Internet] like any other campaign resource and limit the amounts that can be spent on it and who can spend money. And to me, this would smother this new medium that's so democratic, that's inexpensive, that almost anyone can use. And I think that had Congress known that they were going to be regulating the Internet, it wouldn't have passed."

In response to the FEC regulations, four lawmakers sued on Oct. 8, 2002. Rep. Christopher Shays (R-Conn.) and Rep. Martin T. Meehan (D-Mass.) brought the lawsuit in federal district court in the District of Columbia. Senator McCain and Senator Feingold will file *amicus* briefs in support of the lawsuit. The lawmakers contend that the regulations frustrate the intent of the BCRA and create loopholes, allowing the use of soft money for Internet campaigning. In a press conference announcing the lawsuit, McCain called the regulations "flawed and corrupt."

The lawsuit asks the court to extend the ban on soft money to Internet campaigning. Senators McCain and Feingold are also expected to submit a resolution to invoke the Congressional Review Act, which if approved by both houses of Congress and signed by President Bush, would overturn the FEC regulations.

The ACLU, the Libertarian Party, Senator Mitch McConnell (R-Ky), and Representative Bob Barr (R-Ga.) have filed a lawsuit, *McConnell v. Federal Elections Commission*, in the U.S. District Court for the District of Columbia, challenging the constitutionality of the BCRA. The plaintiffs argue that by limiting speech on television and radio, while allowing political speech in print and on the Internet, the law violates the First Amendment.

—Kirsten Murphy
Silha Fellow

Saudi Government Censors Internet, According to Study

The government of Saudi Arabia engages in widespread censorship of the Internet, according to a recent study by the Berkman Center for Internet and Society at Harvard Law School.

A 2001 Council of Ministers Resolution declares that "Anything contravening a fundamental principle or legislation, or infringing the sanctity of Islam and its benevolent Shari'ah, or breaching public decency," may not be accessed by Saudi Internet users.

Prior to granting the public access to the Internet, the Saudi government spent two years building a controlled infrastructure that funnels all web traffic through government proxy servers before the sites are transmitted to the public's computers. The infrastructure, completed in 1999, employs a filtering system called "SmartFilter," made in San Jose, Calif., by Secure Computing. The software is customized with blacklists, which filter specified categories of Internet content. A government agency, the Internet Service Unit (ISU), operates the filter and controls Internet access.

In May 2002, the ISU gave the Harvard researchers access to the computer servers. Out of the 64,557 Web sites the researchers attempted to access, 2,038 were blocked. The Saudi government says that the purpose of the filtering system is to protect Islamic values, and aims to block all sexually explicit content. The ISU Web site states that additional content, related to "drugs, bombs, alcohol, gambling and pages insulting the Islamic religion or the Saudi laws and regulations" is also censored.

[T]he purpose of the filtering system is to protect Islamic values.

The researchers found that blocked Web sites include sites with content regarding non-Islamic religions, women's rights, gay and lesbian issues, political criticism of Saudi policies, humor and entertainment. The list of highlights of blocked sites includes: rollingstone.com (Rolling Stone magazine), women.eb.com (the Women in American History section of the Encyclopedia Britannica Online), saudiinstitute.org (reports on Human Rights in Saudi Arabia), and idf.il (Israel Defense Force).

Anyone wishing to block or unblock a Web site may submit a form to the ISU for consideration. The Harvard researchers, led by Professor Jonathan Zittrain, have stated that they may investigate the nature and timeliness of these responses to requests for blocking and unblocking of specified pages and sites.

Titled "Documentation of Internet Filtering in Saudi Arabia," the study and comprehensive list of blocked Web sites can be found at http://cyber.law.harvard.edu/filtering/saudiarabia/.

—Anna Nguyen
Silha Research Assistant

Silha Center Director and Silha Professor Jane Kirtley with Anthony Lewis and members of the Silha family - Helen Silha, Stephen Silha, David Reimann and Alice Reimann. *See Silha Lecture story on page 26.*

Recent Developments in Internet Law

Internet Censorship in Asia

The governments of China and Vietnam continue to censor access to the Internet as more people can connect to it in their homes, Internet cafes or at work. Both governments have blocked sites and arrested those who used the Internet to disseminate information deemed "inappropriate."

In Vietnam, the government is sending its citizens mixed signals about Internet usage. While the government improves the infrastructure, it also increases the regulations on content. There are about one million users in Vietnam's population of 69 million. The Chinese government continues to expand its methods of surveillance, discouraging the use of the Internet as a forum for free speech and blocking access to gambling, pornography and "extremist" websites. The Associated Press estimates there are about 45 million regular Internet users in China.

The Chinese government continues to expand its methods of surveillance, discouraging the use of the Internet as a forum for free speech.

The Vietnamese government has blocked U.S.-based Web sites, such as Thong Luan that features pro-democracy writings, according the Associated Press. In March 2002, the government arrested Pham Hong Son for translating and posting an article on the Internet about democracy from the U.S. State Department Web site. An online political forum for young people, TTVNOnline.com, was shut down after posting negative opinions about the government in August.

The Vietnamese government also opposes access to pornographic websites. In October this year, the Vietnamese government released new laws that required businesses and organizations to obtain permission before setting up Web sites, according to the Associated Press. Owners of Internet cafés now carry the responsibility for controlling their users' Web surfing.

Greg Walton, a San Francisco researcher who provides technical support for an organization advocating independence for Tibet, told the Associated Press that earlier this year the Chinese government took only 24 hours to discover how people were circumventing blocked sites in chat rooms or discussion groups. The Chinese government continues to try to identify sites run by foreign media, religious and human rights groups. Webmasters are told to cut off subversive talk in Internet chat rooms, and a special police force filters e-mails and searches the Web for forbidden content.

Agence France Presse reported on September 1 this year that the highly popular Chinese language version of the search engine Google had been blocked. New York-based Committee to Protect Journalists (CPJ) told the publication it was concerned about the action, arguing it would adversely affect access to information for both journalists and citizens in the country.

Shortly after the block was imposed, *New Scientist* discovered that users could access Google through a mirror site, called elgooG. Another search engine, AltaVista, had also been blocked, reported *New Scientist*. The *Washington Post* reported that the block on Google was lifted on September 12 without any explanation, but some content linked to the site remained blocked, such as Tibetan independence sites.

In late October, the Associated Press in Beijing reported that a Chinese province required Internet café users to buy access cards identifying them to police. The system requires customers to register their names, ages and addresses, which are then loaded into a police database, a police spokesman told the Associated Press. Currently, more than 200,000 users have obtained cards.

A spokesman with the police computer crime division in the provincial capital of Nanchang told the Associated Press that the government installed the system in all 3,200 Internet cafes in the central province of Jiangxi in September. "This system gives us more power to prevent crimes and identify criminals on the Internet," said the spokesman. The Associated Press did not reveal his name.

The censorship in these countries has attracted the attention of concerned groups in the United States. The technologically savvy have developed ways to access blocked sites for the country's citizens, the Associated Press reported in September. Third party Internet gateways known as proxies have allowed Chinese and Vietnamese citizens to bypass government filters. As governments begin to block these proxies, technologists find new ways of evading censors.

The commercial proxy Anonymizer frequently changes domain names or numeric Internet addresses. Lance Cottrell, president of Anonymizer based in San Diego, said its site is one of the first ones blocked. The site, www.anonymizer.com, features products that allows an individual to surf the Internet anonymously and block cookies.

The company currently has launched an initiative with the Voice of America (VOA) to provide anti-censorship tools for people in China. Cottrell started the business in 1995 to provide people the right to use the Internet as democratizing tool. "I think it's appropriate to make it possible for people to exercise their rights even against the wishes of their government," he said in a telephone interview. Cottrell hopes to expand the anti-censorship tools program in the future.

—Anna Nguyen
Silha Research Assistant

Greek Law to Ban Electronic Game Fails

A Greek law banning electronic games was declared unconstitutional on Sept. 10, 2002, because it interfered with the player's freedom of expression, *Deutsche Presse-Agentur* reported. As a result of the anti-gaming law, Greek police had made arrests closing Internet cafés around the country in early September, according to BBC News. *New Media Age* reported that Greece was the only country to outlaw all forms of computer games. However, online gambling is outlawed in places such as Hong Kong and China.

The Greek government enacted the legislation on July 30, 2002, outlawing all electronic or mechanical games in a bid to stamp out an illegal gambling epidemic. According to the BBC story, the law was enacted in response to an earlier scandal involving a leading politician from the ruling socialist Pasok party. The politician, whom BBC News did not identify, was forced to resign after being caught on film gambling using an unlicensed machine. Many have criticized the bill for failing to distinguish between slot machines and mainstream games.

Deutsche Presse-Agentur reported that the first arrests under the law involved two Internet café owners and an employee charged with for allowing their customers to play online chess. Anyone found to violate the law faced a minimum fine of 5,000 Euros or at least three months in jail. A second offense could result in at least a year in jail as well as a fine of between 25,000 to 75,000 Euros, according to *New Media Age*.

