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House Permanent Select Committee On Intelligence Holds Hearings on Information Leaks; Silha Center Director Jane Kirtley Submits Statement

Leaks of intelligence information play a critical but controversial role in American politics and American journalism. The Bush administration has suggested that the 1917 Espionage Act, never before applied to the news media, may be utilized to investigate and prosecute both leakers and the reporters of those leaks. One example involves FBI attempts to search boxes of archival material owned by the late journalist Jack Anderson in connection with the prosecution of two American Israel Public Affairs Committee lobbyists who are accused of communicating national defense information to others. This case and others prompted a hearing by the House Permanent Select Committee on Intelligence on May 26, 2006, and will be covered in future issues of the Silha Bulletin. Information about the hearing can be found at the Committee's home page, available online at <http://intelligence.house.gov>. Jane E. Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law, filed the following statement with the Committee for that hearing:

Concerns about unauthorized disclosure of classified information have prompted heated debate about the role of a free press in American society as the government has scrambled to stem the leaks and to determine the identity of leakers. In late April 2006, the Central Intelligence Agency fired Mary McCarthy, an analyst who is accused of having provided classified information to *Washington Post* reporters about secret United States-operated prisons in Europe where terrorism suspects are detained. Almost simultaneously, reports surfaced that the Federal Bureau of Investigation was trying to examine nearly 200 boxes containing papers belonging to the late investigative journalist Jack Anderson. A spokesman for the FBI was quoted as saying that the agency had "determined that among the papers, there are a number of U.S. government documents that contain classified information," and further contending that "no private person may possess classified documents that were illegally provided to them." (See Scott Carlson's "Attempt to Screen Archive Prompts Fears" in the April 28, 2006 issue of the *Chronicle of Higher Education*, and Nick Timiraos's, "Late Journalist's Family Resists FBI Request for His Documents" in the April 19, 2006 edition of the *Los Angeles Times*.)

Reaction to both of these incidents was swift, and outspoken. Some commentators accused McCarthy of being a traitor, and suggested that the reporters and news organizations who published the classified information were no better than traitors themselves. (See Cal Thomas's "A traitor in our midst" in the April 26 edition of *The Baltimore Sun*, and "Pulitzer Winners Risen, Lichtblau, Priest "Worthy of Jail," in the April 18, 2006 edition of *Editor & Publisher*.) Others used the incidents as an object lesson in a basic principle: it is up to the government to keep its secrets, if it can. It is up to journalists to ferret out as much information as possible. (See David S. Broder's "Tension Over Press Leaks; Government Has a Right to Keep Secrets—But Also a Duty to Be More Open" in the April 27, 2006 issue of *The Washington Post*.)

Many journalists were outraged, as well as surprised, to learn that the government might have the power to go through boxes of material collected by a journalist and to repossess any classified documents that its agents might find. (See, for example, Holly Mullen's column, "Family Tells Snoopers to Buzz Off" in the April 20, 2006 issue of *The Salt Lake Tribune*, available online at http://sltrib.com/mullen/ci_3729452; and Mark Feldstein's article "A Chilling FBI Fishing Expedition," in the April 29, 2006 issue of *The Washington Post*.) It seemed particularly chilling because the FBI justified its actions by claiming that the Anderson files might contain information relevant to the on-going prosecution of a former Pentagon official and two former lobbyists for the American Israel Public Affairs Committee (AIPAC) who are accused of violating provisions of the Espionage Act of 1917 (18 U.S.C. § 793 (2005)) by conspiring to communicate national defense information to persons not authorized to receive it.

In the past, the espionage statutes were utilized primarily to prosecute those who had committed classic espionage—selling secrets to agents of foreign powers. An important exception was the prosecution of Navy analyst Samuel Loring Morison, for providing classified photographs to the British publication *Jane's Defence Weekly*. See *United States v. Morison*, 844 F.2d 1057 (4th Cir. 1988). But some commentators have speculated that the prosecution of the AIPAC lobbyists is simply a prelude to the prosecution of journalists under the Espionage Act for receiving and disseminating classified information. (See, for example, Gabriel Schoenfeld's article, "Has the New York Times Violated the Espionage Act?" in the March 2006 issue of *Commentary*, available online at <http://www.commentarymagazine.com/production/files/schoenfeld0306advance.html>.)

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"Surely the 35th anniversary of the 'Pentagon Papers' case is not the time to curtail the free flow of information."

– Jane E. Kirtley,
Silha Professor
and Director of the
Silha Center for the
Study of Media
Ethics and Law

It is not my intention here to debate the correct legal interpretation of the espionage statutes and their applicability to journalists. But I would like to point out that we have been down this road before. Almost exactly 20 years ago, then-CIA Director William J. Casey urged the Justice Department to prosecute news organizations under 18 U.S.C. § 798 for publishing classified information concerning interceptions of communications by the Libyan government, as well as NBC for reporting that accused spy Ronald W. Pelton may have given the Soviets information about an NSA project code-named "Ivy Bells" by which U.S. submarines eavesdropped inside Soviet harbors. (See George Lardner Jr.'s article "Justice Officials Cool to Idea of Press Prosecutions," in the May 8, 1986 issue of *The Washington Post*; see also Bryan Brumley's May 20, 1986 Associated Press article, "Casey Charges NBC Violated Secrecy Law," both available from Lexis-Nexis.) A bill sponsored by Sen. Ted Stevens (R-Alaska) designed to prevent convicted spies from profiting from their espionage activities included a provision that would have resulted in the mandatory forfeiture of "all property" used in the commission of the crime, which presumably would have included any news organizations convicted under the Espionage Act. As Rep. Don Edwards (D-Calif.), then-chairman of the House Judiciary subcommittee on constitutional rights, observed, "Coupled with Casey's threats to prosecute the press, this provision is frightening. Communications intelligence today means much of our intelligence product. If this provision is enacted, the media can publish stories on intelligence matters only at the risk of their businesses. Obviously, it will have a chilling effect." (See George Lardner, Jr.'s article "Media Assets May be Forfeit Under Spy Bill; Lawmakers' Efforts to Bar Profits in Espionage Cases Could Have a Hidden Side Effect," in the July 14, 1986 issue of *The Washington Post*.)

As it turned out, no prosecutions of the press resulted from these incidents. But recollecting them reminds us that the issues currently being considered by this committee are neither new nor novel. Trying to balance legitimate concerns about maintaining the secrecy of properly classified information against the role of the press to act as watchdog on the government and to keep the public informed raises genuine and compelling issues and challenges. Apart from the First Amendment implications, there are pragmatic considerations as well. During the 1986 furor over the press disclosures, Sen. Patrick J. Leahy (D-Vt.) was quoted in Lardner's *Washington Post* article as saying "You should go after the persons doing the leaking. Going after the press raises some very serious First Amendment issues in my mind, and really won't get at the problem." And as Retired Adm. Gene La Rocque, then-director of the Center for Defense Information, pointed out, pursuing the press can have other negative consequences by confirming that the disclosures are significant. He was quoted as saying that as a result of Casey's denunciation of the NBC report, "the Soviets now know . . . that the information was highly sensitive, important and prejudicial to U.S. interests." (See Dana Walker's United Press International article from May 21, 1986, entitled, "Casey helping or hurting intelligence effort.")

No journalist seeks to cause harm to national security. But as Judge J. Harvie Wilkinson wrote in his concurring opinion in *Morison*, "National security is public security,

not government security from informed criticism." Benjamin C. Bradlee, then-executive editor of the *Washington Post*, wrote in June 1986, "[w]e do consult with the government regularly about sensitive stories and we do withhold stories for national security reasons, far more often than the public might think. [But] we don't allow the government – or anyone else – to decide what we should print. That is our job, and doing it responsibly is what a free press is all about." (See Bradlee's article, "The Post and Pelton: How the Press Looks at National Security," in the June 8, 1986 issue of *The Washington Post*.)

Extending the espionage laws to prosecute individuals, like journalists, who disclose classified information but who are not engaged in classic espionage, would, as noted by Judge T.S. Ellis III, currently presiding over the AIPAC prosecution, "veer[] into 'uncharted waters.'" (See Richard B. Schmitt's article, "Judge Calls Speech Right Central to Espionage Case" in the April 2, 2006 edition of the *Los Angeles Times*.) As Wilkinson wrote in the *Morison* case, "The First Amendment interest in informed public debate does not simply vanish at the invocation of the words 'national security.'" He emphasized that the prosecution of a naval analyst who was subject to a non-disclosure agreement seemed to be consistent with the First Amendment, but "was not an attempt to apply the espionage statute to the press for either the receipt or publication of classified materials." Judge James Dickson Phillips, concurring specially, observed that Wilkinson appeared to be convinced that "the use of the statute [in that manner] will not significantly inhibit needed investigative reporting about the workings of government in matters of national defense and security." In the view of these judges, however, prosecutions of the press would raise entirely different constitutional questions.

As I testified before the House Judiciary Committee's Civil and Constitutional Rights and Criminal Justice Subcommittees in 1989, "The tension between the government's attempts to keep information secret, and the news media's attempts to inform the public, is a struggle protected and encouraged by the First Amendment and the news media's role in our constitutional system." (See statement of Jane E. Kirtley, Executive Director, Reporters Comm. for Freedom of the Press: "Leaks During the Course of Criminal Investigations: Joint Hearing before the Subcomm. on Civ. & Const. Rights and the Subcomm. on the Judiciary," 101st Congress (Aug. 2, 1989).) The resolution of these questions will never be easy. But surely the 35th anniversary year of the landmark "Pentagon Papers" decision by the Supreme Court in *New York Times Co. v. United States*, 403 U.S. 713 (1971) is not the time to curtail the free flow of information to the public. Secrecy does not invariably enhance security. It often undermines it. Although it may be tempting to yield to the seductive allure of secrecy to preserve the illusion of security, illusions are not safe, and neither are citizens who are denied information.

– JANE E. KIRTLEY
SILHA PROFESSOR
AND DIRECTOR OF THE SILHA CENTER
FOR THE STUDY OF MEDIA ETHICS AND LAW

Government Interference with Speech

Garcetti v. Ceballos

On May 30, 2006, the U.S. Supreme Court ruled that government employees do not have First Amendment protection for speech they make pursuant to their work, a ruling that some critics fear could chill potential government whistle-blowers. The case, *Garcetti et al. v. Ceballos* 2006 U.S. LEXIS 4341 (2006), was initially argued before the Supreme Court in October 2005. After Justice Sandra Day O'Connor retired at the end of January 2006, the case was reargued before the newly-constituted court, with Justice Samuel Alito in O'Connor's place, on March 21. Some media outlets have speculated that had the more politically moderate O'Connor still been on the court when the 5-4 opinion, authored by Justice Anthony Kennedy, was issued, the outcome might have been different.

The case arose from a dispute in the Los Angeles County District Attorney's Office. Richard Ceballos, who has been deputy district attorney in Los Angeles County since 1989, was contacted in February 2000 by a defense attorney regarding a pending criminal case. The defense attorney alleged that there were some inaccuracies in an affidavit used to obtain a crucial search warrant in the case, and he wanted Ceballos to review it. Ceballos "determined the affidavit contained serious misrepresentations," according to Kennedy's opinion. After receiving an unsatisfactory explanation from the deputy sheriff who swore to the affidavit, Ceballos voiced his concerns to his supervisors, Carol Najera and Frank Sundstedt. Ceballos also submitted a disposition memorandum detailing his findings regarding the allegedly inaccurate affidavit and recommending that the case be dismissed.

Subsequently, a purportedly "heated" meeting was held to discuss the affidavit. Ceballos, the deputy sheriff who wrote the affidavit, and other sheriff department employees attended, as well as Ceballos' supervisors and then-Los Angeles County District Attorney Gil Garcetti. After the meeting, Ceballos' supervisors elected to proceed with the case, and in a subsequent hearing regarding a defense motion to dismiss based on the affidavit, Ceballos testified for the defense about his findings. The trial court denied the defense motion, rejecting the challenge to the warrant.

Ceballos alleged that after his memorandum and testimony, "he was subjected to a series of retaliatory employment actions," Kennedy wrote, including being transferred to another courthouse and being denied a promotion. Ceballos filed an employment grievance which was denied. Then Ceballos filed suit in the federal district court for the Central District of California, alleging that his superiors violated the First and Fourteenth Amendments by retaliating against him based on his memo. The defendants in the case, Garcetti, Najera, and Sundstedt, denied any retaliation, and also contended that Ceballos' memo was not protected by the First Amendment. District Judge A. Howard Matz agreed, holding that Ceballos wrote the memo as part of his employment duties, and that therefore he was not entitled to First Amendment

protection for its contents in *Ceballos v. Garcetti et al.*, D.C.No. CV-00-11106-AHM (C.D. Cal. 2002).

The Ninth Circuit Court of Appeals reversed, holding that Ceballos' speech was protected because it was on "a matter of public concern" (*Garcetti et al. v. Ceballos* 361 F.3d 1168 (2004)). The appeals court looked to precedent set forth in *Pickering v. Board of Ed. Of Township High School Dist. 205, Will Cty.* 391 U.S. 563 (1968) and applied a balancing test to determine whether Ceballos' interest in his speech was outweighed by his employer's interest in maintaining an undisrupted and efficient flow of work. The Ninth Circuit found that Ceballos' interest was not outweighed, noting that his supervisors "failed even to suggest disruption or inefficiency in the workings of the District Attorney's Office" as a result of Garcetti's memo, and therefore that Ceballos was protected by the First Amendment from his employer's alleged retaliation.

Following reargument, the U.S. Supreme Court reversed again, remanding the case for further proceedings. Joining Kennedy for the majority were Chief Justice John Roberts and Justices Alito, Antonin Scalia and Clarence Thomas. The majority agreed with the district court's holding that Ceballos was not protected by the First Amendment for speech during the course of his employment. According to Kennedy's opinion, "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Although Kennedy wrote that "public employees do not surrender all their First Amendment rights by reason of their employment," those rights only extend to "a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern."

In this case, instead of focusing on whether Ceballos' allegations of inaccurate law enforcement were of public concern, the majority concentrated on Ceballos' status while making the allegations. Kennedy wrote, "the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline." Because Ceballos' memo existed only because of his employment, the memo should not be considered written by "a citizen on a matter of public concern," or speech that would warrant First Amendment consideration under *Pickering*. "Restricting speech that owes its existence to a public employee's professional responsibilities does not infringe any liberties the employee might have enjoyed as a private citizen," Kennedy wrote. "It simply reflects the exercise of employer control over what the employer itself has commissioned or created."

The majority justified its citizen-employee distinction as one that promotes efficiency and appropriate control for the government as an employer.

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"The ruling is a victory for every crooked politician in the United States."

– Stephen Kohn,
Chairman,
National Whistleblower
Center

“Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees’ official communications are accurate, demonstrate sound judgment, and promote the employer’s mission,” the opinion states. Furthermore, to follow the Ninth Circuit’s logic, Kennedy contended, “would commit state and federal courts to a new, permanent, and intrusive role, mandating judicial oversight of communications between and among government employees and their superiors in the course of official business. . . . To hold [thus] would be to demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers.”

Finally, Kennedy confirmed that “exposing governmental inefficiency and misconduct is a matter of considerable significance,” but denied that this ruling will in any way undermine the ability of whistle-blowers to do so without fear of retaliation, citing a “powerful network of legislative enactments,” including whistle-blower protection laws and labor codes. The court’s reasoning was not convincing to the other four Justices, however, who collectively authored three dissenting opinions, each raising important questions regarding the precedent set by the court’s holding.

Justice John Paul Stevens wrote that the “proper answer” to the question of whether the First Amendment protects a government worker from discipline based on work-related speech is “‘sometimes,’ not ‘never,’” and called the majority’s decision “misguided.” Justice David Souter, with whom Justices Stevens and Ruth Bader Ginsburg joined, wrote a lengthier dissent, detailing the concerns that many others have raised in the popular media. Souter argued that the *Pickering* balancing test should be applied in all government employee speech cases, “in part, because a government paycheck does nothing to eliminate the value to an individual of speaking on public matters, and there is no good reason for categorically discounting a speaker’s interest in commenting on a matter of public concern just because the government employs him.” He contended that “there is no adequate justification for the majority’s line categorically denying *Pickering* protection to any speech uttered ‘pursuant to . . . official duties.’”

In a footnote, Souter predicted that the majority’s distinction could lead employers to write unreasonably vague job descriptions, thus creating more “official duties” to which a greater amount of speech is likely to be “pursuant.” This is an implication Kennedy rejected in the majority opinion, however.

Souter also pondered whether this distinction could affect public universities. “This ostensible domain beyond the pale of the First Amendment is spacious enough to include even the teaching of public university professor[s] . . . who necessarily speak and write ‘pursuant to official duties.’” Kennedy rejected that notion as well, writing “There is some argument that expression related to academic scholarship or classroom instruction implicates additional constitutional interests that are not fully accounted for by this court’s customary employee-speech jurisprudence. We need not, and for that reason do not,

decide whether the analysis we conduct today would apply in the same manner to a case involving speech related to scholarship or teaching.”

Finally, Souter criticized the majority’s reliance on existing whistle-blower protection statutes as sufficient to protect the sort of speech at issue. He wrote that “the combined variants of statutory whistle-blower definitions and protections add up to a patchwork, not a showing that worries may be remitted to legislatures for relief.”

Justice Stephen Breyer also wrote a separate dissenting opinion, echoing Stevens’ concerns that the majority’s categorical denial of First Amendment protection in such circumstances is too broad. In *Ceballos*’ case, Breyer wrote that there are special interests raised by *Ceballos*’ status as a lawyer – a profession whose “canons provide an obligation to speak in certain instances. And where that is so, the government’s own interest in forbidding that speech is diminished.” Furthermore, Breyer wrote, *Ceballos*’ employment as a prosecutor raises constitutional issues, given that “a prosecutor has a constitutional obligation to learn of, to preserve, and to communicate with the defense about exculpatory and impeachment evidence in the government’s possession.” In this case, then, Breyer would agree with Souter and apply the *Pickering* balance. However, Breyer did not agree with Souter’s suggested application of a *Pickering*-based standard to all such similar cases.

On remand, the Ninth Circuit will have to consider *Ceballos*’ testimony in the trial court, as well as his discussions with his superiors. In addition, *Ceballos* spoke at a meeting of the Mexican-American Bar Association about the case, a speech which he alleges at least partly precipitated the dismissal of his employment grievance. In his dissent, Souter wrote that it will be up to the Ninth Circuit to determine how to classify those instances of speech, for, as Souter contended, “not all of those statements would have been made pursuant to official duties in any obvious sense.”

Reaction to the ruling was mixed. Gene C. Schaerr, an attorney for the International Municipal Lawyers Association, which supported the petitioners, told *The Washington Post* that the ruling “allows local and state governments the appropriate degree of oversight of their employees, without really impinging upon their First Amendment right to speak out as private citizens.” Steven Shapiro, national legal director of the American Civil Liberties Union, which supported *Ceballos* in the case, disagreed. “It is fair to say, in the era of excessive government secrecy, this makes government coverups easier by discouraging whistle-blowers,” he told *The Post*. And Stephen Kohn, chairman of the National Whistleblower Center, told the Associated Press, “The ruling is a victory for every crooked politician in the United States.” And some scholars contend that the ruling is, above all, confusing. Robert O’Neil, director of the Thomas Jefferson Center for the Protection of Free Expression and a member of the Silha Center Advisory Board, told the First Amendment Center’s Tony Mauro, “The Court seems to be saying that if you don’t know anything about a subject, you can speak freely about it. I don’t see this decision giving much guidance.” Mauro’s article is available online at <http://www.firstamendmentcenter.org/analysis.aspx?id=16956>.

– PENELOPE SHEETS

SILHA RESEARCH ASSISTANT

Government Restrictions on Information

NASA Revises Policy on Employees' Speech

The National Aeronautics and Space Administration (NASA) unveiled a revised media relations policy for its employees on March 30, 2006, two months after allegations surfaced from several NASA employees that they had felt pressured by the Bush administration and its political appointees within NASA to suppress their views about potentially controversial scientific findings. In particular, *The New York Times* reported on Jan. 29, 2006 that after a senior climate scientist at NASA, Dr. James E. Hansen, suggested publicly in December 2005 that the United States was not doing all that it can or should do to combat the growth of greenhouse gas emissions, he received warnings from NASA officials of "dire consequences" should he continue to make such statements publicly. Additionally, some of Hansen's opportunities for media interviews were cancelled, and his upcoming lectures, papers, and Web postings were ordered to be reviewed by NASA's public affairs staff prior to publication.

