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Supreme Court Vacates and Remands Detainee Photo Case after Congressional Action

On November 30, the Supreme Court of the United States vacated a 2nd Circuit U.S. Court of Appeals judgment ordering the release of 44 government-held photographs depicting detainee mistreatment at the hands of U.S. troops, remanding the case back to the appeals court for reconsideration under new legislation intended to prohibit publication of the photos. The high court's decision made it unlikely the photos will be released in the foreseeable future.

The first time the 2nd Circuit heard the case, in *ACLU v. Department of Defense*, 543 F.3d 59 (2d Cir. 2008), it upheld a 2005 federal district court decision ordering the release of the detainee photos under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. (See "Detainee Abuse Photos Ordered Released" in the Fall 2008 Silha *Bulletin*.)

Although President Barack Obama initially said the photos would be made public in compliance with the 2nd Circuit's decision, he later changed his mind, stating in a May 21 speech that releasing the photos would "inflame anti-American opinion, and allow our enemies to paint U.S. troops with a broad, damning and inaccurate brush." The Obama administration appealed the case to the Supreme Court, and filed a motion to allow the government to keep the photos secret during the appeal. The 2nd Circuit granted the government's motion over the objection of the ACLU in June 2009. (See "Obama and Courts Seek Balance between National Security and Transparency in Terrorism Cases" in the Summer 2009 Silha *Bulletin*.)

While the case was being appealed to the Supreme Court, Congress passed the Protected National Security Documents Act of 2009, Pub. L. No. 111-83, § 565. The act, which was attached to the Department of Homeland Security Appropriations Act of 2010, allows the administration to exempt from the FOIA any photograph "taken during the period beginning on September 11, 2001, through January 22, 2009 … if the Secretary of Defense determines that disclosure of that photograph would endanger citizens of the United States, members of the United States Armed Forces, or employees of the United States Government deployed outside the United States." President Obama signed the act into law on Oct. 28, 2009.

The Senate voted 79-19 to approve the final version of the bill, and the House approved it by a 307-114 vote, although there was some vocal dissent to the FOIA-exemption amendment. "It's unfortunate given that this Administration promised that openness and transparency would be the norm. We should never do anything to circumvent FOIA and I believe that our country would gain more by coming to terms with the past than we would by covering it up," said Rep. Louise Slaughter (D-N.Y.) on the floor of the House on October 15. "I hope that the President will follow judicial rulings and consider voluntarily releasing these photos so we can put this chapter in history behind us."

In an October 15 post on the Secrecy News blog, Steve Aftergood also criticized the Congressional action. "From an open government point of view, it is dismaying that Congress would intervene to alter the outcome of an ongoing Freedom of Information Act proceeding. The move demonstrates a lack of confidence in the Act, and in the ability of the courts to correctly interpret its provisions," Aftergood wrote. "The legislation elevates a speculative danger to forces who are already in battle above demands for public accountability concerning controversial government policies, while offering no alternative avenue to meet such demands."

An October 20 letter to Secretary of Defense Robert Gates from the ACLU, written the same day Congress passed the Protected National Security Documents Act, urged him not to use his power under the law to exempt the photos from the FOIA after Obama signed the bill into law. "The prior administration's decision to endorse torture undermined the United States' moral authority and compromised its security. The failure of the country's current leadership to fully confront the abuses of the prior administration – a failure embodied by the suppression legislation at issue now – will only compound these harms," the letter stated. "For these reasons, you should not invoke your new and discretionary authority to suppress images of abuse."

Nevertheless, on November 13, Gates issued a certification under the new law prohibiting the release of the images in the ACLU's lawsuit, stating that "public disclosure of these photographs would endanger citizens of the United States."

The Department of Defense filed a supplemental brief with the Supreme Court on the same day Gates issued his certification, asking the high court to remand the case to the 2nd Circuit so the appellate panel could examine

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3rd Circuit Rules Personal Privacy Interest Applies to Corporations

The court agreed with AT&T that exemption 7(C) can apply to corporations since "personal" is the adjectival form of "person" and the FOIA defines person to include a "corporation."

The 3rd Circuit U.S. Court of Appeals ruled in an opinion published Sept. 22, 2009, that corporations have a "personal privacy" interest that may allow their records to be withheld from release under a Freedom of Information Act (FOIA) request for government documents.

The main issue in *AT&T Inc. v. FCC*, 582 F.3d 490, (3rd Cir. 2009), was the use of the word "personal" in exemption 7(C) of the FOIA, 5 U.S.C. § 552, which protects disclosure of "information compiled for law enforcement purposes" that could constitute "an unwarranted invasion of personal privacy." The FOIA does not define "personal," but § 551(2) of the act defines "person" as "an individual, partnership, corporation, association, or public or private organization other than an agency."

The court agreed with AT&T that exemption 7(C) can apply to corporations since "personal" is the adjectival form of "person" and the FOIA defines person to include a "corporation."

"It would be very odd indeed for an adjectival form of a defined term not to refer back to that defined term," Judge Michael A. Chagares wrote for the unanimous three-judge panel.

The case arose from AT&T's participation in "E-Rate," a program administered by the Federal Communications Commission (FCC) that sought to increase schools' access to advanced telecommunications technology. Under the program, AT&T supplied equipment and services to elementary and secondary schools and billed the government.

AT&T discovered in August 2004 that it may have overcharged the government for its work with the school district in New London, Conn. The corporation reported the matter to the FCC, which began an investigation into AT&T's billing practices under the program. The inquiry led to a December 2004 settlement in which AT&T paid $500,000 and agreed to adopt a corporate compliance program, according to a September 24 report in *The Legal Intelligencer.*

AT&T gave the commission a variety of documents during the investigation. These documents included invoices, internal e-mails with pricing and billing information, names of employees involved in the overbilling, and AT&T's own assessment of whether employees violated the corporation's code of conduct.

CompTel, a trade association that represents some of AT&T's competitors, filed a FOIA request with the FCC on April 4, 2005, seeking the AT&T documents the FCC acquired during its investigation. AT&T opposed the release of the documents, claiming that the FCC collected the material for law enforcement purposes and that exemption 7(C) prohibited disclosure.

The FCC rejected AT&T's argument, determining that a corporation does not have "personal privacy" under exemption 7(C). The FCC reviewed its ruling at the request of AT&T and reached the same result. AT&T then petitioned the 3rd Circuit to review the FCC's order permitting release of the documents.

In reaching his decision, Chagares said he found little guidance in case law, but noted that neither the Supreme Court nor the 3rd Circuit had ever expressly rejected a corporation's claim to a personal privacy interest. "The most that can be said of the Supreme Court's cases and of our cases is that they suggest that Exemptions 7(C) and 6 frequently and primarily protect –and that Congress may have intended them to protect – the privacy of individuals," Chagares wrote.

The court rejected the FCC and CompTel's text-based argument that the plain meaning of "personal" cannot apply to a corporation. "This argument is unpersuasive," Chagares wrote. "It fails to take into account that 'person' – the root from which the statutory word at issue is derived – is a defined term [in the FOIA]."

The FCC and CompTel also argued that other courts have held that the use of "personal privacy" in other sections of the FOIA does not apply to corporations, specifically noting exemption 6, which protects "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The court rejected this argument. "The phrase 'personnel and medical files' … limits Exemption 6 to individuals because only individuals (and not corporations) may be the subjects of such files," Chagares wrote. "Therefore, nothing necessarily can be gleaned about the scope of "personal privacy," because Exemption 6 would apply only to individuals even if 'personal privacy,' taken on its own, encompasses corporations."

The court also considered Congress' intent in drafting the FOIA and pointed out that if Congress wanted to limit "personal privacy" to human beings, it could have done so as it did in other parts of the act. The court cited exemption 7(F), which protects information gathered in a law enforcement investigation that "could reasonably be expected to endanger the life or physical safety of any individual."

Although the court concluded that corporate information could be exempted from FOIA requests, it did not grant AT&T's request to prohibit the release of the documents. Instead, the court remanded the case back to the FCC to decide whether the AT&T material should be withheld under exemption 7(C).

"Holding, on the very limited record before us, that Exemption 7(C) protects every reasonably segregable jot and tittle of each document that AT&T submitted would be truly extraordinary, and, in our view, not an appropriate course of action for a reviewing court to undertake in the first instance," Chagares wrote. Earlier in the case, the court cited *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979), for the principle that the FOIA "does not prohibit disclosure of information falling within its exemptions." The court noted that "[w]hen information falls within an exemption, no party can compel disclosure, but the FCC can still

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make a disclosure on its own accord unless some independent source of law prohibits the agency from doing so."

Since the court did not determine whether the disputed AT&T records themselves would qualify under exemption 7(C), David Johnson called the ruling a "victory only in principle" for corporate privacy rights in an October 12 post on the Digital Media Lawyer Blog. "This ruling provides corporations with one more arrow in their quiver that they can use to protect corporation documents from competitors or other[s] who might do them harm," Johnson wrote.

In a September 24 post on The FOIA blog, attorney Scott Hodes expressed concern that if the 3rd Circuit ruling remains intact, the public will be less informed about corporate acts investigated by the government. "This will not help the public or stockholders in the long run," Hodes wrote. "Down the road, Congress may need to get involved to stress that 7(C) protection applies only to individuals."

In a previous case, *Nat'l Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004), the Supreme Court extended the "personal privacy" exemption under 7(C) to include surviving family members even though family members were not specifically listed in the statute.

In *Favish*, the Court prevented the release of death scene photographs of Vincent Foster, a deputy counsel for President Clinton at the time of his death, whose body was discovered in a Washington D.C.-area park with a gunshot wound to his head. Law enforcement officials concluded that Foster had committed suicide.

In the majority opinion in *Favish*, Justice Anthony Kennedy wrote that Congress intended the FOIA to protect against "public intrusions long deemed impermissible under the common law and cultural traditions," and recognized a family member's right to control the disposition of a loved one's body and images following death under exemption 7(C). (See "Citing Family Members' Privacy, Supreme Court Allows Government to Withhold Foster Photos," in the Spring 2004 issue of the Silha *Bulletin*. The Silha Center wrote an *amicus* brief in support of California attorney Allan J. Favish, who sought release of the photographs. Brief for Respondent Allan J. Favish as *Amici Curiae* Supporting Respondent, Nat'l Archives and Records Admin. v. Favish, 541 U.S. 157 (2004) (No. 02-954). See "The Silha Center Files *Amicus Brief* With the United States Supreme Court, Comments with the Council of Europe, And Department of Homeland Security," in the Summer 2003 issue of the Silha *Bulletin*.)

– Cary Snyder
Silha Research Assistant

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> – Attorney Scott Hodes, The FOIA blog

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whether the photos should be released under the new federal law. The ACLU filed a responsive brief on November 17, arguing that the Supreme Court should leave "undisturbed the unanimous and well-reasoned decision of the appeals court."

The Supreme Court's ruling did not end the suit, which was initiated by the ACLU in 2004, but legal experts say that the group will have a difficult time winning in the 2nd Circuit under the newly enacted law. "It is hard to imagine that the ACLU will now be able to prevail back in the lower courts, in light of the Supreme Court's ruling. The Protected National Security Documents Act of 2009 was adopted specifically to change the result in this case," wrote Michael Dorf, a Cornell University Law School professor, in a December 2 column on the legal Web site Findlaw. "Technically, [the Court's] ruling leaves open the possibility that the photos will eventually be ordered to be released. However, careful parsing of the Court's order and the documents to which it refers shows that there is little chance that the photos will ever see the light of day."

Despite the setback, the ACLU said in a November 30 press release that it would continue the fight to get the photos released. "We continue to believe that the photos should be released, and we intend to press that case in the lower court," said Steven R. Shapiro, Legal Director of the ACLU. "No democracy has ever been made stronger by suppressing evidence of its own misconduct."

Jameel Jaffer, Director of the ACLU National Security Project, said in the November 30 release that the photos could "show connections between government policy and the abuse that took place in the detention centers" and "would both discourage abuse in the future and underscore the need for a comprehensive investigation of past abuses." Jaffer also said there was "strong public interest" in the photos and that "permitting the government to suppress information about government misconduct on the grounds that someone, somewhere in the world, might react badly – or even violently – sets a very dangerous precedent."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

FOIA and Access

White House Agrees to Release Visitor Logs on Its Own Terms

President Barack Obama announced on Sept. 5, 2009, that his administration would begin voluntarily releasing the names of White House visitors in order to settle a Freedom of Information Act (FOIA) lawsuit from the government watchdog group Citizens for Responsibility and Ethics in Washington (CREW).

The president released a statement on September 4 regarding the new disclosure policy, which the administration called "another indication of [Obama's] commitment to an open and transparent government."

"Americans have a right to know whose voices are being heard in the policymaking process," the statement said.

Prior to its announcement, the Obama administration had taken the same position as the Bush administration by refusing to release the visitor logs and arguing that they were not subject to FOIA requests. (See "White House Continues to Resist Open Government Group's FOIA Requests" in the Summer 2009 issue of the Silha *Bulletin.*)

The new policy, available online at http://www.whitehouse.gov/VoluntaryDisclosure, states that the White House will release a monthly list containing the names of those who visited four months prior. "The short time lag will allow the White House to continue to conduct business, while still providing the American people with an unprecedented amount of information about their government," the policy states.

The policy applies only to visitor records created after September 15, 2009, and the release of visitor names is subject to a list of exceptions, including the ability of the administration to withhold visitor records "whose release would threaten national security interests," records "related to purely personal guests of the first and second families," and records "related to a small group of particularly sensitive meetings," such as visits of potential Supreme Court nominees. The policy also states that the administration would respond to individual requests for visitor records dating from Jan. 20 to Sept. 15, 2009, as long as the requests are "reasonable, narrow, and specific."

The White House released its first batch of names on October 30. According to an accompanying White House blog post by Norm Eisen, special counsel to the president for ethics and government reform, the list included 110 visitor names and 481 visits dating from Jan. 20 to July 31, 2009. The names were released in response to requests made for the information during the month of September.

On November 25, another batch of 1,600 visits was released, covering White House visitors through August 31. The list was produced in response to over 300 requests made during the month of October, Eisen wrote in a November 25 White House blog post.

Both posts from Eisen included the caveat that the records include "a few false positives," meaning some White House visitors shared names with well-known people. For example, Eisen noted that the October release included responses to requests for the names of famous or controversial figures such as Michael Jordan, William Ayers, Michael Moore, and Jeremiah Wright. "The well-known individuals with those names never actually came to the White House," Eisen wrote. "Nevertheless, we were asked for those names and so we have included records for those individuals who were here and share the same names."

In a September 4 post, Eisen said that the new disclosure policy settled four different lawsuits initiated by CREW, dating back to the Bush administration. He also said the first batch of visitor records that will release every name that does not fall under one of the policy's exemptions will be published around December 31, 2009.

White House Press Secretary Robert Gibbs said that the new policy should prove to be precedential. "It's as important a transparency mechanism as has been instituted in decades here. It is something I think every administration after this one will find it difficult – if not impossible – to walk away from," Gibbs said according to a September 4 report by ABC News.

In a statement released in conjunction with the White House's announcement, CREW executive director Melanie Sloan contrasted Obama's new policy with that of his predecessor. "The Obama administration has proven its pledge to usher in a new era of government transparency was more than just a campaign promise," Sloan said in a September 4 CREW statement. "The Bush administration fought tooth and nail to keep secret the identities of those who visited the White House. In contrast, the Obama administration – by putting visitor records on the White House web site – will have the most open White House in history."

Donna Leinwand, president of the National Press Club, also applauded the move in a September 4 Associated Press (AP) story, saying that "although the president has limited the disclosures, it is a step toward more transparency in government and a reversal of this administration's previous policy."

"We hope the president will continue to choose greater transparency and access without news organizations and public interest groups having to go to court to force such access," Leinwand said.

In response to criticism that the new policy would allow the White House, and not federal law, to determine which records should be disclosed, CREW's chief counsel Anne Weismann said she thought the policy would still be effective. "Yes, it's voluntary," Weismann said in a September 4 post on the blog Gawker. "But I think it would be political suicide for them to retreat from it. We'll see what gets released. I think we'll be able to tell if they're holding back."

In a September 4 post on *The New York Times*' The Caucus blog, Francesca Grifo of the Union of Concerned Scientists complained that the new

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"We hope the president will continue to choose greater transparency and access without news organizations and public interest groups having to go to court to force such access."

– Donna Leinwand, President, National Press Club

FOIA and Access

Pentagon Newspaper Says Military Used Profiles of Reporters in Selecting Embeds

The Pentagon authorized a private public relations firm to compile background profiles on journalists seeking to cover the war in Afghanistan that rated the reporters' past work as "positive," "negative," or "neutral," according to *Stars and Stripes*, a daily military newspaper authorized and funded by the Department of Defense.

According to one U.S. Army official cited by *Stars and Stripes*, the military used the profiles as recently as 2008 to deny the requests of disfavored reporters to embed with U.S. forces in Afghanistan, a practice the Pentagon denied.

Stars and Stripes revealed the existence of the profiling practice in a series of reports it published in late August 2009. Professional journalist groups sharply criticized the rating system and the publicity culminated in the military canceling its $1.5 million contract with The Rendon Group, a Washington D.C.-based public relations firm.

Military officials defended the background profiles as a means to familiarize commanders with the topics embedded journalists might cover and to help generate coverage tailored to a reporter's interests. Defense Department representatives repeatedly said the military did not use the profiles to determine whether journalists would be granted permission to embed with U.S. forces in Afghanistan, but rather as a barometer for measuring its own success in effectively communicating information to the public, the newspaper reported.

"We have not denied access to anyone because of what may or may not come out of their biography," said Air Force Capt. Elizabeth Mathias, a public affairs officer with U.S. Forces Afghanistan in Kabul, in an August 24 *Stars and Stripes* report. "It's so we know with whom we're working."

Maj. Patrick Seiber, spokesman for the Army's 101st Airborne Division, contradicted Mathias in an August 29 *Stars and Stripes* report. Seiber said he routinely used the profiles his superior officers sent him to help decide whether to grant requests to cover military units in Afghanistan in 2007 and 2008.

"If a reporter has been focused on nothing but negative topics, you're not going to send him into a unit that's not your best," Seiber said. "There's no win-win there for us. We're not trying to control what they report, but we are trying to put our best foot forward."

Seiber recalled at least two instances in which he used information in the profiles as a factor in refusing embed requests. He rejected a request from one reporter who had allegedly done "poor reporting" and denied another reporter who had been accused of violating embed rules by releasing classified information.

"In one case we had a writer who had taken a story out of context and really done some irresponsible reporting," Seiber said. "When I looked at that on the [profile], I decided if that guy is going to take that much effort to handle and correct I wasn't going to put a unit at risk with an amateur journalist."

The Rendon Group disputed the *Stars and Stripes* reports, saying it neither rates the work of individual reporters nor recommends whether a journalist should be embedded. In a news release posted August 26 on the Rendon Web site, the firm said it quantifies news coverage based on its attitude toward key United States interests, such as stability, security, counterinsurgency and operational results.

"The information and analysis we generate is developed by quantifying these themes and topics and not by ranking of reporters. The analysis is not provided as the basis for accepting or rejecting a specific journalist's inquiries, and [Rendon] does not make recommendations as to who the military should or should not interview," the firm said in the release.

Stars and Stripes obtained Pentagon documents that the newspaper claimed proves the military evaluated reporters' coverage as "positive," "neutral" or "negative." The introduction to one reporter's profile the newspaper obtained reads, "The purpose of this memo is to provide an assessment of [a reporter from a major U.S. newspaper] . . . in order to gauge the expected sentiment of his work while on an embed mission in Afghanistan."

One profile described a staff reporter at a pre-eminent American newspaper as "neutral to positive" in his coverage of the U.S. military. The profile suggested the writer's stories "could possibly be neutralized" by feeding him mitigating quotes from military officials, *Stars and Stripes* reported on August 27. The newspaper revealed in the same report that a reporter for an unnamed major U.S. newspaper received an 83.33 percent "neutral" rating and a 16.67 "negative" rating based on an assessment of 12 stories published over a 16-month period that ended in May 2009. The *Stars and Stripes* report does not indicate whether all the ratings it cited applied to the same journalist.

Another Pentagon profile described a television journalist as providing coverage from a "subjective angle." The profile mentioned that steering the journalist toward covering "the positive work of a successful operation" could "result in favorable coverage," according to *Stars and Stripes*.

"I haven't seen anything that violates any policies, but again, I'm learning about aspects of this as I question our folks in Afghanistan," Pentagon spokesman Bryan Whitman said in an August 28 *Stars and Stripes* report as coverage of the profiling began to gain momentum. "If I find something that is inconsistent with Defense Department values and policies, you can be sure I will address it." Whitman added that the Pentagon would not launch a formal inquiry into the use of the profiles.

Several journalists obtained copies of their military profiles and shared the contents of the reports. Freelance writer P.J. Tobia, whose articles on Afghanistan have been published in *The Washington*

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> "If a reporter has been focused on nothing but negative topics, you're not going to send him into a unit that's not your best. There's no win-win there for us. We're not trying to control what they report, but we are trying to put our best foot forward."
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Post, *Philadelphia Inquirer*, and other publications, posted a copy of his Rendon profile on his True/Slant blog on August 28. The report summarizes Tobia's previous embed articles and concludes, "Based on his previous embed and past reporting, it is unlikely that he will miss an opportunity to report on US military missteps. However, if following previous trends, he will remain sympathetic to US troops and may acknowledge a learning curve in Afghanistan."

On his blog, Tobia complimented the military's effort to learn about reporters, but he expressed concern about the level of detail in his profile. "I think the military is smart to look into the background's [*sic*] of people who will be writing about them," he wrote. "Rating the coverage that reporters give the military –"positive," "neutral," "negative"–seems a bit silly and slightly Orwellian, but if thousands of reporters were covering my organization, I would want a simple shorthand to indentify [*sic*] them as well.