A judge in the city of Thessaloniki initially threw out the case on the grounds that the gaming law was unconstitutional, but prosecutors appealed the decision and launched a new crackdown. Six arrests were made throughout the country. In each case, computers were taken from the cafes, according to the BBC.

Café owners waiting for retrial expressed frustration with the government before the ban was lifted. "The police are acting like the Taleban [sic], closing down businesses, seizing property and stopping people enjoying themselves," Christos Iordanidis, one of the owners waiting for a retrial, told the BBC.

The Greek gaming community told the BBC that the raids could lead to a widespread confiscation of personal computers. A court in Serres confirmed the Thessaloniki judge's decision that the ban was unconstitutional, but police refused to return the confiscated computers. Iordanidis told the BBC, "The prosecutor bypassed the normal procedure and will announce the trial at a date that could be up to a year from now. That means that the owner has no computers to work with."

Along with the Greek owners, prominent European gaming companies Sega, Namco and JVH joined in an appeal against the ban, to be heard by the European Commission. *New Media Age* reported that a petition organized by the Greek gaming community has been signed by more than 24,000 individuals.

In response to the outcry, *Deutsche Press-Agentur* reported on September 25, 2002 that the Greek finance ministry announced that electronic games were legal again.

The statement read, "There is no problem for any individual or for tourists visiting Greece to use their private electronic or other games such as Playstation, Gameboy or X-box . . . It is permissible to set up and use gaming devices provided the use of the devices does not result in any form of financial gain for players of third parties."

Greece allows gambling only inside state-licensed casinos.

—Anna Nguyen
Silha Research Assistant

[T]he raids could lead to a widespread confiscation of personal computers.

Belarusian Newspaper Editor Sentenced For Slandering President

On Oct. 15, 2002, a Belarusian court rejected the appeal of *Rabochiy* newspaper editor Viktor Ivashkevich's sentence on charges of slandering that country's president Alexander Lukashenko. According to the Associated Press, Ivashkevich had printed an article stating that Lukashenko made money from illegal arms sales and by exploiting the Russia-Belarus customs union to smuggle goods. The article had been printed in *Rabochiy* during the September 2002 presidential election campaign. However, 39,000 copies of the newspaper were seized by authorities before they could be publicly distributed.

The hearings in the case were held in secret and Ivashkevich was sentenced to two years in internal exile. Two other Belarusian journalists, Nikolai Markevich and Pavel Mozheiko, were also sentenced earlier this year for libeling Lukashenko, and are serving their terms in remote towns in eastern Belarus. (See "Freedom of Speech Stifled: Belarus" in the Summer 2002 *Bulletin*.)

Ivashkevich told ITAR-TASS that he had originally found the article posted at 66 different Internet sites. He had merely reprinted the article in *Rabochiy*. "There is no libel, but there is truth in the newspaper," Ivashkevich said.

The Associated Press reported that Ivashkevich's attorney said she would appeal his case to the Supreme Court. Ivashkevich will not be forced to serve his sentence until all appeals have been exhausted.

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

International Media Law Developments

Changes in European Union Data Surveillance Law

The European Parliament is considering changes to the 1997 European Union Directive on privacy in telecommunications. The changes in the European Union Treaty (article 29, article 34, paragraph 2, point b) would require member nations' telephone carriers, mobile network operators and Internet service providers to store data of their customers' Web use, e-mails and phone calls for up to two years in the event that the information could be helpful in criminal investigations. The changes are being considered in order to standardize the policies regarding the retention of data among European Union member states.

The draft framework would require all member states to take "adequate measures" to allow law enforcement officials to have access to traffic data required to "complete their task." The data must be retained by the telecommunications service provider or a trusted third party from a minimum of 12 months to a maximum of 24 months. (Current EU policy requires that "traffic data" be destroyed after two months.) The data to be included are whatever would be necessary to follow and identify the source of a communication; to identify its destination; to identify the time it was sent; the subscriber and the type of device used to send the communication. The data would be saved for use in investigations including terrorism, trafficking in human beings or in child pornography; racism and extortion, to name a few.

The draft framework allows access to the retained data only by judicial and police authorities involved in criminal investigations, and only when other measures are not available.

The draft framework allows access to the retained data only by judicial and police authorities involved in criminal investigations, and only when other measures are not available.

Statewatch, an Internet organization based in the United Kingdom that monitors civil liberties, received a leaked copy of the proposal. Statewatch expressed concern over the changes, saying they are too broad. An analysis of the proposed framework, posted on Statewatch's Web site at www.statewatch.org/news/2002/aug/05Adataret.htm examines the framework's drawbacks.

Among Statewatch's criticisms of the proposed changes is that it provides no ground for one state to refuse another's request for information; that terms such as "cybercrime" and "trusted third party" are not clearly defined; and no policy is set forth regarding the disposal of the data after at the end of the retention period. In addition, the types of data retained – "what is necessary in a democratic society for criminal investigation and prosecution" – are not static, according to Statewatch. "The boundaries for 'what is necessary' have expanded leaps and bounds over the past few years and in particular since 11 September," Statewatch's analysis reads. "Indeed it has to be asked are there any boundaries?"

"The right to privacy in our communications – e-mails, phone calls, faxes and mobile phones – was a hard-won right which has now been taken away," writes Tony Bunyan, Statewatch's editor. "Under the guise of fighting 'terrorism' everyone's communications are to be placed under surveillance. Gone too under the Draft Framework Decision are basic rights of data protection, proper rules of procedure, scrutiny by supervisory bodies and judicial review."

According to *Computer Weekly*, data protection commissioners from across Europe met in Cardiff, Wales during the week of Sept. 11, 2002. The commissioners issued a statement expressing "grave doubts as to the legitimacy and legality of such broad measures," and warned of the excessive costs for the telecommunication and Internet industries. The commissioners' statement continued that they "have repeatedly emphasized that such retention would be an improper invasion of the fundamental rights guaranteed by Article 8 of the European Convention on Human Rights."

At the time the *Bulletin* went to press, the framework had not been adopted by the EU. (See "Personal Freedoms at Risk: European Union and Web Site Users," Summer 2002 Silha *Bulletin*.)

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

New Press Law in Somalia

In a protest against a restrictive new press law, most media outlets in Somalia refused to operate on Oct. 3, 2002. In the capital city of Mogodishu, only one radio station continued to broadcast that day, and no newspapers appeared on the newsstands, according to a report filed by Xinhua News Agency.

The new law would require journalists to verify facts with the information ministry and would forbid the dissemination of information contrary to the "common interest" of the country, according to Agence France Presse. In particular, article seven of the new law prohibits the dissemination of any information contrary to Islam, the political system, national security or the social affairs of the people, according to Xinhua News Agency. The law was adopted by the interim parliament, the Transitional National Assembly (TNA), a branch of the Transitional National Government, established in 2000. The law must be signed by President Abdulkassim Salat Hassan before going into effect.

According to BBB Worldwide Monitoring, Somali Banaadir radio broadcast a report on September 29, 2002 saying that various media groups had met and agreed that: they strongly condemned the new media law; they would stop covering reports on the interim government and parliament, and they would strike on Oct. 3. In an AllAfrica Global Media report posted online at http://allafrica.com/stories/200210020379.html, Muhammad Haji Ingriis of the daily newspaper *Ayaamaha* said, "If [the law is adopted] as it is, it will be one of the most draconian press laws in the world. If I were to report on financial scandals involving the government or senior officials, I would be violating the law. This is unacceptable and that is why we are protesting."

The media groups also asked the local and international community as well as human rights groups to assess freedom of speech rights as well as human rights in Somalia. Paris-based Reporters Sans Frontieres (RSF – Reporters Without Borders) wrote to Somali President Hassan, protesting the law. "The authorities say the new law is to deal with the excesses of some media, but the measure threatens the entire press," RSF's secretary general Robert Menard wrote, Agence France Presse reported.

President Hassan declined to sign the media law. He has set up a committee of lawyers, journalists and senior government officials to meet with journalists and "address their grievances," in the hopes that it be modified to "reflect the journalists' concerns," according to the AllAfrica Global Media report.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

[A]rticle seven of the new law prohibits the dissemination of any information contrary to Islam.

Zimbabwe Continues to Harass Independent Journalists

The Zimbabwe government, under Robert Mugabe's repressive regime, continues to harass and intimidate independent journalists working in Zimbabwe. After Parliament passed the Access to Information and Protection of Privacy Act (AIPPA) on Mar. 15, 2002, which criminalized violation of its provisions and requires journalists to register with the Media and Information Commission (MIC), Zimbabwe's independent media challenged the repressive law.

In a hearing before the Supreme Court scheduled for Nov. 21, 2002, on a lawsuit brought by the Independent Journalists Association of Zimbabwe (IJAZ), attorneys will challenge the constitutionality of the power of the MIC to compel journalists to register with the commission. All journalists must register with the MIC by Nov. 21, 2002.

