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Although the press is arguably one of the most transparent of contemporary institutions, a recent spate of ethics scandals has prompted criticism – as well as introspection – both inside and outside the industry. Increasing government secrecy coupled with greater economic and competitive pressures have challenged journalists seeking to uphold traditional values of accuracy, balance and objectivity. Are the media expected to meet impossible standards, or are they in the midst of a genuine ethical crisis? This issue of the Silha *Bulletin* features a variety of articles examining these and other dilemmas facing news organizations.

Panel Publishes Findings Following Review of CBS "60 Minutes" Broadcast

Four long-time, senior staffers at CBS News were either fired or asked to resign after an independent panel assigned to investigate the "60 Minutes Wednesday" Bush Guard Service segment issued its 224-page investigative report in January.

In September 2004, CBS News appointed Attorney General Dick Thornburgh and retired Associated Press Chief Louis Boccardi to conduct an investigation into how "60 Minutes Wednesday" prepared, and aired, the flawed story on President Bush's military record.

The "60 Minutes Wednesday" report, researched primarily by producer Mary Mapes, detailed purported National Guard documents showing Bush had dismissed an order to undergo a physical in 1972, did not fulfill his drill requirements while serving in the Texas Air National Guard, and was given other preferential treatment. Mapes had reportedly done much of the story's research over the last few years and CBS News anchor Dan Rather read the script.

Immediately following the broadcast, questions of authenticity began circulating about the documents, allegedly written by Bush's late squadron leader, Lt. Col. Jerry B. Killian. Theories that the documents were created on a word processor and not a typewriter, as typically would have been used in the 1970's when the documents, if genuine, were created, began to circulate among Webbloggers. However, Killian's former secretary, Marian Carr Knox, told CBS that although she did not believe the documents were original, the information contained in them was accurate.

CBS identified Bill Burkett, a former National Guard Officer and long-time Bush critic, as the person who provided its news staff with the documents. According to the *Los Angeles Times*, Burkett claimed he had obtained the documents from another former Guard member.

Rather defended the authenticity of the documents for 12 days (including statements and further interviews issued September 9, September 10, September 13, and September 18, known as the "Aftermath" in the report) after the "60 Minutes Wednesday" story aired, until suspicions surrounding the story forced CBS and their top anchor into an on-air apology for a "mistake in judgment."

"[A]mid increasing questions about the authenticity of documents used in support of a '60 Minutes Wednesday' story about President Bush's time in the Texas Air National Guard, CBS News vowed to re-examine the documents in question – and their source – vigorously. . . . Now, after extensive additional interviews, I no longer have the confidence in these documents that would allow us to continue vouching for them journalistically. . . . But we did use the documents. We made a mistake in judgment, and for that I am sorry," Rather said in a statement on the CBS News Web site.

During the ensuing investigation, Thornburgh and Boccardi spoke with more than 66 people, including 32 CBS News staff members, as well as with handwriting experts, former Texas Air National Guardsmen and others. The panel's report outlined errors that took place during the preparation of the September 8 broadcast, including the airing of three unauthenticated documents, as well as the determination of those affiliated with the story in the aftermath of the segment's broadcast to stand by their claim that the documents were genuine. The report concluded that the story was "crashed" (rushed to be put on the air) in order to beat potential competition.

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Mapes, an Emmy Award-winning producer, had been with CBS News since 1989 and joined “60 Minutes Wednesday” in 1999. She had recently broken the story on the Abu Ghraib prison abuses and interviewed a woman who was the alleged illegitimate daughter of Senator Strom Thurmond and a black servant. The panel concluded that Mapes was one of the most highly regarded producers at “60 Minutes Wednesday” and thus her colleagues did not scrutinize her work as closely as they may have with stories produced by others. The report found that her reporting was faulty, her sources were unreliable and she did not put the story through the proper vetting procedures (a thorough examination of sources, review of facts with CBS management as well as with Dan Rather, and a review of the accuracy in scripting, together with supplementing the story with appropriate graphics and visuals).

The panel noted it had set out to verify the authenticity of the documents, but, during its investigation, found “fundamental deficiencies relating to the reporting and production of the September 8 segment and the statements and news reports during the Aftermath. These problems were caused primarily by a myopic zeal to be the first news organization to broadcast what was believed to be a news story about President Bush’s TexANG service, and the rigid and blind defense of the Segment after it aired despite numerous indications of its shortcomings.” The report stated CBS failed to clearly authenticate the documents as well as verify sources within the story.

The report recognized CBS’s commitment to “the highest quality and unimpeachable integrity” and said that this goal was seen by CBS as attainable by employees who follow the core standards of fairness and accuracy.

The report included suggestions CBS should implement to remedy the situation, including changes in staffing, and the incorporation of further standard procedures to ensure greater fairness and accuracy in the reporting of stories. It also included a section on ways that CBS could have better handled the “aftermath” by admitting their inaccuracies immediately and promising further verification of their story.

As a result of the recommendations, the following people were fired: Mary Mapes; Josh Howard, Executive Producer of “60 Minutes Wednesday;” Mary Murphy, Senior Broadcast Producer; and Betsy West, Senior Vice President, “Prime Time,” who had direct supervisory responsibility for the complete “60 Minutes Wednesday” broadcast, were relieved of their duties at “60 Minutes Wednesday” and asked to resign from CBS News. Esther Kartiganer, Senior Producer in charge of reading scripts and unedited transcripts to determine whether an interview segment was used in context, was relieved of her duties at “60 Minutes Wednesday” but offered another assignment at CBS News. Yvonne Miller, the Associate Producer assigned to Mapes six days before the story aired, was told she would remain in her position on the news program. Dan Rather, anchor of “CBS Evening News” and “60 Minutes

Wednesday,” had already voluntarily set a date to resign from the “CBS Evening News” anchor position in March 2005.

Andrew Heyward, CBS News President, who had warned West and Howard before the broadcast and had issued orders to further investigate sources and to authenticate the documents afterward, remained in his position as President. Jeff Fager, Executive Producer of “60 Minutes” and “60 Minutes Wednesday,” was asked to stay “at least until the end of the season.” Linda Mason was appointed to the newly-created position of Senior Vice President of Standards and Special Projects.

“By doing what needed to be done, as painful as some of these steps are, we hope to have moved decisively to set the record straight, and to turn this crisis into an opportunity to make CBS News stronger than it has ever been,” Leslie Moonves, Chairman of CBS and Co-President of Viacom, said in a statement after the report was issued. Moonves’ entire response to the panel’s findings is available online at http://www.image.cbsnews.com/htdocs/pdf/complete_report/cbs_response.pdf.

In her own statement, Mapes said she was shocked by Moonves’ “vitriolic scape-goating” in his response.

“I am very concerned that his actions are motivated by corporate and political considerations – ratings rather than journalism.” Mapes said. Mapes’ entire statement is available online at http://www.poynter.org/resource/public/20050110_182326_18354.pdf.

The panel’s results came just months after Dan Rather announced he would end his nearly 24-year post as anchor of “CBS Evening News” on March 9, 2005, the anniversary of the night he succeeded Walter Cronkite in that position.

Rather’s departure had reportedly been in the works for months. Rather told *The Washington Post* he had made his departure announcement ahead of the findings of the “60 Minutes Wednesday” investigation in order to separate any consequences from the pending report.

“After examining the report and thinking about its implications, we believe any further action [toward Rather] would not be appropriate,” Moonves said in his statement.

Rather will continue his 43-year career working as a correspondent with CBS after he steps down in March.

One notable aspect of the CBS/Bush story is the role of Web bloggers, who were among the first to question the authenticity of the documents Mapes relied upon in the report. Scott Johnson, co-founder of Powerlineblog.com, said in a telephone interview that his site received numerous messages from former military personnel, as well as former employees of IBM Select Typewriter, all of whom claimed that the memos were not genuine. Another blogger, Charles Johnson, of LittleGreenFootballs.com, said in a telephone interview that he typed the document into MSWord and found that line breaks inserted by a word-processor differ from the line-breaks inserted by typewriters.

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—Leslie Moonves,
Chairman of CBS
and Co-president
of Viacom

Problems in Media Ethics

Commentator's Promotion of NCLB Leads to Questions of Ethics

On January 7, 2005, *USA TODAY* revealed that radio host, commentator and pundit Armstrong Williams had signed a contract with public relations firm Ketchum Inc. agreeing to air spots and to conduct interviews that promoted President George W. Bush's No Child Left Behind Act (NCLB), 20 USCS § 6301 *et seq.* In return, Williams received \$240,000. Although Williams now says he recognizes that his being party to the contract was a conflict of interest, and he has apologized for his actions, he has also said that such contracts are not unusual.

Williams is an African-American columnist who is characterized in the biography posted on his Web site at www.armstrongwilliams.com as "a pugnacious, provocative and principled voice for conservatives and Christian values in America's public debates." Williams writes a column that was distributed by the Chicago Tribune Media and carried by newspapers such as the *New York Amsterdam News*, *Washington Times*, *Detroit Free Press*, the *Los Angeles Times*. In 2003, he launched The Right Side Production, which produces, syndicates and distributes his television program "The Right Side with Armstrong Williams." The program is carried by Sky Angel Satellite Network, The Liberty Channel and other independent and cable outlets around the country. He also has a daily radio program that is broadcast nationally.

Williams also has a monthly primetime television special, "On Point with Armstrong Williams" airing on cable network TV One. He has written three books, *Beyond Blame*, *Letters to a Young Victim: Hope and Healing in America's Inner Cities*, and another slated to be published in early 2005. He is also CEO and co-founder of the Graham Williams Group, an international public relations and media firm based in Washington, D.C. According to news Web site "The Washington Dispatch," the Graham Williams Group was founded by Williams and Stedman Graham, Oprah Winfrey's longtime companion. See "Political Commentator Paid for by the White House" available online at <http://www.washingtondispatch.com/spectrum/archives/000759.html>.

Ketchum Inc., described as "one of the world's leading public relations agencies" on its Web site, available online at www.ketchum.com, initiated the contract with Williams, as part of a \$1 million contract with the Department of Education (DoE). That contract, obtained by *USA TODAY* through a Freedom of Information Act request, is dated May 14, 2003 and can be accessed by going to *USA TODAY's* article, "Media distributor severs ties with commentator" available online at http://www.usatoday.com/news/washington/2005-01-09-williams_x.htm and clicking on "Williams contract" in the body of story.

The contract stated that the DoE is "interested in exploring communications strategies for educating the African-American community with messages about . . . NCLB." Reportedly, Williams' program was selected as the best vehicle, because, as the contract read, "Whereas others just report the news, 'The Right Side' goes one step further, providing compelling insights into the political social issues that Americans care about most, with a strong emphasis placed on moral striving and rededication to the family." According to the terms of the contract, Ketchum

would "arrange for production" of two television and two radio ads that would run on "The Right Side" for six months. The ads were to include Williams and Education Secretary Roderick R. Paige, and would focus on NCLB. In addition, Williams was to "regularly comment on NCLB during the course of his broadcasts" and he should "utilize his . . . relationship with American's Black Forum, where he appears as a guest commentator, to encourage the producers to periodically address the [NCLB]."

Williams told BlackAmericaWeb, "No one can ever pay me for what I believe in. In fact, when we cut the commercial reels for these ads, Ketchum called us back to tell us there were problems with the contract. It appeared as though it would not go forward . . . I said, 'It doesn't matter; I believe in it.' I was already advocating [NCLB] before [Ketchum] ever approached us, and so we'll do it for free." But the problems with the contract were resolved, and Williams did receive payment according to the contract.

The same day *USA TODAY* broke the story on Williams, Tribune Media Services (TMS) terminated its business relationship with him. The company issued a statement that read in part, "The fact that Mr. Williams failed to notify TMS of his receipt (through the Ketchum public relations agency) of payments from the DOE is a violation of provisions in his syndication agreement with TMS. The agreement requires him to notify TMS when a possible or potential conflict of interest arises . . . [A]ccepting compensation in any form from an entity that serves as a subject of his weekly newspaper columns creates, at the very least, the appearance of a conflict of interest. Under these circumstances, readers may well ask themselves if the views expressed in his columns are his own, or whether they have been purchased by a third party."

Other media organizations dropped Williams as well, including the syndicated television program "America's Black Forum," and *The State*, a Columbia, S.C. newspaper. Edie Emery, a spokeswoman for CNN, which often used Williams to offer the conservative view of an issue, told the *Los Angeles Times* that Williams should have revealed his contract with the DoE. "We will seriously consider this before booking him again," she said.

The main ethical question seems to turn on whether Williams is a journalist, and if so, has he violated journalistic ethics by failing to disclose his relationship with the government? In an online chat session with washingpost.com, Williams wrote, "I'm a pundit and a commentator. A pundit or commentator are one and the same. They are not expected to be objective. They're not expected to represent both sides of a story. They're not even expected to be balanced." Williams continued, "I'm . . . not a journalist. Yes, my credibility has been tainted; however, this is the first and only time that I've ever advocated a position where a government agency was advertising that position on my syndicated show. . . . The ethical line that I crossed was not disclosing to the media that No Child Left Behind was an advertiser on my syndicated television show. . . . This can never happen again."

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—Armstrong Williams

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Williams, continued from page 3

Williams has received criticism from many quarters. Bob Steele, The Nelson Poynter Scholar for Journalism at the Poynter Institute, told Cox News Service, "It is the role of journalists – and to some degree Armstrong Williams falls within that category – to hold the government and government officials accountable. We should provide meaningful, substantive, fair, accurate – and here's the key – independent – reporting on government policies and activities."

Bryan Monroe, who is both the Vice President-Print with the National Association of Black Journalists and the vice president of news with Knight Ridder told BlackAmericaWeb, "I thought we in the media were supposed to be watchdogs, not lapdogs. I thought we had an administration headed by a president who took an oath to uphold the First Amendment, not try to rent it."

Williams responded to Monroe's statement by saying he is a commentator, not a journalist. He is, however, a member of the Public Relations Society of America (PRSA). Judith T. Phair, the president and chief executive of the PRSA for 2005, condemned Williams' decision to promote the NCLB law "without revealing that his comments were paid for by a public relations agency under contract to the government. The relationship should have been disclosed up front, no question... As public relations professionals, we are disheartened by this type of tactic. It does not describe the true practice of 'public relations.' PRSA strongly objects to any paid endorsement that is not fully disclosed as such as is presented as objective news coverage. Such practices are clearly contrary to the PRSA Member Code of Ethics..." Phair's statement is available online at http://www.prsa.org/_News/leaders/disclosure0111.asp.

On January 13, Paige issued a statement that read, "Hiring outside experts to help communicate a complex issue is standard practice in all sectors of our society..." Paige continued, "The funds for the Graham Williams Group's services went exclusively toward the production and airtime of the advertisement in which I described the [NCLB] law and encouraged viewers and listeners to call the Department's toll-free information line. The funds covered those costs alone and nothing more. All of this has been reviewed and is legal. However, I am sorry that there are perceptions and allegations of ethical lapses. This is disappointing to me and to this Department..." Paige concluded his statement by saying that he has also asked for an expedited Inspector General investigation "in order to clear up any remaining aspects of this issue as soon as possible..."

On January 13, Ray Kotcher, Ketchum's CEO, wrote in *PRWeek*, "Conducting public outreach on major federal initiatives is not new and, in fact, serves as a fundamental basis for communicating urgent national priorities... The great shame in this event is not only the unfair collective black eye these programs endure, but the potential for curtailing these very vital outreach programs in the future." Kotcher concluded by saying, "For our part, Ketchum has begun a thorough review of all existing federal contracts and is retaining an outside firm to conduct a complete process that will surely yield recommendations to improve transparency as it relates to government contracts." Kotcher's article is available online at http://www.prweek.com/news/news_story_free.cfm?ID=232353&site=3.

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—Bryan Monroe
Vice President-
Print, National
Association of
Black Journalists
and Vice President
of News with
Knight Ridder

On January 20, *The New York Times* reported that Ketchum released a statement apologizing for the incident. "We should have recognized the potential issues in working with a communications firm operated by a commentator," the statement read. "This work did not comply with the guidelines of our agency and our industry. Under those guidelines, it is clear that we should have encouraged greater disclosure. There was a lapse of judgment in this situation. We regret that this has occurred."

The Washington Post reported that Rep. George Miller (D-Calif.), the ranking Democrat on the House education committee, said that the Williams contract "is propaganda, it's unethical; it's dangerous and it's illegal," and said such activity is "worthy of *Pravda*." According to *USA TODAY*, Williams' contract may be illegal under laws such as the Anti-Lobbying Act, 18 USCS § 1913 (2004), the Anti-Deficiency Act 31 USCS § 1341 *et seq.* (2004) and provisions routinely added to appropriations bills that forbid the use of federal funds for "publicity or propaganda purposes within the United States." Committee Chairman John A. Boehner (R-Ohio) agreed to join Miller in requesting an investigation into the Williams contract by the inspector general.

The New York Times reported that House Minority Leader Nancy Pelosi (D-Calif.) and other Democrats joined Miller in writing a letter to President Bush suggesting "a deliberate pattern of behavior by your administration to deceive the public and the media in an effort to further your policy objectives" and urged the President to disclose "all past and ongoing efforts to engage in covert propaganda."

On January 13, FCC commissioner Jonathan Adelstein told *USA TODAY* that the agency has received "about a dozen" complaints about Williams. Adelstein plans to ask the FCC to investigate whether Williams broke any federal telecommunication laws in accepting the money from the DoE.

National Journal's CongressDaily reported on January 11 that Senate Minority Leader Harry Reid (D-Nev.), with Sens. Frank Lautenberg (D-N.J.) and Edward Kennedy (D-Mass.) have asked the General Accounting Office (GAO) to investigate DoE's contract with Williams. Lautenberg is preparing "anti-propaganda" legislation that will, if passed, prohibit federal agencies from engaging in "questionable tactics."

The Associated Press reported on January 8 that the Bush administration has also promoted the NCLB with a video that appears to be a news story but fails to make it clear that the reporter appearing in the video was paid with taxpayer money. The Bush administration also developed a point system where newspapers are awarded points for publishing stories stating that Bush and the Republican Party are strong on education. The Associated Press reported that the GAO has launched an investigation into these practices.

This is not the only time the Bush administration has engaged promoting its policies through the news media. The GAO has conducted two investigations on the Bush administration involving unauthorized federal propaganda. One dealt with the use of prepackaged news stories by the Office of National Drug Control Policy (ONDCP) and the other with the Department of Health and Human Services. In both cases, videos were created to educate

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Problems in Media Ethics

Sinclair Broadcast Group Wrestles with Decision to Air Anti-Kerry Film

Sinclair Broadcast Group aired an hour-long program on October 29, 2004 that evolved out of its original plan to air the controversial anti-John F. Kerry documentary, “Stolen Honor: Wounds That Never Heal.” The documentary is critical of the senator’s 1971 testimony before Congress about the Vietnam war and alleges that Kerry’s testimony demeaned U.S. troops fighting in Vietnam and motivated captors of American POWs to extend their times in captivity.

According to the *Portland (Maine) Press Herald*, “Stolen Honor” was made by Carlton Sherwood, identified by *The Washington Post* as a Vietnam veteran and a former journalist who has served as an aide to Homeland Security Secretary Tom Ridge. A group of Pennsylvania veterans had funded the film.

Following appeals to the Federal Communications Commission, accusations of partisan bias, plummeting stock prices, and the firing of Sinclair’s Washington bureau chief, Sinclair announced on October 20 that a revised program, now entitled “A POW Story: Politics, Pressure and the Media” would air on October 29. The revised program was hosted by WBFF’s (Baltimore) anchor Jeff Barnd, utilizing selected footage from “Stolen Honor” together with other political documentaries in a program examining allegations of media bias.

But before Sinclair announced that the program would be broadcast in a revised form, Reps. John D. Dingell (D-Mich.) and Edward J. Markey (D-Mass.) wrote a letter to the FCC stating, “Airing programming such as ‘Stolen Honor’ just days before the Election Day is to us, and many of our colleagues in Congress, inconsistent with the public interest that broadcasters are licensed to serve.” A copy of their letter is available online at <http://www.rcfp.org/news/2004/1026federa.html>.

Democratic senators and representatives said the broadcast could potentially violate broadcast regulations requiring equal time for political candidates. The Democratic National Committee expressed its concern to the Federal Election Commission. Both stated that the broadcast would have been “an improper in-kind contribution to the Bush re-election effort,” according to the *Los Angeles Times*.

The day before “Stolen Honor” film was to have aired, FCC Chairman Michael Powell said that the Commission would not block Sinclair’s effort. “There is no rule that I’m aware of that would allow the Commission – nor would it be prudent – to prevent the airing of a program. And the only rule that I’ve heard in any way possibly implicated are equal time, which merely means that the licensee would have to offer the other side an opportunity to respond. And, at least according to press reports, that opportunity has been provided,” Powell stated.

Senator Kerry’s campaign reportedly had demanded equal time on Sinclair Stations; however, when given an opportunity, the campaign had turned down a request to take part in the hour-long special.

“If Kerry came on our program, he would have an opportunity to make a statement that could be very statesmanlike and sway a lot of undecided people,” Mark Hyman, Sinclair’s on-air editorialist and vice president of corporate relations, told *Broadcasting & Cable*.

Joe DeFeo, Sinclair’s vice president for news, told *The Washington Post* he was “disappointed” with the Kerry campaign’s refusal to take part in the program. DeFeo said Sinclair’s staff had done its best to include Kerry’s side of the debate and that there had been some “inaccuracies out there” about the broadcast, “and if we’re being criticized for those, that’s unfair. . . . This is meant to be as much information as we can get out there on the candidates before the election.”

Sinclair’s stock prices plunged more than 15 percent after news of the initial plans to air “Stolen Honor,” rebounding only after the company revised its plans to air the program. On October 21, *The New York Times* reported that some of Sinclair’s shareholders planned to sue the broadcaster, alleging insider trading and damaging the value of shares by pursuing a political agenda.

Not only did shareholders suffer financial losses, but Sinclair’s Washington D.C. bureau chief Jon Leiberman was “escorted out of the building” and out of a job after protesting the company’s plans to force its stations to air the original hour-long film. Leiberman said he was fired by Joseph DeFeo, on Monday, October 18, without severance or benefits, according to the Associated Press.

“I was told I violated company policy by divulging information from a staff meeting to *The (Baltimore) Sun* in this morning’s edition [October 18],” Leiberman told the Associated Press. “They’re using the news to drive their political agenda. I don’t think it serves the public trust.”

Sinclair issued a statement that called Leiberman a “disgruntled employee,” according to *The Washington Post*.

“Everyone is entitled to their personal opinion, including Jon Leiberman. We are disappointed that Jon’s political views caused him to speak to the press about company business,” Sinclair Vice President Mark Hyman told *The Washington Post*.

Other problems arose from Sinclair’s announcement to air “Stolen Honor” in its original form. *The Legal Intelligencer* reported on October 19 that Kenneth J. Campbell, one of the veterans interviewed for the film, filed suit in Philadelphia Common Pleas Court, alleging that the makers of the film defamed him by using editing tricks and misleading voiceover narration to distort Campbell’s comments from another film, “Winter Soldier.”

Although Sherwood claims that Campbell was neither identified nor mentioned by name in “Stolen Honor,” Campbell alleges that clips from “Winter Soldier” were manipulated for “Stolen Honor” and placed him and other veterans in a false light. Attorneys for Campbell told *The Legal Intelligencer* that the makers of “Stolen Honor” caused their client “extreme mental suffering and irreparable harm and cast a permanent, destructive shadow over his personal and professional reputation” and exposed him to “public hatred, contempt, and/or ridicule.” Campbell is seeking \$100,000 as well as punitive damages.

Another lawsuit against Sinclair was filed in federal district court in Manhattan by George Butler, who alleges that Sinclair violated his copyright of material covering much of Kerry’s life, according to the Associated Press. Butler has taken photographs of Kerry since 1969.

“Airing programming such as ‘Stolen Honor’ just days before the Election Day is inconsistent with the public interest that broadcasters are licensed to serve.”

—Representatives
John D. Dingell
and
Edward J. Markey

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Problems in Media Ethics

Boston Herald Apologizes After Running Graphic Photo of Student

Graphic coverage of a student journalist's death during a Red Sox playoff victory prompted an apology by *The Boston Herald* on October 22, 2004. *The Herald* ran two bloody photos of an Emerson College journalism student who was killed by police during the celebration following the Red Sox' pennant victory over the New York Yankees in game seven of the American League Championship Series. Victoria Snelgrove, 21, was fatally shot in the eye by police. The police were using pepper balls in an effort to subdue fans who were throwing bottles and bricks, but hit Snelgrove, a bystander. The photographs, one in color, and one in black and white, depicted Snelgrove lying on the sidewalk, bleeding from her right eye, nose and mouth, according to *Boston Magazine*. The front page color photograph was placed between the headlines "Go Sox!" and "Triumph and Tragedy."

The photographs caused such intense reader reaction that *The Herald* issued an apology the next day. "Yesterday, [*The Herald*] ran two very graphic photos that angered and upset many in our community. Our aim was to illustrate this terrible tragedy as comprehensively as possible . . . In retrospect, the images of this unusually ugly incident were too graphic," wrote *The Herald's* Editorial Director Kenneth A. Chandler.

"The accurate reporting in print of how Ms. Snelgrove died and the less graphic photos of the huge and unruly crowd were enough to convey the devastating truth of what happened. I only hope that a friend or relative prevented the Snelgroves from reading your newspaper today," David Procopio, spokesman for the Suffolk County

District Attorney's Office, told *The Boston Herald*.

Snelgrove's journalism professor said the tragedy forced her to explain to her students the ethical difficulty faced by a reporter personally impacted by a story he or she is expected to cover. Janet Kolozdy, assistant professor of journalism at Emerson College, wrote in an editorial for *The Christian Science Monitor* that "as her adviser and their teacher, I was left trying to explain the inexplicable: graphic sensationalism, exploitative sentimentality, and callous intrusiveness. The students wanted to know if this was the norm or an aberration. I knew it was a little of both."

