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UNIVERSITY OF MINNESOTA

Former *Washington Post* Reporter Subpoenaed by International Criminal Tribunal

Jonathan Randal, who in 1993 wrote a story for the *Washington Post* containing quotes from an interview with former Bosnian Serb housing minister, Radoslav Brdjanin, was subpoenaed on January 29, 2002 to appear before the International Tribunal for the Former Yugoslavia (ICTY). The tribunal is trying Brdjanin and Momir Talic for their participation in ethnic cleansing during the 1992-1995 war of succession from Yugoslavia.

Randal and another U.S. journalist (identified only as "X" by the tribunal) interviewed Brdjanin." "X" was able to translate Serbo-Croat into English and Randal depended on his translation for his *Washington Post* story. Randal's article read: "[Brdjanin] said he believes the 'exodus' of non-Serbs should be carried out peacefully, so as to 'create an ethnically clean space through voluntary movement.' Muslim and Croats, he said, 'should not be killed, but should be allowed to leave – and good riddance.'"

Attorneys for the prosecution are now arguing that "X" misinterpreted Brdjanin's comments during the interview with Randal on purpose and that Brdjanin's comments were actually more malevolent. They hope that Randal's testimony will bring the discrepancies between Brdjanin's actual words and those of the interpreter to light. On the other hand, Brdjanin's attorneys contend that comments in Brdjanin's interview with Randal may predate the time period covered by the trial, therefore making them irrelevant to the case.

In a witness statement filed with the Office of the Prosecutor on August 17, 2001, Randal said that he was willing to speak to investigators for the Tribunal, but hesitated to give evidence to the court. Randal has said that if compelled testify before the court, he would affirm that the quotes he attributed to Brdjanin in the 1993 article were accurate and true.

Randal was compelled to appear before the Trial Chamber in spring 2002. Randal told the tribunal that although there was no reason to doubt the translation provided through "X," Randal himself could provide only hearsay evidence as to Brdjanin's comments during the interview. Randal argued that the tribunal should be questioning "X" instead.

On May 11, *Washington Post* attorneys filed a motion to quash the subpoena against Randal. The *Post's* attorneys cited the following reasons for dropping the subpoena:

- Certain categories of people, such as Red Cross and Red Crescent workers, who, like journalists, place themselves in war areas in order to perform a public service, are currently excluded from being compelled to testify before the Tribunal. Because journalists also perform a valuable public service, they should be exempt as well.
- The Tribunal's power to subpoena must recognize a testimonial privilege for journalists, who perform a public service by providing information about war coverage to the outside world. According to the statement submitted by Randal's attorneys, Rule 73 of the International Criminal Court's Rules does not preclude the recognition of a journalist's privilege.
- Media coverage can aid in pursuing international criminal justice. This can include alerting the International Criminal Court to war crimes and providing evidential material for the investigation of war crimes. Such advantages would be lost if journalists were routinely ordered to testify. Additionally, being required to testify would undermine the safety and efficacy of journalists, who could be looked upon as informants.
- The watchdog role of the press has been recognized by the European Court of Human Rights, and the Inter-American Court of Human Rights, as well as by domestic courts in the U.S. and Great Britain.
- Journalists should be required to testify only if there is absolutely no other way to obtain the information.
- Randal holds no additional information about Brdjanin except what was published in the 1993 article. If compelled to testify, he could add nothing new to the case that is not already publicly available.

Randal, *continued on page 8*

Recent United States Supreme Court Rulings

Watchtower Bible and Tract Society of New York v. Village of Stratton

The U.S. Supreme Court has struck down a Stratton, Ohio ordinance requiring solicitors to register with the mayor's office and obtain a permit before engaging in door-to-door canvassing. In an 8 to 1 vote, the Court ruled that the ordinance violated the First Amendment as it applies to religious proselytizing, anonymous political speech, and the distribution of handbills.

The case, *Watchtower Bible and Tract Society of New York v. Village of Stratton* (122 S. Ct. 2080 (2002)), began in June 1999 when the Jehovah's Witnesses sought injunctive relief in the federal district court for the Southern District of Ohio against Stratton's enforcement of the ordinance requirements. The Jehovah's Witnesses argued that the ordinance violated their First Amendment right to canvass door-to-door as part of their religious belief that they should share the Gospel with others.

> The ordinance was overbroad. It could even apply . . . to trick-or-treaters and Christmas carolers.
> -Justice Stevens

The Village of Stratton, a community of 278 people, defended the ordinance as a regulation promulgated to protect residents from criminals who prey on small towns and to protect the privacy of residents. The ordinance, passed in 1998, required those wishing to visit local homes for purposes of solicitation to register with the mayor's office and to provide a name, address, and information about the organization they represented.

The ordinance required permit applicants to list specific addresses to be visited, limited the hours of permitted solicitation to between 9 a.m. and 5 p.m., and required solicitors to carry a permit to be shown upon request to police and residents. Any violation of the ordinance carried criminal penalties.

Federal District Court Judge Edmund A. Sargus, Jr. upheld most of the ordinance, striking the limitation on the hours solicitors might travel door-to-door as an invalid restriction on speech. He also found that the separate listing of Jehovah's Witnesses in the registration forms constituted an unnecessary isolation of that group.

The Jehovah's Witnesses appealed to the U.S. Court of Appeals (6th Cir.). On February 20, 2002, in a 2 to 1 vote, a three-judge panel affirmed the lower court's decision, ruling that the ordinance was a content-neutral regulation and applied generally to all door-to-door solicitors. The majority rejected the argument that the ordinance covered too much speech and that it did not serve the city's stated goal of protecting residents from crime and annoyance.

The panel majority applied an intermediate scrutiny standard of review and ruled that the ordinance was a reasonable restriction on speech that was neither vague nor overbroad. The third judge argued that the ordinance burdened more speech than necessary to further the Village's legitimate interests.

Watchtower Bible came before the Supreme Court in February 2002. During his oral argument for the Jehovah's Witnesses, attorney Paul Polidoro rejected the Village's asserted interest of protecting residents, "It is implausible to think that someone intent on committing a violent crime would stop at the city hall to get a permit or in any way be deterred." Polidoro cited the Court's decision in *McIntrye v. Ohio Elections Commission* (514 U.S. 334 (1995)), in which the Court found the interest in having anonymous political speech enter the marketplace of ideas outweighed any interest in requiring disclosure of identity.

Justice John Paul Stevens, writing for the majority, focused on the history of Court's protection of Jehovah's Witnesses, dating back to the 1930's and 1940's. "The value judgment that then motivated a united democratic people fighting to defend those very freedoms from totalitarian attack is unchanged. It motivates our decision today," he wrote. Stevens further noted the historical importance of door-to-door canvassing and pamphleteering in advancing unpopular and "poorly financed causes." Stevens added that Jehovah's Witnesses have played an important role in defending the First Amendment rights of other groups in past Supreme Court cases.

Stevens found that the permit requirement itself violates the right to free speech under the First Amendment and determined that the ordinance was overbroad. It could even apply to one neighbor's visit to another seeking to change the local garbage disposal service, or to trick-or-treaters and Christmas carolers, he wrote.

Stevens also objected to the regulation's quelling of anonymous and spontaneous speech. "It is offensive – not only to the values protected by the First Amendment, but to the very notion of a free society – that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so."

Alternative means of solving the problem exist, Stevens reasoned, because residents may place "No Solicitation" signs on their lawns, enforceable by local authorities, to warn off neighborhood canvassers.

Justice Breyer, joined by Justices Souter and Ginsburg, concurred. Breyer's opinion completely rejected the Village's asserted interest in protecting the residents of Stratton. The interest in crime prevention was never asserted in the Village's argument before the lower courts, he observed. Furthermore, Breyer said, the ordinance was unlikely to deter crime.

Justice Scalia, joined by Justice Thomas, also concurred in the judgment. However, he rejected Stevens' argument that some would prefer silence to being forced to seek permission to speak. Scalia wrote, "If our free-speech jurisprudence is to be determined by the predicted behavior of such crackpots, we are in a sorry state indeed."

Watchtower, *continued on page 3*

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Watchtower, *continued from page 2*

Chief Justice Rehnquist, the lone dissenter in the case, agreed with the Village of Stratton, saying that the ordinance was necessary to protect the residents from fraud and annoyance. Citing a recent Hanover, NH murder case, where two teenagers were convicted of posing as environmental canvassers in order to murder and steal from two Dartmouth professors, Rehnquist found the Village's stated interest sufficient to overcome the First Amendment interests involved.

The decision has been praised by free speech advocates and religious groups as a triumph of First Amendment values over privacy interests. However, the opinion leaves open the possibility that the ordinance could survive constitutional scrutiny if the permit requirement was limited to commercial solicitation.

—Kirsten Murphy
Silha Fellow

Gonzaga University v. Doe

The Family Educational Rights and Privacy Act of 1974 (FERPA) does not create a judicially enforceable individual right to privacy, the U.S. Supreme Court ruled on June 20, 2002. In a 7 to 2 decision, the Court decided that the Act, which is designed to protect the privacy of students' educational records, is not enforceable through the federal civil rights statute 42 U.S.C.S. § 1983.

"FERPA's nondisclosure provisions . . . have an aggregate, not individual focus."
-Chief Justice Rehnquist

The case, *Gonzaga University v. Doe* (122 S.Ct. 2268 (2002)), began in 1994, when an undergraduate education student at Gonzaga University in Spokane, Washington, sued the University and a University employee in state court for tort and contract law violations, as well as a claim for violation of FERPA. The student, John Doe, learned that he would not receive his teacher certification in March 1994 because the University, through the actions of its employee, had released information concerning sexual misconduct allegations against Doe to the state agency responsible for teacher certification. As a result, John Doe could not become certified as a Washington schoolteacher. The jury found for Doe and awarded him $1.15 million dollars, $300,000 of that judgment on the FERPA claim.

The Washington Court of Appeals reversed in part, holding that the FERPA does not create an individual right to enforce the disclosure of academic records violation of the Act. The Washington Supreme Court reversed that decision, holding that FERPA grants a federal right to individuals that is enforceable under §1983.

Chief Justice William Rehnquist delivered the opinion of the court. FERPA, wrote Rehnquist, is not enforceable by an individual plaintiff because Congress must have "unambiguously" intended to allow individuals to judicially enforce the Act; Congress instead left the enforcement of FERPA in the hands of the secretary of education.

The Court further concluded that because the only remedy created by Congress for violations of the Act is the cutoff of federal funds, Congress did not intend to create an individual cause of action for violations of FERPA. "FERPA's nondisclosure provisions contain no rights-creating language, they have an aggregate, not individual focus," wrote Rehnquist.

Concurring in the decision were Justices Breyer and Souter, who wrote separately to express disagreement with the Chief Justice's conclusion that Congress must speak in clear and unambiguous language to create an individual right to enforce federal laws.