That article created controversy in the scientific and media community, and precipitated similar allegations from other employees at NASA. One such incident involved a Jet Propulsion Laboratory scientist, Dr. Tong Lee, who alleged that he was pressured to give a quote for a press release linking his research on wind patterns and the Indian Ocean to space exploration, which he later disavowed, according to *The Times*. Other incidents reported by *The Times* and *The Washington Post* involved similar allegations – that some of NASA's political appointees purportedly sought to interfere with some NASA scientists' research presentations – though news reports are varied and the political appointees in question denied the allegations.

These incidents, according to a Feb. 5, 2006 editorial in the *Philadelphia Inquirer*, are part of a "worrisome pattern in the Bush administration of subjugating science to politics." That editorial quoted a letter from Representative Sherwood Boehlert (R.-N.Y.), the Chairman of the House Science Committee, to NASA after the news about Dr. Hansen's allegations broke: "Good science cannot long persist in an atmosphere of intimidation."

There was reaction within NASA as well. NASA Administrator Michael Griffin instigated a "pledge of 'scientific openness,'" *The Times* reported on Feb. 4, 2006. That pledge led to a revamping of NASA's communication policy, entitled NASA's "Policy on the Release of Information to News and Information Media" and written by a group of NASA's scientists, lawyers, public affairs specialists and managers, according to *The Post*. The policy sets out five principles governing the release of public information. The first is that NASA is "committed to a culture of openness with the media and public," where "scientific and technical information . . . will be accurate and unfiltered." The second and third principles refer to the timeliness of the release of complete, factual information; the fourth principle states, "In keeping with the desire for a culture of openness, NASA employees may, consistent with this policy, speak to the press and the

public about their work." The fifth principle qualifies the other four by exempting information from release that is protected by "statute, regulation, Executive Order, or other . . . policy," including any information covered by exemptions provided by the Freedom of Information Act (5 U.S.C. § 552).

The portions of the revised policy most relevant to the Hansen controversy stipulate that NASA employees "may speak to the media and the public about their work," but that they "shall notify their immediate supervisor and coordinate with their public affairs office" either in advance of interviews or immediately afterward, and are "encouraged," whenever possible, "to have a public affairs officer present during interviews. If public affairs officers are present, their role will be to attest to the content of the interview, support the interviewee, and provide post-interview follow up with the media as necessary." The policy also states that "NASA, as an Agency, does not take a position on any scientific conclusions. . . . NASA scientists may draw conclusions and may, consistent with this policy, communicate those conclusions to the media. However, NASA employees who present personal views outside their official area of expertise or responsibility must make clear that they are presenting their individual views – not the views of the Agency – and ask that they be sourced as such." Additionally, the policy provides for editing of material by public affairs staff "to ensure that public information products are well written and appropriate for the intended audience. However, such editing shall not change scientific or technical data, or the meaning of programmatic content." The revised policy, as well as Griffin's press release, is available online at <http://www.nasa.gov/commpolicy>.

Boehlert praised the policy, telling *The Post* that NASA's approach "puts a premium on open communication," and that it "should become a model for the entire federal government." *The Post* also reported that Griffin stressed in a broadcast to NASA employees that they should make distinctions between their personal views and scientific findings very clear while talking to the media. But some scientists maintain that they have always made such clear distinctions. Dr. Ralph J. Cicerone, an atmospheric chemist and president of the National Academy of Sciences, told *The Times* that Hansen did so as well. "I've heard Hansen speak many times and I've read many of his papers, starting in the late 70's. Every single time, in writing or when I've heard him speak, he's always clear that he's speaking for himself, not for NASA or the administration, whichever administration it's been."

NASA's own Web site, however, emphasizes that this is not really a "new" policy. Instead, NASA claims, it is "a revision of the existing NASA policy that has been in the Code of Federal Regulations in one form or another since at least 1976." NASA's Web site also suggests that its media relations policy may continue to evolve.

– PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

The revised policy stipulates, in part, that NASA employees may speak to the media and the public about their work, but that they shall notify their immediate supervisor and coordinate with their public affairs office either in advance of interviews or immediately afterward.

Government Interference with the Media

Politicians Attempt to Assert Controls Over Access

Less than two months after the Fourth Circuit rejected the arguments of *Baltimore Sun* reporters David Nitkin and Michael Olesker who claimed that Maryland Governor Robert Ehrlich violated their First Amendment rights by instructing public employees and agencies not to talk to them in *Baltimore Sun v. Ehrlich*, 437 F.3d 410 (4th Cir. 2006), other journalists and media organizations continue to face challenges in reporting on public officials at the state and local level. (See “Government Restrictions on Information: Governor Prevails in Suit Filed by *Baltimore Sun*” in the Winter 2006 issue of the *Silha Bulletin* and “Access to Government: Judge Upholds Maryland Governor’s Ban on State PIOs Speaking to Two *Baltimore Sun* Reporters” in the Summer 2005 issue of the *Silha Bulletin* and “Access to Government: Maryland Governor Forbids Employees to Speak to Reporters” in the Fall 2004 issue of the *Silha Bulletin*.) In Mississippi and Arkansas, reporters have been denied access to elected officials, apparently in reprisal for aggressive coverage.

And in Ohio, the state Supreme Court has expanded the authority of the governor to withhold information from the press and reporters.

The War of Words Between *The Clarion-Ledger* and Mayor Frank Melton

In Mississippi, reporters from *The* (Jackson) *Clarion-Ledger* and WAPT-TV, a local television station, were denied entry to a news conference held by Jackson Mayor Frank Melton. According to an article published on April 14, 2006 on the Reporters Committee for Freedom of the Press (RCFP) Web site, Melton barred reporters in retaliation for the news organization’s often-aggressive coverage of Melton since he took public office last summer. The RCFP article is available online at <http://rcfp.org/news/2006/0414-new-jackso.html>.

According to *The Clarion-Ledger*, its managing editor, Don Hudson, received a call from the mayor’s office on April 11, 2006 and was told of a news conference being held later that day. With the exception of reporter Kathleen Baydala, who wrote an article the previous month on Melton’s use of the Jackson Police Department for private security purposes, *The Clarion-Ledger* was told by the mayor’s office that the event would be open to anyone.

Hudson, who accompanied Baydala to city hall and instructed her not to attend the news conference, was confronted by a security guard after arriving. Hudson was told that only two local television stations would be allowed into the conference. Hudson, along with a reporter from one of the two local television stations, approached Melton in the mayor’s office. When Hudson identified himself as a representative of *The Clarion-Ledger*, Melton ordered the editor to be escorted from the building.

The mayor’s actions were “clearly an effort to retaliate against *The Clarion-Ledger* because the

paper has been critical of him,” Jeanni Atkins, a University of Mississippi journalism professor and executive director of the Mississippi Center for Freedom of Information said in an e-mail to the RCFP. Moreover, she said, “the action of selectively barring reporters from a press conference clearly violates the First Amendment.”

According to the April 14 RCFP article, *Clarion-Ledger* executive editor Ronnie Agnew said that *The Clarion-Ledger* had been watchful of Melton since he took office the previous summer. Soon after, Melton had become more antagonistic of the newspaper and its reporters. On March 11, 2006, the newspaper reported that Melton verbally threatened Baydala, promising to “cream” her personally if the reporter pursued a story about his use of Jackson police officers as private security guards.” Baydala’s investigation followed a series of aggressive reports detailing Melton’s law enforcement tactics, which included personal involvement in random vehicle searches and crime sweeps, and alleging that Melton had violated a number of state laws because the mayor was not certified as an officer by Mississippi. Melton also complained openly of being scrutinized by *The Clarion-Ledger*, and claimed that the publication was attempting to prevent him from performing his duties as mayor.

The tension between the mayor and area media organizations continued to increase in April and May 2006. According the *Jackson Free Press*, Melton filed a civil suit in Hinds County Circuit Court against *The Clarion-Ledger* on April 18, 2006. The lawsuit claimed that the newspaper breached an oral agreement that it would check the facts contained in a falsified memo provided to the paper by Melton. According to the *Jackson Free Press*, the lawsuit arose out of events that transpired in 2003, when Melton mistakenly disclosed the memo to *The Clarion-Ledger* when he served as director of Mississippi Bureau of Narcotics.

On May 22, 2006, with Melton’s civil lawsuit pending, *The Clarion-Ledger* reported that Melton “responded earlier today to requests made by *The Clarion-Ledger* for public documents from City Hall by shredding them and telling the newspaper to ‘go to hell.’” It was unclear which of several outstanding requests were destroyed. The requests, which under state law must be answered within 14 working days, included requests for city payroll records, the mayor’s security budget, crime statistics, and information relating to the mayor’s attempts to board a commercial aircraft while armed.

On June 3, 2006 *The Clarion-Ledger* and Melton reached an out-of-court settlement regarding the city’s failure to respond to records requests. “I think his attitude has changed tremendously,” Melton’s attorney Dale Danks told *The Clarion-Ledger*’s Julie Goodman. “We’ve had long discussions about this particular issue. He’s still feeling his way around. Being Mayor is a big job.”

Media Controls, continued on page 7

Arkansas Governor Mike Huckabee Singles Out the *Arkansas Times*

Arkansas Gov. Mike Huckabee has refused to communicate with a weekly alternative publication, the *Arkansas Times*, that voiced criticism about the governor's job performance. On April 27, 2006, the newspaper and its associated online publication were removed from e-mail lists used to distribute routine news releases, public scheduling, and information to interested media organizations, according to a posting on the newspaper's weblog.

Spokeswoman Alice Stewart said the governor's office does not consider the weekly publication a news organization in a statement to the *Arkansas Times*. "By your own definition, you are a journal of politics and culture. As you said, there are hundreds of news outlets in the state and we don't attempt to notify every one of them. The major news organizations are on our e-mail list and that's the way it will continue," she said.

"The *Times* is, of course, a news medium," the weekly tabloid responded. "We report the news on this blog and in our weekly print edition on a regular basis. But definitions are largely irrelevant. The Freedom of Information Act is the public's law, not a press law. Rights abridged under the law for one are rights abridged for all." Though the governor's office has refused to answer any further questions, it denies that the removal of the *Arkansas Times* was in retaliation for criticism of the governor's use of police airplanes and excessive spending by his political action committee, according to an April 28, 2006 article published by the Arkansas News Bureau, which provides news reports to member newspapers of the Stephens Media Group. According to the Arkansas News Bureau, much of the information that appears in the e-mails, including public schedules and other announcements, is available to the public online. The governor's office, Huckabee said, was under no duty to offer any special treatment to the paper when the information is readily available online.

"Contrary to what the governor has told others, news releases are not always posted in a timely fashion on his website. Some are not posted for days. News conferences are never posted on his website," *Arkansas Times* editor Max Brantley wrote in a posting to the newspaper's weblog on May 22, 2006. "It's not true, as he's insisted, that what we seek is otherwise readily available or that we are seeking special favors." It is true, he said, that the removal of the *Arkansas Times* will make it "impossible" for the newspaper to effectively report on the governor and his administration.

"The governor has decided to punish us for our opinions by withholding a publicly financed service. We don't think this practice can stand legal scrutiny and we intend to review our options in that regard," Brantley wrote on the *Arkansas Times* weblog. "We believe we are entitled to access to all press documents issued by the governor's office by virtue of the [Freedom of Information] law."

Considering the recent legal precedent set by the Fourth Circuit in *Baltimore Sun Co. v. Ehrlich* and other cases like it, the *Columbia Journalism Review Daily* wrote, "we're not sure what recourse (besides filing time-consuming FOI requests) the *Times* has, other than rallying its readers to pressure the governor's office to do the right thing, and make public information available to the public: in this case the reporters of the *Arkansas Times*." The article is available online at http://www.cjrdaily.org/politics/another_governor_lowers_the_cu.php.

On April 28, 2006, Brantley told the Arkansas News Bureau that he believes his newspaper would have a stronger case than *The Baltimore Sun* because access was refused to an entire news organization, not just individual reporters. In the same article, the Arkansas News Bureau reported that Milton Fine, the governor's chief counsel, has refused the *Arkansas Times* access to all future news releases and to the names of news organizations on the mailing list, claiming that this information qualified for a "working papers" exemption under the Arkansas Freedom of Information Act of 1967, ARK CODE ANN. § 25-19-105(b)(7) (1967).

"We believe constitutionally they could not deprive us of services provided others on a broad basis on account of them not liking our opinions," Brantley said. "A 'working papers' exception cannot be claimed on information if it is otherwise being provided to others."

"There are hundreds of real news outlets throughout the state and the simple fact is, we don't make phone calls or e-mail every one of them each time we issue a press release or announcements," Huckabee told the Arkansas News Bureau.

The Ohio Supreme Court Allows Governor a Limited Executive Privilege

On April 13, 2006, the Ohio Supreme Court expanded the scope of executive privilege in Ohio, giving Gov. Bob Taft the ability to keep records related to executive branch policymaking private. The decision in *State ex rel. Dann v. Taft*, 2006 Ohio 1825 (2006), marked the first time in the state's history that a privilege was extended to records on executive policy.

Without Ohio precedent, Chief Justice Thomas Moyer, writing for the majority, based his decision on the landmark 1973 Supreme Court of the United States ruling in *United States v. Nixon*, 418 U.S. 683, which allowed certain presidential communications to be entitled to a presumptive executive privilege. "Because a President's communications and activities encompass a vastly wider range of sensitive material than would be true of any ordinary individual, it is necessary in the public interest to afford Presidential confidentiality the greatest protection consistent with the fair administration of justices," Moyer wrote, citing *Nixon*. "We have found no more precise and persuasive statement of the rationale for executive privilege than these words in the unanimous opinion of the Supreme Court of

Government Interference with the Media

FBI Investigation Includes *Sacramento Bee* Reporters

An FBI investigation into how information from sealed court documents was included in stories published during July 2005 in California's *Sacramento Bee* has led to the questioning of three of that newspaper's reporters.

The stories, which involved a federal probe into possible terrorist activity by five Muslims living in Lodi, a town located in California's San Joaquin Valley, were written by staff reporters Dorothy Korber and Stephen Magagnini. A third staff writer, Denny Walsh, who did not work on the story, but is assigned to cover the federal courthouse in Sacramento, was also included in the investigation. The stories dealt with the arrests of a father, his son, and three others, two of them clerics, the *Bee* reported. The *Bee* employees were contacted by FBI agents assigned in the Los Angeles area to avoid a conflict of interest between employees at the courthouse in Sacramento and the Sacramento FBI office, Karen Ernst, the FBI's Sacramento office spokesperson told the *Sacramento Bee*. The *San Francisco Chronicle* noted that clerks at the courthouse were also questioned by FBI agents.

The *San Francisco Chronicle* reported that attorney Joseph Wiseman has been hired to represent the clerics. The case, which Wiseman characterized as "probably the highest-profile terrorist case in the country right now," involves Lodi resident Hamid Hayat, who has been accused of supporting terrorists by attending a training camp in Pakistan in 2003 and 2004, the *San Francisco Chronicle* reported. His father, Umer Hayat, is charged with lying to the FBI about his son's training. Two others, both clerics who allegedly carried orders they were to give the younger Hayat, agreed to be deported to Pakistan rather than fight immigration charges. The *San Francisco Chronicle* stated that the two clerics, identified by the *Sacramento Bee* as Muhammed Adil Khan and Shabbir Ahmed, had no ties to terrorism. Khan's son, Mohammad Hassan Adil, also agreed to deportation.

The *Bee*'s executive editor, Rick Rodriguez, confirmed that the three reporters had been contacted by the FBI, but did not comment further.

— ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Media Controls, *continued from page 7*

the United States. The rationale applies with equal force to the chief executive official of a state."

The Ohio gubernatorial privilege, however, was not unqualified. Instead, Moyer laid out a three-step process to determine whether the privilege applies. First, the governor must formally assert the privilege. Second, the party must demonstrate "a particularized need for disclosure of the material." Finally, Moyer wrote, the governor should present the records to court for *in camera* review to balance "the requesters' need for disclosure against the public's interest in ensuring informed and unhindered gubernatorial decision making."

The case before the Ohio Supreme Court arose when Ohio state Sen. Marc Dann (D-Youngstown) attempted to use the state public records law to review documents related to a corruption scandal involving the governor and state investments in rare coins, according to an *Associated Press* report published on April 14, 2006. A ruling on Dann's specific records request was postponed until Taft could produce more evidence that the documents he was protecting fell under the newly-created executive privilege.

According to the *Cleveland Plain Dealer*, Dann called the decision "outrageous." Dann also alleged that the court's ruling allows Taft and any other governor to "cover up government corruption and shields the court's majority because three of its members received laundered contributions," in a scandal involving the governor and allegedly the documents requested by Dann. Moreover, as Justice Paul Pfeiffer noted in dissent, "anyone who requests a document under the Public Records Act, R.C. § 149.3, can now be forced by the governor to pursue a difficult legal battle to retrieve it." Under the Public Records Act, that includes media organizations, undermining the right of access that allows reporters and the public to inspect official records.

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Government Interference with the Media

Reporters Monitored at Home and Abroad

Reporters' calls are being monitored by the U.S. government, according to a May 15, 2006 report by ABC News reporters Brian Ross and Richard Esposito on their blog *The Blotter*, available online at <http://blogs.abcnews.com/theblotter>. Ross and Esposito revealed that the source, whom they did not publicly identify, told them, "It's time for you to get some new cell phones, quick."

The two wrote that their sources have revealed that reporters at *The Washington Post*, *The New York Times*, and ABC News are being monitored in an effort to ascertain who disclosed the existence of secret CIA prisons in Eastern Europe to reporters at all three news organizations.

The source reportedly said that there was no indication that the calls were being recorded, but rather that the numbers of incoming and outgoing calls were being tracked.

A day later, Ross and Esposito reported that the FBI had confirmed that it is "increasingly seeking reporters' phone records in leak investigations," according to their blog. A senior federal official told them, "It used to be very hard and complicated to do this, but it no longer is in the Bush administration." The official also said that reporters' calls are not being "tracked" as they had reported the day before, but instead were "backtrack[ed]." In other words, the phone records are gathered and analyzed after the calls are made.

The FBI released a statement noting, "The FBI will take logical investigative steps to determine if a criminal act was committed by a government employee by the unauthorized release of classified information."

Ross' and Esposito's reports lend credibility to speculation that arose in January 2006 that reporters were being monitored by the government. A Jan. 5, 2006 *CJR Daily* blog report from the *Columbia Journalism Review's* Paul McLeary noted that an interview of *New York Times's* James Risen conducted by NBC's Andrea Mitchell contained this exchange:

Mitchell: *Do you have any information about reporters being swept up in this net?*

Risen: *No, I don't. It's not clear to me. That's one of the questions we'll have to look into [in] the future. Were there abuses of this program or not? I don't know the answer to that.*

Mitchell: *You don't have any information, for instance, that a very prominent journalist, Christiane Amanpour, might have been eavesdropped upon?*

Risen: *No, no I hadn't heard that.*

The question led some bloggers to believe that Mitchell had specific information about Amanpour

being wiretapped. McLeary noted that a few hours after NBC published the transcript of the Mitchell-Risen interview on its website, the Amanpour question was cut. After being questioned about the edit by another blogger, NBC released a statement. "Unfortunately this transcript was released prematurely. It was a topic on which we had not completed our reporting, and it was not broadcast on 'NBC Nightly News' nor on any other NBC News program," the statement read. "We removed that section of the transcript so that we may further continue our inquiry." The *CJR Daily* entry is available online at http://www.cjrdaily.org/blog_report/is_the_nsa_wiretapping_reporte.php.

In other reporter wiretapping news abroad, *Editor & Publisher* reported on May 15, 2006, that the German intelligence agency, the Bundesnachrichtendienst (BND), had spied on German journalists since 1993. Media outlets being spied on included *Focus*, *Stern*, *Der Spiegel*, *Berliner Zeitung*, and WDR television, among others.

Chancellor Angela Merkel ordered an end to the program, which also involved paying some journalists to write reports about their colleagues. CNN reported that one prominent German journalist received approximately 653,000 Deutsche Marks over the years, which is equivalent to \$375,000 U.S. dollars for 856 such reports.

A German spokesperson, Ulrich Wilhelm, said the BND had been asked to give a report to the government on the issue. The *Christian Science Monitor* reported on May 18, 2006 that the 170-page report was delivered in a secret parliamentary meeting the second week of May. German journalists demanded access to the document, and Reporters Without Borders (Reporters sans Frontières or RSF) has requested a second investigation. The article quoted Annabelle Arki, chief of the RSF European desk, saying, "The danger is obvious. If journalists cannot protect their sources, no one will speak to them, and the press can't perform its role of providing information that the public needs in a democracy."

The *Editor & Publisher* article is available online at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1002502952; the CNN article can be found online at <http://edition.cnn.com/2006/WORLD/europe/05/15/german.spying.reut/>; and the *Christian Science Monitor* article is also online at <http://www.newsdesk.org/archives/000683print.php>.