The registration forms require journalists to provide personal information such as addresses, fax numbers, e-mail addresses, cell phone numbers, passport and drivers' license numbers. Many independent journalists believe the registration is part of the government's "intelligence-gathering," according to a letter addressed to Media Commissioner Tafataona Mahoso by Zimbabwe Union of Journalists (ZUJ) secretary general Luke Tamborinyoka.

The journalists are also challenging sections of the AIPPA that regulate against publishing "falsehoods" and define journalist privileges.

Another amendment to the AIPPA changes the accreditation period for foreign journalists from "a short period" of time to "not exceeding 30 days." On Sept. 15, 2002, Zimbabwe expelled American journalist Griffin Shea, an Agence France-Presse correspondent in Harare. The government refused to renew Griffin's work permit, without providing any justification.

Commenting on Shea's expulsion, Information Minister Jonathan Moyo is quoted in a Sept. 10, 2002 article in *Africa News* as stating that Zimbabwe will not allow foreign journalists to hold work permits "until Jesus Christ comes back," and "Shea is an American and he can go and work there." In addition, Moyo also accused those who are "screaming" over Shea's expulsion of showing contempt for Zimbabwe law.

In July 2002, Andrew Meldrum, the London *Guardian's* Harare correspondent, was ordered to leave the country after being acquitted of violating the AIPPA by publishing "falsehoods." Meldrum challenged his deportation and the High Court has referred the matter to the Zimbabwe Supreme Court. (See "Freedom of Speech Stifled: Zimbabwe" Summer 2002 Silha *Bulletin*.)

—KIRSTEN MURPHY
SILHA FELLOW

International Media Law Developments

Russian Parliament Passes Bill Limiting Media Coverage

In what it characterized as an effort to fight terrorism, the Russian State Duma (Parliament) passed amendments to Article 4 of the law "On the mass media" and Article 15 on the law of "On fighting terrorism" on Oct. 23, 2002. The amendments would limit news coverage of anti-terrorist operations and would also prohibit the media from carrying rebel statements. The bill passed with a vote of 259 to 34, with two abstentions. To become law, the bill must be passed by the Duma in a third reading, but this step is usually a formality, according to the Associated Press. The final step requires the signature of President Vladimir Putin.

"The military will decide who is hindering. This [bill] does not correspond to the letter or the spirit of democratic law."
—Mikhail Melnikov

As written, the law prohibits the media from disseminating information that hinders a counter-terrorist operation, that "reveals special methods and tactics" used in such operations or reveals information about the people involved in them. The bill further bans the media from revealing "statements by individuals that are aimed at hindering a counter-terrorist operation and/or justifying resistance to a counter-terrorist operation" and other "propaganda or justification of extremist activity," according to Sarah Karush, writing for the Associated Press. ITAR-TASS News Agency added that the amendments banned the use of the media for "extremist activities" including disseminating instructions for making weapons, ammunition or explosive devices as well as "the dissemination of programs cultivating pornography, violence, and cruelty." ITAR-TASS further reported that a new article was later added, stating that the "burial of terrorists who died as a result of counter-terrorist operations shall be carried out in keeping with the rules established by the government. Their bodies shall not be handed over to relatives for burial and the place of burial shall be kept secret."

According to the Associated Press, Mikhail Melnikov, an expert at the Center for Journalism in Extreme Situations located in Moscow, said the bill did not clearly define the terms "counter-terrorist operation" and "hinder," although "extremism" is defined as any activity aimed at overthrowing the government, instigating social, national or religious hatred, or distributing fascist literature. Calling the bill a "direct act of censorship," Melnikov further stated that "The military will decide who is hindering. This does not correspond to the letter or the spirit of democratic law."

On Nov. 13, ITAR-TASS reported that Russia's Federation Council (the upper house) had approved the amendments following a "heated debate" on how to balance the freedom of the press against the need to maintain secret sensitive information regarding terrorists attacks. The majority of the Council members believed that the amendments should be adopted, but that the Council should "take under its control the application of the law, in order not to allow the curbing of the work of journalists," according to ITAR-TASS. On Nov. 16, the Associated Press reported that the Federation Council had passed the amendments by a vote of 145 to 1 with two abstentions.

Federation Council speaker Sergei Mironov said that further amendments may come before the legislative body regarding additional laws banning terrorist propaganda, but he also called for joint action with the mass media to evaluate how the newly-adopted amendments will play out in practice. Dmitry Mezentev, head of the Commission for Information Policy, said that the commission voted unanimously for the law, telling ITAR-TASS that the new amendments "will not restrict the creative endeavour (sic) of the journalists."

The Associated Press reported that human rights groups have criticized the new law, saying it gives authorities too much power and could lead to the silencing of political groups.

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

New Press Law in Togo

A new press law, adopted September 3, 2002, could allow Togolese courts to jail reporters for publishing false information about the nation's president or other high ranking governmental officials. The law sets jail terms for up to five years for reporters who libel the president, and up to two years for those who libel the prime minister or other senior officials.

On Sept. 13, 2002, Agence France Presse reported that Julien Ayi, publisher of *Nouvel Echo* newspaper, had been sentenced to four months in jail for "attacking the honour [sic]" of President Gnassingbe Eyadema. The head of Togo's opposition Labour Party, Claude Ameganvi, was also sentenced to six months in prison for defamation. Ayi had published reports written by Ameganvi stating that *Forbes* magazine had run a story crediting President Eyadema with a personal fortune of 4.5 billion dollars (Euros). The prosecution argued that *Forbes* had never run such a story; furthermore, Eyedema's name does not appear in the list of the world's 500 wealthiest people posted on *Forbes'* Website.

An earlier Togolese law allowed suspended jail terms for libeling senior officials, imposing fines instead. Pitang Tchalla, Togo's minister for communications, said the new law was necessary in order to "protect and

Togo Press Law, *continued on page 17*

Court Rules in Naomi Campbell Privacy Case

The Court of Appeal in London, England, has unanimously ruled that the London-based *Daily Mirror* was justified in publishing articles about supermodel Naomi Campbell's drug addiction and therapy, in *Campbell v. Mirror Newspapers, Ltd.*, [2002]EWCA Civ. No. 1373 (Oct. 14, 2002).

In the first action brought under the Data Protection Act of 1998, the court also overturned a trial court ruling that the *Mirror* breached the Act by using "sensitive personal data" about Campbell without her consent. The statute, which came into effect in March 2000 to implement the European Data Protection Directive of 1995 (Directive 95/46 EC), regulates the processing of personal information about individuals. It allows those who suffer damage or distress as a result of violations of the Act to recover damages.

Campbell, who had falsely stated in interviews that she did not use illegal drugs, had conceded that the newspaper was entitled to publish the fact that she was a drug addict. But she argued that revelations that she had attended Narcotics Anonymous meetings constituted a breach of confidence under British law. She further contended that the publication of photographs of her leaving the meetings constituted "processing of data" in violation of the Data Protection Act.

A High Court of Justice ruling had found in favor of Campbell on both claims, awarding her 4,000 pounds in damages.

On appeal, Lord Phillips of Worth Matravers ruled that the information about Campbell's addiction was a matter of public interest, and that additional details about her treatment through Narcotics Anonymous were not highly offensive, especially because the photographs had been taken in a public street and not through covert means. He distinguished publication of these photographs from those at issue in *Douglas v. Hello Ltd.*, which had been taken at a private wedding. (See "British Court Issues Historic Privacy Decision," in the Spring 2001 Silha *Bulletin*.)

"We consider that the detail that was given, and indeed the photographs, were a legitimate, if not essential, part of the journalistic package designed to demonstrate that Miss Campbell had been deceiving the public when she said she did not take drugs," Phillips wrote. "Provided that publication of particular confidential information is justifiable in the public interest, the journalist must be given reasonable latitude as to the manner in which that information is conveyed to the public, or his . . . right to freedom of expression will be unnecessarily inhibited."

Phillips agreed that the publication of data in hard copy, such as newspapers, technically constitutes "processing" under the 1998 Act. However, he ruled that the *Mirror* could invoke section 32 of the statute, which exempts processing of data "with a view to the publication by any person of any journalistic, literary or artistic material" as long as the publisher reasonably believes that publication would be in the public interest.

"[T]he details of Miss Campbell's attendance at Narcotics Anonymous was part of a journalistic package that it was reasonable to publish in the public interest," Phillips wrote. "We do not consider that it would have been reasonably practicable to comply with the provisions of the data protection principles while at the same time making the publications in question."

The *Mirror*'s editor, Piers Morgan, told the *Guardian* of London that the ruling was "a wake-up call to all celebrities queuing up to take on the media." Marcus Partington, a lawyer for Mirror Group, said the ruling established that "if you lie to the public through the media, particularly if you lie for commercial advantage, then the media will be entitled to correct the false impression and will be given considerable latitude by the courts in how they do that."