Justice Stevens and Justice Ginsburg joined in dissent, arguing that FERPA creates a federal right, enforceable by individuals through §1983, and that the Court's contrary conclusion is a "novel attempt to craft a new category of second-class statutory rights."

The decision has been applauded by journalist organizations because individual rights to enforce FERPA could have encouraged state agencies to endorse nondisclosure policies in order to avoid lawsuits brought by individuals.

Two other recent cases have addressed the scope and enforceability of FERPA through private action.

The Wisconsin Supreme Court ruled on July 2, 2002, in *Osborn v. Board of Regents* (2002 WI 83; 2002 Wisc. LEXIS 480) that FERPA does not cover academic records once personal identifiers have been removed from the records. Citing Wisconsin's presumption in favor of openness and public access to information, the Court decided that the University of Wisconsin school systems may not withhold admissions documents from a requester, once personal identifiers have been redacted from the documents.

On June 27, 2002, one week after the Supreme Court decided *Gonzaga*, the Sixth Circuit U.S. Court of Appeals held in *United States v. Miami University* (2002 U.S. App. LEXIS 12830; 2002 FED App. 0213P (6th Cir.) (2002)) that FERPA prohibited Miami University and Ohio State from releasing student disciplinary records to *The Chronicle of Higher Education*, an education trade publication. The appellate court ruled that the Department of Education has the power to enforce FERPA violations judicially, not only by withholding funds from offending institutions. In addition, the court decided that there is no First Amendment right of access to student disciplinary records.

—Kirsten Murphy
Silha Fellow

Recent United States Supreme Court Rulings

Republican Party v. White

In a 5 to 1 decision issued June 27, 2002, the U.S. Supreme Court struck down a Minnesota legal ethics code prohibiting candidates for judicial office from announcing their views on "disputed legal or political issues." (*See Republican Party v. White*, 122 S. Ct. 2528 (2002); *see* also Minn. Code of Judicial Conduct, Canon 5 (A)(3)(d)(i) (2000)) Known as the "Announce Clause," the prohibition was promulgated by the Minnesota Supreme Court and based on of Canon 7 (B) of the 1972 American Bar Association Model Code of Judicial Conduct. Incumbent judges who violated the restriction were subject to discipline, which could have included removal from office, censure, civil penalties, and suspension without pay. Any lawyer who wished to run for office was also required to comply with the Announce Clause.

The majority . . . found the Minnesota prohibition unconstitutional because it restricted political speech.

The case began in 1996 when one of the petitioners, Gregory Wersal, ran for associate justice of the Minnesota Supreme Court. As part of his campaign, he distributed literature critical of several Minnesota Supreme Court decisions involving crime, welfare, and abortion. A complaint was filed against Wersal with the Minnesota Lawyers Professional Responsibility Board, which investigates and prosecutes ethical violations of lawyer candidates for judicial office. The Board dismissed the complaint, saying it doubted whether the Announce Clause was constitutional.

Wersal subsequently withdrew from the election, but ran again for the same office in 1998. At that time, he sought an advisory opinion from the Lawyers Board as to whether they would enforce the Announce Clause. The Board again responded that they doubted whether the clause was constitutional, but that Wersal should submit to them a list of the announcements he wished to make. Shortly afterwards, Wersal sued the officers of both the Lawyers Board and the Minnesota Board on Judicial Standards in federal district court for the district of Minnesota (*see Republican Party v. Kelly*, 63 F. Supp. 2d 967 (1999)), claiming that the Announce Clause prevented him from even answering questions from the public and the press, for fear that he might violate the clause. Other plaintiffs in the suit, including the Minnesota Republican Party, alleged that, with Wersal's speech restricted, no one would be able to learn his views and decide whether or not to vote for him. The district court, however, found that the Announce Clause did not violate the First Amendment. The Court of Appeals (8th Cir.) affirmed. (*See Republican Party v. Kelly,* 247 F.3d 854 (2001)). In 2001, the U.S. Supreme Court granted certiorari.

The majority opinion, written by Justice Antonin Scalia, joined by Chief Justice Rehnquist and Justices O'Connor, Kennedy and Thomas, found the Minnesota prohibition unconstitutional because it restricted political speech. Although the Announce Clause allows candidates to discuss their character, education, work habits, and how they would handle administrative duties if elected, Scalia wrote that the clause nevertheless prohibits speech on the basis of its content and "burdens" candidates' speech about their qualifications for office. It is a long-standing tradition that political speech is the most protected form of American speech freedoms.

Although impartiality is an important trait in a judge, it is nearly impossible to find a judge who, based on prior experience in the field, does not have preconceptions about the law, Scalia wrote. Quoting then-Justice Rehnquist in *Laird v. Tatum* (409 U.S. 824 (1972)), Scalia added, "Since most Justices come to [the Supreme Court] bench no earlier than their middle years, it would be unusual if they had not by that time formulated at least some . . . notions that would influence them in their interpretation of the . . . Constitution. . . . It would be not merely unusual, but extraordinary, if they had not given opinions as to constitutional issues in their previous legal careers." In fact, Scalia wrote, it would be undesirable to elect a candidate to judicial office if that person had no preconceived views on legal issues, and would serve as "a lack of qualification, not lack of bias."

Scalia also called the Announce Clause "underinclusive." Those who seek a seat in the judiciary are backed by a career in which they have already committed themselves to certain legal issues. Many of them have also taught classes, given speeches, and written books and papers for law reviews. But when such persons run for office, the Announce Clause would stifle speech about their stand on the issues, only to be taken up again when the election is over.

Justice O'Connor concurred, writing that the problem with the Announce Clause lies primarily in Minnesota's decision to elect its judges. She advocated a system where judges would be appointed rather than elected, thereby eliminating the need for judicial campaigning. "If the State has a problem with judicial impartiality," she wrote, "it is largely one the State brought upon itself by continuing the practice of popularly electing judges."

Justice Kennedy's concurring opinion centered on the Announce Clause's effect of silencing political speech. The ability of judicial candidates to speak freely would not "foster disrespect for the legal system," as appeared to be a concern of the state of Minnesota. "Free elections and free speech are a powerful combination," Kennedy wrote. "Together they may advance our understanding of the rule of law and further a commitment to its precepts."

Justice Stevens' dissenting opinion, joined by Justices Souter, Ginsburg, and Breyer, focused on the differences between judicial offices and other political offices. "In a democracy," he wrote, "issues of

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policy are properly decided by majority vote; it is the business of legislators and executives to be popular. But in litigation, issues of law or fact should not be determined by popular vote; it is the business of judges to be indifferent to unpopularity." Judges, he pointed out, are "surely disliked by at least 50 percent of the litigants who appear before them."

According to Stevens, the Announce Clause is problematic because it could "convey the message that the candidate's mind is not open on a particular issue," when the judicial branch depends on its reputation for impartiality and nonpartisanship. Overall, the criteria for judicial campaigning are very different from those of other political campaigns, and the Announce Clause helped maintain the integrity of judicial office.

Justice Ginsburg's dissenting opinion was joined by Justices Stevens, Souter, and Breyer. Quoting *Buckley v. Illinois Judicial Inquiry Board* (997 F. 2d 224 (1993)), she wrote, "Judges remain different from legislators and executive officials, even when all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech." Ginsburg pointed out that the majority opinion ignored a portion of the Announce Clause that did not bar candidates from stating their views on legal questions; it prevents candidates from "publicly making known how [they] would *decide* disputed issues." (Emphasis in Ginsburg's opinion.) It does not prohibit candidates from describing their background, including how they may have ruled on previous cases, nor does it limit statements that qualify how future decisions might be made or that are framed in general terms such as, "drunk drivers are a threat to the safety of every driver." What remains, Ginsburg wrote, are statements that commit the candidate to a specific position on a specific issue, and which allow no latitude in the consideration of cases that may come before candidates and which would undermine judicial credibility. Campaign promises would put elected judges in a position where they would have an interest in the outcome of a case, and would compromise the guarantee of due process owed to the parties in the case.

"Properly construed," Ginsburg wrote, "the Announce Clause prohibits only a discrete subcategory of the statements the Court's misinterpretation encompasses. . . . [It] has hardly stifled the robust communication of ideas and views from judicial candidate to voter."

Campaign promises would put elected judges in a position where they would have an interest in the outcome of a case. . . .

-Justice Ginsburg

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

Florida Autopsy Records Remain Sealed

On July 12, 2002, a three-judge panel of the Florida appeals court affirmed a ruling by Broward County Fla. Circuit Court Judge Leroy H. Moe that autopsy photos are "presumptively private, " upholding a state law sealing autopsy photos passed following the death of NASCAR racer Dale Earnhardt on February 18, 2001. The Florida law prohibits the release of autopsy photos, making release a felony punishable by a $5000 fine and up to five years in prison. (*See* Summer 2001 *Bulletin*, " New Florida Law Closes Door on Autopsy Photos.")

Besides upholding Moe's ruling on July 3, Judge Thomas D. Sawaya, who was joined in his opinion by Judges Peterson and Griffin, also certified to the Florida Supreme Court the questions of whether the law restricting access to autopsy records was constitutional, and if so, whether it should be applied retroactively. (*See Campus Communications, Inc. v. Earnhardt* (2002 Fla. App. LEXIS 9770).)

Much of Moe's decision reflected the reasoning used by Volusia County Circuit Judge Joseph Will, according to a story posted on the Reporters Committee for Freedom of the Press Web site (*see* http://www.rcfp.org/news/2002/0709orland.html). Will's decision was handed down on July 10, 2001 as a result of a lawsuit brought by Theresa Earnhardt against the medical examiner of Volusia County prohibiting him from releasing her husband's autopsy photos to media organizations. The media organizations had wanted experts to view the photographs to determine whether the injuries that led to Earnhardt's death could have been prevented. Under Florida's Sunshine Laws, the photographs had been considered public until the Earnhardt family took measures to have them sealed, citing privacy concerns.

"The right to privacy, the right to freedom of the press and speech, the right of the people to have access to public records and the right to be left alone are important rights to all who live in this country," Moe wrote. "They are not absolute rights, however, and they frequently clash, as they did in this case. The legislature has indeed applied a proper balancing of these rights in enacting this legislation."

As the *Bulletin* went to press, it was announced that the publishers of the *Independent Florida Alligator*, student newspaper of the University of Florida, has asked the Florida State Supreme Court to review the constitutionality of the legislation.

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

International Law

Mexico Passes Freedom of Information Act

On June 10, 2002, President Vicente Fox fulfilled his campaign promise to promote an open government by signing Mexico's first freedom of information act. The Transparency and Access to Public government Information Act, which was endorsed by all three political parties and approved by both houses of Congress in the 2002 spring session, is designed to "encourage accountability to citizens" and "contribute to the democratization of Mexican society," according to Article 4 of the Act.