— ASHLEY EWALD
SILHA FELLOW

"The danger is obvious. If journalists cannot protect their sources, no one will speak to them, and the press can't perform its role of providing information that the public needs in a democracy."

— Annabelle Arki,
Chief of the RSF
European Desk

Government Interference with the Media

Police Association Posts BOLO Warning Following Correspondent's Investigative Report

On March 23, 2006, in response to an investigative report criticizing law enforcement agencies in southern Florida, the Broward County Police Benevolent Association (BCPBA) posted the addresses, dates of birth, and driver's license numbers of a local television correspondent and a member of an independent watchdog organization on their Web site.

The information was made available in a "be on the lookout" (BOLO) warning sent to officers and police stations across Broward and Miami-Dade counties but accessible to the general public through the police union's BCPBA Web site, as Jeff Stratton of the *Miami New Times* reported on March 23, 2006. On the BCPBA's site, a flashing icon alerted viewers that the Miami-area news program CBS 4 was "setting up officers and instigating confrontations, then filing complaints with various police departments."

The report, featuring hidden-camera footage of members of a police abuse advocacy group requesting incident complaint forms at area police stations, aired on Miami-based CBS affiliate WFOR-TV on February 4, 2006. Michael Kirsch, who filed the report, found that "in police departments, large and small, it was virtually impossible to walk in the door, and walk out with a complaint form." A transcript of the report is available online at http://cbs4.com/topstories/local_story_033170755.html.

Footage from the report showed police officers threatening undercover investigators when they attempted to file complaints against other officers or retrieve complaint forms from the station. At one point, according to the report, an undercover investigator was threatened by an officer who placed his hand on his gun and said, "Take a step closer, and see what happens."

Dick Brickman, a retired police officer and president of the police union, issued the BOLO warning, according to the *Miami New Times*. "I put the information out so our members, if they come across any of these people, they should be aware these people they're talking to probably have you on camera," Brickman said according to the article published on March 23, 2006. "They're trying to set you up to aggravate you so you'll make a mistake." Brickman also warned that CBS 4, which teamed with members of the Police Complaint Center in its initial investigation, was planning a follow-up story in May.

Brickman was advised by an attorney to remove any personal information related to Kirsch or Gregory Slate, a member of the Police Complaint Center whose information was also posted from the warning after receiving a "cease and desist" letter from WFOR-TV. Brickman removed the personal information from the Web site but, according to a *Miami Herald* article published on March 30, 2006, left a photograph of Kirsch on the website.

Alan Rosenthal, an attorney for WFOR-TV, described the release of personal information as unlawful harassment. According to an article published by the *Miami Herald* on March 30, 2006, Rosenthal claimed that the BOLO warning posting on the BCPBA's Web site violated Florida and federal laws that prohibit the disclosure of personal information contained in motor vehicle records. The article did not identify the state or federal statutes referred to by Rosenthal, but both the federal Drivers Privacy Protection Act (DPPA), 18 U.S.C. §§ 2721(a) and 2721(b) (1997), and the Florida implementing statute, F.S.A. § 119.07, regulate the disclosure of this information.

The posting, Rosenthal told the *Miami New Times*, was for the "sole purpose of harassing and intimidating Mr. Kirsch, Mr. Slate, and CBS 4 in an effort to prevent them from investigating and reporting on a matter of public concern." It was not, in his opinion, to further "any legitimate law enforcement function" the *Miami New Times* reported.

According to the *Miami Herald*, Slate also filed a complaint with the Hollywood Police Department, alleging that an officer there used the national Crime Information Center to provide Brickman with his driver's license number. A subsequent investigation by the Florida Department of Law Enforcement concluded that Slate's claim was unfounded.

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

The posting was for the "sole purpose of harassing and intimidating Mr. Kirsch, Mr. Slate and CBS 4 in an effort to prevent them from investigating and reporting on a matter of public concern."

— Alan Rosenthal,
Attorney

Access to Courts

Previously Redacted Portions of Tatel Opinion in Miller Case Released

Pursuant to a February 3, 2006 order of the U.S. Court of Appeals for the District of Columbia, portions of a previously redacted judicial opinion in the Judith Miller CIA leak case have recently been released to the general public. Approximately eight pages of Judge David Tatel's concurring opinion from *In re Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005) had been sealed.

On Nov. 2, 2005, Dow Jones and Co., Inc. filed a motion as *amicus curiae* (friend of the court) in the federal Court of Appeals seeking to unseal the portions of Tatel's opinion, claiming that the redacted material has become so widely known that it is unnecessary to keep it protected. Dow Jones was permitted to make this motion pursuant to Circuit Rule 47.1(c) for the D.C. Circuit, which allows any interested party to request a record of the court be unsealed. Patrick Fitzgerald, special counsel for the investigation, responded to the motion by agreeing that parts of Judge Tatel's opinion could be released, but arguing that it is still necessary for other parts to remain sealed. The court, composed of the same three-member panel that issued the original decision, agreed with Fitzgerald. See *In re: Grand Jury Subpoena, Judith Miller*; No. 04-3138 (D.C. Cir. 2006).

Tatel's opinion is a concurrence in the D.C. Circuit's decision that Judith Miller, formerly of *The New York Times*, and Matthew Cooper of *Time* magazine were not protected by a reporter's privilege and must testify to a grand jury about conversations they had with government officials concerning undercover CIA agent Valerie Plame. The *Silha Bulletin* has covered this case extensively. (See "Reporters Privilege News: Appeals Court Rules That Reporters Must Testify About Confidential Sources" in the Winter 2005 issue of the *Silha Bulletin*; see "Reporters Privilege News: Judith Miller Resigns from *The New York Times*" in the Fall 2005 issue of the *Silha Bulletin*; see "Reporters Privilege News: New York Times' Judith Miller Released After 85 days; Dole Suggests Identities Law Not Violated" in the Spring 2005 issue of the *Silha Bulletin*; see "*In re: Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir)" and "Plame Update: Journalists Miller and Cooper Appeal Their Sentences" in the Winter 2004 issue of the *Silha Bulletin*; and "Reporters' Privilege: *In re: Special Counsel Investigation*" and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue of the *Silha Bulletin*.)

According to the *per curiam*, or unsigned, order unsealing portions of the opinion, Judge Tatel originally redacted the material to preserve grand jury secrecy and to protect classified information. However, these interests became less compelling at the time of Dow Jones' motion because none of the redacted material was still considered classified by the government, and much of the information gathered from the grand jury had become widely known through the five-count indictment against Vice President Dick Cheney's former Chief of Staff I. Lewis "Scooter" Libby.

Although the order strongly emphasized the continuing necessity of grand jury secrecy, the court relied on Federal Rule of Criminal Procedure 6(e)(6), stating that judicial material describing grand jury information only need to remain secret "to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring

before a grand jury." As the D.C. Court of Appeals previously held in *In re: North*, 16 F.3d 1234 (D.C. Cir 1994) "information widely known is not secret." The order cited testimony from the Iran-Contra affair and the investigation into former president Bill Clinton's affair with Monica Lewinsky and subsequent perjury investigation as examples of times when grand jury testimony has become sufficiently well-known as to no longer require secrecy.

As speculated by many members of the press, a large portion of the redacted opinion discussed the involvement of Lewis "Scooter" Libby.

The primary message of Tatel's concurrence involves the existence of a common law privilege for reporters, immunizing them from complying with subpoenas to give grand juries evidence. Unlike his colleague Judge David Sentelle, Tatel wrote that such a common law privilege does exist, but that it was overcome in the *Miller* case. All three judges on the panel agreed that even if such a privilege did exist, it did not apply in this case. In Tatel's opinion, the critical nature of the reporters' testimony, the exhaustion of alternative non-reporter sources, and the public interest favoring compelling disclosure overcame the privilege.

The order emphasized the strong presumption of secrecy for grand jury proceedings, relying heavily on the government's response brief to the Dow Jones motion. Both cite *Douglas Oil Co. v. Petrol Stops Nw.*, 441 U.S. 211, (1979) to provide the historical argument for keeping grand jury proceedings and their records closed to the public. *Douglas Oil* is an oft-quoted case involving a party seeking grand jury transcripts to be used in a civil matter, with the Court placing stringent requirements on any party seeking grand jury transcripts. The court also refers to *Douglas Oil* for providing practical reasons for justifying grand jury secrecy including avoiding scaring away potential witnesses, ensuring those witnesses who do appear will testify fully, and preventing those about to be indicted from influencing grand jurors.

In addition to case law, Rule 6(e) of the Federal Rules of Criminal Procedure also seeks to preserve secrecy of grand jury proceedings. Different sub-parts of the rule prohibit those in official capacities from disclosing matters occurring before the grand jury. However, the Federal Rules do not require this secrecy to be preserved indefinitely.

Portions of the Tatel opinion still remain sealed, according to the court, because publication of these parts could "identify witnesses, reveal the substance of their testimony, and – worse still – damage the reputations of individuals who may never be charged with crimes." The court added that the continuation of Special Counsel Fitzgerald's investigation requires maintaining grand jury secrecy concerning certain individuals, so that he can complete that investigation with the full cooperation of witnesses. However, the court's order allows Dow Jones to seek release of the rest of the opinion at a future date.

– SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

The primary message of Judge Tatel's concurrence involves the existence of a common law privilege for reporters, immunizing them from complying with subpoenas to give grand juries evidence.

Access to Courts

Media Granted Access to Jury Exhibits in Moussaoui Trial

The unanimous appellate panel ruled that administrative difficulties and fears of jury tainting were insufficient justifications to overcome the constitutional right of access to criminal trials.

On March 22, 2006, in a unanimous ruling overturning a previous order of U.S. District Judge Leonie Brinkema, the U.S. Court of Appeals for the Fourth Circuit granted the media access to all exhibits introduced and provided to the jury during the sentencing portion of Zacarias Moussaoui's trial. In *In re: Associated Press et. al.*, CR-01-455 (4th Cir. 2006), the unanimous appellate panel ruled that administrative difficulties and fears of jury tainting were insufficient justifications to overcome the constitutional right of access to criminal trials. However, Chief Judge William Wilkins' opinion upheld the portions of Judge Brinkema's order restricting access to those items admitted into evidence but not yet or only partially provided to the jury, as well as her order preventing the release of transcripts of bench conferences, until the trial was completed.

Eight media organizations including *The New York Times*, *The Associated Press*, *The Washington Post*, and the (Minneapolis) *Star Tribune*, as well as the Reporters Committee for Freedom of the Press (RCFP), asked the Court of Appeals to compel the district court to allow public access to the exhibits. This request followed Brinkema's March 10 affirmation of her February 14 orders prohibiting the release of exhibits and bench conferences until after the sentencing portion of Moussaoui's trial was completed. Moussaoui is the sole individual charged thus far for responsibility of the September 11 terrorist attacks, and was sentenced to life in prison on May 3, 2006.

The motion by the media organizations recognized the difficulty of balancing a fair trial for the defendant, the government's interest in security, and the court's interest in maintaining orderly proceedings, but argued that the First Amendment and the common law guarantee the public a right of access to criminal proceedings. It also contended that because of their connection to the events of September 11, these proceedings implicated both the fundamental fairness of the American judicial system and profound issues of national policy and the war on terrorism.

Brinkema's original order was one of many steps she had taken in efforts to ensure a fair trial for the defendant and to protect the privacy of the jurors. She had prohibited journalists from interviewing or photographing jurors during the trial, and assured the jurors their names would not be made public.

Wilkins' opinion for the unanimous court both overturned and affirmed portions of Brinkema's orders, acknowledging the importance of the public's right of access to criminal proceedings, but also noting the limitations on that right. These limitations included not granting access to exhibits not yet provided to the jury, as well as not requiring contemporaneous access to transcripts of bench conferences. Because bench conferences are not

traditionally open to the public and the media do not have a First Amendment right to observe all parts of trial per *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 581 (1980), Wilkins did not require the district court to allow the media organizations immediate access to bench conferences as they desired.

However, although the appellate court did not grant the media intervenors all of the access they sought, it did permit the media access to all exhibits fully provided to the jury. The court relied on a Second Circuit opinion, *United States v. Myers (In re: Nat'l Broad. Co.)*, 635 F.2d 945 (2d Cir. 1980), that said it would require extraordinary circumstances to prohibit those not in the courtroom from seeing evidence at a later time when it can easily be reproduced.

The appellate court also easily dismissed the two justifications provided by the trial court for prohibiting access: improper influence of jurors and administrative difficulties. Improper jury influence was unlikely because they already would have seen the evidence, so simply seeing it again would not endanger a fair trial. Also, jury taint through the media should not be an issue in any event, because the trial court repeatedly reminded the jurors to avoid media coverage of the trial. The court also found that administrative concerns were insufficient to deny access.

Jay Ward Brown, attorney for the Associated Press, was pleased with the portion of the opinion granting access to the published exhibits. He told the RCFP that the decision "put back in the bottle a genie that the district court might have released that administrative burden and the potential for juror taint are sufficient for denying public access." See <http://rcfp.org/news/2006/0322-sct-eviden.html>.

Prior to the ruling, Brown acknowledged that it was unusual to request the Court of Appeals to give a directive to a district court. "The Fourth Circuit is always reluctant to issue a writ to a district court judge because it's an extraordinary rebuke," he told the RCFP. However, in this case, he contended the order sealing the trial exhibits concerned the "core record in this trial . . . which is contrary to governing law." See <http://rcfp.org/news/2006/0314-sct-medias.html>

— SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

Access to Information

City of New York Releases September 11 Tapes to *New York Times*

On March 31, 2006, the City of New York released to the public 130 calls made to emergency personnel from victims trapped in the World Trade Towers on September 11, 2001. The tapes' release came after a four-year court battle between the city and *The New York Times*.

Times reporter Jim Dwyer filed a New York state Freedom of Information Law (FOIL) (Art. 6, Public Officers Law §§ 84-90) request on Jan. 25, 2002 seeking release of public records concerning the terrorist attacks. Specifically, Dwyer requested "[a]ll transcripts of interviews conducted by the department with members of the FDNY concerning the events of Sept. 11, 2001" as well as "[a]ny and all tapes and transcripts of any and all radio communications involving any Fire Department of New York (FDNY) personnel on Sept. 11, starting from 8:46 a.m." The request was eventually broken down by the New York State Court of Appeals into three separate categories, "(1) calls made on September 11 to the Department's 911 emergency service; (2) calls made on the same day on the Fire Department's internal communication system, involving Department dispatchers and other employees, which are referred to as 'dispatch calls;' and (3) 'oral histories,' consisting of interviews with firefighters in the days following September 11."

The Fire Department had refused to fully grant the request "on the grounds that [the information was] needed to prosecute Zacarias Moussaoui for complicity in the attacks; or contained opinions that were not subject to disclosure; or were too personal," a *Times* article from April 1, 2006 reported.

The Times and Dwyer filed suit to appeal the Department's denial, and family members of nine victims who died at the World Trade Center joined the case in *New York Times Co. v. City of New York Fire Dept.*, 754 N.Y.S.2d 517 (N.Y. Sup. 2003). In February 2003, Judge Richard F. Braun of the New York Supreme Court (a trial court) ordered that only tapes involving the relatives of the plaintiffs be released in full.

Tapes from other callers were ordered redacted to include only the words of the dispatchers and other public employees. Judge Braun held that disclosure of the callers' words would constitute an "unwarranted invasion of personal privacy." He further ordered that any parts of the tape that constituted intra-agency communication be kept secret under a FOIL exemption, Public Officers Law § 87(2)(g)(i)-(iv).

Also at issue were "oral histories," which consisted of firefighters' taped recollections of 9/11 and were recorded by the New York Fire Department in the months following the attack. Braun held that the factual parts of the oral histories should be disclosed, but the personal feelings of the public employees should be kept private.

On appeal, the First Department of the Appellate Division modified Braun's ruling in January 2004, allowing families to intervene in the lawsuit as "interested persons." *New York Times Co. v. City of*

New York Fire Dept., 770 N.Y.S.2d 324 (N.Y.A.D. 1st Dept. 2004). The court also modified the trial court's ruling, holding the personal expressions of feelings contained in the oral histories must be disclosed, but agreeing that the privacy exemption protects the words of callers from disclosure. It noted, "The anguish of these relatives, as well as the callers who survived the attack, outweighs the public interest in disclosure of these words, which would shed light on public issues."

In March 2005, the New York Court of Appeals, the state's highest court, declined to order the release of any additional full tapes apart from the ones involving family members of those who had joined the lawsuit.

"We are not persuaded that such disclosure is required by the public interest," Judge Robert S. Smith wrote for the majority in *The New York Times Co. v. City of New York Fire Dept.*, 4 N.Y.3d 477 (N.Y. 2005). "The desire to preserve the dignity of human existence even when life has passed is the sort of interest to which legal protection is given under the name of privacy," he wrote. "We thus hold that surviving relatives have an interest protected by FOIL in keeping private the affairs of the dead." For support, the Court cited *National Archives and Records Administration v. Favish*, 541 U.S. 157 (2004), a U.S. Supreme Court case that held that the Freedom of Information Act recognizes surviving family members' right to personal privacy with respect to their close relative's death-scene images, and that the family's privacy interest outweighed the public interest in disclosure in that case. The Silha Center submitted a friend of the court brief in *Favish*, available online at <http://www.silha.umn.edu/Resource%20Documents/iocvfavishamicusbrieffinal.pdf>, advocating for disclosure. (See also "Citing Family Members' Privacy, Supreme Court Allows Government to Withhold Foster Photos" in the Spring 2004 issue of the *Silha Bulletin*.)

The majority upheld Braun's ruling that tapes, transcripts or interviews involving intra-agency personnel not be disclosed except to the extent they involve "statistical or factual tabulations or data" pursuant to § 87(2)(g)(i) of FOIL. However, it ruled that the words spoken by public employees must be released, including the personal feelings sections of the oral histories, "except for specifically-identified portions that can be shown likely to cause serious pain or embarrassment to an interviewee."

During the appeals process, the Fire Department asked the court to deny disclosure of six records that the Department of Justice said might be used in the Moussaoui trial. The majority ordered that "the Department of Justice be given a chance to demonstrate that disclosure of the six potential exhibits would interfere with the Moussaoui case, or would deprive either the United States Government or Moussaoui of a fair trial." See "Access to Courts: Media

"Precisely because of the importance of the September 11 attacks, Americans deserve to have as full an account of that event as can be reasonably furnished."

— Judge Albert Rosenblatt

FOIA News

State Access Laws Trump HIPAA in Ohio Lead Poisoning Case

An Ohio reporter's Public Records Act request for state health department citations was granted in March 2006 by the Ohio State Supreme Court in *State ex. rel. Cincinnati Enquirer v. Daniels*, 844 N.E.2d 1181 (Ohio 2006), in spite of the state's argument that it sought information protected by the federal Health Insurance Portability and Accountability Act (HIPAA).

The case began when *Cincinnati Enquirer* reporter Sharon Coolidge filed a Public Records Act request with the Cincinnati Department of Health in January 2004. She requested 343 citations the health department had issued to property owners for environmental hazards associated with lead poisoning, such as failure to eliminate lead paint from their buildings. The city requires health care providers to report cases of lead poisoning to the state's health commissioner, who then authorizes inspectors to visit the victim's residence to determine whether lead-based paint or other hazards on site are causing the poisoning. If such materials are found, the health department issues a citation.

The health department refused to grant Coolidge's request because the citations contained the addresses of lead poisoning victims. The department took the position that revealing this information would violate HIPAA, which prohibits disclosure of information that could identify an individual.

"We were simply looking to make sure we did not fall victim to violating the law," Walter Handy, the assistant health commissioner, was quoted as saying in a March 18, 2006, *Enquirer* article covering the results of the case. The article noted that HIPAA violators can receive fines as high as \$50,000. The article is available online at <http://news.enquirer.com/apps/pbcs.dll/article?AID=/20060318/NEWS01/603180420/1077>.

The *Enquirer* filed suit in Ohio's First District Court of Appeals asking the court to order the commissioner to release the documents and to overturn the health commissioner's decision to deny access to the citations. The lower court, in a 3-0 decision, denied the newspaper's writ request, holding that a previous Ohio state Supreme Court decision, *State ex. rel. McCleary v. Roberts*, 88 Ohio St.3d 365 (2000) exempted information about children from being disclosed under Ohio's Public Records Act.

However, the State Supreme Court unanimously reversed the First District. The author of the opinion, Justice Terrence O'Donnell, noted that "[O]nly one sentence in the fourteen-page narrative has any reference to medical information or medical conditions." The sentence in question stated the residence was reported as the home of a child with "an elevated lead level," and the justices found that this did not reveal any confidential or protected health information and ordered the citations released.