The Associated Press reported that Campbell said, in a statement, that she had sued the paper in order to establish her right to privacy and to ensure that she and others could receive therapy without media intrusion. "The idea that because you deny something about your private life automatically entitles the media to publish otherwise private information, seems to me to be very harsh indeed," she said.

—SILHA CENTER STAFF

[Campbell] conceded that the newspaper was entitled to publish the fact that she was a drug addict.

Togo Press Law, *continued from page 16*

ensure respect for state institutions," according to an Associated Press story dated Oct. 7, 2002. Agence France Presse further quoted Tchalla as saying that the new law was "aimed at encouraging professionalism." The law also allows the interior and security ministries to seize copies of newspapers that break Togolese laws, and requires journalists to serve a two-year apprenticeship before beginning their professional careers.

Togolese journalists have denounced the new law as "oppressive." John Holonou, president of the Togolese Association of Editors of the Private Press, said in an Agence France Presse story, "Togolese democracy does not tolerate press freedom. A journalist's place is not behind bars, but in the newsroom." Reporters sans Frontieres has also protested the adoption of the new law.

At the time that Ayi and Ameganvi were sentenced, President Eyadema had not yet formally enacted the new law. Amnesty International has demanded the release of the two men, calling them "prisoners of conscience."

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Journalists on the Frontlines

Military Reporters Join Forces to Fight Access Restrictions

Prompted by concerns that the impending war with Iraq may result in tighter restrictions for journalists trying to cover the conflict, a group of journalists who cover military news have founded a new group, Military Reporters and Editors (MRE). The group shares the acronym of Meals Ready to Eat, the pre-prepared food that soldiers typically carry with them into the field.

MRE's Mission statement reads: "The Association exists to advance public understanding of the military, national security and homeland defense; to educate and share information with its members and the public on best practices, tools and techniques for such coverage; to represent the interests of working journalists to the government and the military; and to assure that journalists have access to places where the U.S. military and its allies operate." (MRE's Constitution and Bylaws are available on the Internet at http://m_r_es.tripod.com/constitution_bylaws.htm.) Formed at a University of Maryland conference in 2002, the group is incorporated in Seattle, Wash., with offices in San Antonio and Washington, D.C.

"MRE wants to ensure that mass media access improves as the United States wages its war on terrorism. The people of this country deserve nothing less."
—James G. Wright, President, MRE

James G. Wright is the group's president as well as the assistant metro editor with the *Seattle Post-Intelligencer*. In an article posted on the Poynter Institute's Web site at www.poynter.org/offthenews/NextWar.htm, Wright is quoted as saying, "We've seen numerous cases where the Pentagon has restricted our ability to report on the soldiers, sailors, airmen and Marines who serve the people of this nation. MRE wants to ensure that media access improves as the United States wages its war on terrorism. The people of this country deserve nothing less."

Since the Sept. 11, 2001 attacks on New York and Washington, D.C., there has been growing concern that increased restrictions on the media limit their ability to report fully on the issues. According to a press release posted on MRE's Web site, veteran journalist Walter Cronkite visited students in Tokyo earlier this year and said, "We have a duty to know what [American troops] are doing in our name. They are keeping the war correspondents at arm's length. It's a very serious gap in our democratic procedures."

MRE's press release also describes how reporters have had difficulties reporting on military matters. John Diedrich, a military writer with the *Colorado Springs Gazette* covered the deployment of airmen from a base in Colorado. He described the Air Force statement that read, "An undisclosed number of people from an undisclosed unit left Peterson Air Force Base earlier this week. Their mission, where they will be and how long they will be there will not be discussed. Any questions?"

Reporters following troops in Kandahar were restricted to an air base that Tom Bowman, Pentagon reporter for the *Baltimore Sun*, said had been "turned into some kind of theme park." James W. Crawley, military writer with the *San Diego Union-Tribune*, said that reporters at Camp Rhino in Afghanistan were "kept under near sequestration" and received little information, although Marine Corps media followed the troops into the field, leaving civilian journalists behind. Kirk Kicklighter, an ex-Marine who now writes for *DoubleTake* magazine, reported that he was not allowed to interview anyone on Parris Island without a public affairs officer in attendance, a policy held by the Air Force, Army and Navy as well. Reporters often complain about the Department of Defense's policy that last names of those soldiers deployed overseas should not be revealed, and that the destination of deployed troops be kept secret.

In order to address the relationship between the media and the military, MRE sponsored a conference November 15-16, 2002 in Washington, D.C. A major theme of the conference was how journalists have covered the Bush administration's war on terrorism and what strategies might be used to better report on troops if and when a new conflict arises in Iraq. The keynote speaker at MRE's inaugural luncheon was Pulitzer Prize winner Bob Woodward, best known for his work in breaking the Watergate story during the Nixon administration. More recently, Woodward, an assistant managing editor for the *Washington Post*, authored a book about the Gulf War, *The Commanders*, and has written extensively about President George W. Bush's reaction to the attacks on September 11.

A Reuters dispatch released in mid-November described the Pentagon's launch of a training program for reporters who will cover war news. The program includes training for emergencies at sea, surviving nuclear, chemical or biological attacks, and dealing with "live-fire" situations. Nearly 60 reporters and photographers from more than 30 news organizations and three countries were present for the first session. Reuters reported that the Pentagon is planning to offer three more week-long sessions over the next few months. "The Pentagon hoped to raise the media's and the military's 'comfort level' in dealing with each other," Jim Wolf wrote in the Reuters article.

But there are concerns that the Pentagon program is merely the military's means to "sanitize" the information reporters receive. The *Village Voice* reported that at a panel discussion before First Amendment experts on Nov. 13, 2002 in New York, Bob Simon of CBS's "Sixty Minutes" said that the news media shared the blame because reporters sometimes trade access for censorship. "The Washington press corps is complicit," he said. "If you agree to sing their song, you'll be invited for an audience."

But Ted Koppel, host of ABC's "Nightline," said that he was sympathetic with military restrictions on the press. "Live TV coverage could realistically endanger U.S. troops in combat," he told the *Village Voice* in a telephone interview following the panel discussion. "The military ought to have the right to censor that." Koppel acknowledged, however, that issues between the Pentagon and reporters needed to be "ironed out."

In his President's Report on MRE's Web site, Wright quoted former U.S. Senator Hiram W. Johnson, who said in 1917, "The first casualty when war comes is truth."

"In a Democracy, where the military acts in the name of the people," Wright's report continues, "the people must have accurate information about the actions of the military – the things that are being done in their name. It is our moral and constitutional responsibility to ask tough questions and demand straight answers, regardless of prevailing sentiment or personal risk. MRE exists to help all journalists fulfill that duty."

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

Media Groups File Amicus *Brief in International Criminal Tribunal*

Thirty-four newspapers, media advocacy groups and non-governmental organizations filed an *amicus* brief on Aug. 17, 2002 with the Appeals Chamber in the International Criminal Tribunal for the former Yugoslavia. The brief supported former *Washington Post* reporter Jonathan Randal who had been subpoenaed to testify before the tribunal about a 1993 interview he conducted with former Bosnian Serb housing minister Radoslav Brdjanin. Brdjanin has been charged with deporting, torturing and murdering Croats and Muslims during the Bosnian War from 1992-95.

The *Washington Post* filed a motion to quash the subpoena on May 11, 2002, arguing that reporters serve a valuable public service in providing information, including human rights abuses, which can often be obtained only when the source is given a promise of anonymity. (See "Former *Washington Post* Reporter Subpoenaed by International Criminal Tribunal," Summer 2002 Silha *Bulletin*.)

However, on June 7, the Chamber ruled that Randal had to testify. On July 17, 2002, counsel for the media groups requested that the Appeals Chamber allow them to file an *amici curiae* (friehds of the court) brief. The Chamber agreed, and an *amicus* brief was filed by the media groups on August 17.

The parties to the brief included the New York Times Company, Time, Inc., the Associated Press, ABC, CBS, NBC and the BBC, the Committee to Protect Journalists, Reporters Committee for Freedom of the Press, Reporters sans Frontieres, Society of Professional Journalists, and the World Press Freedom Committee, among others. They argued for a "qualified privilege" for journalists, forcing journalists to testify only as a last resort and only if their testimony was "absolutely essential to the determination of the case." Additionally, the brief stated that the information must be unobtainable by any other means. In the Randal case, *amici* contended that the court subpoenaed only Randal because his testimony "may be" useful.

A qualified privilege strikes the proper balance without compromising the Tribunal's work.

In their Statement of Interest, *amici* wrote that:

- The free flow of information has brought human rights violations to the attention of the International Tribunal. Without a qualified privilege that exempts journalists from testifying, the free-flow of information and a journalist's ability to report the news would be threatened.
- "Vague balancing tests" such as applied by the Trial Chamber in this case do not protect journalists who may be compelled to testify against someone they have interviewed. Working journalists place themselves in dangerous situations. When an interviewee fears that his words may later be used against him by a journalist in a court of law, the danger to the journalist increases.
- Journalists are not "arms of governments or courts." If they were, they would be participants and not observers, which would shatter their credibility and rob them of their independence.
- *Amici* do not seek an *absolute* privilege for journalists; rather they ask for a *qualified* one. A qualified privilege, *amici* wrote, "strikes the right balance between protecting journalists . . . without fatally compromising in any case the important work of the Tribunal."