The Act . . . is designed to "encourage accountability to citizens" and "contribute to the democratization of Mexican society."

The law requires all branches of government to respond to citizen requests for copies of public documents within 20 days. The information that will be made available includes government employees' salaries, government contracts, budgets and executive branch expenditures. Government agencies, Congress, the judiciary and the Bank of Mexico will have one year in which to post their public information on the Internet.

Classified or confidential information must be released after twelve years, as compared to United States information law, which currently requires classified information to be released after 25 years in most cases.

The law is designed to make government information easily accessible. Apart from copy or delivery fees, there are no charges for responses to requests for information. Failure to respond to a request is presumed under the Act to indicate that the requested information will be provided and the requisite deadlines are set in motion.

Article 9 of the act states that government agencies must "give support to users who need it and lend every type of assistance possible" to requesters.

The law is also distinguishable from the U.S. Freedom of Information Act because it requires agencies to produce an index of classified files, organized by subject matter, to be published twice a year. Special emphasis is placed on information regarding human rights violations, and the government may not withhold this type of information under any circumstances.

Information that will not be disclosed under the Act includes national defense, information that may harm Mexico's economic stability, and judicial information. However, the judiciary must release information on court proceedings after conviction and sentencing. Also exempt are records of the government's internal deliberative process, such as staff opinions and recommendations, although final decisions will be documented and made public. By comparison, the U.S. Freedom of Information Act (exemption 5) requires the government to separate and release the background factual information contained in otherwise exempt deliberative process documents.

Fox's administration plans to monitor and enforce the Act through the newly created Federal Institute of Access to Public Information. The Institute will investigate unfulfilled citizen and press requests for information. Government officials who attempt to obstruct the operation of the law could face public reprimand, fines or criminal charges. Additionally, citizens will have the right to appeal any denials of requests for information to the Institute. If the appeal is denied, the individual has the right to take the case to court.

At a breakfast with the winners of the National Journalism Prize on May 6, 2002, Fox discussed the significance of the Act in his speech, published on the Mexican Presidency Internet site www.presidencia.gob.mx. "This Act introduces a transcendental change and makes us a member of that select group of nations whose democracy has lead [sic] them to bring in such legislation to ensure information for all citizens," Fox said.

Fox was elected in July 2000 as a National Action Party candidate, ending the 71-year reign of the Institutional Revolutionary Party. During his campaign, he promised a more open government in order to encourage public awareness and minimize official corruption.

The Mexican constitution's Article Six, in theory, grants the public a right of access to official information.

—Kirsten Murphy
Silha Fellow

New Romanian Press Law Signed

On June 10, 2002, Romanian president Ion Iliescu said that he would not sign into law proposed legislation that would have required newspaper editors to publish responses to articles readers found offensive. According to the Associated Press, the law would have forced newspapers to publish responses in the same place as the original article appeared. Non-compliance with the law could have resulted in a fine of up to 100 million lei, or more than $3000. President Iliescu told members of the Romanian Press Club that the measure would be sent back to parliament, a reversal of his earlier position.

Mircea Toma, director of the Media Monitoring Agency, an organization supporting freedom of expression, said the proposal would not have reduced the number of libel suits against journalists. Libel can result in a hefty fine or a prison sentence of up to five years. Approximately 400 journalists are currently being sued for libel or for insulting authorities.

The Associated Press stated that Romania is currently seeking membership in NATO. That, coupled with foreign media groups' criticism of the proposal, may have influenced Iliescu's change of position.

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

Boston Newspaper Links to Video of Daniel Pearl

In June 2002, alternative newspaper the Boston *Phoenix* posted a link on its Web site to the unedited video showing the beheading of Wall Street Journal reporter Daniel Pearl by Pakistani terrorists. *Phoenix* publisher Stephen M. Mindich defended the paper's decision to link to the video, saying, "If there is anything that should galvanize every non-Jew hater in the world – of whatever faith, or of no faith – against the perpetrators and supporters of those who committed this unspeakable murder – it should be the viewing of this video." Mindich went on to question the silence of the U.S. government over the incident.

The video shows Pearl making statements about his Jewish background and U.S. policy, interspersed with images such as al-Qaida prisoners at Guantanamo Bay. After Pearl is decapitated, the video ends with a list of demands from Pearl's captors, including the release of the Guantanamo Bay prisoners and the end of U.S. presence in Pakistan.

The *Phoenix* also published two still photographs of Pearl's execution.

The decision to link to the Pearl video has raised ethical concerns. Pearl's family and his former employer, the *Wall Street Journal*, had requested that the video not be shown. Bob Steele, senior faculty and ethics group leader at the Poynter Institute wrote (*see* article at http://www.poynter.org/talkaboutethics/060702.htm) that he could see "no legitimate purpose" in publishing the pictures and linking to the video. "I just don't believe there is any journalistic imperative to show these terrible images of Daniel Pearl's death to the general public. I don't believe we learn anything substantive or new.... Journalism is inherently intrusive and invasive. There are many times... when we must tell the painful truth with words and images.... But we should strive in our reporting techniques and publishing decisions to avoid causing unnecessary harm."

Bob Giles, curator of the Nieman Foundation at Harvard was quoted on the *Boston Herald's* Web site as saying that "pictures of death that run with an ongoing story are different. But [the *Phoenix*] is not breaking any new ground with the story by publishing the photos now. You have to suspect they are trying to draw attention to their newspaper." (*See* the full article at http://www2.bostonherald.com/news/local_regional/phoe06072002.htm)

Dan Kennedy of the *Phoenix* defended the newspaper's decision in his article, "Witnesses to an Execution" found at http://www.bostonphoenix.com/boston/news_features/dont_quote_me/multi-page/documents/02309509.htm. Kennedy compared the Pearl video and pictures to images of prisoners during the Holocaust, the explosion of the Challenger, and the Twin Towers being struck by aircraft. Such images, Kennedy writes, "tell powerful, unforgettable stories that merely reading about them could not." Certain photos, such as those of the death camps during World War II, have been credited with driving the Allies to victory. Many such photos have won awards.

Kennedy also claimed that the newspaper "recontextualized" the Pearl video. Ogrish.com, the original site, is known for posting images such as autopsy and accident photos that cater to prurient interests. But by posting a link to the Pearl video on a newspaper site, the video takes on the mantle of "political pornography," according to publisher Mindich, and should move the viewer to moral outrage.

Kennedy quoted MSNBC.com columnist Jan Herman, who wrote: "For the first time in my life, after seeing that video I understand in my gut what I thought I understood in my head... It can happen again. It has already begun."

Comments posted on the Poynter Institute's Forum page (see http://www.poynter.org/forum/default.asp?id=19785) range from a call to take into consideration the feelings of the Pearl family to an absolutist view of the need of journalism to show the truth. Paul Bryant, one of the contributors to the discussion, cited several newspapers and media organizations that described Pearl's execution as taking place on camera while Pearl is still speaking. But it appears in the actual video that Pearl was decapitated after he was already dead. Such clarification is important, Bryant claims, and is one reason people should be allowed to see the video for themselves.

An edited version of the video ran in May on CBS News with Dan Rather. That broadcast did not air any graphic images of Pearl's death, however.

The FBI had asked Pro Hosters to pull the video from its site on May 23, and demanded to know the name of the person running Ogrish.com. According to a report filed by the Associated Press on May 25, FBI special agent Sandra Carroll made a "courtesy call" asking the sites were asked to pull the videos "out of consideration for the [Pearl] family." Carroll admitted, however, that there was no legal prohibition against showing the video.

Both Pro Hosters and Orgrish.com initially complied with the request, according to a report by Newsbytes. But later Ted Hickman, president of Pro Hosters, posted the video again, saying, "We put this video up because we believe in the reasons it originally was posted – freedom of speech and freedom of the press." Ogrish.com also reposted the video. A spokesman for the Web site, who identified himself only as "Dan" said that the video was posted so that people "can be aware of the serious situation in the world."

Both sites also posted statements expressing sympathy to the Pearl family for their loss.

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

Such images . . . "tell powerful, unforgettable stories that merely reading about them could not."

-Dan Kennedy, *Boston Phoenix*

Newspapers Under Siege

British Newspapers Ordered to Return Documents

Five of Britain's largest news organizations were served court orders on July 12, 2002, by lawyers from Interbrew SA, a Belgian brewing company, directing them to return original copies of leaked and falsified documents about Interbrew's bid to take over South African Breweries (SAB). The documents, sent to the news organizations by an anonymous source, were allegedly doctored in order to manipulate the price of shares for both Interbrew and SAB. When the news organizations published stories based on the documents last November, it caused Interbrew's shares to decline in value while SAB's rose. Interbrew claims this is a case of insider trading and whoever leaked the information may have profited from the false information.

Interbrew offered to drop the action against [the newspapers] if the documents were surrendered to the FSA.

The Financial Services Authority (FSA), an independent, non-governmental body regulating the financial services industry in the United Kingdom, initially made an informal request for the news organizations to hand over the documents. But the four newspapers, The *Guardian*, the *Times*, the *Financial Times*, and the *Independent*, together with Reuters wire service, refused, citing a need to protect the identity of their source. Interbrew then obtained a court order requiring the news organizations to surrender the documents. Noncompliance could lead to seizure of the news organizations' assets. They could also be found in contempt of court and their editors could face up to seven years' imprisonment and fines.

Section 10 of the British Contempt of Court Act allows journalists to protect their sources except in the interest of justice or national security, or to prevent disorder or crime. But the "interest of justice" clause can be interpreted loosely, and can permit compelled disclosure of unidentified sources. Interbrew claims that there is a matter of justice in this case – putting an end to the practice of insider trading.

On July 18, the *Independent* reported that Interbrew offered to drop the action against the *Guardian*, the *Times*, the *Financial Times*, and Reuters if the documents were surrendered to the FSA. The FSA, once it had received the documents, would then be under no obligation to hand them over to Interbrew or even to reveal the information that they contain. The FSA would itself use the documents to aid in a criminal fraud investigation.

On July 23, the Guardian reported that Interbrew intends to take the newspaper to court to press contempt of court charges, which could result in seizure of the newspaper's assets. The *Guardian* claims that the documents are not in its possession, but are being held by the journalist who received them. The *Guardian* is not willing to force him to hand the papers over.

The *Independent* was not named in the offer as it claims it did not receive any original documents from the anonymous source.

The news organizations are planning to take the case to the European Court of Human Rights.

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

Randal, *continued from page 1*

The three-judge panel for the trial chamber dismissed the motion to quash in a ruling on June 7. Judges Carmel Agius, Ivana Janu and Chikaka Taya wrote that Randal himself has said that his safety at this time is not compromised; he is retired and no longer reporting from a war zone. They acknowledged that journalists should not be subpoenaed if doing so would "hamper, obstruct or otherwise frustrate the vital role of newsgathering." However, journalistic independence and objectivity should not be absolute, but must be balanced against the needs of the course of justice, and would vary according to the circumstances of each case.