The state Supreme Court also held that HIPAA itself has a specific exception allowing record-keepers to "disclose protected health information to the extent that such . . . disclosure is required by law." Ohio's Public Records Act requires information to be made public unless a law specifically prohibits that information's release. The Court ruled that when two laws conflict, the state law trumps the federal law, provided it is otherwise constitutional.

HIPAA, enacted in 2003, has been controversial as government agencies and media organizations attempt to determine which information is protected by the privacy statute and which is subject to the FOIA or other information disclosure laws.

Tena Friery, research director for the Privacy Rights Clearinghouse, a nonprofit agency in San Diego, told the *Enquirer*, "We have this constant recurring conflict between privacy and public records. Newspapers generally are on one side and privacy advocates are on the other."

Jack Greiner, attorney for the *Enquirer*, said in an interview with the paper, "The state open records law trumps HIPAA. There has been a question about what happens when you have this conflict. This is the first court decision to answer that question." Greiner added that this decision could affect other court decisions as other states grapple with the inherent conflicts between states records laws and HIPAA requirements.

The Ohio Court refused to allow the *Enquirer* to recover attorney fees, noting that the issue was a matter of unsettled law and that it was reasonable for the government to litigate the issue.

The Ohio case is not the first time information protected under HIPAA was found to be trumped by other concerns. In August 2004, a federal district court judge dismissed a case against a Denver newspaper, finding that HIPAA regulates only those "who might have access to individuals; health information and not newspapers." (See "New Developments in Privacy Law: Federal Judge Rules Newspaper Cannot Be Sued Under HIPAA," in the Fall 2004 issue of the *Silha Bulletin*.)

In two other instances, attorneys general found that their states' public information acts trumped the restrictions to information under HIPAA, once in Texas in February 2004, and again in Kentucky in August 2004.

Texas's Attorney General Gregg Abbott wrote that when a request is made under that state's Public Information Act (PIA), PIA trumps HIPAA. The *Lubbock Avalanche-Journal* had requested information from the police department, but city officials refused, citing privacy limits under HIPAA. But Abbott wrote that although the police department may be considered a "first responder" to emergency situations, it

This decision could affect other court decisions as other states grapple with the inherent conflicts between states' records laws and HIPAA requirements.

Lead Poisoning, continued on page 16

FOIA News

TWA Flight 800 Records Will Remain Closed

In March 2006, the federal courts ruled that two government agencies had no obligation to disclose additional records in two separate Freedom of Information Act (FOIA, 5 U.S.C. § 552) suits regarding TWA Flight 800, which crashed into the Atlantic Ocean off the coast of New York in July 1996. A Federal Bureau of Investigation (FBI) inquiry after the crash determined that it was most likely not caused by a criminal act, and a National Transportation and Safety Board (NTSB) investigation concluded that a fuel tank explosion caused the crash. Although some citizens continue to debate this explanation, the NTSB's official report on the incident has long since been filed, and is available online at www.nts.gov/Publictn/2000/AAR0003.pdf.

The two suits arose from two separate FOIA requests for documents related to the crash. On March 29, 2006, Judge Colleen Kollar-Kotelly of the federal district court for the District of Columbia granted summary judgment to the defendant in *Accuracy in Media, Inc. v. National Transportation Safety Board* 2006 U.S. Dist. LEXIS 21532 (D.D.C.). In 2002, Accuracy in Media (AIM) filed a FOIA request for fourteen types of documents primarily related to the disposal of the wreckage from TWA Flight 800. NTSB acknowledged the request, but failed to produce any records for at least five months, after which AIM filed a complaint in federal district court for the District of Columbia. NTSB responded to the request in February 2003, releasing some records but withholding others under the relevant FOIA exemptions. NTSB also filed a motion for summary judgment against AIM's complaint. AIM had no objections to NTSB's responses to ten of AIM's fourteen requests, but opposed NTSB's response to the remaining four, alleging that NTSB's search for the relevant records was inadequate for two reasons. First, AIM alleged that the four remaining sets of records "must exist . . . and, because [NTSB] failed to produce them, the search was *ipso facto* inadequate," as Kollar-Kotelly wrote in her memorandum opinion. Second, AIM alleged that there was "evidence of bad faith on the part of [NTSB] during the investigation of the TWA Flight 800 accident."

Kollar-Kotelly dismissed AIM's first argument, writing that "in examining the adequacy of an agency's search, the Court must not address 'whether there might exist additional documents possible responsive to a request, but rather whether the search for those documents was adequate.'" In other words, just because AIM asserts that additional documents "must exist" does not impugn NTSB for not producing them, provided the NTSB conducted a reasonable search. In order for an agency to satisfy the reasonable search condition, Kollar-Kotelly wrote, "the agency may submit affidavits or declarations that explain . . . the scope and method of the agency's search. . . . In the absence of contrary

evidence, such affidavits or declarations are sufficient to demonstrate an agency's compliance with the FOIA." It appears, therefore, that the word of NTSB itself that it conducted a reasonable search is enough to satisfy its burden of proving that it did. As for AIM's second argument, Kollar-Kotelly found that "there is simply no established, supportable evidence of bad faith in this case." Again NTSB's own words were deemed sufficient: "Agency actions and affidavits are presumed to be conducted in good faith absent evidence to the contrary." NTSB's motion was thus granted.

The second TWA Flight 800 case has been in the federal courts for much longer, though recently it met a similar fate. In *Sephton v. FBI*, 365 F. Supp. 2d 91 (D. Mass. 2005), District Judge Michael A. Ponsor ruled that the FBI had conducted a reasonable search pursuant to Graeme Sephton's FOIA requests. Sephton is a member of the "Flight 800 Independent Research Organization," a citizens' group supported by the families of some victims of the Flight 800 disaster. Since Sephton filed his FOIA request with the FBI in 1998, the two parties have been engaged in what Ponsor called "a very lengthy procedural history," which resulted in the release of nearly 600 pages of documents to Sephton's organization. The case, Ponsor wrote, has been "very difficult. Its history has included, so far, three trips to the Court of Appeals and the death of the judge who originally presided. The FBI's halting response to the plaintiff's requests has exacerbated an already excruciating situation and undoubtedly deepened the mistrust felt by the grieving families who have supported this FOIA initiative. The families deserved better from their government. Despite this, I am convinced that the efforts of the FBI, at this time, comport with the law."

The primary issue was the adequacy of the search performed by the government agency. And once again, the affidavits of the agency were material to the court's ruling on this issue. Ponsor stated that Sephton had presented insufficient evidence to "rebut the presumption of good faith" of the four separate FBI affidavits describing its search for records. Ponsor wrote that "Given the history of this case . . . it is not surprising that the plaintiff finds it difficult to take the government at its word." However, Ponsor contended, "If the FBI has, in fact, not conducted a reasonable search, then four highly placed officials are either lying under oath, or . . . deliberately misleading the court – thereby jeopardizing their careers and risking a citation for contempt. This record contains no evidence that any such inexplicably egregious misconduct has occurred." Ponsor thus granted the FBI's motion for summary judgment.

Sephton took the case to the First Circuit Court of Appeals, and on March 31, 2006, the appeals panel affirmed the lower court's decision in *Sephton v. FBI*, 442 F.3d 27 (1st Cir. 2006). The brief opinion, written by Judge Jeffrey R. Howard on behalf of himself and

"The FBI's halting response to the plaintiff's requests has exacerbated an already excruciating situation."

– District Judge
Michael A. Ponsor

TWA 800 Records, continued on page 16

Granted Access to Jury Exhibits in Moussaoui Trial” on page 12 of this issue of the *Silha Bulletin* for further information on this aspect of the case.

In an opinion dissenting in part and joined by two other judges, Judge Albert Rosenblatt wrote that “the Freedom of Information Law requires more disclosure” and disagreed with the majority’s decision to allow disclosure of the words spoken by operators but to delete the words of the callers. “FOIL’s goal of making information public is inhibited when only half the conversation is divulged,” Rosenblatt wrote. “Precisely because of the importance of the September 11th attacks, Americans deserve to have as full an account of that event as can be responsibly furnished,” he wrote, further stating that full transcripts of the tapes should be disclosed, with redactions made for unusually personal components such as dying wishes to family members.

In August 2005, the city released over 12,000 pages of transcripts to the public of dispatch recordings and other oral histories but said it needed more time to remove callers’ voices. After the 130 tapes were finally released in March 2006, scores of other tapes surfaced that had not been released but should have been. On April 14, 2006, *The New York Times* reported that Fire Commissioner Nicholas Scoppetta said lower-level officials might not have recognized their obligations in deciding which tapes to release. He stated that the new review of the tapes would be fully compliant with the Court of Appeals order.

The April 14 article quoted a lawyer for the 9/11 families, Norman Siegel, who said, “My instinct was we hadn’t been given all the tapes. The more we learn, the better. It’s momentarily painful to the families, but in the long run, it’s empowering.”

– ASHLEY EWALD
SILHA FELLOW

Lead Poisoning, continued from page 14

does not provide any health care. Furthermore, police records are subject to PIA. Abbott’s decision, Open Records Decision No. 681, is available online at <http://www.oag.state.tx.us/opinions/or50abbott/ord-681.htm>.

In Kentucky, a reporter had requested information under that state’s Open Records Act about accident victims from a police department. Attorney General Gregory D. Stumbo ruled that “because the . . . Police Department is not a ‘covered entity’ for purposes of HIPAA analysis, records generated by police officers do not contain ‘protected health information,’ and such records are therefore not covered by HIPAA’s Privacy Rule.” The Kentucky ruling is available online at <http://ag.ky.gov/NR/rdonlyres/B8753E25-59D0-4F53-8546-CBA430A3BEFD/0/04ORD143.htm>.

– ASHLEY EWALD
SILHA FELLOW

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

TWA 800 Records, continued from page 15

Judges Bruce M. Selya and Kermit V. Lipez, commended Ponser on his “cogent opinion” and “sound analysis.” It considered only one issue. Sephton contended that, at one stage of the litigation, the FBI failed to file an answer to his FOIA complaint, and that that failure “amounts to an admission to all of the allegations contained in the complaint,” including the allegation of an inadequate search. The panel rejected this argument, however, because “At least two other [federal] circuits have held that FOIA does not require an answer to the complaint so long as the issues are otherwise joined, for example, by the filing [of] a dispositive motion,” such as the FBI’s motion for summary judgment. In thus dismissing Sephton’s argument, the panel affirmed the lower court’s judgment.

Daniel J. Stotter, who represented Sephton in the case, told the Reporters Committee for Freedom of the Press (RCFP) that he was disappointed by the decision of the panel. “It was like they were looking for forks and opened the plate drawer and said ‘no forks here’ but refused to open the fork drawer to look for them. They refused to declare that they searched in all places reasonably likely, and instead said they searched in one place really carefully,” he said. According to RCFP, Sephton’s group “is considering whether to petition the entire First Circuit” for a rehearing, but does not think that a favorable ruling is likely. The RCFP article is available online at <http://rcfp.org/news/2006/0411-foi-noaddi.html>.

– PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Shield Law Update

New Federal Shield Bill Introduced

A federal shield law proposal is making its way to the floor of U.S. Congress. However, compared to bills prepared in years past, the new bill contains a number of additional exceptions describing circumstances when a reporter could be compelled to testify. The “Free Flow of Information Act of 2006” (S. 2831) was proposed May 18, 2006 by a group of bipartisan senators that included Arlen Specter (R-Penn.) and Richard Lugar (R-Ind.), as well as Christopher Dodd (D-Conn.) and Charles Schumer (D-NY).

The bill’s stated purpose is “to guarantee the free flow of information to the public through a free and active press as the most effective check upon government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice.” It defines “journalist” as:

“...a person who, for financial gain or livelihood, is engaged in gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing news or information as a salaried employee of or independent contractor for a newspaper, news journal, news agency, book publisher, press association, wire service, radio or television station, network, magazine, Internet news service, or other professional medium or agency which has as one of its regular functions the processing and researching of news or information intended for dissemination to the public.”

The definition may dim the hopes of some nontraditional journalists, such as bloggers, for being considered a “journalist” protected by the shield, as most do not make a financial gain or livelihood from their reporting.

The bill prohibits a U.S. attorney in any criminal or civil investigation or prosecution in federal court from compelling a journalist, an independent contractor with a journalist, or a communication service provider to disclose the identity of a source who had been promised confidentiality, or any records, documents, or communications the journalist obtained or created and promised to keep confidential.

Exceptions to the rule include instances when the U.S. attorney has exhausted other sources of information and “nondisclosure of the information would be contrary to the public interest,” or when “there are reasonable grounds, based on an alternative, independent source, to believe that a crime has occurred, and that the information sought is critical to the investigation or prosecution, particularly with respect to directly establishing guilt or innocence.”

The bill also contains exceptions for the journalist’s eyewitness observations, when the information is necessary to prevent death or substantial bodily injury, or to prevent an act of terrorism or to prevent significant and actual harm to the national security.

The Free Flow of Information Act of 2006 differs

in important respects from its 2005 predecessors. Last year, Representatives Mike Pence (R-Ind.) and Rick Boucher (R.-Ind.) and Senators Lugar and Dodd introduced the Free Flow of Information Act of 2005. Dodd also reintroduced a separate bill in the Senate that was substantially similar. Both provided protection of confidential information with exceptions only where an “imminent threat to national security” presented itself, or if information was gathered without promises of confidentiality. Senate hearings on the reporter’s privilege were held in July and October 2005 (see “Federal Shield Law Introduced in 109th Congress” in the Winter 2005 issue of the *Silha Bulletin*; “Federal Shield Law Debated in Hearings Before Senate Judiciary Committee” in the Summer 2005 issue of the *Silha Bulletin*; and “Shield Law Update” in the Fall 2005 issue of the *Silha Bulletin*), but action was delayed after Specter indicated he was interested in a modified bill.

An informal survey of major media organizations revealed that most support the new bill. The Society of Professional Journalists endorsed the bill, and the organization’s president, David Carlson, called it “important legislation that all Americans should support.” He continued, “A free and independent press is critical to a democratic society. It’s one of the few checks of the federal system. When reporters face jail time for not revealing sources, the system is out of balance, and democracy is in peril.”

A Reporters Committee for Freedom of the Press press release dated May 18, 2006, stated that “[a]lthough in the past it has only supported bills that would give journalists an absolute privilege for confidential sources, the Reporters Committee has determined the political reality of the situation facing journalists today requires reporters to receive as much protection as possible.” A separate document available on its website analyzed the bill and said, “The bill is not what journalists want or need. So why support it? For one thing, there is little downside to adopting these protections. If they are granted by Congress and therefore subject to its whims and repealed one day, reporters are in no worse position than they are now.” The document is available online at http://www.rcfp.org/shields_and_subpoenas/specter.html.

The American Society of Newspaper Editors also endorsed the bill, but reserved the right to withdraw support should the bill be amended. The Newspaper Association of America also gave the bill its measured support. Its president, John Sturm, said “While the bill introduced today does not provide an absolute protection for reporters from having to reveal confidential sources, we believe the legislation establishes important ground rules for confidential sources and reporters. It is a very positive step toward safeguarding the free flow of information to the public.”

The bill was referred to the Senate Judiciary Committee, which is chaired by Specter. It will have to pass the committee before being afforded a full vote by the Senate.

— ASHLEY EWALD
SILHA FELLOW

The bill’s stated purpose is “to guarantee the free flow of information to the public through a free and active press as the most effective check upon government abuse, while protecting the right of the public to effective law enforcement and the fair administration of justice.”

Shield Law Update

Connecticut Shield Law Passes Legislature

Connecticut has become the thirty-second state, along with the District of Columbia, to pass a reporter's shield law. The bill, H.B. 5212, entitled "An Act Concerning Freedom of the Press," was introduced by State Rep. James Spallone (D-Essex). An earlier version of the bill failed to pass last year, but, with revisions, the current bill was passed unanimously by the state Senate on May 3, 2006, and then later that same day passed the State House of Representatives by a vote of 136-11 after some revisions. A spokesman for Connecticut Governor M. Jodi Rell told the Associated Press that the governor is very likely to sign the bill, which will take effect October 1, 2006.

The revisions made in the bill resulted in changing it from providing an absolute privilege to a qualified privilege. That means disclosure of a reporter's confidential source can be compelled, but only when specified conditions apply. In the case of Connecticut's shield law, the information sought from a reporter's confidential source must be vital to the case at hand; must be unavailable from any other source, and there must be a great public interest in the disclosure of the information. The full text of the act is available online at <http://www.cga.ct.gov/2006/AMD/H/2006HB-05212-R00SB-AMD.htm>.

The bill was introduced in part due to concerns arising out of the case of Connecticut native Jim Taricani who, while reporting for a Rhode Island television station, refused to name the person who gave him a sealed FBI tape showing a public official accepting a bribe. See "Reporters Privilege News: Taricani Given Early Release" in the Winter 2005 issue of the *Silha Bulletin*; "Reporters Privilege: In re: Special Proceedings" in the Summer 2004 issue of the *Silha Bulletin* and "Reporters Privilege News: Journalist Sentenced to House Arrest for Refusing to Reveal Source" in the Fall 2004 issue of the *Silha Bulletin*. On March 10, 2006, Taricani spoke at a public hearing concerning the bill before Connecticut's legislature. At a press conference preceding the hearing, Taricani told the *New Haven Register* that the proposed shield law "is not about placing reporters above the law."

Scandals that have occurred in Connecticut politics in recent years, including one that sent former Governor John G. Rowland to jail over issues of public corruption, could not have been revealed to citizens without the work of "carefully researched and constructed news stories," according to an editorial Spallone wrote, together with Connecticut's Secretary of State, Susan Bysiewicz, for the *New London Day*. "Could [the news accounts about Rowland] have been as thorough and revealing if reporters had to think twice about working with unnamed sources?" Bysiewicz and Spallone wrote. "Responsible news reporters frequently act as whistleblowers in their own right. They are often the first ones to expose serious wrongdoing, and do it objectively and within the constructs of editorial review and a strict ethical code." Spallone and Bysiewicz concluded: "The shield law is a good government bill." The editorial and other articles about the bill are posted on Spallone's Web site, available online at: <http://www.cga.ct.gov/hdo/036/PR036-06.asp#ADVANCE%20THE%20SHIELD%20LAW>.

— ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

The revisions made in the bill resulted in changing it from providing an absolute privilege to a qualified privilege.

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Reporters' Privilege News

SEC Changes Policy Regarding Subpoenaing Reporters

After as many as nine reporters were subpoenaed in an effort to gain information about questionable practices in stock trading earlier this year, criticism led the Securities and Exchange Commission (SEC) to create policy that set limits on subpoenaing reporters in the future. According to the Associated Press, SEC Chairman Christopher Cox and four other SEC commissioners voted unanimously to issue "clear principles" that would guide attorneys when seeking information from reporters. By April 12, 2006, the SEC had posted a news release on its Web site spelling out the new policy.

On Feb. 25, 2006, *The New York Times* reported that Dow Jones Newswires columnist Carol S. Remond and MarketWatch.com columnist Herb Greenberg had been subpoenaed by the SEC for information about stock declines covered in their articles. Remond's and Greenberg's articles had stated that Gradient Analytics and Camelback Research Alliance had worked to manipulate the costs of shares for other companies, including Overstock.com. According to the *New York Post*, Overstock.com is involved in a California lawsuit accusing the two companies of conspiring to drive down the price of its shares. The subpoena sought telephone records, e-mails and other documents related to Overstock.com, the *New York Post* reported.

David Becker, a former general counsel at the SEC, told Knight-Ridder's *Business* that although there had been previous instances where reporters were subpoenaed for participating in insider trading, he could not recall when the SEC had subpoenaed a journalist for information. On February 26, *Business* reported that the SEC had decided not to enforce the subpoenas or seek documents from Remond and Greenberg "at least for the time being." Meanwhile, Cox told the Associated Press that he had not been consulted before the subpoenas had been issued.

On February 28, the *New York Post* reported that another journalist, Jim Cramer of The Street.com, had also been subpoenaed. And despite statements to the contrary by Cox, who had told *The New York Times* that the "sensitive issues" raised by the subpoena would be considered before the matter went further, by April 3 another six reporters had been subpoenaed, the *New York Post* reported, including that paper's reporter Roddy Boyd. But a few days later the SEC had posted its new policy on its Web site.