Kolozdy continued, "*The Boston Herald's* publication of lurid photos of [Victoria] sprawled bleeding on the pavement again pitted the journalist in me against the human being. My first reaction to those photos was to grab up every paper I could find and destroy them. That's not necessarily what a First Amendment advocate should be thinking, but definitely something that a regular person would feel. And while *The Herald* crossed the line of sensibility, some television stations 'had their toes on it,' as one colleague put it, with some of the footage they used."

Steve Rendall, senior analyst at the media watch group Fairness and Accuracy in Reporting, told *The Boston Herald* that photos are part of responsible journalism. "I do have concern and sympathy for the family. But one of the most important tasks of journalism is to go to those in power and hold their feet to the fire, and sometimes that entails showing the public tragedy or ugliness."

—KRISTINE SMITH

SILHA RESEARCH ASSISTANT

Our aim was to illustrate this terrible tragedy as comprehensively as possible. In retrospect, the images of this unusually ugly incident were too graphic."

—Kenneth A. Chandler,
Editorial Director,
The Boston Herald

Memogate, continued from page 2

"Mainstream media has no idea what they're up against because there are tens of thousands of bloggers out there. . . . It's like a gale-force wind, as evidenced by the fact that CBS said they spent five or six months working on this story, and it took bloggers about 12 hours to prove it false," Mike Krempasky told the *Pittsburgh Post Gazette*. Krempasky is one of the founders of the conservative blogs Redstate.org and Rathergate.com. He said that the role bloggers played in finding the gaps in the CBS/Bush story may force reporters to take more time in crafting stories when they know that bloggers will be working to find factual errors in their stories.

Even so, the origin of the documents is still in question. "It is noteworthy the panel did not conclude that these documents are false," Mapes said in an interview she released with her attorney after publication of the report. "Indeed, in the end, all that the panel did conclude was that there were many red flags that counseled against going to air quickly. I never had control of the timing of any airing of a 60 Minutes segment; that has always been a decision made by my superiors. Contrary to the conclusions of the panel, I vetted all aspects of the story with my editors."

Geneva Overholser, a professor at the University of Missouri School of Journalism's Washington bureau, said CBS waited too long to admit its inaccuracy.

"They sounded so blustery and arrogant – 'we're 100 percent sure.' We should never say that. It's not good journalistic instinct," she told *The Washington Post*. "We're always supposed to doubt. There's a funny old saying: 'If your mother says she loves you, check it out.' They went in the absolute opposite direction."

Jill Geisler, of the Poynter Institute, wrote in her "Leading Lines" column that the report raised the question of the responsibility of the correspondent and questioned the amount of credibility CBS vested in its award-winning producer. She said this situation should serve as a reminder for news organizations to hold all employees equally accountable and to make questioning become such a routine that it becomes part of a news room's culture.

Thornburgh and Boccardi concluded their report by writing, "The panel expresses the earnest hope, however, that, the failures identified in this Report will not induce timidity at CBS News or chill its investigative reporting. Done accurately and fairly, investigative reporting serves a critical role in a free society. Done inaccurately, it can cause great harm. The recommendations made by the Panel at the end of this Report will, we hope and expect, strengthen '60 Minutes Wednesday' and CBS News' capacity to fulfill this role." The Report of the Independent Review Panel is available online at http://www.cbsnews.com/htdocs/pdf/complete_report/CBS_Report.pdf.

—KRISTINE SMITH

SILHA RESEARCH ASSISTANT

Problems in Media Ethics

Reporter Prompts Soldier to Question Rumsfeld, Raising Ethical Concerns

On Dec. 8, 2004, at a town hall meeting for American soldiers in Kuwait, Spc. Thomas Wilson asked Secretary of Defense Donald Rumsfeld why he and others in the Tennessee National Guard's 278th Regimental Combat Team "had to dig through landfills to find scrap metal to up-armor vehicles." For a moment, the soldiers in the meeting were silent; then applause broke out before Rumsfeld could answer the question. After the crowd quieted down, Rumsfeld responded by saying, in part, "You go to war with the Army you have, not the one you might want or the one you might wish to have at a later time." He added, "You can have all the armor in the world on a tank, [and] it can [still] be blown up."

The exchange was televised widely and prompted debate on adequacy of the preparation and equipping of soldiers, especially those in the National Guard, in Iraq. The story was first reported by Edward Lee Pitts, a reporter for the *Chattanooga Times Free Press*, who claimed that he had encouraged Wilson to ask the question. Pitts, who is embedded with the 278th Regimental Combat Team, had been reporting on the personal lives of National Guard soldiers and had been trying to break a story about the lack of armor for the 278th. When Pitts learned about the town hall meeting between soon-to-be deployed soldiers in Kuwait and Rumsfeld, he thought it would be his chance to ask Rumsfeld directly.

Instead, Pitts discovered that although the media would be allowed to cover the meeting, only soldiers would be allowed to ask questions. Pitts spoke with two soldiers who escorted him to the town hall meeting, one of whom was Wilson. In an e-mail to *Times Free Press* staffers on December 8, Pitts explained that he and the two soldiers who were escorting him had "worked on questions to ask Rumsfeld about the appalling lack of armor their vehicles going into combat have." After arriving at the meeting, Pitts asked the Sergeant in charge of the microphone to make sure the two soldiers he spoke with would get a chance to ask Rumsfeld questions. Pitts' e-mail explained that he talked to the soldiers and urged them to ask Rumsfeld about armor because Pitts "believe[s] lives are at stake with so many soldiers going across the border riding with scrap metal as protection."

Almost immediately, some cried foul, claiming that Pitts had abandoned his role as a neutral reporter. L. Brent Bozell, president of the Media Research Center, a conservative watchdog group, told the *Chicago Tribune* on December 10 that what Pitts did "was sneaky, it was slimy, and he should be fired for it."

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told *The San Francisco Chronicle* that

Pitts appeared to have violated the ground rules of the town meeting by having Wilson ask a question in order to provide him with a story. "I don't like it," Kirtley said. "Not because they're not good questions, but because we have to play by the rules."

Bob Steele, an ethicist with the Poynter Institute, took a different view of Pitts' actions. "Pitts used some enterprise in how he went about getting that question on the table," Steele told the *Times Free Press* on December 10. "From an ethical standpoint, he certainly needed to be honest with the soldiers about what he was doing . . . My impression is that is what he did."

Tom Griscom, the publisher and executive editor of the *Times Free Press*, stated that Pitts was only pursuing a story and had done nothing wrong. "If he couldn't ask Rumsfeld the question, then clearly he said to the soldiers, 'This is something you should talk about.' But they decided to ask the question." Griscom did say that it was a mistake to not reveal Pitts' role in the story when it was first published, but otherwise stood by his reporter's actions. In a column for the *Los Angeles Times* on December 11, Tim Rutten agreed, saying, "Pitts should have told his paper's readers that he knew of the question in advance."

Dispelling rumors that he had been duped into asking the question, Wilson made it clear that he was acting on his own accord, saying that he thought it was part of his duty as a soldier to ask Rumsfeld about armor. After the town hall meeting, he told a reporter that he was not trying to abandon his duty as a soldier, saying, "I'm a soldier and I'll do this on a bicycle if I have to, but we need help."

In his first public interview since the town hall meeting in Kuwait, Wilson insisted that the decision to ask the question was his alone. Wilson told *Time* magazine in a story published December 27 that although Pitts had asked him and the other soldier to ask "intelligent questions," it was ultimately his question. In fact, Wilson said that when he told Pitts the question he planned to ask, Pitts said that he should find "a less brash way of asking the question." Wilson said he did not intend to put Rumsfeld in a bad position, but added that "[i]f this is my fifteen minutes of fame, I hope it saves a life."

After the town hall meeting, President George Bush acknowledged that the need for armor in Iraq was a real one. In a press event at the Oval Office on December 9, Bush said, "The concerns expressed are being addressed, and that is, we expect our troops to have the best possible equipment. And if I were a soldier overseas, wanting to defend my country, I'd want to ask the secretary of defense the same question."

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

"I don't like it. Not because they're not good questions, but because we have to play by the rules."

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

Problems in Media Ethics

San Francisco Chronicle Reveals Grand Jury Testimony in BALCO Scandal

The *San Francisco Chronicle's* reporting on secret grand jury testimony by baseball stars Jason Giambi and Barry Bonds in the case *United States v. Victor Conte*, CR-04-0044, better known as the BALCO steroids scandal, has prompted U.S. Attorney Kevin V. Ryan to formally request that the Department of Justice (DoJ) investigate the source of the leaks. The grand jury is investigating the alleged illegal distribution of steroids by the Bay Area Laboratory Co-Operative (BALCO), the laboratory at the epicenter of the doping scandal that has overtaken the top ranks of professional sports.

The request by Ryan, head of the U.S. Attorney's office in San Francisco, followed a story published by *The Chronicle* on Dec. 2, 2004 detailing testimony by Giambi that he used performance-enhancing drugs during the 2003 baseball season and had started using them at least two years earlier. *Editor & Publisher* reported that *The Chronicle's* story by reporters Mark Fainaru-Wada and Lance Williams was based on transcripts *The Chronicle* obtained of Giambi's Dec. 11, 2003 testimony in the case. In requesting the investigation into the source of the leaks, *USA TODAY* reported that Ryan released a statement saying, "Violations of grand jury secrecy rules will not be tolerated." Ryan stated that he had asked the DoJ to "take appropriate action." *The Chronicle* reported that Blain Rethmeier, spokesman for the DoJ, said that the request for a formal investigation was currently "under review." *Editor & Publisher's* article is available online at http://www.editorandpublisher.com/eandp/search/article_display.jsp?vnu_content_id=1000730008.

The Chronicle has covered the steroids scandal in detail for several months. The leaks of confidential information began in June 2004 when the newspaper published excerpts from the transcripts of sprinter Tim Montgomery's grand jury testimony, and have continued since then, much to the dismay of federal Judge Susan Illston of the U.S. District Court in the Northern District of California and the attorneys involved in the case.

Earlier in 2004, the office of the U.S. Attorney in San Francisco sent letters to *The Chronicle* and to the *San Jose Mercury News*, which also produced stories based upon the secret grand jury testimony, asking the newspapers to reveal the identity of the source or sources of the leaks. Requests to return leaked materials and to reveal their sources were also made to five reporters from the two newspapers – Sean Webby and Elliot Almond of the *San Jose Mercury News*, and Henry Lee, along with Williams and Fainaru-Wada of the *San Francisco Chronicle*. Webby and Almond received letters from prosecutors on August 25; Lee received a similar letter on July 28, and Williams and Fainaru-Wada received letters on July 29. All of the reporters have refused to reveal their sources.

The Chronicle said that it would fight any attempts to force them to identify their sources. Phil Bronstein, editor of *The Chronicle*, addressed readers' criticism of the newspaper's decision to publish the information in a December 12 editorial, stating, "We don't believe that it's our responsibility to enforce federal secrecy provisions

surrounding grand jury proceedings. We do believe that it is our responsibility to provide as much information as possible to help people make decisions on issues of importance to them, often referred to as 'the public's right to know. . . .' [T]he press sees its role this way: We are the institution through which people can get the most transparent view of what its government is doing in the name of the people it's supposed to serve."

Bronstein wrote that *The Chronicle's* editorial staff decided to run the story because "Professional athletes are role models. Millions of people whose kids, grandkids or siblings are involved in school sports have a stake in how this issue is dealt with." Bronstein continued, "[T]his story touches on larger cultural points: the quest for perfection or fame or power even if it means cheating; contemporary self-image; creation of myth in our society; the need for heroes and pressure on those heroes, etc. But perhaps most important, illegal sports doping tarnishes our most-American of values: equal opportunity."

The Chronicle reported that Jonathan Donnellan, senior counsel for the Hearst Corporation, which owns *The Chronicle*, stated on Dec. 2, 2004 that the newspaper had not been contacted by the U.S. Attorney's office or the DoJ regarding the request for an investigation. According to *The Chronicle*, Donnellan stated, "We fully expect that if there is an investigation, it will not focus on the media. That is what the First Amendment requires, the Department of Justice guidelines require, and the California Constitution requires. They all recognize that the press cannot function without confidential sources." Donnellan added, "If they did pursue us, this would be the first time we know of in history that a United States attorney in California sought to compel a news organization to disclose its confidential sources."

By law, federal grand jury testimony and evidence are supposed to be secret. Frank Tuerkheimer, law professor at the University of Wisconsin and former assistant U.S. Attorney in the Southern District of New York, told *USA TODAY* that copies of testimony are not provided to defendants until after they are indicted and that the only people authorized to access the testimony and other materials are the U.S. Attorney's office, court employees and defense attorneys.

The government in the BALCO case has indicted four men: BALCO founder Victor Conte, BALCO Vice President James Valente, track coach Remi Korchemny, and Greg Anderson, trainer of San Francisco Giants slugger Bonds, on charges of distributing banned steroids to elite athletes. According to The Associated Press, the charges against the four also include possession of human growth hormones, money laundering, and "misbranding drugs with intent to fraud." Giambi is only one among more than a reported two dozen other athletes who have testified in the rapidly expanding investigation. On Dec. 28, 2004, Illston denied a motion for dismissal by Conte. The case is likely to go to trial sometime in 2005.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

"The press is the institution through which people can get the most transparent view of what its government is doing in the name of the people it's supposed to serve."

—Phil Bronstein,
editor,
*San Francisco
Chronicle*

Problems in Media Ethics

St. Paul Pioneer Press Reporters Suspended after Attending Concert

Editor Vickie Gowler for the *St. Paul Pioneer Press* suspended two investigative reporters, Chuck Lasezewski and Rick Linsk, after they attended the October 5, 2004 political fundraising concert, “Vote for Change” at the Xcel Energy Center in St. Paul, Minnesota. Bruce Springsteen, R.E.M. and Neil Young were the main attractions at the pro-Kerry concert that raised money for political causes in battleground states like Minnesota. Gowler asserted that Lasezewski and Linsk had violated a *St. Paul Pioneer Press* ethics policy because attending the concert was a conflict of interest for the reporters.

The reporters’ union, the Newspaper Guild, filed a grievance against the paper on October 13. The paper pointed to a Sept. 27, 2004 staff e-mail memo issued by Gowler which warned reporters not to attend activities that would conflict with their employment, including “concerts that are held as political fundraisers.” Gowler asserted that a union steward approved the memo, but union executive officer Mike Sweeney told the Minneapolis *Star Tribune* that a fundraising concert “does not meet the definition of conflict of interest as outlined in the union’s contract.” Lasezewski, who, in 2000, was a member of the union committee that pushed for an ethics policy at the *Pioneer Press*, said he had read the memo but assumed it did not apply to him. Lasezewski told the Associated Press that the memo referred to weekend, general assignment, and political reporters, and did not mention the investigative team.

Gowler explained that she had been planning to assign one of the offending reporters to follow a story on a computer voting system that would involve the Minnesota Secretary of State, Republican Mary Kiffmyer. Gowler told *Editor & Publisher*, “I don’t know how I would explain to readers . . . why one of these reporters was covering a Republican state officeholder on a controversial state issue.” Speaking for the union, Sweeney told the Associated Press, “we’re not saying the company doesn’t have a right to be concerned about the ethics and the off-duty behavior of its reporters, but they have to meet a standard. We can’t allow a company to subjectively decide what is or is not a conflict.” Although the reporters already served their suspension, the union is trying to get the suspensions overturned. Sweeney suspected that the grievance would proceed to arbitration.

Several other newspapers had issued similar warnings to reporters, but no other suspensions have been reported. Newspaper policies regarding attendance at political concerts range from complete bars to no prohibition at all. There are also varying degrees of proscription based on the conflict of interest rules. The Minneapolis *Star Tribune*, for example, asked its reporters not to attend the concert unless they were covering it.

—KELLY J. HANSEN MAHER
SILHA FELLOW

A staff memo warned reporters not to attend activities that would conflict with their employment, including concerts held as political fundraisers.

Williams, continued from page 4

the public about a change in policy. The “video news releases” (VNRs) were produced to look like *bona fide* news segments, and were provided to stations with text to be read as an introduction, such as, “Mike Morris has the story.” According to the GAO’s Department of Health and Human Services report, the use of VNRs “is widespread and widely known by those in the media industry” and the use of them has increased greatly since 1990. The GAO’s report on the ONDCP found that, “None of the narrators were affiliated with any news organization at the time the stories were produced or distributed.” The GAO findings in the Department of Health and Human Services Report further found that “[S]ome news organizations indicated that they misread the label [of the videotape] or they mistook the story package as an independent journalists news story on CNN Newsource.” The ONDCP report is available online at www.gao.gov/decisions/appro/303495.htm and the Department of Health and Human Services report is available online at <http://www.gao.gov/decisions/appro/302710.pdf>.

Laurence Moskowitz, chairman and chief executive of Medialink, a producer of promotional news segments, told *The New York Times* that “The Clinton administration was probably even more active than the Bush administration” in distributing VNRs that promoted its policies. And *USA TODAY* reported that in 1987, former President Ronald Reagan paid consultants to write newspaper articles endorsing that administration’s support for anti-communist rebels in Nicaragua.

In an interview published January 14 by *USA TODAY*, Bush expressed disapproval of the DoE’s contract with Williams, saying, “There needs to be a clear distinction between journalism and advocacy. . . . All of us, the Cabinet, needs to take a good look and make sure this kind of thing doesn’t happen again.”

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

U. S. Supreme Court Declines to Hear Three Speech-Related Cases

The nation's highest court declined to consider three speech-related cases at the start of its new term in the fall of 2004. The U.S. Supreme Court let stand appellate rulings on press access to war, a photographer's coverage of a demonstration surrounding the Elian Gonzalez story, and the release of names of individuals involved in illegal music file-sharing.

The press access case, *Flynt v. Rumsfeld*, 335 F.3d 697 (D.C. Cir. 2004), *cert. denied*, 125 S.Ct. 313 (2004), involved the rejection of a *Hustler* magazine reporter's request to cover the first wave of U.S. troops in Afghanistan (See "D.C. Circuit Rules That Reporters Have No Constitutional Right of Access to Military Operations," in the Winter 2004 *Silha Bulletin*). Larry Flynt, publisher of *Hustler* magazine, had initially asked to have one of his reporters embedded with special operations troops in Afghanistan in October 2001, shortly after the September 11 terrorist attacks prompted the deployment of troops in Afghanistan.

In response to Flynt's initial request, Pentagon spokeswoman Victoria Clark told Flynt that "the highly dangerous and unique nature of work" done by U.S. troops in Afghanistan made "it very difficult to embed media." Flynt subsequently sued the Defense Department.

The District of Columbia federal district court initially denied Flynt's First Amendment claim that the Pentagon is required to give news media access to U.S. troops during combat in *Flynt v. Rumsfeld*, 180 F. Supp. 2d 174 (D.D.C. 2002). In February 2004, the D.C. Circuit also sided with the Pentagon, saying that nothing in case law or the Constitution gave reporters the right to access government property or information that is not open to the public.

The second free-speech case denied review on the Supreme Court docket, *Durruthy v. Pastor*, 351 F.3d 1080 (11th Cir. 2003), *cert. denied*, 125 S. Ct. 45 (2004), involved a photographer who was arrested for covering demonstrations over the fate of Elian Gonzalez, the 8-year-old boy who had defected from Cuba. Freelance photographer Albert Durruthy was videotaping the arrest of an NBC photographer during demonstrations in Miami, Fla., on April 22, 2000, when a Miami police officer told him to leave the street.

Police officer Jennifer Pastor allegedly threw Durruthy to the ground and detained him, claiming he had resisted arrest. Videotaped evidence, however, showed he was complying with Pastor's orders. The officer then claimed Durruthy violated a Florida law that prohibits pedestrians from walking on streets that have a sidewalk. Durruthy sued Pastor and the City of Miami for illegal arrest and excessive use of force, according to the National Press Photographers Association (NPPA).

According to the Reporters Committee for Freedom of the Press (RCFP), the federal district court ruled that Durruthy was not required to use the sidewalk because the road had been closed to traffic and that he was "clearly a member of the media acting within the scope of his journalistic duties." Miami's police department policy prohibits arresting journalists without probable cause, according to the NPPA. The decision was overturned by a panel of the 11th Circuit, which held that Pastor did nothing wrong and was "acting within her discretionary authority" when arresting Durruthy, and was, therefore, entitled to immunity from the civil rights lawsuit he filed against her. The Supreme Court denied review on Oct. 4, 2004.

The third case the Supreme Court refused to hear was *Verizon Internet Services, Inc. v. Recording Industry Association of America, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), *cert. denied*, 125 S. Ct. 347 (2004). RIAA sued Verizon Internet Services in 2002 to force the company to reveal the name of one of its users accused of sharing more than 600 songs illegally over the internet, according to the Electronic Frontier Foundation. The Verizon subscriber had allegedly used KaZaA, a peer-to-peer software program, to disseminate the music. RIAA argued that the 1998 Digital Millennium Copyright Act allowed the subscriber to be identified. Verizon said the provision did not cover alleged copyright-infringing material if it resided on an individual's personal computer.

In 2003, the federal district court in the District of Columbia sided with the RIAA. But the U.S. Court of Appeals (D.C. Cir.) overturned that ruling in December 2003, finding that Internet Service Providers, such as Verizon, are not responsible for the material stored on a subscriber's personal computer and that the identity of the subscriber did not have to be released. The Supreme Court denied review on Oct. 12, 2004 (See "RIAA Announces More Lawsuits to Hobble Online Music Sharing" on page 41 of this issue of the *Silha Bulletin*).

—KRISTINE SMITH
SILHA RESEARCH ASSISTANT

Reporters Privilege News

Senator Dodd Introduces Federal Shield Law

In response to the “intense pressure” the press has come under in recent months to reveal the identities of confidential sources, Sen. Christopher Dodd (D-Conn) introduced a bill to create a federal shield law in the U.S. Senate on November 19, 2004. “This legislation,” Dodd wrote in a press release, “is fundamentally about good government and the free and unfettered flow of information to the public.” The full press release is available online at <http://dodd.senate.gov/press/04-releases.html>.

Dodd’s proposed law, titled the “Free Speech Protection Act of 2004,” (S. 3020) would provide absolute protection from compelled disclosure of sources, whether or not the sources were promised confidentiality. The law covers those individuals “engaging in the gathering of news or information” who intend to disseminate that information to the public. The bill also includes their supervisors, employers, or anyone assisting them in gathering the information.

The proposed bill prohibits any “entity of the judicial, legislative or executive branch” of the federal government from issuing a subpoena that would compel a journalist from disclosing the source of information, or any information that could lead to the identity of the source. The proposed law would create a qualified privilege to protect journalists from being forced to disclose unpublished materials, including notes, outtakes, photographs or photographic negatives, video or sound tapes, film, or any other data that is not used when the final report is disseminated. However, the prohibitions do not apply in situations where the news or information is critical to the case, such as when the information cannot be obtained by any alternative means, and when there is an overriding public interest in the disclosure.

Dodd wrote in a press release, “The American people deserve access to a wide array of views so that they can make informed decisions and effectively participate in matters of public concern. When the public’s right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are endangered. The legislation that I am introducing today will protect these rights, and ensure that the government remains open and accountable to its citizens.”

Thirty-one states and the District of Columbia currently have shield laws, but no statutory protection for journalists and their sources exists at the federal level.

Dodd’s introduction of the bill came after reporters for *The New York Times*, *The Washington Post*, *Time* magazine and other news organizations had been cited for contempt for refusing to reveal their sources in a string of recent civil cases, and had incurred steep fines or were ordered to jail as a result. In the most recent case, Jim Taricani, a television reporter for WJAR-TV in Providence, R.I., was sentenced on Dec. 9, 2004 to six months of home confinement for refusing to reveal who provided him with a videotape of a politician accepting a bribe in a federal corruption case. (See “Journalist Sentenced to House Arrest for Refusing to Reveal Source” on page 15 of this issue of the *Silha Bulletin*.)

Ever since the Supreme Court’s decision in *Branzburg v. Hayes*, 408 U.S. 665 (1972), holding that the First Amendment provided no privilege for reporters who

witness a crime to refuse to testify about their sources before a grand jury, federal courts have disagreed as to whether and to what extent members of the press may still invoke a constitutionally-based or common law reporter’s privilege to protect confidential sources. The recent cases, however, point toward a trend by the courts to reject reporter’s privilege claims under the First Amendment. Dodd, citing this trend, was quoted in *The New Haven Register* on November 20 as saying, “We, in my view, are entering very, very dangerous territory indeed for our democracy.”

Dodd further told *The New Haven Register* that the bill will be “hard to pass” primarily because of lawmakers’ reluctance to restrict prosecutors during the war on terror. The newspaper noted that Dodd introduced his bill with just “hours left” during the 108th Congress, and stated that Dodd must again introduce the bill when the 109th Congress convenes in January 2005.

The Reporters Committee for Freedom of the Press (RCFP) noted that previous attempts to pass a federal shield law in the 1970s and 1980s failed because of disagreement among journalists over the scope of the laws. However, the string of recent decisions, involving such reporters as Jim Taricani, Matthew Cooper, Tim Russert and others, are eroding press protections, resulting in a demand for a federal shield law by many news organizations. RCFP’s analysis is available online at <http://www.rcfp.org/news/2004/1122s3020s.html>. (See “Plame Update: Journalists Miller and Cooper Appeal Their Sentences” on page 12; “Use of ‘Plame Waivers’ of Confidentiality is Expanding” on page 13; “Canadian Journalist Found in Civil Contempt for Protecting Sources” on page 16 of this issue of the *Silha Bulletin*; see also “Reporters Privilege: *In re: Special Counsel Investigation*,” “Reporters Privilege: *Dr. Wen Ho Lee v. United States Department of Justice*,” “Reporters Privilege: *In re: Special Proceedings*” and “Reporters Privilege: *Weinberger v. Maplewood Review*” in the Summer 2004 issue of the *Silha Bulletin*.)