"I do think the reports are creepy though. These guys have read almost everything I've written in the last few years, even interviews I've given to local news blogs. Reading this report is like perusing the diary of your stalker. Rendon also classifies certain publications as 'left leaning' which I find odd." The blog post and excerpts from Tobia's Rendon report are available at http://trueslant.com/pjtobia/2009/08/28/the-us-military-investigates-afghan-desk/.

Another freelance journalist, Nir Rosen, who has reported for *Time* and *Rolling Stone*, told *Stars and Stripes* for a September 1 report that military officials overseas almost blocked his embed requests because profiles labeled him an opponent of the Iraq war. Rosen said his report warned that he might "circumvent security and administrative restrictions in order to pursue other story angles," an accusation he denied.

The screening of reporters by the military drew the ire of leaders of professional journalist groups. "The whole concept of doing profiles on reporters who are going to embed with the military is alarming," said Ron Martz, president of Military Reporters and Editors, in an August 24 *Stars and Stripes* story. "It speaks to this whole issue of trying to shape the message and that's not something the military should be involved with."

Amy Mitchell, deputy director for Pew Research Center's Project for Excellence in Journalism, also criticized the policy in the August 24 story. "That's the government doing things to put out the message they want to hear and that's not the way journalism is meant to work in this country," Mitchell said.

Aidan White, general secretary of the Brussels-based International Federation of Journalists, pointed to the profiles as evidence that the U.S. military is not allowing journalists to work freely. "It suggests they [the military] are more interested in propaganda than honest reporting," White said, according to an August 31 Reuters report.

Some journalists defended the military's work to compile profiles on reporters seeking to embed with U.S. troops. Thomas Ricks, a special military correspondent for *The Washington Post* who has covered the U.S. military overseas for more than 25 years and written two books about the war in Iraq, characterized the reporter profiles as a necessity in a September 1 post on The Best Defense blog.

"Commanders need to know who they are dealing with, and it is the job of public affairs officers to tell them," wrote Ricks, who added that he has twice viewed official military files that have been compiled on him. "I actually wish the military knew more about the media – it is amazing how much bellyaching officers do about reporters without knowing what they are talking about."

In his "From the Chairman" column in the October 2009 edition of *Joint Force Quarterly*, Adm. Mike Mullen, the chairman of the Joint Chiefs of Staff, said the military's concern with its image is misplaced. "To put it simply, we need to worry a lot less about how to communicate our actions and much more about what our actions communicate," Mullen wrote. "I would argue that most strategic communications problems are not problems at all. They are policy and execution problems. Each time we fail to live up to our values or don't follow up on a promise, we look more and more like the arrogant Americans the enemy claims we are."

On August 31, the U.S. military announced that it had canceled its $1.5 million contract with Rendon, effective September 1. "The decision to terminate the Rendon contract was mine and mine alone," Rear Adm. Gregory J. Smith wrote in an e-mail sent August 30 to *Stars and Stripes*. "As the senior U.S. communicator in Afghanistan, it was clear that the issue of Rendon's support to US forces in Afghanistan had become a distraction from our main mission." The one-year contract with Rendon called for the firm to provide a range of media analysis services to the military beyond the reporter profiles.

Rendon has drawn criticism before for its work surrounding the Iraq War. According to an August 25 AP story, Rep. Walter Jones (R-N.C.) and other critics claimed the Pentagon hired Rendon to create an information campaign designed to convince the American public and members of Congress that Iraq posed an imminent threat to the United States. An investigation by the Defense Department inspector general found no evidence to support the allegations.

A classified review made public in 2008 revealed the Pentagon relied extensively on Rendon for communications advice, analysis of media coverage, and training foreign governments in public relations, the August 25 AP story reported.

Stars and Stripes garnered praise from some journalists for questioning the actions of the military despite being a Pentagon-authorized newspaper. "[N]o one should doubt the daily's editorial independence from the Defense Department," Frank Smyth wrote in an August 28 post on the Committee to Protect Journalists blog.

– Cary Snyder
Silha Research Assistant

FOIA and Access

5th Circuit Upholds Texas Open Meetings Law; More Challenges Underway

The 5th Circuit U.S. Court of Appeals dismissed a lawsuit on September 10 brought by two city council members from Alpine, Texas, who challenged the constitutionality of the Texas Open Meetings Act. The court's *en banc* panel declared the case moot by a 16-1 vote, reversing an earlier ruling from a three-judge panel on the 5th Circuit.

The case originated in February 2005 when two Alpine city council members, including lead plaintiff Avinash Rangra, were indicted for violating the Texas Open Meetings Act (TOMA), Tex. Gov't Code Ann. § 551.001 *et seq.,* for sending various e-mails to a quorum of the Alpine City Council discussing when to call a meeting to consider a public contract matter.

Because the e-mails discussed official government business, Rangra was charged with conducting an illegal, closed meeting under the TOMA, which defines a meeting as "a deliberation between a quorum of a governmental body … during which public business or public policy over which the governmental body has supervision or control is discussed or considered." Under § 551.144 of the TOMA, knowing participation in a closed meeting is punishable by up to a $500 fine and a six-month jail sentence. The charge against Rangra was later dropped.

Rangra and fellow city council member Anna Monclova then brought an action in federal court under 42 U.S.C. § 1983, which allows citizens to sue government officials for civil rights violations, seeking a declaration that certain portions of the TOMA violated their free speech rights under the First Amendment.

Judge Robert Junell, of the United States District Court for the Western District of Texas, determined in an unpublished opinion from November 2006, *Rangra v. Brown*, No. P-05-CV-075 (W.D. Texas 2006), that "the TOMA is not regulating speech," and that the act "simply requires [government] speech to be open and public." Junell also rejected claims that the TOMA was overly broad or vague.

Rangra appealed to the 5th Circuit, where a three-judge panel determined in an April 24, 2009 opinion written by Circuit Judge James Dennis, that the TOMA was a "content based" speech regulation because it only applied to government business. Therefore, Dennis wrote, Texas had the duty of proving that the law advances a "compelling state interest" and that it is "narrowly tailored to further that compelling interest." The April 24 opinion, *Rangra v. Brown*, 566 F.3d 515 (5th Cir. 2009), remanded the case back to the district court level to determine if the state of Texas had met these standards.

After the 5th Circuit agreed to hear the case again, the *en banc* panel issued an order consisting of a single sentence dismissing the case as moot, presumably because Monclova was no longer on the Alpine city council, Rangra's term on the council had ended May 19, and he was prevented by term limits from running again. Dennis wrote a lengthy dissent to the order, arguing that the court had dismissed the suit because hearing the case would "overtax" the judges. "A heavy work load never justifies giving short shrift to a case," Dennis wrote in *Rangra v. Brown*, 584 F.3d 206 (5th Cir. 2009). Oral arguments had been scheduled for September 24 in the case.

In a September 11 post on the Texas legal blog Tex Parte, Dick DeGuerin, attorney for Rangla and Monclova, said that his clients might appeal to the United States Supreme Court. "I'm not sure what we're going to do, but we're not through," DeGuerin said.

In an undated story in *The Big Bend Sentinel* of Marfa, Texas, Rangra said the TOMA goes too far. "It's good to prohibit secret deals, but we have to allow our elected representatives to speak and build consensus for those who elect them," Rangra said. "I'm against making decisions in private and not against the open meetings act. But there must be a free exchange of ideas."

In addition to arguing that the case was moot because the law no longer applied to Rangra and Monclova since they were no longer city council members, the Texas attorney general's office argued the benefits of the TOMA on behalf of the state.

"Because the decisions of governmental bodies are made not on behalf of the members themselves, but on behalf of the people they serve, the people have a right to view the decisionmaking [sic] process," the attorney general's brief said. "Accordingly, TOMA provides that members of governmental bodies may not meet, either formally or informally, to discuss public business within their jurisdiction with a quorum of their colleagues, unless the body provides advance notice to the public about the meeting and the opportunity to attend."

The Reporters Committee for Freedom of the Press filed an *amicus* brief in the case, encouraging the 5th Circuit to rehear the *Rangra* case *en banc*. "Open meetings laws like the Texas statute exist to further the goals of a democracy by promoting the First Amendment values of open government, public debate, petition and assembly," the Reporters Committee brief said. "To call into question the constitutionality of the Texas Open Meetings Act and to subject it to the highest form of constitutional scrutiny by mischaracterizing it as a restriction on the speech of elected officials could potentially have a disastrous impact upon the public's right to access, observe, and criticize their government officials."

The California First Amendment Coalition also filed an *amicus* brief in support of the Texas law. "TOMA restricts public meetings for the purpose of preventing closed-door decision-making, not to restrict speech," the group's brief argued. "In doing so, it serves the significant and undisputed government interest in protecting public access to open government."

Frank LoMonte, the executive director of the Student Press Law Center, wrote in a September 4 entry on the Center's blog that the three-judge panel's

"Because the decisions of governmental bodies are made not on behalf of the members themselves, but on behalf of the people they serve, the people have a right to view the decisionmaking [sic] process,"

– Texas Attorney General's Office

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Open Meetings Law, *continued from page 7*

decision in *Rangra* was "bizarre and dangerous," and called for a reversal. "*En banc* consideration of cases is quite rare, and reversal of a panel's decision even rarer, but this is a case in which a thundering national consensus supports it," LoMonte wrote. "State attorneys general of all political persuasions have weighed in to point out that the decision, if not corrected, will place *every* state's open-meetings law under a constitutional cloud, despite overwhelming public support for 'sunshine' laws, which exist in all 50 states."

Since the dismissal of *Rangra*, several Texas cities and local politicians have mounted a new challenge to the TOMA. An October 15 story in the *Austin American-Statesman* stated that city council members in Pflugerville, Texas, voted unanimously to join a lawsuit initiated by the current city council of Alpine to challenge the constitutionality of the TOMA.

"Our lawsuit is not trying to throw out the entire Open Meetings Act. We're only asking to declare unconstitutional the criminal provision that says that council members can't talk to each other except at a meeting," said Alpine city attorney Rod Ponton in the October 15 story. "We do believe that the First Amendment gives public officials the right to speak to one another or the public."

According to the *American-Statesman*, the new suit was expected to be filed by the end of the year. Fifteen elected officials from cities across the state have joined the challenge as co-plaintiffs, Ponton said in the October 15 story.

"I understand the other side. You don't want corruption. But at some point, it gets a little onerous and you actually have the opposite effect. If you shut people up, you inhibit the dissemination of ideas, which is the purpose of the whole democratic process," Pflugerville city attorney Floyd Akers said.

Jim Hemphill, a Texas lawyer who has represented the *American-Statesman*, said it was "kind of ironic" that public officials were arguing that the First Amendment allowed government officials to be less transparent. "It seems in some way it's turning the First Amendment on its head," Hemphill said.

A November 21 story in the Corpus Christi *Caller-Times* reported that the city of Rockport also voted to join the proposed lawsuit.

"I'm not advocating anybody ever try to conduct the public's business behind closed doors," Rockport Mayor Todd Pearson said. "But I don't think the penalties of the law should be quite so onerous on public officials."

The November 21 *Caller-Times* story said that Texas Attorney General Greg Abbott's office responded to reports of the lawsuit with a statement affirming its support for the TOMA. "Open, transparent government is fundamental to our democratic system of government," the statement said. "The Texas Open Meetings Act ensures that elected officials conduct the taxpayers' business in the light of day and in a manner that informs the public about government decision-making."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Visitor Logs, *continued from page 4*

policy's exceptions are too broad. Grifo said the White House left itself "a huge loophole," and can now "label meetings 'particularly sensitive' and then it does not have to tell us who they're meeting with."

Despite the settlement, the Obama administration maintains that release of visitor information cannot be compelled under the FOIA. According to an October 17 report from the Reporters Committee for Freedom of the Press, the Secret Service denied an August 10 FOIA request from the government accountability group Judicial Watch asking for all the visitor logs from Jan. 20 – Sept. 15, 2009.

"It is the government's position that the categories of records that you requested are not agency records subject to the FOIA," a response from Homeland Security agent Craig W. Ulmer to the Judicial Watch request said. "Rather, these records are records governed by the Presidential Records Act, 44 U.S.C. § 2201 et seq., and remain under the exclusive legal custody and control of the White House Office and Office of the Vice President."

The denial of Judicial Watch's FOIA request came despite a federal district court judge's January ruling that visitor logs are subject to the FOIA, in *Citizens for Responsibility and Ethics in Washington v. U.S. Dept. of Homeland Sec.*, 592 F. Supp. 2d 111 (D.D.C. 2009).

"The Obama White House has yet to explain why visitor logs from its first eight months will be afforded special protection," Judicial Watch said in a press release on October 16.

"Just because the Obama White House says FOIA law doesn't cover White House visitor logs doesn't make it so. The Obama administration is not above the law," said Judicial Watch president Tom Fitton in the October 16 release. "These visitor logs are subject to release under FOIA and the courts have affirmed this. Judicial Watch has no intention of abandoning its pursuit of these records. We will go to court, if necessary."

MSNBC has also filed a FOIA request for the complete records of all visitors from the first months of the administration, which was also rejected by the White House. According to a November 4 MSNBC story, the network has filed an administrative appeal with the Department of Homeland Security.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

FOIA and Access

2nd Circuit Denies *New York Times* Access to Emperor's Club Wiretap Information

The New York Times does not have a First Amendment right of access to sealed wiretap applications filed in the investigation of the prostitution ring that led to former New York Gov. Eliot Spitzer's resignation, the 2nd Circuit U.S. Court of Appeals ruled on Aug. 6, 2009.

The media's interest in monitoring the government's use of wiretaps, even when they involve the potential prosecution of public officials, does not constitute "good cause" to override the statutory presumption against disclosing wiretap materials, the three-judge panel held in *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 577 F.3d 401 (2d Cir. 2009) (*Spitzer II*).

In March 2008, the government charged four people with running a prostitution ring called the Emperor's Club. Ensuing media reports identified Spitzer as a customer of the ring and the Democratic governor resigned within a few days of the revelation, although he was never charged.

The affidavit attached to the government's criminal complaint that charged the four defendants contained evidence obtained through wiretaps of cell phones used in connection with the prostitution ring. Under Title III of the Omnibus Crime Control and Streets Act of 1968, 18 U.S.C. § 2518(8)(b), wiretap applications are to be filed under judicial seal, but according to the 2nd Circuit's opinion, the orders and applications are normally unsealed as a criminal case approaches trial because 18 U.S.C. § 2518(9) requires disclosure of wiretap applications before the intercepted communications may be used against a party in court. However, because the four defendants in the Emperor's Club waived indictment and pleaded guilty in 2008, the wiretaps remained under seal.

In December 2008, *The Times* asked the United States District Court for the Southern District of New York to unseal the government's wiretap and search warrant applications in the Emperor's Club investigation. The government agreed to disclose the search warrant applications, but opposed unsealing the wiretap materials on the grounds that Title III prohibits disclosure of the wiretap applications except for a showing of "good cause."

At a hearing before the district court on Jan. 27, 2009, *The Times* agreed that the government could redact the names and identifying information of the Emperor's Club customers. On Feb. 19, 2009, Judge Jed S. Rakoff granted the newspaper's request to unseal the redacted wiretap applications in *In re New York Times Co. to Unseal Wiretap & Search Warrant Materials*, 600 F. Supp. 2d 504 (S.D.N.Y. 2009) (*Spitzer I*).

Rakoff concluded that the wiretap applications were "judicial records" and that the press had a right of access to the records under the First Amendment and common law. He determined the government no longer had an interest in maintaining the confidentiality of the wiretap applications since the investigation had been completed and any lingering privacy interest could be satisfied through the redactions. Rakoff also rejected the government's argument that Title III's "good cause" requirement created a presumption against disclosure that could not be overcome by journalistic interest.

"[T]here is no reason to believe that Congress intended "good cause" to be anything other than a synonym for the balancing dictated by . . . constitutional and common law principles," Rakoff wrote.

After the government appealed the order, the court in *Spitzer II* interpreted Title III as indicating a presumption against disclosure of the wiretap material and that a prior case, *Nat'l Broad. Co. v. Dep't. of Justice*, 735 F.2d 51 (2d Cir. 1984), held that "good cause" to overcome that presumption could only be found when the applicant seeking to unseal the wiretap was an "aggrieved person." Title III defines an "aggrieved person" as someone who "was a party to any intercepted wire, oral, or electronic communication or a person against whom the interception was directed."

Judge José A. Cabranes, who wrote the *Spitzer II* opinion, found that it was "irrelevant for the purposes of Title III that the Times is a newspaper investigating a matter of public importance."

The court then considered whether *The Times* had a sufficient First Amendment interest to override the Title III requirement for access. The court used the two-part "experience and logic test" that the U.S. Supreme Court relied on in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986), in which the Court extended the First Amendment right of public access to criminal proceedings to also include preliminary hearings.

Under the "experience and logic test," also known as the "history and logic test," a judicial proceeding is presumptively open to the public if it has historically been open or logic requires that it be open. Cabranes declined to recognize a First Amendment right of access under the "history" prong because "wiretap applications have not historically been open to the press and general public," and "there is no question that the public and the press are not permitted to attend the ... proceedings where wiretap applications are presented to a district judge." As for the logic prong, Cabranes did not agree that *The Times'* objective of monitoring the government's use of wiretaps outweighed Congress' preference for sealing wiretap applications.

Times lawyer David E. McCraw said the newspaper had not decided whether to seek further review of the ruling, according to an August 8 report in *The Times*. "We are obviously disappointed with the result," McCraw said, "and we continue to believe that public access to these types of court records would provide a valuable check on law enforcement agencies and on the courts."

Wiretap Information Sealed, *continued on page 10*

"This case sets a very high bar for media access to wiretap applications... If access to wiretap applications is limited to 'aggrieved persons,' it puts the fox in charge of the proverbial henhouse."

– Attorney JaneAnne Murray, New York Federal Criminal Practice Blog

Wiretap Information Sealed, *continued from page 9*

In an August 18 column on the legal research Web site Findlaw.com, columnist and attorney Julie Hilden criticized the 2nd Circuit for protecting the privacy rights of those who were recorded without their consent since it is probable that the wiretapped conversations were between customers and law enforcement targets, or between the targets themselves. She emphasized that *The Times* had already agreed that the government could redact customers' names from the applications.

"So whose privacy rights, exactly, was the Second Circuit protecting – if customers were already protected by the parties' agreement, and targets were already exposed by their decision to plead guilty?" Hilden wrote. "Even if the statute [Title III] was driven by a concern for privacy, that concern seems negligible here."

In a September 15 post on the New York Federal Criminal Practice blog, attorney JaneAnne Murray criticized the court's decision as limiting the ability of the media to scrutinize how prosecutors obtain wiretaps in criminal investigations.

"This case sets a very high bar for media access to wiretap applications," Murray wrote. "It's hard not to imagine a more compelling reason for public disclosure of the submissions to a judge in support of surveillance than a now closed investigation that led to the resignation of a state governor. . . . [I]f access to wiretap applications is limited to 'aggrieved persons,' it puts the fox in charge of the proverbial henhouse."

– Cary Snyder
Silha Research Assistant

FOIA and Access

Florida Judge Grants $750,000 Award for Attorneys' Fees in Open Government Suit

A Florida judge awarded $750,000 in legal fees on Sept. 25, 2009, to the attorneys of an open-government advocacy group that sued several city officials in Venice, Fla., for violating the state's open government laws.

According to a Sept. 15, 2009 story in the Sarasota *Herald-Tribune*, the Florida nonprofit group Citizens for Sunshine filed a lawsuit against several Venice city council members in May 2008, alleging that they had violated Florida's Public Records Act as well as its Government in the Sunshine Law by illegally holding secret meetings via e-mail and deleting e-mails in which they discussed city business.

In an amended complaint filed by the group on Oct. 8, 2008, Citizens for Sunshine claimed that the officials had "held electronic meetings and used liaisons to discuss public business which has not been noticed to the public" and "destroyed and failed in their duty to preserve public records in their possession." The case settled in March 2009 with the city acknowledging violations of Florida law and agreeing to change its policies to align with Florida's open government regulations. In the settlement, the parties decided to let the circuit court settle the issue of legal fees incurred in the pre-settlement litigation.

Although attorneys for the city argued that the award was excessive, Sarasota County Circuit Judge Robert Bennett stated in his decision, *Citizens for Sunshine v. City of Venice*, No. 2008-CA-8108-SC (Fla. Cir. Ct. 2009), that the case had been "vigorously and zealously litigated by all parties" and that the award was equitable.

According to the September 15 *Herald-Tribune* story, the city had argued that the Citizens for Sunshine attorneys should have been paid $63,000 as part of the settlement. Meanwhile, the plaintiffs had originally asked for $2 million, arguing that the award should include $842,000 that had been billed on the case in addition to a multiplier which can be allowed under Florida common law when the suit has been brought in the public interest. Bennett rejected the request for a multiplier in his September 25 decision.

Florida's open-government laws, Fla. Stat. §§ 119.01-.19 and 286.001-.030, include the requirement that "all meetings of any board or commission of any state agency or authority or of any agency or authority of any county, municipal corporation, or political subdivision … at which official acts are to be taken are declared to be public meetings open to the public at all times."

A Sept. 26, 2009 story in the *Herald-Tribune* reported that the city had already spent over $600,000 to defend city officials, and when added to the costs incurred by city attorneys fighting over fees, the total cost of the case to the city came to about $1.4 million.

"It vindicated the public's right to know," said Michael Barfield, an assistant to Citizens for Sunshine attorney Andrea Mogensen. "The language in the judge's order was more satisfying than the amount the judge ordered."

"I'm fairly confident this is a record award in Florida," said Barbara Petersen of the First Amendment Foundation in Tallahassee in a September 29 Associated Press (AP) story. "It makes everyone sit up and take notice."

"It again drives home the point: It doesn't matter whose AOL account you're using ... if you're a government entity and you're discussing public business, those documents are going to be public record," Petersen said.