The "Policy Statement of the Securities and Exchange Commission Concerning Subpoenas to Members of the News Media" begins: "Freedom of the press is of vital importance to the mission of the [SEC]... Diligent reporting is an essential means of bringing securities law violations to light and ultimately helps to deter illegal conduct." In an effort to "strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective enforcement of the federal securities laws," the new

policy limits seeking information from news media unless it is unobtainable from other, non-media sources. Like many shield laws, as well as the Attorney General's guidelines (see 28 C.F.R. §50.10) for subpoenaing journalists, the new policy also requires the SEC to make "reasonable effort" to obtain information from those other sources and to determine whether the information sought is essential to the investigation. (See "Shield Law Update: Federal Shield Law Update" on page 17, and "Shield Law Update: Connecticut Shield Law Passes Legislature" on page 18 of this issue of the *Silha Bulletin*.)

If it is determined that the information cannot be obtained from other sources, SEC staff members are to seek approval from one of various SEC administrators, such as the Regional Director, District Administrator, or Associate Director, before going to a journalist's attorney, rather than to the journalist directly. Negotiations should then be undertaken to gain the information sought, without seeking a subpoena. If, however, negotiations are not successful, another set of principles come into play: the SEC staff member must be certain that the information being sought is essential to the investigation, and that all other means of obtaining the information have been exhausted. At that point, the staff member is to seek authorization for a subpoena from the Director of the Division of Enforcement. Only after the Director has consulted with the General Counsel can a subpoena be issued.

Any subpoena that is issued must be narrowly tailored to obtain only information that is essential to the investigation. The policy guidelines further state that a subpoena should "cover a reasonably limited period of time" and should not require journalists to hand over "a large volume of unpublished material." Demands for material should be "reasonable and timely." Failure to follow the SEC's policy could result in disciplinary action.

At the May 1 annual convention of the Society of American Business Editors and Writers, Cox cited instances where the work of journalists has led to the uncovering of business wrongdoing, such as the Enron scandal. "That kind of conscientious coverage of the financial news is an invaluable service to the American people, to the SEC – and to me personally. After all, it was from press reports that I first learned that the agency was issuing subpoenas to journalists. The truth is, sometimes your efforts provide a more efficient way for me to find out what's going on than the SEC's own interoffice memos." Cox added that "[T]he overarching aim of our efforts is to strengthen our working relationship with financial journalists."

The SEC's Policy Statement is available online at <http://www.sec.gov/news/press/2006/2006-55.htm>.

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

"The overarching aim of our efforts is to strengthen our working relationship with financial journalists."

– Christopher Cox,
SEC Chairman

Reporters' Privilege News

Missouri Judge Orders Newspaper to Disclose Unpublished Pictures

In late April 2006, a Missouri judge ordered the *Columbia Daily Tribune* to disclose over 600 unpublished photos to the parties in a lawsuit concerning the death of a University of Missouri football player. The *Tribune* refused to disclose the photos until two days after Boone County Circuit Court Judge Gary Oxenhandler ruled that the newspaper had no legal basis to resist the subpoena of the photos. It then surrendered the photographs along with a detailed explanation of its actions to its readers.

The photos in question were taken by Jenna Isaacson at a July 12, 2005 University of Missouri at Columbia football team practice. Aaron O'Neal, a sophomore with four years of athletic eligibility remaining, collapsed towards the end of the practice and died later that day. An autopsy report released on August 23, 2005 revealed the cause of death to be viral meningitis. Later that same day, O'Neal's father, Lonnie O'Neal, filed a \$300,000 negligence lawsuit against 14 University of Missouri officials, but not the university, in Boone County Circuit Court in Missouri. Almost all of Isaacson's time-stamped photos were of other players involved in conditioning drills, but there were some photos of O'Neal collapsing and being helped off the field by trainers. Some pictures of O'Neal were part of the *Tribune's* original 18-picture slideshow posted on the newspaper's Web site, but the parties involved in the lawsuit subpoenaed the 604 unpublished photos.

Isaacson formally refused to disclose the unpublished photos during an April 3 sworn deposition. The circuit court then ordered her to do so on April 26.

Oxenhandler was not persuaded by the *Tribune's* argument that case law and the First Amendment protected the unpublished photos. His ruling emphasized the "photographic point of view that cannot be duplicated from any other source, known or unknown." Oxenhandler further found that there was no legal basis for the *Tribune* to refuse to comply because there was no promise of confidentiality between Isaacson and the university. Jean Maneke, attorney for the *Tribune*, argued to the court that when Isaacson was granted access to a closed practice by the university, there was an "inferred promise of confidentiality" between the parties that the photos would only be used for publication. This

issue was important because case law in Missouri grants a reporter's privilege only when there is a promise of confidentiality. However, Oxenhandler found that these inferences did not rise to the level of creating a promise of confidentiality. He determined the photos were relevant, necessary or critical to the defense, and all alternative sources to obtain them had been exhausted, satisfying the three-prong test of deference.

After considering whether to appeal Judge Oxenhandler's order, the *Tribune* elected to disclose the previously unpublished pictures both to the parties in the lawsuit, and by producing another slideshow of all 622 photos on the *Tribune's* website. *Tribune* editors explained that if the court and lawyers were going to see the photos, then the *Tribune's* readers should see them as well.

Tribune managing editor Jim Robertson has been a voice for the paper throughout this entire ordeal, giving statements both on the *Tribune's* "Triblog" and on the "Trib Board" Web bulletin board system, available online at <http://board.columbiatribune.com>. He emphasized that the *Tribune's* resistance to disclosing the unpublished photos was based on the principle that unpublished materials are the work product of journalists, and should be protected from intrusion by the government and the legal system because the media should be independent of those entities. Robertson also explained that the newspaper concluded that a successful appeal was unlikely because existing case law did not support the *Tribune's* position, and also feared that an unfavorable ruling by an appellate court could create a bad precedent for all Missouri newspapers.

Robertson's final comment on the Trib Board expressed his belief that Missouri needs a reporters' shield law. Currently, 31 states and the District of Columbia have some form of statutory protection for journalists. (See "Shield Law Update: Connecticut Shield Law Passes Legislature" on page 18 of this issue of the *Silha Bulletin*.) During 2005-06, a bill was offered in the Judiciary and Civil and Criminal Jurisprudence Committee of the Missouri legislature, but it failed to receive a floor vote.

— SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

If the court and lawyers were going to see the photos, then the *Tribune's* readers should see them as well.

— *Columbia Daily Tribune* Editors

Reporters' Privilege News

Settlement Reached in Wen Ho Lee Privacy Case

In an unusual move on June 2, 2006, five media organizations announced that they had agreed to pay \$750,000 in settlement fees to Wen Ho Lee, the scientist who was charged in 1999 with 59 counts of copying classified information onto computer tapes. Although Lee was eventually cleared of all but one of the charges against him, he sued U.S. Departments of Energy and Justice under the Privacy Act (5 U.S.C. §522a(b)), alleging that personal information about him had been leaked to the press. Subpoenas *duces tecum* were issued to five reporters – Jeff Gerth and James Risen, both of *The New York Times*; Robert Drogin of the *Los Angeles Times*; H. Josef Herbert of the Associated Press, and Pierre Thomas, formerly of CNN, but who is now with ABC – seeking the identity of their sources. (See “Reporters Privilege News: *Wen Ho Lee v. Department of Justice*” in the Spring 2005 issue of the *Silha Bulletin*, “Reporters Privilege: *Dr. Wen Ho Lee v. United States Department of Justice*” in the Summer 2004 issue of the *Silha Bulletin* and “Reporters Refuse to Reveal Sources in Spy Case” in the Fall 2003 issue of the *Silha Bulletin*.)

The media attempted to quash the subpoenas, and unsuccessfully appealed to the U.S. Supreme Court. Just before the high court denied *certiorari*, the U.S. government and five news organizations agreed to pay Lee \$1.65 million. The government stipulated that its portion of the settlement – \$895,000 – must be used to pay legal fees and taxes. According to *The Washington Post*, “government lawyers insisted that the government not pay anything that would be perceived as damages to Lee.” However, no such stipulation was placed on the money Lee received from the five media organizations, which were ABC, the Associated Press, the *Los Angeles Times*, *The New York Times*, and *The Washington Post*.

A joint statement issued by the media organizations read: “We [agreed to the settlement] to protect our confidential sources, to protect our journalists from further sanction and possible imprisonment, and to protect our news organizations from potential exposure... We were reluctant to contribute anything to this settlement, but we sought relief in the courts and found none. The journalism in this case – which was not challenged in Lee’s lawsuit – reported on a matter of great public interest, and the public could not have been informed about the issues without information that we were able to obtain only from confidential sources. We will continue to vigorously fight subpoenas that seek to identify our confidential sources in the future.”

CNN did not contribute to the settlement but instead issued a statement that it had “a philosophical disagreement over whether it was appropriate to pay money to Wen Ho Lee or anyone else to get out from under a subpoena.”

From a strictly economic point of view, the settlement might have been the wisest move. *The New York Sun* reported that both legal costs and contempt fines for the reporters, which alone started at \$500 a day, could only escalate. But the settlement raises con-

cerns about how similar cases might be handled in the future. *The New York Sun* speculated that attorneys in the Privacy Act case filed by Steven Hatfill have been watching the *Wen Ho Lee* case closely. Hatfill was named by federal officials as “a person of interest” when anthrax powder was mailed to news organizations and to the U.S. Senate in 2001. Hatfill has filed a lawsuit against the government for violation of his privacy and civil rights, and for allegedly leaking information about him to the media. As in the *Lee* case, Hatfill has subpoenaed journalists to obtain the identity of the leakers. The Hatfill case is pending in federal district court in the District of Columbia. Documents concerning the case are available online at <http://www.anthraxinvestigation.com/Docket.html>. (See also “Defamation News: Defamation Case over Anthrax Mailings Continues” on page 24 of this issue of the *Silha Bulletin*.)

Betsy Miller, one of Lee’s attorneys, characterized the settlement as one that was never aimed to “target or punish journalists... It was to vindicate the injuries suffered by Dr. Lee resulting from unlawful leaks by government officials who disregarded their obligations under the Privacy Act in favor of pursuing their own political agendas,” she told *The New York Sun*.

Mike Silverman, an Associated Press managing editor, told *Editor & Publisher* that he saw the results as positive because the identity of no confidential source was ever revealed, nor were any of the reporters jailed. “I would hope that any potential sources would take heart that we are determined to protect them in any way,” he told *Editor & Publisher*. The article is available online at http://www.mediainfo.com/eandp/news/article_display.jsp?vnu_content_id=1002613283.

The media organizations’ settlement has alarmed other media watchers, however, including Jane Kirtley, Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law. She told *The New York Times* that “to make a payment in settlement in this context strikes me as an admission that the media are acting in concert with the government.” Further calling the implications in the case “staggering,” Kirtley told *The New York Sun* that the settlement could lead to abuse, and, in a quote to *The New York Times*, said it “certainly underscores the need of meaningful journalists’ shield laws, now.” (See “Shield Law Update: Federal Shield Law Update” on page 17, and “Shield Law Update: Connecticut Shield Law Passes Legislature” on page 18 of this issue of the *Silha Bulletin*.)

On June 6, although the settlement had already been reached, the U.S. Supreme Court declined to review the case. The decision by the U.S. Court of Appeals in *Wen Ho Lee v. Department of Justice*, 367 U.S. App. D.C. 53 (D.C. Cir. 2005) stands, which found that the reporters had no legal right to shield the identities of their sources.

– ELAINE HARGROVE
SILHA FELLOW AND BULLETIN EDITOR

“The settlement certainly underscores the need of meaningful journalists’ shield laws, now.”

– Jane E. Kirtley,
Silha Professor and
Director of the
Silha Center
for the Study of
Media Ethics
and Law

Privacy News

Suit Over Internet Content Barred by Privacy Act Statute of Limitations

The Ninth Circuit Court of Appeals ruled on March 14, 2006 that the Privacy Act's two-year statute of limitations starts to run from the first publication of Internet content, even if that content remains available online for months after its initial posting. In *Oja v. United States Army Corps of Engineers* 440 F.3d 1122 (9th Cir. 2006), a three-judge panel affirmed a U.S. District Court ruling (D.Or.) in favor of the United States Army Corps of Engineers (USACE) and Lieutenant General Robert B. Flowers, who held the USACE's post of Chief of Engineers at the time Oja filed his complaints.

The case arose from a Nov. 5, 2002 complaint by Robert Oja, who held the post of Regulatory Chief of the Alaska District of the USACE between 1985 and 1998. According to the opinion, written by Judge Jay S. Bybee on behalf of himself and Judges Procter Hug, Jr. and Marsha S. Berzon, while Oja was employed by the USACE he repeatedly criticized its practices, making "numerous protective disclosures under the Whistleblower Protection Act of 1989 . . . and document[ing] repeated statutory violations by the USACE's Alaska construction projects in investigative reports required under the Clean Water Act of 1977 . . ." In 1997, the USACE removed Oja from his post as Regulatory Chief, and the next year Oja filed a claim for job-related illness. Finally, in 1999, the two parties agreed on a settlement regarding Oja's illness, rewording his file to include "continued absence due to illness" rather than the initial entry, "excessive absence and failure to follow leave procedures" as the justification for his employment termination. USACE agreed to remove the earlier justification from its records, and Oja agreed to file for retirement, which was granted retroactively to March 1998.

In September 2000, *The Washington Post* published a series of articles criticizing the USACE, including a Sept. 13, 2000 article that mentioned Oja's complaints about the USACE, including a hint that the temperature in Oja's office, which sometimes reached 120 degrees during the winter, was purposefully turned up as a result of his "brash critic[ism]" of his superiors. In a statement to *The Post*, the USACE denied the allegation, stating that office renovations "resulted in heating and air-flow problems affecting many." But, *The Post* continued, there was an underlying tension during Oja's tenure between Oja's regulatory responsibilities and the USACE's engineering and construction duties. Oja told *The Post*, "The [Alaska] district just doesn't believe in regulation. If you even mention an environmental concern, you're not a team player. The pressure to look the other way is incredible."

The USACE then posted a rebuttal to *The Post's* and Oja's criticisms on its main public Web site. One of the points of rebuttal read: "Mr. Oja stopped coming to work on October 23, 1997, and failed to provide information about the likelihood of returning to work. Effective September 5, 1998, Mr. Oja was removed from his position for excessive absence due to illness." That posting was removed from the Web site on Nov. 27, 2000. The next month, however, Oja avers that he

found "the very same personal information" on the Public Affairs website of the USACE. Oja filed a Petition for Enforcement with the Merit Systems Protection Board (MSPB) in September 2001, alleging that USACE had intentionally breached its settlement agreement with Oja by publishing employment and medical information. In that petition he stated that he first learned of the USACE postings in September 2000. The USACE responded, according to the opinion, saying that it had posted that information to "defend" the USACE from "media inquiries," presumably arising from *The Post's* article.

Oja then filed a complaint in federal district court for the District of Oregon on Nov. 5, 2002, accusing the USACE of violating the Privacy Act by posting private information about Oja on its public Web site. Oja filed an amended complaint on Nov. 25, 2002. Oja alleged in both complaints that the USACE had posted the private information about him on its website from September to November 2000, according to the opinion. Oja also filed a second amended complaint on March 10, 2003, alleging that "during the month of December 2000," the USACE posted private information about Oja on "public portions of the USACE's Public Affairs Internet website," and that that information had been continually posted until January 2001.

Under the Privacy Act, 5 U.S.C. § 552a(b), "[No] [government] agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains . . ." Oja alleged that the USACE thus violated the Privacy Act in disclosing his personal information, including his employment history, on the USACE's Internet website without Oja's prior written consent.

The USACE argued that Oja had not filed his first amended complaint within the Privacy Act's two-year statute of limitations (see 5 U.S.C. § 552a(g)(5)). Using Oja's petition to the MSPB, the USACE was able to show that Oja first learned of the Internet posting in September 2000, but did not file his first complaint until Nov. 5, 2002, more than two years after his discovery. Oja offered three arguments in rebuttal: first, because the information was continuously available on the USACE's website through most of November 2000, there was an ongoing violation of the Privacy Act with each day the information was posted. Each day, Oja claimed, should be counted as a separate publication, with which a fresh statute of limitations period should start. Therefore, because the information was available past Nov. 5, 2000, Oja's complaint was indeed filed within the two-year statute of limitations period.

Oja's second argument took a different tack, claiming that the statute of limitations should not properly have begun to run until Oja was made aware that the postings were "intentionally and willfully" disclosed by the USACE, as required under the Privacy Act (see 5 U.S.C. § 552a(g)(1)(D)). Finally, Oja argued that his second

"The posting of information on the web should be treated in the same manner as the publication of traditional media."

— Judge
Jay S. Bybee

amended complaint, which introduced the December 2000 publications, should, under the Federal Rules of Civil Procedure's "relation back doctrine," be considered to have the same filing date as his original complaint, dated Nov. 5, 2002, which would land it safely within two years of the December 2000 postings. In other words, because his second amended complaint (filed March 10, 2003) referred to the same published content as his first complaint (though that content was posted on a different site at a later date), his second complaint should "relate back" to his Nov. 5, 2002 first complaint, and should therefore fall within the two-year statute of limitations period for material published in December 2000.

The District Court, in an unpublished opinion, ruled against each of Oja's arguments, finding that the two-year statute of limitations only began to run at the time of the initial posting, that Oja should reasonably have inferred that the postings were intentional, and that his second amended complaint did not relate back to his first complaint. The District Court thus granted summary judgment to the USACE on Oja's first amended complaint, and dismissed his second amended complaint. Oja appealed to the Ninth Circuit, where each of his arguments was re-considered.

The Ninth Circuit panel's discussion of Oja's first argument is at the heart of the case and its implications. Bybee noted the power and ubiquity of the Internet, agreeing that defamatory and private information, if published online, "has the potential to be vastly more offensive and harmful than it might otherwise be in a more circumscribed publication." However, the panel agreed with prior rulings in state defamation suits that "have generally concluded that the posting of information on the web should be treated in the same manner as the publication of traditional media" According to this tradition, the "single publication rule" should apply to Internet postings as it does to traditional media publications such as magazines and newspapers. As Bybee wrote, "Under this rule, the aggregate communication can give rise to only one cause of action in the jurisdiction where the dissemination occurred, and result in only one statute of limitations period that runs from the point at which the original dissemination occurred."

The advantage of the single publication rule, according to the court, is "to protect defendants from harassment through multiple suits and to reduce the drain of libel cases on judicial resources." Quoting an earlier case, *Firth v. State*, 775 N.E.2d (N.Y. 2002), Bybee continued, "Given that 'communications posted on Web sites may be viewed by thousands, if not millions, over an expansive geographic area for an indefinite period of time,' allowing Internet publications to be subject to a multiple publication rule 'would implicate an even greater potential for endless retriggering of the statute of limitations, multiplicity of suits and harassment of defendants. Inevitably, there would be a serious inhibitory effect on the open, pervasive dissemination of information and ideas over the Internet, which is, of course, its greatest beneficial promise.'" Bybee observed that both state and federal courts have extended this rule to Internet publication.

Underlying this extension is the continued comparison by the courts of the Internet to print media rather than other forms, like broadcast media. Oja objected to this comparison, arguing that each time the website was accessed by an Internet user, it should be equated to a user calling the USACE on the telephone and the USACE giving out Oja's private information in "a series of discrete acts of publication." The court rejected this analogy, however, pointing out that "The actual posting or publishing of information onto a website requires only a single, discrete act, and no additional action by the host is necessary before the information may be accessed by the general public." The court held that the single publication rule should be applied under the Privacy Act to Internet publications. Therefore Oja's original and first amended complaints were barred by the Privacy Act's two-year statute of limitations.

The panel also rejected Oja's second and third arguments, based on the Privacy Act and rule 159(c) of the Federal Rules of Civil Procedure, respectively. The panel refuted Oja's second argument on the grounds that "Oja knew or had reason to know in September 2000 that the USACE intentionally posted his information on its Internet site," and therefore the two-year statute of limitations should rightfully have begun when Oja first became aware of the postings. Similarly, the panel rejected Oja's third argument, regarding the "relation back doctrine," on the grounds that Oja's second amended complaint focuses on a separate posting than the first complaints, even if the content of that posting was the same as the earlier postings. Since the postings are separate, Oja cannot rely on the date of the original complaint to govern the statutory period for the content of his second complaint. In other words, Oja's second amended complaint, as filed, could not function as merely the addition of later postings to his first complaint in order to satisfy the two-year statute of limitations requirement. In thus rejecting Oja's arguments, the Ninth Circuit affirmed the district court's grant of summary judgment to the USACE on Oja's first amended complaint, and affirmed the district court's dismissal of Oja's second amended complaint.

What remains unclear about the case is whether the statute of limitations begins on the date of the original posting or the date at which the plaintiff becomes aware of the posting, because in this case, both incidents occurred more than two years before Oja filed his amended complaints. Regardless, the application of the single publication rule to Privacy Act claims about Internet publication provides a powerful limit on the period of time during which an online publisher can be vulnerable to suit for the content published on its website.

— PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Defamation News

Defamation Case over Anthrax Mailings Continues

The Supreme Court refused to grant a request for review by *The New York Times* in March 2006, and therefore a defamation case against the paper and its columnist Nicholas Kristof will be allowed to proceed. The petition for *certiorari*, which was denied on March 26, 2006 without comment (*New York Times Co. v. Hatfill*, 126 S. Ct. 1619 (2006)), ends a long procedural battle over whether Steven J. Hatfill's defamation claims are sufficient to proceed to trial. The original federal district court's dismissal of the case was reversed by the U.S. Court of Appeals (4th Cir.), and then a petition for an *en banc* hearing was narrowly rejected in a 6-6 tie, with the tie-breaking thirteenth judge not participating.

Hatfill's complaint was based on five columns authored by Kristof in the wake of the 2001 anthrax mailings. Kristof criticized the FBI's "lethargy" and "lackadaisical ineptitude" in investigating the attacks, and posed a series of questions regarding the investigation and one "person of interest" into whom, Kristof contended, the FBI should look more closely. In the first four columns, published in 2002 on May 24, July 2, July 12, and July 19, this person of interest was simply referred to as "Mr. Z." On August 11, 2002, Hatfill, a former U.S. Army bioterrorism expert, held a press conference in which he publicly acknowledged that he was being investigated by the FBI in connection with the anthrax mailings, but denied any connection to the attacks, calling himself a loyal American who was being made a "fall guy" in the investigation. In his final column on the topic, published on August 13, 2002, Kristof discussed Hatfill's press conference and asserted that he was the same "Mr. Z" who had been discussed in his earlier columns.

Hatfill filed suit in federal district court in 2004, asserting claims for libel and for intentional infliction of emotional distress. (See *Hatfill v. New York Times Co. et al.*, 2004 U.S. Dist. LEXIS 27530 (E.D. Va. 2004).) His complaint, according to the District Court opinion by Judge Claude M. Hilton, stated three causes of action: that the five Kristof columns "collectively state or imply that Dr. Hatfill was the anthrax mailer . . . and impute guilt for the anthrax letters to Dr. Hatfill in the minds of reasonable readers;" that Hatfill was also defamed "by a number of discrete untruths contained in the Kristof columns;" and that the "intentional public identification of Dr. Hatfill with the anthrax murders for the collateral purpose of lighting a fire under the government inflicted grievous emotional distress on Hatfill."

The Times and Kristof filed a motion to dismiss the case against *The Times* on the grounds that Hatfill had failed to "state a claim upon which relief can be granted," and a motion to dismiss the case against Kristof because the Virginia court lacked personal jurisdiction over him. Hilton granted both motions, and dismissed all three counts of Hatfill's complaint, writing that "The columns at issue in the case . . . accurately report questions being raised in the context of an ongoing public controversy. Even if the conclusion that Hatfill is indeed the anthrax mailer could conceivably be found within the range of possibilities raised by the columns, this is not a reasonable reading of the columns. Critiquing the propriety of the FBI's investigation and raising questions of legitimate concern to the public is not the same as a direct accusation of wrongdoing, and does not subject defendants to a claim

for libel." Hilton added, "Because the columns specifically and repeatedly disavow any conclusion of guilt, no such intent can possibly be found, and the claim of libel fails . . ."

After the District Court verdict, Kristof told *The Washington Post* "I think this is good for reporters, but more importantly, I think it's good for the country." That good feeling only lasted, however, until the ruling in Hatfill's appeal in July 2005, *Hatfill v. New York Times Co. et al.*, 416 F.3d 320 (4th Cir. 2005). Two of the three judges on the panel reversed the lower court ruling and reinstated Hatfill's libel case. Judge Dennis W. Shedd, who wrote the opinion on behalf of himself and Chief Judge William A. Wilkins, disagreed with Hilton's ruling, reading Kristof's columns as "capable of defamatory meaning." Shedd wrote, "At this stage of the litigation, there is no evidence to show whether or to what extent Kristof's columns were, as the district court stated, 'accurate reports of [an] ongoing investigation.' . . . Kristof's columns did not merely report others' suspicions of Hatfill; they actually generated suspicion by asserting facts that tend to implicate him in the anthrax murders." Judge Paul V. Niemeyer dissented, writing that he found "nothing in the letter or spirit of these columns" that amounted to an accusation that Hatfill was the anthrax murderer. "The columns' purpose was to put into operation prosecutorial machinery that would determine whether Dr. Hatfill committed the crimes and end this unseemly limbo either by exculpating Dr. Hatfill or arresting him," Niemeyer wrote, quoting one of Kristof's columns.

Two months later, *The Times* petitioned for an *en banc* rehearing by the entire Fourth Circuit to reconsider the panel's reversal in *Hatfill v. New York Times Co. et al.*, 427 F.3d 253 (4th Cir. 2005). Judge Karen J. Williams did not participate for undisclosed reasons, leaving twelve to decide the fate of the appeal. Because the vote was split evenly, 6-6, the panel's ruling was allowed to stand. Although the order denying rehearing was issued without comment, Judge J. Harvie Wilkinson III wrote a dissenting opinion on behalf of himself and Judges M. Blane Michael and Robert B. King. Wilkinson wrote, "The panel's decision in this case will restrict speech on a matter of vital public concern," arguing that allowing libel cases like this to proceed will intimidate news media from pursuing important stories, especially smaller papers without the monetary backing to withstand "protracted litigation." Wilkinson continued, "The consequences of this decision for the First Amendment run deep. If one purpose of public commentary is to assess the functioning of government, these columns were surely in that vein." Wilkinson observed that it is the news media's job "not to deprive the public of a meaningful report. . . . It is a job that the Constitution protects, and I would not construe gray areas of Virginia law to punish it and deter others from performing it. . . . The public's right to know in this case was not a matter of voyeurism, titillation, or idle curiosity. The bioterrorism presaged by these anthrax mailings was no small matter, and it may one day post a threat on a very large scale. Let us hope that on that day, reluctance to take issue with authority has not become our norm."

Hatfill, continued on page 26

Judge J. Harvie Wilkinson argued that allowing libel cases like this to proceed will intimidate news media from pursuing important stories.

Defamation News

Appeals Court Upholds Verdict over Editorial in *Chanhassen Villager* Case

On March 22, 2006, a Minnesota court of appeals affirmed in part and reversed in part a jury's decision to award former County Board of Commissioner Chairperson Tom Workman \$625,500 in damages for defamatory statements written about him in a *Chanhassen* (Minn.) *Villager* editorial. The three-judge panel found that the editorial in question centered on two statements – one they labeled “sued-and-lost” and the other “decision-making.” The court found that the “sued-and-lost” statement could result in injury to Workman's reputation, but that the “decision-making” statement had not. The case, *Workman v. Serrano*, 34 Media L. Rep. 1577, was remanded to the district court, which could result in a reduction in damages.

The case began when the newspaper's former editor, Eric Serrano, published an editorial on Jan. 16, 2003. Two passages in the editorial became the center of a defamation trial involving Workman, Serrano, and the *Villager*. The statement identified as “sued-and-lost” by the appeals court read: “We won't go so far as some residents in wondering whether [Workman's firing of County Administrator Dick Stolz] was rooted in some ancient grudge between county officials and [Workman, who had been sued by the administrator and lost] – we like to think our elected officials are above such petty motives.” A retraction and apology for that portion of the editorial ran on the editorial page of the next issue of the *Villager*.

The “decision-making” statement centered on Serrano's implication that Workman's alleged grudge against Stolz had led Workman to violate Minnesota's Open Meeting Law, Minn. Stat. §13D.01 *et seq.*, enabling Workman to sway the rest of the board to oust Stolz. Workman sued, and in December 2005, a Carver County District Court jury awarded Workman \$625,500. The *Villager* filed post-trial motions with Judge John S. Connolly, but Connolly denied them on March 3, 2005 in *Workman v. Serrano*, CV-03-579 (Minn. Dist. Ct. 2005). The case then went to the appeals court. (See Libel News: Minnesota Weekly Will Appeal Libel Decision” in the Winter 2005 issue of the *Silha Bulletin*.)

On appeal, Judge Terri J. Stoneburner found that the “sued-and-lost” statement might have “created an injury that is too small to have contributed to any injury to Workman's reputation.” As to the “decision-making” statement, Stoneburner found that to be a “statement of opinion” and wrote that “a statement of opinion which does not contain a provably false factual connotation will receive full constitutional protection.”

Stoneburner reviewed the standard for actual malice – whether Serrano wrote the defamatory statements while knowing they were false or while “acting recklessly with regard to whether the statements were true.” Stoneburner noted that a *Villager* reporter kept a file on the Workman dispute which Serrano examined prior to writing the editorial, and that his examination of that file became the basis of the examination of the “sued-and-lost” statement. Serrano had testified that although he had reviewed the file before writing the editorial in question, the error nevertheless appeared in his article. Because of this, Stoneburner found that “the evidence of actual malice was stronger concerning the sued-and-lost statement than concerning the decision-making statement,” even though the *Villager* had published its retraction.

In an interview with the *Bulletin*, attorney Mark Anfinson, the *Villager's* legal advisor, said that the question before the district court when it hears the remanded case will center on whether or not the remaining damages amount is appropriate for the “sued-and-lost” statement. A new jury will have to decide if and how Workman was damaged when there was no specific description of the lawsuit in Serrano's article.

The *Workman* case, Anfinson said, is an example of how the actual malice standard “is fading away” and not “being applied as intended [in the 1964 landmark *New York Times v. Sullivan* case, 376 U.S. 254],” where Justice William J. Brennan opined that a degree of honest error is to be expected in rigorous public debate, particularly when it involves criticism of public officials. Anfinson credits a “more conservative bench” and the “growing power of the media” for the current trend in the awarding of large monetary amounts in defamation suits, resulting in “resentment of powerful portions of the media by portions of society, including the courts.”

Following Stoneburner's decision, the case was appealed to Minnesota's Supreme Court. But on May 24, 2006, the petition was denied. Anfinson said that the case might now be appealed to the U.S. Supreme Court. The parties have until August 22, 2006 to decide if they will take this route. If the parties do not appeal to the U.S. Supreme Court, the remanded case will be considered by Minnesota's district court in the fall of 2006 at the earliest, Anfinson said.

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Anfinson credits a “more conservative bench” and the “growing power of the media” for the current trend in the awarding of large monetary amounts in defamation suits.

Media Ethics News

AP Bureau Chief Dismissed

In March 2006 the Associated Press fired Vermont bureau chief Chris Graff, a 27-year veteran of the organization. By May 2006, the reasons for his unexpected departure became clear, as Graff was allowed to release his termination letter pursuant to his severance agreement. The letter, written by AP Chief of Bureau Larry Laughlin read, “Your decision to allow an elected official’s editorial comments to run unfettered on the wire March 8 compromised the integrity and impartiality of the AP’s news report.”

Laughlin was referring to an editorial piece written by Vermont’s Democratic senator Patrick Leahy regarding the then-upcoming Sunshine Week, an annual event devoted to openness in government. Leahy has co-sponsored several bills in Congress pertaining to the Freedom of Information Act and open government and presided over a hearing on the subject in 2005 at which former Associated Press executive editor and vice president Walter Mears testified. The Leahy column was critical of the Bush administration and said that “the foundations of our open government are under direct assault from the first White House in modern times that is openly hostile to the public’s right to know.”

Graff included an editor’s note with the piece advising that it had been solicited by the American Society of Newspaper Editors for use during Sunshine Week. Graff had included a similar column from Leahy in the Sunshine Week “package” the Vermont AP bureau sent out in 2005 and had received no complaints. This time, however, the column was removed from the wire shortly after it was sent.

Laughlin’s termination notice called Graff’s decision a “repeat of the failure in judgment displayed in 2003 when you were admonished for allowing a Montpelier staffer to write a chapter in a member-published book about Howard Dean, at the time a candidate for the Democratic presidential nomination.” He called the incidents “grave violations of the AP’s policies, procedures and specific directives.”

Many in the Vermont media and political community were unhappy with the AP’s decision. Vermont’s governor, Jim Douglas, its U.S. senators Patrick Leahy and Jim Jeffords (I-Vt.), and its U.S. House representative Bernie Sanders (I-Vt.) wrote a joint letter to AP president and CEO Thomas A. Curley calling for Graff’s immediate reinstatement. They wrote that Graff “is the personification of the great attributes of good journalism: professionalism, courage, steadiness, and public service by honoring the public’s right to know.”

The editor-publisher of the *St. Albans Messenger*, Emerson Lynn, wrote to Curley asking for information on how to cancel his paper’s AP subscription. In his letter, Lynn called Graff an “institution in Vermont” and “one of the guiding forces of high-quality journalism in our state. His integrity is above reproach.”

At the time Lynn wrote to the AP, it was only being speculated that the reason for Graff’s termination was the Leahy column. He said that “would be an outrage, if even partially true” and asked, “You fired someone for forwarding you a column about government’s need to be more forthcoming? Do you understand the irony?”

After the termination letter was disclosed in May and the Leahy column became one of the official reasons for Graf’s dismissal, Leahy released a separate statement calling the “AP’s decision all the more difficult to accept and understand.” He noted that the “AP itself takes an advocacy position each year during Sunshine Week” and said that he had “never heard anything but praise about Chris Graff for his professionalism and his evenhandedness, and he has earned that praise.”

According to an *Editor & Publisher* article dated May 3, 2006, Graff could not comment about the termination letter due to the terms of his severance agreement, but did say that he had released it to “answer some of those lingering questions” about his firing. The article noted that Graff has since taken part-time positions with Vermont Public Radio and Vermont Public Television, and quoted Graff as saying “I am still talking to folks to sort out what I want to do next. I have to see if we will stay in Vermont, if that is an option. It is going to be a several-months process.” The article is available online at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1002462017.

– ASHLEY EWALD
SILHA FELLOW

Hatfill, continued from page 24

The final procedural step was a petition for *certiorari* to the U.S. Supreme Court. But, on March 27, 2006, the high Court refused to hear the case, meaning that Hatfill’s defamation suit has no further procedural hurdles before going to trial. “It’s not unexpected,” David Schulz, a lawyer for *The Times* told the Reporters Committee for Freedom of the Press. “Now it’s back to the trenches. We’re confident that at the end of the day that the case lacks merit.” According to the Associated Press, the case will return to federal court in Alexandria, Va., although a trial date has not been set.

Meanwhile, the investigation into the anthrax mailings – which killed five people and sickened seventeen, according to the Associated Press – is still open. Additionally, Hatfill is also proceeding with a suit against former attorney general John Ashcroft and the Justice Department for allegedly violating the Privacy Act in releasing his name to journalists in connection with the attacks (see *Hatfill v. Ashcroft*, 404 F. Supp. 2d 104 (D.D.C. 2005)). (See also “Reporters Privilege News: Use of ‘Plame Waivers’ of Confidentiality is Expanding” in the Fall 2004 issue of the *Silha Bulletin*.) *The Washington Post* reported on April 12, 2006 that several reporters have been subpoenaed and at least two have already been questioned about their confidential sources in the case. According to *The Post*, both reporters who have already testified, Michael Isikoff of *Newsweek* and Brian Ross of ABC, claimed a First Amendment and common law reporter’s privilege to refuse to reveal their confidential sources. *The Post* reported that Allan Lengel, a *Post* reporter, “intends to take a similar position” when he is deposed.

– PENELOPE SHEETS

SILHA RESEARCH ASSISTANT

“You fired someone for forwarding you a column about government’s need to be more forthcoming? Do you understand the irony?”

– Emerson Lynn,
Editor/Publisher
of the *St. Albans
Messenger*

Media Ethics News

Scandal at the *New York Post's* Page Six

In an ironic twist, the *New York Post's* Page Six gossip column has become the subject of scandal as one of its reporters, Jared Stern, is under federal investigation for allegedly attempting to extort money from California billionaire Ron Burkle in exchange for protection from negative coverage. Starting on April 8, newspapers including the *New York Daily News* and *The Guardian* (London), along with numerous blogs, reported that the *Post* is under investigation by the FBI. As a result, the journalistic ethics of what is arguably the most infamous gossip page in the United States are being called into question by stories in competing news outlets alleging a long history of corruption and manipulative reporting by Page Six.

Burkle, a California grocery magnate and prominent Democratic campaign contributor, secretly videotaped his meetings with Stern after he consistently received unflattering coverage from Stern's articles for Page Six. In the tapes, Stern allegedly offered Burkle "protection" from bad coverage at a price of \$100,000 upfront and \$10,000 a month for one year after that.

According to *The New York Times*, items on Burkle began to appear in the *Post* in early 2005. In its Page Six column, the *Post* characterized Burkle as a "babe-loving billionaire," cavorting with models and living a hard-partying lifestyle. Burkle objected to the coverage, particularly to those news items that he and his attorney claim are false. For example, the *Post* reported in a January 1, 2006 column that Burkle flew his girlfriend and two models in his private jet to his mansion in Aspen for a weekend vacation. After the scandal broke at the *Post*, the *New York Daily News* reported that Burkle does not own a mansion in Aspen and did not vacation with any of the women mentioned in the column.

According to *The New York Times*, Burkle began contacting the *Post* to object to their coverage of his activities, first writing to the Page Six lead writer, Richard Johnson, and the *Post's* managing editor, Colin Meyer. According to *The Times's* sources, Meyer responded to Burkle promising to treat him fairly. Burkle's attorney, Martin D. Signer, sent several letters to the paper threatening litigation for false and defamatory stories, and Burkle also wrote a personal letter of complaint to Rupert Murdoch, owner of the News Corporation, of which the *Post* is a part.

The New York Times's sources stated that Burkle was then contacted by Stern, who suggested in an email that Burkle had "the means" to change the way he was being covered in the column. Burkle then set up a series of private meetings with Stern in his home, which were taped by Burkle's security team and a New York City private investigation firm and turned over to Federal authorities. According to the *Daily News*, at one point in the meetings, Burkle directly asked Stern "How much

do you want?" Stern replied with his request for \$100,000 transferred into a personal account, with \$10,000 per month to follow. The *Daily News* reported that sources who have viewed the tapes, Stern spent some time prior to making his request for money explaining how things "work" with prominent people and the *Post*. Stern allegedly stated that the system was "a little bit like the Mafia," and mentioned Miramax Films co-founder Harvey Weinstein and Revlon chairman Ronald Perleman as other prominent individuals who had made "arrangements" with the *Post* for favorable coverage.

Gary Ginsberg, an executive at the News Corporation, insisted that the accusations against Stern had no larger implications for the *New York Post*, and stated that the *Post* would cooperate with the Federal investigation. "We're taking it very seriously," Ginsberg told *The New York Times*. He pointed out that Stern, who has since been dismissed from the paper along with several other part-time writers, was only a part-time contributor to the paper. "No one's trying to make any excuses for [Stern's] alleged behavior," Ginsberg told *The Times*, "but in terms of what it means for the franchise, I think the franchise is as strong as any in journalism. This is highly aberrational."

Journalists such as Joe Conason, who writes for the *New York Observer*, disagree. Conason wrote a piece for the *Observer* on April 17, 2006 reminding readers of a 1980 incident in which Rupert Murdoch and the *Post* were investigated by the Senate Banking Committee for their involvement in another scandal in which Murdoch sought a loan from the U.S. Import-Export bank to finance the purchase of an American airline, and allegedly received it after his *New York Post* endorsed Jimmy Carter for president, only to change its endorsement to Reagan that fall. Conason detailed a number of other incidents pointing to corruption in Murdoch's franchises, and wrote that the current scandal at the *Post* could "at least bring renewed scrutiny to the appalling journalistic standards and practices of the Murdoch media." While Rupert Murdoch's holdings are vast and his penchant for increasing them and maintaining control over the content his outlets produce is well known, whether "news coverage for cash" arrangements are truly "aberrational" at the *New York Post* remains to be seen. In the meantime, the *Post* has been silent regarding the investigation at the paper.

— SARA CANNON
SILHA CENTER STAFF

Stern allegedly offered Burkle "protection" from bad coverage at a price of \$100,000 upfront and \$10,000 a month for one year after that.

Media Ethics News

New York Times Reporter Received Free Computer Repair Services

A recent incident involving a weekly *New York Times* technology columnist, David Pogue, raised ethical questions about whether journalists should be required to pay for the services they review. Pogue, who in addition to his *Times* column is a regular correspondent for CBS News and National Public Radio's (NPR's) "Morning Edition," received free computer hard drive repair services from a San Francisco Bay area company called DriveSavers, and then wrote about the company in pieces for each of his employers. The piece for "Morning Edition" aired on Sept. 12, 2005. Pogue also did a review for "CBS Sunday Morning." Finally, Pogue mentioned DriveSavers in a *Times* column on Feb. 15, 2006. But when a columnist for *SF Weekly*, Matt Smith, visited DriveSavers himself, he heard about Pogue's visit, and wrote a March 8, 2006 article criticizing Pogue for what Smith viewed as a "pretty significant violation of journalism's ethical conventions."