Since then, according to the *Washington Post*, Brdjanin's attorneys have apparently changed their minds and no longer feel a need to call Randal to take the stand, making Randal's appearance before the Chamber a moot point.

But the concern for a qualified privilege for journalists remains. Policy regarding evidentiary procedures in the International Criminal Court are still being settled. *Amici* acknowledged the need to establish rules regarding the testimony of journalists, saying that the current approach of the Trial Chamber "undervalues free speech rights" because journalists can be made to testify with regard to anything that is "pertinent" to the case. Such a policy, *amici* wrote, has a chilling effect on newsgathering efforts. "Just as the Tribunal has established a privilege for [Red Cross] workers on the theory that their independence needs to be preserved if they are going to do the work they do, the Tribunal should extend a similar privilege to war-zone journalists, because they too need to remain independent and impartial in order to effectively perform their functions."

Amici concluded their brief by setting forth the standard for a qualified privilege. The two-pronged approach stated that a journalist's testimony needs to be "absolutely essential to the case" and that "the information cannot be obtained by any other means." For the testimony to be essential, *amici* wrote, it needed to be "critical" to determining the defendant's guilt or innocence. The requirement that "information cannot be obtained by any other means" puts the burden of proof on the party seeking the subpoena to show that all other avenues of obtaining the information have been exhausted.

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

Ethical Conundrums Puzzle Journalists

Media Coverage and the D.C. Sniper

"Did we provoke him to do it?"
—Harvey Goldstein, Psychologist

Americans across the country gave a collective sigh of relief when two alleged snipers were arrested on Oct. 24, 2002 after being spotted asleep in a car at a rest stop near Frederick, Md. According to the Associated Press, John Allen Muhammad, 41, and John Lee Malvo, 17, have been accused of shooting 19 people, killing 13 of them during their three-week shooting spree. Two additional shootings are under investigation.

During the attacks, media coverage of the Washington, D.C. area sniper became a topic of increased analysis and criticism as the sniper eluded police and government law enforcement. The tension between the media and law enforcement increased due to the nature of the information surrounding the investigation. The media faced accusations of engaging in speculation and aiding the sniper due to the intense coverage among news outlets.

On October 13, Michael Getler, columnist and ombudsman for the *Washington Post,* questioned whether the media were serving readers or impairing the police. The week before, the local CBS affiliate, WUSA-TV (Channel 9), reported that the sniper had left behind a tarot card that seemed to be the first significant clue in the case. The *Washington Post* also used this information as a headline the next day.

Montgomery County Police Chief Charles A. Moose, who conducted press conferences several times a day when the sniper coverage began, criticized WUSA-TV and the *Washington Post* for reporting on the leaked information. Moose told the *Washington Post*, "I have not received any messages that citizens of Montgomery County want Channel 9 or the *Washington Post* or any other media outlet to solve the case. If they do, then let me know. We will go ahead and do other police work, and we will turn the case over to the media, and you can solve it."

Getler wrote that the paper acted properly. Executive editor of the *Washington Post* Leonard Downie was quoted in Getler's piece, "It would not be responsible to our readers to fail to provide *Washington Post* coverage of such an interesting fact that everyone would be talking about and wondering about after Channel 9's report. The concerns the police had about publication need to be weighed against the possibility that this information could jog the memory of someone who knows the sniper and could help the police."

Harvey Goldstein, a psychologist who consults with law enforcement agencies nationwide and internationally, wrote in an op-ed column in the *Washington Post* on October 13, "my fear is that we may now be facing a more determined killer, unintentionally emboldened by police, politicians, the media and others whose motives are much better than their judgment." For example, the sniper's ninth attack occurred at a school after an announcement that children were safe in schools. Goldstein asked, "Did we provoke him to do it?"

Goldstein says that human behavior depends heavily on reinforcement. In the case of the sniper, he is rewarded after each new incident with the captivation and concerns of the public. Goldstein cited comments made by public figures during news conferences that he believed that could provoke the sniper. For example, Police Chief Moose said in a news conference, "Someone is so mean spirited that they shot a child . . . I guess, it's getting to be really, really personal now." Even President Bush called the sniper "cowardly and senseless."

Those experts appearing on TV and radio during the crisis speculated on every aspect of the criminal's life and behavior patterns. They need to ask whether there is any utility in bolstering his arrogance, Goldstein wrote. Before publicizing sensitive information, Goldstein urged the media to consider the possible effect on someone like the D.C. sniper who was probably closely observing what the media were saying about him.

Richard Roeper, a *Chicago Sun-Times* columnist, wrote that there was the possibility that the Washington area sniper might never be caught, as had happened in such cases as the Zodiac Killer and Jack the Ripper. Readers accused him of giving the sniper ideas. In his October 23 column, Roeper responded, "The frustration and fear levels of the public have been escalating ever higher with each shooting and now some are taking it out on the media, blaming everyone from their local newspapers to the cable news channel commentators to the *New York Times* for aiding and abetting the sniper, either by providing him with information he can put to use as he plans his next kill, or engaging in speculation that the sniper actually takes as advice."

Roeper continued that the complaints regarding the amount of saturation coverage only applied to a small portion of the media such as cable news networks, while other outlets have treated it as a "huge and terrible domestic story that none of us will forget, but not World War III."

Roeper concluded by acknowledging that there is no such thing as perfect news coverage when humans do the work. He said if he were given the choice between too much coverage or none at all, he would take an excess and rely on the intelligence of the news consumer to sort it out.

Muhammad and Malvo face multiple state and federal counts in Maryland, Virginia and Washington, D.C, and have been charged in the deaths of two women in Alabama and Louisiana as well. They are also suspects in a February killing in Washington state. Malvo has reportedly confessed to investigators that is was he and not Muhammad who was the actual killer in several of the Washington-area sniper shootings, including the Virginia slaying in which Muhammad has been charged with murder.

—Anna Nguyen
Silha Research Assistant

Ethical Concerns Surround Tape of Mother Striking Her Child

The shocking video footage of Madelyn Toogood striking her four-year-old daughter Martha in a department store parking lot has sparked a debate about a variety of media ethics issues. The video, taken by store surveillance cameras on Sept. 13, 2002 in Mishawaka, Ind., was released about a week later by police in the hopes that the mother could be found. Toogood turned herself in eight days after the video aired on news broadcasts throughout the world, according to CNN.

The story has raised questions about privacy and the use of video cameras. As the media followed the events, some media observers questioned the newsworthiness of the video and the media's portrayal of Toogood.

In *Newsday*, Clay Calvert, author of *Voyeur Nation: Media, Privacy, and Peering in Modern Culture*, and a professor at Pennsylvania State University, wrote in an op-ed column that the media "heaped on the incident" after the tape became public. Although he does not excuse Toogood's conduct in the video, he questioned the newsworthiness of the event.

> "The videotape could not capture the whole story."
> — Clay Calvert

Calvert said the video "is a call for caution on the part of journalists when they sacrifice the lives of a troubled mother and her child for, when viewed cynically, ratings, or when seen more charitably, the public's right to know." He added that the event passed as news because American society is conditioned by infotainment programs such as the "World's Wildest Police Videos" and "Real TV."

"Such video clips shows blur the line between news and entertainment, while they suggest that news is simple whatever drama a camera captures," Calvert wrote in the column.

Calvert also said the video appealed to a sense of video justice found in "Cops." The Toogood tape exposed wrongdoing and provided evidence leading to Toogood's battery charge, which he called "instant guilt-by-media." Calvert declared the videotape "a decontextualized collection of continuous images that masquerade as the truth." The videotape could not capture the whole story, he contended.

Even the additional information about her nomadic gypsy lifestyle as an Irish Traveler and her daughter's possible misbehavior before Toogood struck her will not change how she will be remembered because of the images in the videotape, Calvert said.

Chicago Sun-Times columnist Mary Mitchell has also evaluated how the media have portrayed Toogood. A doctor who examined the Martha Toogood found the child showed no medical problems or signs of long-term abuse. But when Toogood turned herself in, she was charged with battery to a child and her daughter was placed with foster parents, Mitchell wrote. The media did not give much coverage of the findings, but rather concentrated on the videotape.

As the story unfolded, the news media continued to reveal Toogood's alleged criminal background. A Dateline NBC transcript on October 11 described the Irish Travelers as "a secret society, a clannish group with a bad reputation." The report went on to say they are "families that cross the country doing house repairs, roofs, driveways and too often, not doing them well; they're often flat-out scams." The report stated that Toogood supposedly had multiple IDs in different states with different names.