In an *amicus curiae* brief filed in the case in support of Citizens for Sunshine, the Reporters Committee for Freedom of the Press urged Judge Bennett to note the "considerable public interest" served by the lawsuit. "Without this litigation, Defendants may have continued to disregard these open government laws, flaunting [sic] the procedural mechanisms that allow a democracy to function," the brief stated. "Plaintiff took on the burden to restore transparency in government on behalf of all citizens. Such service in the public interest should be recognized and attorney's fees and costs should be awarded in this case."

Pam Johnson, the city's public information officer, said in the September 29 AP story that the city is "grateful to have this behind us so we can carry on with our real work."

The September 26 *Herald-Tribune* story reported that Venice has changed its policies as a result of the litigation, and now requires that all city officials undergo training in Florida's open records law. In addition, city officials are now allowed to use only their city-issued e-mail address for official business.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

"It again drives home the point: It doesn't matter whose AOL account you're using ... if you're a government entity and you're discussing public business, those documents are going to be public record."

– Barbara Petersen, First Amendment Foundation

FOIA and Access

State, Federal Courts Resist Access to Judicial Records, Proceedings

Courts across the country curtailed public access to judicial records and court proceedings in the fall of 2009, as state and federal judges used a variety of statutory, constitutional, and administrative methods to limit openness.

> "The coverage of this public hearing was wonderful. It was rich, and you got the flavor of both sides ... it was a positive thing. It's too bad it turned into a negative thing and the judge had to apologize for something that was good for the community."
>
> – J. Steven Beckett, Defense Attorney and Professor, University of Illinois Law School

Oklahoma Judge Orders Reporter to Destroy Court Audio Recording

An associate district court judge in Woodward, Okla., ordered an assistant editor at *The Woodward News* to destroy an audio recording of a bond hearing in a rape case on October 20, threatening her with contempt of court if she did not comply.

According to an October 20 *Woodward News* story, visiting judge N. Vinson Barefoot told Rowynn Ricks to destroy the recording after an observer shouted out in the courtroom that reporters had tape-recorded the brief hearing without the judge's knowledge, although Ricks was the only reporter who had actually done so.

Ricks said the regular judges in Woodward County District Court had allowed her to record open court proceedings in the past, according to *The Woodward News*. Barefoot normally presides in a neighboring district, but was handling the bond hearing because the Woodward judge had recused himself due to a conflict of interest.

Barefoot ordered Ricks and other reporters present to raise their rights hands and swear they would not use any portion of voice recordings in their public reports after Ricks told the judge she had recorded the open court portion of the hearing. Barefoot then said the reporters would be subject to contempt of court if they made public any part of the recorded proceeding. "You all know what six months means?" Barefoot asked, in reference to a jail sentence for contempt.

Ricks said she was "stunned and shaken up" by the judge's order, *The Woodward News* reported.

According to Canon 3(B)(10) of the Oklahoma Code of Judicial Conduct, "Except as permitted by the individual judge, the use of cameras, television or other recording or broadcasting equipment is prohibited in a courtroom or in the immediate vicinity of a courtroom." In addition, express permission of the judge must be obtained before any "recordings or broadcasting equipment are used."

Federal Judge Reprimanded for Allowing Cameras in his Courtroom

Chief Judge Frank Easterbrook of the 7th Circuit U.S. Court of Appeals issued a memorandum reprimanding U.S. District Court Judge Joe Billy McDade for allowing cameras in his courtroom, a violation of the policy of the Judicial Conference of the United States, a resolution adopted by the 7th Circuit's Judicial Council, and a local rule of the district court. McDade later apologized.

According to an October 6 story in the *Chicago Tribune*, McDade allowed newspaper and television reporters to bring at least four video cameras, two audio recorders and one still camera into his Peoria, Ill., courtroom to document a September 15 hearing involving a proposed extension of a settlement that forces the Champaign school district to reduce an achievement gap between white and black students.

In a letter dated September 21, McDade apologized to Easterbrook for allowing cameras and audio devices. "Because of the considerable interest in the case by the Champaign community over the past seven years during the existence of the consent decree, I wanted the widest possible dissemination of the hearing," McDade wrote. After repeatedly apologizing for allowing cameras, McDade wrote that he would "never deviate from the policy in the future."

In Easterbrook's memo, dated September 28, he said McDade's actions violated a policy established by the Judicial Council of the United States, a resolution adopted by the Judicial Council of the 7th Circuit, and C.D. Ill. R. 83.7, a district court rule that prohibits all "electronic devices," which includes both still and video cameras.

"The role of cameras in the courtroom is a subject of ongoing debate in the legislative and judicial branches, and among members of the public. People of good will advocate photography and broadcasts; other people think that cameras would have ill effects," Easterbrook wrote. "No matter what one makes of these contentions, once the Judicial Conference of the United States and Judicial Council of the Seventh Circuit have adopted a policy, a judge must implement it without regard to his own views."

Easterbrook's memo states that no disciplinary action would be taken against McDade, and that his apology was sufficient.

In an October 8 story in the Peoria *Journal Star*, J. Steven Beckett, a Champaign-area defense attorney and University of Illinois law professor, defended McDade's use of cameras. "The coverage of this public hearing was wonderful. It was rich, and you got the flavor of both sides," he said. "It was a positive thing. It's too bad it turned into a negative thing and the judge had to apologize for something that was good for the community."

Beckett also said that the rule banning cameras in all federal courts was "archaic," and said that the judge should be the determining factor. "His common sense told him that this cried out for the largest public dissemination," Beckett said in the *Journal Star*. "So what does that tell us about the rule?"

South Dakota Panel Recommends Tight Restrictions on Cameras

A court-appointed panel recommended to the

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South Dakota Supreme Court that cameras and other recording devices should be allowed in the state's circuit (trial) courts only when the judge and all parties in a case agree, a December 4 Associated Press (AP) report stated. The state's high court will make the final determination on the extent to which cameras should be allowed in the state's circuit courts.

According to the AP, the panel, which included lawyers, judges and representatives of news organizations, issued a majority plan that had been endorsed by the state's presiding circuit court judges.

A statement attached to the recommendation said that a majority of the committee believed trial court proceedings should be presumed closed to television cameras, still cameras, and audio recording devices, and should only be open to recording if a judge and all parties agreed at least a week before the trial or hearing.

A minority of the committee's members submitted a report recommending that a trial court proceeding should be presumed open to recording devices unless a judge decides cameras would interfere with the fairness of a trial, the AP reported.

Watertown Public Opinion publisher Mark Roby, a committee member who sided with the minority, said the majority report's recommendation was unlikely to result in many open trial court proceedings, based on his observations of Minnesota's cameras-in-the-courtroom policy, which also currently requires the consent of every party involved in the proceeding, in addition to the judge, before recording is allowed.

"There have not been any cases except for a couple in the last 30 years in Minnesota that actually allowed cameras," Roby said, according to the AP story. (For more on cameras in Minnesota trial courts, see "Minnesota High Court Approves Cameras-in-Court Pilot Program" in the Winter 2008 Silha *Bulletin*.)

State Supreme Court Justice David Gilbertson, who appointed the study committee, has said cameras have caused no problems in his court's hearings, but that many courts have struggled with the issue. "If there was one easy way to do it, all states would have done it that way," Gilbertson said, according to the AP.

In an October 2 story on the Web site of Sioux Falls, S.D. television station KELO, Jeff Larson of the Minnehaha County Public Defenders Office, who sided with the majority, said that privacy was an important issue. "If you think there's never a criminal defendant that is not going to want their proceeding televised, I can tell you [from] my interaction from clients through the years there are some," Larson said.

On March 16, 2008, South Dakota Gov. Mike Rounds signed S.D. Sess. Laws chapter 118, which repealed a law "prohibiting radio or television broadcasting or taking of photographs of judicial proceedings from courtrooms." Currently, S.D. Codified Laws § 15-24-6 states that "electronic recording by moving camera, still camera, and audiotape, and broadcasting will be permitted of all judicial proceedings in the courtroom during sessions of the Supreme Court," but there is currently no rule governing cameras in the state's circuit courts.

Washington Supreme Court Exempts Judiciary from Public Records Law

The Supreme Court of the state of Washington ruled on October 15 that Washington's Public Records Act does not apply to the state's judiciary, and that Washington judges are not required to disclose professional correspondence under the state law.

The case, *City of Federal Way v. Koenig*, 217 P.3d 1172 (Wash. 2009), began when open government activist David Koenig requested all public records related to the resignation of Municipal Judge Colleen Hartl in the city of Federal Way in 2007. According to an October 17 story in *The Spokesman-Review* of Spokane, Wash., Hartl stepped down and was censured by a state panel after she revealed a sexual relationship with a public defender who routinely appeared in her courtroom.

Washington's Public Records Act (PRA), Wash. Rev. Code § 42.56.001 *et seq*., defines a "public record" as a "writing containing information relating to the conduct of government ... [that is] prepared, owned, used, or retained by any state or local agency." A state agency is defined as a "state office, department, division, bureau, board, commission or other state agency." According to Wash. Rev. Code § 42.56.030, the PRA "shall be liberally construed and its exemptions narrowly construed to promote this public policy and to assure that the public interest will be fully protected."

Koenig received 183 documents in response to his request, but Federal Way refused to provide any correspondence between Hartl and Municipal Court Presiding Judge Michael Morgan. The city cited a 1986 Washington Supreme Court case, *Nast v. Michels*, 730 P.2d 54 (Wash. 1986), that concluded that the PRA does not apply to court case files because the judiciary is not included in the PRA's definition of "agency."

The Washington Supreme Court's 7-2 decision affirmed two lower-court rulings that had denied Koenig's request, and stated that if the PRA was intended to apply to judicial documents, it was the legislature's job to rewrite the statute.

"[T]he legislature has declined to modify the PRA's definitions of agency and public records in the 23 years since the *Nast* decision. This court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence in that decision," Justice Susan J. Owens wrote for the majority in *Koenig*. "By not modifying the PRA's definition of agency to include the judiciary, the legislature has implicitly assented to our holding in *Nast* that the PRA does not apply to the judiciary and judicial records."

Justice Debra L. Stephens dissented from the majority's opinion. "In the end, I believe we do a disservice to interpret the PRA, a broad mandate for open government, to exempt entirely the judicial branch of government," Stephens wrote. "[C]ourts

"In the end, I believe we do a disservice to interpret the PRA, a broad mandate for open government, to exempt entirely the judicial branch of government."

– Justice Debra L. Stephens, Washington Supreme Court

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Subpoenas and Shield Laws

Military Appeals Court Rejects Reporter's Privilege

A military appeals court held that military courts should not recognize a reporter's privilege for non-confidential sources under either constitutional or common law in a decision published Aug. 31, 2009. The U.S. Navy-Marine Corps Court of Criminal Appeals overturned a ruling by a military judge that had quashed a government subpoena seeking unaired portions of a "60 Minutes" interview with Staff Sgt. Frank D. Wuterich.

Wuterich is accused of killing or participating in the killing of 24 civilians on Nov. 19, 2005, in Haditha, Iraq, in response to an attack on his military convoy. He faces charges of voluntary manslaughter, aggravated assault, reckless endangerment, dereliction of duty, and obstruction of justice.

After he had been indicted in connection with the killings, Wuterich gave an interview to CBS News correspondent Scott Pelley. Portions of the interview aired on March 18, 2007, in a "60 Minutes" report titled, "The Killings in Haditha: Staff Sgt. Frank Wuterich discusses what the Marines did the day 24 Iraqi civilians were killed."

On Jan. 16, 2008, the government issued a subpoena to CBS Broadcasting Inc. seeking all the recorded material from the interview with Wuterich, including the outtakes. CBS provided the segment of the interview that had been broadcast, but moved to quash the portions of the subpoena that sought unaired footage. CBS argued that the First Amendment establishes a reporter's privilege which, by extension, should also apply to military courts under the Military Rules of Evidence.

But in the court's 8-0 opinion, *United States v. Wuterich*, 68 M.J. 511 (N-M Ct. Crim. App. 2009), Chief Judge Daniel O'Toole rejected CBS's constitutional argument by relying on the "controlling precedent" of *Branzburg v. Hayes*, 408 U.S. 665 (U.S. 1972), in which the Supreme Court refused to recognize a broad, constitutionally-based reporter's privilege. O'Toole also noted that the Military Rules of Evidence do not specifically provide for a reporter's privilege.

O'Toole wrote that a common law reporter's privilege may be incorporated into military courts under Mil. R. Evid. 501(a)(4), which permits the application of any evidentiary privilege that is "generally recognized." However, O'Toole also wrote that there continues to be "substantial controversy" over the legitimacy and parameters of the reporter's privilege in federal courts.

The military appeals court declined to precisely define what it means for a privilege to be "generally recognized," but O'Toole found that a reporter's privilege did not meet the standard. "[W]e find it incongruous to characterize as generally recognized in criminal cases any privilege over non-confidential news material, when such a privilege is recognized in only four circuits, and when an equal number of circuit court opinions hold otherwise," O'Toole wrote in the opinion.

According to O'Toole's analysis, four U.S. Circuit Courts of Appeals (the 1st, 2nd, 3rd and 11th Circuits) have recognized a reporter's privilege in criminal cases where prosecutors seek material related to non-confidential sources, while the 4th, 5th, 6th and 7th Circuits have rejected the privilege in these circumstances. The 9th and District of Columbia Circuits have applied the privilege to criminal cases, but only in matters involving confidential material. The extent of the privilege remains unresolved in the 8th and 10th Circuits, the opinion concluded.

The court emphasized in its opinion that Wuterich was not a confidential source. According to the opinion, Wuterich admitted that he participated in the interview as an effort to defend his reputation and that both he and CBS expected the interview would be aired. Therefore, the court concluded, Wuterich "had no expectation that the information he disclosed would be kept confidential." Accordingly, the court found that requiring "60 Minutes" to comply with the subpoena would not improperly burden the First Amendment right to a free press.

The ruling represented the second time the CBS subpoena had appeared before the appellate court. A military judge previously granted CBS's request to quash the subpoena, and the government appealed. In *United States v. Wuterich*, 66 M.J. 685 (N-M Ct. Crim. App. 2008), the U.S. Navy-Marine Corps Court of Criminal Appeals ruled that the judge erred in quashing the subpoena without first reviewing the unaired material. The court remanded the case with an order for the judge to review the unaired material *in camera*. The U.S. Court of Appeals for the Armed Forces upheld that decision in *United States v. Wuterich,* 67 M.J. 63 (C.A.A.F. 2008).

On remand, the military judge found that a qualified reporter's privilege exists in military courts and that the privilege protected the "60 Minutes" footage from the subpoena. The judge held that, although the content on three of the eight DVDs containing footage of the Wuterich interview was highly material and relevant to his prosecution, the government had not overcome the reporter's privilege because the information contained in the DVDs was already available in statements possessed by the government.

The case against Wuterich had been delayed pending the appeal of the government subpoena. O'Toole noted that CBS has the option of petitioning the military judge for a protective order that would limit the information CBS is required to hand over to the government.

Colin Miller, an assistant professor at The John Marshall Law School, wrote that "it is inevitable that military courts will eventually recognize some type of reporter's privilege," in a Sept. 2, 2009 post on the EvidenceProf blog discussing the decision.

"Reading between the lines of the opinion … it seems clear that the identified controversy is not over whether a reporter's privilege exists but over whether it applies to non-confidential sources, such as the sources in *Wuterich*," Miller wrote. "Thus, given a case with a confidential source, I would expect the military courts to recognize a reporter's privilege."

According to a Sept. 2, 2009, report in the *North*

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"Reading between the lines of the opinion ... it seems clear that the identified controversy is not over whether a reporter's privilege exists but over whether it applies to non-confidential sources, such as the sources in *Wuterich*, ... [t]hus, given a case with a confidential source, I would expect the military courts to recognize a reporter's privilege."

– Colin Miller,
Assistant Professor
The John Marshall
Law School

Subpoenas and Shield Laws

Hawaiian Shield Law Protects Independent Filmmaker

A Hawaii state district court judge ruled on September 2 that Hawaii's journalist shield law exempts independent filmmaker Keoni Kealoha Alvarez from responding to subpoenas or being deposed in a lawsuit involving a property dispute.

According to a September 2 story in *The Hawaii Independent*, Kauai Circuit Judge Kathleen Watanabe ruled in favor of Alvarez in *Brescia v. Ka'iulani Edens-Huff*, No. 08-1-0107 (Haw. Cir. Ct. 2009), stating that it is "the public policy of the State of Hawaii to protect journalists."

According to *The Independent*, Watanabe noted that Alvarez's documentaries had been shown at film festivals and on public access television, he had won awards for his work, and he had received a grant for work on his current documentary. "Mr. Alvarez is, in fact, a journalist and therefore he is subject to the protection of Act 210," Watanabe said.

Hawaii's shield law, HRS Div. 4. Tit. 33. ch. 621, was enacted in July 2008. Also known as Act 210, the law states in part that a "journalist or newscaster presently or previously employed by or otherwise professionally associated with any newspaper or magazine or any digital version thereof … shall not be required by a legislative, executive, or judicial officer or body, or any other authority having the power to compel testimony or the production of evidence, to disclose … [t]he source, or information that could reasonably be expected to lead to the discovery of the identity of the source, of any published or unpublished information obtained by the person while so employed or professionally associated in the course of gathering, receiving, or processing information for communication to the public."

The law also applies to "any individual who can demonstrate by clear and convincing evidence that the individual has regularly and materially participated in the reporting or publishing of news or information of substantial public interest for the purpose of dissemination to the general public by means of tangible or electronic media [or the] position of the individual is materially similar or identical to that of a journalist or newscaster, taking into account the method of dissemination." For more on the enactment of Hawaii's shield law, see "Hawaii Enacts 36th State Shield Law" in the Summer 2008 issue of the Silha *Bulletin*.

"With this decision, the media shield law can now be confidently asserted by journalists seeking to protect their work," Alvarez's attorney, James Bickerton, said in a September 3 news release from the ACLU of Hawaii, which assisted in the representation of Alvarez. "The judge ruled that the media shield law means what it says – journalists can protect their confidential sources and can't be forced to reveal their unpublished information."

According to Bickerton, Watanabe's ruling represents the first time Hawaii's shield law has been invoked. "It's always an interesting day when a new law is affirmed by the courts for the first time," Bickerton said in the September 2 *Independent* story. "It's clear that the judge did her homework and had looked at the law and its history in detail, and so Mr. Alvarez is understandably pleased that the new law has withstood its first test and is providing protection to him and other journalists," Bickerton said.

According to *The Independent*, Alvarez was subpoenaed by attorneys for Joseph Brescia, who is attempting to build a house atop Hawaiian burial grounds on Kauai's North Shore. A June 30 press release from the ACLU stated that Brescia is suing several individuals who allegedly delayed construction on his property.

According to *The Independent*, Brescia's attorneys wanted Alvarez, who is making a documentary on Hawaiian burial practices for PBS, to answer questions in a deposition and turn over raw video footage he had compiled from attending meetings of the Kauai-Niihau Island Burial Council and interviewing numerous persons involved in the burial grounds issue.

In a June 30 press release from the ACLU of Hawaii, Alvarez was quoted as saying that he had "promised everyone complete confidentiality … that the film and the interviews will not be released publicly until everyone in it has had a chance to review, comment, or object. Material that doesn't make it into the final published film is intended to remain confidential."

Alvarez also said that confidentiality is especially important since his documentary deals with sensitive topics such as Hawaiian belief systems and burial practices. "If I'm forced to turn over these tapes we'll never be able to do a project like this again – lots of really important Hawaiian cultural preservation work simply won't happen because people will be too afraid to do it. The trust in the journalist will be destroyed," Alvarez said, according to the June 30 statement.

In the September 3 press release by the ACLU of Hawaii, Alvarez said he was relieved at the ruling. "I can continue to work on my projects with integrity – without fear that I may have to betray the trust of my interview subjects. Without this ruling, people wouldn't trust me, and I wouldn't be able to work on really sensitive projects like this one."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

"With this decision, the media shield law can now be confidently asserted by journalists seeking to protect their work."

– James Bickerton
Attorney for independent filmmaker Keoni Kealoha Alvarez

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County Times (Escondido, Calif.), in November 2005 Wuterich was head of a squad from the Camp Pendleton marine base, located about 40 miles north of San Diego, that was stationed in and around Haditha, Iraq. After Wuterich's squad was attacked, members allegedly stormed homes in Haditha looking for the attackers. According to the story, four men who got out of a nearby car immediately after the bombing and 19 others, including several women and children, were among those killed by the Marines.

Wuterich is the only person still facing criminal charges in the incident, according to the *North County Times* report. Charges brought against three other enlisted men were dropped. Charges were also dropped against three officers accused of failing to investigate the killings, and a fourth officer was exonerated at trial.

– Cary Snyder
Silha Research Assistant

Open Courts Roundup, *continued from page 13*

plainly meet the statutory definition of 'agency' …. It seems to me the PRA speaks for itself."

In an October 16 AP story, the president of the Washington Coalition for Open Government, former state Rep. Toby Nixon, said his group would ask lawmakers to bring the judiciary under the law. "Changing this will be part of the coalition's legislative agenda," Nixon said. "I think that the Legislature is going to agree with this. … I can't imagine that the Legislature would believe the kind of records that were involved in the Koenig case should be kept from the public."

Judge Closes Blackwater Trial to the Public

On October 14, a federal district court judge in Washington, D.C., blocked the media and the public from the pretrial hearings in the prosecution of five U.S. security contractors accused of killing 14 unarmed Iraqi civilians in 2007, an October 15 *Washington Post* story said.

U.S. District Judge Ricardo M. Urbina said that he was closing the hearings because he wanted to shield witnesses and potential jurors from pretrial publicity and that he wanted to ensure the guards a fair trial, the October 15 *Post* story reported. The hearings were not listed on the public docket, and filings by prosecutors and defense attorneys over the immunity issue were sealed.