John F. Sturm, president of the Newspaper Association of America, hailed the proposed legislation. On November 19, *Editor & Publisher* quoted Sturm as saying, “A federal shield law will allow journalists to do their jobs without fear of penalty. It is in the public’s best interests that reporters’ privileges are preserved, and Senator Dodd’s bill is the first step toward providing stronger protection for journalists, not to mention reminding Americans that our First Amendment rights are at stake.” The *Editor & Publisher* article is available online at http://www.editorandpublisher.com/eandp/search/article_display.jsp?vnu_content_id=1000724169.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

“When the public’s right to know is threatened, and when the rights of free speech and free press are at risk, all of the other liberties we hold dear are threatened.”

—Senator
Christopher Dodd

Reporters Privilege News

Plame Update: Journalists Miller and Cooper Appeal Their Sentences

In the most recent development in the Valerie Plame federal probe, a three-judge panel of the U.S. Court of Appeals for the District of Columbia heard oral arguments on Dec. 8, 2004 on whether journalists Judith Miller of *The New York Times* and Matthew Cooper of *Time* magazine can legally defend their refusal to reveal their confidential sources before the grand jury conducting the investigation. Miller and Cooper are appealing rulings handed down in October 2004 by Federal District Chief Judge Thomas F. Hogan (D.D.C.). Hogan held both reporters in civil contempt for refusing to answer questions posed by special prosecutor Patrick J. Fitzgerald about their sources and ordered them jailed until the grand jury completes its work or for 18 months, whichever is shorter.

The sentences have been stayed pending the outcome of the reporters' consolidated appeal. Fitzgerald is investigating the leak of undercover CIA agent Valerie Plame's identity to the press. *The Washington Post* reported that the appeals court's decision would mark the first time in 30 years that a federal appeals court has revisited the core issues raised in the case *Branzburg v. Hayes*, 408 U.S. 665 (1972). In that case, the U.S. Supreme Court ruled that reporters can be compelled to divulge confidential sources before a grand jury investigating the commission of a crime the reporters have witnessed and that no qualified First Amendment privilege for journalists to shield the identity of sources in front of a grand jury exists.

The New York Times reported that only one appeals court judge, David S. Tatel, "appeared to leave the door open for the possibility" that journalists subpoenaed to reveal their sources might have some legal protection, though not under the First Amendment. *The Times* wrote that two judges, Tatel and Judge David B. Sentelle, "gave strong indications" that *Branzburg* "definitely and negatively answered the question of whether the First Amendment provides reporters with any protection" in a grand jury context. According to *The Times*, Sentelle pressed attorney Floyd Abrams, who is representing both Cooper and Miller, repeatedly on whether a "material difference" exists between *Branzburg* and the present case, and expressed skepticism over Abrams' attempts to draw a distinction between the two cases. "We're bound by *Branzburg*," said Tatel.

Abrams also argued that the court should recognize a federal common law privilege on the basis that 49 states and the District of Columbia provide some legal protection, either through state shield laws or through state court decisions, for journalists protecting the identity of confidential sources. When *Branzburg* was decided in 1972, only fifteen states had shield laws. The Reporters Committee for Freedom of the Press (RCFP) reported that during oral arguments, Abrams told the panel of judges, "We've had a lot of jurisprudence that changes *Branzburg*."

Abrams further supported his argument for a separate legal basis for reporter's privilege by citing Federal Rule of Evidence 501, enacted by Congress in 1975. Rule 501 says that courts must recognize privileges "by the principles of the common law as they may be interpreted . . . in the light of reason and experience." During his argument, Abrams discussed a Supreme Court case, *Jaffee v. Redmond*, 518 U.S. 1 (1996), which recognized a privilege at the federal

court level for communications between psychotherapists and their patients. The Supreme Court came to that conclusion after finding that such a privilege had become widespread at the state level. Abrams' arguments appeared to win support from Tatel. According to RCFP, Tatel said, "It seems to me the argument for a qualified privilege is more powerful here than in *Jaffee*." RCFP's report is available online at <http://www.rcfp.org/news/2004/1208inregr.html>.

According to *The New York Times*, U.S. Attorney James P. Fleissner, arguing the case for the government, disputed Abrams' argument that Federal Rule of Evidence 501 means that the federal courts should recognize a separate basis for a reporter's privilege claim. Fleissner told the panel, "I disagree that Rule 501 changed circumstances in any significant way." *The Washington Post* reported that Fleissner said that reporters can be compelled to disclose their sources unless prosecutors "act in bad faith or in a harassing manner."

Sentelle voiced concern that in today's media environment, a reporter's privilege could be readily invoked by anyone. According to the RCFP report, Sentelle asked Abrams, "You want us to come out with a privilege from grand jury testimony for anybody who wants to take three minutes to set up a blog?" Abrams' replied that the legitimacy of the invocation rested on the bloggers' purpose, rather than the blogger's employer. He said, "They ought to get [the privilege] because they disseminate information to the public."

After the arguments concluded, RCFP reported that Miller said, "The central issue for me as a reporter is still the public's right to know." Cooper said, "No American reporter should have to go to jail for doing his or her job."

In August 2004, Cooper, *Time's* White House correspondent, provided limited testimony after a source, Lewis Libby, Chief of Staff to Vice President Cheney, released him from his pledge of confidentiality. On September 14, Cooper was subpoenaed for a second time by prosecutors seeking Cooper's notes about his other confidential sources. This second subpoena was reportedly issued as a result of questions that surfaced during Cooper's testimony. According to the Associated Press, Cooper said, "The prosecutor came back a few days later and basically asked for everything in my notebook." Cooper objected to the second subpoena and has refused to comply.

The New York Times reported that the appeals court did not indicate when it would issue its ruling, but that lawyers in the case said that they expected a decision within weeks. *The New York Times* further reported that if Miller and Cooper lose, they may appeal again to the full D.C. Circuit Court, sitting *en banc* instead of as a three-judge panel, or to the U.S. Supreme Court. Both Miller and Cooper, *The New York Times* reported, are likely to remain free until their appeals are exhausted.

The case, reported the *Los Angeles Times*, has "come to symbolize a new era of aggressive tactics by prosecutors towards the media," and is being closely watched by press freedom advocates, and its outcome may have far-reaching consequences. The Associated Press cites a "widening pattern of legal pressure on reporters to break promises of

Plame Update, continued on page 14

"Without an enforceable promise of confidentiality, sources would quickly dry up and the press would be left largely with only official government pronouncements to report."

-Arthur Ochs
Sulzberger, Jr. and
Russell T. Lewis,
New York Times
Executives

Reporters Privilege News

Use of “Plame Waivers” of Confidentiality is Expanding

On Dec. 17, 2004, attorneys for Dr. Steven J. Hatfill issued subpoenas to several news organizations in the case *Hatfill v. Ashcroft*, Hatfill’s civil lawsuit against Attorney General John Ashcroft and other government officials for alleged violations of the federal privacy act. National Public Radio, the Associated Press (AP), CBS News, ABC News and *The Washington Post* have all received subpoenas and additional subpoenas may soon be issued to other news organizations in the case, according to a press release issued by the Reporters Committee for Freedom of the Press (RCFP). But U.S. District Judge Reggie B. Walton has ordered federal employees involved in the investigation to sign waivers of any confidentiality agreements they had with reporters. RCFP’s press release is available online at <http://www.rcfp.org/news/2004/1217hatfil.html>.

Hatfill’s lawyers are trying to discover how Hatfill’s name was linked with the anthrax attacks that killed five people and sickened 17 others in late 2001. They hope to question journalists who covered the federal probe into the attacks about the government sources they relied upon to produce their stories. The AP reported on December 17 that its subpoena “asks for all documents relating to Hatfill that AP received from any federal employee.” AP reported that the subpoena also seeks to depose an AP employee in February 2005. *The Los Angeles Times* also reportedly obtained a copy of one of subpoenas, which requests any information about Hatfill that was procured either “directly or indirectly from any person employed by the federal government.”

Representatives for the news organizations stated that they would fight the subpoenas. Dave Tomlin, the assistant general counsel for The Associated Press, stated, “News organizations are supposed to gather news, as opposed to spending their time performing research and testifying in court on behalf of various parties with axes to grind.” The Associated Press reported that CBS Spokesman Kevin Tedesco said, “We have received [the subpoena], and we will resist it vigorously.” If the news organizations resist the subpoenas, Hatfill and his team could ask Walton of the federal District Court in Washington, D.C. to order the organizations’ compliance. The news organizations can also file a motion with Walton to quash the subpoenas.

Walton had ordered the circulation of confidentiality waivers to federal prosecutors, FBI agents, and other personnel involved in the investigation of the anthrax attacks. RCFP reported on Dec. 6, 2004 that as many as 100 federal agents may have been asked to sign the waivers, which released journalists from agreements to protect the identity of sources who provided information confidentially, thus allowing Hatfill’s lawyers to depose journalists about their news sources. RCFP’s report is available online at <http://www.rcfp.org/news/2004/1206hatfil.html>. *Newsweek* obtained a

copy of the waiver, which states that the official who signs it waives “any promise of confidentiality, express or implied” that was made by a reporter. *Newsweek* reported on Dec. 1, 2004 that the waiver further releases any reporter with whom the official shared information to reveal “any communications that I may have had . . . regarding the subject matters under investigation, including any communications made ‘on background,’ ‘off the record,’ ‘not for attribution,’ or in any other form.” *Newsweek*’s report is available online at <http://www.msnbc.msn.com/id/6630166/site/newsweek/>.

Walton approved the use of “Plame waivers,” named after their use in the Valerie Plame investigation (see “Plame Update: Journalists Miller and Cooper Appeal Their Sentences” on page 12 of this issue of the *Silha Bulletin*) at the request of Hatfill’s lawyers in October 2004. Hatfill is suing U.S. Attorney General John Ashcroft and other government officials under the Privacy Act, 5 U.S.C. § 522a(b), for publicly identifying him as a “person of interest” in the investigation into the attacks. Hatfill had been employed at the Army Medical Research Institute of Infectious Diseases at Fort Detrick in Frederick, Md., but lost his job as a result of his public identification and has been unable to find work since that time. According to the Associated Press, Hatfill claims his reputation has been destroyed and is seeking unspecified money damages. Although Hatfill is still the only publicly identified “person of interest” in the case, he has never been charged with any crime. The question of who sent the tainted letters remains unanswered.

The Department of Justice (DoJ) has claimed that its employees should be shielded from inquiries in the case because of the danger that sensitive information may be divulged from the ongoing criminal investigation into the source of the attacks. In October, the AP reported that Walton agreed to stay the depositions, exempting DoJ officials from being questioned until April 2005. The confidentiality waivers were proposed as a means of advancing the lawsuit without interfering in the criminal investigation.

Attorneys for both Hatfill and the government approved the plan to distribute the waivers, but RCFP reported on October 28 that members of the media were not consulted in the decision. RCFP’s report is available online at <http://www.rcfp.org/news/2004/1028hatfil.html>. Shortly after the plan was approved, Elizabeth Shapiro, an attorney for the government, called the distribution of waivers “an extraordinary concession.” Shapiro told the AP, “Sending out these forms is completely unprecedented,” but emphasized that signing the waivers is strictly optional. “There’s a risk of compulsion if we don’t advise them that this is voluntary.”

Press freedom advocates have criticized the waivers, citing their harmful impact on the press’

“News organizations are supposed to gather news, as opposed to spending their time performing research and testifying in court on behalf of various parties with axes to grind.”

—Dave Tomlin,
Assistant
General Counsel,
Associated Press

Plame Waivers, *continued from page 13*

ability to conduct newsgathering, while questioning just how voluntary the waivers are. “It’s very disturbing that this is starting to become used as a way to out the relationship between reporters and sources,” First Amendment attorney Floyd Abrams told *Newsweek* on December 1. “On the face of it, [the waivers] are coercive. How could they be anything but?” An additional and very real danger is that the circulation of the waivers may speak to an emerging legal pattern, as their use in lawsuits may become an accepted practice. *The New York Times* reported that the acceptance of the term “Plame Waivers” by lawyers in Hatfill’s case suggested that the waivers may be treated as “an established legal tool.”

News organizations and press freedom groups have also criticized Hatfill’s lawyers for failing to recognize how the press’ ability to promise confidentiality to news sources ensures the free flow of information to the public by enabling officials to speak with reporters without risking retaliation. *The New York Times* reported in October that the use of the waivers “could erode government employees’ confidence that they can provide information to reporters without fear of later being identified and punished.” An appreciation of the critical function of reporter’s privilege is absent from the statements of lawyers in the Hatfill case. “All that’s affected by the waiver is a private promise of confidentiality,” Mark A. Grannis, Hatfill’s attorney, told *The New York Times*. “We want that waived precisely so that we don’t have to depose investigators but can get the information from reporters.” Bruce W. Sanford, a Washington lawyer and an expert in media law, told *The New York Times* that the use of the waivers was “outrageous” and said that it “shows a fundamental failure to understand the role the press plays in our society.”

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Plame Update, *continued from page 12*

confidentiality that is having a chilling effect on people who want to share important information with the public but only on condition that their names not be disclosed.” Clark Hoyt, Washington editor for the Knight Ridder newspaper company, told *The New York Times*, “I think there is no question that there is a greater anxiety among sources about talking to journalists.”

After Hogan issued his October ruling against Miller, Arthur Ochs Sulzberger Jr., chairman and publisher of *The New York Times*, and Russell T. Lewis, chief executive of *The Times*, published a statement supporting Miller and defending the critical function that reporter’s privilege plays in newsgathering. They wrote, “The press simply cannot perform its intended role if its sources of information – particularly information about the government – are cut off.” They continued, “Without an enforceable promise of confidentiality, sources would quickly dry up and the press would be left largely with only official government pronouncements to report.”

The Plame controversy began after *The New York Times*’ published an Op-Ed commentary by former U.S. diplomat and CIA envoy Joseph C. Wilson IV on July 6, 2003. It criticized the assertion by the Bush administration that Iraq had tried to purchase uranium in Niger, a claim cited by the administration as a reason for going to war against Iraq.

Wilson disputed that claim and said that the administration had relied on discredited intelligence. Just days after the commentary’s publication, the identity of Valerie Plame, who is Wilson’s wife, as an undercover agent working for the Central Intelligence Agency, was made public in a column written by Robert Novak. Novak, a nationally syndicated columnist for the *Chicago Sun-Times* and a CNN show co-host, received the information about Plame from two unidentified officials within the Bush administration.

Novak has not revealed whether he has been subpoenaed or questioned in the case.

The intentional disclosure of an undercover agent’s identity by a government official may be a felony under the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421 *et seq.* (See “*In re: Special Counsel Investigation*” in the Summer 2004 issue of the *Silha Bulletin*.)

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Sinclair, *continued from page 5*

Sinclair’s 62 stations include affiliates of Fox, NBC, CBS, ABC, WB and UPN, and reach nearly one-fourth of the nation’s homes. Many of these stations were in the 2004 election’s highly contested swing states, including Florida, Ohio, Pennsylvania and Wisconsin.

The broadcast giant is owned by four brothers; David D, Frederick, Robert and J. Duncan Smith. The four are often criticized for their conservative views supporting President Bush. On April 30, 2004, Sinclair opted not to broadcast a special edition of ABC’s “Nightline” featuring host Ted Koppel reading the names of Americans who had lost their lives in the war with Iraq. The decision not to air the program was based on Sinclair executives’ assertion that the “Nightline” broadcast was “motivated by a political agenda designed to undermine the efforts of the United States in Iraq.” (See “ABC’s ‘Nightline’ Honors Iraqi War Dead Despite Protests,” in the Spring 2004 *Silha Bulletin*.)

—KRISTINE SMITH
SILHA RESEARCH ASSISTANT

Reporters Privilege News

Journalist Sentenced to House Arrest for Refusing to Reveal Source

On Dec. 9, 2004, U.S. District Court Judge Ernest C. Torres sentenced reporter Jim Taricani to six months of home incarceration for refusing to identify one of his sources. The sentencing hearing brought to a close what had been a tumultuous time for Taricani, a reporter with WJAR-TV, the NBC affiliate in Providence, R.I. Taricani first came under fire after he obtained a sealed tape showing Frank Corrente, an aide to Vincent Cianci, Jr., the former Mayor of Providence, taking a bribe from a confidential source. Taricani's station subsequently aired the tape in 2001. The tape was at the center of an ongoing investigation and criminal trial of city official corruption in Providence known as "Operation Plunder Dome."

On Nov. 18, 2004, Taricani was found guilty of criminal contempt for refusing to turn over the name of his source to a grand jury investigating the violation of the court's protective order placing all video and audio tape evidence under seal. The court order prohibited anyone involved with the trial, including the defense attorneys, from making any of the audio or video recording evidence public. Shortly thereafter, and before Taricani's sentencing, Joseph A. Bevilacqua, Jr., a defense lawyer in the Plunder Dome case, identified himself as Taricani's source. Bevilacqua had represented Joseph Pannone, the former chairman of the Providence Board of Tax Assessment Review and one of those indicted in the Plunder Dome case. Then, in December 2004, Marc DeSisto, the special prosecutor appointed to investigate the leak, claimed in court filings that Bevilacqua had never requested a promise of confidentiality. DeSisto wrote that Bevilacqua first told Taricani to reveal him as the source almost three years earlier.

Bevilacqua received video tapes under the protective court order, in his capacity as Pannone's defense attorney, in November 1999 and August 2000, and had initially agreed to abide by the court order. After Bevilacqua was replaced by another defense attorney for Pannone, Taricani, reportedly a close friend of Bevilacqua, asked Bevilacqua to give him the tapes. Bevilacqua gave Taricani all the tapes he had at the time. Taricani made a copy of one of the tapes before returning all of the tapes to Bevilacqua. The copied tape, which showed Corrente taking a bribe, was the only tape subsequently aired by WJAR in 2001. Bevilacqua testified at the sentencing hearing that he never asked for confidentiality when he gave Taricani the tapes but that Taricani had volunteered not to reveal his identity as the source.

Bevilacqua eventually signed a waiver of confidentiality with DeSisto in late November 2004. DeSisto showed the waiver to Taricani and asked whether he would be willing to reveal his source. Taricani still refused and has since said that Bevilacqua did not want his identity revealed and may have been coerced into signing the waiver. According to a statement from Taricani, released through NBC on December 1, Bevilacqua told Taricani that he signed the waiver in order not to raise suspicions that he might be the source. In a subsequent statement to

The Providence Journal on December 2, Taricani stood by his story, saying, "I would never have jeopardized my health and reputation, and put my family and my company through this ordeal, if my source had not required a promise of confidentiality."

Shortly after the tape was first aired in 2001, DeSisto had conducted a lengthy investigation and several depositions early in the case, but was still unable to determine who had released the tape. In order to compel Taricani to release the identity of his source, DeSisto asked a judge to hold Taricani in civil contempt in March 2004 (See "Reporters Privilege: *In re: Special Proceedings*" in the Summer 2004 *Silha Bulletin*). Torres found Taricani in civil contempt and ordered him to pay a \$1,000 per day fine until he revealed his source. Taricani unsuccessfully appealed to the U.S. Court of Appeals (1st Cir.) and began paying the fine until November 2004, at which point he had paid a total of \$85,000. Finding that the civil contempt charge had done nothing to move the case along, DeSisto asked in early November 2004 to increase Taricani's fine to coerce him to reveal his source.

At the November 4 hearing, Torres declined to increase Taricani's fine, saying that he believed it was unlikely that Taricani would divulge his source. After suspending Taricani's civil contempt fine, Torres decided he had no choice but to charge Taricani with criminal contempt. From the bench, Torres said that Taricani's refusal to cooperate with the ongoing prosecution had "protracted, hamstrung, and may have actually defeated the special prosecutor's efforts to identify and prosecute the person or persons who violated the protective orders in the Plunder Dome cases."

Torres concluded by saying, "I have great respect for Mr. Taricani as a journalist and from any limited acquaintanceship with him as an individual" but added that he was "duty bound to take appropriate action and Mr. Taricani has left me with no choice as to what that course of action must be. It must take the form of a criminal contempt proceeding." On Nov. 18, 2004, Torres determined that Taricani's direct refusal to follow a court order to reveal his source meant there was no other choice but to find him guilty of criminal contempt. From the bench, Torres said that the "evidence is clear and overwhelming and undisputed," proving beyond a reasonable doubt that Taricani was guilty of criminal contempt.

Taricani, who is 55 years old, had a heart transplant in 1996 and a pacemaker installed a few years later. At the sentencing hearing on December 9, Torres told Taricani that he would not be going to jail. Instead, Taricani was put on probation and placed under house arrest for six months, beginning the day of the sentencing. The terms of Taricani's sentence require him to stay inside his home at all times, except in a medical emergency or to visit the doctor. Taricani is not allowed to conduct any interviews with the media, cannot work, and cannot use the Internet. Additionally, Taricani must always wear an electronic ankle strap

Taricani, *continued on page 18*

Torres determined that Taricani's direct refusal to follow a court order to reveal his source meant there was no other choice but to find him guilty of criminal contempt.

Reporters Privilege News

Canadian Journalist Found in Civil Contempt for Protecting Sources

It is not only journalists in the United States who face possible fines and jail sentences for not revealing their sources. A Canadian journalist is finding himself grappling with the issue as well.

On Dec. 1, 2004, *Hamilton Spectator* reporter Ken Peters was found in civil contempt for refusing to disclose the name of one of the two persons who had given him documents alleging poor care practices and abuse of residents at St. Elizabeth Villa, a home run by a Catholic charity. Peters had met with two people, identified only as "A" and "B." It was "A" who had provided him with documents listing the alleged abuses at the retirement home. Peters subsequently wrote a series on the abuses, published in the *Hamilton Spectator* in 1995.

Following the publication of Peters' series, St. Elizabeth Villa launched a \$15.5-million civil suit alleging defamation against public officials and demanded Peters name the person who had given him the documents. Administrators at the home suspected that Peters' source was a member of the city of Hamilton's local government. Although Peters had promised not to reveal the identity of "A," he also refused to identify "B," believing that do so would also identify "A." "B," according to the *Globe and Mail*, was later identified as Hamilton alderman Henry Merling. Dominic Agostino, a Hamilton councilor who later became a member of the Ontario legislature, was named in St. Elizabeth Villa's statement of claim as the person who leaked the documents to Peters, according to News1130, an all-news radio station.

On December 4, 2004, the *Hamilton Spectator* printed a transcript from Canada's Ontario Supreme Court oral ruling by Mr. Justice David Crane. In that transcript, Crane stated that he found Peters in contempt of court as of November 17 because of Peters' refusal on that day to identify Merling as the provider of the documents. At that point, Crane stopped the proceedings of the trial. "The trial was in crisis," Crane said, according to the *Spectator's* December 4 transcript. "The plaintiff was being denied the opportunity to attempt to prove a vital element of its case."

Crane found that although Peters' own actions showed his intentions to keep the identity of his source secret – that he had discussed revealing Merling's identity to the court prior to the case and that he had discussed the implications of revealing the identity of the source with his editor – it was the management of the *Spectator* that ultimately determined the "function of confidential sources."

That determination by the *Spectator*, Crane stated, resulted in an "oppressive nature" in the newsroom, and put "enormous" pressures on Peters during the course of the trial. "[Peters] has been obliged to decide, as he sees it, between continuing in the only occupation he has had and to which he is very dedicated or perhaps disobeying the law, being found to be a criminal and sentenced to a lengthy imprisonment . . . [W]hat feeds this conflict

of values is a view that the media enjoys an autonomy of power and authority, perhaps believed to be borne out of the ancient status of the 'fourth estate.'"

On December 7, Crane handed down Peters' sentence, fining him \$31,600 (Canadian) for legal costs of the delay to the civil trial, caused by Peters' refusal to identify his source. Peters was not, however, ordered to serve time in jail. The *Hamilton Spectator* initially agreed to pay the fine on Peters' behalf, but on December 22, Peters filed an appeal with Ontario's Court of Appeal, asking that court to set aside Crane's opinion as well as the fine.

Peters' attorney, Brian Rogers, told the *Globe and Mail* that the appeal is essential to clarify the right of journalists to protect their sources. The appeal documents cited 20 reasons to overturn Crane's decision, including the fact that Crane never ruled that Peters' disclosure of the source's identity was essential to the case, and that Crane did not give Peters time to rethink his position or speak with his source. Furthermore, Rogers said, Peters was found in contempt after his source's identity was revealed, making his testimony moot. "Ken Peters is the guy caught in the headlights, but this affects every journalist in Canada," Rogers told *The (Kitchener-Waterloo, Ontario) Record* in a December 24 article.

Robert Cribb, vice-president of the Canadian Association of Journalists, told News1130 that he knows of no case in Canada where a journalist has faced time in jail for refusing to reveal the identity of sources. "This relationship between journalists and confidential sources serves society. It gives us the access to information about how we're governed that we simply couldn't get otherwise."

The (Ontario) Windsor Star reported that the Peters' case conflicts with an earlier Canadian ruling, *Canadian Broadcasting Corp. v. Dagenais*, [1994] 3 S.C.R. 835. That case, according to *The Windsor Star*, "ruled that freedom of the press was equally as important as the right to a fair trial."

The *Hamilton Spectator* cited *Her Majesty the Queen v. The National Post*, 115 C.R.R. (2d) 65 (2004), in which Ontario Superior Court Justice Mary Lou Benotto ruled that, "To compel a journalist to break a promise of confidentiality would do serious harm to the constitutionally entrenched right of the media to gather and disseminate information. . . . Without confidential sources, many important stories of considerable public interest would not have been published." That case involved a *National Post* reporter's refusal to turn over confidential documents involving Prime Minister Jean Chretien to the Royal Canadian Mounted Police.