In a CNN interview with Toogood on September 22, CNN national correspondent, Gary Tuchman, cast some doubt about her character when introducing the videotaped interview. "She's done a couple news conferences and she was very blunt. You'll have to decide at his point if you think she's being honest while she's talking to us," Tuchman said. During the interview, Toogood apologized and admitted to hitting her daughter, adding how it had changed her life, "Don't raise your hand to a child, it ain't worth it . . . worth what it does to the family."

Calvert questioned whether the media have damaged Toogood's reputation as a private citizen. He said the media transformed Toogood into the "national poster mother for poor parenting." Additionally, the media could have damaged her daughter's reputation by revealing Martha's name. Calvert leaves his readers with a final question, "Do the general benefits of this story to the media and the public outweigh the specific harm to Madelyne and Martha Toogood?"

—Anna Nguyen
Silha Research Assistant

Ethical Conundrums Puzzle Journalists

Columnist Bob Greene Resignation Raises Ethics Questions

Bob Greene, a nationally syndicated columnist for the *Chicago Tribune*, tendered his resignation after allegations of past "sexual misconduct" with a 17-year old girl who was also a source. On Sept. 14, 2002, the newspaper accepted Greene's resignation. He had been with the newspaper for 24 years.

The 55-year-old Greene made his career writing a popular column that presented readers with a nostalgic look at America, mourning the loss of innocence in the United States and celebrating the World War II generation of Americans. He was particularly known for his vehement columns in defense of abused and neglected children. Greene also wrote more than a dozen books, including *Good Morning Merry Sunshine* and *Once Upon a Time: The Miracle of the North Platte Canteen.*

"[Greene's] unprofessional behavior damaged the *Tribune's* credibility."

Bob Steele, Poynter Institute

In 1988, a 17-year-old Catholic high school student interviewed him. The girl came to the *Tribune* with her parents, seeking Greene's help with a school project. Greene wrote a column about the girl and then asked her to dinner and to a hotel room, where the sexual activity took place.

The woman, now in her 30's, contacted Greene twice within the last year. Greene reportedly contacted the FBI, who in turn contacted the woman and warned her that she might be threatening the columnist. In September, the *Tribune* received an anonymous e-mail describing the affair, without mentioning Greene's name. The *Tribune* management contacted the woman and then approached Greene with her allegations. He confessed and offered his resignation.

The *Tribune* published a tersely worded announcement of the columnist's resignation, stating that Greene's conduct was a "serious violation of *Tribune* ethics and standards for its journalists."

Greene's resignation has raised a flurry of ethics questions. Many wonder if he deserved to lose his position with the *Tribune* over the scandal. Still others wonder exactly what ethical violation Greene committed. Was it that he wrote a column about the girl? Was it her age? Was it that he misused his position for personal advantage?

The *Tribune* seems to believe that Greene's ethical lapse was that he took advantage of his position with the newspaper. Editor Ann Marie Lipinski stated in an interview with *Tribune* reporters published on September 16, 2002 that: "Journalists have a special obligation to avoid personal conflicts that undermine their professional standing and their trust with readers, sources or news subjects. We concluded that trust had been violated."

Bob Steele, Ethics Group Leader with the Poynter Institute, wrote in a Sept. 19, 2002 column, "Talk About Ethics," that journalists' professional lives and personal lives are inseparable and that journalists have a responsibility to the public and to their employers. Steele contended that: "Greene also seriously undermined his employer by compromising the trust placed in him. His unprofessional behavior damaged the *Tribune's* credibility." The column is available at http://www.poynter.org/talkaboutethics/091902.htm.

Others criticized the *Tribune's* actions. Lewis Z. Koch, a Chicago-based reporter and columnist, argued in an email sent to the Society of Professional Journalists ethics listserve: "This Greene debacle has all the makings of journalists having to hew to some kind of politically correct behavior. [N]o one in journalism takes a vow of chastity."

Greene has not made a public comment, except for a short e-mail he wrote to the Associated Press expressing regret.

—Kirsten Murphy
Silha Fellow

Civil Rights, *continued from back page*

Fortunately, some federal judges do. In early August, Gladys Kessler, a federal district judge in Washington, D.C. ordered the Justice Department to disclose the names of individuals detained since September 11, despite the government's insistence that doing so might compromise national security. And a few weeks later, a U.S. Court of Appeals panel ruled that deportation hearings for aliens, even the so-called "special interest" cases involving individuals suspected of having some kind of terrorist ties, must be open to the press and the public. "Democracies die behind closed doors," Circuit Judge Damon J. Keith reminded us.

But secret justice is only one aspect of the new, post-9/11, regime. The executive branch has seized on national security concerns as a pretext to revamp the Justice Department's policy governing responses to requests under the Freedom of Information Act. A memorandum issued by Attorney General John Ashcroft in October 2001 advised government bureaucrats that the Justice Department would defend their decisions to withhold records from disclosure as long as there was some "sound legal basis" for doing so. This is a major shift from the articulated policy of the previous administration. At least on paper, the Clinton Justice Department recognized the presumption that government records should be open to public scrutiny, and directed agencies to disclose material,

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Faxing Search Warrants Approved By Eighth Circuit

A three-judge panel of the United States Court of Appeals for the Eighth Circuit ruled in November 2002 that faxing a search warrant seeking e-mails from Yahoo!'s server was reasonable under the Fourth Amendment, even though no law enforcement official was present at the time the search was conducted. Judge Clarence Beam, who authored *United States v. Bach*, 2002 U.S. App. LEXIS 23726, found that the Fourth Amendment imposes a flexible "reasonableness" standard on searches. In this case, the appeals court ruled that because no warrant was physically served, no persons or premises were searched in the traditional sense, and Yahoo!'s technicians did not directly confront the individual whose e-mails were seized, the search was constitutional.

The case began in October 2000, when Sgt. Brooke Schaub of the St. Paul, Minn. Police Department was provided with a text document from a mother showing that her son had received sexually suggestive comments while visiting a Yahoo! chatroom. She told Schaub that the person used the screen name "dlbach15" and met with her son on one occasion.

Schaub used Yahoo!'s publicly-available profiles to trace the username to Dale Bach, a 26-year-old registered sex offender living in Minneapolis. Three months later, a Ramsey County judge approved a state search warrant ordering Yahoo! to hand over an e-mail sent to or from Bach or the boy. Schaub faxed the search warrant to Yahoo!, which sent him a zip disk with the e-mail messages. One of the messages contained a photograph which the police decided constituted child pornography.

With that evidence, police obtained a search warrant from a Hennepin County judge magistrate for Bach's home and computer. In August 2001, Bach was indicted for possession, transmission, receipt and manufacture of child pornography. He filed a motion in federal District Court in Minneapolis to suppress the evidence obtained by the execution of both warrants.

Although District Court Judge Paul Magnuson upheld the search of Bach's home and computer, he ruled that the Fourth Amendment requires police to be on hand when a search warrant is executed by third parties. "Police officers have taken an oath to uphold federal and state constitutions and are trained to conduct a search lawfully and in accordance with the provisions of the warrant," he wrote. "Civilians, on the other hand, are not subject to any sort of discipline for failure to adhere to the law." (*United States v. Bach*, 2001 Dist. LEXIS 21853).

But the appeals court reversed. "Civilian searches," Beam wrote, "are sometimes more reasonable than searches by officers." Citing examples where experts such as dentists, software experts, and bank employees assist law enforcement in conducting searches, Beam contended that their expertise may actually make a search less intrusive because an expert would know better than a police officer what information would be useful to the investigation. The opinion also noted that the items seized were on Yahoo!'s property, and that the officers involved complied with the Electronic Communications Privacy Act (ECPA), 18 U.S.C. §2701.

The panel further ruled that the provisions of ECPA, which require law enforcement to be present at a search, apply to federal officials, not to state law enforcement officers executing a state-issued warrant.

The appeals court acknowledged that Congress clearly intended to create a statutory expectation of privacy in e-mail files under the ECPA, but did not reach the question of whether Bach had a Fourth Amendment privacy interest as well. (See "Fall 2002 Silha Forum Asks: What is the Future of Privacy in Cyberspace?" on pg. 25 of this issue.)

—SILHA CENTER STAFF

> "Civilian Searches are sometimes more reasonable than searches by officers."
>
> —Judge Clarence Beam

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even if it could legally be withheld under an exemption to the FOIA, unless some harm would result.

Sadly, in the wake of September 11, it seems that just about any kind of information could be used by someone for evil purposes: the location of water reservoirs, gas pipelines, chemical plants. As a result, many federal agencies quietly removed this kind of data from their web sites, even though the same material might be readily obtainable from other sources. And most Americans, if they paid any attention at all, cheered them on. After all, why make it easier for a terrorist to attack us? Who needs all that information, anyway?

The short answer is: we do. Democracy doesn't exist in a vacuum, and the Constitution isn't a self-executing document. Even the best government can become lazy or corrupt if it isn't held accountable. The confidence that so many citizens claim to have in their elected officials is predicated on openness. The public has the responsibility to monitor the government. We abandon that responsibility at our peril. A time of national crisis is certainly not the occasion to do so.