The judges noted that that Randal's argument regarding the watchdog role of the press is based on cases involving confidentiality of sources. But his interview with Brdjanin was published, with full disclosure of the parties involved; therefore, there are no confidential sources.

Randal lives in Paris where he has been writing books. According to the *New York Times*, Randal would not have been subpoenaed if he had been currently living in the United States because rules for subpoenaing journalists are more stringent here. However, France is a signatory to the documents that created the court and anyone living in one of the signatory countries can be compelled to testify before the court or face imprisonment, according to London's *Guardian* newspaper.

Randal's case has elicited varying responses. In an article published June 20, William Safire called the judges "self-righteous" and said that they are "contemptuous of America's First Amendment." Journalists just "be able to gain access to war zones as objective observers . . . to bear witness to the murder and rape of innocents. . . . " A June 21 editorial in *Newsday* called the ruling "unacceptable" and said that the ruling could mean that journalists in war zones could be prevented from doing their jobs or even killed. An article in the *New York Post* said that journalists could be seen as potential witnesses and would be prevented from access to news, "allowing horrors and atrocities to go undiscovered."

Reporters Without Borders also issued a statement on June 13 protesting the decision.

However, Ed Vulliamy, who also covered the war in Bosnia, took a different view of the Randal case in an article he wrote in the London *Observer*. Vulliamy

Randal, *continued on page 9*

Bay Area Newspapers Searched

Palo Alto police served several newspapers in the San Francisco Bay area with search warrants during June 2002. The offices of the Daily News, which publishes both the *Palo Alto Daily News* and the *San Mateo Daily News*, as well as those of Metro Newspapers, publishers of three Bay area weeklies in San Jose, received search warrants demanding the invoices of customers who purchased advertising space for their massage parlors. According to the Associated Press, some of those customers had been arrested in a May 11, 2002 raid of illegally-operated massage and acupuncture parlors that also served as fronts for prostitution.

Paulo Pereira, an employee of the Daily News, complied with the request, giving police officer Sgt. Lacey Burt a print out of invoices for customers who ran massage parlors and purchased advertising space from the newspapers. Daily News publisher Dave Price said that his attorneys advised him the warrant was extremely broad in scope and would have allowed police to search the newsroom or any other part of the building.

The editor and publisher of Metro Newspapers, Dan Pulcrano, also complied with the search warrant, but said that he did not think the warrant was the appropriate way to obtain ad invoices. "This is judicial indiscretion," Pulcrano was quoted as saying by the Associated Press, "Both the Palo Alto Police Department and this judge should be ashamed."

According to the Associated Press, Paula Kuty, chief district attorney whose office aided police in getting the search warrant, said that an "expansive" reading of the California evidence code probably would have supported the warrant. However, she criticized both law enforcement and judicial officials in the way the situation was handled. The deputy "should have told police not to proceed in this fashion," Kuty said, further noting that, "A judge did review this [warrant] and a judge made the same error, if error it be."

Jim Ewert, legal counsel for the California Newspaper Publishers Association, said that the searches appeared to violate state and federal laws that protect newsrooms.

An editorial posted by the *Palo Alto Daily News* on July 26 cites *Zurcher v. Stanford Daily* (*see* 436 U.S. 547 (1978)), the U.S. Supreme court case where the Palo Alto police executed a search warrant on the *Stanford Daily*, Stanford University's student newspaper. Photographers for the newspaper had been present when protesters turned a fire hose on police, resulting in several officers being injured. The Palo Alto police department issued a search warrant for the *Stanford Daily's* offices, hoping to obtain the photographs and to identify the protesters involved in the incident. The Supreme Court ruled in favor of the police. Congress reacted by passing the Privacy Protection Act, which prohibits the search of a newsroom unless there is probable cause that the newspaper was involved in a crime or in other limited circumstances. None of the exceptions fit the current circumstances facing the Bay area newspapers, the Daily News claimed.

The editorial describes California state laws, (California Penal Code Section 1524(g) and Evidence Code Section 1070) which outlaw newspaper building searches in most cases. The editors claim the laws prevent the kind of search that would have been permitted by the warrant issued because they exempt "any information procured" by any "publisher, editor, reporter, or other person connected with or employed upon a newspaper . . ."

According to the editorial, the Daily News does not plan any further legal action. However, attorneys for the newspapers have sent letters to Police Chief Pat Dwyer, Presiding Criminal Court Judge Hugh Mullin and District Attorney George Kennedy asking for policy changes so that such a search warrant is not issued again.

"Democracy can't survive without a free press, and a free press can't cover the news if newsrooms are subject to government searches. Congress and the state Legislature understand that point. We hope our local officials understand it as well," Daily News editors wrote. (To read the full editorial, go to http://www.paloaltodailynews.com/projs/editorials/072602a.html)

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

> "Democracy can't survive without a free press, and a free press can't cover the news if newsrooms are subject to government searches."
> -*Daily News* Editorial

Randal, *continued from page 8*

had interviewed Milan Kovacevic, who had been involved in Bosnian concentration camps. When Kovacevic was tried in an international court for genocide, Vulliamy was called as a witness. Lawyers were determined to, as they reportedly told the *New York Times*, "roast Mr. Vulliamy on a spit so that no one ever again believes a word he writes."

Nevertheless, Vulliamy wrote that there are times when "neutrality is not neutral but complicit in the crime... We describe what we see objectively and that is sacrosanct. But what we objectively report need not lead us to neutral conclusions." Journalists should not "perch loftily above the due process of law."

Randal's British lawyer, Mark Stephens, has said that the judgment in the case will affect practices at the permanent International Criminal Court. (*See* http://news.bbc.co.uk/hi/english/world/europe/newsid_197800/1978584.stm)

Former President Clinton initially signed the Treaty of Rome that ratified the creation of the International Criminal Court (ICC). The Bush administration has since backed out of the treaty, saying that it will not be sent to Congress for ratification. In a statement dated May 6 and posted on the U.S. Department of State's Web site at http://www.state.gov/p/9949.htm, Marc Grossman, Under Secretary for Political Affairs, said that the U.S. could no longer be a party to the court. Reasons include: the International Criminal Court is an "institution of unchecked power; the Rome treaty dilutes the authority of the UN Security Council; the treaty threatens U.S. sovereignty; the current structure of the ICC undermines the democratic rights of U.S. citizens, and that U.S. citizens working in a peacekeeping capacity may be victims of politicized prosecutions and investigations.

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

Freedom of Speech Stifled

Zimbabwe

The new laws make critical reporting of the government a crime.

Twelve journalists have been arrested in Zimbabwe since the March 15, 2002 passage of repressive new press laws. The Access to Information and Protection of Privacy Act (AIPPA) was passed shortly before the controversial election of Zimbabwean President Robert Mugabe and has been used to intimidate and repress independent journalists in Zimbabwe.

Condemned by the international community, the new laws make critical reporting of the government a crime. Journalists may be arrested for making minor factual errors or printing incorrect information.

American journalist Andrew Meldrum, the London *Guardian*'s correspondent in Harare, Zimbabwe, is the first journalist to stand trial under the Act. He was arrested May 2, 2002 and charged with "abuse of the journalistic privilege and printing falsehoods" in the *Guardian* newspaper. If he had been convicted, he could have faced a two-year prison sentence. Meldrum was acquitted of abusing journalistic privilege on July 15, but was told by an immigration official that he had 24 hours to leave the country. He is currently fighting government efforts to have him expelled.

Meldrum, who has lived and worked as a correspondent in Zimbabwe since 1980, has pleaded innocent to the charge. Leading to his arrest was an article about a woman who was reportedly beheaded by supporters of the ruling ZANU PF party. The story was first reported in the only independent Zimbabwe newspaper, *The Daily Mail.* When *The Daily Mail* found the source was false, the newspaper withdrew the story and published an apology.

The case, which began in mid June of 2002, came before magistrate court judge Godfrey Machey in Harare. The trial offered to be an important case in determining how the draconian new laws would affect the free press in Zimbabwe, and presented the issue of international jurisdiction over the Internet.

Meldrum's lawyer, Beatrice Mtetwa, argued during the hearings that the court did not have jurisdiction to hear the charges because Meldrum's article was published on the *Guardian's* web-site in the UK, not in Zimbabwe.

The prosecution insisted that the court had jurisdiction over the case because by writing the article and sending it to the *Guardian*, Meldrum had thereby published the article himself. The prosecution further argued that because the article could be downloaded off the *Guardian's* web-site in Zimbabwe, the court had jurisdiction to hear the charges.

On July 12, the court denied Meldrum's motion to dismiss the charges against him. Meldrum's attorney argued that the case was built upon an unjust law and that the prosecution did not have sufficient evidence to prove Meldrum's guilt. The magistrate judge concluded, however, that the prosecution had established a case and the trial continued.

On July 15, Judge Machey pronounced Meldrum not guilty because the prosecution had not proved that Meldrum failed to take all reasonable steps to verify the story.

At the conclusion of the trial, immigration officials informed Meldrum that his permanent residency status had been revoked and gave him 24 hours to leave Zimbabwe. Meldrum appealed this order to the High Court, which has asked the Zimbabwe Supreme Court to rule on whether Meldrum's deportation by the Home Affairs Minister is constitutional.

Journalist organizations in Zimbabwe have joined forces in opposition to the new laws. The Independent Journalists Association of Zimbabwe (IJAZ), Foreign Correspondents Association (FCA),the Media Institute of Southern Africa (MISA) Zimbabwe, and the Zimbabwe National Editors' Forum are working to repeal Section 80 of the Act, under which the 12 journalists have been charged.

The FCA filed an urgent application in June in the Zimbabwe Supreme Court, arguing that Section 80 poses a threat to their security and profession. The Supreme Court ruled that the application was not urgent. The organization will continue to fight the law in court, arguing that the Act violates their rights under the Zimbabwe constitution.

In addition to the tough new regulations covering the media in Zimbabwe, the Zimbabwean government has instituted exorbitant accreditation fees for journalists and media organizations. Foreign correspondents will now have to pay $12,000 in U.S. dollars in application and license fees to operate in Zimbabawe – a nonrefundable $2,000 application fee and another $10,000 in operation fees.

Local journalists working for the foreign media will also face large fees of $1,050 while journalists working for local media will pay $120 in application and accreditation fees. Other media groups such as publishers, movie theaters, and advertisers are also subject to fees equivalent to $10,000 dollars. In addition, all mass media services in Zimbabwe must pay a tax of 0.5% of its annual gross profit.