According to the *Globe and Mail*, another Canadian journalist, Stéphane Beaudoin, was charged with contempt of court in 1995 for not revealing his sources. It was later learned that he had fabricated his sources, and was subsequently fired by his employer.

"Ken Peters is the guy caught in the headlights, but this affects every journalist in Canada."

—Attorney
Brian Rogers

Reporters Privilege News

Newspaper Settles Lawsuit Against U.S. Marshals Service Over Scalia Tape

On Sept. 28, 2004, the Associated Press (AP) and the *Hattiesburg American* settled their lawsuit against the U.S. Marshals Service over the erasure of journalists' recordings of a speech given by Supreme Court Justice Antonin Scalia in April 2004, after the Department of Justice (DoJ) acknowledged that the action violated federal law.

On April 7, 2004, when Scalia spoke on preserving the Constitution at the Presbyterian High School in Hattiesburg, Miss. Two reporters, Antoinette Konz of the *Hattiesburg American*, and Denise Grones of the AP, sat in the front row. Both women planned to record Scalia's speech to assist them in accurately writing their articles. But approximately 40 minutes into the Justice's speech, following Scalia's policy of prohibiting video or audio recordings of his speeches, Deputy U.S. Marshal Melanie Rube approached the reporters and demanded that they erase their recordings. Rube erased Grones' recording after Grones showed her how to operate her digital tape recorder; Konz erased her tape at Rube's request.

Scalia later sent letters of apology to the two reporters, acknowledging that the experience was "an upsetting and indeed enraging experience" but that "[i]t has been the tradition of the American judiciary not to thrust themselves into the public eye, where they might come to be regarded as politicians seeking public favor." (See "U.S. Marshal Orders Reporters to Erase Scalia Speech Tapes" in the Spring 2004 issue of the *Silha Bulletin*.)

On May 9, the AP and the *Hattiesburg American* filed a civil rights lawsuit against the Marshals Service in federal court in Jackson, Miss. The suit alleged that the seizure and destruction of the tapes violated the reporters' First Amendment guarantees of freedom of the press, Fourth Amendment protections against unreasonable searches and seizures, Fifth Amendment due process requirements, and the Privacy Protection Act. The Privacy Protection Act, 42 U.S.C. § 2000aa (2004), prohibits government search or seizure of a journalist's "work product materials" except in limited situations such as if the journalist is involved with criminal activity or when the search or seizure would

prevent death or serious injury. The suit sought damages of \$1,000 for each reporter, as well as reasonable attorneys' fees. The news organizations further sought an injunction that would bar the government from performing similar seizures in the future.

On September 10, the DoJ conceded that the actions of the U.S. marshals violated the Privacy Protection Act. The DoJ agreed that each reporter was entitled to \$1,000 damages as well as payment of their attorneys' fees. On September 28, the AP and the *Hattiesburg American* agreed to settle, dropping the matter of the injunction against the government.

Charlotte Porter, AP bureau chief for Louisiana and Mississippi, told the AP, "I'm glad to see this matter behind us and hope that the new policies will prevent cases like this in the future."

Jon K. Broadbrooks, the *Hattiesburg American's* executive editor told the AP that the settlement "provides a level of guarantee that it will operate within the boundaries of the law in the future."

On December 23, the *Hattiesburg American* reported that the U.S. Marshals Service has changed its policy on how agents will handle the media while providing security for judicial officials. Agents are now forbidden to seize recordings or cameras from reporters at public events. Responsibility for security screening and enforcement of rules regarding decorum, photography or audio and video taping is now placed on the event organizer or host.

The *Hattiesburg American* learned of the change in policy after filing a Freedom of Information Act request. However, requests for a copy of the final investigative report on the April 7 incident involving Scalia, Konz and Grones, as well as copies of the interviews relating to the investigation, were denied. Leonard Van Slyke, an attorney for the *Hattiesburg American*, said that the government denied the request for those documents claiming privacy concerns for the individuals involved. Van Slyke called the denial "unwarranted."

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

"The settlement provides a level of guarantee that the Marshals will operate within the boundaries of the law in the future."

—Jon K. Broadbrooks,
Executive editor,
Hattiesburg American

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that monitors his movements. Torres also said that if Taricani violates any of the terms of his probation and incarceration, he will go to jail, but if he complies with his sentence, he may spend only four months under home incarceration.

From the bench, Torres dismissed some of the points of contention in the case, saying that whether or not Bevilacqua had requested confidentiality, it was apparent that he wanted to keep his identity secret. Torres also said that it appeared Bevilacqua had violated the court order by giving Taricani the tapes and that he also believed that Taricani knew the order had been violated when he took the tapes. Torres contended that “The First Amendment does not confer on reporters or anyone else the right to violate the law in order to get information that they might consider newsworthy, the right to encourage others to do so, or the right to conceal the identity of a source who committed a criminal act in providing the information by refusing to comply with a lawful court order directing the reporter to identify the source.”

If Bevilacqua did violate the protective order by giving Taricani the tapes, it is likely that he will face prosecution. Taricani has decided that he will not appeal his sentence. A statement from WJAR said, “The last several years have taken a tremendous physical and emotional toll on Jim and his family, and he is looking forward to getting on with his life and getting back to work.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Peters, continued from page 16

Anne Kothawala, president of the Canadian Newspaper Association, wrote in a press release dated November 18, “The principle that a journalist has not just a right but also an obligation to protect confidential sources is absolutely fundamental to press freedom. It’s a principle that has been recognized around the world as critical to democracy.” The press release is available online at <http://www.cna-acj.ca/client/CNA/cna.nsf/web/CNA+sounds+alarm+on+press+freedom?OpenDocument>.

The (Charlottetown, Prince Edward Island) *Guardian* reported that the Canadian Association of News Editors (CANE) has called on Ontario’s attorney general to denounce Crane’s ruling and “clarify a reporter’s right to shield his sources [as] sacrosanct.” Kirk LaPointe, managing editor of *The Vancouver Sun* and one of CANE’s board members, told *The Guardian*, “Without that fundamental ability, the press cannot adequately serve the public by permitting people to step forward to provide information that has historically led to revelations of abuse of trust, institutional malfeasance and threats to public safety.”

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

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Access to Government

Maryland Governor Forbids Employees to Speak to Reporters

Maryland's governor Robert L. Ehrlich, Jr., has banned state public information officers from speaking with two reporters from *The Baltimore Sun*. The ban against David Nitkin and Michael Olesker apparently arose from two instances where, according to *The Baltimore Sun*, the governor believed that their reporting in the newspaper was "unfair." *The Sun* has filed suit to challenge the policy.

On Nov. 18, 2004, Ehrlich's press office sent out a memo to all state public information officers ordering them not to speak with *The Sun's* State House Bureau Chief David Nitkin or columnist Michael Olesker. The memo read, "Effective immediately, no one in the Executive Department or Agencies is to speak with David Nitkin or Michael Olesker until further notice. Do not return calls or comply with any requests. The Governor's Press Office feels that currently both are failing to objectively report on any issues dealing with the Ehrlich-Steele Administration. Please relay this information to your respective department heads." Recipients of the memo were directed to contact Greg Massoni, Ehrlich's Press Secretary, with questions or concerns.

The first article, written by Olesker and published on Nov. 16, 2004, concerned a hearing about state pro-tourism commercials. Ehrlich himself was featured prominently in the ads. Olesker wrote that when Paul E. Schurich, the governor's communication director, was questioned during the hearing about the potential for Ehrlich's political gain in making the ads, Schurich "struggl[ed] mightily to keep a straight face." It was later determined that Olesker had not actually attended the hearing, so he could not have known Schurich's demeanor. Olesker later said that he wrote the comment as metaphor. "What I was clearly intended to say for any discerning reader was that the ads were clearly meant to profit the governor politically, and for anyone to say otherwise, they would have to struggle to keep from smiling," Olesker told *The Sun*. "Anyone past the age of elementary school could have figured that much out."

On November 24, Olesker wrote a column stating that he had made a similar comment about a member of the Democratic party, and had received no complaint. "Was I there to see Schurich's expression? No. Was I there to see the Democrat's? No. If I misled anyone into thinking I was there, that's my fault – but not my intent. I'm sorry for any misunderstanding. My intent was to use shorthand to indicate the sheer absurdity – by both political parties – in pretending political gain isn't the intent of these commercials, which are paid for with taxpayers' money."

A November 23 editorial in *The Sun* defended Olesker, stating, "There's a metaphoric wall erected between the newsroom and the editorial departments (not to mention an actual floor). We don't tell them what to write and they don't tell us. It's a sacred division of labor."

The other article involved was one in a series by Nitkin in which he claimed that the state was selling

836 acres of parkland to the owner of a contracting company, and that the owner stood to make as much as \$7 million in tax breaks. One part of the series, published November 17, concerned properties across the state that were "being considered" for sale. The front-page story ran with a map erroneously depicting 450,000 acres of state-owned preservation land as the area for sale; it should have depicted an area composed of 3,000 acres. Nitkin was not himself responsible for the map, and *The Sun* ran a correction notice concerning the map the following day. In an article published by *The Sun* on November 23, Nitkin claimed that no one has pointed to any factual errors in the series.

Other articles may have played a role in Ehrlich's ban against *The Sun*. In 2002, *The Sun* published an editorial stating that African-American Lt. Governor Michael S. Steele "brought little to [Ehrlich's] team but the color of his skin." Although not specifically mentioned in the ban, another dispute involved a conversation between Olesker and Steele at Pimlico Race Course on May 14, 2004, when Olesker asked Steele about multiculturalism. According to Olesker, Steele said, "I'm comfortable with my governor," then laughed and asked, "So, what's your question?" On November 15 and again on November 19, Ehrlich's office claimed that Steele never saw Olesker at Pimlico. But on November 24, *The Sun* reported that Massoni and another of the governor's aides, Shareese N. DeLeaver, said that Steele did speak to Olesker at Pimlico. They claim that although Steele's comment about being comfortable with Ehrlich did occur, the second comment did not. The incident, Ehrlich's aides said, was not in the context of a formal interview with Olesker, but took place as Steele was being whisked away.

On November 28, *The Sun's* Public Editor Paul Moore wrote an article, perhaps in an effort to ease strained relations between the newspaper and the governor. Moore wrote, "*The Sun* bears responsibility for the errors that escalated an already contentious relationship. The newspaper's system of checks and balances broke down on deadline, which allowed the incorrect map of state lands to be published. The other issue is more serious. The decision by Olesker to describe [Schurich's] facial expression was a major lapse in judgement." Moore continued, "The administration has complained that the articles have been 'unbalanced,' but nothing in them has been found to be inaccurate," citing the incident where the governor's office reversed itself in the Steele matter.

Organizations such as the American Society of Newspaper Editors, the Reporters Committee for Freedom of the Press, the Maryland-Delaware District of Columbia Press Association, and the Newspaper Guild called on Ehrlich to rescind the ban.

On November 23, lawyers for Tribune Company, *The Sun's* owner, formally asked Ehrlich to lift the ban, calling the ban "unconstitutional on its face." "Federal

"The only arrow
in my quiver
is access."

—Governor
Robert L. Ehrlich

Courts have repeatedly recognized that all members of the media must be given the same access to official news sources,” David Bralow and Stephanie Abrutyn wrote. “Indeed, this appears to be nothing less than the government seeking to control content by punishing those who it perceives as critical.”

But in a November 24 interview with WBAL radio, Ehrlich told host Rob Douglas, “At some point you have to say, ‘Wait a second, how do I respond? What’s in my quiver?’ The only arrow in my quiver is access. If this is what we had to do in order to bring them to the table . . . I’m telling you we will talk to them.” But Ehrlich also said that the ban was meant to have a “chilling effect” on “two writers who have no credibility.”

Abrutyn responded to Ehrlich’s WBAL comments in a November 27 *Sun* article by saying, “He’s admitted that what he’s doing is using the power of his office to censor what citizens are able to hear by manipulating who they can hear it from based on whether he’s liked what they’ve said in the past. It’s inappropriate and it’s a violation of the First Amendment.”

On December 2, *The Sun* reported that Maryland state comptroller and former governor William Donald Schaefer urged Ehrlich to meet with editor Timothy A. Franklin. “You can’t beat a group with barrels of ink,” Schaefer told Ehrlich. “My advice to you, from someone who has fought the [Baltimore] Sunpapers, is you’ll never win.” Ehrlich did not immediately take Schaefer’s advice.

The following day, *The Sun* filed a lawsuit in the federal District Court in Baltimore, challenging Ehrlich’s ban against Nitkin and Olesker. The ban, the complaint stated, not only affected *The Sun’s* right to free expression in gathering news about state government, but also violated 42 USCS § 1983, which guarantees individuals the civil right to speak to anyone they wish. “The Governor,” the complaint read, “defended imposing the ban on all executive branch employees by saying, ‘That’s my government.’”

The complaint concluded with *The Sun* asking the court to enter a permanent injunction enjoining Ehrlich, DeLeaver and Massoni from banning reporters from speaking to the Governor’s staff, and requesting that attorney’s fees and court costs be paid by the Governor’s office.

David C. Vladek, an associate professor at Georgetown University Law Center and a specialist in First Amendment law told *The Sun* that the ban “is an effort to muzzle all state employees. What I’m concerned about is that the governor has pushed this issue in a way that almost necessitates a visit to the courts. I would hope that cooler heads will prevail soon.” Floyd Abrams, who represented *The New York Times* in the Pentagon Papers case, told *The Sun*, “A public official is not allowed to discriminate against one individual or newspaper as opposed to all others.”

On December 10, *The Sun* reported that Ehrlich and members of his communication staff had agreed to meet with *Sun* publisher Denise Palmer and editorial page editor Dianne Donovan, as well as Franklin and Moore. The meeting was scheduled for December 17. On December 18, however, *The Sun* reported that the meeting had “resulted in very little apparent progress toward lifting the ban other than an agreement to continue talking.” Ehrlich reportedly gave the paper’s editors a list of articles that he claimed contained inaccuracies. The editors agreed to “go over them soon.” On December 28, *The Sun* reported that Ehrlich had asked that *The Sun’s* complaint be dismissed. But on December 30, *The Sun* responded by filing a motion to lift the ban, saying that talks between the newspaper and the governor appeared to have stalled. The motion read that if Ehrlich’s ban is not immediately lifted, “*The Sun*, Mr. Nitkin and Mr. Olesker will remain unable to speak and listen freely, as is their right, and each citizen in Maryland will fear the Governor’s wrath if the Executive does not like what the citizen says.”

Between the time that *The Sun* filed its motion and January 8, Nitkin was not allowed to attend a briefing held by the governor, and was told by Massoni that the briefing was “private.” Another briefing concerning medical malpractice legislation was held on an “invitation only” basis.

A hearing on the motions was scheduled for January 28.

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

Access to Government

Failed Highway Bill Would Have Increased Government Secrecy

A federal highway funding bill would have expanded the definition of Sensitive Security Information (SSI), information that can be withheld from the public, to include any records containing information “detrimental to the safety of passengers in transportation, transportation facilities or infrastructure or transportation employees.” However, a threatened veto from President George Bush and squabbling over the size of federal funding in the Highway Trust Fund bill (S. 1072), also known as the Transportation Equity Act of 2004, resulted in conference committee talks collapsing towards the end of the Congressional session prior to elections on Nov. 2, 2004.

SSI is currently defined as information whose unauthorized release would be detrimental to transportation security, usually records pertaining to security screening procedures and related matters at airports and maritime facilities. Additionally, the Senate bill would have allowed SSI definitions by federal agencies to preempt state open records laws, meaning some previously open state records would be withheld from the public under the proposed law. (See “Media Access: TSA Publishes Guidelines to Protect Sensitive Security Information,” in the Summer 2004 *Silha Bulletin*, “Proposed Rules on Critical Information Infrastructure Elicit Comments from Silha Center, Others” in the Summer 2003 *Silha Bulletin*, and “The War on Terrorism: Balancing National Security and Civil Liberties,” in the Winter 2003 *Silha Bulletin*.)

Pressure from the Bush administration, which had threatened to veto any transportation bill over \$260 billion, along with political squabbling between members of a conference committee attempting to work out differences between the two versions of the Transportation Equity Act, eventually led members of Congress to give up trying to pass the legislation. The Senate version had called for \$318 billion in new highway spending as compared to the \$299 billion requested in the House version. Congress instead voted to continue highway spending at the levels established by the last highway funding bill, which was passed in 1996. The current funding levels will be effective until July 2005.

However, the designation of information as SSI has already led to preemption of state laws in some cases. A story in the Louisville *Courier-Journal* on Dec. 19, 2004 reported that officials at the Louisville International Airport had been instructed by the Transportation Security Administration (TSA) not to release information covered by SSI regulations even though it would otherwise be available to the public under Kentucky’s open records law. TSA, along with the Department of Homeland Security (DHS) and the Coast Guard, is in charge of labeling information as SSI.

Additionally, multiple definitions of SSI potentially create confusion as to whether or not information should be designated SSI. The U.S. Department of Agriculture (USDA) issued a departmental regulation, No. 3440-002, in January 2003 that identifies as SSI information that is “unclassified but sensitive security information.” USDA SSI is distinct from the transportation-related SSI regulated by other federal agencies. USDA SSI includes “unclassified information of a sensitive nature, that if publicly disclosed could be expected to have a harmful impact on the security of Federal operations or assets, the public health or safety of the citizens of the United States or its residents, or the nation’s long-term economic prosperity”

In a related development, *The Washington Post* reported on November 16 that the DHS was requiring all of its employees and contractors to sign nondisclosure agreements (NDAs) prohibiting them from sharing SSI and other sensitive but unclassified (SBU) information with the public. The DHS policy has been formally in place since May 2004. Valerie Smith, a spokesperson for DHS, told reporter Spencer Hsu that the agreements are “simply to inform and educate [employees] about the sensitivity of the information and the need to protect it” adding that “[i]t does not do anything to further obscure or shroud that information.” DHS had recently sought to require congressional aides to sign the same agreements but was rebuffed by both Democratic and Republican members of Congress. The NDAs had also reminded those signing them that violations can be penalized through administrative, disciplinary, civil, and criminal actions.

The NDA policy quickly gained the attention of open government advocates who feared they would increase government secrecy and cause those signing NDAs to unnecessarily withhold documents for fear of being punished if they were improperly released. Citing a need to safeguard SBU “without impeding its legitimate flow,” the DHS recently reversed its policy regarding NDAs. An internal DHS memo from Janet Hale, Undersecretary for Management, said that a new policy would replace the past policy mandating NDAs. The Jan. 11, 2005 memo said that any NDAs signed in the past will no longer be valid. Instead, the memo said that as of January 6, DHS “will develop and implement an education and awareness program for safeguarding of SBU information.” The memo concluded, “All employees, however, are reminded that they are obligated to follow the statutory and regulatory requirements governing the handling and dissemination of all categories of SBU information.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

The bill would have expanded information that can be withheld from the public, to include any records containing information detrimental to the safety of passengers in transportation, transportation facilities or infrastructure or transportation employees.

Freedom of Information Act News

Federal Lawmakers Call for Expanded Access to Court Records

The Senate Judiciary Committee and the Governmental Affairs Committee have concurrent jurisdiction to oversee the administration of federal laws such as the Freedom of Information Act (FOIA), 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, along with other laws regulating access to government records. The last time the Judiciary Committee held an oversight hearing on FOIA was more than 12 years ago, and the Governmental Affairs Committee last held such a hearing in 1980. Citing concerns over growing secrecy in the government, Rep. Harry Waxman (D-Calif.), a member of the House committee responsible for FOIA oversight, requested a study on secrecy in government earlier this year. The result was an 81-page report released on Sept. 14, 2004, entitled “Secrecy in the Bush Administration.” The report is available online at http://democrats.reform.house.gov/features/secrecy_report/index.asp.

Among the findings of the report, the study concluded that the federal government and private industry officials had spent over \$6.5 billion to classify government records in fiscal year 2003, a 38 percent increase from the \$4.7 billion spent in fiscal year 2001. The report was also critical of what it found to be inappropriate use of FOIA exemptions by federal agencies, delays in answering agencies’ responses to FOIA requests, and implementation of laws such as the USA PATRIOT Act, Pub. L. No. 107-56, 115 Stat. 272, that have expanded secrecy in the federal government. In an announcement at the release of the report, Waxman, the ranking minority member on the Government Reform Committee, said, “The Bush administration has an obsession with secrecy. It has repeatedly rewritten laws and changed practices to reduce public and congressional scrutiny of its activities.”

The report is only part of Waxman’s campaign to allow greater public access to federal government records, however. On the same day “Secrecy in the Bush Administration” was released, Waxman, along with several other members of the Government Reform Committee, introduced the Restore Open Government Act of 2004, H.R. 5073. The proposed bill contained several provisions that would have enhanced federal sunshine laws and restricted secrecy in the federal government, but failed to get House approval before the 108th Congress adjourned for the year.

One of the provisions would have revoked a memorandum issued by Attorney General John Ashcroft on Oct. 12, 2001. The Ashcroft memo is widely seen as providing significant legal protection to agencies if they refuse to disclose records under FOIA. The memo states that the Department of Justice will defend an agency’s asserted claims of FOIA exemption for its records “unless they lacked a sound legal basis.” Ashcroft’s memo reversed an earlier memo issued by Attorney General Janet Reno under the Clinton administration, which had stated that there would be a “presumption of disclosure” for all FOIA requests and unless “the agency reasonably foresees

that disclosure would be harmful to an interest protected by that exemption,” the Department of Justice would not defend the agency’s claimed FOIA exemption. The bill would have reinstated the Reno memo’s position on FOIA exemption claims.

Another provision of the Restore Open Government Act dealt with records released under the Presidential Records Act, 44 U.S.C. § 2201, et seq. The Presidential Records Act provides for the public release of the papers of former presidents after they have left office. President Ronald Reagan issued Executive Order (E.O.) 12667, 54 Fed. Reg. 3403, modifying the Presidential Records Act, on Jan. 16, 1989. E.O. 12667 allowed a former president to present a claim of executive privilege exempting those records from public release. However, unless either the current president or the Archivist of the United States agreed with the claim of executive privilege, the records would still be released despite the claimed privilege. President George Bush changed this presumption with E.O. 13233, 66 Fed. Reg. 56025, issued on Nov. 1, 2001. E.O. 12233 permits former presidents to veto the release of their papers to the public under the Presidential Records Act unilaterally without approval of the sitting president or the Archivist. The Restore Open Government Act sought to revoke Bush’s E.O. 13233 and replace it with the Reagan E.O. 12667.

A final provision of the Restore Open Government Act would require disclosure of the names of individuals who provide information to an inter-agency committee when that information “influenced or was reflected in any way in the committee’s advice, recommendations, or report to the President or Vice President.” This would modify the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2, which only requires disclosure of the names of individuals actually appointed as members of inter-agency committees.

The current disclosure provisions of FACA are being contested in the controversy over the National Energy Policy Development Group led by Vice President Dick Cheney. (See “Media Access: *Cheney v. United States District Court*” in the Summer 2004 *Silha Bulletin*, and “Access to Information and the U.S. Supreme Court: *Cheney v. United States District Court*” in the Fall 2004 *Silha Bulletin*.) The proposed changes to FACA would require any such future committee to release the names of those providing advice to the committee, even if they were not actually appointed to serve on the committee.

Waxman is not alone in the fight to open government records to the public. Sen. John Cornyn (R-Texas), a former judge and attorney general for Texas under then-Governor George Bush, also wants to modify the administration of FOIA. The junior Senator wants to change FOIA to allow quicker, easier, and broader access to government records. Cornyn told *Roll Call* reporter Suzanne Nelson, “My interest in [FOIA] really goes back to basics – my philosophy of government and why I am proud to call myself a conservative. That

“All legitimate government authority flows from the consent of the governed, and the governed can’t consent if they don’t know what is going on.”

—Rep. Harry Waxman

Waxman, continued on page 25

Access to Courts

Update: Electronic Access to Court Records

Minnesota

On Sept. 21, 2004, the Minnesota Supreme Court held a final public hearing on the proposed Rules of Public Access to Records of the Judicial Branch (Access Rules). The Supreme Court hearing was the last step before the court promulgates new Access Rules designed to enable public access to electronic court records in Minnesota. The public hearing also marked the formal presentation of an advisory committee's final report on recommendations for the new Access Rules.

The committee was appointed by the court on Jan. 23, 2002 and was composed of Minnesota judges, court clerks, attorneys, and others. The committee was charged with determining which court records should be available remotely via the Internet and had released a preliminary report in January 2004. The Silha Center provided written comments on both the preliminary and final report of the advisory committee. (The comments are available on the Silha Center's website at <http://www.silha.umn.edu/resources.htm>. See also "Court Advisory Committee Files Online Access to Court Documents Report," in the Summer 2004 Silha *Bulletin* and "Silha Center Files Comments on Records Access," in the Winter 2004 Silha *Bulletin*).

The Hon. John R. Rodenberg, Brown County District Court judge, and the Hon. Warren Sagstuen, Hennepin County District Court judge, formally presented the final report of the advisory committee and the proposed Access Rules to the state's high court at the September 21 hearing. Rodenberg explained that the advisory committee solicited input from multiple outside sources including state legislators, local law enforcement officials, and experts in access to court records before settling on a "measured step" in a "go slow approach" toward greater remote access to court records. As a result, Rodenberg said that the proposed Access Rules restrict access to most court records, allowing only a few categories of records to be made available remotely, such as registers of actions and parties, court calendars, judgment dockets, and final judgments and orders.

Sagstuen addressed the advisory committee's inability to come to a determination of how access to bulk distribution of court records should be handled; the committee split on three alternatives regarding distribution of bulk records. Bulk records are compilations of court documents maintained in a database for analytical or other purposes. One alternative would restrict access to only those bulk records available remotely. Another alternative would further restrict public access to bulk records by withholding from the public those records containing any preconviction data. The final alternative would allow bulk records to be distributed to anyone when the individual records are already publicly available either at the courthouse or remotely. This alternative would also allow bulk distribution of records not otherwise available for scholarly, journalistic, or governmental research, provided individuals in the records would not be identified.