What kind of horrific new disaster will it take, I wonder, to make the public realize that secrecy does not equal security? Or that rights, once given up, are very hard to win back again?

—JANE E. KIRTLEY
DIRECTOR OF THE SILHA CENTER AND
SILHA PROFESSOR

Bush Urges Passage Of Virtual Law on Child Pornography

President Bush urged passing a law that would make both virtual and actual images of child pornography illegal.

In an Oct. 23, 2002 speech on children's online safety, President Bush urged the Senate to join the House in passing a law that would make both virtual and actual images of child pornography illegal. Bush argued that prosecutors need both types of images to be criminalized in order to prosecute producers and distributors of child pornography because virtual child pornography is indistinguishable from images of real children.

The House passed the Child Obscenity and Pornography Prevention Act (COPPA) by an overwhelming majority, 413-8, on June 25, 2002. The bill, introduced by House Judiciary Crime Subcommittee Chairman Rep. Lamar Smith (R-Texas), was rushed through the House in an effort to replace legislation that was struck down by the Supreme Court on Apr. 16, 2002 on First Amendment grounds. (See "Supreme Court Strikes Down Virtual Child Pornography Law," Silha *Bulletin*, Spring 2002.)

In *Ashcroft v. Free Speech Coalition*, 535 U.S. 234 (2002), a 6-3 decision held that the "Child Pornography Prevention Act of 1996" (CPPA) violated the First Amendment because it covered both protected and unprotected speech. Justice Kennedy, writing for the majority, opined that although a law criminalizing real images of child pornography may be constitutional, a ban of virtual images of minors engaged in sexually explicit activity unlawfully prohibits speech that is not criminal and creates no victims.

The CPPA criminalized any image that "appears to be" a minor. The COPPA is written more narrowly, in an effort to create a law that will pass Supreme Court review. The COPPA makes illegal any pornographic image that is "virtually indistinguishable from that of a minor."

President Bush applauded the efforts of the House in passing COPPA. "The House passed a bill which makes it illegal for child pornographers to disseminate obscene, computer-generated images of children. It's an important piece of legislation," Bush said during his speech. He pressured the Senate to join the house in fighting child pornography on the Internet: "The Senate needs to act soon. The Senate needs to get moving and join the House in providing our prosecutors with the tools necessary to help shut down this obscenity, these crimes against children."

The Senate is considering two bills similar to the COPPA, one introduced by Senator Carnahan (D-Mo.) and another by Senators Leahy (D-Vt.) and Hatch (R-Utah). However, neither bill has yet been marked up, and appropriations legislation is expected to monopolize the legislators' time after the Senate's recess.

In addition to pushing for legislation to make virtual child pornography illegal, Bush called for an increase in federal funding for the Internet Crimes Against Children task forces from $6.5 million to $12.5 million dollars for the 2003 fiscal year. The President's speech is available online at http://www.whitehouse.gov/news/releases/2002/10/20021023-8.html.

—Kirsten Murphy
Silha Fellow

New Web Site Posted - Journalism.org

The Project for Excellence in Journalism and the Committee of Concerned Journalists have combined their Web sites under one new address: www.journalism.org.

The site was designed for both journalists and the public at large. Both groups are affiliated with the Columbia University Graduate School of Journalism and both are funded by the Pew Charitable Trusts. The Project for Excellence in Journalism focuses on clarifying the principles and standards of journalistic practices, while the Committee of Concerned Journalists is a consortium of reported, editors, producers, publishers, and others who are concerned about the direction of journalism in America and the pressures it faces.

Besides posting a "Daily Briefing" of media news, Journalism.org offers tools for citizens, print journalists, broadcast journalists, teachers and students as well as links to jobs and training materials.

Fall 2002 Silha Forum Centers on Topic of Computer Privacy, Government Investigations

The 2002 Fall Silha Forum on Oct. 16, 2002 featured Professor Stephen J. Cribari, speaking on "Privacy in Cyberspace? Computers, the Internet, and Government Investigations." Held in Jackson Hall on the east bank of the University of Minnesota's Minneapolis campus, the Forum was well-attended by students, faculty, and members of the Twin Cities legal community.

Cribari, a former federal public defender, currently specializes in criminal law, criminal procedure, and evidence, and teaches classes in computer forensics at the University of Denver College of Law. His presentation examined the issues surrounding privacy in cyberspace and considered who should protect that privacy – the Constitution, the Supreme Court, Congress, technology or the individual computer user.

The problem, Cribari explained, is that this area of law is currently still evolving. "Take your computer," he said. "It's your space in which you have a privacy interest, and yet at the same time you're saying 'I don't know how this works.' The law has a doctrine called willful ignorance." Cribari gave the example of someone driving another person's truck across a national border without inquiring about the contents. If the driver of the truck is caught transporting drugs and charged with smuggling, citing ignorance about the cargo is not an excuse. Cribari likened the contents of the truck to the files contained on a computer.

Stephen Cribari speaking to the Silha Forum audience.

"When you actually do delete a file, what happens to that file? If it goes to your trash bin, all you've done is move it. If you empty your trash bin, you've begun the process of getting rid of it. But do you know how your computer gets rid of that file?" Cribari explained that the government assumes a computer user does know how such things work. When a user knows how to save files, government prosecutors can assume the user meant to save it. Until new data are saved over deleted files, the computer can still hold intact those files that the user intended to delete. "In a forensic investigation, those remnants can be found," Cribari stated, so long as the warrant specifies data as opposed to files.

"Are we approaching a time when you could be too stupid to run a computer and you'll just get in trouble?" he asked. "I think we may be, if we hold a person to the 'reasonable computer person' standard, which may well happen."

Furthermore, law enforcement may not even have to search your computer directly in order to retrieve information contained there. E-mail, Cribari explained, does not have the same privacy as a letter mailed in a stamped envelope through the postal system, and a copy is often retained by Internet providers and on servers, as in the case *U.S. v. Dale Robert Bach*, 2002 U.S. App. LEXIS 23726. (See "Changes in European Union Data Surveillance Law," pg. 14 and "Faxing search Warrants Approved by Eighth Circuit," pg. 23 in this issue of the *Bulletin*).

The future of privacy in cyberspace and for computer users, Cribari explained, lies in the way the U.S. Supreme Court will interpret "reasonable" invasions into a person's privacy, and a person's "reasonable" expectation of privacy. Citing *Katz v. United States*, 389 U.S. 347 (1967), Cribari explained that what is "reasonable" was defined on the basis of where the individual was when the act occurred and the expectation of privacy in that setting, not on the basis of whether the act committed was legal or illegal.

For additional information about this Forum and other Silha Fora and programming, visit the Silha Center's Web page at www.silha.umn.edu.

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

"Are we approaching a time when you could be too stupid to run a computer and you'll just get in trouble?"
— Stephen Cribari

Silha Lecturer Anthony Lewis Speaks to Packed House

Speaking at the 17th Annual Silha Lecture to an overflow audience numbering nearly 350, Anthony Lewis said, "In this democracy, it is the job of all of us to protect our freedoms." Lewis' lecture, entitled "Terrorism and Freedom," was delivered on Oct. 8, 2002 in the Cowles Auditorium of the Minneapolis Campus of the University of Minnesota. Lewis, a former *New York Times* columnist, has also received two Pulitzer awards and written three books, *Portrait of a Decade, Gideon's Trumpet* and *Make No Law.*

Silha Professor and Silha Center Director Jane Kirtley introduced Lewis as one of the *New York Times'* most consistently liberal voice in recent times. "[Lewis'] fearlessness, the clarity of his writing and his commitment to human rights and civil liberties are legendary," Kirtley said, quoting *New York Times'* editorial page editor.

Lewis explained that civil liberties have been taken away in time of war or national emergency in the past.

Lewis' lecture addressed how to preserve constitutional values in light of the terrorist attacks of Sept. 11, 2001. Lewis quoted the Jeffersonian ideal, "Our liberty depends on freedom of the press, and that cannot be limited without being lost." This is a great challenge due to the measures the government has taken to fight terrorism, he said. For example, if President Bush declares someone an "enemy combatant," that person can be detained without charges or the right to see a lawyer. Lewis named two cases where this has occurred, Jose Padilla and Yasir Hamdi. The two men have been held without the benefit of any legal counsel, said Lewis.

Lewis explained that civil liberties have been taken away in time of war or national emergency in the past. He described United States' policies such as the Sedition Act of 1798, created in reaction to the French Revolution, that made it a crime to criticize the president. In the twentieth century, the Cold War brought about anti-communist sentiments. During that time, Congress urged university professors to take a loyalty

Silha Lecture, *continued on page 27*

SPJ Ethicist Develops Balancing Factors for Journalists

Since the September 11 attacks on America, journalists have faced a new set of ethical challenges, arising from concerns about national security, personal safety and tighter restrictions on government and law enforcement information. Peter Sussman, co-author of the original code of ethics for the Society of Professional Journalists (SPJ) (available online at http://www.spj.org/ethics.asp), has developed a program of "balancing factors" to assist journalists in analyzing how they will go about covering the current war on terrorism and the impending war on Iraq.