The fees are paid to the media commission, run by government supporter Tafataona Mahoso. The commission has unlimited power to refuse accreditation, effectively giving the commission the power to decide who may or may not work as a journalist in Zimbabwe. Journalists and media organizations operating without prior registration are subject to criminal prosecution under the Act.

—Kirsten Murphy
Silha Fellow

Belarus

Two Belarussian journalists, Nikolai Markevich and Pavel Mozheiko, were convicted of libeling Belarussian President Alexander Lukashenko on June 24, 2002, according to the Associated Press. Both men had worked for the *Pahonia* (Pursuit) newspaper, which had been shut down on November 12, 2001 by order of the Supreme Court of Arbitration.

The newspaper had published an article calling for voters not to support Lukashenko's election to office in September 2001. The newspaper had also included a pamphlet and a poem critical of Lukashenko and carried accusations that he had orchestrated the disappearances of those who opposed him. The articles were also posted to the newspaper's Web site.

Markevich, *Pahonia's* chief editor and Mozheiko, a member of the editorial board, were charged with slander in February 2002, marking the first time in Belarussian history that journalists were charged with libeling the head of state.

In April, three protest rallies were staged across Grodno, Belarus, led by independent journalists to express support for Mozheiko and Markevich. According to the Associated Press, 14 journalists were arrested for their parts in the rallies. Six were convicted, sentenced to between three and ten days of "administrative arrest." Two of the others received fines; two others received warnings; one was released. Hearings for the remaining three journalists were postponed.

The two men wore shirts that read, "I'm a journalist, not a criminal."

Mozheiko and Markevich's trial began in Grodno in early June. During the proceedings, the two men wore shirts that read, "I'm a journalist, not a criminal," and condemned the trial as politically motivated. According to a June 24 TASS report, both men pleaded not guilty. The materials published in *Pahonia* "did not contain any libel, while making principled criticism of abstract persons," the TASS report claimed.

According to an Interfax News Agency Bulletin, Markevich was sentenced to 30 months in "an open correctional facility" while Mozheiko was sentenced to two years in prison. "The law has been raped," Mozheiko said in a June 24 Associated Press story. "The court did not consider a single argument to our benefit."

The conviction of the two journalists has been opposed by the United States, the Organization for Security and Cooperation in Europe (OSCE), Reporters without Borders, and Russia's Glasnost Foundation. Agence France Presse quoted Mozheiko as saying, "It was only thanks to international support that they only limited our freedom and did not take it away entirely."

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

Italy

Two popular Italian television programs whose anchors have been critical of Prime Minister Silvio Berlusconi were removed from the fall 2002 lineup on state television RAI in late June. Michele Santaro and Enzo Baiagi were accused by Berlusconi of making "criminal use of public television," according to the London *Independent*. Executives at RAI attributed the cancellation to poor ratings, but members of Berlusconi's opposition believe that the prime minister is trying to silence any opinions critical of his policies. Berlusconi owns three national private television channels, including Mediaset, the largest in Italy. (*See* Spring 2002 *Bulletin*, "Italian Prime Minister's Media Holdings Running Risk of Becoming a Monopoly").

The *Independent* quoted Gloria Buffo, an opposition member, as saying, "RAI is being transformed from a company of public service into a business of private service working for the political interests of Berlusconi and for the economic interests of Berlusconi and Mediaset."

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

Developments in Internet Law

The Internet and Public Libraries

"... content-based restrictions on speech ... demand[] the precision of a scalpel. ..."
-Judge Edward R. Becker

On May 31, 2002, a federal court special panel in Philadelphia ruled that the Children's Internet Protection Act (CIPA) signed by President Clinton in 2000, is unconstitutional and violates the First Amendment. The Act, codified as Pub. L. No. 106-554, required public libraries to implement software that filters sexually explicit content. By July 1, 2002, any library refusing to implement the software would have risked the loss of federal funding.

The case, *American Library Association v. United States*, 2002 U.S. Dist. LEXIS 9537, began when the plaintiffs, a group of libraries, library associations and civil liberties groups, (collectively the American Library Association or ALA) brought suit in federal court, alleging that the Act violates the First Amendment. The ALA argued that the CIPA is facially unconstitutional because it induces libraries to violate the First Amendment rights of patrons and creates an unconstitutional condition where the receipt of federal money is tied to the relinquishment of a constitutional right. In the alternative, the ALA claimed that even if the CIPA was not found unconstitutional on those grounds, the law is an impermissible prior restraint on speech.

The government argued that the Act served the interest of protecting children from viewing harmful materials on the Internet. The filtering software is highly effective, claimed the government, and is not required to be flawless. In addition, the government contended, libraries already engage in filtering when they purchase books for their collections.

Third Circuit Court Judge Edward R. Becker delivered the opinion of the three-judge panel. In deciding that the CIPA violates the First Amendment, the court relied on a Supreme Court decision, *South Dakota v. Dole* (483 U.S. 203 (1987)). In *Dole*, the Court set forth four categories of constraints on Congress's spending power. The fourth category bars Congress from creating an unconstitutional condition – that is, withholding federal funds from those who refuse to give up a Constitutional right. The panel was faced with the issue of whether the CIPA required libraries to infringe on the First Amendment rights of patrons in order to receive federal funds.

The court found that in addition to creating an unconstitutional condition, the Act's library filtering requirement was overbroad because it covered protected as well as unprotected speech. In addition to blocking sexually explicit material, the filtering software blocks legitimate sites, which may contain information about topics such as breast cancer and homosexuality. The court also concluded that the filters are underinclusive and could allow access to some pornographic material.

Although the court expressed sympathy for the government's position and interest in protecting minors, it concluded that the current filtering software is simply too crude to pass scrutiny under the First Amendment. "It is currently impossible, given the Internet's size, rate of growth, rate of change, and architecture and given the state of automated classification systems, to develop a filter that neither under blocks nor over blocks a substantial amount of speech," Judge Becker wrote.

The court also found that the Act was not narrowly tailored to serve the government's interest in preventing minors from accessing obscene or pornographic web sites. "Where the government draws content-based restrictions on speech in order to advance a compelling government interest, the First Amendment demands the precision of a scalpel, not a sledgehammer. We believe that a public library's use of the technology protection measures mandated by CIPA is not narrowly tailored to further the governmental interests at stake."

Less restrictive alternatives to the filtering technology exist, such as providing parents with filters to use when their children are surfing the Internet on library computers, or creating a library policy on Internet use. Libraries could also position computer monitors to obscure screen content, the court said.

Under the terms of the Act, any appeal of the federal court's decision must be made directly to the Supreme Court, which is required to review the appeal. The Justice Department is said to be reviewing the case in consideration of an appeal.

American Library Association is the third decision to overturn similar Congressional efforts to regulate Internet access. Both the 1996 Communications Decency Act and the1998 Child Online Protection Act were struck down by the judiciary.

The provisions of the Act that apply to Internet filters in public schools were not affected by the federal court's ruling.

—Kirsten Murphy
Silha Fellow

Minnesota Supreme Court Rules on Internet Libel Case

The Minnesota Supreme Court ruled in July 2002 that statements made by a Minnesota resident in an Internet chat room were not sufficiently directed toward readers in the state of Alabama to require Minnesota to confer "full faith and credit" on an Alabama district court decision finding that the statements were libelous (*see Griffis v. Luban*, 2002 Minn. LEXIS 461 (Minn. 2002).

The Minnesota high court's decision that Alabama does not have jurisdiction over Minnesota resident Marianne Luban relied on a narrowed interpretation of the test used in the 1984 U.S. Supreme Court ruling in *Calder v. Jones* (465 U.S. 783 (1984)). In that case, a California plaintiff sued the *National Enquirer* over an allegedly libelous article written about the plaintiff. Although the defendant *National Enquirer* was based in the state of Florida, the Supreme Court determined that because the magazine had its largest circulation in California, and because the article was "expressly aimed" at California and concerned the California activities of a California resident, the judgment was enforceable in that state.

> The activity that caused the injury must be directed towards the forum state.
> -MN Chief Justice Kathleen Blatz

Katherine Griffis, an Alabama resident, sued Luban in Jefferson County, Ala. in September 1997. Griffis's claim alleged that Luban had defamed her and invaded her privacy when she published statements Luban made on the Internet newsgroup, sci.archaeology.

Luban and Griffis had participated in on-line discussions on the newsgroup site on the subject of ancient Egypt and Egyptology since 1996. In the latter part of 1996, Luban posted a message on the site challenging Griffis's academic credentials, accusing Griffis of obtaining her degree from a "box of Cracker Jacks," and calling Griffis a liar.

Luban did not appear in the Alabama court in December 1997. Griffis obtained a default judgment of $25,000. She filed the judgment in Ramsey County district court in May 1998. The Minnesota district court decided to give full faith and credit to the Alabama ruling and enforce the Alabama court judgment.

Luban appealed to the Minnesota Court of Appeals in 2001. The appellate court upheld the district court's decision to enforce the Alabama judgment, concluding that Luban's potentially defamatory statements were being read on the Internet in Alabama and that Luban knew what effect those statements would have in Alabama. (*See Griffis v. Luban*, 633 N.W.2d 548 (2001)).

The Minnesota Supreme Court overturned the lower courts and vacated the judgment, finding that the Alabama court did not have jurisdiction over Luban. In discussing the decision in *Calder v. Jones*, the court ruled that other courts have read the so-called "effects test" in that case too broadly, effectively allowing any state where an injured plaintiff resides to haul an out-of-state defendant into local court.

Chief Justice Kathleen Blatz, writing for the court, adopted the U.S. Court of Appeals (3rd Cir.) test for a narrower application of the "effects test," holding that mere residence in the forum state is not enough to enforce a judgment against an out-of-state defendant. Instead, the court wrote, the activity that caused the injury must be directed towards the forum state.

The pivotal question in the case was whether Luban had "expressly aimed the allegedly tortious conduct at the forum such that the forum was the focal point of the tortious activity," the court said. The case turned upon whether Luban's statements on the Internet were expressly aimed at the state of Alabama or at an Alabama audience other than Griffis herself.

The court concluded that the news group was organized around subjects of archaeology and Egyptology, not Alabama. No evidence was presented that any other person in Alabama ever read the statements, Blatz wrote. Luban's statements were made in a public forum, the Internet, which has no fixed state of publication or readership, and no specific ties to Alabama. "The fact that messages posted to the newsgroup *could* have been read in Alabama, just as they *could* have been read anywhere in the world, cannot suffice to establish Alabama as the focal point of the defendant's conduct," Blatz concluded.

—Kirsten Murphy
Silha Fellow

Developments in Internet Law

New York Rules on Republication

On July 2, 2002, the New York Court of Appeals, the state's highest court, unanimously decided that Internet publications are subject to the single publication rule, so that each subsequent viewing of an Internet site is not considered to be a republication. The decision, *Firth v. State*, 2002 N.Y. LEXIS 1901, upheld a Court of Claims decision to grant summary judgment to the State of New York, denying plaintiff George Firth's defamation claim.