In addition to the Silha Center's submission of written comments to the Court, Professor Jane Kirtley, Director of the Silha Center, presented oral comments on behalf

of the Silha Center. Kirtley stressed the importance of maintaining the presumption of public access to court records, especially those in electronic form, pointing to the fact that other states look to Minnesota for guidance in this area as Hennepin County courts have provided remote access to its electronic records since 1992. Broader access to court records, Kirtley said, including remote access, allows public oversight of the judicial systems while facilitating the transition to electronic records in an age when paper records are quickly disappearing from courthouses. To preserve public access, she emphasized that "records that are public at the source should remain public. When we say we believe in access, we should make it meaningful."

John Borger, an attorney at the Faegre & Benson law firm in Minneapolis, spoke on behalf of the Minneapolis *Star Tribune* and also advocated for broader access to court records. He called the Access Rules "in many respects, a practical step backward [that] sets up a ceiling which would be unconstitutional." He explained that the content restrictions on court records available remotely, which are presumptively open to the public, amounted to a prior restraint on members of the media who use those records for accurate and quick reporting on matters of public interest. Borger, in written comments to the Court, said that the Access Rules "should affirmatively embrace public access rather than focus upon the perceived problems of remote and bulk access to court records, and should not prohibit remote and bulk access to court records that are public at the courthouse."

Several individuals provided comments against the adoption of broad Access Rules. John Stuart, a Minnesota public defender, said, "Many names in [preconviction court records] belong to those who didn't do any wrong." Stuart warned that because minorities have disproportionately high arrest rates and low conviction rates, court records containing that sort of preconviction data can potentially be used by landlords and employers to discriminate against those individuals. Hersch Izek, a staff attorney at the Legal Rights Center, echoed Stuart's concerns, while adding that court records are often inaccurate. He said that court records that contain misspelled names could possibly be used wrongly against individuals sharing the misspelled name with the inaccurate court records.

Prof. Roger Banks, speaking for the State Council on Black Minnesotans, Julian Johnson, from Communities United Against Police Brutality, Gordon Stewart, executive director for the Legal Rights Center in Minneapolis, and Don Samuels, a Minneapolis City Councilor for the 3rd Ward, all raised similar concerns about the potential misuse of court records to discriminate against the poor and minorities. Additionally, Marna Anderson, executive director of WATCH, an organization that

"Records that are public at the source should remain public. When we say we believe in access, we should make it meaningful."

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

monitors domestic and child abuse cases in Minneapolis, raised concerns over the possible harms to abuse victims if family court records containing identifying information on victims should become available online. Anderson said that abusers could possibly use that information to stalk or attack their victims again.

Several individuals and organizations also submitted written comments to the Court but did not speak at the public hearing. The Consumer Data Industry Association (CDIA), an international trade association that represents more than 400 consumer data companies in areas such as credit reporting, fraud prevention, and collection services, urged the Court to allow broad public access to court records. CDIA said that broad Access Rules would provide its members with up-to-date information which can be used to prevent fraud and provide accurate credit reports serving both public and private interests. Additionally, CDIA explained that the Fair Credit Reporting Act, FCRA, 15 USC §§ 1681 *et seq.*; the Minnesota credit reporting law, Minn. Stat. §§ 13C.001 *et seq.*; and other privacy laws have already established effective regulation regimes to minimize misuse of information gathered from public records.

Although the Minnesota Supreme Court has not said when it will issue the final version of the Access Rules, the final hearing, at least temporarily, has ended public discussion on remote access to court records in Minnesota. The debate, however, continues around the country. As courts decide how best to allow public access to court records in the electronic age, public access advocates continue to spar with those urging greater protection of privacy.

Washington

The Washington Supreme Court updated its rules on public access to court records when it adopted General Rule 31 on Oct. 26, 2004. Like the proposed Access Rules in Minnesota, General Rule 31 was the result of work by a committee empanelled by the court to study how technology could be used to provide access to court records remotely and at the courthouse.

The Judicial Information System Committee (JISC) was chosen to oversee this process and held its first public hearing in 1999. JISC's final report was released in July 2004. Justice Bobbe J. Bridge, chairman of JISC, said in an October 7 press release, "The adoption of this rule provides the citizens of Washington state assurance that they will have open access to the working of the judicial system by the Washington courts. Our state constitution mandates that government shall be administered openly, and we strived to develop a rule that would accomplish this, while still protecting a citizen's reasonable expectation of privacy."

In contrast to the proposed Access Rules in Minnesota, Washington's General Rule 31 begins with the presumption that all court records should be widely available to the public and that courts should facilitate remote access to those records. General Rule 31 applies universally to court records in paper and electronic formats. While the rule does not require that courts

put records online, it does mandate that "[t]he public shall have access to all court records except as restricted by federal law, state law, court rule, court order, or case law." Under General Rule 31, attorneys are responsible for redacting personal information from records filed with courts, whether in electronic or paper form. This requires that attorneys remove all but the last four digits of Social Security numbers and financial account numbers, use only initials in place of the names of minor children, and completely remove driver's license numbers.

Records not available to the public can still be released to scholarly, governmental, and research organizations provided that the requesting party signs an agreement restricting disclosure and dissemination of the requested information. Bulk distribution of all court records is allowed, except when a request for bulk records would create "an undue burden on court or court clerk operations because of the amount of equipment, materials, staff time, computer time or other resources required to satisfy the request." General Rule 31 also states that bulk records cannot be used for commercial solicitation of the individuals in the records. Only juror identification information from ongoing cases and master lists of jurors are specifically "presumed to be private" under General Rule 31. However, even that information can potentially be released upon a good cause showing by the requestor. Two other Washington court rules already restrict access to family law court records and allow courts to seal any record when compelling circumstances exist.

California

The California Judicial Council approved new rules on Oct. 15, 2004 that allow courts to post records and other information in high publicity criminal trials online. Records from most criminal trials will remain available only at the courthouse, however. The new rules allow individual courts to decide whether to allow remote access to the court records and whether that information should be available to the general public or only members of the media. *The Recorder*, a San Francisco legal publication, reported on Oct. 18, 2004 that the impetus to modify California rules on access to court records was due to the intense public scrutiny of Michael Jackson's criminal trial which is taking place in Superior Court for Santa Barbara County. According to *The Recorder*, the Santa Barbara County's Web site for court records has received more than 150,000 hits from members of the media seeking information on the trial. Santa Barbara County Superior Court Judge Clifford Anderson, III, said that making these records available remotely has saved the court between \$500,000 and \$750,000. Anderson told reporter Jill Duman, "So far, there have been no requests at the clerk's office for a copy of a document. The media is well trained – they wait for the beep saying, 'You have e-mail,' and they leave us alone."

Florida

The Florida Supreme Court has created a 15-member Committee on Privacy and Court Records to recommend new court rules for remote access to

Access to Courts

Criminal Charges Dropped Against Kobe Bryant; Civil Suit Pending

On Sept. 1, 2004, prosecutors dropped felony rape charges against Kobe Bryant in the Colorado criminal case *People v. Bryant*. Bryant's accuser, however, had commenced a federal civil suit on Aug. 10, 2004, suing Bryant for unspecified damages attributed to "ridicule, pain and suffering" stemming from the alleged rape. Questions have arisen regarding the accuser's anonymity and the public's access to criminal files, as Bryant continues to face civil charges.

After prosecutors dropped the criminal charges, six different media organizations, including the Associated Press, requested access to the files from the criminal investigation and trial. The records were voluminous, and included hundreds of court filings and transcripts of interest to the public, such as a transcript of an interview with Bryant taken the night after the alleged attack. Bryant's attorney, Pamela Mackey, feared that media exploitation of the file contents would harm her client. Mackey told the Associated Press, "no member of the public or media should be permitted to manipulate and abuse for salacious and other improper purposes the evidence, audio recordings and other materials in this case."

On Sept. 8, 2004, Bryant's attorneys sought a temporary restraining order to seal Bryant's arrest and criminal records. Arguing for the order, Mackey said that open records would expose Bryant to "immediate and irreparable injury." Eagle County District Judge Richard Hart granted Bryant an emergency temporary restraining order on September 8, sealing the files for ten days or until deciding on the hearing for a permanent restraining order. But on September 27, Bryant's legal team filed three motions to vacate Hart's order. Mackey explained the reversal by saying that she and Bryant's other attorneys believed that

opening the documents to the public would allow for access to ample evidence suggesting Bryant's innocence. The Colorado Bureau of Information (CBI), however, determined that it would not release records of its findings from the criminal investigation of Bryant. CBI records include, for example, results from DNA, hair, clothing and fiber tests.

Although the CBI has blocked access to investigative records, Bryant's accuser will not be able to enjoy anonymity while pursuing her civil claims. On October 6, District Judge Richard Matsch ruled that Bryant's accuser's name would be made public in the civil suit. Upon commencement of the civil trial, the accuser's name did not appear in pretrial court filings. Both Bryant's attorneys and *The Rocky Mountain News* argued against a guarantee of anonymity, and distinguished issues of fairness in a civil case from issues of privacy in a criminal case. Matsch embraced the distinction, noting that in civil proceedings the "parties appear as equals before the court." According to Matsch, allowing Bryant's accuser to make anonymous allegations would impose unfair prejudice on Bryant.

Although the criminal trial court had itself accidentally released the name of Bryant's accuser more than once, the young woman's identity was officially sealed during the criminal case (see "Justice Breyer Upholds Publication Ban" in the Summer 2004 *Silha Bulletin*). Now the identity of Bryant's accuser is a matter of public record, but most mainstream media groups have opted not to publish the young woman's name out of respect for press ethics policies favoring anonymity of alleged rape victims.

—KELLY J. HANSEN MAHER
SILHA FELLOW

"No member of the public or media should be permitted to manipulate and abuse for salacious and other improper purposes the evidence, audio recordings and other materials in this case."

—Attorney
Pamela Mackey

Waxman, continued from page 22

is because all legitimate government authority flows from the consent of the governed, and the governed can't consent if they don't know what is going on."

Cornyn has said he intends to introduce a bill in the Senate that would reshape FOIA to make it more like the Texas open records laws, Texas Gov't Code Ann. §§ 551.001, *et seq.* and 552.001 *et seq.* The Texas statutes presume that the public has a right to information unless the government can affirmatively show that the release of the requested records would be against the public interest. Cornyn has also suggested that he would like to see federal court records and Congressional records subject to the terms of FOIA.

Cornyn was considered a staunch defender of public release of government records in Texas and even sued Texas agencies on a few occasions to force them to comply with lawful requests. Additionally, when Cornyn was attorney general for Texas, he helped to dramatically reduce turnaround times on information requests for government records. As attorney general, he also established a state-wide, toll-free hotline to take requests for public information. The hotline handled more than 11,000 calls in 2000 alone.

Waxman has not said whether he intends to propose the Restore Open Government Act during the 109th Congress that convened in January 2005.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Florida court records. The committee, which is currently conducting meetings and public hearings, has until July 2005 to determine what court documents should be available remotely. Since November 2003, the public has not had remote access to Florida court records due to a moratorium on posting court records online issued by then-Florida Supreme Court Chief Justice Harry Lee Anstead. The moratorium is set to expire once the Florida Supreme Court promulgates new rules on remote public access to court records.

Echoing concerns raised by those in Minnesota and elsewhere, privacy advocates have maintained that publishing court records online will enable private companies to collect large amounts of personal information on people that could be used improperly by employers or landlords, or that identity thieves might acquire information on potential victims from court records. In September 2004, Jon Mills, a privacy advocate and director of the Center for Governmental Responsibility at the University of Florida law school and chairman of the Florida committee, told *The Broward Daily Business Review* reporter Laurie Cunningham, "It doesn't appear that there's a legal requirement that if it exists on paper, it must exist on the Internet. This is a question of medium. Does the medium of computer amalgamation make it more damaging or more dangerous than it is sitting in the court file?"

Public access advocates say that Florida court records and other public records do not present a threat of identity theft because identity thieves typically gather their information by stealing wallets and lifting credit card numbers from discarded receipts. Stephen Grimes, a partner at Holland & Knight law firm in Tampa, had petitioned the Florida Supreme Court to lift its moratorium as being unnecessarily overbroad and unduly restricting public access to court records. Grimes, who represented the *Tampa Tribune*, the *Sarasota Herald-Tribune*, and *The Orlando Sentinel*, wrote in the petition that the supreme court's moratorium "does not identify a single instance in which Internet access to judicial records has resulted in a harmful result to the public in general, or to any person in particular." A similar petition was filed by the Florida Land Title Association claiming that restrictions on access to court records was hampering accurate data collection and made it more difficult and expensive for title insurance companies to research mortgage foreclosures, divorce files, and probate records to ensure that a property is free of liens. The court denied both petitions, keeping the moratorium in place, and recommended that the groups present their concerns to the Florida Committee on Privacy and Court Records during its public hearings and comments. The Florida committee's final report is due in March 2005 and will be submitted to the Florida Supreme Court in July 2005.

Federal Courts

Federal courts have been implementing a system to allow remote access to a greater number of federal court records. The Case Management/Electronic Case Files (CM/ECF) system was first introduced in federal district courts around the country in 2001 for civil and bankruptcy cases, and for criminal cases on Nov. 1, 2004. The CM/ECF system is part of a plan to update the federal judiciary's ability to handle and create electronic records while also accepting case filings from attorneys over the Internet. According to the U.S. Courts CM/ECF website, available online at http://www.uscourts.gov/cmecf/cmecf_about.html, the Court of International Trade, Court of Federal Claims, 53 district courts, and 77 bankruptcy courts now use the CM/ECF system. Federal appellate courts will begin implementing the CM/ECF system later this year.

Like Washington state's General Rule 31, parties and attorneys filing records with a federal court using the CM/ECF system have the duty to redact all but the last four digits of Social Security numbers and financial account numbers, and to reduce the names of minor children to initials. Additionally, attorneys must remove all but the year from dates of birth and the city and state from home addresses. Unexecuted warrants, presentence reports, supervision violation reports, juvenile records, financial affidavits used to seek court-appointed counsel, *ex parte* requests for expert or investigative services at court expense, and sealed court records are not available to the public in any form. Additionally, federal courts are still allowed to seal any court record upon a good cause showing by the requesting party.

All of the courts that already have the EM/CEF system in place have the ability to offer court records remotely to the public. Even though the Judicial Conference has adopted a set of recommendations to govern public access to electronic court records in the EM/CEF system, remote public access is not mandatory for any of the courts utilizing the EM/CEF system. However, the public can obtain copies of all court records available at the courthouse through the Public Access to Court Electronic Records (PACER) program for seven cents per page, with a maximum cost of \$2.10 per document.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

New Developments in Privacy Law

Federal Judge Rules Newspaper Cannot Be Sued Under HIPAA

On Aug. 2, 2004 a federal district court judge dismissed a lawsuit filed against a Denver newspaper for an alleged violation of the Health Insurance Portability and Accountability Act (HIPAA), 42 U.S.C. §§ 1320d *et seq.* Judge Walker Miller of the federal District Court in Denver found that the *Rocky Mountain News'* publication of excerpts from a peer review report by the University of Colorado Hospital Authority did not create a private cause of action against the newspaper under HIPAA. HIPAA protects patients' privacy in medical records and allows the imposition of fines and possible jail time for anyone who violates the law with "intent to sell, transfer or use individually identifiable health information for commercial advantage, personal gain or malicious harm." But in *University of Colorado Hospital Authority v. Denver Publishing Co.*, 2004 U.S. Dist. LEXIS 19913, the court held that HIPAA "displays no intent to create a private right of action," finding that the law regulates only those "who might have access to individuals' health information" and not newspapers.

The peer review report had focused on accusations of substandard care and breaches of ethics by Dr. Issam Awad. Awad had been the chairman of the University of Colorado Medical School's neurosurgery department until his resignation in February 2003. He remained on the University of Colorado faculty until leaving for Northwestern University later that year. The peer review report concluded that Awad should have his hospital privileges permanently revoked, although the hospital authority did not take that action. After the peer review process was complete, Awad filed a discrimination suit in June 2003 against the hospital, the university, and several doctors at the hospital, claiming that the report and its recommendations were the result of prejudice against him because he is Lebanese.

In November 2004, during Awad's initial lawsuit, the *Rocky Mountain News* obtained the confidential peer review report from an anonymous source in November 2003. Although Awad and the doctors he sued, all of whom were involved with the peer review, agreed that the report should be released to the public, the hospital authority asked the district court to issue a temporary restraining order against the *Rocky Mountain News*, barring it from releasing any part of the peer review report. The *Rocky Mountain News* argued that a temporary restraining order would be tantamount to a prior restraint and that other remedies, such as a civil lawsuit for damages, would be more appropriate. The judge agreed and denied the hospital authority's request in November 2003.

According to an *American Medical News* article, available online at: <http://www.ama-assn.org/amednews/2003/11/10/gvsb1110.htm>, Miller said from the bench that the hospital authority had raised legitimate concerns for patient privacy but the First

Amendment required heightened scrutiny of the privacy claim. Miller went on to find that the public interest in the regulation and policing of the medical profession means the peer review report is newsworthy. "There isn't any question that what's asked is a prior restraint," Miller said. "And the law is clear that that's only acceptable in exceptional circumstances, only where the evil that would result from the publication is great and certain and can't be mitigated by less intrusive measures." Miller found that the hospital authority had failed to satisfy the demanding burden to show that the temporary restraining order would be the least intrusive measure, and allowed the *Rocky Mountain News* to publish the peer review report.

Miller's subsequent decision in August 2004 foreclosed the hospital authority's attempt to recover civil damages against the *Rocky Mountain News* under HIPAA. Although the hospital authority's HIPAA claim was dismissed from federal court, Miller remanded the hospital authority's state law claims to state court. The hospital authority has maintained that the possession of the peer review report by the *Rocky Mountain News* constituted civil theft in violation of Colorado law and that the newspaper's refusal to return the report to the hospital constituted trespass of personal property.

In a separate case raising similar issues, an individual in Texas has sued a newspaper claiming that the publication of his HIV-positive status violated his expectation of privacy in his medical information. That case, *Doe v. New Times Inc.*, is before Judge Merrill Hartman in the 192nd District Court, Dallas. The plaintiff filed his lawsuit against the *Dallas Observer* after the newspaper identified him by name as being HIV-positive.

Doe's suit stems from an article, written by freelance reporter J.D. Sparks and entitled "Fallen Angel," which focused primarily on accusations of wrongdoing by Rev. Michael Piazza of the Dallas-based Cathedral of Hope Church and mentioned the plaintiff only in reference to a possible insurance scam by the church.

The plaintiff seeks \$1.1 billion in damages from the *Observer* and its parent company, New Times Inc. Doe does not dispute that he is HIV-positive, but claims that the newspaper's publication of that fact violated section 81.103 of the Texas Health and Safety Code. Section 81.103 bars disclosure of medical test results without the written consent of the patient and provides for civil penalties between \$5,000 and \$10,000 per disclosure. Doe argues that the *Observer's* circulation of 110,000 and the number of visitors to its webpage each day amount to at least \$1.1 billion in damages. The *Observer* has kept Sparks' article on its website since it was initially published in December 2003.

The *Observer* and New Times Inc. have moved for summary judgment and dismissal of the plaintiff's

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"There isn't any question that what's asked is a prior restraint."

—Judge
Walker Miller

New Developments in Privacy Law

Video Voyeurism Prevention Act Signed into Law

The House called video voyeurism the new frontier of stalking.

The U.S. House and Senate have both approved federal legislation amending title 18 of the United States Code to include a prohibition on video voyeurism. Approved by the House on Sept. 21, 2004, the bill was signed by President Bush on December 23. The legislation (S.1301) known as the "Video Voyeurism Prevention Act of 2004," prohibits knowingly capturing an improper image of an individual "by video tape, photograph, film, or any means or broadcast" without that individual's consent and under circumstances in which the individual has a reasonable expectation of privacy. Improper images are those that depict an individual's "naked or undergarment clad genitals, pubic area, buttocks, or female breast." The prohibition does not apply to people engaged in lawful law enforcement or intelligence activities.

The House called video voyeurism the new frontier of stalking. After voting to pass the bill, Rep. F. James Sensenbrenner, Jr. (R-Wisc.), Chairman of the House Judiciary Committee, said that smaller cameras and instantaneous Internet distribution capabilities make "the issue of video voyeurism is . . . a huge privacy concern." The Act will make video voyeurism on federal property punishable by a fine of not more than \$100,000, or up to one year imprisonment, or both.

Video voyeurism, also known as "cyber-peeping," typically refers to "up-skirt" or "down-blouse" images taken of women without their consent. With the proliferation of video and camera phones, law enforcement officials have seen an increase in "peeper" cases, which commonly involve photos of women or girls taken in public places like stores or malls. Some wireless video cameras, such as those marketed by a company named X10, specifically promote the ability to surreptitiously video women's private body parts. With the technological ability to immediately transmit images with camera phones, there is also a growing host of video voyeurism Web sites.

Because the federal law applies only to acts conducted on federal property, sponsors of the bill hope that it will serve as a model for comparable state laws. Currently, more than half the states have some form of video voyeurism law. Minnesota, for example, currently has an "Interference with Privacy" statute, Minn. Stat. § 606.746, that makes it a misdemeanor to surreptitiously install any device for monitoring a person where they would have a reasonable expectation of privacy.

—KELLY J. HANSEN MAHER
SILHA FELLOW

HIPAA, continued from page 27

claim, arguing that section 81.103 was not intended to be used against newspapers when the published information was already disclosed to the public. They argue that the plaintiff's HIV-positive status was made public by the release of a CD recording of HIV-positive choral singers that included the plaintiff's name and picture among the group's membership. James Hemphill, an Austin attorney who represents the *Observer*, told Miriam Rozen of the *Texas Lawyer*, online at: <http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1090180434875>, "The First Amendment gives us the right to print the truth, especially when it's not private. Our position is that the court should not even reach that question because there is no liability. But if the court does, certainly it is not the Legislature's intention for multimillion-dollar lawsuits against newspapers." The motion for summary judgment had not been decided at the time the *Silha Bulletin* went to press.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Internet Updates

FBI Seizes Hard Drives Belonging to Indymedia

The FBI, acting at the behest of the Italian and Swiss governments, seized computer hard drives and shut down over 20 Web sites belonging to Indymedia, a global media collective on October 7, 2004. The computer seizure and the subsequent web site shutdown have provoked an outcry from press freedom advocates who see the governments' actions as an abridgement of free speech on the Internet.

The two computer hard drives confiscated at the London premises of Rackspace, a Texas-based Web host provider, hosted Internet sites belonging to the Independent Media Center, better known as Indymedia. Indymedia, a global collective of independent media organizations and reporter-activists, was established to provide grassroots coverage during the World Trade Organization protests in Seattle in 1999. It defines itself as "a network of collectively run media outlets for the creation of radical, accurate, and passionate tellings of the truth." Indymedia's statement is available on its website at <http://www.indymedia.org/en/static/about.shtml>. The FBI seizure shut down over 20 of Indymedia's Web sites in an estimated 17 countries.

Indymedia insists that it was not notified about the seizure nor informed about the reasons for it. Rackspace has stated that it is prohibited from disclosing the subpoena's contents. The confiscated computers were returned on October 12, and the Associated Press (AP) reported that while the Web sites shut down by the seizure were up and running as of October 27, some of the sites that did not have backup are missing material, such as photographs.

The FBI, in a statement published by AP on October 27 said "Rackspace located the Indymedia records on servers in the United Kingdom. A brief interruption of Indymedia's Internet service resulted when Rackspace copied the subpoenaed records from their servers. There is no FBI or U.S. investigation into Indymedia." The BBC reported a statement by a Rackspace spokesperson who said, "Rackspace is acting as a good corporate citizen and is cooperating with international law enforcement authorities." The BBC story is available online at <http://news.bbc.co.uk/1/hi/technology/3732718.stm>.

Free speech advocates reacted to the seizure and shutdown with alarm. Barry Steinhardt of the American Civil Liberties Union (ACLU) told the AP in an October 26 story that the implications of the FBI's seizure and Indymedia's shutdown are "profound." Steinhardt called the Indymedia group "classic dissenters" and compared the seizure of Indymedia's information to government seizure of "a printing press or [the] shutting down a radio transmitter."

On October 20, the Electronic Frontier Foundation (EFF), a civil liberties organization working to protect

free expression online, filed a motion in the United States District Court for the Western District of Texas on Indymedia's behalf to unseal the seizure order. EFF argues that "the public and the press have a clear and compelling interest in discovering under what authority the government was able to unilaterally prevent Internet publishers from exercising their First Amendment rights." EFF's motion to unseal is available online at http://www.eff.org/Censorship/Indymedia/20041022_Indymedia_Motion_to_Unseal.pdf.

"The feds can't pull the plug on more than 20 news Web sites – our modern printing presses – based on a secret proceeding at the request of a foreign government. This is a flagrant violation of the First Amendment," said Kevin Bankston, an EFF attorney. "As far as the Constitution is concerned, Indymedia has the same rights as any other news publisher. The government can't shut down *The New York Times*, and it can't shut down Indymedia." Bankston's statement is available on EFF's website at <http://www.eff.org/Censorship/Indymedia/>.

EFF reports that it has contacted the FBI, the U.S. Departments of State and Justice, the U.S. Attorney's Office in San Antonio, and the U.S. District Court for the Western District of Texas to discover where the seizure order was initiated, "but no agency has accepted responsibility." None of the governments involved in the Indymedia investigation have said where the servers were taken or even what specific Indymedia content was the object of the seizure. EFF's statement is available online at <http://www.eff.org/Censorship/Indymedia/>.