Sussman, who for 29 years served as editor of the *San Francisco Chronicle*, is a recipient of the Wells Key award, SPJ's highest honor. He also is co-author of *Committing Journalism: The Prison Writings of Red Hog*, a book about Dannie Martin, who served time in a California prison for robbery and faced retaliation for attempting to publish his prison memoirs.

Sussman launched his efforts to develop his "balancing factors" in response to many of the events that followed the September 11 terrorist attacks. "The emotion surrounding this war is greater because of the attack on American soil," Sussman said in a recent interview. "The President has declared an undeclared war against numerous entities for an unspecified number of years against unspecified countries. That vagueness leads to confusion in policy choice. [Currently] policy choices are 'wrapped in the flag.'"

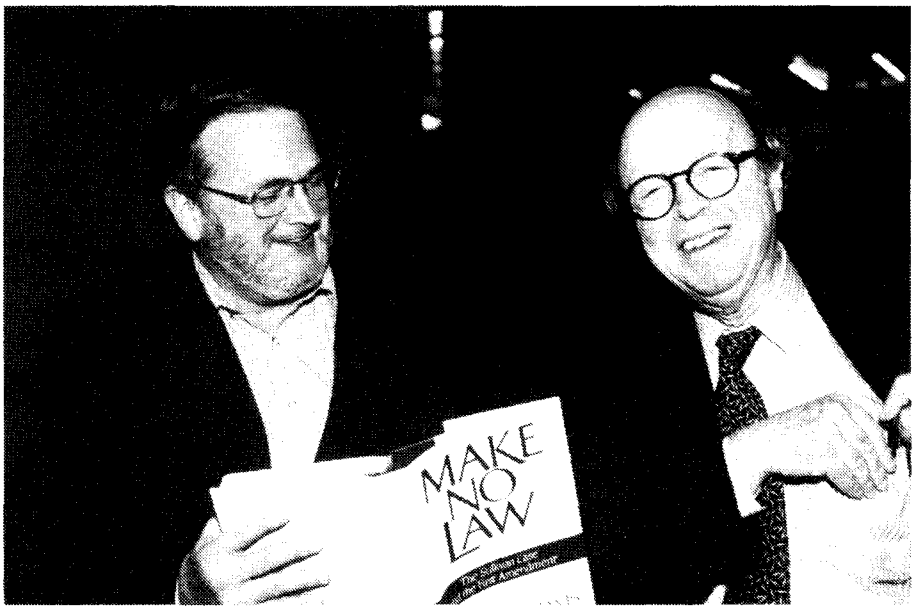
Sussman cited the repeated showings of the clips of airliners crashing into New York's twin towers, the media's revelation of Daniel Pearl's Jewish background (which Sussman speculates may have led to his execution), and the incident with the *Wall Street Journal* handing over the computer that belonged to al-Qaida terrorists to government officials as examples of ethical dilemmas facing journalists in the current environment. Sussman said that members of SPJ – reporters, editors, and journalists – are asking how to balance the factors that they face in reporting today's news. How do you balance accountability against independence? How can seeking truth and reporting it be balanced against minimizing harm? To whom are reporters, editors and journalists responsible? To their news organization? To their government? When can – or should – patriotism get in the way of reporting news in war time?

In an effort to discuss possible solutions to these and other dilemmas, Sussman conducts workshops addressing topics such as "Assessing our motivation in publishing or suppressing information;" "Assessing the Government's motivation in seeking suppression;" and "Assessing the reliability of the information." To date, he has held his "balancing factors" workshops at the SPJ regional conference in San Francisco, and at the SPJ national convention in Fort Worth, Tex. Another workshop will be held in San Francisco on Dec. 9, 2002.

For additional information, contact Peter Sussman directly at peter@psussman.com or write to him at:

Peter Y. Sussman
2636 Woolsey Str.
Berkeley, CA 94705

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



Anthony Lewis signs a copy of his book for First Amendment attorney John Borger.

"[F]reedom for the comfortable depends on freedom for the uncomfortable."
— Anthony Lewis

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oath. In addition, actors, writers and directors were blacklisted, preventing them from finding work.

Lewis said that today, extraordinary executive powers are being asserted based on an undeclared war against terrorism whose end we cannot predict or even define. This current exercise of executive power overrides constitutional rights, making the threat to our liberties more profound.

"It is those claims that raise the present danger. The Bush administration has not carried out mass arrests of high-profile figures, but under the cover of cases involving obscure, unpopular persons that, if sustained, would haunt us for the indefinite future," he said.

Lewis observed that the actions taken by the Bush administration have received little attention from the American public. "I suppose it is natural for people not to notice, or not to care, when those whose liberties are being taken away are different from us – when they are unknown immigrants or Muslim accused of connections with terrorism . . . but freedom for the comfortable depends on freedom for the uncomfortable. It is a great mistake to assume that repression of someone different from you will stop there," Lewis said.

Lewis called on the press to bring these issues into the public domain. When Judge Robert Doumar tried to see that Yasser Hamdi receive his constitutional right to a lawyer, Lewis noted that he did not see any newspapers or broadcast outlets give it much prominence.

Lewis quoted Justice Potter Stewart, who warned against the danger of presidential powers when writing his opinion for the "Pentagon Papers" case (*New York Times Co. v. United States*, 403 U.S. 713 (1971)). 30 years ago. "'A press that is alert, aware and free most vitally serves the basic purpose of the First Amendment. For without an informed and free press there cannot be an enlightened people,'" Lewis said, quoting Stewart.

At the end of his speech, Lewis emphasized the importance of maintaining the freedoms of the press. Lewis quoted James Madison who said, "'To the press alone, chequered [sic] as it with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression.'" Lewis concluded by saying, "I have often wondered whether praise of our profession was too extravagant. Now is the time that will test it."

In addition to the lecture held in Cowles Auditorium at the Hubert H. Humphrey Center at the University of Minnesota, Lewis also spoke to an ethics class at the School of Journalism and Mass Communication and was interviewed by Don Shelby on his WCCO talk radio show. Lewis also spoke at a pre-lecture dinner hosted by the Silha Center and held at the University of Minnesota presidential mansion, Eastcliff, attended by the members of the Twin Cities legal, media and academic communities, as well as the Silha family.

The Silha Lecture series is made possible through an endowment given in 1984 by Otto Silha to the University of Minnesota's School of Journalism and Mass Communication, which also established the Silha Center for the Study of Media Ethics and Law.

—Anna Nguyen
Silha Research Assistant

Should National Security Be Exchanged for Civil Rights?

This essay originally appeared in the Minnesota Daily on Sept. 11, 2002.

Depending on whom you talk to, either everything changed on Sept. 11, 2001, or nothing changed.

Most Americans would like to think that the core values that are central to our society – the vision, the concepts, the ideals that make us what we are – emerged stronger than ever out of the rubble of the World Trade Center towers. Some of the most important of those, at least to me, would include the right to find out what our government is up to and to express ourselves freely.

But the reality is that, as has so often been the case in times of crisis, the initial, knee-jerk reaction of many of those in government has been to jettison those fundamental rights in the name of achieving greater security. And for the most part, the public has been indifferent, or even complicit.

The reason for this attitude can probably be attributed to the fact that most Americans had little or no prior personal experience with terrorist attacks before September 11. They bought the argument that it was the openness of our society that made us vulnerable. And in panic and desperation, they instinctively demanded that the government take steps to make sure nothing like that ever happened again, no matter what the cost.

And so, with little discussion and less dissension, Congress passed the USA PATRIOT Act just a few weeks after the attacks. The law is the embodiment of the FBI's ultimate wish list, granting sweeping new authority to the law enforcement community to monitor our telephone conversations and intercept our e-mail communications.

People who should know better have said that this kind of surveillance is unqualifiedly a good thing. It will protect us from the "bad guys." And, besides, if you aren't doing anything illegal, why should it bother you if the government is keeping tabs on what you say and what web sites you visit?

There are many flaws in that reasoning, but let's mention just two. First of all, law enforcement officials themselves would admit that electronic surveillance is only one imperfect method of trying to track down terrorists, and that, inevitably, innocent people who have nothing to do with illegal activities will also be caught up in this type of electronic sweep. And second, only those who have never experienced life in a totalitarian state – or have never bothered to read the history of the FBI during the J. Edgar Hoover years – would be confident that their "innocent" activities could never be misconstrued as suspicious, or worse. If you know you are subject to government surveillance, it will change the way you act, speak and think. I, for one, am not prepared to abandon the Bill of Rights in return for vague promises that doing so will keep me safe.

Even if you are fortunate enough not to be the target of an investigation yourself, spare a thought for those who are. Perhaps they are people who don't look much like you. Perhaps they speak a different language. Perhaps they aren't even American citizens. Who cares if a few hundred of them are kept in secret custody by the government?

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

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