The case began when George Firth, a law enforcement official with the New York Department of Environmental Conservation, was harshly criticized by the state Inspector General. On December 16, 1996, the Inspector General published on its Web site a report entitled "The Best Bang for Their Buck," in which Firth's management style and weapons procurements were criticized. Firth was suspended from his employment with the State and later resigned.

[The court] unanimously decided that each subsequent viewing of an Internet site is not considered a republication.

Firth sued for defamation in the New York Court of Claims against the State of New York on March 18, 1998, over a year after the initial publication of the report. He sought a total of $10 million dollars in damages. The Court concluded that the claim was barred by the one-year statute of limitations, rejecting Firth's argument that the ongoing availability of the report on the Inspector General's Web site constituted a new publication.

Judge Howard Levine, writing for the Court of Appeals, held that the lower court had correctly barred Firth's claim as untimely under the statute of limitations. Applying traditional defamation principles to the Internet, the court concluded that the single publication rule applied to the Inspector General Web site. The rule states that although a publication may continue to circulate and be accessible to the public, the date of publication is considered to be the date of initial publication, which is the date from which the statute of limitations begins to toll.

The court considered the policy implications of adopting Firth's multiple publications rule, where continued access to Web sites would constitute republication. These include harassment of web publishers and the burden on the judiciary. Adding to these considerations, the court said, are the unique advantages of the rapidly changing Internet as a communications tool. "A multiple publication rule would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise."

The Court of Appeals also rejected Firth's claim that a modification of the Web site, which was not directly related to the alleged defamation material, constitutes republication.

—Kirsten Murphy
Silha Fellow

House Passes Amendment to Child Pornography Protection Act

In a reaction to the U.S. Supreme Court's ruling on April 16, 2002 that it is unconstitutional under the First Amendment to ban the production, possession or distribution of computer-generated child pornography (*Ashcroft v. Free Speech Coalition*, 122 S.Ct. 1389 (2002); *see* also Spring 2002 *Bulletin*, "Supreme Court Strikes Down Virtual Child Pornography Law"), the House passed HR 4623, the Child Obscenity and Pornography Prevention Act of 2002, on June 25. The bill amends the 1996 Child Pornography Protection Act (CPPA), 18 U.S.C. §2256.

Representative Lamar Smith (R-TX) who sponsored the bill, said that HR 4623 "reaffirms the ban on child pornography in a manner that can withstand constitutional review," according to a report in *Tech Law Journal*.

In drafting the bill, supporters of the bill drew on to Justice Thomas' concurring opinion in *Ashcroft v. FSC*. Thomas wrote, "[T]echnology may evolve to the point where it becomes impossible to enforce actual child pornography laws because the Government cannot prove that certain pornographic images are of real children."

Section 2256 of the CPPA contains definitions. Paragraph 8 specifically defines child pornography as "any visual depiction, including any photograph, film, video, picture or computer or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of sexually explicit conduct.... " HR 4623 will amend clause (B), which currently states: "such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct" to read instead "such visual depiction is a computer image or computer-generated image that is, or is nearly indistinguishable... from that of a minor engaging in sexually explicit conduct," encompassing the capability of computers to reproduce realistic-looking images.

Attorney General John Ashcroft urged the Senate to vote on HR 4623 as soon as possible, saying that the bill "will strengthen the ability of law enforcement to protect children from abuse and exploitation."

—Kirsten Murphy
Silha Fellow

Internet Use Restricted in China

A "Declaration of Internet Users' Rights" was published by 18 Chinese dissidents and intellectuals in China on July 29, 2002, according to Agence France-Presse. The declaration calls for the Chinese people to have complete freedom in surfing the Internet. Additionally, the Declaration of Rights states that creators of Web pages must be restricted only with regard to "evident and real" slander, pornography or certain "violent attacks or behavior."

Internet access in China is very tightly controlled, and most people are forced to use "Internet cafés" in order to surf the Web and maintain anonymity. According to Reuters, many of these cyber cafes are run illegally and ignore fire and safety regulations.

Such disregard led to the deaths of 25 people on June 16, when a fire broke out in an Internet café in the northeastern port city of Dalian. The staff of the Lanjisu Cyber Café had left for the night, locking the doors but allowing some customers to remain inside to surf the Internet. When the café caught fire, the customers, mostly students, were trapped. The mayor of Beijing subsequently ordered all of the city's 2,400 cafés to close. New cafés were not allowed to open unless they passed safety inspections. Agence France-Presse reported that on July 18, 30 of the city's cyber cafés had reopened.

Wang Yuesheng, who operates a legal Internet café, told Reuters that four government departments must approve a café's license before it can become operational. Of Beijing's 2,400 web cafés, only 200 are legal, according to the official Xinhua news agency. Cyber cafés are not permitted within 200 yards of factories or businesses, primary or secondary schools, or any government or Communist Party installation. Café owners are required to pay for and install equipment that will allow police to monitor Internet activity. Police search the computers for activity relating to Taiwan, Tibet, the officially banned Falun Gong spiritual movement, and pornography.

The declaration calls for the Chinese people to have complete freedom in surfing the Internet.

On July 15, the Associated Press reported that Internet portals in China have signed a voluntary pledge to limit user access to sites that do not conform with official Chinese guidelines. Signatories to the pledge include Yahoo!'s Chinese-language site, which agreed to refrain from "producing, posting or disseminating pernicious information that may jeopardize state security and disrupt social stability." Those who sign the pledge also agree not to spread "superstition and obscenity," and to block any foreign-based Web sites that contain "harmful information." Currently, most Web sites belonging to human rights groups and Western media are blocked. New regulations will take effect beginning August 1, 2002 that, according to the Beijing *Morning Post*, will "promote the healthy development of Internet publications."

In related news, satellite transmission of the British Broadcasting Corporation's programming into China was cut off on July 1, 2002. According to the Associated Press, Chinese officials said the shut-down would be temporary. It was not revealed what portion of the transmissions was offensive, although the BBC reported that the shutdown came after a broadcast on the fifth anniversary of the 1997 hand over of Hong Kong from Britain to China during which the Falun Gong movement had been mentioned.

All foreign channels have recently been required to broadcast through a state-owned satellite, which the Chinese government can switch off at will. However, there are reportedly other satellites continuing to broadcast the BBC into China.

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

Silha Center Files Brief in *Bunner* Case

The Silha Center has joined the American Civil Liberties Union and the American Civil Liberties Union of Northern California in an *amicus* brief in *DVD Copy Control Association, Inc. v. Bunner* (No. S102588), filed in the California Supreme Court on July 11, 2002. Silha Professor and Silha Center Director Jane E. Kirtley was co-author of the brief.

The case arose after several individuals posted DeCSS, a computer program that allows the decryption of DVDs, on the Internet. The DVD Copy Control Association claims that the publication unlawfully disclosed trade secrets, and obtained an injunction to stop the defendants from "posting or otherwise disclosing or distributing on their websites or elsewhere, the DeCSS program . . . or any other information derived from this proprietary information." The California Court of Appeal overturned the injunction, finding it to be an unconstitutional prior restraint (see *DVD Copy Control Association v. Bunner*, 113 Cal. Rptr.2d 338 (Cal. Ct. App. 2001)).

The primary issue raised on appeal is a narrow one: does the First Amendment permit an injunction prohibiting disclosure by third parties of lawfully obtained and widely disseminated information? It is similar to the question decided by the U.S. Supreme Court in *Bartnicki v. Vopper*, 532 U.S. 514 (2001), in which the high court ruled that journalists could not be sued for publishing the contents of an illegally-intercepted telephone conversation when the conversation concerned a matter of public interest and when the journalists had done nothing illegal to obtain the tape. (*See* Summer 2001 *Bulletin*, "U.S. Supreme Court Rules In Historic Bartnicki Case").

Another issue which may be considered by the court is whether computer software such as DeCSS is "speech," and, if so, whether its distribution can be enjoined. (*See* Winter 2002 *Bulletin*, "Appeals Court Rules Ban on Hyperlinks Constitutional.") The date for oral argument has not yet been set. The text of the *amicus* brief can be found at www.silha.umn.edu. Click on "Resources."

Developments in Internet Law

Cybersquatting

Cybersquatting is defined in Black's Law Dictionary as "the act of reserving a domain name on the Internet, especially a name that would be associated with a company's trademark."

In recent weeks, two men in different parts of the country have been ruled to be cybersquatters. One of them considers it a matter of freedom of speech; for the other, it is a matter of profit.

New York resident John Barry has arguably been cybersquatting for profit. Operating a company named "Domains for Sale," Barry has eight rulings against him: three with the World Intellectual Property Organization (WIPO) and five with the National Arbitration Forum. In *Nielsen Media Research, Inc. v. Domains for Sale, Inc.*, filed with the WIPO, Barry reportedly wrote Nielsen Media Research, Inc. that <nielsenmediaresearch.com> could be purchased from him for $1000. But Nielsen Media Research, Inc. responded that Barry's fee was more than it would have cost them to simply register the domain name themselves. Other cases involve such companies as Walgreens, Sears, and the pharmaceutical company Searle.

For one cybersquatter, it is a matter of freedom of speech; for the other, a matter of profit.

William Purdy, Jr., of South St. Paul, Minnesota, has been targeting domain names similar to well-known brand names and newspapers, where he then posts anti-abortion information. He claimed he legally obtained the domain names and that the issue is one of free speech. He said he had specially targeted the *Washington Post* and the *Minneapolis Star Tribune* because of their pro-abortion stance.

According to an article posted on wired.com, Purdy was inspired by Barry's entrepreneurial spirit and modified Barry's methods to suit his goals. Purdy reportedly negotiated with Barry so that visitors to www.minneapolispublicschools.com would be directed to an abortion site. The school system obtained ownership of the site on July 16, and now visitors are redirected to its official Web site at www.mpls.k12.mn.us.

A July 23, 2002 ruling against Purdy was handed down by United States District Judge Ann D. Montgomery in Minnesota District Court. Besides prohibiting Purdy from using domain names similar to famous trademarks on the site, Montgomery also told Prudy he must notify domain registrars and instruct them to take action to stop his sites from functioning. She further ordered Purdy to transfer ownership of the domain names to the proper trademark holder. Montgomery gave Purdy five days in which to file a report with the court as well as with the plaintiffs in the case, telling them that he had complied.

This case was not the first time that Purdy had come before a judge for creating a Web site with a name confusingly similar to a well-known company. In 1993, after his involvement in a train accident while working for Burlington Northern Railroad, Purdy began using the service mark "BSNF" (standing for "Bringing Safety Now First"). He created a Web site promoting railroad safety. In 1993, Burlington Northern Railroad merged with Santa Fe Railway, thereby creating BNSF Corporation. In 1996, the U.S. Patent and Trademark Office granted Purdy use of the service mark "BNSF," but two years later, a federal court in Texas ordered the patent office to cancel the registration. The Fifth Circuit affirmed the lower court's ruling, and Purdy sued in federal court to determine his rights to hold "BNSF."