The critical question was whether there is a difference between a journalist receiving free products on loan – such as electronics – and a journalist receiving free services.

According to Smith's article, he also took his crashed hard drive to DriveSavers, "which specializes in rescuing data from hard drives that have stopped working." Some of DriveSavers's customers include movie and music producers, "whose lost files can be worth fortunes." The typical fee for a successful data recover by DriveSavers is over \$2000. Smith declined the service, but was told that another journalist, who he concluded was Pogue, had had his fee "comped" in connection to a story on DriveSavers. According to Smith, Pogue defended himself in a subsequent CNET podcast, denying any wrongdoing. Smith continued to pursue the story, and wrote a second column on April 5, 2006.

The critical question was whether there is a difference between a journalist receiving free products on loan – such as electronics – and a journalist receiving free services. Jeffrey A. Dvorkin, Ombudsman at NPR, wrote in an online article that, "Newsrooms are always awash with review copies of books, CDs and DVDs. These 'freebies' are seen by news organizations as an acceptable form of free sample, especially when it comes to covering the arts. . . . In this case, a big-ticket item, such as the cost of data recovery, should have been paid for by the news organization or at least acknowledged on the air that Pogue received this service for free." Dvorkin cited NPR's ethics guidelines, which state clearly, "NPR journalists may not accept compensation, including property or benefits of any kind, from people or institutions they cover. NPR journalists may accept gifts of token value (hats, mugs, t-shirts, etc.). Unsolicited items of significant value will be returned with a letter thanking the sender but stating our policy on gifts." Despite being a freelancer for NPR, the same guidelines apply to Pogue, Dvorkin wrote. Bill Marimow, NPR's Vice President of News, told Dvorkin, "Based on our code of ethics, it's clearly improper to review a company's computer recovery services after receiving \$2,700 worth of complimentary service. Given the benefit of 20-20 hindsight, we should have either decided not to air the review or paid for the services ourselves."

Smith's inquiry did not stop at NPR. He wrote in his April 5 column that a CBS spokeswoman claimed CBS "had not been aware" that Pogue received the services for free. Smith also reported that *Times* spokeswoman Diane McNulty told Smith, "David Pogue had apparently misunderstood the policy if he thought it allowed him to review a technical service without paying for it, and his editor told him so." Smith wrote that *The Times* has clarified its ethics policy, adding the word "services" into what Smith called the "no-gift rule." According to NPR's Dvorkin, *The Times* has also contacted DriveSavers to coordinate payment for the services Pogue received.

As Pogue told Smith, "My editors, producers, and I all agree on these points: that public apologies have been made, DriveSavers has been reimbursed, and now we move on."

– PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Media Ethics News

LA Times Blogger Involved in Controversy Over Anonymous Postings

On April 20, 2006, *Los Angeles Times* business columnist Michael Hiltzik admitted to using a pseudonym to post controversial comments on a number of Web sites, including his own company-sponsored Weblog. After a week-long investigation, the newspaper announced that it would no longer publish Hiltzik's column and discontinue his latimes.com blog, "The Golden State." Hiltzik, a Pulitzer Prize-winning reporter, was suspended and will be reassigned when his suspension ends.

The controversy, which provoked mixed reactions from journalists, media ethicists, and commentators, began when Patrick Frey, an assistant Los Angeles prosecutor, unmasked the *Times* columnist in an online posting to a weblog named "Patterico's Pontifications." The Weblog, or blog, was authored anonymously by Frey. Frey is one of a number of politically-oriented bloggers in southern California who feuded frequently with Hiltzik online. "As a blogger, Mr. Hiltzik is often strident in his liberal views, and has engaged in public political scrapes with a number of conservative bloggers," *The New York Times* reported on April 24, 2006. According to a column written that same day by Howard Kurtz of *The Washington Post*, the conflicts were often "far more personal and inflammatory than his newspaper column on financial issues."

On April 20, 2006, Frey offered evidence that Hiltzik "left comments on the Internet under an invented pseudonym, at times explicitly pretending to be someone other than Michael Hiltzik." After noticing that Hiltzik's online comments were frequently admired by a blogger using the name "Mikekoshi," Frey used an online search engine to retrieve a number of Internet mailings lists that identified Hiltzik as "Mikekoshi." The search results, he said, also included online messages signed using the invented identity but bearing the columnist's full name and news affiliation. A second pseudonym used by Hiltzik, "Nofanofcablecos," was discovered by matching the IP addresses used to post comments under all three names, at times on his latimes.com blog. According to Frey, "Hiltzik and his pseudonymous selves have echoed each other's arguments, praised one another, and mocked each other's enemies."

Hiltzik admitted to the use of the pseudonyms in his final authorized posting on "The Golden State," but chided Frey's attack as a reaction to his earlier comments ridiculing Hugh Hewitt, a conservative talk show host and blogger. According to Michael Weiss of *Slate.com*, Hiltzik remained "defiant and unapologetic to the end," even when confessing to his indiscretion.

An Editor's Note, written by *Times* editor Dean Baquet on April 29, 2006, acknowledged the columnist's use of assumed names. According to Baquet, "employing pseudonyms constitutes deception and violates a central tenet of *The Times*' ethics guidelines: Staff members must not misrepresent themselves and must not conceal their affiliation with *The Times*." The editor mentioned no other ethical indiscretions that the columnist may have committed while working as the newspaper's first staff member to maintain a blog on latimes.com. "Hiltzik did not commit any ethical violations in his newspaper column, and an internal inquiry found no inaccurate reporting in his postings or on the Web," he wrote.

For some, Hiltzik's use of assumed identities was representative of a nettlesome but unavoidable problem for publications sponsoring staff-written weblogs. Many commentators who make online postings do so anonymously. But one perceived problem in posting anonymous commentary as a journalist is that, while it may pose no direct harm the reader, it may raise issues for the companies sponsoring the blogs.

"In posting to his own blog under a fake name, Hiltzik was clearly abusing the trust the paper had placed in him, and the *Times* has a right to protect the reputation that its brand depends on. But writing praise about yourself in pseudonym-ed comments is like a sitcom using a laugh-track; pretty lame, but not ultimately harmful," *Editor & Publisher's* David Hirschman wrote.

"What exactly are the rules for print or television journalists blogging on company sites?" Howard Kurtz, a columnist for *The Washington Post*, asked in a column on April 23, 2006. "Reporters are usually told not to take political stands or say anything they wouldn't say in print or on the air. But their blogs by their nature are more personal, attitude-filled, sharp-edged or sarcastic." The posting of blogs by reporters requires that publications come to terms with the fact that the "freewheeling, name-calling, grudge-settling blogosphere" that Kurtz described in an April 24, 2006 article may be at odds with many of the ethical guidelines adopted by publications across the nation.

The *Los Angeles Times* Ethics Guidelines forbid reporters from using their affiliation with the newspaper to settle personal disputes, and warns staff members to refrain from making public comments that "stray beyond what they would write in the newspaper." The newspaper's guidelines are available at <http://www.asne.org/ideas/codes/losangelestimes.htm>. Yet Hiltzik was widely known for posting incendiary and unrestrained commentary on "The Golden State" and on other Web sites. Kurtz characterized Hiltzik's posts as being frequently inflammatory and often motivated by personal grudges in his April 24 column.

According to Hiltzik, the *Times* never assigned an editor to guide the commentary on his blog. "I think essentially, they trusted me to know where the limits were. And to know that the limits were going to be a little different from what they are in the column," Hiltzik told Robert Niles in an interview published by the *Online Journalism Review* on April 17, 2006, only days before his assumed identities were exposed.

The key is "to use the technology our way," *The New York Times* deputy managing editor Jonathan Landman wrote in a memo sent to reports and editors at the paper after the launch of columnist David Carr's blog, "Carpenter-bagger." So long as editors and writers, working together, vigilantly observe the typical standards of fairness and care while blogging and editing online commentary, he wrote, "[o]ur notions of journalistic responsibility are perfectly compatible with spirited fun." The memo is available at <http://www.cyberjournalist.net/news/003082.php>.

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

"Hiltzik and his pseudonymous selves have echoed each other's arguments, praised one another, and mocked each other's enemies."

— Patrick Frey,
Assistant
Los Angeles
Prosecutor

Pentagon Inquiry Concludes No Wrongdoing Occurred When P.R. Firm Planted News Stories in Iraqi Media

The Lincoln Group, a Washington, D.C.-based public relations firm, did not violate military policy by paying Iraqi news outlets to publish articles favorable to the United States, and in some cases written by American troops, according to a Pentagon inquiry. *The New York Times* reported on March 22, 2006 that the inquiry was ordered by General George W. Casey Jr., the senior American military commander in Iraq, in response to disclosures made in November 2005 that the Lincoln Group was hired by the Department of Defense (DoD) to undertake a campaign in Iraq to get pro-U.S. news coverage into the Iraqi press. Although the inquiry found no legal wrongdoing, the program to plant positive news in Iraqi media raises ethical questions about freedom of the press in a country touted by the United States as an emerging democracy.

The news about the Lincoln Group's activities has been, perhaps ironically, both varied and confusing, as both national and international papers try to decipher the covert program, and often use unnamed sources to do so. The story first broke in the *Los Angeles Times* on Nov. 30, 2005. According to that original article, the news stories in question, written by U.S. military "information operations" troops, are "mostly factual, [but] present only one side of events and omit information that might reflect poorly on the U.S. or Iraqi governments." The Lincoln Group's staff, under contract with the military, then translate the articles into Arabic and place them in Iraqi newspapers, often posing as freelancers or advertising executives, or simply e-mailing the stories to newspapers anonymously, according to the *Times*. *The (London) Independent* described the process slightly differently, in which "psyops" – psychological operations – troops wrote the articles and, via the Lincoln Group, paid Iraqi newspaper editors "thousands of dollars . . . to run these unattributed reports in their publications." Under either scenario, the process masks the articles' provenance, and the Iraqi readers were presented with seemingly independent, though one-sided, pro-U.S. and pro-Iraqi government news accounts which were never attributed to the U.S. military. Furthermore, as *The Independent* reported, the quotes in such articles, often attributed to anonymous Iraqi citizens or officials, "were routinely made up by U.S. troops who never went beyond the perimeter of the Green Zone."

The program was also reported to entail paying "friendly" Iraqi journalists monthly stipends for writing favorable articles, according to *The New York Times*. But it is the masking of the source of the news that has created the most controversy. The *Los Angeles Times* quoted one unnamed "senior military official" who found the strongly pro-U.S. news in Baghdad papers difficult to believe, saying "Stuff would show up in the Iraqi press, and I would ask, 'Where the hell did that come from?' It was clearly not something that indigenous Iraqi press would have conceived of on their own." Beyond such dissonance, some officials strongly objected to the

practice on ethical grounds. The *Times* also quoted an unnamed "senior Pentagon official" who said, "Here we are trying to create the principles of democracy in Iraq. Every speech we give in that country is about democracy. And we're breaking all the first principles of democracy when we're doing it [planting the stories]." On its face, the program is inconsistent with the Bush administration's efforts at journalism education in Iraq, as well as its efforts to launch more than twelve Iraqi television channels, according to the *Los Angeles Times*.

The scope of the program is difficult to estimate. *The (Albany, N.Y.) Times Union* reported that the Lincoln Group had placed more than 1000 articles in "the Arab press," and had "placed propaganda pieces on an Iraqi web site," all for a contract worth \$6 million from the Defense Department. *The New York Times* estimated that the numerous contracts Lincoln has received from the military's "information operations" troops amount to "tens of millions." That includes another disputed program, in which Lincoln hired several Sunni religious scholars to help produce messages to persuade Sunnis in Anbar Province to participate in national elections and resist the insurgency.

This is not the first time the government has been accused of disseminating "misinformation" during the Iraq war. One of the more famous domestic episodes of government propaganda, described in a Dec. 19, 2005 article in the *The Times Union*, is the story of Private First Class Jessica Lynch. Lynch's dramatic March 31, 2003 rescue from an Iraqi hospital led American audiences to believe that she had been mistreated by Iraqis. Lynch later "went public with her real story," according to *The Times Union*, saying she had been well-treated. (See "The Media and the Military: Questions Surround Rescue Operation of Pfc. Jessica Lynch" in the Spring 2003 issue of the *Silva Bulletin*.)

After the story about the Lincoln Group's activities initially broke, the White House and other government bodies expressed concern about the program, leading to a Dec. 2, 2005 closed-door session on Capitol Hill during which Pentagon officials were questioned by the Senate Armed Services Committee, according to *The New York Times*. The Chairman of the Armed Services Committee, Senator John W. Warner (R.-Va.) issued a statement saying "A free and independent press is critical to the functioning of a democracy, and I am concerned about any actions which may erode the independence of the Iraqi media."

The results of that hearing have not been made public, but a summary of General Casey's inquiry – conducted by Rear Admiral Scott Van Buskirk – was released on May 23, 2006, according to *The Times*. Interestingly, *The Times* reported that Van Buskirk's summary did not mention the Lincoln Group, although it "faulted the military for failing to examine whether paying for placement for articles [in the Iraqi

Although the inquiry found no legal wrongdoing, the program to plant positive news in Iraqi media raises ethical questions about freedom of the press in a country touted by the United States as an emerging democracy.

Sedition Project Gains Pardon for Montanans

On May 3, 2006 Montana Governor Brian Schweitzer pardoned state citizens who had been convicted under a draconian sedition law enforced in Montana during World War I. Inspired by University of Montana journalism professor Clem Work's book, *Darkest Before Dawn: Sedition and Free Speech in the American West*, law professor Jeffrey Renz, together with a group of that university's journalism and law students, had launched the Montana Sedition Project to secure the pardons.

According to the Project's Web site, available online at www.seditionproject.net, Montana's Sedition Act was passed by a special session of that state's legislature in 1918, and was one of the harshest in the United States. Although it was later repealed, Montana's law was the basis for the federal Sedition Act passed later that same year.

Montana's Sedition Act read: "Whenever the United States shall be engaged in war, any person or persons who shall utter, print, write or publish any disloyal, profane, violent, scurrilous, contemptuous, slurring or abusive language about the form of government of the United States, or the constitution of the United States, or the flag of the United States, or the uniform or the army or navy of the United States, or shall utter, print or publish any language calculated to incite or inflame resistance to any duly constituted Federal or State authority in connection with the prosecution of the War . . . shall be guilty of sedition."

Seventy-nine people were convicted under Montana's law, most of them blue-collar or rural workers. Notably, however, no Montanan was convicted under the federal Sedition Act, according to the Project's Web page. Only three trials under the Montana Sedition Act involved the printed word, according to the Web page. They included the trials of Will Dunn, editor of the *Butte Daily Bulletin* and Bruce Smith, the newspaper's publisher; and a trial against an unidentified pamphleteer for the *Industrial Workers of the World*, which was a radical labor organization.

According to the Project's Web site, "virtually all sedition convictions in Montana were based on witness accounts of casual statements, often in saloons, that were perceived and pro-German or anti-American." Other statements may have been critical of war efforts such as Liberty Bonds, sold to fund the war effort, or the need for food rationing. Other statements simply called into question the chastity of a soldier or a woman.

According to *The New York Times*, speaking German or publishing materials in German was forbidden, which was especially problematic for a state with an immigrant population made up largely of Germans and German-speaking Austrians.

Eleven convictions were appealed during the early 1900s, according to the Project's Web site, and seven of those were reversed by the state Supreme Court. But the other convictions remained. *The New York Times* reported that many of those convicted served prison sentences ranging from one to 20 years and paid fines ranging from \$200 to \$20,000.

The Project submitted the "Seeking Pardon" letter, available online at www.seditionproject.net/petitionletter.html,

asking the Governor to posthumously pardon 40 people convicted and sent to prison, and another 37 who were also convicted, but who did not serve prison time. The 39 signatories included historians, attorneys, and First Amendment advocates. Two of them – Jane Kirtley and Robert O'Neil – have ties to the Silha Center. Kirtley is the Silha Professor and Director of the Silha Center for the Study of Media Ethics and Law, and O'Neil serves on the Center's advisory board. Geoffrey Stone, the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago School of Law, also signed the letter. Stone will deliver the 2006 Silha Lecture on October 4.

Kirtley praised Work's efforts and those of Renz and the students, telling the (Minneapolis) *Star Tribune*, "In times of crisis, this nation tends to go a little haywire, and I think in Montana there was a combination of circumstances – the war, labor efforts . . . and immigration issues. It was a situation that could resonate with us today. I would think that Americans today would agree that going to jail for criticizing power couldn't happen. But there are obvious parallels with our own time. People have not been jailed, but there have been assaults on the right to speak out [and] suggestions that people are engaging in treason if they speak out against government. This is a reminder to people how vulnerable our First Amendment rights are."

Work told *The New York Times* that while researching his book, he found the similarities between the early nineteenth century sedition laws and current laws passed in the United States since the Sept. 11, 2001 terrorist attacks to be "eerie." He told *The Times*, "The hair on the back of my neck stood up. The rhetoric was so similar, from the demonization of the enemy to saying 'either you're with us or against us' to the hasty passage of laws." Work further stated that he believed the passage of the Montana Act was influenced by the Anaconda Copper Mining Company, which had a high economic stake in the state at the time, and which saw the Act as a way to squelch labor unrest. But Work also blamed then-Governor Sam Stewart, who had signed the bill into law. "In the last 100 days of his term, [Stewart] commuted 50 sentences, including 13 murderers and seven rapists. But not a single seditionist," Work told *The Times*.

Relatives of those convicted were present in the rotunda of the Montana State Capitol to witness Schweitzer sign the pardon. Many of them had no idea of their relatives' pasts, as was the case for Phyllis Rolf, now a resident of Atwater, Minn. But after being told about her grandfather's history, she explained his silence in an interview with the *Star Tribune*, saying, "I don't think my grandfather said another political word after he walked out of that prison."

As current Governor Schweitzer signed the pardon, he said, "I'm going to say what [former Governor] Stewart should have said. I'm sorry, forgive me, and God bless America, because we can criticize our government."

– ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

"In times of crisis, this nation tends to go a little haywire, and I think in Montana there was a combination of circumstances – the war, labor efforts . . . and immigration issues. It was a situation that could resonate with us today."

– Jane E. Kirtley,
Silha Professor and
Director of the
Silha Center
for the Study of
Media Ethics
and Law

Copyright News

U.K. Court Dismisses Suit Against *DaVinci Code* Author

On April 7, 2006, a High Court judge in London dismissed a copyright infringement claim against publisher Random House and author Dan Brown, finding that Brown's bestselling novel, *The Da Vinci Code*, had not appropriated ideas from a 1982 non-fiction book.

"Today's verdict shows that this claim was utterly without merit," Brown said in a statement following the verdict in *Baigent v. Random House Group*, [2006] EWHC 719 (No. HC04C03092). "A novelist must be free to draw appropriately from historical works without fear that he'll be sued and forced to stand in a courtroom facing a series of allegations that call into question his very integrity as a person."

Authors Michael Baigent and Richard Leigh brought the suit, claiming Brown "appropriated the architecture" of their book, *The Holy Blood and the Holy Grail*, as the basis for the *Da Vinci Code*. Henry Lincoln, who co-authored the book with Baigent and Leigh, did not take part in the case.

Justice Peter Smith, presiding in the High Court of Justice, Chancery Division, acknowledged Brown's reliance on *The Holy Blood and the Holy Grail*, but said the plaintiffs failed to prove Brown had stolen the "central theme" of the non-fiction book because the book "does not have a central theme as contended by claimants: it was an artificial creation for the purposes of the litigation working back from 'The Da Vinci Code.'" Smith said that even if there were central themes, they were too general to be protected by copyright.

"It would be quite wrong if fictional writers were to have their writings pored over in the way 'The Da Vinci Code' has been pored over in this case by authors of pretend historical books to make an allegation of infringement of copyright law," Smith wrote in his decision, available online at http://www.hmcourts-service.gov.uk/judgmentsfiles/j4008/baigent_v_rhg_0406.pdf.

The lawsuit involved potentially millions of dollars in royalties and profits from the book, which is one of the best-selling books of all time with more than 40 million copies sold since its release in 2003, the Associated Press and *The Washington Post* reported. The paperback version of the book, which was released during the trial on March 28, sold more than 500,000 copies in its first week, and the movie, "The Da Vinci Code," starring Tom Hanks and directed by Ron Howard, opened in theaters on May 19, 2006.