According to the October 15 *Post* story, the newspaper sent a letter to Urbina asking him to reconsider closing the hearings. *Post* attorney James McLaughlin said the court should have put the proceedings on the open docket and given the public an earlier chance to challenge the basis for the closure of the hearing. He said concerns about the impact of pretrial publicity were "highly speculative" unless supported by factual findings in open court.

Urbina denied *The Post*'s request, saying that the rights of the five guards to a fair trial outweighed the public's interest in attending the proceedings. He said he was concerned about how news accounts of the statements might affect witnesses.

The five Blackwater guards are charged with voluntary manslaughter and weapons violations in the killing of 14 civilians and the wounding of 20 others in an unprovoked attack on Iraqi civilians. Blackwater, which has since renamed itself Xe, had a contract to provide security for the State Department in Iraq.

The Post criticized Urbina's decision in an October 17 editorial. "It is not clear to what extent, if any, Judge Urbina considered anything short of complete secrecy, such as closing off only parts of the hearing," the editorial said.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Digital Media

Federal Government, States Grapple with Cyber-Bullying Laws

A proposed federal law intended to combat a form of Internet-based harassment known a "cyber-bullying" was criticized by a House subcommittee this fall. Meanwhile, local police made several arrests attempting to enforce similar, state-based legislation.

House Subcommittee Members Criticize Proposed Cyber-bullying Law

On Sept. 30, 2009, members of a House Judiciary subcommittee expressed doubt that a proposed law could accomplish its goal of criminalizing the online bullying of children without infringing on free speech rights.

In April 2009, Rep. Linda Sanchez (D-Calif.) introduced H.R. 1966. Known as the "Megan Meier Cyber-bullying Prevention Act," after a 13-year-old Missouri girl who hanged herself in 2006 after a classmate's mother created a false Web site to taunt her, the legislation seeks to criminalize electronic communication transmitted "with the intent to coerce, intimidate, harass, or cause substantial emotional distress to a person."

Sanchez acknowledged during the hearing that crafting a cyber-bullying law able to withstand constitutional challenges will be difficult. She said annoying e-mails, political blogs, and an unfriendly text to an ex-boyfriend should remain legal, while serious, repeated and hostile communications made with the intent to harm should constitute a criminal offense, according to a September 30 Associated Press (AP) story.

A September 30 post on the Threat Level blog described members of the House Subcommittee on Crime, Terrorism and Homeland Security as giving Sanchez's comments a bipartisan "chilly reception" during the hearing.

"We need to be extremely careful before heading down this path," Committee Chairman Rep. Bobby Scott (D-Va.) said. Rep. Louie Gohmert (R-Texas) said the legislation "appears to be another chapter of over-criminalization," according to Threat Level.

John Palfrey, a professor at Harvard Law School who also testified at the hearing, said a task force he led in 2008 did not resolve the question of whether bullying has increased among youths. "It is quite clear that more young people are bullying one another than ever before via digital technologies," he said, according to an October 2 AP story. "What is not clear is whether this replaces any traditional, offline forms of bullying. It could be that bullying is neither up nor down as an overall trend, but rather just shifting venues."

Rep. Debbie Wasserman Schultz (D-Fla.) proposed an alternative to a criminal law. She suggested a new federal assistance program in which competitive grants would allow non-profit Internet safety groups to educate schools and communities of the dangers of online bullying, according to the September 30 AP story.

Missouri Woman Charged With Felony Harassment Under State Law

A Missouri woman was charged in August 2009 with felony harassment for allegedly posting a photo and personal information of a teenage girl on the "Casual Encounters" section of Craigslist, a popular advertising Web site.

Elizabeth A. Thrasher is accused of creating the listing after she had an online confrontation with the 17-year-old daughter of a woman Thrasher's ex-husband was dating, according to an August 18 report in the *St. Louis Post-Dispatch*. The post included the girl's picture, employer, e-mail address and cell phone number.

Authorities said that Thrasher and the girl's mother had been arguing, and that there was some back-and-forth bickering on MySpace among the three. "Who started what is up for debate," said St. Charles County Prosecutor Jack Banas, according an August 19 AP story.

According to the *Post-Dispatch*, Banas said the Craigslist post's language would cause people to believe it was an invitation to engage in sexual contact with the girl. Investigators said men called the girl and sent e-mails, text messages and pornography to her cell phone after Thrasher posted the listing.

The AP reported that Thrasher, of St. Peters, Mo., is the first person charged with felony cyber-bullying under a Missouri law that went into effect in August 2008 in response to the 2006 suicide of 13-year-old Megan Meier, who was the victim of an Internet hoax that drew international attention. (See "Judge Dismisses Ruling against Mother in MySpace Suicide Case," in the Summer 2009 issue of the Silha *Bulletin*.)

According to Mo. Rev. Stat. § 565.090, harassment occurs when a person "[k]nowingly frightens, intimidates, or causes emotional distress to another person by anonymously making a telephone call or any electronic communication." The law also applies when someone communicates with a person who is, or purports to be, 17 years old or younger "and without good cause recklessly frightens, intimidates, or causes emotional distress to such person." An offense can be charged as a felony if a victim is 17 years old or younger and the suspect is at least 21 years old.

Thrasher was released after posting $10,000 bond, but a judge prohibited her from having a computer or Internet access at home. Thrasher's attorney, Michael Kielty, likened the accusations against Thrasher, who has two children, to posting a telephone number on a bathroom wall, telling people to "call Jane Doe for a good time." He said that while Thrasher's actions may have been "in poor taste" or "inappropriate," they do not amount to a crime, according to the August 19 AP story.

"To charge a woman, a mother, with a felony for what is tantamount to a practical joke, that's awfully

Cyber-bullying, *continued on page 18*

On Sept. 30, 2009, members of a House Judiciary subcommittee expressed doubt that a proposed law could accomplish its goal of criminalizing the online bullying of children without infringing on free speech rights.

Cyber-bullying, *continued from page 17*

rash," Kielty told the *Post-Dispatch*. "That's taking it to the extreme." Kielty also said that he thought the statute was poorly drafted.

In an August 21 post on The Volokh Conspiracy law blog, Eugene Volokh criticized the law "as an extremely vague and potentially broad statute" that violates the First Amendment because it is not limited to false statements. Volokh, a law professor at UCLA, focused on the statute's use of the words "without good cause" as the basis for determining that the law is unconstitutional.

"A great deal of speech, including anonymous speech, emotionally distresses people," Volokh wrote. "That doesn't strip it of constitutional protection, and neither should constitutional protection turn to jury conclusions of which causes are good and which are bad." Volokh added that Thrasher could probably be constitutionally prosecuted under a narrower law.

If convicted of felony harassment, Thrasher could face up to four years in state prison, or up to a year in county jail and a $5,000 fine, Banas said in the August 19 AP Story.

"A great deal of speech, including anonymous speech, emotionally distresses people. That doesn't strip it of constitutional protection."

– Eugene Volokh, Law Professor, UCLA

Missouri High School Student Disciplined for Creating Bullying Web Site

A high school freshman in the Troy, Mo., school district was disciplined in October 2009 after she created a Web site to bully another girl, according to an October 14 report in the *St. Louis Post-Dispatch*.

School officials would not say what kind of discipline the girl received, but under the district's bullying policy, the punishment could range from loss of privileges to expulsion, the *Post-Dispatch* reported.

The school district alerted the Lincoln County Sheriff's Department after the victim in the case complained to the principal about the Web site, which contained the girl's name, explicit language and photos, comments, and a poll about the girl, the newspaper reported. Lt. Andy Binder, a Lincoln County sheriff's department representative, told the *Post-Dispatch* that investigators arrested a ninth-grade girl who confessed to creating the Web site, which has since been taken down.

The case was turned over to county juvenile investigators while prosecutors decided whether to press criminal charges, according to the newspaper. Binder said the state would probably not pursue charges under Missouri's cyber-bullying law, Mo. Rev. Stat. § 565.090, because both the suspect and the victim are juveniles, according to an October 15 AP story.

Arthur Bright, a law student at Boston University School of Law, who said he had been the occasional target of bullies as a child, urged authorities not to charge the girl with a crime in an October 16 post on the blog for the Citizen Media Law Project, based at Harvard University's Berkman Center for Internet and Society. "Probably the best thing to do is to look at the way the world actually works," Bright wrote. "And in [the] non-legal world of schoolyard bullies, the bullies generally are kept in line through the oversight of the schools and the parents."

Bright wrote that he feared much of schoolyard bullying could fall under the "recklessly frightens, intimidates, or causes emotional distress" language of the state's harassment law. He suggested the Missouri legislature add a juvenile exception to prevent the issue of schoolyard bullying in the online world from being criminalized.

Charge Dropped Against Texas Girl Arrested Under State's New Online Harassment Law

An online harassment charge against a 16-year-old Texas girl arrested in October under a new state law was dropped within a week of her arrest because prosecutors said her conduct did not meet specific requirements of the law.

Bexar County Assistant District Attorney Cliff Herberg said the girl was not sending messages under an assumed or hidden identity, which is needed for the law to apply, according to an October 16 report in the *San Antonio Express-News*.

The online harassment law, Tex. Penal Code § 33.07, which took effect Sept. 1, 2009, criminalizes the act of sending e-mails, text messages, instant messages, or communicating through social networking sites with the intent to "harm, defraud, intimidate, or threaten any person." The law only applies to instances in which one uses "the name or persona of another person."

According to the law, it is a third-degree felony if the harassing communication involves creating a Web page or posting messages on a social networking site. Harassment through other forms of electronic communication constitutes a misdemeanor that carries a sentence of up to one year in jail and a $4,000 fine.

In this case, authorities said the girl from Somerset, a suburb of San Antonio, never concealed her identity when sending the messages, according to the *Express-News* report, which did not detail her alleged harassing behavior.

Great Britain Teenager Sentenced to Juvenile Facility for Bullying on Facebook

An 18-year-old woman who made death threats on Facebook became the first person in Great Britain to be jailed for bullying on a social networking site, British newspaper *The Guardian* reported on August 21. Keeley Houghton, of Malvern, Worcestershire, pleaded guilty to harassment on August 21 in Worcester Crown Court. She was sentenced to three months in a juvenile offenders' institution, according to *The Times* of London.

The Times reported that Houghton had updated her Facebook status on July 12 to say: "Keeley is going to murder the bitch. She is an actress. What a [f***ing] liberty. Emily [F***head] Moore." Houghton had two previous convictions in connection with Moore for assault and damaging Moore's property that date back to 2005.

Houghton told police that she wrote the death threats late at night while she was drunk and had no memory of doing so, *The Guardian* reported.

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Digital Media

Reporting Errors Haunt Major News Outlets

In the fall of 2009, several inaccurate stories in the mainstream news media circulated widely among reputable organizations before they were retracted or corrected.

CNN Criticized for September 11 Reporting

On the morning of Sept. 11, 2009, CNN reported that the Coast Guard had fired on a suspicious vessel on the Potomac River that had breached a security zone near the Pentagon, close to where President Barack Obama was attending a September 11 anniversary ceremony. It was later revealed that CNN had based the report on radio transmissions from what turned out to be a routine training exercise, and that no shots had ever been fired.

On the morning of September 11, CNN reported on-air that a reporter had seen a suspicious boat on the Potomac, and accompanied the story with stock video of speeding Coast Guard boats. The network also showed pictures of the river above a banner that read: "Breaking News: Coast Guard fires 10 rounds at boat on Potomac River," a September 11 Associated Press (AP) story reported.

According to the September 11 AP story, CNN's Twitter feed read: "Coast Guard confronts boat as Obama visits Pentagon, police scanner reports say shots fired." Reuters and Fox news soon repeated the CNN reports. "Here is what we are learning. The U.S. Coast Guard ship of some type fired on what is considered a suspicious boat in the Potomac River," Fox News reported. "I can't recall a time or moment like this, on an American river, where the Coast Guard has opened fire," Fox news Anchor Bill Hemmer said, according the AP.

The Coast Guard held a news conference later in the day to explain that it was simply conducting a "routine exercise." According to a CNN transcript of the conference, Coast Guard Vice Adm. John Currier said the radio transmissions were relayed on an unencrypted but discreet Coast Guard channel. "Part of the protocol in their training is verbalization of gunfire and orders between the boats simulating what we would normally do if we were intercepting a suspect vessel," Currier said. "That 'Bang, bang' was verbalized on the radio, but I want to re-emphasize that no shots were fired, no weapons were trained, no ammunition was loaded. This was strictly on the radio, a verbalization."

In a statement released later that day, CNN said that it had contacted the Coast Guard public affairs office before airing the story, but the spokeswoman "said she was unaware of any activity taking place on the Potomac River."

"After hearing a further radio transmission about 10 rounds being expended, and after reviewing video of rapid movement by Coast Guard vessels as the President's motorcade crossed the Memorial Bridge, CNN reported the story. Simultaneously, during a second phone call, the Coast Guard spokeswoman informed us that its National Command Center and other command posts knew nothing about any activity in the area," the network's September 11 statement said. "Given the circumstances, it would have been irresponsible not to report on what we were hearing and seeing."

In a September 11 news conference, White House Press Secretary Robert Gibbs criticized CNN's reporting of the incident. "Before we report things like this, checking would be good," Gibbs said, according to a September 11 report on NBC News.

Al Tompkins of the Poynter Institute was also critical of CNN's erroneous reporting. "The treatment of this story is a reminder of the hazards and responsibilities of live reporting," Tompkins wrote. "Media organizations, including CNN, worked heroically to bring us the world-changing events of 9/11/01. If that was a high point of coverage, this one wasn't."

> "Before we report things like this, checking would be good."
>
> – White House Press Secretary Robert Gibbs

Environmental Activists Stage Fake Chamber of Commerce Press Conference

An October 19 press conference at the National Press Club purportedly sponsored by the U.S. Chamber of Commerce was revealed to be a hoax after about 20 minutes when Eric Wohlschlegel, the communications director for the real Chamber, entered the room and announced: "This is a fraudulent press activity, and a stunt."

The fake press conference and an accompanying fake press release misled several media organizations, including Reuters, CNBC, and Fox Business, that ran stories about the event before running retractions.

During the fake press conference, which included handouts on the Chamber's letterhead, a podium with the Chamber logo, and some individuals posing as journalists, Jacques Servin, an environmental activist posing as a Chamber of Commerce official and calling himself "Hingo Sembra," announced that the Chamber had changed its position and now supported a Senate climate change bill, an October 20 *New York Times* story reported. After Wohlschlegel arrived and confronted Servin, both men accused each other of being impostors and demanded to see each other's business cards. Video of the staged press conference is available on Web sites such as YouTube.com.

An October 19 story in *The Washington Post* identified an "activist-prankster group" called the Yes Men as the culprits behind the stunt. The group has carried out several other hoaxes in order to draw attention to what they consider slow progress fighting climate change.

According to an October 20 *Los Angeles Times* story, the U.S. Chamber of Commerce has generally opposed most climate-change legislation, arguing that it is not sufficiently comprehensive and international, and that it imposes too high a regulatory burden on U.S. businesses.

As it became clear that the conference and the press release, which misspelled Chamber President Tim Donohue's name, were hoaxes, news organizations scrambled to correct the story. According to an October 19 post on the Web site Politico.com, a

Errors, *continued on page 20*

Errors, *continued from page 19*

CNBC anchor interrupted herself mid-sentence to announce that CNBC had "breaking news" before cutting away to Hampton Pearson, a reporter who read from the fake press release. Upon realizing the story was a fake, Pearson later followed up with a second report saying that the "so-called bulletin" was an "absolute hoax."

An October 19 story on the Web site Talking Biz News reported that the wire service Reuters also published a story based on the false press release. "The U.S. Chamber of Commerce said on Monday it will no longer oppose climate change legislation…" the initial Reuters story began, according to Talking Biz News. Reuters quickly updated its story to indicate that the event was a hoax, but not before it was picked up and posted on the Web sites of several news organizations, including *The New York Times* and *The Washington Post.*

On October 26, the U.S. Chamber of Commerce filed suit against the Yes Men in Washington, D.C. Federal District Court. The suit, *Chamber of Commerce v. Servin*, No. 09-CV-02014-RWR, claims trademark and copyright infringement, and that the Yes Men staged the press conference for financial gain.

In response to the suit, the Yes Men issued a statement attributed to Andy Bichlbaum, an alias often used by Servin according to a October 27 *New York Times* story, calling the suit a "blow" to free speech. "It demonstrates in gory detail the full hypocrisy of the Chamber," the statement said. "The only freedom they care about is the economic freedom of large corporations to operate free of the hassles of science, reality and democracy."

Steven Law, general counsel for the Chamber, disagreed. "The defendants are not merry pranksters tweaking the establishment," Law said in the October 27 *Times* story. "Instead, they broke the law in order to further commercial interest in their books, movies and other merchandise."

Team Web Site, News Outlets Erroneously Report Death of Former NFL Player

When the Minnesota Vikings Web site erroneously reported on October 28 that the team's former safety Orlando Thomas had died, the news quickly circulated across the Internet, including posts on the Web sites for ESPN and the Minneapolis *Star Tribune*. A few hours later, Thomas' agent informed the team that Thomas was still alive and battling Lou Gehrig's Disease, an October 28 AP story reported.

"Somebody put it on their MySpace page down in Crowley, La. [near Thomas's current home in Youngsville], and I guess the local media ran with it or something," said Thomas' agent, Mark Bartelstein, in an October 29 *Star Tribune* story. "You know how in today's world once rumors start, it spreads like wildfire. … But it's totally false. He's sick, but he's good and he's fighting the battle he fights every day."

According to the *Star Tribune* story, the Vikings Web site reported Thomas' death after officials from the University of Louisiana-Lafayette, Thomas' alma mater, called and told team officials that he had died.

The Vikings issued an apology later on October 28, expressing their regret for the inaccurate report on their Web site. "We are thankful that this report was inaccurate and he and his family continue to be in our thoughts," the apology read.

The *Star Tribune* reported that it had already written a story on Thomas' death when it learned that former Vikings player Jake Reed had been "frantically tweeting" that Thomas wasn't dead. "Attention All ... Orlando Thomas is NOT dead!! Thanks for your concern! Please continue to pray for him and his family!" one Twitter post said. "This is NOT true! I just spoke to his family and they are VERY upset about this! He is fine!" said another, according to the *Star Tribune*, who then called Bartelstein to confirm that Thomas was still alive.

"It's every journalist's nightmare: reporting a death that has not actually occurred," wrote *Los Angeles Times* reporter Claire Noland on an October 29 post on Afterward, the blog of the *Times* obituary staff. "Lesson learned? Confirm the facts before running with the story. Even in the fast-paced world of a 24-hour news cycle, we need to get the story right before getting it first."

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said that it wasn't surprising that the media relied on the Web site for the information about Thomas. "I cannot fault the media for relying initially on the Vikings; presumably they know what is happening with their players," Kirtley said on Twin Cities television station KARE-11 on October 29. "What is classic about this is that the old fashioned reporting of picking up the phone and calling someone who might actually know seems to have gotten lost in the shuffle."

Vikings fan and blogger Dan Zinski was also critical of the reporting on Thomas' death. "Evidently, no one at Vikings.com, the Star-Trib [sic] or ESPN bothered calling anyone associated with Thomas to confirm the original story. Basically, they behaved like I and all the other lazy psuedo-journalists [sic] in the world would have," Zinski wrote on The Viking Age blog on October 29. "So, here's the question: If the mainstream media start acting just like bloggers, how are we to tell the difference between the real journalists and the fake?"

– Ruth DeFoster
Silha Research Assistant

If the mainstream media start acting just like bloggers, how are we to tell the difference between the real journalists and the fake?"

– Blogger Dan Zinski

Digital Media

New FTC Guidelines Target Bloggers, Raise First Amendment Concerns

New Federal Trade Commission guidelines became effective on December 1 that require online product reviewers to disclose any compensation or payment received in exchange for publishing the review.

The revisions represent the first changes to the FTC's policy on endorsements since 1980, before the Internet became a tool to appeal to consumers. The FTC says the revisions now apply the same kinds of guidelines to bloggers and commentators on social media Web sites that have long governed other media forms, such as television or print.

"Given that social media has become such a significant player in the advertising area, we thought it was necessary to address social media as well," said Richard Cleland, assistant director of the division of advertising practices at the FTC, in an October 6 report in *The Washington Post*. *The Post* reported violators could be subjected to up to $11,000 in FTC penalties or civil liability in a lawsuit.

The guidelines represent the FTC's interpretation of the Federal Trade Commission Act, 15 U.S.C. §§ 41-51, as applied to new technology. The FTC began to investigate revising its Guides Concerning the Use of Endorsements and Testimonials in Advertising, 16 C.F.R. § 255.0 *et seq*., (2009), in January 2007. The agency then issued proposed revisions in November 2008. The final guidelines can be found online at http://ftc.gov/os/2009/10/091005endorsementguidesfnnotice.pdf.

The guidelines raise questions about what constitutes an advertisement, the extent to which a reviewer must disclose relationships with companies, and how far the FTC will go to police online reviews and advertisements. "The revised Guides specify that while decisions will be reached on a case-by-case basis, the post of a blogger who receives cash or in-kind payment to review a product is considered an endorsement," the FTC said in an October 5 release. "Thus, bloggers who make an endorsement must disclose the material connections they share with the seller of the product or service."

The FTC's overview of the regulations published in the Federal Register assures bloggers that not all product reviews violate the guidelines. The crucial question is whether the statement can be considered "sponsored." A consumer who buys a product with his or her own money and writes a glowing review on a personal blog has not violated the guidelines. However, posts by a blogger paid to speak about the product constitute a violation, according to the FTC.

In an October 5 interview with Edward Champion, publisher of the Reluctant Habits blog, Cleland said that the FTC was still in the process of finalizing how to apply the guidelines. Cleland revealed that the FTC will not make a priority of targeting individual bloggers who fail to disclose one minor free gift.