A third cybersquatter, Thomas P.A. Fitch, who lives in Florida, runs a web site with a name similar to that of the *Wyoming Tribune-Eagle* which also takes visitors to an anti-abortion web site. According to a story in the *Wyoming Tribune-Eagle*, Fitch also obtained the domain from Barry.

To date, no suit has been filed by the newspaper against either Fitch or Barry, although Scott Walker, vice president of marketing and operations at the newspaper, said they may try using WIPO to arbitrate a solution to the situation.

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

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Philadelphia Inquirer Reporters Found in Contempt

Four reporters from the *Philadelphia Inquirer* were found in contempt and sentenced in June 2002 for violating a court order not to "contact or attempt to interview" any member of the jury of the New Jersey murder trial of Rabbi Fred Neulander, who was charged with hiring a hit man to kill his wife, Carol. The trial ended on November 13, 2001 in a mistrial.

In July 2001, before the Neulander trial began, Camden County, N.J. trial Judge Linda G. Baxter issued an order forbidding the media to publish the names of the jurors, and barring them from contacting jurors, even after they would be discharged. She further prohibited jurors from speaking with journalists. The *Inquirer* asked Baxter on two occasions to lift her order. She refused to do so. The *Inquirer* went twice to New Jersey appellate division to appeal Baxter's order, but was unsuccessful.

When the jurors were discharged on November 13, the *Inquirer*, together with NBC news, again asked Baxter to lift the order. She again denied the request. *Inquirer* reporters nevertheless obtained interviews with members of the jury. On November 15, the Inquirer published a story about the Neulander mistrial, naming members of the jury and including information from interviews with them. Contempt proceedings were brought against the reporters in Superior Court in May. Judge Theodore Z. Davis found the four *Inquirer* reporters guilty of violating Baxter's order and held them in contempt on June 17.

Davis found that George Anastasia, Dwight Ott, and Emilie Lounsberry had contacted and spoken with members of the jury, and that Joseph A. Gambardello had published information that revealed the identity of members of the jury. Davis said that Baxter's order was clear and that the reporters were aware of it. The *Inquirer's* executive editor, Walker Lundy, said that the newspaper would appeal the decision to the Supreme Court of New Jersey. (Before he was named editor of the *Inquirer* in November 2001, Lundy had edited of the St Paul *Pioneer Press* in Minnesota.)

On July 20, based on a ruling handed down by the New Jersey Supreme Court in April, Davis suspended the 180-day jail terms originally given to Anastasia, Lounsberry and Ott, provided they perform five to ten days of community service. They were also fined $1000 each, as was Gambardello. The maximum penalty for contempt in New Jersey is six months in jail and a $1000 fine. Another writer, Carol Saline of the *Philadelphia Magazine*, was also found in contempt for talking to a juror while the trial was in progress. She was given a $1000 fine and a 30-day suspended sentence.

New Jersey Supreme Court Justice Gary Stein wrote the majority opinion, joined by Justices James Coleman, Jaynee La Vecchia, Peter Verniero, and James Zazzali, which was issued in July (*see In re: Application of Philadelphia Newspapers, Inc.*, 2002 N.J. LEXIS 1074). Because jurors' names are part of the public record, Stein wrote, the ban on naming the jurors could not stand. However, jurors' deliberations "are conducted in secrecy to preserve the integrity of the jury process," and therefore the prohibition on contacting the jurors until after the retrial was constitutional. Particularly in the case of a mistrial, when a new jury will be selected and the case tried again, it is important that the deliberations of the first jury be kept secret so that the prosecution will not have an undue advantage in presenting the case, he wrote.

Justice Virginia Long, joined by Chief Justice Deborah T. Poritz, concurred in part, but added that the restriction placed on the jurors violated their First Amendment rights, particularly when the trial had been carried, gavel-to-gavel, on television and the Internet. "No aspect of this case has escaped public discourse, " Long wrote. "Thus, it is extremely unlikely that any comments made by former jurors would give even a crumb of new insight to a moderately competent prosecutorial team."

A retrial in the Neulander murder case has been scheduled for September 2002 in Monmouth County. The venue was changed because Neulander's attorneys believe that the publicity surrounding the case made a fair trial impossible in its present location.

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

"No aspect of this case has escaped public discourse. . . ."
-NJ Justice Virginia Long

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Personal Freedoms at Risk

European Union and Web Site Users

Europol, the police and intelligence arm of the European Union, has proposed a plan that will require member states' telephone operators and Internet Service Providers to retain records regarding telephone and Internet activity for a period of up to five years.

The plan gives new powers to police and intelligence agencies to monitor e-mail activity and telephone calls. The code was drafted at a meeting in the Europol Headquarters in The Hague in April 2001, when police, intelligence services and other European officials gathered in secret.

The plan gives new powers for police and intelligence agencies to monitor e-mail activity and telephone calls.

On May 30, 2002, the European parliament approved revisions to the 1997 Telecommunications Data Protection Directive, adopting the basic proposals drawn up at the April Europol meeting. The approval in parliament followed on of the heels of the January 2002 Council of Ministers' adoption of a common position that member states could require retention of data for a limited time.

The move towards data retention reflects a dramatic shift in EU privacy law, which many attribute to the September 11, 2001 terrorist attacks on the United States. The revisions give each of the 15 EU member states the right to authorize data retention for law enforcement purposes for a limited period of time. Under the 1995 Data Protection Directive, personally identifiable data could only be kept for a short time for billing purposes, and then had to be destroyed.

Under the new code, companies running Internet sites will be required to record passwords and Web-page visits. Police and intelligence services will be able to ascertain senders and recipients of e-mails, dates and times, as well as the contents of messages. Financial data will also be kept, including credit card and bank details.

Telephone companies will also be required to retain text messages and details of calls made on mobile phones. Details of calls will include numbers dialed, address, birth date and bank details of the telephone subscriber. Police will also be able to track down the geographical location of anyone making calls using mobile phone call records.

Europol asserts that the retention of telecommunications data will assist police and intelligence services efforts to prevent such crimes as international terrorism, cyber crime, and drug running. In addition, the Commission has drawn a distinction between data retention and information turned over wholesale to police. A policy that ensures that data is saved for a limited period of time means that police and intelligence will not possess the information, but must request data from network operators before the operators are permitted by individual member state law to destroy the information.

Although the new law contains language requiring that law enforcement access to data be "appropriate, proportionate and limited in length," the plan has been denounced by privacy advocates in Europe and the United States as a highly intrusive form of surveillance. Civil libertarians express concern that the data archives will be used to conduct fishing trips to find information to incriminate individuals. Tony Bunyan, of the civil liberties group Statewatch, argues that if telecommunications data is retained "not only will data protection be fatally undermined but so too will be the very freedoms that distinguish democracies from authoritarian regimes." (*See* www.statewatch.org/news/2002/may/05surv.htm for full article.)

Europol is currently drawing up a manual of standards for member state police and intelligence on how to implement the code.

A copy of the agenda for the April meeting at Europol headquarters, entitled: "Expert Meeting on Cyber Crime: Data Retention," is available at www.statewatch.org/news/2002/may/europol.pdf

—Kirsten Murphy
Silha Fellow

Homeland Security

President Bush's proposal for a new cabinet-level Department of Homeland Security contains provisions for a broad FOIA exemption. Under the Bush plan, information voluntarily supplied to the government by private businesses would not be subject to disclosure under the Freedom of Information Act.

House Majority Leader Richard Armey (R-Texas) introduced HR-5005, the Homeland Security Act of 2002, on June 24, 2002. Section 204 of the bill states that information that exposes national "infrastructure vulnerabilities or other vulnerabilities to terrorism" will be exempt from the Freedom of Information Act. The bill is currently under review by 12 committees of the House of Representatives, and the FOIA exemption debate is one of the flash points over the legislation. The FOIA already contains numerous exemptions, including law enforcement and national security exemptions.

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The Bush administration argues that the exemption will encourage businesses to share security information with the government. According to supporters of the bill, which include telecommunications and energy industry representatives, release of "critical infrastructure" data through FOIA creates risks for the private sector.

Although the House Commerce Committee Chairman Billy Tauzin (R-La) removed the original FOIA exemption language during the Committee mark-up on July 11, 2002, on the grounds that the exemption should be narrower, the House Select Committee on Homeland Security has the final say on the FOIA exemption.

Bill Smith, the Chief Technology Officer of BellSouth, has stated that the telecommunications industry is reluctant to share information with the government because of security concerns. Smith testified before the House Subcommittee on Oversight and Investigations on July 9, 2002 that BellSouth has "received numerous requests for sensitive information – such as lists of critical facilities – from federal, state and local authorities. From the perspective of a corporation such as BellSouth, these requests are troubling because if such a list were released publicly, whether through a FOIA request or through accidental disclosure, it could provide terrorists with a road map directing them to our most critical locations."

However, critics of the proposed exemption point out that the types of information which concern industry are already covered by existing FOIA exemptions. Exemption 1 of the FOIA covers software vulnerabilities of classified computer systems used by the government and Exemption 4 protects trade secrets and confidential information. David Sobel, the General Counsel for the Electronic Privacy Information Center, who also testified on July 9, stated that Exemption 4 covers all the "critical infrastructure" material.

. . . [T]he types of information which concern industry are already covered by existing FOIA exemptions.

Sobel urged the Subcommittee to reject the new exemption as unnecessary and potentially dangerous legislation. "If a company is willing to fudge its financial numbers to maintain its stock price, what assurance would we have that it was not hiding behind a "critical infrastructure" FOIA exemption in order to conceal gross negligence in its maintenance and operation of a chemical plant or a transportation system?" asked Sobel.

Government watchdog groups expressed concern over other aspects of the Bush proposal. They argued that the Bush plan limits the agency's accountability and openness by establishing advisory committees that may be closed to the press and public. The President's Homeland Security Advisory Council has already met in secret session on July 2, 2002. Many express concern that the administration's penchant for secrecy will shape the guidelines and culture of the new department, creating an executive Agency that will not have to answer to the public about its activities and competence.

The Department would also act without the benefit of an internal watchdog under the Bush plan, as the proposal hamstrings the ability of the departmental inspector general to conduct investigations of the department. The Cabinet secretary will have the power to halt Inspector General investigations or audits.

In addition, the legislation gives the secretary of Homeland Security discretion to determine whether department employees are covered by current whistleblower laws, possibly creating legal or employment repercussions for employees who report on agency mistakes or misconduct.