EFF compared the seizure of Rackspace's hard drives to the computer seizure in the *Steve Jackson Games, Inc. v. United States Secret Service*, 36 F.3d 457 (5th Cir. 1994). In that case, the Fifth Circuit considered whether a seizure by the Secret Service of a computer housing an electronic bulletin board system and private e-mail violated federal law. The District Court for the Western District of Texas had ruled that the Secret Service violated the federal Privacy Protection Act, 42 U.S.C. § 2000aa (2004) and awarded damages, which were affirmed by the Fifth Circuit.

The FBI issued its subpoena to Rackspace under the authority of the Mutual Legal Assistance Treaty (MLAT). The BBC described MLATs as "powerful bilateral agreements between two countries which allow for far-reaching powers of police and judicial cooperation." The BBC report is available online at <http://www.infoshop.org/inews/stories.php?story=04/10/13/1495350>.

Specifically, MLATs enable signatory countries to work in tandem to summon witnesses, compel docu-

"As far as the Constitution is concerned, Indymedia has the same rights as any other news publisher. The government can't shut down *The New York Times*, and it can't shut down Indymedia."

—Kevin Bankston,
Attorney for EFF

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Internet Updates

Federal Judge Finds Provision of the PATRIOT Act Unconstitutional

U.S. District Judge Victor Marrero of the Southern District of New York struck down a key provision of the USA PATRIOT Act, Pub. L. 107-56, ruling that the provision, which authorized the FBI to gather telephone and Internet records on private citizens from Internet service providers (ISPs), was unconstitutional because it allowed the agency to operate without judicial oversight. The Sept. 29, 2004 ruling in the case *Doe v. Ashcroft*, 334 F.Supp. 2d 471 (S.D.N.Y. 2004), was the second to strike down the expanded government surveillance powers provided for in the PATRIOT Act. Marrero also struck down a gag order provision that prohibited ISPs from telling their customers when they receive an FBI subpoena as an unconstitutional prior restraint on free speech.

The lawsuit was brought by the American Civil Liberties Union (ACLU) and the New York Civil Liberties Union on behalf of an ISP, identified only as "John Doe," to challenge the constitutionality of Section 505 of the PATRIOT Act. Section 505 expands the ability of government counterterrorism and law enforcement agents to authorize a type of subpoena called a "national security letter." Such letters do not require judicial approval or any finding of probable cause of illegal activity. They also prohibit the recipients from disclosing the fact that a subpoena was issued.

National security letters first became available as an investigative tool in 1986. The *Los Angeles Times* reports that they are "common among regulatory agencies" such as the Internal Revenue Service and the Securities and Exchange Commission. An Oct. 11, 2004 *Washington Post* editorial said, "What makes these letters unusual is their secrecy. The recipients are forbidden from disclosing that they got one, and there is no explicit provision for judicial review. Under the literal terms of the statute, a recipient would not even be able to tell his lawyer he had received it."

Out of concern for possible abuses, this investigation power has only been available to law enforcement under certain circumstances. According to the *Los Angeles Times*, the National Security Letter Statute, 18 U.S.C. § 2709, "carved out an exception in terrorism or counterintelligence cases where the target was said to be an agent of a foreign power." Section 505 of the PATRIOT Act further expanded the powers of the government to engage in counterterrorism activities through intelligence and surveillance agencies by weakening the requirements for issuing national security letters while affording government authorities greater discretion to issue the letters. According to the *Los Angeles Times*, the FBI has issued hundreds of these letters since the Sept. 11 terrorist attacks.

The ACLU, in *Doe v. Ashcroft*, had argued that Section 505 was an unconstitutional infringement upon citizens' First and Fourth Amendment rights. It argued that in conferring limitless authority upon the FBI to access private communications records while affording the recipients of the subpoenas no opportunity to challenge them, the provision was an unreasonable search and seizure in violation of the Fourth

Amendment. The ACLU also argued that the gag order provision of the PATRIOT Act was an unconstitutional prior restraint on free speech. The government maintained that the opportunity to challenge a subpoena was implicit and that the gag order was necessary to protect the integrity of ongoing investigations by intelligence agencies.

Marrero sided with Doe and the ACLU, ruling that the PATRIOT Act's gag order provision was an unconstitutional prior restraint violating the First Amendment's guarantee of free speech and that the national security letters violated the Fourth Amendment by failing to provide for judicial challenge. "Democracy abhors undue secrecy," Marrero wrote. "An unlimited government warrant to conceal . . . has no place in our open society."

Marrero continued, "Under the mantle of secrecy, the self-preservation that ordinarily impels our government to censorship and secrecy may potentially be turned on ourselves as a weapon of self-destruction." Marrero rejected the government's arguments of implicit safeguards on the grounds that the letters do not make it clear that the recipients can challenge them. Marrero issued an injunction to block the use of the letters, but stayed his decision while the Department of Justice (DoJ) appeals the case.

After the ruling, the ACLU issued a statement saying, "In his ruling, Judge Marrero recognized that the PATRIOT Act represented 'a major revision' to the [national security letter] power because it replaced the prior requirement of individualized suspicion with a 'broad standard of relevance to investigations of terrorism or clandestine intelligence activities.'" The ACLU's analysis is available online at <http://www.aclu.org/news/NewsPrint.cfm?ID=16631&c=282>.

ACLU Executive Director Anthony D. Romero hailed the ruling, calling it "a landmark victory against the Ashcroft Justice Department's misguided attempt to intrude into the lives of innocent Americans in the name of national security." ACLU attorney Jameel Jaffer said, "Today's ruling is a wholesale refutation of excessive government secrecy and unchecked executive power." The ACLU's statements are available online at <http://www.aclu.org/SafeandFree/SafeandFree.cfm?ID=16603&c=282>.

On September 30, the DoJ issued a press release defending Section 505 of the PATRIOT Act, saying, "The New York district court has struck down as unconstitutional an important act of Congress, the 1986 National Security Letter Statute. That decision takes away a tool for fighting terrorism that the Congress has authorized. The DoJ will appeal that decision." DoJ's statement is available online at http://www.usdoj.gov/opa/pr/2004/September/04_opa_664.htm. U.S. Attorney General John Ashcroft told the Associated Press, "We believe the act to be completely consistent with the United States Constitution."

Marrero's ruling is considered to be a "signal blow" to the Bush Administration, according to the (ACLU),

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"Democracy abhors undue secrecy. An unlimited government warrant to conceal has no place in our open society."

—Victor Marrero,
U.S. District Judge

Internet Updates

Settlement Reached in *Dow Jones v. Gutnick*

On Nov. 12, 2004, Dow Jones settled its lawsuit with Australian mining magnate Joe Gutnick, ending a four-year-long international defamation dispute that raised important questions about jurisdiction in cases involving Internet publications. Dow Jones agreed to pay Gutnick \$180,000 (Australian) as well as \$400,000 in legal costs. The settlement is worth approximately \$450,000 in U.S. dollars.

The case began when Dow Jones published an article in its October 2000 issue of *Barron's*. The article, entitled "Unholy Gains," portrayed Gutnick as a schemer who engaged in stock scams, money laundering and fraud. Gutnick claimed that the article also described him as having business associations with suspicious characters such as Nachum Goldberg, a convicted tax evader. *Barron's* article was also published on the magazine's Web site, and was accessed by Gutnick and others in Australia, where Gutnick lives. Gutnick sued Dow Jones in his hometown of Victoria, claiming the *Barron's* article defamed him.

Initially, two lower Australian courts dismissed the case, but the Supreme Court of Victoria at Melbourne granted review. In that case, *Gutnick v. Dow Jones & Co. Inc.* [2001] VSC 305 (28 August 2001), Justice Hedigan ruled that Victoria was "both the appropriate forum and convenient forum," where Gutnick should have his case heard. Hedigan concluded that the alleged defamatory statements were "published in the State of Victoria when downloaded by Dow Jones subscribers who had met Dow Jones' payment and performance conditions and by the use of their passwords."

In its appeal to the High Court of Australia, that country's highest court, Dow Jones argued that the defamation had occurred in New Jersey, the location of Dow Jones' servers and editorial offices. However, the High Court unanimously dismissed the appeal on Dec. 10, 2002, ruling that the Internet story was published where it was downloaded and read. The court did not address the merits of the libel case. A copy of the case, *Dow Jones & Company Inc. v. Gutnick* (2002) HCA 56 is available online at http://www.austlii.edu.au/au/cases/cth/high_ct/2002/56/html. (See "Recent Developments in Defamation Law: *Dow Jones & Company Inc. v. Gutnick*" in the Winter 2003 issue of the *Silha Bulletin*.)

In addition to the money paid Gutnick, Dow Jones issued an apology which read: "*Barron's* has no reason to believe that Mr. Gutnick was ever a customer of Mr. Goldberg, and has no reason to believe Mr. Gutnick was a money laundering customer of, or had any criminal or other improper relationship with, Mr. Goldberg." The item appeared under a heading entitled, "Corrections & Amplifications Statement," in the Oct. 25, 2004 issue of the magazine.

In the same issue, *Barron's* published an editorial by Richard Rescigno protesting the pending settlement, saying that 95 percent of the readers of the original "Unholy Gains" were Americans. Since Gutnick was

moving his business to the United States, his shares had the potential to fall into the hands of American investors. But the allegations against Gutnick were unintentional. "[W]e believed the article didn't carry the meaning Gutnick alleged [and Australian] law didn't allow us to defend ourselves meaningfully in court." Rescigno wrote.

"Australia has a lot going for it," Rescigno continued, "the Great Barrier Reef, the Sydney Opera House, fabulous beaches and, not least, Nicole Kidman. What it doesn't have is a rational libel law." Rescigno criticized Australian libel law, calling it "outdated and unfair," forcing the magazine to reach a settlement "based on something we don't think we said." Rescigno continued, "The ruling [has a] potential chilling effect on anyone involved in investigative journalism In its eight-decade history, *Barron's* has exposed dozens of investment schemes and frauds. We will continue to do so. But unless a rational international accord is reached on the jurisdiction issue, our job will be more difficult"

The *Gutnick* case has already had implications on Internet publishing in other parts of the world. In January 2004, a Canadian case, *Bangoura v. The Washington Post*, 03-CV-247461CN1, cited *Gutnick* when the Ontario Superior Court of Justice ruled that it had jurisdiction to hear an Internet defamation case against *The Washington Post*. The plaintiff, Cheikh Bangoura, had been employed by the United Nations from 1987 to 1997. During that time, he had lived in numerous countries. In January 1997, while Bangoura was living in Kenya, *The Washington Post* published three articles claiming that Bangoura had been the subject of UN investigations involving allegations by his colleagues of sexual harassment, financial improprieties and nepotism. At the time the articles were published there were only seven paid subscribers of *The Washington Post* in the Ontario area; however, the articles were also posted on the newspaper's Web site. As a result of the articles, the *Guelph Mercury* (Ontario, Canada) reported that Bangoura was placed on administrative leave until the end of his contract a month later. His contract was not renewed. Two UN tribunals eventually cleared Bangoura. He then moved to Ontario and became a Canadian citizen in 2001.

Although Bangoura did not live in Ontario at the time the articles were published, he claims that the damages to his reputation have been felt the most there, making it difficult for him to find employment or secure promotions. Justice Romain W. M. Pitt ruled that given the international reach of *The Washington Post*, editors of the newspaper should have foreseen that the articles could have impacted Bangoura no matter where he lived. Further, Pitt wrote, "[T]he *Post* is a newspaper with an international profile, and its writers influence viewpoints throughout the world. I would be surprised if it were not insured for damages for libel or defamation anywhere in the world, and if it

"The ruling has a potential chilling effect on anyone involved in investigative journalism."

—Richard Rescigno,
Editor, *Barron's*

Indymedia, *continued from page 29*

ments, issue search warrants, and serve subpoenas. Countries usually rely on MLATs to avail themselves of mutual aid in investigations in such areas as terrorism and money laundering.

The Indymedia seizure could possibly have been the result of a terrorism investigation. AP reports that Italian prosecutor Marina Plazzi, who is conducting a probe into an anarchist group that made bomb threats against European Commission President Romano Prodi, affirmed that she had requested information from the United States about Indymedia content. According to the Associated Press, Plazzi emphasized that she did not request “the seizure of servers or hard disks.” The BBC also cites a claim by the Milan-based newspaper *Corriere della Sera* that the Italian investigation stems from an Indymedia Web site in Italy expressing support for terrorists who murdered Italian police in Al-Nasiriyah in Iraq.

The BBC reported that the computer seizure was not Indymedia’s first clash with the FBI, which tried to gain access to Indymedia records in August 2004, when it was conducting an investigation of Indymedia affiliates Radio Free Santa Cruz and Cyprus IMCista. Prior to that investigation, the BBC reported that during the 2001 G8 summit in Genoa, an Indymedia newsroom was raided by the Italian police. “Computers were destroyed and equipment seized” in the raid. The BBC report is available online at <http://www.infoshop.org/inews/stories.php?story=04/10/13/1495350>.

The AP also reported on October 27 that an ongoing Swiss investigation revolves around the posting of a photograph on an Indymedia site in France. The photograph depicts two undercover Swiss intelligence agents disguised as protesters at an anti-globalization rally during the 2003 G8 summit in Evian. AP reported that “in late September, Rackspace sent Indymedia an FBI notice about the photos.” The French collective then obscured the faces of the Swiss agents in the photo by covering them with pictures of the characters’ faces from the television program “The X Files.”

On October 12, Reporters Without Borders (Reporters sans Frontières, or RSF) issued a letter to British Home Secretary David Blunkett, saying “Closure of web sites is a serious step, the reasons for which should definitely be made public.” RSF’s statement is available online at http://www.rsf.org/article.php3?id_article=11579&var_recherche=indymedia.

Similarly, in a statement, Aidan White, General Secretary of the International Federation of Journalists (IFJ), called for a full investigation into the Indymedia seizure. A posting concerning his statement is available at the IFJ’s Web site at <http://www.ifj.org/?Index=2734&Language=EN>.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

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because the PATRIOT Act has been a centerpiece of the Administration’s anti-terrorism policies. Yet Section 505 is only the most recent of the Act’s provisions to fail to pass constitutional scrutiny.

In January 2004, U.S. District Judge Audrey Collins for the Central District of California ruled that a provision of the PATRIOT Act that criminalized giving “expert advice or assistance” to foreign terrorist groups violated the First Amendment. In *Humanitarian Law Projects v. Ashcroft*, 309 F.Supp. 2d 1185 (C.D. Cal. 2004), Collins ruled, “The USA PATRIOT Act places no limitation on the type of expert advice and assistance which is prohibited and instead bans the provision of all expert advice and assistance regardless of its nature.”

Another challenge to the PATRIOT Act by the ACLU is already under way. The *Los Angeles Times* reported on Sept. 30, 2004 that the ACLU has filed suit challenging a provision of the Act which “gives the government wide access to business records.”

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Dow Jones, *continued from page 31*

is not, then it should be.” The opinion is available online at <http://www.canlii.org/on/cas/onsc/2004/2004onsc10181.html>.

The ruling in the *Bangoura* case has given rise to a new term in defamation law: “libel tourism,” meaning that plaintiffs travel worldwide to “shop for jurisdictions that are most restrictive of free expression,” according to *The Australian*. A similar defamation case involved *Forbes* magazine and a Dec. 30, 1996 article containing text that read, “Is he the Godfather of the Kremlin? Power, Politics, Murder. Boris Berezovsky can teach the guys in Sicily a thing or two,” and “Berezovsky stands tall as one of the most powerful men in Russia. Behind him lies a trail of corpses, uncollectible debts and competitors terrified for their lives.” Berezovsky sued for damages in England, where he had business dealings that had suffered, he claimed, as a result of the *Forbes*’ article. But Berezovsky dropped the suit in early 2003, London’s *Financial Times* reported, when *Forbes* agreed to publish a statement saying it had not intended to accuse Berezovsky of murder, and had also not intended to characterize Berezovsky as a “mafia boss.”

Regarding the settlement in his case, Gutnick told *The Australian*, “Our law system should be respected. We are not talking about [a] renegade or Third World country. If you live in Australia, then you follow the laws of Australia. Each country you need to judge on its own merits. The U.S. cannot impose their laws on this country. They have to respect our law.”

—ELAINE HARGROVE
SILHA FELLOW AND BULLETIN EDITOR

Updates in Libel Law

Texas Supreme Court Finds *Dallas Observer* Article Is Satire, Not Defamation

Ending nearly five years of litigation stemming from a 1999 satirical article published in the *Dallas Observer*, the Texas Supreme Court ruled in September 2004 in the newspaper's favor in *New Times, Inc. v Isaacks*, 2004 Tex. LEXIS 787 (2004). The litigation moved through several appeals as Texas courts attempted to determine whether the *Observer* defamed two public officials when it published a fictitious news story about them. After defining an actual malice standard that specifically pertains to fictional parodies or satire, the Texas Supreme Court ruled unanimously (with one justice abstaining) that the article was not defamatory and was protected by the First Amendment.

At the heart of the controversy was *Observer* staff writer Rose Farley's article "Stop the Madness," which the alternative weekly published in both its print and online editions on Nov. 11, 1999. The story ridiculed officials Darlene Whitten, a Denton County Juvenile Court Judge, and Bruce Isaacks, Denton County District Attorney. Farley's story parodied the detention of Christopher Beamon, a thirteen-year-old who wrote a Halloween story containing what officials believed were violent threats to his school. As central figures in Beamon's detention, Whitten and Isaacks were also central figures in Farley's "Stop the Madness," which "reported" the fictitious arrest of a six-year-old who presented a book report on Maurice Sendak's *Where the Wild Things Are*.

The real-life apprehension of Christopher Beamon in November 1999 occurred six months after the shooting of twelve students and a teacher at Columbine High School in Littleton, Colo. Beamon, then a seventh-grader from Ponder, Texas, wrote an assigned "scary story," which depicted the killing of a teacher and two students. Although Beamon received extra credit for his story from his teacher, his school principal contacted juvenile authorities to have Beamon removed from school. Presiding over the matter, Whitten ordered Beamon to a ten-day detention at Denton County Juvenile Detention Facility. Five days later, when Isaacks decided against prosecuting Beamon, Whitten ordered the boy's release. News of Beamon's detention attracted national and international media attention.

The *Dallas Observer* responded to Beamon's detention by publishing Farley's "Stop the Madness." In Farley's story, Whitten detains six-year-old "Cindy Bradley" for presenting a book report about "fanaticism, cannibalism, and disorderly conduct." Cindy is placed in ankle shackles and handcuffs, and Isaacks considers trying Cindy as an adult. The story also uses fictitious quotes, such as a fabricated quote from a county bailiff who comments on having tiny, child-size handcuffs and shackles on hand from Beamon's detention. The article then describes Beamon's actual arrest.

Not all of the *Observer's* readers, however, were aware that Farley's article was a parody. A radio talk

show host and the University of North Texas school newspaper both reported the parody as real news. Whitten and Isaacks received angry letters and criticism following the *Observer's* story, and some letters called for Whitten's resignation. Whitten and Isaacks asked the newspaper to apologize and retract the story, but the *Observer* responded by ridiculing Whitten in its Nov. 18, 1999 "Buzz" column. The column also referred to its readers who did not get the joke as "cerebrally challenged."

On Nov. 30, 1999, Isaacks and Whitten filed a defamation action in the 158th District Court of Denton County, Texas, naming New Times, Inc. (part owner of the *Observer*), the *Dallas Observer*, Farley, and editors Julie Lyons and Patrick Williams as defendants. Denton County judges recused themselves from the matter, and the case was assigned to Fort Worth judge Bob McCoy, who typically presides over the 48th District Court, in Tarrant County, Texas. Isaacks and Whitten claimed they were libeled by "Stop the Madness." The newspaper, however, contended that an average, reasonable reader would have known that the article was a parody and that Whitten and Isaacks could not prove that the newspaper acted with actual malice. Arguing that the case presented no issues strong enough to support a trial, the newspaper twice requested summary judgment in its favor.

On Dec. 30, 1999, McCoy denied the paper's first motion for summary judgment, ruling that there was a factual question as to whether a reasonable reader would believe that the article was satirical. The *Observer* appealed the decision to the Texas Court of Appeals, but the appeal was stayed as the district court heard a second motion for summary judgment on Feb. 15, 2001. McCoy denied the second motion on May 29, 2001, ruling that there was also a factual matter as to whether the paper acted with "actual malice" by intentionally leading its readers to believe the article was factual. The *Observer* appealed again, and the two requests for review were consolidated before the appellate court.

In its appeal, the *Observer* asked a three-judge panel of the Texas Court of Appeals in Fort Worth to answer two specific questions. First, does the First Amendment protect an article defended as parody in the same way it protects opinion or hyperbole? Second, what is the proper "actual malice" standard for scrutinizing a satirical piece in a defamation action initiated by public officials?

In an opinion issued Nov. 21, 2001 by Judge Anne Gardner, the appellate court again denied summary judgment. In answer to the *Observer's* specific questions, the court first held that the First Amendment does not protect satire that conveys a substantially false and defamatory impression. Further, the court found that Whitten and Isaacks had raised genuine issues as to whether the paper had sufficiently warned its readers that the article was parody, and whether a reasonable reader could have concluded that the story was factual.

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The Texas Supreme Court read U.S. Supreme Court precedent as clearly recognizing First Amendment protection of parody and satire.

Updates in Libel Law

In Pennsylvania, No “Neutral Report” Privilege Recognized

On Oct. 20, 2004, exactly one year after the case was argued, the Pennsylvania Supreme Court held that there is no constitutional basis, in either the U.S. Constitution or the Pennsylvania Constitution, for an absolute privilege to protect news media publications reporting defamatory statements made by one public official about another. In *Norton v. Glenn*, 860 A.2d 48 (Pa. 2004), the court ruled that even if the media accurately and objectively report such statements, they may be liable in defamation actions if challengers can prove that they published the statements with actual malice.

Norton v. Glenn arose from a newspaper article by Tom Kennedy that was published in the *Chester County Daily Local* on April 20, 1995. The article, “Slurs, Insults Drag Town Into Controversy,” described heated exchanges that occurred between members of the Parkersburg Council, both inside and outside the Council chambers. Kennedy reported that Council member William T. Glenn had claimed that Council President James B. Norton III and Borough Mayor Alan M. Wolfe were homosexuals and child molesters. Glenn made his comments, the article reported, in order to make the public aware that Norton and Wolfe were homosexuals because they had “access to children[.]” Kennedy also included a response from Norton in the article in which Norton called Glenn’s comments bizarre and implied that Glenn needed help.

After the newspaper published the article, Wolfe and Norton filed a defamation suit against Glenn, but also named Kennedy, the *Daily Local*, and the *Local’s* owners as additional defendants. The Court of Common Pleas of Chester County determined that Kennedy and the media defendants were entitled to the protection of the “neutral reportage privilege,” articulated in *Edwards v. National Audubon Society, Inc.*, 556 F.2d 113 (2d Cir. 1977) and recognized by at least thirteen states and some federal jurisdictions. The trial court equated the neutral reportage privilege with the fair report privilege, and explained the privilege provided immunity from defamation suits for all accurate media reports of public proceedings.

Because of the neutral reportage privilege, the trial court reasoned, there was no need to determine whether the media defendants acted with actual malice. Had there been no privilege, Norton and Wolfe would have to prove that the media defendants published statements with actual malice, the constitutional standard of actual malice requiring public officials to show that the defendant published statements with knowledge that the statements were false, or with reckless disregard for whether they were false.

At trial, the jury found Glenn liable for defamation. Regarding the media defendants, however, the jury first had to determine whether Kennedy had accurately reported Glenn’s statements, and whether

there was any implication that the paper adopted Glenn’s views as its own. Answering these questions in the negative, and following the judge’s instructions regarding neutral reportage immunity, the jury found the media defendants not liable. The court also denied Norton and Wolfe’s motion for a new trial, but indicated that a new trial would be in order if the state appellate court determined that the neutral reportage privilege was not viable.

Norton and Wolfe appealed, and the appellate court held that the neutral reportage privilege had no constitutional basis. Because the trial court erred in applying the privilege and excluded evidence relevant to actual malice, the Superior Court ordered a new trial on March 18, 2002. See *Norton v. Glenn*, 797 A.2d 294 (Pa. Super. 2002).

In response to the Superior Court’s order, the media defendants requested a decision from the Pennsylvania Supreme Court as to whether Pennsylvania recognizes the neutral reportage privilege. The media defendants argued that the neutral reportage privilege is grounded in the First Amendment of the U.S. Constitution and the free expression provision of the Pennsylvania Constitution. But the Pennsylvania Supreme Court unanimously disagreed.

Citing *Edwards v. National Audubon Society, Inc.*, the high court noted that the doctrine was not, as the trial court asserted, the equivalent of the fair report privilege. Although the fair report doctrine protects reports of public proceedings, the court explained, the neutral reportage privilege, as crafted by the Second Circuit, protects all newsworthy statements. The court found this protection to be fatally overbroad.

In examining whether there was a federal basis for the neutral reportage privilege, the Pennsylvania court reviewed United States Supreme Court decisions regarding defamation and freedom of the press. Chief Justice Ralph J. Cappy, wrote “the [U.S. Supreme Court] has not declared that the media, because of their special role in our democracy, enjoy a blanket immunity from suit A primary reason for rejecting such a sweeping privilege for the media is the concern that such a privilege would essentially obliterate the states’ power to provide protection, via defamation actions, to a person’s reputation[.]” Finally, the court stated, “Our examination leads us to the conclusion that the U.S. Supreme Court will not adopt the neutral reportage doctrine.”

The court also declined to recognize a neutral reportage privilege based on the Pennsylvania Constitution’s free expression provision. Although the court agreed with the media defendants’ observation that the court had formerly declared that the Pennsylvania Constitution’s free expression clause offered broader protection than the federal First Amendment, it then cited a 1988 case, *Sprague v. Walter*, 543 A.2d 1078 (Pa. 1988), that controlled

“Our examination leads us to the conclusion that the U.S. Supreme Court will not adopt the neutral reportage doctrine.”