"I think that as we get more specific examples, ultimately we hope to put out some business guidance on specific examples," Cleland said. "From an enforcement standpoint, there are hundreds of thousands of bloggers. … Looking at individual bloggers is not going to be an effective enforcement model."

The FTC acknowledged that bloggers will probably be subjected to different standards than reviews published in traditional media. The commission described traditional media reviews as instances "where a newspaper, magazine, or television or radio station with independent editorial responsibility assigns an employee to review various products or services as part of his or her official duties, and then publishes those reviews." The commission reasoned that in such a context, revealing whether the media entity paid for the product "would not affect the weight consumers give to the reviewer's statements."

This rationale for distinguishing bloggers from journalists raised the ire of Jack Shafer, who likened the new guidelines to licensing journalists and policing speech in an October 7 story on Slate.com. "[I]f the guidelines don't apply to established media like the *New York Review of Books*, which also happens to publish reviews on the Web, why should they apply to Joe Blow's blog? … Nobody likes deceptive advertising or fishy bloggers. But I'd rather wade through steaming piles of unethical crap on the Web than give the FTC Javertian powers to pursue shady advertorial. This is one of those cases in which the government's solution is 10 times worse than the problem."

Many bloggers and traditional journalists said they favor transparency, but reject the notion that online dialogue should be regulated. "There should be more disclosure, but the Web is different from earlier media in ways that make government regulation less relevant and practical," L. Gordon Crovitz, the former publisher of *The Wall Street Journal*, wrote in an October 18 *Journal* op-ed. "The Web has its own self-regulatory mechanisms. Failing to disclose interests sullies one's reputation online, and reputation harm travels faster and lasts longer than it did before the Web."

On his BuzzMachine blog, Jeff Jarvis questioned the need for the regulations because he said most online commentators do not consider what they do to be remotely connected to journalism. "So for the FTC to go after bloggers and social media – as [the regulations] explicitly do – is the same as sending a government goon into Denny's [restaurant] to listen to the conversations in the corner booth and demand that you disclose that your Uncle Vinnie owns the pizzeria whose product you just endorsed," Jarvis wrote in a October 5 post.

To ease the fear of bloggers, Cleland noted that the FTC is more likely to use its enforcement policies against an advertiser for disclosure or testimonial violations than a blogger. An exception, Cleland said

FTC Guidelines, *continued on page 22*

> "[I]f the guidelines don't apply to established media like the *New York Review of Books*, which also happens to publish reviews on the Web, why should they apply to Joe Blow's blog? . . . This is one of those cases in which the government's solution is 10 times worse than the problem."
>
> – Jack Shafer, Slate

FTC Guidelines, *continued from page 21*

in an October 5 Associated Press (AP) story, is a blogger who runs a substantial operation that violates the guidelines and has already been warned about the practice. To further clarify the rules, Cleland noted that a blogger who receives a free product without the advertiser's knowledge would not violate the rules. As an example, he said that someone who receives a free bag of dog food as part of a pet store promotion would be able to write about the food without violating the guidelines.

Jack Gillis, a spokesman for the Consumer Federation of America, said the FTC guidelines were necessary to put added pressure on bloggers to properly disclose their ties to advertisers. "Consumers are increasingly dependent on the Internet for purchase information," Gillis said in an AP report. "There's tremendous opportunity to steer consumers to the wrong direction."

In an October 7 post on Legal Blog Watch, Robert Ambrogi defended the guidelines as an easy way to foster the disclosure that bloggers should practice anyway. "These guidelines are not a heavy-handed government crackdown on innocent bloggers who say nice things about a product," Ambrogi wrote. "It is meant to expose marketing practices that exploit viral media by paying for favorable reviews – whether the payment is in cash or goods. One other point to keep in mind about the guidelines is that the disclosure they require is not onerous. All a blogger needs to do is to add a line to the particular post saying what was received, whether it was a payment, a free sample or something else of value."

Since the guidelines were released, some bloggers started disclosing their connections in a manner that criticized the new regulations. An October 6 post on DeepGlamour, a blog that comments on a variety of subjects, such as fashion and real estate, began by revealing that the blog's editor receives a percentage of the purchase price on items readers buy via the blog's link to Amazon.com. The post concluded by saying, "The Federal Trade Commission demands that we tell you this – they think you're idiots and are violating the First Amendment with their regulation of what bloggers publish – but it's also a friendly reminder to Support DeepGlamour by starting all your Amazon shopping here."

In another change incorporated into the new guidelines, advertisements that feature consumer testimonials about a product or service must clearly disclose the results that consumers can generally expect rather than use a standard "results not typical" disclaimer.

Anthony DiResta, general counsel for the Word of Mouth Marketing Association, a trade group that promotes advertising via social media, said that while he favors disclosing connections between advertisers and endorsers, he was less enthusiastic about abolishing the "results not typical" disclaimer. "Whenever there is going to be a claim of typicality, then there's going to have to be substantiation," which costs time and money, DiResta said, according to an October 6 report in *The National Law Journal*.

The new guidelines do not reveal what the FTC considers "typical" results and the term needs to be more accurately defined, said Daniel Fabricant, interim executive director and CEO of the Natural Products Association, a trade group for nutritional supplements and natural products manufacturers and retailers. "I don't think [the FTC has] done that," Fabricant said in the October 5 AP report. "The results you see in clinics are going to be in some degree different from what you see in the consumer."

The new regulations also require that celebrities disclose their relationships with advertisers when they make endorsements outside the context of traditional ads, such as on talk shows or in social media. In addition, if a company pays or sponsors a research company to study a product, an ad that cites the study must disclose the financial tie between the advertiser and the research organization, according to the guidelines.

– Cary Snyder
Silha Research Assistant

Cyber-bullying, *continued from page 18*

However, police say Internet records show Houghton wrote the threatening message at 4 p.m. on July 12 and kept it on her page for 24 hours. *The Daily Mail* in London reported that people in Great Britain have previously been jailed for harassment and stalking on social networking sites, but that Houghton is believed to be the first to be jailed for online bullying.

Yasmin Joomraty, a lawyer who specializes in digital media issues, said the online bullying falls under the Protection from Harassment Act. "Though this case does not seem to me to mark a turning point necessarily, people do have to watch what they say online," Joomraty said, according to *The Times*.

– Cary Snyder
Silha Research Assistant

Media Ethics

Washington Post Delays, Redacts Information From Afghanistan Report

The Washington Post agreed to delay publication and redact certain portions of a classified Afghanistan report after the White House expressed concern that the release of the leaked document might threaten the safety of U.S. troops, *Post* writer Howard Kurtz revealed on September 22, 2009.

A redacted version of the report and an accompanying story written by veteran *Post* reporter Bob Woodward were published September 21. The story summarized the 66-page document, which was written by Gen. Stanley McChrystal, the top U.S. and NATO commander in Afghanistan, and intended for President Barack Obama.

In the September 22 story, Woodward told Kurtz that administration officials strongly objected to the publication of the full report and told him, *Washington Post* Executive Editor Marcus Brauchli, and a *Post* lawyer in a September 19 conference call that if they published the full report, "it could endanger the lives of troops."

On September 20, after a meeting at the Pentagon with Brauchli, Woodward, and *Post* reporter Rajiv Chandrasekaran, Woodward said administration officials "did a wholesale declassification of 98 percent" of the document. *The Post* then agreed to withhold certain operational details, which Woodward said "made it easier" for the newspaper to proceed to publication without risking criticism for disclosing classified information, according to the September 22 story.

In a September 22 story on Politico.com, Woodward told media correspondent Michael Calderone that he accepted most of the Pentagon's requests to withhold information from the report, but balked when asked to withhold McChrystal's 12-month estimate for when he believes failure is likely without additional forces in Afghanistan. "Marcus [Brauchli] and I felt very strongly that's one of the core points of McChrystal's argument and we want to represent it accurately," Woodward said.

Woodward told Kurtz that he was given the McChrystal report by an anonymous source for a book he plans to publish about the Obama administration. After reading it, he said he realized that its blunt assessment of the military situation in Afghanistan was immediately newsworthy, because President Obama was in the process of deciding whether to send more troops.

"I went back to the source or sources and said, 'This definitely belongs in the newspaper,' and they agreed," Woodward said in the September 22 *Post* story. He also said he suggested to *The Post* "that we not even think about publishing" a section of the report on future operations in Afghanistan.

Woodward compared the report to the Pentagon Papers, a classified study of the Vietnam War that was leaked to newspapers in 1971. The leak of the Pentagon Papers and the subsequent restraining order sought by then-President Richard Nixon against *The New York Times* and *The Washington Post* eventually led to the Supreme Court case *New York Times Co. v. United States*, 403 U.S. 713 (1971), a landmark decision that allowed the newspapers to publish the Pentagon papers and set a high bar for any government-instituted prior restraint against the press.

In his report, McChrystal wrote that without more forces within the next year, the eight-year conflict in Afghanistan "will likely result in failure."

The assessment also criticized the Afghan government as corrupt and called the Afghan prison system "a sanctuary and base to conduct lethal operations" against government and coalition forces. In the report, McChrystal outlined a plan to shore up the Afghan government's ability to manage its own prison system, identified three main insurgent groups in the country, and proposed a surge in troop levels in both the American and Afghan armies.

The report stated that "failure to provide adequate resources … risks a longer conflict, greater casualties, higher overall costs, and ultimately, a critical loss of political supports. Any of these risks, in turn, are likely to result in mission failure."

On the September 27 edition of CNN's "State of the Union with John King," Kurtz spoke with *USA Today* managing editor Lauren Ashburn during his recurring "Reliable Sources" segment. "My newspaper delayed the story for two days, during which time there was a conference call between the editor and Woodward and officials at the White House. There was a meeting at the Pentagon. The Pentagon pressed for deletions, saying that some of that information could endanger or jeopardize troops," Kurtz said. "Does a newspaper have a choice in that situation but to hold off and hear these arguments?"

Ashburn replied that it was the duty of a newspaper to "weigh the negative impact" of disclosing classified information. "I think everybody needs and does, from managing editors to news directors across the country, weigh that very seriously," Ashburn said. "And there may be a lot of people out there who don't think that that happens, but it does."

– Ruth DeFoster
Silha Research Assistant

"The Pentagon pressed for deletions, saying that some of that information could endanger or jeopardize troops. Does a newspaper have a choice in that situation but to hold off and hear these arguments?"

– Howard Kurtz, *The Washington Post*

Media Ethics

Quarrel between Obama Administration, Fox News Intensifies

"The press is there as a surrogate for the public, to ask the questions the public wants answers for. Their job is not to stand there and provide him an opportunity to talk on any subject he wants."

– Martha Joynt Kumar, Professor, Towson University

The relationship between President Barack Obama and the Fox television network, and in particular the Fox News Channel, escalated into a headline-grabbing feud in the fall of 2009, prompting criticism of both the cable network's politically-charged commentary and the administration's reaction to Fox's unfavorable coverage.

An October 23 story in *U.S. News and World Report* stated that, although the Democratic president and the conservative-leaning news channel have always had fundamentally different political views, "Team Obama was pushed over the brink by a growing list of what it considered outrageous anti-Obama conduct by Fox that showed no sign of stopping." The *U.S. News* story said Obama staffers reached a "break point" this summer as Fox personalities tried to pressure controversial Obama advisers to resign, and later created the impression that "angry anti-Obama protesters at congressional town hall meetings last summer signaled that Obama's healthcare proposals were dying."

Several news sources cited a surge in hostility between the parties the weekend of September 20, when Obama appeared on five different networks' Sunday morning news shows touting his health care reform plan, but did not appear on Fox. According to a September 21 story in *The San Francisco Examiner*, the administration referred to Fox as an "ideological outlet," and quoted an unnamed Obama spokesperson as saying "we figured Fox would rather show 'So You Think You Can Dance' than broadcast an honest discussion about health insurance reform," referring to the network's decision to run the popular dance show on its broadcast stations instead of an Obama news conference in July 2009.

On a September 19 interview on the Fox News show "The O'Reilly Factor," Chris Wallace, the host of "Fox News Sunday," reacted to the administration's decision not to appear on his show by calling the Obama White House "the biggest bunch of crybabies I have dealt with in my 30 years in Washington."

In an October 11 *New York Times* story, White House communications director Anita Dunn spoke out directly against Fox. "We're going to treat them the way we would treat an opponent," said Dunn. "As they are undertaking a war against Barack Obama and the White House, we don't need to pretend that this is the way that legitimate news organizations behave."

Michael Clemente, Fox's senior vice president for news, answered with a press release on October 12. "Instead of governing, the White House continues to be in campaign mode, and Fox News is the target of their attack mentality," Clemente wrote. "Perhaps the energy would be better spent on the critical issues that voters are worried about."

On October 18, David Axelrod, President Obama's senior advisor, said Fox is "not really a news station," even in their daily news programming. "It's really not news — it's pushing a point of view. And the bigger thing is that other news organizations like yours ought not to treat them that way, and we're not going to treat them that way," Axelrod said on ABC's "This Week." "We're going to appear on their shows. We're going to participate, but understanding that they represent a point of view."

In an October 23 CBS News story, Dunn said that "FOX News often operates almost as either the research arm or the communications arm of the Republican party."

At times, the conflict moved beyond words. On October 22, the Treasury Department tried to exclude Fox News from pool coverage of interviews with "pay czar" Kenneth Feinberg, but backed down after strong protests from other press outlets. "All the networks said, that's it, you've crossed the line," said CBS News White House correspondent Chip Reid, in the October 23 CBS News story.

"What gives this dust-up special irony is that Fox News success comes in no small part from its ability to convince its viewers that the 'mainstream' media are slanted to the left," CBS political correspondent Jeff Greenfield said on the October 23 CBS News story, noting that Fox's prime-time voices generally come from the right. "Now, the White House is arguing that the network is not a real news organization at all, and that has brought some mainstream media voices to its defense."

In an October 19 entry on *The Washington Post*'s PostPartisan blog, columnist Ruth Marcus criticized the Obama administration's feud with Fox as being "dumb on multiple levels" and distracting to the administration's goals. "Where the White House has gone way overboard is in its decision to treat Fox as an outright enemy and to go public with the assault. Imagine the outcry if the Bush administration had pulled a similar hissy fit with MSNBC," Marcus wrote. "Certainly Fox tends to report its news with a conservative slant – but has anyone at the White House clicked over to MSNBC recently? Or is the only problem opinion journalism that doesn't match its opinion?"

In an October 26 Associated Press story, AP journalist Ben Feller characterized the hostility between Obama and Fox as consistent with the administration's previous reactions to criticism, stating that "publicly singling out one news organization is but the most highly publicized push-back from an Obama White House that began back during last year's presidential campaign building a reputation for aggressively confronting reporters over stories it didn't like and using hardball tactics to try to get its way."

Martha Joynt Kumar, a political science professor at Towson University who studies White House communications, told the AP that all presidents will inevitably complain about their treatment in the press.

"The press is there as a surrogate for the public, to ask the questions the public wants answers for," Kumar said in the October 26 AP story. "Their job is not to stand there and provide him an opportunity

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Media Ethics

ACORN Videos Provoke Media Debate, Trigger Lawsuit

A series of hidden-camera videos released in September 2009 depicting employees of the nonprofit group Association of Community Organizations for Reform Now (ACORN) advising a couple posing as a pimp and a prostitute resulted in the elimination of the organization's federal funding, a lawsuit against the filmmakers, and a bevy of media commentary surrounding news coverage of the videos.

The footage that sparked the controversy featured 25-year-old James O'Keefe and 20-year-old Hannah Giles walking into ACORN offices in Baltimore; Washington, D.C.; Brooklyn, N.Y.; San Bernardino, Calif.; and San Diego asking for help with buying a house to use as a brothel for underage immigrant prostitutes. In some of the videos, ACORN employees provided advice about tax breaks and home loans.

On the morning of September 10, the first video footage of the couple's interactions with ACORN employees was published on the conservative Web site BigGovernment.com and soon spread to other sites. Later that day, Fox News became the first TV network to broadcast coverage of the videos, and other organizations soon followed.

As a result of fallout from the videos, on October 1 President Barack Obama signed into law a spending bill, H.R. 2918, that included a provision that "[p]rohibits the availability of funds for the Association of Community Organizations for Reform Now (ACORN) or any of its affiliates, subsidiaries, or allied organizations."

ACORN, which fired many of the employees featured in the videos, has repeatedly been the target of conservatives, most recently for its alleged use of voter registration fraud in the 2008 presidential election. The creation of the videos was widely viewed as politically motivated.

A September 18 story in *The New York Times* described O'Keefe as a "conservative activist" with "pro-market, anti-government views." Giles, who currently writes for BigGovernment.com and the conservative Web site Townhall.com, met O'Keefe on Facebook and pitched the undercover video idea to him via a phone call.

"Politicians are getting elected single-handedly due to this organization," O'Keefe said in a September 19 *Washington Post* story. "No one was holding this organization accountable. No one in the media is putting pressure on them. We wanted to do a stunt and see what we could find."

O'Keefe denied claims that he and Giles were bankrolled by conservative organizations and insisted that the pair acted independently, although he did admit to receiving help and advice from Andrew Breitbart, the founder of BigGovernment.org. "We'll be providing receipts, documented proof that this was an independent piece of journalism done by myself and Hannah Giles," O'Keefe said in September 18 story in *The Washington Post*.

Media reaction to the videos was mixed. Slate's Jack Shafer wrote in a September 23 column that political motivations did not taint the inherent newsworthiness of the underlying story. "One of the great strengths of American journalism is that it will accept contributions from everybody from amateurs to entertainers (I'm looking at you, Jon Stewart) to gadflies to billionaires to activists to students to genocidal tyrants. The system is so delightfully open that even pornographers can spill worthwhile journalistic ink," Shafer wrote. "That Breitbart comes swinging a political ax should bother nobody, unless the journalism published in *Mother Jones*, *The Nation*, the Huffington Post, *Salon*, the *New Republic*, the *American Prospect*, *Reason*, the *Weekly Standard*, or the *National Review* gives them similar fits. Viewing the world through an ideological lens can sometimes help a journalist to discover a story."

Ken Silverstein, the Washington editor for *Harper's Magazine*, looked past the political motivations of O'Keefe and Giles and focused on the pair's willingness to report a story he said the mainstream media would not undertake. "Liberals have been attacking the videos by saying that the two videomakers, James O'Keefe III and Hannah Giles, are right-wing advocates," Silverstein wrote in a September 18 post on *Harper's* Washington Babylon blog. "Who cares? O'Keefe and Giles got some important things wrong, like the amount of federal money received by ACORN, but there's no denying the central claims and power of their work. Nor does it matter that the case is now being picked up and exploited by Fox News, Glenn Beck, and Sean Hannity, which in no way undermines the journalists' work. … Elsewhere you hear that this is only the kind of work trained professionals in the mainstream media should do. Except of course no one in the mainstream media would have done the story."

Other commentators criticized the O'Keefe-Giles videos as unethical. On September 22 Fort Lauderdale *Sun Sentinel* columnist Michael Mayo wrote that the ends of the ACORN videos did not justify the means. "Philosophically, I like undercover investigations that expose ongoing corruption and wrongdoing, but I don't like sting operations that entrap people and essentially induce people to commit crimes," Mayo wrote. "Real immersion journalism takes time and hard work. It doesn't have to involve deception or lying. Giles could have signed up to work for ACORN under her own name, and then been a fly-on-the-wall, watching and waiting to see if anything untoward was going on. What these two college students did wasn't journalism. It was a stunt."

In a November 30 story on Politico.com, Kelly McBride, a faculty member at the Poynter Institute, spoke of the inherent dangers of hidden-camera reporting. "We don't have a set of standards for citizen journalism," McBride said. "But undercover work is often considered outside the boundaries of acceptable methods. It can be very problematic if your first value as a reporter is to tell the truth, and the first thing you do is deceive. It's very hard for the public to figure out when to trust you."

In a September 23 column, *Los Angeles Times*

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"We don't have a set of standards for citizen journalism. But undercover work is often considered outside the boundaries of acceptable methods. It can be very problematic if your first value as a reporter is to tell the truth, and the first thing you do is deceive. It's very hard for the public to figure out when to trust you."

– Kelly McBride, Faculty Member, Poynter Institute,

ACORN Videos, *continued from page 25*

media critic James Rainey said that while the videos provided valuable content, the political motivations of O'Keefe and Giles should have caused news outlets to be careful with their coverage. "[N]o legitimate news organization can claim editorial integrity if it merely regurgitates information from political activists without subjecting the material to serious scrutiny," Rainey wrote. "Some news outlets have taken that responsibility on earnestly, but others, notably Fox News and its commentators, have taken a pass. They've offered little context and less proportion in recycling the ACORN story, day after day."

According to Rainey's column, O'Keefe and his promoters told Fox that not a single ACORN worker had the slightest qualms when confronted with the prostitution scheme, yet a report from Philadelphia suggested an ACORN worker in that city called police after a visit by the duo. Rainey also wrote that a statement from police in National City, Calif., showed that a suspended ACORN worker had called his cousin, a police detective, to ask for advice about the matter.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said that the ACORN videos clarified an important role for traditional news outlets. "The role of gatekeeper and arbiter is the main role left for the mainstream media," Kirtley said in Rainey's September 23 column. "If they are not at least doing that, they might as well give up."

Other commentators criticized mainstream media outlets for not reacting quickly enough to report on the ACORN videos. Clark Hoyt, the public editor at *The New York Times*, said in a September 27 column that *The Times* "stood still" as more ACORN videos appeared online and government authorities distanced themselves from the group. Hoyt attributed the newspaper's "slow reflexes" to not knowing how to deal with stories that originate from the world of talk radio, cable television and partisan blogs. Some of these stories, Hoyt noted, lack factual support and never gain momentum. "But others do, and a newspaper like *The Times* needs to be alert to them or wind up looking clueless or, worse, partisan itself."