Two other pending bills proposed even broader protection of the private sector than H.R. 5005. Senator Robert Bennett (R-Utah) supported a bill, S. 1456, which would create more specific FOIA exemptions. Representative Thomas Davis (R-VA) has proposed that the Homeland Security bill protect businesses from anti-trust actions and liability suits (H.R. 2435).

However, after weeks of negotiations with Senator Patrick Leahy (D-Vt) and Carl Levin (D-Mich), Senator Bennett agreed to several compromises to a Homeland Security Bill (S. 2452) that would significantly narrow the FOIA exemptions for the private sector.

The Senators' agreement allows records to be covered by the exemption, not simply information, and only records that have been submitted to the Department of Homeland Security; records submitted to other agencies are not covered by the exemption. Records given to other agencies, even if also submitted to the Department of Homeland Security, are not subject to the exemption.

The submitter of the record is required to certify its confidentiality and confidentiality is limited to records containing information about threats and vulnerabilities to the national infrastructure, as opposed to any information concerning "critical infrastructure." Furthermore, the compromise narrows the definition "furnish voluntarily, " to ensure that any company submissions to receive government grants, licenses or other government benefits are not covered by the exemption.

The Senators also agreed that the FOIA exemption will not preempt state or local sunshine laws, nor will private companies gain civil or antitrust immunity. Any portions of voluntarily submitted reports that are not classified under the exemption are subject to FOIA and any person who discloses classified information is not subject to criminal penalty.

—Kirsten Murphy
Silha Fellow

Reporters Subpoenaed, Detained

Attorneys for Lindh Subpoena CNN Reporter

On July 12, 2002, Federal District Judge T.S. Ellis III refused to quash a subpoena issued to Robert Young Pelton, the CNN reporter who interviewed American Taliban fighter John Walker Lindh. (See *U.S. v. Lindh*, 2002 U.S. Dist. LEXIS 13233 (D. Va., July 12, 2002)) Four days later, the issue became moot when Lindh pled guilty to two felony charges.

Lindh's attorneys subpoenaed Pelton to testify at a hearing seeking to suppress videotape and testimony he gathered when interviewing Lindh following his capture in November 2001. They contend that Green Berets who were friends of Pelton helped the reporter gain access to Lindh, and that Pelton continued filming Lindh despite Lindh's requests that he stop. Additionally, Lindh's attorneys claim that their client was malnourished, wounded and in a weakened physical condition and therefore unable to make a clear decision about granting the interview. They assert that Pelton, who interviewed Lindh together with a U.S. Special Forces medic, acted as an agent of the government and that Lindh's Miranda rights were not read to him prior to his speaking with Pelton.

[Lindh's attorneys] assert that Pelton acted as an agent of the government . . .

On July 5, Pelton moved to quash the subpoena on the ground that, as a journalist, he has a First Amendment right not to disclose information obtained while gathering news, and that he was not acting as a government agent.

Ellis applied a two-part analysis in his ruling: whether the subpoena satisfies the requirements of Rule 17, Federal Rule of Criminal Procedure, and whether the First Amendment journalist's privilege applies in this case. Ellis concluded that the subpoena was "properly issued" to Pelton and that Pelton's testimony would be "both material and favorable to the defense."

Ellis interpreted *Branzburg v. Hayes* (408 U.S. 665 (1972)) narrowly, finding that the U.S. Supreme Court "considered and expressly rejected the creation of a First Amendment journalist privilege in criminal cases. . . .[A] First Amendment journalist privilege is properly asserted in this circuit where the journalist produces some evidence of confidentiality or government harassment. Only where such evidence exists may district courts then proceed to strike a balance in the circumstances between the competing interests involved, namely 'freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.'"

Pelton admitted that there is no basis to claim confidentiality in this case, nor that he was the subject of government harassment. However, he argued that, if forced to testify at Lindh's trial, particularly under the suspicion of having been a government informant, it could endanger all correspondents. Ellis rejected this argument as a "novel claim," saying that there has never been a case where a journalist claimed First Amendment protection when acting as a war correspondent. The potential danger to Pelton is outweighed by Lindh's Sixth Amendment right to "prepare and present a full defence to the charges against him."

Although Ellis upheld that the subpoena, he granted Pelton leave to renew the motion to quash in the event that he was called as a witness to the suppression hearing.

Lindh agreed to plead guilty to the charges that he had provided services as a soldier to the Taliban, a felony. He also pled guilty to a separate charge of carrying explosives while in service to the Taliban. The government will drop the remaining counts against Lindh, including charges that he conspired to kill Americans and participated in acts of terrorism. Both sides agreed to a 20-year prison term and a fine of $500,000. Sentencing will be on October 4.

A documentary on the war, "House of War: Uprising at Mazar-e-Sharif" was scheduled to air on CNN August 6. The program reportedly would include interviews with Pelton describing his meeting with Lindh as a captured prisoner, according to the *Washington Times*.

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

Wally Wakefield Subpoena Update

In mid-June, 2002, a Minnesota Court of Appeals panel reversed a lower court ruling that held *Maplewood Review* reporter Wally Wakefield in contempt for not revealing his sources in a libel suit, releasing Wakefield from contempt charges and a $200 a day fine. (*See* Winter 2002 *Bulletin*, "Minnesota Shield Law Facing Test" and *Weinberger v. Maplewood Review et al.* (2002 Minn. App. LEXIS 711 (Minn. Ct. App. 2002))

Weinberger, a football coach for a local high school, had been fired from his job following accusations of misconduct. Wakefield had covered the story for the *Maplewood Review*, incorporating statements from unnamed school officials who alleged that Weinberger had intimidated the players. Weinberger sued the school district and four school officials for defamation. Wakefield himself was not sued, but in August 2000, he was subpoenaed to reveal the identities of the confidential sources. Wakefield refused. At a November 2001 hearing, he was found in contempt of court and was fined $200 a day. Wakefield appealed his case to the Minnesota Court of Appeals.

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Wakefield, *continued from page 20*

Presiding Judge Terri Stoneburner, joined by Judges Harten and Anderson, wrote that five interrelated factors had to be considered before a reporter could be compelled to reveal confidential sources in libel cases: 1) the relevance of the source's identity to the action; 2) the availability of the information from alternative sources; 3) whether a compelling interest in the information or the source exists; 4) whether the nature of the litigation is sufficiently compelling to warrant the disclosure of a confidential source, and 5) whether the defamatory statements were false and made with actual malice.

Stoneburner wrote that Weinberger had not proven that any of the statements made against him were made with actual malice. She further stated that Wakefield was not named in the defamation suit, and Weinberger himself admitted to the district court that he does not suspect either Wakefield or the *Maplewood Review* of creating falsely attributed statements. Because Wakefield could not speak to the intentions of those who furnished information to him, Weinberger sought to have them identified so they might be forced to reveal their intentions – and whether or not they had malicious intent – for themselves.

Stoneburner acknowledged that Wakefield's article had "great public interest and the public would be harmed by any chilling effect on the free flow of this type of information." She noted that Wakefield's affidavit stated that his sources had said they would not be willing to provide information to him if as their identities were revealed because they feared retaliation from Weinberger. "[T]he ability of the press to gather information about public officials is at' least as great as Weinberger's interest in the disclosure ordered in this case," Stoneburner wrote. "... [T]he chilling effect and burden on the media that will result from making a reporter a witness against sources to whom he promised confidentiality are more significant than Weinberger's interest in the disclosure and his inability to obtain the information he seeks from other sources."

Weinberger and his attorney are appealing the appeals court's decision to the Minnesota Supreme Court.

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

[Wakefield's article] had "great public interest and the public would be harmed by any chilling effect on the free flow of this type of information."

-Judge Terri Stoneburner

Reporter Held by State Department

Joel Mowbray, a reporter for the *National Review*, was held for half an hour at the conclusion of a briefing at the State Department in Washington, D.C. on July 12, 2002. Mowbray had written an article critical of the U.S. visa policy in Saudi Arabia, which he speculated may have allowed three of the September 11 terrorists to enter the country. According to a report in the *Washington Post*, Mowbray also testified before a House Government Reform Subcommittee in June 2002. Those authorities are currently investigating Saudi visa fraud.

Mowbray has published various articles in the *National Review* and on the magazine's Web site (*see* http://www.nationalreview.com). He relied on a classified cable that was reportedly sent to the State Department by U.S. Ambassador Robert Jordan calling for an end to the Saudi visa program. The July 12 briefing concerned the visa policy, and Mowbray brought the cable with him in order to compare its contents to what the State Department claims the cable contained. According to a story posted by the Reporters Committee for Freedom of the Press (http://www.rcfp.org/news/2002/071usoffi.html), Mowbray was confronted while trying to leave the briefing.

"It was surreal," Mowbray is quoted as saying by the Reporters Committee, "It started out rather benignly. But then they asked me how I got the cable and where I got it from, and I realized they were looking for my source."

Mowbray denied having the cable with him and he was not searched. He used his cellular phone to call his editors and an attorney, although initially a security guard told him that he was not being detained. But moments later when Mowbray tried to walk away, another guard stopped him and told him that "Now you are being detained." Fifteen minutes later, he was released without explanation.

When questioned about the incident, State Department spokesman Richard Boucher replied, "Every reporter in this room at one time or another has written a story purportedly based on classified documents. But nobody has ever said in here, on camera, on-the-record until last week, "I have it – I have a classified cable with me right now, right here,' and gotten up to leave the building. What the guards did was entirely appropriate." (*See* full story at Federation of American Scientist's Project on Government Secrecy Web site at http://www.fas.org/sgp/news/secrecy/2002/07/071902.html)

National Review editor Rich Lowry wrote to the State Department defending Mowbray's articles and saying that the cable was not secret, as the *National Review* and the *Washington Post* had both published articles about it. Mowbray, Lowry wrote, was not a security threat. Lowry's letter was published in the July 15 issue of the magazine.

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

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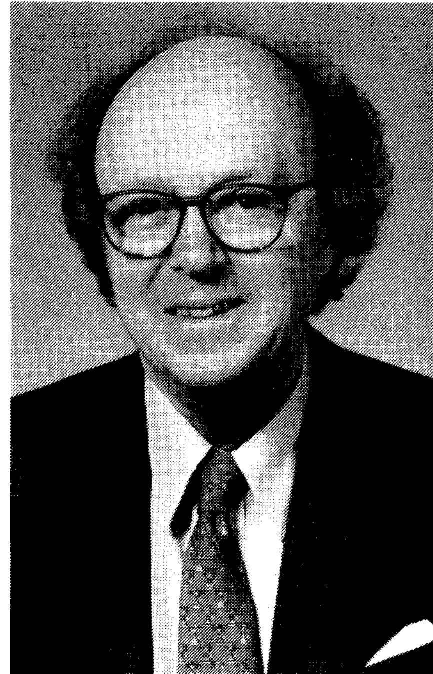

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