Following the dismissal, Smith ordered Baigent and Leigh to pay 85 percent of Random House's legal fees, which are expected to be several million dollars, and refused to grant them permission to appeal, according to the BBC.

Baigent and Leigh's book is a non-fiction, historical work, whereas Brown's book is a thriller that tells the story of a fictional professor, Robert Langdon, who "investigates the murder of an elderly member of an ancient society that guards dark secrets about the story of Jesus and the quest for the Holy Grail," the Associated Press reported.

The books do share several underlying theories in their themes. The most prominent is the theory that Jesus was married to Mary Magdalene. The theory purports that Jesus and Mary Magdalene had a child and that Jesus' blood line continues today. This was one of 15 plot points common to both books in dispute at trial.

Copyright is a property right in an original work of authorship, such as a literary or musical work, that gives the holder of the right the exclusive right to reproduce, display or distribute the work. Under the United Kingdom's Copyright, Designs and Patents Act of 1988 (c.48), creators of literary, dramatic, musical and artistic works can protect their work if they can establish a labor, skill or judgment in its production. Historical facts and theories generally are not copyrightable, nor are ideas. Claims in infringement of copyright must be based on the way an idea is expressed.

Copyright lawyer David Hooper told the BBC that the key issue in a copyright case is the amount of the book, both in quality and quantity, that is copied. "Frankly, the only hope for the plaintiffs in the *Da Vinci* case would have been to produce a detailed schedule showing on which pages of Dan Brown's book their idea, language and structure had been plagiarized [sic]."

Jonathan Rayner James, the attorney for Leigh and Baigent, said his clients were not concerned about stolen words, but were convinced Brown stole the "idea you are left with when you've read the book," *The Post* reported.

During his three days on the witness stand, Brown admitted using *The Holy Blood and the Holy Grail* as research for his own book, but he rejected the assertion that he had copied from the book. Brown said *The Holy Blood and the Holy Grail*, which is also published by Random House, was not crucial to his book and that there were notable differences between his novel and the non-fiction book. Brown said he read only parts of *The Holy Blood and the Holy Grail* and what he did read, he read after submitting a synopsis of the future novel. Brown noted that he credited *The Holy Blood and the Holy Grail* in his books, naming one of his characters Sir Leigh Teabing, a combination of Leigh's name and an anagram of Baigent's name.

Dan Brown said his wife, Blythe Brown, had done much of his research for the book, although Blythe Brown did not appear as a witness in the case. The plaintiffs admitted into evidence her copy of *The Holy Blood and the Holy Grail*, which was marked and highlighted in certain areas. That book was one of 38 books and more than 300 documents admitted as evidence of Brown's research for *The Da Vinci Code*.

Although Smith criticized the fact that Blythe Brown did not testify, Smith rejected Baigent and Leigh's request for appeal, *The Times* reported.

"A novelist must be free to draw appropriately from historical works without fear that he'll be sued and forced to stand in a courtroom facing a series of allegations that call into question his very integrity as a person."

– Dan Brown,
Author,
The DaVinci Code

Iraqi Media, *continued from page 30*

press] would ‘undermine the concept of a free press.’” The summary appears to confirm the conclusions reported in March, and though its results have now been made public, the inquiry still found no legal wrongdoing, according to *The Times*. According to *The Independent*, a separate inquiry by the Pentagon’s Office of the Inspector General (OIG) is being conducted at the behest of Senator Ted Kennedy (D.-Mass.). Although the program has thus far been found to be technically legal, several reports suggest that Defense Secretary Donald Rumsfeld and other Pentagon officials are considering changing Pentagon guidelines to address the concerns raised. Lawrence Di Rita, a senior advisor to Rumsfeld, told *The New York Times* in March 2006, “The big issue in our world is whether our doctrine and our policy are up to date. We owe more big thinking to the combatant commanders. What are the things that should be balanced when you look at information and communications issues?”

Whether policy changes will be made remains to be seen. Meanwhile, despite the investigations, the Lincoln Group appears to be continuing with its DoD contractual duties. *The Times* reported on May 23, 2006, “In interviews this week, several Pentagon officials said the Lincoln Group and other contractors were still involved in placing propaganda messages in Iraqi publications and on television.” Other recent news coverage has started to look more closely at the people in firm itself, rather than its activities abroad. A March 26, 2006 report in *The Washington Post* described the firm’s executives, who prefer the term “influence” over “propaganda” to describe their work. One of the heads of Lincoln Group, Paige Craig, is a former Marine intelligence specialist. The other is Christian Bailey, “a Briton with no experience in PR,” according to *The Independent*. Another senior executive is Andrew Garfield, a former British military and intelligence official who teaches regular courses in “psyops” at the Fort Bragg Army base, according to *The Post*. Garfield defended the firm’s activities to *The Post*, explaining that the slight deception over an article’s origins is necessary to get an unbiased audience of readers to listen to a message. If the articles were openly written by the U.S. government, Garfield contends that a reader “wouldn’t look at them objectively. You wouldn’t give them a fair hearing. . . . But the aim is not deceit.”

– PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

DaVinci, *continued from page 32*

Smith drew media attention with a code he embedded in his opinion, accentuating certain letters within his opinion with bold, italic font, the first nine of which spell out “smithy code.” The remaining letters form a code broken by a mathematical formula and which reveal an obscure quote from British naval history: “Jackie Fisher, who are you?”, according to *The (London) Times*.

This is the second time Random House, Brown and *The Da Vinci Code* have come under attack. Brown successfully defended the book in 2005 when Lewis Perdue brought a copyright infringement claim, alleging that Brown took the premise of Perdue’s book, *Daughter of God*. The court in *Brown v. Perdue*, 2005 U.S. Dist. LEXIS 15995, granted summary judgment for Brown, saying the reasonable person would not conclude that *The Da Vinci Code* was substantially similar to Perdue’s book. The court also said that the similarities Perdue asserted were unprotectable ideas, historical facts and general themes that were not original elements of *Daughter of God*.

The next legal challenge for the film may come in Korea, where the Christian Council of Korea (CCK) has filed an application for a provisional injunction against Sony to prevent the release of the movie in Korea. The CCK said the film was an “insult and defamation” of Jesus Christ and the Bible, the BBC reported.

Random House still faces lawsuits for allegations surrounding *A Million Little Pieces*, a non-fiction bestseller written by James Frey. Frey admitted in January that he had fictionalized some parts of the book, prompting disgruntled readers to file lawsuits across the country against Frey and Random House. See “Media Ethics News: Author of *A Million Little Pieces* Criticized for Embellishments” in the Winter 2006 edition of the *Silha Bulletin*.

– JESSICA MEYER
SILHA RESEARCH ASSISTANT

Endangered Journalists

Freelance Reporter Jill Carroll Released

On March 30, 2006, just as unaccountably as when they took her 82 days earlier, freelance journalist Jill Carroll's kidnappers released her. "They just came to me and said 'OK, we're letting you go now.' That's all," Carroll told the Associated Press. *Editor & Publisher* reported that without any explanation by her captors, Carroll was dropped off at an unidentified political party office.

Carroll, a stringer for *The Christian Science Monitor*, was traveling with an interpreter and a driver on Jan. 7, 2006, when they were ambushed. The driver escaped but Carroll and interpreter Allan Enwiyah were taken by unknown gunmen about 300 yards from the office of Adnan al-Dulaimi, a Sunni politician with whom Carroll had scheduled an interview. Al-Dulaimi never showed for the interview and after waiting for 20 minutes, Carroll left. The attack occurred shortly after Carroll left al-Dulaimi's office. Enwiyah's body later was found nearby. He had been shot twice in the head, *The Christian Science Monitor* reported.

Although there are still far more questions than answers for Carroll surrounding the incident, what matters most to her now is that she is free. "I finally feel like I am alive again. I feel so good," said Carroll, who received the Courage in Journalism Award from the International Woman's Media Foundation. "To be able to step outside anytime, to feel the sun directly on your face – to see the whole sky. These are luxuries that we don't appreciate every day," Carroll told *The Monitor*.

Carroll's abduction initially was kept very quiet at the request of *The Monitor*. Borzou Daragahi, a *Los Angeles Times* Baghdad correspondent, was one of the reporters who also urged U.S. news outlets not to immediately report on the abduction. The 48-hour media silence drew some initial criticism as a restriction on the press, but the blackout supporters now say the move may have helped bring Carroll safely home.

Daragahi said the delay allowed the media to portray Carroll as a serious journalist and cast her in a positive light, *Editor & Publisher* reported.

David Cook, *The Monitor's* Washington, D.C. bureau chief and lead spokesman for the paper about Carroll's kidnapping, does not give all the credit for Carroll's release to the blackout, but said it was a positive strategy. "We did it because it seemed like the prudent, careful thing to do," Cook told *Editor & Publisher*. "I'm glad she got out safely. Seeing how it turned out, I'm glad we were as cautious as we were."

On January 17, ten days after she was abducted, a tape of a weeping Carroll was broadcast on Al-Jazeera television. Carroll said her kidnappers would kill her unless all women detainees in Iraq were released within 72 hours. On January 26, the U.S. military agreed to release five Iraqi women detainees, while continuing to detain as many as six others, but the military said the release was unrelated to the captors' demands.

Carroll appeared in videos again on January 30 and February 9, asking viewers to give the captors whatever they wanted to help secure her release. Carroll said in the video that the captors had set a new deadline of February 26. Nothing else was heard from Carroll until her release on March 30.

The night before Carroll was released, her captors demanded that she make another video in praise of them but critical of the United States. Once out of Iraq, however, Carroll denounced that video. The views she expressed were not her own, but were words she was forced to say as a condition of her release, her father, Jim Carroll, told *The Christian Science Monitor*.

Some Americans have berated Carroll for the comments she made on the propaganda video. Bloggers and commentators called her unpatriotic, going so far as to call for a treason charge. Carroll has insisted she was forced to make the statements and that they were not her own views.

U.S. Senator John McCain (R-Ariz.), who was a prisoner of war in Vietnam, supported Carroll and urged Americans not to take the comments Carroll made as an indication of her own personal views. "This was a young woman who found herself in a terrible, terrible position. And we're glad she's home. We understand when you're held a captive in that kind of situation, that you do things under duress. And God bless her, and we're glad she's home," McCain, said on NBC's "Meet the Press."

After making the video, the captors dropped off Carroll at an office of the Iraqi Islamic Party. From there, she went to the party headquarters, gave an interview to Baghdad Television, and then was handed over to U.S. authorities.

The increased kidnappings and hostage situations in Iraq raises the question of whether or not to continue airing prisoner videos. Some argue that airing videos of the hostages in distress has played into the hands of the terrorists, whose aim it is to make Americans feel helpless and weak.

"Maybe it's time we refused to air a tape and, in effect, quit pandering (if unwittingly) to the terrorists," Jon Friedman wrote in an article for *MarketWatch* on Feb. 1, 2006. "Perhaps Americans living and working in danger zones around the world would be better off from now on."

But for Mary Beth Carroll, Jill Carroll's mother, the videos were an indication her daughter still was alive. "A video just released gives us hope that Jill is alive, but has also shaken us about her fate," Mary Beth Carroll told CNN on January 19.

Carroll's kidnapping also prompted calls for more to be done to protect the journalists covering the war in Iraq. At the time of Carroll's release, there were no other foreign journalists being held hostage, but two Iraqi journalists, who had been captured on Feb. 1, 2006, still were being detained.

"As journalists are being kidnapped, detained and killed, it becomes exceedingly hard for them to do their job in Iraq. And it is we, the general public, who lose from it."

– Ann Cooper,
Executive Director,
Committee to Protect
Journalists

Carroll, continued on page 35

“As journalists are being kidnapped, detained and killed, it becomes exceedingly hard for them to do their job in Iraq,” Ann Cooper, the executive director of the New York-based Committee to Protect Journalists, told the Associated Press. “[A]nd it is we, the general public, who lose from it.”

Foreign editors at major newspapers such as *The Boston Globe*, *The New York Times*, and *The Chicago Tribune*, told *Editor & Publisher* that they would not reduce coverage or change their approach to covering the war in Iraq following Carroll’s abduction.

But those editors did urge better protections and better safety measures when traveling and reporting in Iraq. Although their specific safety measures generally are kept secret, most major news organizations use armored cars to transport their reporters, followed by a second armored car. Freelance writers, like Carroll, are often in a more vulnerable position when out covering stories.

“We have opted for a high-profile security method,” James Smith, foreign editor at *The Globe* told *Editor & Publisher*. “We never go out without a follow car. That began about a year ago . . . There is no question that Jill’s kidnapping piles even more concern on the concern we have had for a year.”

Ethan Bronner, *The New York Time’s* deputy foreign editor, said the paper had reevaluated its safety measures since Carroll’s abduction, but that the paper was not altering its current security measures. “We have a very, very extensive security approach every time our correspondents go out,” Bronner said. “We make it a policy not to talk about it, but they are quite extensive.”

Since 2004, 41 journalists have been kidnapped in Iraq, according to the Committee to Protect Journalists (CPJ) Web site, available online at http://www.cpj.org/Briefings/Iraq/iraq_abducted.html. In all, 73 journalists have been killed since the fighting began in Iraq in March 2003. For details, see CPJ’s report, available online at http://www.cpj.org/Briefings/Iraq/Iraq_danger.html.

– JESSICA MEYER
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Student Press

Supreme Court Will Not Hear *Hosty* Case

In February 2006, the U.S. Supreme Court declined to hear the appeal of former college journalists who had been told they must submit their work to the dean for approval before going to press. In refusing to hear the case, *Hosty v. Carter*, 126 S.Ct. 1330 (2006), the Court allowed the Seventh U.S. Circuit Court of Appeals' *en banc* decision (412 F.3d 731 (7th Cir. 2005)) to stand, which gave college and university officials the power to censor student newspapers. (See "*Hosty* Ruling Could Result in Fewer Freedoms for University Newspapers, Students" article in the Summer 2005 issue of the *Silha Bulletin* for an indepth account of the Seventh Circuit's ruling).

The case was brought by three former student journalists from Governors State University. In 2000, one wrote an article critical of university administration, and a university official responded by ordering all future issues of the newspaper to be reviewed by an administrator before going to press. The Seventh Circuit ultimately held that the 1988 Supreme Court ruling in *Hazelwood v. Kuhlmeier* (484 U.S. 260), which granted high school administrators the authority to censor school newspapers if supported by "valid educational purposes," applied to college administrators as well.

In *Hosty*, the case turned on whether the newspaper was an established "public forum," meaning speech cannot be regulated, or a non-public forum, where regulation is allowed. The court concluded that, even assuming the Governors State student newspaper, *The Innovator*, was established by the Board as a designated public forum, the dean had no way of knowing whether or not *Hazelwood* applied to the collegiate press.

Reaction to the Supreme Court's refusal to hear the appeal was swift and strong. "The original *Hazelwood* decision in 1988 is regrettable enough," said Mead Loop, the Society of Professional Journalists (SPJ) vice president of campus chapter affairs. "Now the high court has missed an opportunity to keep a bad law narrowly defined."

The President of the SPJ, David Carlson, also derided the move. "Allowing college administrators to decide the content of college newspapers is not far different from allowing the White House to determine the content of *The Washington Post*," Carlson said. "It is preposterous."

The Student Press Law Center encouraged students in the Seventh Circuit, which includes Wisconsin, Illinois and Indiana, to push their schools to designate student media as "public forums" which remain protected from censorship by the First Amendment. Meanwhile the Society of Professional Journalists called for all colleges and universities to endorse the following statement:

"Student media are designated public forums and free from censorship and advance approval of content. Because content and funding are unrelated, student media are free to develop editorial policies and news coverage with the understanding that students and student organizations speak only for themselves. Administrators, faculty, staff or other agents shall not consider the student media's content when making decisions regarding the media's funding."

The executive director of the Student Press Law Center, Mark Goodman, said in a press release that he was disappointed in the Court's decision not to take the case but that his organization remained undeterred. "By refusing to take this case, the Supreme Court has postponed the legal conclusion for another day. But the Student Press Law Center stands ready to help college student journalists at any school in the country who find their right to publish freely under attack," Goodman said. "We will not hesitate to take others schools to court in defense of student press freedom." The press release is available online at <http://www.splc.org/newsflash.asp?id=1190>.

— ASHLEY EWALD
SILHA FELLOW

"Allowing college administrators to decide the content of college newspapers is not far different from allowing the White House to determine the content of *The Washington Post*. It is preposterous."

— David Carlson,
SPJ President

Silha Center Events

Seth Mnookin Speaks at Spring Ethics Forum

The concept of news media objectivity is a shifting one, Seth Mnookin, author of *Hard News: Twenty-One Brutal Months at The New York Times and How They Changed the American Media*, told the audience at the Silha Center's Spring Ethics Forum, held on May 1, 2006, and entitled "The Customer is Always Right? The Assault on Media Impartiality from the Empowered American Consumer."

The idea that the news media's role is one of "communicating an unvarnished truth" is under siege following the decline in family ownership of newspapers, according to Mnookin. Whereas only three or four U.S. newspapers remain family-owned, most U.S. newspapers are now controlled by publicly-owned corporations. These businesses are necessarily accountable to their stockholders, a fact which has changed the power dynamic at news organizations. Instead of editors and publishers making decisions based on the ideal of "putting out the single best, unbiased newspaper" they can, they now must bow to increasing demands for news that confirms readers' worldviews. The implication is that these shifting demands parallel a "growing sense of entitlement on the part of American consumers to get exactly what they want." Why this attitude extends to the news media remains unclear, but it helps to explain the success of news outlets like Fox News that focus on the alleged biases of mainstream media.

Another approach to appeal to more demanding readers is the one taken by Howell Raines, who was executive editor at *The New York Times* from the fall of 2001 to the spring of 2003, and whose tenure there is the subject of Mnookin's book. Raines' tactics to counter declining readership, Mnookin said, involved "finding crusades" for *Times* reporters to pursue, and giving his reporters – including Jayson Blair and Judith Miller – "free rein" to pursue those stories and write articles consistent with Raines' "bomb-throwing, rabble-rousing" approach he brought to the newsgathering pages from the editorial page he used to edit. The Blair scandal, in which the young *Times* reporter was caught having plagiarized or falsified portions of dozens of stories, was the "match that set off" Raines' downfall at *The Times*. Mnookin speculated, however, that had Blair's scandal not led to Raines' resignation, then Judith Miller's stormy career – including her factually

flawed reporting about alleged weapons of mass destruction, and her involvement in the Valerie Plame leak investigation – would have. (See "Developments in Media Ethics: Jayson Blair and *The New York Times*" in the Summer 2003 issue of the *Silha Bulletin*; and "Judith Miller Resigns from *The New York Times*" in the Fall 2005 issue of the *Silha Bulletin*.)

Mnookin argued that neither Raines' approach to news-gathering nor ideologically-driven news outlets like Fox News are desirable models for the American press. It is up to readers, he suggested, to encourage a return to the objective ideal, rejecting news that offers only easy-to-digest, belief-confirming information. He argued that it is time for readers to "take a step back" and ask "Does this article offend me because it's not telling me the truth? Or does it offend me because it's telling me something I didn't know before?"

Kate Parry, Reader's Representative at the (Minneapolis) *Star Tribune* responded to Mnookin's remarks. She described her role in dealing with readers' concerns in the age of easy and rapid e-mail communication. She confirmed Mnookin's suggestions that readers are more demanding these days, but said that e-mail facilitates positive feedback as well as negative. Parry also touched on the challenging editorial tasks of catering to the paper's main audience while also seeking to attract younger readers. Following Mnookin's and Parry's speeches, the Forum was opened up for audience discussion, which ranged from concerns about declining newspaper readership, to the role of blogs in newsgathering, to whether objectivity is a feasible ideal. Mnookin contended that every journalist brings his or her biases to a news article, so purely 'objective' news reporting might be more mythical than practical. However, that does not undermine the importance or value of striving for objectivity.

More than 100 students, faculty, and members of the public attended the forum, which was co-sponsored by the Society of Professional Journalists as part of the observance of Ethics in Journalism Week. The Silha Center for the Study of Media Ethics and Law was established in 1984 with a generous endowment from the late Otto Silha and his wife, Helen.

— PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Mnookin argued that neither former *New York Times* editor Raines' approach to news-gathering nor ideologically-driven news outlets like Fox News are desirable models for the American press.

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Geoffrey Stone is the Harry Kalven, Jr. Distinguished Service Professor of Law at the University of Chicago. His most recent book, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (2004) received the Robert F. Kennedy Book Award for 2005, and the *Los Angeles Times* Book Prize for 2004 as the Best Book in History. It will be available for purchase at the book signing immediately following the lecture.

Geoffrey Stone

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