Starting September 14, National Public Radio published several stories and blog posts about the ACORN videos, but NPR ombudsman Alicia Shepard defended the delay the organization took while verifying the authenticity of the videos. She wrote that it was necessary to protect NPR's credibility in an age of Internet hoaxes. "[I]n this case, ACORN deserved intense – not halting – scrutiny from any reputable organization. The same is true for the groups that have raised allegations against ACORN. Allegations need to be checked out—not just repeated," Shepard wrote in a September 23 NPR Ombudsman blog post.

In his September 23 column, Rainey predicted that the ACORN videos will spawn a surge in undercover reporting. "O'Keefe and Giles' takedown, a television staple for more than a week, likely will … popularize and expand the form," Rainey wrote in his column. "Now nurses, doctors, teachers, cops, social workers – just about everyone – ought to get ready for their unflattering close-ups."

Rainey also said that legal judgments against undercover journalists have made television producers and executives hesitant to authorize the use of deceptive reporting tactics. He mentioned the initial $5.5 million verdict a jury levied against ABC in 1997 after the network deceived the Food Lion supermarket chain into hiring undercover reporters to expose unsanitary conditions in the chain. Food Lion did not contest the accuracy of the reports that aired on ABC's "Prime Time Live," but instead focused on how the network gathered its information. The 4th Circuit U.S. Court of Appeals later reduced the verdict to $2 in nominal damages in *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505 (4th Cir. 1999).

On September 23, ACORN and two of its fired Baltimore employees – Tonja Thompson and Shera Williams – filed a $5 million-dollar lawsuit against O'Keefe, Giles, and Breitbart in Baltimore City Circuit Court, alleging violations of Maryland's wiretapping law, Md. Cts. & Jud. Proc. Code § 10-402(a). The law makes it unlawful for anyone to "willfully intercept, endeavor to intercept, or procure any other person to intercept or endeavor to intercept, any wire, oral or electronic communication." The law also prohibits disclosing the contents of an illegally intercepted communication. Md. Cts. & Jud. Proc. Code § 10-410 creates a civil cause of action for violating the wiretapping law.

The lawsuit, which only involves the Baltimore recording, claims the video damaged ACORN's reputation and asks for an injunction prohibiting further broadcast or distribution. The lawsuit seeks $2 million in compensatory damages – $1 million for ACORN and $500,000 for each of the two terminated workers – in addition to $1 million punitive damages from each of the three defendants.

Andrew D. Freeman, an attorney for ACORN, Thompson, and Williams, said the emotional distress claim "is not an exaggeration," according to a September 24 Associated Press (AP) report. "They're doing their best not to watch television. They've sort of been prisoners in their own homes," Freeman said. "While everyone, including them, agrees that some of the things they said were dumb, in Maryland we have a right to say dumb things in the privacy of our homes and offices without fear of being taped and without fear of being splashed all over the Internet."

A two-month internal investigation of ACORN conducted by former Massachusetts Attorney General Scott Harshbarger concluded that the employees shown on the O'Keefe-Giles videos did not act illegally, according to a December 7 AP report. Harshbarger said some of the behavior was inappropriate, but that there is a difference between behaving unprofessionally and behaving illegally.

ACORN funded Harshbarger's investigation, which led some to attack the merits of the report. "How surprising is it that a report paid for by ACORN exonerates them?" asked Rep. Darrell Issa (R-Calif.), the ranking Republican on the House Oversight and Government Reform Committee, according to the December 7 AP report.

– Cary Snyder
Silha Research Assistant

Media Ethics

Photo of Dying Marine Sparks Controversy

An Associated Press (AP) decision to publish a photograph of a fatally wounded Marine in Afghanistan drew sharp criticism from the Pentagon and sparked a journalistic debate in September 2009 after the AP made the photograph public over the objections of the soldier's family. The controversy over the release of the photograph eventually led to modifications in the rules governing media photography of the war in Afghanistan.

The image, taken August 14 by AP photographer Julie Jacobson, shows 21-year-old Lance Cpl. Joshua Bernard of New Portland, Maine, being helped by fellow Marines after suffering severe leg injuries from a rocket-propelled grenade attack. He later died of his wounds. The photograph was released as part of a series of stories titled "AP Impact – Afghan – Death of a Marine," with the dateline of Dahaneh, Afghanistan.

Defense Secretary Robert Gates objected "in the strongest terms" to the AP's decision to publish the photo, according to a September 4 post on the blog Politico. In a letter to Thomas Curley, the president and chief executive officer of the AP, Gates asked that the organization respect the wishes of Bernard's father and not publish the photo. "Why your organization would purposefully defy the family's wishes knowing full well that it will lead to yet more anguish is beyond me," Gates wrote. "Your lack of compassion and common sense in choosing to put this image of their maimed and stricken child on the front page of multiple American newspapers is appalling. The issue here is not law, policy or constitutional right – but judgment and common decency."

The AP stood by its decision to release the photograph, noting that Jacobson "took the picture from a distance with a long lens and did not interfere with Marines trying to assist Bernard," according to a September 4 post on *The New York Times* photojournalism blog The Lens. The AP also noted that it withheld the photograph until after Bernard's burial and contacted his family in advance. In a September 4 AP story, AP senior managing editor John Daniszewski said, "We understand Mr. Bernard's anguish. We believe this image is part of the history of this war. The story and photos are in themselves a respectful treatment and recognition of sacrifice."

The September 4 AP story also pointed out that the photograph was transmitted on the morning of September 3 with an "embargo" that prohibited release of the picture until 12:01 a.m. on Friday, Sept. 4. The embargo left the decision about whether and how to publish the photograph up to individual editors and gave them extra time to consider the implications of the decision.

According to a September 5 AP report, the news story accompanying Jacobson's photo was used on the front page of at least 20 newspapers, none of which ran the photograph on the front page, although a few included the photograph on inside pages or on their Web sites. Most newspapers and news organizations opted not to use the photograph.

In a September 5 post on the blog Foreign Policy, former *Washington Post* defense reporter Tom Ricks wrote that the AP's decision to transmit the photograph was "morally indefensible," and that he was embarrassed for American journalism. "As a former military reporter, I'm also angry with the AP," Ricks wrote. "They've committed the sin, but all of us in the media will pay for it. This one will haunt us for years. The Marines, especially, don't forget."

Santiago Lyon responded to Ricks' criticism in a September 11 broadcast of National Public Radio's "On the Media," saying that Marines on the ground in Afghanistan have told him they do not have a problem with the AP's decision to publish the photograph. "They understand that it's our job to photograph and capture reality and that we did our job," Lyon said. "And this is coming from the men on the ground actually fighting the war."

Many news organizations that chose to run the photograph included editorial statements explaining their decisions. In a September 10 post on NPR's Web site, NPR ombudsman Alicia Shepard wrote that the decision to post the photo on its Web site came after a lot of thought and discussion, and that the photos were placed behind a screen warning, in order to leave the decision to view the photos up to the individual. Ellen Weiss, NPR senior vice president for news, was quoted as saying that the picture was a "legitimate, albeit grim, image that was part of the overall story of the Afghan war … . The embedding of journalists should reflect not just the story of military or policy successes but has to tell the stories of sacrifices and losses."

Mike Tharp, executive editor of the Merced, Calif., *Sun-Star*, weighed in on his decision to print the photograph, responding to heated criticism by commenters on the *Sun-Star*'s Web site:

"I expected these reactions when I ordered that both the AP photo and story be published in our pages and on this Web site. … I did so because, as a veteran, a war correspondent and an editor, I feel a deep duty to show American civilians the costs of fighting a war. To show the ultimate sacrifices paid by our servicemen and women in our name. Printed words, as your comments vividly show, wouldn't have generated the same responses as the image we ran.

"As a father I also understand those of you who commented about respecting the family's wishes. I don't take those wishes lightly. But the photo and story had been transmitted all over the world by the time it landed in Merced. I believe that a greater good came from our publishing the photo than by not publishing it.

"Good journalism isn't good if it tells only what you want to know. We sometimes must tell you what you need to know. And, as happened so often in history, the first reaction was to shoot the messenger for the bad news."

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– Mike Tharp,
Executive Editor,
Merced Sun-Star

Dying Marine Photo, *continued on page 30*

Media Ethics

Conde Nast Accused of Self-Censorship

In what was widely viewed as an act of self-censorship, publishing giant Conde Nast suppressed the publication of a controversial story in the September 2009 issue of the Russian edition of one of its magazines, drawing the ire of American journalists and media critics.

The story in question was an 8,800-word feature for the September 2009 issue of *GQ,* written by veteran war correspondent Scott Anderson. The story examines allegations that a controversial series of apartment bombings in 1999 may have been the work of Russia's internal security services in an effort to aid Vladimir Putin in his rise to the presidency, rather than an act of Chechen terrorists, as had been widely reported. The bombings killed hundreds of Russians.

"The idea that information can be sequestered at a time when people can communicate instantly across oceans and continents may seem quaint, but in this instance, Conde Nast sought, against technology, logic and the thrust of its own article, to show deference in the presence of power."

– David Folkenflik, National Public Radio

The issue containing the story, which was titled "None Dare Call it Conspiracy: Vladimir Putin's Dark Rise to Power," was not shipped to Russia. The story was also omitted from *GQ*'s Web site, and was not reprinted in any of *GQ*'s sister periodicals. On September 4, National Public Radio's David Folkenflik broadcast a critical report titled "Why 'GQ' Doesn't Want Russians To Read Its Story," detailing the lengths to which Conde Nast had gone to bury the story.

According to the September 4 NPR report, Jerry S. Birenz, a top Conde Nast lawyer, sent a memo to several corporate executives and *GQ* editors, ordering them not to distribute the story in Russia, show the story to Russian government officials, journalists, or advertisers, or publicize the story in any way. The piece, which ran on page 246 of September's *GQ,* was not mentioned on the cover.

"The idea that information can be sequestered at a time when people can communicate instantly across oceans and continents may seem quaint," Folkenflik said. "But in this instance, Conde Nast sought, against technology, logic and the thrust of its own article, to show deference in the presence of power."

Other media outlets joined in the criticism, expressing dismay that Conde Nast had seemingly tailored the release of the story to avoid offending the Russian government.

In a September 14 story in *The Miami Herald,* columnist Edward Wasserman, a professor of journalism ethics at Washington and Lee University, wrote that although journalists in Russia have suffered "appalling reprisals," the quashing of the *GQ* story "wasn't about protecting journalists. It was about a huge and gutless institution committing an act of preemptive self-mutilation to appease people its duty is to expose." In an environment of media consolidation, Wasserman wrote, he often hears the argument that the concentration of private power is necessary to "stand up to governmental bullying and blow whistles when they need blowing." But in this case, Wasserman wrote, Conde Nast, which is owned by Advance Publications, a publishing company privately held by the Newhouse family, proved that argument wrong.

In a September 15 column, Anne Applebaum of *The Washington Post* also criticized Conde Nast's decision, writing that its suppression of the story will probably only lead to the exertion of greater pressure by Russian companies on their Western partners, making it even harder to publish controversial material about Russia in the future. "There is no law or edict that can force these companies, or any American company, to abide by the principles of free speech abroad," Applebaum wrote. "But it is at least possible to embarrass them at home. Hence this column."

Since 2000, there have been over a dozen journalists killed in Russia, many covering government and military scandals. The most high-profile murder was that of Anna Politkovskaya, a well-known investigative reporter. For more on the Politkovskaya trials, see "Politkovskaya Murder Trial to be Reheard; Prominent Activist and Reporter Killed" in the Summer 2009 issue and "Accused Politkovskaya Conspirators Acquitted" in the Winter 2009 issue of the Silha *Bulletin*. For more on Politkovskaya's murder, and the subsequent investigation, see "Famed Russian Reporter Murdered in Contract Killing" in the Fall 2006 issue, "Russia: Politkovskaya Investigation Continues; Reporter Detained for Alleged Extortion" in the Fall 2007 issue, and "Charges Filed in Politkovskaya Murder, Killer Still at Large" in the Summer 2008 issue.

In the September 4 NPR story, Nina Ognianova, the program director for Europe and Central Asia at the Committee to Protect Journalists, said that Russian authorities often exact retribution on journalists who become too critical. "You can be sued for defamation – but you don't even have to be sued. You can be audited," Ognianova said. "Politicized audits are a big hurdle for publications that dare to publish sensitive topics."

Anderson, the author of the *GQ* piece, told Folkenflik the reception his story received in the U.S. was mystifying. "I think it's really kind of sad," Anderson said. "Here now is finally an outlet for this story to be told, and you do everything possible to throw a tarp over it."

In a September 4 post on Foreign Policy's Net Effect blog, Evgeny Morozov wrote that Conde Nast had inadvertently exposed itself to the "Streisand Effect" by censoring the story. The "Streisand Effect" refers to a 2003 incident in which singer Barbra Streisand unsuccessfully sued a photographer in an attempt to have the aerial photograph of her house removed from the publicly available collection of California coastline photographs, citing privacy concerns. As a result of the case, public knowledge of the picture increased substantially and it became popular on the Internet. Morozov pointed out that the outcry over the story's suppression had led to greater publicity for the story in the long run, including, most notably, a "crowdsourced" translation of the story into Russian by New York-based gossip and media news blog Gawker, which posted scanned copies of

Conde Nast, *continued on page 30*

Media Ethics

Yale University Press Withdraws Controversial Artwork from Book about Danish Cartoons

Citing potential threats of violence, Yale University Press removed 12 Danish cartoons depicting the prophet Muhammad that sparked a series of riots in 2006 from a forthcoming book about the cartoon controversy. Other historical images of Muhammad, including a drawing for a children's book, an Ottoman print, and a sketch by 19th-century artist Gustave Doré, were also deleted from the book, titled "The Cartoons That Shook the World."

In an August 14 statement, Yale University Press wrote that the decision to omit the images was difficult, but that numerous experts had advised against republishing the cartoons. The statement said that Yale University Press is "deeply committed to freedom of speech and expression," but the threat of loss of innocent life had caused it to omit the images.

"It was fairly overwhelming that the people who knew the most about this kind of situation said 'Don't do it,' that this was likely to provoke violence," Yale Press director John Donatich said in an October 26 report on National Public Radio's Morning Edition.

NPR reported that one of the experts who advised against publishing the photos was former Director of National Intelligence John Negroponte. "I felt that there was a considerable risk that more violence, possibly even resulting in serious injury or death, could occur as a result of the publication of these images," Negroponte said.

Protests and riots in the Middle East and Africa following the initial publication of the cartoons in 2006 resulted in the deaths of over 200 people. (For more on the Danish cartoon controversy, see "Controversial Cartoons Lead to Worldwide Concern For Speech, Press Freedom, and Religious Values," in the Winter 2006 issue of the Silha *Bulletin*.)

In the October 26 NPR story, Yale student Fatima Ghani said she was glad Yale University Press removed the cartoons from the book, and that the drawings represent hate speech, not freedom of expression.

"People don't see this the same way they would see a swastika or they would see the N-word," Ghani said. "They see bigotry against Muslims in a separate category as they see bigotry against other races or religions."

Elsewhere, the decision to omit the images was met with criticism. In an August 14 story in *The Guardian,* the book's author, Jytte Klausen, said that she had argued "every step along the way" to include the images, and was disappointed by their omission. "You can walk up and down the high street in the UK and pick [the Doré sketch depicting Muhammad in Dante's "Inferno," one of the images that was removed from the book] out of antique bins. The ubiquity of this illustration moved me to want to include it," Klausen said.

In an August 12 story in *The New York Times,* Klausen also said she was disturbed by Yale's insistence that she could not read summaries of the expert recommendations unless she signed a confidentiality agreement that prohibited her from talking about them. "I perceive it to be a gag order," she said, after declining to sign.

In an August 29 column in *The Washington Post,* Mona Eltahawy called Yale University Press's decision to remove the images a victory for extremists. "Both Yale and the extremists distorting this issue should be ashamed. I say this as a Muslim who supported the Danish newspaper *Jyllands-Posten*'s right to publish the cartoons of the prophet Mohammed [sic] in late 2005 and as someone who also understands the offense taken at those cartoons by many Muslims," she wrote.

"Sunni Muslims observe a prohibition on depictions of the prophet – but since when has Yale?" Eltahawy wrote. "One by one, regimes and Islamists competed in outrage, whipping up a frenzy that at times spiraled out of control. Unfortunately, those dictators and radicals who want to speak for all Muslims – and yet care little for Muslim life – have found an ally in Yale University Press."

Other groups also condemned Yale's decision, including PEN American Center, the National Coalition Against Censorship, and the American Association of University Professors, which published an open letter written by its president, Cary Nelson. In the letter, Nelson wrote that the organization's members "deplore this decision and its potential consequences. … 'We do not negotiate with terrorists. We just accede to their anticipated demands.' That is effectively the new policy position at Yale University Press."

A group of Yale alumni calling themselves "The Yale Committee for a Free Press" also decried the decision in a letter written by Washington lawyer Michael Steinberg and signed by 44 Yale alumni. The letter, which was published in the *Yale Daily News* on October 1, urged the Yale Corporation, the governing body of Yale that appoints members to the board of Yale University Press, to insist that the Press reprint the book with the images of the cartoon. "Simply stated, Yale must not be the arbiter of what is 'safe' to publish," Steinberg wrote. "Such censorship corrodes the intellectual freedom that is the foundation of the entire university community. … In a world where light and truth are under siege, the entire Yale community has a vital stake in preserving a free press."

In a September 30 interview on the Web site of the Foundation for Individual Rights in Education, Flemming Rose, the cultural editor of *Jyllands-Posten*, said that Yale's censorship was "very damaging."

"Academic freedom is based on the right to free inquiry," Rose said. "And that fundamental precondition for any path-breaking academic work has been undermined by one of the most prestigious academic publishers in the world. What kind of

Cartoons Omitted, *continued on page 32*

> "Sunni Muslims observe a prohibition on depictions of the prophet – but since when has Yale? One by one, regimes and Islamists competed in outrage, whipping up a frenzy that at times spiraled out of control. Unfortunately, those dictators and radicals who want to speak for all Muslims – and yet care little for Muslim life – have found an ally in Yale University Press."
>
> – Mona Eltahawy, *The Washington Post*

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to talk on any subject he wants."

In an October 28 column, *The Wall Street Journal*'s Thomas Frank said the Obama administration was right to call Fox a partisan organization. "To point out that this network is different, that it is intensely politicized, that it inhabits an alternate reality defined by an imaginary conflict between noble heartland patriots and devious liberals – to be aware of these things is not the act of a scheming dictatorial personality. It is the obvious conclusion drawn by anybody with eyes and ears," Frank wrote. "Still, one wishes that the Obama administration had taken on Fox News with a little more skill. As cultural criticism goes, this was clumsy, plodding stuff. What the situation required was sarcasm, irony, a little humor. Simply feeding Fox a slice of raw denunciation was like dumping gasoline into a fire. It did nothing but furnish the network with a real-world validation of its long-running conspiracy theories - and a nice bump in its ratings."

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Dying Marine Photo, *continued on page 27*

According to an October 16 AP story, shortly after the release of the photograph, Afghanistan regional commanders amended the rules that reporters and photographers are required to sign before being embedded with a unit. The new rules stated "Media will not be allowed to photograph or record video of U.S. personnel killed in action."

Jacobson's photo was instrumental in the rule change. "After that incident, we felt that for the sake of the soldier and the family members that was what we needed to do," said Lt. Col. Clarence Counts, a spokesman for the U.S. military command in eastern Afghanistan, in an October 16 *Washington Post* story. Counts said the earlier rules "left it too wide open with regard to protecting the soldier and his family members if we had a KIA," referring to a service member killed in action.

After news organizations protested the rule change, the Pentagon suggested a revision to the rule, according to the October 16 AP story. The new rule, released October 15, stated, "Media will not be prohibited from viewing or filming casualties; however, casualty photographs showing recognizable face, nametag or other identifying feature or item will not be published. In respect to our family members, names, video, identifiable written/oral descriptions or identifiable photographs of wounded service members will not be released without the service member's prior written consent." The most recent version of the rule is available online at http://tinyurl.com/afghanembeds.

"In retrospect we may have gone a little too far to the right – so we modified it a little more," Counts said of the second change in the October 16 *Washington Post* story.

Lucy Dalglish, the executive director of The Reporters Committee for Freedom of the Press, criticized the rules in the October 16 AP story, saying that wartime photography gives citizens a necessary sense of what war is about.

"I'm really concerned about the government deciding what's newsworthy, instead of a news organization deciding what's newsworthy," Dalglish said.

– Ruth DeFoster
Silha Research Assistant

Conde Nast, *continued from page 28*

the story in its entirety in both English and Russian on its Web site. "I think that anyone concerned with the state of modern Russia and the rise of Putin, regardless of whether they subscribe to numerous conspiracy theories, should thank Conde Nast for their incompetence," Morozov wrote. "There is hardly a better way to get people talking about it."

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told Folkenflik that the decision to suppress the story was an absurd one for Conde Nast.

"On one level, the smart thing is to stay in business and stay in Russia, of course," Kirtley said. "But these stories will get out, they will get read in Russia. They're being somewhat naïve to believe that by limiting this to their American edition that somehow they're preventing this from being read."

Kirtley emphasized that the most important problem with Conde Nast's decision was its failure to fulfill its obligations as a news organization. "It goes with the territory of a news organization to speak for those who can't speak – and to bear the consequences," she said.

– Ruth DeFoster
Silha Research Assistant

Libel

Jury Awards $10 Million in Libel Suit against *St. Petersburg Times*

Massachusetts Jury Rejects Truthful Libel Claim

A Florida jury awarded the former chief of medicine at a Veterans Administration medical center more than $10 million in a libel suit against the *St. Petersburg Times* in an Aug. 28, 2009 verdict, despite the paper's insistence that its stories were true.

Dr. Harold L. Kennedy, the former chief of medicine at the Bay Pines VA Medical Center in Bay Pines, Fla., filed the suit in Pinellas-Pasco Circuit Court in 2005 in response to three *Times* stories from December 2003, reporting on Kennedy's reassignment from chief of medicine to cardiology, his subspecialty.