—Pennsylvania Supreme Court

Endangered Journalists

Suspect in Daniel Pearl Murder Killed by Security Forces

Amjad Hussain Farooqi, the main suspect in the kidnapping and beheading of *Wall Street Journal* reporter Daniel Pearl, was killed by Pakistani security forces on Sept. 26, 2004. Farooqi had also been suspected of masterminding two assassination attempts on Pakistan's president, General Pervez Musharraf, in December 2003.

Farooqi was killed in a gunfight with paramilitary police during a raid on a house in Nawabshah, a small city in the Sindh Province in southern Pakistan, after police received a tip that Farooqi was there. According to *The New York Times*, Pakistani authorities reported that Farooqi had been living in the house with two other men, two women and three children for about six weeks. *The New York Times* reported that the paramilitary police had used tear gas in an effort to take Farooqi alive; however, Farooqi refused to surrender and fired on the police before being shot and killed. Three other men, one of them a cleric, were taken alive in the raid.

Farooqi was an associate of Ahmed Omar Saeed Sheikh, who was convicted by a Pakistani court of plotting Pearl's abduction and murder. He was also an associate of Khaled Sheikh Mohammed, the former al-Qaida operations chief who is believed to have masterminded the Sept. 11, 2001 attacks, and who is now in U.S. custody. *The New York Times* reported that both Farooqi and Sheikh belonged to Jaish-e-Muhammad, a Pakistani terrorist group believed to be linked with both al-Qaida and the Taliban. Farooqi is also believed to have been one of the hijackers of an Indian Airlines plane in 1999. The hijacking ended with the exchange of the plane's passengers and crew for four men being held in Indian prisons, including Sheikh. In May, *The Washington Post* quoted Pakistani authorities who called Farooqi, a top operative in al-Qaida's network in Pakistan, "Pakistan's most wanted fugitive."

Pearl was abducted on Jan. 23, 2002 in front of a Karachi restaurant where he had gone to meet the leader of an Islamic militant group. He had been *The Wall Street Journal's* South Asia bureau chief for about two years, and was investigating links between Richard C. Reid, the British citizen accused of attempting to blow up a passenger plane by detonating explosives hidden in his sneakers, and militant groups in Pakistan. Pearl's investigation had also expanded to include links between militant

groups and the Inter-Services Intelligence (ISI), Pakistan's intelligence agency. Pearl was held for a month by his captors before he was decapitated. Police found his body in a deserted part of Karachi some weeks later. The alternative newspaper the *Phoenix* (Boston) posted a link to a video showing Pearl's execution. (See "Boston Newspaper Links to Video of Daniel Pearl" in the Summer 2002 issue of the *Silha Bulletin*.)

On June 15, 2002, a court in Pakistan convicted Sheikh and three others of Pearl's murder. Sheikh was sentenced to death by hanging. The three others – Sheikh Adil, Fahad Naseem, and Salman Saqib – were sentenced to life in prison. United Press International (UPI) reported on Sept. 29, 2004 that Sheikh's death sentence has been stayed pending an appeal. The other three men have also appealed their convictions. AP reported that seven other suspects, including the still unidentified person who executed Pearl, remain at large.

In the wake of the convictions of Sheikh and his associates, UPI reported that authorities in Pakistan have revised their theories concerning Pearl's murder. A senior Pakistani official, speaking on condition of anonymity, told the UPI that suspects other than those convicted played a more central role in Pearl's abduction and murder. After Farooqi's death, UPI reported that authorities in Pakistan said that Farooqi, and not Sheikh, was the principal plotter of Pearl's kidnapping and murder. Farooqi, UPI wrote, had "planned Pearl's abduction and taken him to a hideout in Karachi where he was beheaded."

The (London) Independent reported on September 28, "The more police investigated this murky case, the more Farooqi's name came up. He was there the night Mr. Pearl was kidnapped, some reports say. He was there when Mr. Pearl was lured from a safe corner of central Karachi where he had set up a meeting with a contact; he was in the car in which the journalist was driven to the remote house in the suburbs where he was held prisoner, and murdered." *The Independent* further described Farooqi as "the linchpin" of the Pearl murder.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

"Farooqi was there the night Mr. Pearl was kidnapped. He was there when Mr. Pearl was lured from a safe corner of central Karachi; he was in the car in which the journalist was driven to the remote house in the suburbs where he was held prisoner and murdered."

—*The Independent*

Endangered Journalists

French Journalists Freed

French journalists Georges Malbrunot, 41, and Christian Chesnot, 37, walked off an airplane at Villacoublay military airport outside Paris on Dec. 22, 2004, after being held since August 20, 2004 by the group calling itself the Islamic Army of Iraq, according to *The Boston Globe*.

“We’re fine. We never lost hope,” said Malbrunot, “We lived through a difficult experience, sometimes very difficult, but we never lost hope.”

Chesnot, of Radio France International, and Malbrunot, of the daily newspaper *Le Figaro*, were kidnapped, along with their Syrian interpreter and driver, south of Baghdad on August 20, 2004.

Their driver, Mohammed Al-Joundi, was freed by U.S. marines November 11, according to Reporters Without Borders (Reporters Sans Frontieres – RSF), a press freedom group.

French President Jacques Chirac, who cut short his Christmas holiday, joined French Cabinet ministers, family and friends in an emotional reunion at the military airport.

“It’s a very tough situation to be surrounded by people with guns and in masks,” Malbrunot said, as he described how their captors tied and blindfolded them. The two men were moved four times before being released to the French Embassy in Baghdad, December 21. “When I got out of the trunk of a Mercedes and I saw the French flag, I said to myself ‘Finally, it’s over,’” he told *The Boston Globe*.

Questions surround the details of the reporters’ release. The Arab broadcaster Al-Jazeera reported that the Islamic Army of Iraq issued a statement saying the journalists had been released because France maintains its stance against the Iraq war, it was proven the reporters were not United States spies, and because Muslim groups had made numerous pleas for the journalists’ release.

French officials say their country’s opposition to the U.S.-led Iraqi war, coupled with support for the Palestinian cause, as well as the “confused, disparate

but generally moderate nature of the Islamic Army of Iraq” may have helped the reporters survive, according to London’s *Guardian Unlimited*.

According to *The Boston Globe*, Jean-Paul Cluzel, the president of the state-run Radio France, said the French government had “indirect contact” with the kidnappers.

Le Monde said the hostages were held in Fallujah and the U.S. assault there had contributed to their release.

One unidentified official in the French government said the Islamic Army of Iraq was just too disorganized to continue holding the reporters. On Dec. 23, 2004, the unidentified source told the *Guardian Unlimited*; “[The Islamic Army of Iraq was] a bit out of its depth with two French hostages on its hands. It didn’t really know who they were when it kidnapped them, and it didn’t really know what to do with them afterwards. And, having decided it wanted to free them, it didn’t really know who to deal with, or how to arrange the logistics of the handover.”

French Prime Minister Jean-Pierre Raffarin and other French officials have maintained that the release was negotiated through intermediaries and there was never a ransom involved, according to the *Guardian Unlimited*.

But a senior French political source told *Le Monde* that he believed a ransom had been part of the negotiation, according to the *Guardian Unlimited*. A former aide of then President François Mitterand told the *Guardian Unlimited* in a 2002 interview that ransoms were “perfectly normal” in hostage situations. And Al-Joundi, the reporters’ freed interpreter, had said in interviews with the French press that the Islamic Army of Iraq was “maintained mainly from ransom payments obtained through kidnappings.”

—KRISTINE SMITH
SILHA RESEARCH ASSISTANT

“When I got out of the trunk and saw the French flag, I said to myself, ‘Finally, it’s over.’”

—Georges Malbrunot

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on the more narrow issue of how much state constitutional protection extends to the media in defamation cases filed by public officials. In *Sprague*, the court stressed the importance of balancing the right of citizens to protect their reputations with the constitutional right to free expression. Affirming *Sprague*, the court held that the state right to free expression was no broader than its federal counterpart.

In a concurring opinion, Justice Ronald D. Castille wrote that he believed “there is much to be said” in favor of recognizing a neutral reportage privilege where there is a newsworthy event pertaining to “matters involving the official conduct of elected public officials.” Nonetheless, he agreed with the majority that such an “innovation” would need to come from the U.S. Supreme Court.

—KELLY J. HANSEN MAHER
SILHA FELLOW

Endangered Journalists

Journalists in China

Zhao Yan, a researcher in the Beijing bureau of *The New York Times* has been arrested on a charge of divulging state secrets to foreigners, a crime punishable by the death penalty.

The Chinese government alleges that Zhao was the source for a story on the retirement of former president Jiang Zemin from his post as Chairman of the Central Military Commission. *The New York Times* reported the news on Sept. 7, 2004, twelve days before the official announcement. As a result of the leak, Zhao was arrested in Shanghai on September 17. On September 21, the government informed Zhao's family that he had been detained under suspicion of providing state secrets, charges which were formalized on October 20. The Associated Press reported that since Zhao's arrest, requests by his lawyer, Mo Shaoping, to see Zhao have been denied, and that Zhao's family is "legally barred" from seeing him until his case has been decided. If found guilty, Zhao may face the death penalty.

The Chinese government safeguards its leadership decisions, and takes disclosures of secret party information very seriously. The human rights watchdog group Human Rights in China (HRIC) cites two sources as saying that President Jintao Hu "personally ordered" the investigation in to the leak. HRIC's press release is available online at <http://www.hrichina.org/public/contents/press?revision%5fid=15930&item%5fid=15929>.

The New York Times expressed strong support for Zhao. Susan Chira, foreign editor of *The New York Times*, said, "We can categorically deny that Mr. Zhao has provided state secrets to our newspaper." Chira also stated, "We are deeply, deeply concerned, and we are doing all we can to help him." Bill Keller, executive editor of *The New York Times*, was reported by *The Times* as having contacted the White House, the State Department and the Chinese government about Zhao's case. *The Times*' efforts on Zhao's behalf have not gone unheeded. The State Department voiced concern over Zhao's status with the Foreign Ministry in Beijing and with the Chinese Embassy in Washington. Adam Erel, deputy State Department spokesman, told *The Times*, "We are seeking clarification of his status, and expressing our concern for his welfare and underscoring our view that the role of a free press is critical in providing information to build a strong civil society."

According to the Associated Press (AP), Chinese Foreign Ministry spokesman Kong Quan stated in response, "Zhao Yan is a Chinese citizen. He is suspected of illegally possessing state secrets. Without doubt, this is a Chinese domestic issue. Outside forces should not interfere with it." When U.S. Secretary of State Colin Powell again raised Zhao's case during a meeting with the Chinese foreign minister, Li Zhaoxing, on October 25, AP reported that Li responded, "Zhao is a Chinese citizen who is being dealt with in accordance with Chinese law."

Press freedom groups have expressed outrage at Zhao's plight. Ann Cooper, Executive Director for the Committee to Protect Journalists (CPJ) said, "Zhao Yan's arrest and continuing detention are alarming and unjustified. Zhao's work as a news assistant for *The New York Times* has not violated state security, and his continued deten-

tion has a chilling effect on all journalists in China." CPJ's statement is available online at <http://www.cpj.org/news/2004/China21oct04na.html>. CPJ sent a letter to President Hu, calling upon him to "ensure that Zhao is released immediately and unconditionally." The letter added, "We also urge you to allow both foreign and Chinese journalists to conduct their work without fear of detention or harassment." CPJ's letter is available online at <http://www.cpj.org/protests/04ltrs/China24sept04pl.html>.

HRIC also cited the danger posed to journalists by China's State Secrets Law, which covers a practically unlimited store of information. In a September 30 press release, the group wrote, "The State Secrets provisions of China's Criminal Law are an essential element in the government's system of control over information. Information that can be classified as a state secret under these provisions does not have to be directly related to matters of national security." The net cast by the law is sufficiently vast such that the publication of any information "that has not been officially vetted" may constitute a violation of the law. The HRIC press release is available online at <http://www.hrichina.org/public/contents/press?revision%5fid=15930&item%5fid=15929>.

"The use and misuse of State Secrets law has particularly severe implications for the ability of local and foreign journalists to do their work in China," said HRIC president Liu Qing. "It produces the environment in which any controversial information can lead to the intimidation of Chinese journalists, and in particular those associated with foreign news organizations." HRIC's statement is available online at <http://www.hrichina.org/public/contents/press?revision%5fid=15930&item%5fid=15929>.

Several news reports have raised the possibility that Zhao may have been targeted by the authorities for his previous work as a reporter and for his political activism. Before being hired by *The New York Times* in May, Zhao wrote for the magazine *China Reform*, where he was well-known for exposing government abuses of power in the agricultural sector and for his advocacy on behalf of China's peasants. AP cited a report by China Labor Watch that Zhao was also a political activist and that he spent three years in prison for his role in a failed effort to form a new political party.

Zhao is not the only journalism professional suspected of divulging state secrets. CPJ and RSF reported the arrest of journalist Shi Tao at his home in Taiyuan in Shanxi province on Nov. 24, 2004 because of his writings criticizing the Chinese government. According to CPJ, Shi is being detained on suspicion of "leaking state secrets," a charge which, as in Zhao's case, is punishable by a lengthy prison sentence or by the death penalty. CPJ observed that the seriousness of the charge "makes it very difficult for a defense lawyer to meet with Shi because of the secrecy with which the government treats this type of case." RSF reported that Shi worked until May 2004 for the daily *Dangdai Shang Bao* (*Contemporary Trade News*). He also wrote for several newspapers and had contributed articles to online forums, particularly Min Zhu Lun Tan (Democracy Forum). In April, 2004 Shi posted an online article titled "The Most Disgusting Day," in which he

"The use and misuse of State Secrets law has particularly severe implications for the ability of local and foreign journalists to do their work in China."

—Liu Qing,
HRIC president

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criticized the government for the March 28, 2004 arrest of Ding Zilin, an activist for the Tiananmen Mothers advocacy group whose son was killed in the 1989 Tiananmen Square massacre. CPJ and RSF reported that following Shi's arrest, the authorities confiscated his computer and personal files. They also reported that Shi's family has not been allowed to visit him since he was taken into custody. CPJ's report is available online at <http://www.cpj.org/news/2004/China08dec04na.html>; RSF's report is available online at http://www.rsf.org/article.php3?id_article=12026

The arrests of Zhao Yan and Shi Tao are only part of a larger crackdown on the press by the Chinese government in recent months. The crackdown has consisted of a string of closures of websites and publications, both online and offline, a wave of arrests, and the imposition of harsh sentences on dissenters.

Other Chinese Restrictions on the Media & the Targeting of Online Journalists

The press freedom group Reporters Sans Frontières (RSF) reported the closure of the respected diplomatic magazine *Zhanlue Yu Guanli* (*Strategy and Management*) in September 2004 for publishing an article criticizing North Korea, an allied state, and encouraging policy changes in Chinese-North Korean relations. RSF also reported the closure on September 23 of the Wikipedia online encyclopedia, which contained several articles about human rights abuses in China. On September 13, according to RSF, the government shut down the popular online forum Yi Ta Hu Tu, which had an estimated 300,000 users and served as a forum for discussion of such issues as official corruption, human rights and Taiwanese independence. RSF's report is available online at http://www.rsf.org/article.php3?id_article=11468.

Press freedom groups have also sounded the alarm over the ongoing arrests of online journalists and the harsh sentences the government has handed down against them for posting articles on the Web. In a letter to President Hu on October 15, 2004 CPJ called attention to the plight of Kong Youping, an online essayist and poet, who had been sentenced in September to 15 years in prison. Kong had been detained since December 2003; his crime was posting online articles calling for democratic reform. CPJ cites a report by HRIC that Kong's associate, Ning Xianhua, was indicted on charges which have not been made public and sentenced on Sept. 16, 2004 to twelve years in prison. CPJ also raised the case of Huang Jinqiu, a writer for the U.S.-based dissident Web site Boxun News, who was sentenced on Sept. 27, 2004 to 12 years in prison after he was convicted on a charge of "subversion of state power." "The sum of these actions" writes CPJ, "constitutes an assault on the freedom of expression guaranteed in the Chinese Constitution." CPJ's letter is available online at <http://www.cpj.org/protests/04ltrs/China15oct04pl.html>.

In the most recent incidents involving the targeting of online journalists by the Chinese government, CPJ and RSF reported the arrest and release of Yu Jie and Liu Xiaobo, writers, cyberdissidents and defenders of jailed reporters in China. Both were arrested in Beijing on Dec. 13, 2004 and detained for 12 hours. While in custody they were interrogated about articles they had posted on Web sites and warned to stop criticizing the government. CPJ Executive Director Ann Cooper condemned the arrests in a December 14 press release. "The detention and interrogation of Liu Xiaobo and Yu Jie demonstrates the Chinese government's willingness to target high-profile intellectuals in an effort to stem the expression of dissent," Cooper said. "These two writers have not only fought to express their own ideas but have also supported other writers who are harassed, censored and imprisoned in China." CPJ reported that Yu and Liu are founding members of the Independent Chinese PEN Center (ICPC), a group campaigning for the release of imprisoned writers, poets, and journalists in China. Yu is also a prominent writer of social criticism and political commentary, while Liu is a leading activist and writer who has served jail time for his advocacy of democratic reforms and his efforts on behalf of fellow journalists, according to CPJ. CPJ and RSF reported that the government accuses Yu and Liu of endangering national security. RSF condemned the arrests in a Dec. 14 press release, which said, "The aim of these arrests is clearly to silence liberal and reformist political voices." RSF's press release is available online at http://www.rsf.org/article.php3?id_article=12070; CPJ's press release is available online at <http://www.cpj.org/news/2004/China14dec04na.html>.

In another incident, RSF reported that online journalist Zhang Zuhua was arrested on December 13 and jailed overnight. Zhang, along with Yu and Liu, signed a letter in May 2004 calling upon the government to apologize for the 1989 Tiananmen Square massacre. RSF's report is available online at http://www.rsf.org/article.php3?id_article=12082

RSF further announced the release of cyberdissident Ouyang Yi on Dec. 4, 2004 after serving a two-year prison sentence for creating a pro-democracy website. But RSF wrote that Ouyang is now serving a "second sentence," since he is prohibited from publishing for two years and will be living under police supervision. RSF wrote, "Ouyang Yi has been released from prison but he no longer has the right to work at his job as a teacher nor to live from his writing." RSF continued, "His case illustrates the methods the government uses to silence 'subversive' intellectuals." Ouyang was arrested on Dec. 4, 2002 and found guilty of "incitement to subversion." RSF's report is available online at http://www.rsf.org/article.php3?id_article=12035. CPJ on November 30 announced the release of dissident journalist Liu Jingsheng, who had been jailed since 1992 for "spreading counterrevolutionary propaganda." Before his incarceration, Liu had written articles expressing support for the 1989 pro-democracy demonstrations. In a statement announcing Liu's release, CPJ Executive Director Ann Cooper voiced relief at Liu's long-overdue freedom, but she warned, "...as long as China's prisons operate a revolving door for journalists, there will be no progress in the rights of its people to report the news and to express dissent." Cooper's statement is available online at <http://www.cpj.org/news/2004/China30nov04na.html>.

In its 2004 country report on China, RSF estimated that at least 23 print journalists and at least 50 online

Court Rules in 50-Year-Old Secrecy Case

On Sept. 10, 2004, Federal District Judge Legrome D. Davis of the Eastern District of Pennsylvania ruled in *Herring v. United States*, U.S. Dist. LEXIS 18545 (2004), that he saw no evidence of fraud in the U.S. Air Force's testimony in a case going back some 50 years. Decided during the Cold War, *United States v. Reynolds*, 345 U.S. 1 (1953), is seen by legal scholars as setting the precedent allowing the executive branch the power to withhold information from the judiciary when national security could be compromised.

The case began in 1948 when civilian engineers Albert Palya, William H. Brauner and Robert Reynolds were working with the Air Force to develop secret navigation equipment. They joined an Air Force flight crew in a B-29 bomber on October 6, flying from Robbins Air Force Base in Georgia to Orlando, Fla., to test new equipment. However, on the return leg of the flight, the plane crashed in Waycross, Ga., and the three engineers were killed. Their widows filed suit under the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.* (FTCA), which allows citizens to sue the government for harm caused by its negligence or misconduct.

The case was heard by Federal District Judge William Kirkpatrick of the Eastern District of Pennsylvania, who ordered the Air Force to produce a report concerning the crash. Thomas Finletter, then secretary of the Air Force, told Kirkpatrick that it was not in the "public interest" to do so. A sworn statement from Maj. Gen. Reginald Harmon, who was judge advocate general of the Air Force at the time, declared that the information contained in the report would harm national security. Kirkpatrick then requested that the Air Force allow him to examine the reports *in camera*, but his request was denied. Without access to the information, therefore, Kirkpatrick entered judgment for the widows, awarding them the full amount they requested.

But the government appealed Kirkpatrick's ruling to the U.S. Supreme Court, arguing that it could withhold documents concerning the crash on the basis of public interest. In *United States v. Reynolds*, the high court ruled in the government's favor. When the case was remanded back to the courts, the widows were awarded smaller financial payments than they originally sought.

Nearly 50 years later, Palya's now-grown daughter, Judith Loether, discovered a Web site where declassified Air Force plane crash reports were offered for sale. She ordered a copy of the report involving her father's plane.

The report revealed that the plane crashed as a result of pilot error and the B-29's own engineering flaws. Convinced that the Air Force had committed fraud upon the court, the engineers' survivors petitioned the Supreme Court for a writ of *coram nobis* – to correct a judgment made that now was found to turn on an error of fact. The brief filed by the survivors claimed that the Air Force wanted to keep the real causes of the crash a secret because it was a recently-established branch of the military services; because the safety of the B-29 was coming under question, and because of the circumstances of the Cold War.

But in June 2003, the Supreme Court refused to hear the case without comment. (See "Access to Documents: *United States v. Reynolds*" in the Summer 2003 issue of the *Silha Bulletin*.)

The current case came before Davis because the survivors sought to reconcile the amount of money received from the court and the amount originally awarded by Kirkpatrick. The survivors claimed that the now-declassified crash reports reveal that there was nothing secret about the flight in 1948, and that Air Force representatives committed fraud when withholding reports about the crash 50 years ago.

But following an examination of the legal standard for "fraud upon the court" and common law precedent, Davis wrote that "A finding of fraud upon the court is justified only by the most egregious misconduct directed to the court itself such as bribery of a judge or jury or fabrication of evidence by counsel." Davis found that was not the case in *Reynolds*.

Although the surviving family members believe that "nothing in the accident investigation report would compromise the public interest," Davis wrote that the report and accompanying affidavits "also suggest the need to preserve engineering technology, mechanical and operational data, and equipment usage for the safety and development of the Air Force fleet." Davis cited a 1944 incident involving three American B-29 bombers that were forced to land in Vladivostok, Russia. The crews were allowed to return to the United States, but the Soviet government kept the planes, using reverse engineering to create the Soviet Tu-4, identical to the American B-29. The Soviet plane was "so faithful to the originals that the Soviets had many of the same technical problems," Davis stated, citing historical documents about the event. Under these Cold War circumstances, Davis wrote, "Details of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security."

Davis granted the government's motion to dismiss the case, writing that there was not "a sufficient showing of egregious conduct by any Air Force representatives. As such, this Court cannot, in good conscience, find a gross miscarriage of justice or grant Plaintiffs the relief from judgment they seek."

On November 13, the *Philadelphia Inquirer* reported that the families' attorney, Wilson M. Brown III, said he would ask the U.S. Court of Appeals (3^d Cir.) to reverse Davis' ruling.

"Details of flight mechanics, B-29 glitches, and technical remedies in the hands of the wrong party could surely compromise national security."

—Federal District Judge Legrome D. Davis

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

U.S. District Judge Orders Federal Election Commission To Create New Campaign Regulations

On Oct. 10, 2004, a U.S. District Court Judge for the District of Columbia denied a request from the Federal Election Commission (FEC) to temporarily stay an order striking down several of the FEC's campaign fundraising rules. Judge Colleen Kollar-Kotelly's decision to deny the stay also clarified that the FEC's current fundraising rules would remain in force until new rules could be developed. This aspect of Kollar-Kotelly's decision alleviated concerns of those who feared that striking the FEC rules immediately would throw the final months of federal election campaigns into chaos. After Kollar-Kotelly's initial decision on Sept. 18, 2004 in *Shays v. Federal Election Commission*, Civ. No. 02-1984 held that the FEC had failed to properly interpret the Bipartisan Campaign Reform Act (BCRA), 2 U.S.C. § 441, *et seq.*; many had wondered what rules, if any, would govern federal campaign fundraising leading up to the November 2 elections. The October 10 ruling made clear that the current campaign rules would stay in place until the FEC could draft rules that met the requirements in Kollar-Kotelly's September 18 decision.

"The federal district court's opinion is a victory for democracy and clean elections."

—Representative
Martin Meehan

Reps. Martin Meehan (D-Mass.) and Christopher Shays (R-Conn.) filed the lawsuit in *Shays* claiming that the FEC had illegally created rules that subverted the congressional intent of BCRA. Kollar-Kotelly's ruling in *Shays* agreed with the plaintiffs and found that the FEC had acted as a "super-legislature disregarding [the] congressional intent [of BCRA]" and had sought "to thwart the very essence of the wide-sweeping system of reform enacted by Congress." *Shays* marked the second time in recent years that BCRA, also known as the McCain-Feingold Act, had been involved in major litigation since it was signed into law by President George Bush on Mar. 27, 2002. In *McConnell v. Federal Election Commission*, 124 S. Ct. 619 (2003), the U.S. Supreme Court upheld almost all of the provisions of the BCRA despite a challenge from political and advocacy groups alleging that the law was an unconstitutional restriction on freedom of speech.

Relying on the Administrative Procedure Act (APA), 5 U.S.C. § 551, *et seq.*, which allows judicial review of agency rules implementing federal laws, Kollar-Kotelly struck down 15 of the FEC's fundraising regulations, finding that they were either not faithful to the plain language and meaning of BCRA or that they were impermissible interpretations of the law. Four other provisions of the FEC's regulations that had been challenged by Shays and Meehan were upheld.