Kennedy's attorneys alleged that the stories damaged the doctor's reputation by implying that Kennedy engaged in corruption, theft, and malfeasance, according to an August 29 report in the *Times* announcing the verdict.

The *Times* argued truth as a defense. "What the *Times* published was true," said *Times* attorney Alison Steele, according to the August 29 story.

The stories that were the subject of Kennedy's suit ran under the byline of *Times* staff writer Paul de la Garza, who died of a heart attack in 2006 at age 44. The newspaper wanted to use de la Garza's notes as evidence in its defense, but a judge excluded them from the trial, the *Times* reported.

On August 28, following a five-day trial, the jury of four women and two men found in favor of Kennedy in *Kennedy v. Times Publishing Co.*, No. 05-008034-CI (Fla. Cir. Ct. 2009) and awarded Kennedy $5.1 million in compensatory damages and $5 million in punitive damages.

The *Times* said it will appeal the jury's decision. "We are very disappointed by the verdict," *Times* Executive Editor and Vice President Neil Brown said in the newspaper report. "We believe our reporting and editing of these stories met the highest journalistic and ethical standards."

Some media law experts expressed doubt that the jury award will survive post-trial scrutiny. A Sept. 4, 2009, report in *Missouri Lawyers Weekly* referenced a Media Law Resource Center study that found appellate courts have reduced or overturned 48 percent of plaintiff libel verdicts against media entities since 1980.

"The standard to get punitives is so high that it will be very difficult for the plaintiffs to hold that part of the verdict," said Jean Maneke, a Kansas City media law attorney, according to *Missouri Lawyers Weekly*. "Freedom of speech in this country would rather we err on the side of more speech than speech that's so limited by a fear of damages that we limit the right to speak."

The first of de la Garza's articles detailing Kennedy's reassignment was published on Dec. 4, 2003. Two follow-up articles were published on December 9 and 10.

Under the headline, "Bay Pines Ousts Chief of Medicine," the December 4 report stated that Kennedy was under federal investigation on allegations of sexual harassment and misusing money, including that he accepted money from pharmaceutical companies to pay for private parties. According to the article, Kennedy also faced several Equal Employment Opportunity complaints, including one that alleged Kennedy routinely told staff members they were too old and should consider quitting.

The article quoted an official with the Office of Inspector General in Washington D.C., who confirmed the office was involved in an ongoing investigation of Kennedy. Smith Jenkins, the Bay Pines VA hospital director, said that none of the EEO complaints had been substantiated, according to the *Times* report.

Kennedy was interviewed in the December 4 story, and stated that the allegations against him were unfounded and that he had made enemies at Bay Pines by trying to establish an academic program and doing what he had been hired to do. "They don't want people to elevate the quality of care," Kennedy was quoted as saying. At the time, he was also a professor at the University of South Florida.

Kennedy said in the December 4 story that a sexual harassment complaint had been filed against him for giving a colleague an apron as a gift. He said another complaint was filed against him for asking somebody to turn on the coffee.

The *Times* report also revealed that Kennedy was fired in 1990 from his job as chief of cardiology at St. Louis University Medical Center. The report quoted a letter Kennedy wrote to the *St. Louis Post-Dispatch* in December 1990 in which he claimed that he had been "involuntarily terminated as chief of cardiology because of charges of 'disharmony' by a new chairman of the department of internal medicine."

The December 9 story focused on concerns regarding the hospital's chief of staff. The article briefly referenced the allegations against Kennedy and the chief of surgery, who was also ousted. The allegations against Kennedy were summarized again in a December 10 story.

Before the *Times* stories were published, Kennedy had a job offer from the medical school at the University of Michigan, which was revoked after the school learned of the allegations, said Ira Berkowitz, a St. Louis-based attorney who helped represent Kennedy, according to *Missouri Lawyers Weekly*.

At closing arguments, Timothy Weber, one of Kennedy's attorneys, told the jury that the only way to restore the doctor's reputation was to rule against the publishing company and award punitive damages. "He was not given a fair shake by the defendant," Weber said, according to the August 29 *Times* report. "The defendant cared little for his reputation when it published the article."

Libel Suit, *continued on page 32*

"Freedom of speech in this country would rather we err on the side of more speech than speech that's so limited by a fear of damages that we limit the right to speak."

– Jean Maneke, attorney

Libel Suit, *continued from page 31*

At the time of the verdict, Weber told the *Times* that Kennedy was living in St. Louis as a consultant for the Cardiovascular Research Foundation in Europe. "He's extremely pleased to regain his good name," Weber said.

Update: Jury Finds for Defendant in Defamation Suit over Truthful E-mail

On Oct. 8, 2009, a Massachusetts jury found that a truthful mass e-mail an executive of the office supply company Staples sent to more than 1,500 of its employees was not libelous because it was not sent with actual malice.

The verdict represented the latest development in a case in which a previous 1st Circuit U.S. Court of Appeals ruling departed from the common principle that truth serves as an absolute defense to libel claims. On Feb. 13, 2009, the 1st Circuit in Boston focused on a 1902 Massachusetts state law that recognizes a narrow exception to truth as a defense against libel if the defendant acted with "actual malice" in publishing the libelous statement. *Noonan v. Staples, Inc.*, 556 F.3d 20 (1st Cir. 2009).

The plaintiff in the case, Alan Noonan, a former Staples manager, was fired for violating the company's travel and expense policy. The day after Noonan was fired, Staples' Executive Vice-President Jay Baitler sent an e-mail to 1,500 employees telling them why Noonan was fired. Noonan sued the company for libel, but did not dispute the truth of the statements in the e-mail, instead alleging that the message was sent maliciously and therefore was libelous under Massachusetts law.

On March 18, 2009, the 1st Circuit permitted Noonan to continue with his suit when it denied a request by Staples to have the case heard before all of the judges in the 1st Circuit. *Noonan v. Staples, Inc.*, 561 F.3d 4 (1st Cir. 2009). (See "1st Circuit Denies Rehearing in Libel Case Disallowing Truth as An Absolute Defense," in the Spring 2009 issue of the Silha *Bulletin*.)

Mass. Gen. Laws ch. 231 § 92 states that the defendant in an action for libel may introduce into evidence "the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved." (See "1st Circuit Rules Truth Not Always a Defense to Libel," in the Winter 2009 issue of the Silha *Bulletin*.)

The 1st Circuit ruling ran counter to the modern libel standard that the U.S. Supreme Court established in *New York Times Co. v. Sullivan*, 376 U.S. 254 (U.S. 1964), where the Court defined "actual malice" as a false statement made "with knowledge that it was false or with reckless disregard of whether it was false or not."

Richard Gelb, the attorney who represented Noonan, said he planned to appeal the jury verdict on the grounds that the judge's interpretation of actual malice was too narrow, according to an October 12 report in *The National Law Journal*. Gelb said that Staples had an ulterior motive to use Noonan as a "scapegoat" in sending the e-mail because many employees were not following the company's credit card and travel policies.

Robert Ambrogi, the executive director of the Massachusetts Newspaper Publishers Association and publisher of the Media Law Blog, described the jury verdict as good news for employers because it shows that they can continue to reveal truthful information about disciplinary issues to employees "and not necessarily end up in hot water," according to *The National Law Journal.*

– Cary Snyder
Silha Research Assistant

Cartoons Omitted, *continued from page 29*

message does this send to other academic institutions?"

In response to the controversy over the Yale University Press incident, Voltaire Press, an independent publishing company founded by Professor Gary Hull, director of the Program on Values and Ethics in the Marketplace at Duke University, published "Muhammad: The 'Banned' Images" in November 2009. The book includes full color reproductions of all the images that were removed from Klausen's book.

The book also included a "Statement of Principle" as an afterward that was signed by many prominent academics and attorneys, including Nelson, Rose, UCLA law professor Eugene Volokh, and former ACLU president Nadine Strossen, among others.

"A number of recent incidents suggest that our long-standing commitment to the free exchange of ideas is in peril of falling victim to a spreading fear of violence," the statement, which specifically mentions Klausen's book, said. "It is incumbent on those responsible for the education of the next generation of leaders to stand up for certain basic principles: that the free exchange of ideas is essential to liberal democracy; that each person is entitled to hold and express his or her own views without fear of bodily harm; and that the suppression of ideas is a form of repression used by authoritarian regimes around the world to control and dehumanize their citizens and squelch opposition."

– Ruth DeFoster
Silha Research Assistant

Endangered Journalists

Military Raid Results in Rescue of *New York Times* Reporter, Death of Afghan Translator

British troops carried out a deadly raid against Taliban forces in northern Afghanistan on September 9, 2009, to rescue *New York Times* reporter Stephen Farrell. Although Farrell was successfully freed, a British soldier, an Afghan civilian, and Farrell's interpreter, Afghan journalist Sultan Munadi, were killed during the rescue effort.

Taliban gunmen seized Farrell, a veteran foreign correspondent for *The New York Times* who has both British and Irish citzenship, and Munadi on September 5, while they were working near Kunduz, Afghanistan. The journalists had been investigating NATO airstrikes that killed dozens of people, including an unknown number of civilians. After being kidnapped by the Taliban, Farrell and Munadi were held for four days by gunmen, who moved them from house to house and paraded them in the streets of Taliban-controlled areas southeast of Kunduz, according to a September 9 account of the ordeal by Farrell in *The New York Times.*

In a predawn raid early September 9, British special forces moved in to rescue Farrell. According to Farrell's account, he and Munadi tried to escape the compound where they were being held during the chaos of the raid. Munadi, who was leading Farrell, was felled in a volley of gunfire despite both men shouting, "Journalist! Journalist!" Farrell said.

Relief for the safe return of Farrell was contrasted by anger among Afghans over Munadi's death during the early-morning firefight, in which British Cpl. John Harrison and an unidentified Afghan woman were also killed, according to a September 10 story in *The Washington Post.* Afghan critics compared the rescue to a 2007 incident in which kidnapped Italian journalist Daniele Mastrogiacomo was freed in exchange for the release of five Taliban prisoners, while his Afghan interpreter and driver were killed.

"We are all very disappointed," said Rahimullah Samandar, the director of the Afghan Independent Journalists' Association, in the September 10 *Washington Post* story. "Why would the British forces rescue the British man and not his Afghan colleague? They were both running for help and shouting that they were journalists. He was shot in the head, and his body was left lying. This is wrong behavior that makes people very upset."

Munadi's body, which was recovered by members of his village, was driven in a pickup truck to Kabul, where many Afghan journalists and others gathered on September 9 to pay respects, according to the September 10 *Post* story. A September 10 obituary in *The New York Times* called Munadi a "gentle stalwart" whose death illustrated two grim truths of the war in Afghanistan: "Vastly more Afghans than foreigners have died battling the Taliban, and foreign journalists are only as good as the Afghan reporters who work with them."

British journalist and foreign war correspondent Max Hastings wrote in a September 11 column in the London *Daily Mail* that military forces should not have intervened to rescue Farrell. "In most of the world's war zones journalists are perceived by insurgents, especially Islamic militants, as hated infidels, as fit for death as Western soldiers. … Every media organisation [sic] and reporter knows this, and most respond accordingly," Hastings wrote. "In fairness to Stephen Farrell, he never asked anybody to risk their lives to free him from the tiger's jaws into which he had walked. The real lesson of his experience is that journalists who report wars must do so at their own risk – and suffer the consequences of a misjudgment."

Others criticized the raid as premature. Both *The Guardian* and *The Times* of London cited unidentified diplomatic sources who said that fruitful efforts to negotiate the release of the two prisoners had been underway, and that they were within days of the journalists' peaceful release. But British defense officials, including British Prime Minister Gordon Brown, came out in support of the raid. In a September 9 statement, Brown praised the heroism of the British commandos and confirmed the death of one of them. "When British nationals are kidnapped, we and our allies will do everything in our power to free them," Brown said. His statement also expressed condolences to Munadi's family.

On *The New York Times* At War blog, reporter John Burns – who was also once kidnapped in Afghanistan – wrote that many readers who contacted the paper were critical of the risks taken by Farrell in the situation that led to his and Munadi's kidnapping. Burns quoted a British woman who called him on the phone, "incandescent" with anger, arguing that it was appalling for *The New York Times* to endanger other people's lives in pursuit of a story.

"These are issues that have been intensely debated at *The Times* for years, with resulting protocols, in our war bureaus, about the importance of weighing risk carefully before embarking on dangerous assignments," Burns wrote. "But just as we have to cover these wars, we have to go out of our compounds to experience the conflict at first hand if our reporting is not to quickly descend into 'hotel journalism.' Some of that, indeed much of it, has been done on embeds, where our protection comes from the military units we cover. But an essential part, too, comes from going in search of the war that embeds don't reach – the 'other side' of the war, often enough; the war as it is experienced by ordinary Iraqis and Afghans, the civilians who have done most of the dying. That was what Stephen Farrell was doing when he and Sultan set out on Saturday for the site of the fuel-tanker bombing south of Kunduz."

The Committee to Protect Journalists also issued a statement on September 9, saying that although they were greatly relieved at the safe rescue of Farrell, Munadi's death highlighted "the growing danger faced by all Afghans and reporters, who are working and risking their lives to cover a story that is taking an ever higher toll on the country and its people."

Jill Abramson, managing editor of *The New York Times*, wrote in a September 11 column answering

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> "Why would the British forces rescue the British man and not his Afghan colleague? They were both running for help and shouting that they were journalists. He was shot in the head, and his body was left lying. This is wrong behavior that makes people very upset."
>
> – Rahimullah Samandar, Director, Afghan Independent Journalists' Association

Endangered Journalists

American Journalist, Companions Charged with Espionage

On Nov. 9, 2009, an American freelance journalist and two companions were charged with espionage by Iranian authorities in Tehran after 101 days of imprisonment. The three were reportedly hiking in the Iraqi region of Kurdistan on July 31 when they crossed over the Iranian border and were arrested by border guards.

CNN reported on November 9 that Tehran's prosecutor general, Abbas Jafari Dolatabadi, announced the charges in an interview with the official Iranian news agency IRNA, stating that "the charge against the three U.S. citizens who were arrested on the Iran-Iraq border is espionage."

Iranian Foreign Minister Manouchehr Mottaki told Iran's Fars News Agency on December 14 that the three Hikers were to stand trial for espionage, according to a CNN report the same day. The Australian newspaper *HeraldSun* reported December 18 that the trial had begun, but as of press time no verdict had been released.

"The allegation that our loved ones may have been engaged in espionage is untrue" and is "entirely at odds with the people Shane, Sarah and Josh are and with anything that Iran can have learned about them since they were detained."

– Statement from the families of Shane Bauer, Sarah Shourd, and Joshua Fattal, on Freethehikers.org.

Shane Bauer, 27, a freelance journalist, Sarah Shourd, 31, and Joshua Fattal, 27, entered Iran accidentally, according to Shon Meckfessel, a friend of the three who spoke with Bauer the morning before he was arrested. In a letter published August 6 in *The Nation*, Meckfessel called his friends' presence in Iran "a simple and very regrettable mistake."

Since their arrest, friends and family of the three American citizens have issued repeated calls for their release, launching Freethehikers.org, an advocacy Web site featuring their story and biographies, and statements to media. After the espionage charges were announced, the hikers' families issued a statement on November 9 saying that "the allegation that our loved ones may have been engaged in espionage is untrue," and is "entirely at odds with the people Shane, Sarah and Josh are and with anything that Iran can have learned about them since they were detained."

On November 25, the mothers of all three hikers released a video appeal to the government of Iran, which was broadcast on television news programs across the United States and, according to a statement on Freethehikers.org, "sent to the Iranian Ambassador to the United Nations in New York, with a request to forward them to the three hikers – Shane Bauer, Sarah Shourd and Josh Fattal – and to the Iranian authorities."

On November 9, Secretary of State Hillary Rodham Clinton repeated the Obama administration's call for the hikers' release, asking the Iranian government to "exercise compassion," and saying that the administration believes "strongly that there is no evidence to support any charge whatsoever," according to CNN.com. White House spokesman Robert Gibbs said the same day that the three hikers were "innocent young people who should be released by the Iranian government."

On December 14, Clinton told reporters that "The three young people who were detained by the Iranians have absolutely no connection with any kind of action against the Iranian state or government," according to a report from CNN the same day.

The hikers' arrest came just days before American journalists Laura Ling and Euna Lee were released from custody after nearly four months of imprisonment in North Korea. (See "North Korea Releases American Journalists; Iran Detains Freelancer," in the Summer 2009 issue of the Silha *Bulletin*.)

American journalist Roxana Saberi was released from Iranian custody on May 11, 2009, after being detained for more than four months. She was convicted of espionage and sentenced to eight years in prison, but her sentence was reduced to a two-year suspended sentence prior to her release. (See "Saberi Released from Prison in Iran, Sentence Suspended," in the Spring 2009 issue of the Silha *Bulletin*.)

– Sara Cannon
Silha Center Staff

Reporter Rescued, *continued from page 33*

readers' questions that the newspaper's mission necessitated the sending of correspondents into difficult and dangerous places. "If we did not venture out to see the effects of war directly, our journalism … would be told through the lens of a hotel, or some other remote spot," Abramson wrote. "Truthful journalism that pierces the fog of war is vital to the free flow of information in our democracy."

The New York Times did not report on Farrell's kidnapping until after his rescue, and asked other media outlets not to report the news, citing fears for Farrell's safety. It was the second time in recent months that *The New York Times* had attempted to suppress a story about a *Times* journalist being kidnapped. Reporter David Rohde was held for more than seven months with almost no mention of his kidnapping in mainstream media between November 2008 and June 2009. (see "Ethical Questions Surround *Times* Decision to Keep Rohde Kidnapping Secret" in the Summer 2009 issue of the Silha *Bulletin*.)

In a September 9 interview with NPR host Neal Conan, *New York Times* executive editor Bill Keller gave his reasons for the Farrell news blackout. "In this case, we had some early word through intermediaries that this might be resolvable, and we wanted to just keep it as quiet and calm as we could in the hopes that we could persuade the captors that these guys were legitimate journalists doing important work and that they should be released."

Military commentator Bill Roggio refused to follow the media blackout and reported on the Farrell kidnapping on the Threat Matrix blog on September 6. "The media has not afforded the US military the courtesy of a news blackout when US troops have been captured in Iraq and Afghanistan," Roggio wrote. "The kidnapping of Farrell serves only to highlight the deteriorating security situation in the northern province of Kunduz (and neighboring Baghlan)."

– Ruth DeFoster
Silha Research Assistant

Prior Restraints

Social Media Sites Assist Gagged British Newspaper

Social networking sites and blogs helped uncover the source of a gag order against the British newspaper *The Guardian* in October 2009 after the paper published a story on its Web site claiming it was prohibited from reporting certain remarks made in the British Parliament.

In a cryptic October 12 story, *The Guardian* reported that, "for the first time in memory," it was prevented from covering remarks made in Parliament. "Today's published Commons order papers contain a question to be answered by a minister later this week. The Guardian is prevented from identifying the MP who has asked the question, what the question is, which minister might answer it, or where the question is to be found," the October 12 story said. "The only fact the Guardian can report is that the case involves the London solicitors Carter-Ruck, who specialise [sic] in suing the media for clients…"

According to an October 13 *Guardian* story, the October 12 notice "had been published online for just a matter of minutes before internet [sic] users began tearing apart the gag."

Posts on blogs and the social networking site Twitter led many Web users to speculate that Trafigura, a multinational energy company, was behind the attempt to prevent *The Guardian* from publishing the story. In the October 13 *Guardian* story, published after the gag order was partially lifted, the paper confirmed that Trafigura was the source of the "super-injunction," a British legal remedy that prevents news organizations from revealing the identities of parties involved in legal disputes or from reporting that restrictions have been imposed.

According to an October 19 *New York Times* story, a British judge issued the super-injunction on September 11 at the behest of Trafigura's lawyers from the law firm Carter-Ruck in order to prevent *The Guardian* from publishing any information regarding a 2006 toxic waste-dumping incident in the Ivory Coast.

According to *The Times*, Trafigura had paid a local operator to dispose of waste from the treatment of low-quality gasoline. The operator dumped about 400 tons of a mixture of petrochemical waste and caustic soda into open landfills. In the following weeks, 85,000 people sought medical attention and eight people died from exposure to the waste.

The Times reported that in 2007, Trafigura paid the Ivory Coast government about $225 million related to the dumping without admitting liability, and later settled a class-action lawsuit in Britain by agreeing to pay $1,500 each to 30,000 different Ivory Coast residents while asserting "that it did not foresee, and could not have foreseen, the reprehensible acts" of its contractor.

When a *Guardian* reporter obtained a Trafigura-sponsored scientific analysis of the dumped materials, the company asked a British judge to order a super-injunction to prohibit its publication, saying it was a confidential communication with lawyers for the company. The judge agreed, the October 18 *Times* story reported.

Shortly after the October 12 *Guardian* story was published, human rights activist and author Richard Wilson found out about the gag order from a message posted on Twitter, the October 13 *Guardian* story said. "I knew Trafigura were incredibly litigious and I knew [Cater-Ruck was] defending them," Wilson said. "I had a hunch, so I went to the website [sic] of the parliamentary order papers where they publish all the questions, searched for Trafigura and a question from [MP Paul] Farrelly popped up and I tweeted it straight away. It took several tweets and then I pasted in the link."

The Guardian reported that Wilson signed on to his Twitter account at 9:13 p.m., posted the link to *The Guardian* report about the gag and wrote: "Any guesses what this is about? My money is on, ahem, #TRAFIGURA!" By 9:30 p.m. he had published all of Farrelly's questions about Trafigura. The October 12 *Guardian* story had been published at 8:31 p.m.

From that point on, the word "Trafigura" rapidly became a top search topic on Twitter, and numerous other bloggers and Internet users posted about the scandal, according to October 13 articles in *The Guardian* and *The Telegraph.*

"One day – if it's not happening already – they will teach Trafigura in business schools," *Guardian* editor Alan Rusbridger wrote in an October 14 column describing the traditional public relations methods used by Trafigura to stifle bad publicity. "The textbook stuff – elaborate carrot, expensive stick – had been blown away by a newspaper together with the mass collaboration of total strangers on the web. Trafigura thought it was buying silence. A combination of old media – The Guardian – and new – Twitter – turned attempted obscurity into mass notoriety."

Faced with the ongoing Web leaks about the story, Carter-Ruck e-mailed *The Guardian* the next day, agreeing to allow reports of the parliamentary business, and on October 16 Trafigura agreed to allow *The Guardian* to report on the scientific study that led to the super-injunction, an October 17 *Guardian* story reported .

An October 14 story in the London *Press Gazette* reported that several MPs condemned the super-injunction imposed against *The Guardian*. "It seems to me that a fundamental principle of this House is now being threatened by the legal proceedings for an injunction," Liberal Democrat MP David Heath said. "As you know, we have enjoyed in this House since 1688 the privilege of being able to speak freely."

In an October 13 *Time* story, Stephen Shotnes, a London-based media law specialist, was reluctant to give Twitter too much credit for breaking the Trafigura story. "It's been enshrined in our law for 300 years that there's freedom of reporting of parliamentary proceedings. I would like to think that what would have happened is that the *Guardian* would have trotted off to court today and the injunction would have been lifted anyway," Shotnes said. "The likely impact of Twitter was to speed up that process."

– Ruth DeFoster
Silha Research Assistant

> "Trafigura thought it was buying silence. A combination of old media – The Guardian – and new – Twitter – turned attempted obscurity into mass notoriety."
>
> – Alan Rusbridger, Editor, *The Guardian*

Student Media

Student Media Roundup: Student Press Tested by Subpoenas, Prior Review, Self-Censorship

Members of the student press faced challenges from state prosecutors in Illinois, a Supreme Court justice's staff in New York, and a school superintendent in Missouri in the fall of 2009. Meanwhile, student newspapers in Wisconsin and Pennsylvania refused to run certain advertisements, citing a desire to avoid controversy and fear of libel charges.

"My students are told to uncover the truth, wherever that leads them."

– David Protess, Professor, Medill School of Journalism, Northwestern University

Illinois Investigators Subpoena Records of Northwestern Journalism Students

Prosecutors in Cook County, Ill., issued a subpoena for the grades, grading criteria, class syllabi, expense reports and correspondence of several journalism students at Northwestern University's Medill School for their work investigating a decades-old murder charge as part of the Medill Innocence Project.

An October 24 *New York Times* story reported that prosecutors working on the case of Anthony McKinney, an Illinois man convicted of murder 31 years ago and sentenced to life in prison, issued a subpoena on May 20 requesting the students' documents, saying they needed every pertinent piece of information about the three-year investigation into McKinney, whose conviction is under review.

Medill Professor David Protess' students began looking at McKinney's case in October 2003 after McKinney's brother brought it to the attention of the Medill Innocence Project. The investigation into McKinney's case involved three years and nine teams of student reporters, all of whom have since graduated. The teams eventually concluded that McKinney had been wrongly convicted, *The Times* reported.

The claims are being considered by Cook County Circuit Court Judge Diane Cannon, and the next hearing in the case is scheduled for Jan. 11, 2010. Although the students provided their videotaped interviews of critical witnesses and affidavits to the prosecutors, the subpoena is seeking a much broader range of documents. Prosecutors said they want to discover whether students believed they would receive better grades if witnesses they interviewed provided evidence to exonerate McKinney, the October 24 *Times* story reported.

Sally Daly, a spokeswoman for Anita Alvarez, the Cook County state's attorney, said the prosecutors were simply trying to get to the bottom of the McKinney case. "At the end of the day, all we're seeking is the same thing these students are: justice and truth," Daly said in the October 24 *Times* story. "We're not trying to delve into areas of privacy or grades. … Our position is that they've engaged in an investigative process, and without any hostility, we're seeking to get all of the information they've developed, just as detectives and investigators turn over."

In a November 10 supplemental brief filed with the court, the prosecution accused the Medill students of paying Anthony Drakes, a witness who told students in a 2004 video interview that he was at the murder scene and McKinney was not, but later recanted. According to the filing, Drakes, who the Medill investigation named as an alternative suspect in McKinney's case, said that "he let the team know he wanted money," and that the students gave a cab driver $60 to drive him a short distance. Drakes said the cab driver gave him $40 in change, and that he said he used the money to buy crack cocaine. A cab driver's handwritten log attached to the filing supported Drakes' account.

"This evidence shows that Tony Drakes gave his video statement upon the understanding that he would receive cash if he gave the answers that inculpated himself," the brief stated.

According to a November 10 *New York Times* story, Evan Benn, one of the students who interviewed Drakes, said he had given the cab driver $60 because the driver had estimated it would cost at least $50 to take Drakes where he wanted to go, but there was not supposed to be a payment to Drakes.

Protess also denied that students had paid witnesses. "It is so filled with factual errors that if my students had done this kind of reporting and investigating, I would give them an F," Protess said of the supplemental brief in a November 11 Associated Press (AP) story.

Prosecutors also suggest that the Medill students should be viewed as an "investigative agency," and not as reporters, whose unpublished materials might be protected under the Illinois journalist shield law, 735 Ill. Comp. Stat. 5/8-901 to 909.

Protess argued that his students should be considered journalists, and said that they did not wish to become "an arm of the government" by providing their notes and private exchanges. "It would destroy our autonomy," Protess said in the October 24 *Times* story. "We function with journalism standards and practices to guide our work."

Protess also said his students would not have been rewarded with better grades for witnesses that gave testimony favorable to McKinney. "My students are told to uncover the truth, wherever that leads them," he said in the October 24 *Times* story. In the last four years, he said, students had twice concluded that the convicts whose cases they were studying were indeed guilty.

In a November 18 interview in *The Daily Northwestern*, Protess said there was certain information that he would not turn over. "There are no circumstances under which I will reveal my students grades or e-mails — to do so would violate federal privacy law," Protess said. "I will also refuse to comply with any demand to turn over unpublished information, because that would set a terrible precedent for other student journalists. We are picking up the slack because of the lack of resources nowadays to do investigative reporting."

In an August 13 motion to quash the subpoena, attorneys for Protess and the Medill School said that, in addition to the Illinois shield law, the student records were protected under the Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g(b), which restricts the disclosure of student records. "[W]here courts have permitted student records to be produced,

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Student Media Roundup, *continued from page 36*

either the particular student was party to the lawsuit or there was allegations that the school had engaged in a pattern or practice of wrongdoing," the motion stated. "That is not the situation here."

In an October 22 story in *Time* magazine, John Lavine, the dean of the Medill School, said that the school supports Protess and will only turn over on-the-record documents and statements — not background information or any private grades or grading criteria.

Tim McGuire, a journalism professor at Arizona State University, wrote in an October 27 post on the McGuire on Media blog that the long-term consequences of the Medill case could be significant. "The major voices and organizations in the industry need to speak out, write briefs and raise holy hell about this witch hunt by Cook County prosecutors. Every advocate for good journalism needs to see this case really matters," McGuire wrote. "Increasingly, the industry and scholars are recognizing the crucial role these university efforts might play in the future of journalism. … The bullies who want to hamstring great student journalism need to be stopped."

Justice Kennedy's Office Insists on Prior Review of Student Newspaper Report

When United States Supreme Court Justice Anthony Kennedy spoke at a private school in Manhattan on October 28, members of his office insisted that they be given the right to review any story before it was published in the student newspaper, *The Daltonian*, a November 10 story in *The New York Times* reported.

Kathleen Arberg, the Court's public information officer, said in *The Times* story that the request had been made to ensure the quotations attributed to him were accurate.

The justice's office received a draft of the proposed *Daltonian* article on November 9 and returned it to the newspaper the same day with "a couple of minor tweaks," and quotations were "tidied up" to better reflect the meaning the justice had intended to convey, Arberg said in the November 10 *Times* story.

Ellen Stein, Dalton's head of school, defended the review in the *Times*. "This allows student publications to be correct," she said. "I think fact checking is a good thing."

Many media sources were quick to criticize Kennedy after *The Times* story was published. "We're disappointed, too, with Justice Kennedy, who on bench has been a champion of the First Amendment. Why in this case he seems not to have known better than to have made such an ill-conceived request is a mystery," a November 12 editorial in *The Baltimore Sun* said. "It would have been better to have suffered a minor factual slip - and later written a letter to the editor to correct it - than to have trashed the nation's centuries-old tradition of a free press."

In a November 18 interview in *The Wall Street Journal*, Kennedy said the situation was a misunderstanding that had spiraled out of control in the media. Kennedy said he never asked to clear the copy before publication, and that the request came from a new employee in his office who misunderstood Kennedy's longtime rule for classroom visits: outside media are prohibited, but campus reporters are welcome.

"What a stupid story," said Justice Kennedy in the November 18 *Journal* interview, although he did not dispute the technical accuracy of *The Times* report. "The press loves to point out that people have double standards."

Missouri Superintendent Exerts Extra Control over Student Newspaper

The superintendent of Boonville High School in Boonville, Mo., ordered copies of the school year's first edition of *The Pirate Press*, Boonville High's student newspaper, pulled from distribution on October 2 because the school's principal had not reviewed the publication. A few hours later, the superintendent allowed the paper to be distributed to students, but not, as was normally done, as a monthly insert in the local paper.

Boonville Superintendent Mark Ficken requested that distribution of the papers be stopped after the school's principal, Jay Webster, called him on October 2 and said that he had not reviewed the paper before it went to press, the *Boonville Daily News* reported on October 2. Ficken said that under current district protocol, the principal reviews *The Pirate Press* before it goes to print.

On October 8, the Student Press Law Center (SPLC) reported that Ficken reversed his decision to stop delivery of the paper to the student body, but still refused to allow its distribution to the rest of the community because of controversial language and topics. Ficken told the *Daily News* on October 5 that the issue included what he characterized as inappropriate quotes from students about school personnel and facilities, citing three stories in particular.

Ficken specifically mentioned a story on school lunches that quoted a student as saying, "School lunch sucks!"

"I think that there's better verbiage to use," Ficken told the *Daily News*. He also said the story insulted employees who "work so hard and do a really, really good job."

Another story included student comments about buses. "It's ridiculous how over crammed we are. We're like pack sardines in here, sweaty sardines," a student said. Ficken said the comments were untrue and could worry parents. "Buses are not overloaded, they are safe," Ficken told the *Daily News*.

A third story, titled "Far From Straight," described students' attitudes toward homosexuals, and included a student quote calling gay people "freaks." Ficken said such comments "can be disruptive to the educational process," and that the stories could cause fighting or gossiping.

Ficken told the *Daily News* that the school would continue to publish the student newspaper, but that the publication would not be allowed to include inappropriate language or belittling of staff. "I'm not going to stand for that," Ficken said.

In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Supreme Court of the United States ruled that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-

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sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."

Frank LoMonte, the executive director of the SPLC, told the *Daily News* on October 5 that under the *Kuhlmeier* standard, Ficken is constitutionally permitted to remove some material from the school paper. "What's worrisome is the idea that material that's simply critical of the school could be cited as grounds for withholding the paper," LoMonte said.

University of Wisconsin-Oshkosh and Stevens Point Newspapers Reject Abortion Opponent's Ad

University of Wisconsin student newspapers at campuses in Oshkosh and Stevens Point both rejected an anti-abortion advertisement in September 2009, the University of Wisconsin *Badger Herald* reported on September 24.

The UW-Oshkosh *Advance-Titan* and *The Pointer* of UW-Stevens Point rejected a 12-page insert created by the Human Life Alliance. According to an October 5 AP story, the insert contains information about abortion, its side effects, contraception, prenatal development, and adoption.

"(The decision) actually had nothing to do with the content that was in there; I sat down with my advisor and advertising manager and we discussed it," Andrew Munger, editor in chief of the *Advance-Titan*, said, according to *The Badger Herald*.

According to *The Badger Herald*, Jacob Mathias, the editor in chief of *The Pointer*, also said they refused to run the advertisement to avoid controversy.

The decision to refuse the insert was not taken lightly, said Vince Filak, the *Advance-Titan*'s faculty advisor, in an October 4 story in *The Oshkosh Northwestern*. "[The *Advance-Titan* staff] knew full well if they didn't accept the ad that something like this could happen," Filak said, referring to the protests by anti-abortion groups. "They also knew if they had accepted the ad, people on the other side of the argument would be upset. It was the perfect Catch-22, there wasn't anything they could have done to completely avoid a problem entirely."

"It was the perfect Catch-22, there wasn't anything they could have done to completely avoid a problem entirely."

– Vince Filak, faculty adviser to *Advance-Titan*

The Human Life Alliance issued a press release on October 7 saying that *The Pointer* had told the organization that they had "a policy against advertising topics which have a tendency to cause conflict, shame or controversy among the student body." The press release also said the *Advance-Titan* told the group that, "While we don't necessarily disagree with the message that you wish to promote, some of our readers might, and we don't want to alienate our readership by appearing to choose sides in such a controversial argument."

"I guess these two editors have decided for their entire university what other students need to know - so much for free speech and academic freedom," said Jo Tolck, the executive director of the Human Life Alliance, in the October 7 statement.

The group said in its October 7 statement that the advertisement had previously been accepted by college papers at Marquette University, and University of Wisconsin student papers at campuses in Eau Claire, La Crosse, Whitewater, Milwaukee, and Madison.

"Either they are ideologically opposed to the pro-life message or too scared to run anything controversial. Whichever, it is insulting to the intelligence of college students." said Virginia Zignego, the communications director of Pro-Life Wisconsin in the October 7 statement.

According to the SPLC's Student Media Guide to Advertising Law, available online at http://www.splc.org/legalresearch.asp?id=45, the right of students at a public school to reject advertising is protected as long as the students, and not public school officials, make the advertising decisions. The SPLC guide cites cases such as *Leeds v. Meltz*, 85 F.3d 51 (2d Cir. 1996), which determined that student editors at public schools are not "state actors" and therefore have the right to reject advertisements.

Bucknell University Student Newspaper Refuses Ad Criticizing School

A September 23 story from the SPLC reported that *The Bucknellian*, the student newspaper at Bucknell University in Lewisburg, Pa., rejected an advertisement in early September from The Foundation for Individual Rights in Education (FIRE) that criticized the university, citing libel concerns.

Adam Kissel, director of FIRE's Individual Rights Defense Program, dismissed the paper's claim that the ad was potentially libelous, saying its claims were clearly opinion. "If third parties cannot even criticize the university in an ad in the student newspaper, free speech is in dire straits at Bucknell," Kissel said, according to the SPLC.

Bucknellian Editor-in-Chief Lenore Flower said she thought the advertisement was inappropriate and would reflect poorly on the newspaper, according to the SPLC. She said she advised FIRE to change the wording of their advertisement or to write a letter to the editor, a format that Flower said was more appropriate for opinionated content.

According to the SPLC, the rejected ad criticized the school's decision to shut down demonstrations by the Bucknell University Conservatives Club and specifically named Associate Dean of Students Gerald Commerford as one of the administrators responsible for shutting down the demonstrations.

"First, Dean Commerford silenced the conservative club's expression. Now, even the student newspaper is afraid to print a perfectly lawful third-party ad about it," Kissel said in a September 21 press release.

The SPLC reported that *The Bucknellian* ran an article on the event in the spring that presented arguments from both Commerford and students. "I think if FIRE had read the article themselves, they would have been pleasantly surprised," Flower said, adding that the article shows *Bucknellian* reporters are not afraid of their administration.

According to the SPLC's Student Media Guide to Advertising Law, the right of a private school, such as Bucknell, to reject advertising is "virtually absolute." The SPLC's guide cites cases such as *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), in stating that the "First Amendment does not require the commercial print media to carry any advertisement they do not wish to publish," a concept that applies to both editorial advertising and commercial advertising.

– Jacob Parsley
Silha Fellow and *Bulletin* Editor

Silha Events

Award-winning Investigative Reporter Charles Lewis delivers 2009 Silha Lecture

"The ground is shifting in the conventions of media as we've known it in this country," according to Chuck Lewis, the 2009 Silha Lecturer. "The major media outlets don't have enough staff, they've gutted their newsrooms, they have one reporter doing the job of three or four people. And then we've got nonprofits … that want more traffic and more reach and impact than just their Web site." According to Lewis, these conditions constitute a fundamental change in investigative reporting in the United States.

A journalist, author, recipient of a MacArthur "genius award," and executive editor of the Investigative Reporting Workshop at American University in Washington, D.C., Lewis delivered the 24th annual Silha lecture, "Unspoken Realities about Investigative Journalism and the Law," to an overflow crowd in the Cowles Auditorium on October 21 on the University of Minnesota's West Bank. Lewis has co-authored five books, including the national bestseller *The Buying of the President 2004*, and is preparing a new book about truth, power, and the news media.

Despite the many legal protections for journalists working the United States, "I am not impressed, and actually, I've never been impressed, with the extent to which news organizations expose corporate wrongdoing," Lewis said in his lecture. "It is sporadic and infrequent at best." Lewis listed several "discouragements and disincentives" that he said have taken their toll on mainstream investigative news media, including decreasing budgets, threats of lawsuits, and a growing corporate presence reluctant to offend advertisers or harm professional relationships.

Lewis discussed his 30-year history as an investigative reporter and told several stories from his experience with ABC News and CBS's "60 Minutes," that illustrated how investigative journalists face "certain unspoken realities … that often keep the major media's journalistic watchdogs from barking, let alone biting."

Lewis said that, often, the mere threat of a lawsuit was enough to force internal censorship and discourage in-depth reporting. When Pulitzer-prize winning reporter Walt Bogdanich, who was then working at ABC's "Day One," reported a story about tobacco companies knowingly altering nicotine levels in cigarettes to addict smokers, Phillip Morris sued ABC for $10 billion the day after the story ran, Lewis said. ABC News responded by canceling a planned documentary about cigarette exports, turning over all Bogdanich's sources, and settling the case without consulting Bogdanich, he said. "What do we do about lawsuits? These are serious problems for serious journalism," Lewis said. "You've got to have a way to handle that."

Lewis said he eventually quit his job as a producer at CBS after being asked to delete a name from a script focusing on a corporation that was run by a close friend of a CBS executive. After leaving CBS, he founded the nonprofit Center for Public Integrity (CPI), where he and his staff focused on producing accessible reports investigating government, corruption, war and the banking system.

Lewis spoke about his work at CPI, including an investigation into foreign suppliers in Iraq that revealed the political underpinnings of the process of awarding contracts. The CPI also released influential reports on the lucrative illegal trade of smuggling cigarettes, the climate change lobby, and the economic meltdown.

Today, Lewis said, there is an emerging trend toward a nonprofit model of investigative journalism, citing examples such as ProPublica and the Minnesota news Web site MinnPost. Some of these nonprofit groups have combined forces to form the Investigative News Network, which Lewis said plans to combine the investigative resources of many of these nonprofit groups across the country.

"There is a way to stand tall and be tough and to tough these things out and to move forward, "Lewis said. "And it's not easy, it's much easier to do daily journalism…but this kind of work is different."

The Silha Center enter also hosted a luncheon at the University's Coffman Memorial Union celebrating the 25th anniversary of its founding. Al Tims, director of the School of Journalism and Mass Communication, commended Silha Professor and Silha Center Director Jane Kirtley for the Center's work, and praised the vision of Otto and Helen Silha, and the generosity and continued support of the entire Silha family. Stephen Silha, son of founders Otto and Helen, presented the Center with a framed photograph of Otto on behalf of the Silha family. Otto Silha passed away in 1999. Kirtley presented Helen Silha with an antique silver ink well to commemorate the anniversary.

The annual Silha Lecture is supported by a generous endowment from the late Otto Silha and his wife, Helen. Video coverage of the lecture is available on the Silha Center's Web site at http://silha.umn.edu/events.

– Ruth DeFoster
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Subpoenas and Shield Laws

Federal Shield Law Passes Senate Committee

The Senate Judiciary Committee voted 14-to-5 on Dec. 10, 2009 to present the most recent version of a federal journalist shield bill to the full Senate.

If the full Senate approves the bill, S. 448, it will have to be reconciled with H.R. 985, a different version of the legislation approved by the House on March 31, 2009. Both versions of the bill are referred to as the Free Flow of Information Act of 2009.

Both versions of the bill give journalists limited ability to protect their sources. The Senate version contains specific exceptions in cases of criminal or tortious conduct; "to prevent death, kidnapping or substantial bodily injury;" and to "prevent terrorist activity or harm to the national security."

The current version of the Senate bill extends protection to a "person who is engaged in journalism," and defines "journalism" as "the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public."

According to a December 10 report in *The New York Times*, the legislation, which has broad support from news organizations, is a compromise worked out by senators, the intelligence community and the Obama administration.

A December 10 report on the Web site of The Reporters Committee for Freedom of the Press stated that Sens. Dianne Feinstein (D-Calif.) and Dick Durbin (D-Ill.) had proposed an amendment to the bill to limit the definition of a journalist covered by the bill to an employee of a media outlet, but the amendment was rejected and the committee approved the bill with its existing definition of a journalist.

According to the December 10 RCFP report, the bill's sponsors promised that they would continue to work with Feinstein and Durbin on the definition before the bill reaches the Senate floor, which is not expected soon.

"After years of debate and countless cases of reporters being held in contempt, fined and even jailed for honoring their professional commitment not to publicly reveal their sources, the time has come to enact a balanced federal shield law," said the judiciary committee chairman, Patrick Leahy (D-Vt.), according to a December 10 AP story.

"Today has been a long time coming. The bill creates a fair standard to protect the public interest, journalists, the news media, bloggers, prosecutors and litigants," Sen. Arlen Specter (D-Pa.) said, according to the AP. "This marks a major improvement over current procedures where journalists have been threatened, fined and jailed for appropriately protecting sources."

– Jacob Parsley
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