Among the regulations struck down were portions of the FEC's rules that had allowed organizations known as "527s," so named from the section of the IRS tax code under which they are created, to raise vast sums of money during the presidential campaigns. The FEC's rules required most organizations that run issue ads or support a presidential or other candidate for federal office to disclose where they get their money from and to adhere to contribution limits set by BCRA. However, 527s were specifically exempted from those rules by the FEC, allowing them to invest large sums of money into advertising and support for federal candidates. One well-known 527, MoveOn.org, raised a total of \$44 million, mostly through online donations from its 2.8 million members, and primarily used that money to support Democratic candidates. RightMarch.com, another 527, along with other conservative groups, did the same for Republican candidates.

Another of the FEC regulations that was struck down in *Shays* had allowed substantial leeway for groups conducting get-out-the-vote drives to possibly become involved with advocating for a candidate during the federal elections. Non-profit organizations and 527s raised more than \$350 million altogether to conduct get-out-the-vote campaigns. Sometimes those organizations, for example, the U.S. Chamber of Commerce and the New Voter Project, used get-out-the-vote campaigns to support a particular issue that was championed by one candidate over the other.

A final part of the FEC's regulations struck down by Kollar-Kotelly had allowed those advertising on the Internet to avoid many of the requirements of BCRA. Shays and Meehan had argued that BCRA was meant to regulate such ads, despite the FEC's arguments to the contrary. Kollar-Kotelly ultimately agreed with Shays and Meehan, finding that Internet ads could and should be regulated, at least in some instances. All advertising on the Internet will likely amount to more than \$8.5 billion in 2004, a substantial growth from the \$7.3 billion spent in 2003. However, the candidates, their parties, and advocacy groups only spent about \$5 million on Internet ads in the 2004 presidential campaigns, just a fraction of the nearly \$600 million spent on all forms of advertising by the presidential candidates and their parties.

In a press release on September 20 Meehan said, "The federal district court's opinion is a victory for democracy and clean elections – and a clear rebuke of the FEC's repeated attempts to subvert campaign law and create new loopholes. By sending the FEC back to the drawing board, the court's opinion takes a critical step toward fair and appropriate enforcement of BCRA." Meehan and Shays, along with other supporters of the BCRA in Congress, have been highly critical of the FEC's fundraising regulations since the passage of BCRA. Meehan called the FEC "a dysfunctional agency that does more to subvert the law than to enforce it," and Shays said the result in their suit "provides further evidence the FEC had no intention of enforcing campaign finance law as it was intended to be enforced."

Sens. John McCain (R-Ariz.) and Russell Feingold (D-Wisc.), the principal authors of BCRA, who had also filed an *amicus* brief in *Shays*, and made clear that they did not agree with the FEC's implementation of BCRA, especially as it pertained to 527s. In an Aug. 18, 2004 press release, McCain said, "To date, a majority of FEC Commissioners, led by Chairman Brad Smith and Vice Chair Ellen Weintraub, have turned their back on the problems with 527 groups, ignored the nation's campaign finance laws and undermined the interests and rights of the American people." In order to ensure that the FEC could not allow 527s to avoid the requirements of BCRA, McCain and Feingold, along with Shays, Meehan, and other members of Congress, have proposed a bill that would close the loopholes that allow 527s to raise money outside the regulations of BCRA.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

RIAA Announces More Lawsuits to Hobble Online Music Sharing

On Dec. 16, 2004, the Recording Industry Association of America (RIAA), a trade group representing the major music companies, announced it would be suing another 754 individuals sharing music online, including 20 individuals who are accused of using university networks to swap files. In a statement announcing the lawsuits, RIAA President Cary Sherman said, "In order for legitimate services to continue their growth, we cannot ignore those who take and distribute music illegally. There must be consequences to breaking the law, or illegal downloading will cripple the music community's ability to support itself now or invest in the future." Despite the RIAA's assertions, a recently-released study by the Cooperative Association for Internet Data Analysis at the University of California, San Diego, found that overall peer-to-peer file-swapping traffic had not declined between August 2002, before the RIAA began suing file sharers, and January 2004.

So far, 7,704 people have been sued by the RIAA since it began its campaign to bring online music sharers to court in September 2003. More than 1,000 of those suits have been settled, typically for amounts in the thousands of dollars for each defendant.

CD sales, which peaked at more than \$14 billion in 1999, have dropped dramatically down to about \$12 billion for 2003. CD sales were expected to be slightly higher for 2004, but still not near the 1999 peak. Meanwhile, Reuters reported in October that the total number of people paying for music online, at retailers such as Apple's iTunes, Napster, and Wal-Mart's online music store, dropped below one million for the first time this summer, signaling perhaps another loss for the RIAA. The RIAA claims that lagging CD sales and diminished revenues from online music retailers are proof that online music swapping is damaging the music business. Many consumers, however, say that the high price of CDs has led to the downward spiral. Some new CDs cost as much as \$17.99 each with typical prices around \$13.99

Still, the RIAA has continued to sue file sharers, including those overseas. Last year, for example, the RIAA brought suit against a Spanish company that had been offering users the ability to download songs for just pennies a piece. The company, www.Puretunes.com, only operated for a few months in mid-2003, and claimed it was offering legal downloads of the songs from its website. However, the company recently settled RIAA's lawsuit for \$10 million dollars.

In early October, an international trade organization representing the music industry, the International Federation of Phonographic Industry (IFPI), announced it would file 459 criminal and civil suits against file sharers in the United Kingdom, France, and Austria. More than 650 people have already been sued in Europe by the IFPI since it began suing file sharers in March 2003. The IFPI has said it will also launch a second round of suits against individuals in Germany, Italy, and Denmark, and pledged to go after those in other countries as well. The British High Court also delivered a substantial win for the IFPI when it decided on October 14 that the trade group could force Internet Service Providers (ISPs) to turn over personal information on their customers.

Unlike the British High Court, the U.S. Supreme Court has not made a decision on the legality of the RIAA forcing ISPs to turn over information about their customers. However, in a significant legal win for ISPs, the U.S. Supreme Court recently refused to hear an appeal from a lower court case that has blocked the RIAA from using such procedures. In the case, *Recording Industry Ass'n of America, Inc. v. Verizon Internet Services, Inc.*, 351 F.3d 1229 (D.C. Cir. 2003), a three-judge panel of the U.S. Court of Appeals ruled that the RIAA could not compel Verizon Internet Services to reveal the names of its customers without first filing a "John Doe" suit. The so-called "John Doe" suits require the RIAA to first sue users by their unique Internet address and provide some showing that those users are likely to be engaged in illegal file sharing online. Only after a court agrees can the ISPs be subpoenaed and required to turn over personal information on the alleged file sharers. (See "Copyright Updates: RIAA Tries to Enforce Fees For Music Downloads," in the Fall 2003 *Silha Bulletin*.)

On October 12, a federal judge for the federal District Court for the Eastern District of Pennsylvania issued an order requiring that file sharers be given notice of their legal rights before ISPs turn over personal information about them to the music companies or the RIAA. A spokesman for the RIAA, Jonathan Lamy, told *Wired News* in an article published on October 26, available online at: <http://www.wired.com/news/digiwood/0,1412,65516,00.html>, "We have always encouraged ISPs to inform their subscribers of pending subpoenas. This action by the court is consistent with that." Judge Cynthia Rufe's order in *Elektra Entertainment Group v. Doe*, 2004 U.S. Dist. LEXIS 22673, said that the notices must include information on how to challenge the subpoenas, provide a list of attorneys available to help defendants, and must be sent out within seven days of the initial disclosure of their information. Additionally, the notice must inform defendants that if they do not reside in Pennsylvania, they may be able to challenge the court's jurisdiction over them, even though their ISP does business in that state.

In another move to curb illegal transmission of music, some music companies have proposed using technology to make CDs difficult or impossible to copy. Sony's BMG Music, the world's largest record company, had used such technology for two years before announcing in November 2004 that it would abandon the technology, in part due to the fact that some older CD players were unable to play the CDs with the copy-prevention technology. Although studies have shown that very few consumers actually copy CDs illegally, Sony and other music companies have been seeking ways to use newer technology to prevent CDs from being copied while preserving their playability.

Despite the potential benefits from legitimate online music retailers and the threat of lawsuits from the RIAA, peer-to-peer programs continue to remain popular, according to CacheLogic, a British Web analysis firm. One popular file-sharing program, BitTorrent, which allows quick and easy downloading of large-size files including movies, gained the attention of the Motion Picture Association of America (MPAA). On Dec. 14, 2004, the MPAA filed civil suits against operators of 100 servers using BitTorrent in order to try to stamp out online movie sharing, citing concerns similar to those expressed by the RIAA over online music sharing. In addition, the MPAA sent out cease-and-desist letters resulting in several of the most popular servers being taken offline.

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"There must be consequences to breaking the law, or illegal downloading will cripple the music community's ability to support itself now or invest in the future."

—Cary Sherman,
President, RIAA

In conjunction with those efforts, the MPAA initiated twelve lawsuits against hundreds of people who had allegedly used file-sharing programs to swap movies. The MPAA was unable to combine all of the suits into one proceeding, however, when U.S. District Court Judge William Alsup for the Northern District of California ruled on Nov. 24, 2004 that it was improper to group the defendants in the lawsuits together. One of the cases has been allowed to continue while the other eleven have been put on hold until MPAA can identify and sue each of the defendants separately.

The MPAA has claimed that the United States movie industry loses \$3 billion annually due to movie piracy worldwide and that movies shared online account for much of those losses. Dan Glickman, president of the MPAA, said in a statement issued by the organization after it filed its first lawsuits on November 16, “The motion picture industry must pursue legal proceedings against people who are stealing our movies on the Internet. The future of our industry, and of the hundreds of thousands of jobs it supports, must be protected from this kind of outright theft using all available means.”

But some digital technology advocacy groups have questioned the wisdom of MPAA following the RIAA’s example. Public Knowledge, a digital rights advocacy group based in Washington, D.C., predicts that suing file sharers will do nothing to curb the illegal trading of movies. Gigi Sohn, president of Public Knowledge, said, “Simply bringing lawsuits against individual infringers will not solve the problem of infringing activity over [peer-to-peer] networks. First and foremost, it is crucial that the motion picture industry develop new business models that treat the low cost, ubiquity and speed of the Internet as an opportunity, not a threat.”

Also joining the fray is the federal government. The Associated Press reported on Oct. 6, 2004 that U.S. Attorney General John Ashcroft told a conference of prosecutors that the Department of Justice (DoJ) would seek new tools to pursue intellectual property theft on a greater scale. Ashcroft said that a federal response to intellectual property theft “must be as forceful and aggressive and successful as our response to terrorism and violent crime and drugs and corruption has been.” In a press conference to discuss the release of a DoJ report from its Intellectual Property Task Force on October 12, Ashcroft explained, “The department is prepared to build the strongest, most aggressive legal assault against intellectual property crime in our nation’s history.”

The report urges Congress to allow the DoJ to use wiretaps to investigate serious intellectual property crime offenses and to allow FBI agents and prosecutors in Hong Kong and Budapest, Hungary, to help local officials “develop training programs on intellectual property enforcement.” Eastern European countries and developing countries in Asia tend to have lax intellectual property enforcement and high rates of piracy. The RIAA and MPAA both applauded the DoJ’s efforts in statements. The report also backed the controversial Inducing Infringement of Copyrights Act (S. 2650), popularly known as the Induce Act, introduced in the Senate in June 2003 by Sens. Orrin Hatch (R-Utah) and Patrick Leahy (D-Vt.).

The Induce Act would overturn a 1984 ruling by the U.S. Supreme Court in *Sony Corp. v. University City Studios, Inc.*, 464 U.S. 417 (1984), referred to as the Betamax decision. The Betamax decision provided a shield for manufacturers of technology that might be used to violate copyright laws and said specifically that VCRs were legal to sell, despite the fact that they could be used to illegally copy movies, because they were also “capable of substantial noninfringing uses.” The MPAA and RIAA asked the Supreme Court to hear an appeal from a decision in the U.S. Court of Appeals (9th Cir.), *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 380 F.3d 1154 (2004), that ruled peer-to-peer program makers could not be sued for the illegal acts of their users under the doctrine from the Betamax decision.

Grokster and StreamCast, two peer-to-peer file sharing services, were sued by music and movie companies who claimed that peer-to-peer services were liable for the copyright infringement of their users who illegally downloaded music and movies. However, the Court of Appeals ruled that the peer-to-peer services occupied a position like Sony in the Betamax decision, and were not liable for the actions of file sharers. “We live in a quicksilver technological environment with courts ill-suited to fix the flow of internet innovation,” the court said. The music and movie companies, calling it “one of the most important copyright cases” ever to reach the Supreme Court, appealed the Ninth Circuit’s ruling. The Supreme Court decided to hear the case on Dec. 10, 2004. Oral arguments have been set for March 2005 with a decision likely by July.

While the Induce Act and other bills addressing copyright issues relating to movies, music, and software received favorable votes in the House, significant opposition in the Senate ultimately led to their defeat. Industry advocates had argued that the laws were necessary to clamp down on illegal file sharing. However, consumer and technology advocates, such as the Electronic Frontier Foundation, had claimed that the proposed bills would chill innovation and hamper new technologies.

During Congress’ lame duck session following the November 2 elections, Hatch had attempted to craft a single omnibus copyright bill in the Senate that incorporated many of the key provisions from the bills passed in the House. Continued opposition and a fight over an amendment to the bill, added by Sen. John McCain (R-Ariz.), that sought to change regulations for the boxing industry ultimately caused talks on a compromise in the Senate to break down before Congress adjourned for the year. The bill’s defeat before the end of the 108th Congress means that any new legislation in the next Congress would need to start from scratch in both houses.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

In answer to the second question, the court held that the traditional test for actual malice would also apply to defamation claims involving satire or parody of public officials. Consequently, the court held that Whitten and Isaacks should have an opportunity to show whether the article was published with actual malice – knowledge of falsity or reckless disregard for the truth.

Contending that the appellate court’s decision was the first in the nation to find “a triable fact issue in a libel case brought by elected public officials over political satire,” the newspaper appealed the decision to the Texas Supreme Court.

Citing *New York Times v. Sullivan*, 376 U.S. 254 (1964), the Texas Supreme Court explained that it must consider the case “against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” Unlike the court of appeals, the Texas Supreme Court read U.S. Supreme Court precedent as clearly recognizing First Amendment protection of parody and satire. Satire could not reasonably be understood as describing actual facts, the court opined, so the test is not whether reasonable readers could have concluded the story was factual, as the court of appeals had suggested. Rather, the test for drawing the line between protected satire and unprotected defamation is whether the publication could reasonably be understood as describing actual facts.

“The court of appeals has underestimated the ‘reasonable reader,’” wrote the high court. The court pointed to a number of “clues” of exaggeration or distortion in “Stop the Madness” that signaled to readers that the story was fictitious. Acknowledging that “Stop the Madness” had a “superficial degree of plausibility,” the high court nonetheless insisted that “such is the hallmark of satire.” Although the court of appeals emphasized the confusion a reader may experience by finding “Stop the Madness” in the regular “News” section of the paper, the high court found that satirical and irreverent stories were common for the *Observer*. Moreover, the article itself referred to the Beamon incident, signaling to the reader that the story was a comment on Beamon’s detention.

Considering the “actual malice” issue, the Texas Supreme Court noted that even if “Stop the Madness” had been understood as stating actual facts, public figures like Whitten and Isaacks could recover only if they could prove actual malice. Actual malice does not depend on a proving bad motive or a mean spirit. To meet the traditional standard of actual malice, as specified in *New York Times v. Sullivan*, Isaacks and Whitten would have to prove that Farley knew her statements were false or that she acted with reckless disregard for whether they were true.

The Texas Supreme Court, unlike the court of appeals, recognized that the “traditional” standard of actual malice does not neatly apply to works of parody or satire. With parody, the author is always aware that what she is publishing is not true. The Texas Supreme Court noted that the U.S. Supreme Court had not applied this literal standard in its parody/satire cases, yet it had never detailed a clear, modified standard. Consequently, the Texas high court announced a standard for actual malice as applied to satire or parody. “Did the publisher either know or have reckless disregard for whether the article could reasonably be interpreted as stating actual facts?”

Applying this new standard, the state supreme court pointed to detailed affidavits from Farley, Lyons, and Williams that described the paper’s writing and editing process. The affidavits showed that the paper had explicitly decided against writing a prank article, opting to make it obvious to readers that the story was a parody. Whitten and Isaacks argued that Farley showed actual malice by admitting that she intended to hold Isaacks and Whitten up to public ridicule. The court answered that equating the intent to ridicule with actual malice would defeat the purpose of the actual malice standard — to promote robust public debate. Holding that the paper defeated actual malice as a matter of law, the Texas Supreme Court reversed the judgment of the court of appeals.

—KELLY J. HANSEN MAHER
SILHA FELLOW

journalists are in jail for advocating the adoption of democratic reforms, denouncing government abuses or simply raising politically sensitive issues. RSF has since raised its estimate of jailed print journalists to 25 and online journalists to 62. CPJ has called China the world’s leading jailer of journalists. RSF’s 2004 report is available online at http://www.rsf.org/article.php3?id_article=10166; CPJ’s report is available at <http://www.cpj.org/news/2004/China08dec04na.html>.

—HOLIDAY SHAPIRO
SILHA RESEARCH ASSISTANT

Silha Center Events

Geneva Overholser Delivers 2004 Silha Lecture

Ethics in modern media can, and should, include a collection of internal principles, Geneva Overholser told the audience gathered for the Silha Center's 19th Annual Lecture on Oct. 13, 2004. Every media organization can mobilize itself to create a healthier commitment to excellence in journalism, Overholser claimed.

Overholser, the Curtis B. Hurley Chair in Public Affairs Reporting for the Missouri School of Journalism, Washington D.C. bureau, spoke to a crowd of nearly 200 at the 19th Annual Silha Lecture. The lecture, entitled, "High Hopes and Dire Warnings: In Search of a Credo For Today's Journalist," was delivered at the Coffman Memorial Union Theater at the University of Minnesota on Oct. 13, 2004.

Overholser told the gathering of media professionals, Silha Board members, family, friends and students that although ethics codes are important, journalists need a credo, or "the sort of thing to hang onto when the wind is stiff." She said that the current media environment is functioning in a time when public trust of journalists and the profession is low, and high levels of "spin," press releases and pseudo-news events, can make the press seem too easily acquiescent to the demands of the public.

Overholser warned that the objectivity model and the notion of "news as business" need to be reexamined as the press evolves into a new role of responsibility. Facing what Overholser called a "dire warning," she said "[Journalists'] commitment to objectivity and our reliance on commerce have us hobbled and undernourished and that, unless we wake to these problems and respond effectively we, and this democracy we in journalism exist to serve, will indeed be in trouble."

Overholser observed that an adherence to objectivity limits truth in journalism because it can lead to an unchallenged premise that power is truth. Overholser cited numerous critiques of the media and their close ties to government, especially during the Iraq war. An August *Washington Post* article revealed the paper had run more than 140 front-page articles between August 2002 and March 2003, focusing on the Bush administration's rhetoric about the war in Iraq.

Overholser also observed that maintaining credibility in the eyes of the public also becomes difficult when journalists are featured as experts on talk shows or news programs. Finally, she said she has seen a new level of withdrawal from controversial issues covered by the press, creating a "dulling sameness."

Overholser's second concern focused on the pressures placed on the media in a world driven by business and profit concerns. She stated that advertisers today pay 80 percent of a newspaper's costs, potentially creating conflicts over editorial direction. Although recognizing the need for commerce and its relationship to a successful media organization, she also discussed some of the adversarial concerns that relationship can create,

including the challenge to stay focused on journalism rather than the bottom line, and low levels of commitment to staffing, training, salaries, foreign correspondents, and arts coverage.

The "ethic of underinvestment" [by not supporting the reporting and coverage of content in the news] can starve the public of the awareness it needs in a democracy to govern itself, she said. Asking whether she was "clamoring for a return to the old days of the partisan press," she answered, "I want a richer, broader journalism landscape in journalism and I can tell you with high hopes that I see it coming just now, over the horizon."

To get to that horizon, Overholser said it is time to recognize that something is changing in American journalism. Objectivity, she argued, may not necessarily need to be the ultimate ethic a news organization strives to place above all else. Instead, she stressed the importance of a news organization's responsibility to telling the truth regarding its goals and intentions. She also stressed the need for media organizations to be open and up-front about their editorial direction, labeling everything either as news or something other than news. Online, ethnic, and alternative media all share a point of view, she said, stating that "these media let you know what their authors think."

"What do I mean by a welcome diversity of media? Would it include the openly opinionated? In a word, yes. If opinionated journalism has no honorable role, you should tell it to Tom Paine and to Ida B. Wells, to Lincoln Steffens and Ida Tarbell, to Upton Sinclair and Rachel Carson, [a collection of well-respected journalists committed to ethical reporting]," Overholser said.

Overholser also suggested other ways to strengthen and build a new model of journalism. She suggested media owners work to include individuals with experience on the editorial side, as well as the business side, of a news organization on their boards of directors. These members, she continued, could be given responsibilities to monitor the company's editorial performance.

Overholser also noted that there is room for opinion in the media today. She pointed to successful Weblogs' efforts at "busting up" traditional objective reporting models as proof that opinion fits into a modern, diverse, journalism arena. She quoted CNN Washington bureau chief David Bohrman's comment to *The New York Times*, "I'm intrigued at the way that bloggers and blogs have forced their way into the political process on their own: that's why I want to incorporate the blogs into our coverage." Overholser said the mainstream media are beginning to take notice of these newcomers, but added that players with opinions must present themselves honestly.

"Just as a good newspaper labels all stories other than straight news reports – as analysis, criticism, editorial, etc. – so a medium that plays an untraditional role [such as Weblogs] should let its consumers know

"Journalists' commitment to objectivity and our reliance on commerce have us hobbled and undernourished. Unless we wake to these problems and respond effectively, we and this democracy we serve will be in trouble."

—Geneva Overholser

Overholser, continued on back page

Silha Center Events

Silha Center's Fall Forum Features Paramount Studio's Executive Director of Film Preservation

Barry Allen, Paramount Studio's Executive Director of Film Preservation and Archival Resources, spoke to more than 40 students about the legal and ethical challenges surrounding film restoration and preservation on Nov. 11, 2004. "Ethics and Copyright: Issues in Film Restoration," held in the conference center of Murphy Hall, covered topics such as the difference between film preservation and restoration; what constitutes the ideal conditions for film preservation; and problems arising from copyright and other proposed legislation affecting the film industry, including the Family Movie Act.

Allen claimed that 90 percent of all films made before 1920 are lost, and that 50 percent of all films made before 1950 have vanished or deteriorated beyond repair. Even filmmakers who completed films as recently as six months ago should be concerned about film preservation. Many of them, Allen said, do not do what is necessary at the completion of a film to ensure it receives proper care. Proper care includes careful storage of the completed film in archival conditions – including proper humidity and temperature control – to avoid deterioration.

This illustrates the difference between preservation and restoration, Allen said. Preservation involves taking old film and transferring it to modern film stock, thereby making state of the art material from old. Restoration, on the other hand, involves taking original film material and technologically enhancing the video and audio components to make a damaged film as good or better than it was originally, while still maintaining the original artists' intent and vision.

When restoring a damaged or deteriorated film, Allen said that the first thing that is done is to look for defects in the existing prints. Then a log of all the defects is made. Defects include scratched frames or bubbling along the edges of the film. When no bubbling or some bubbling is present, the film can be used. But advanced film deterioration such as flaking or crumbling results in film that cannot. Utilizing all the available good copies of a film, restorers determine how to use the best portions to create a restoration that remains faithful to the director's original intent.

As an example, Allen cited Steven Spielberg's preservation of his film "E.T.," calling that situation "ideal." Spielberg, according to Allen, stored an original negative of the film under controlled conditions, so that there was little deterioration of quality or color. When Spielberg reissued the film, Allen said, he resisted the temptation to remaster or change it, leaving in some scenes where special effects, such as wires undisguised in the original, could still be seen. "Just because you can fix it doesn't mean it is a good idea," Allen observed.

Although many older movies have entered the public domain – the copyright has expired or no one claims ownership for the film – other copyright issues may prevent a

film from being viewed by the public for a number of years.

Contested rights for components such as incidental music or underlying source material may also impede re-release. This was the case, Allen said, with "The Great Gatsby." F. Scott Fitzgerald's family has blocked renewal of the copyright for the 1949 film version, making it "a legal liability to [even] have the film," Allen claimed. Other films cannot be shown publicly because the ownership of the film has changed as a result of the director's death, a change in studio ownership, or the copyright reverting to someone's estate.

Although the U.S. Constitution does not permit copyright in perpetuity, Allen said that it may seem that the law is headed that way. Originally, the length of copyright was 28 years, and then, upon request, the length could be extended another 28. But legislation introduced by the late Sonny Bono (S. 505 §§101-207) extended copyright to 95 years. This potentially could keep some films out of the view of the public for years if the copyright holder's demands for fees are excessive or if the copyright cannot be obtained.

Another problem threatening both copyright and artists' moral rights is the Family Movie Act. This law would make it legal to create software to be added to DVDs that would block scenes and language that some viewers find offensive. As an alternative, some directors are creating two versions of a film when released on DVD. One version is unedited, while the other is edited or includes scenes that have been reshot to eliminate violence, questionable language or explicit sexual situations. In contrast to software that blocks scenes on DVDs, these edited versions are created with the director's input so that the creative process is not compromised.

Allen began his career as a local film editor with WISH-TV in Indianapolis, before becoming a film buyer and repertory programmer for a small chain of theaters. He joined Paramount Domestic Television Group in 1987 as a syndication distribution manager, and in 2000 took charge of preserving the Republic Pictures library which had then been acquired by Paramount. In March 2005, Allen will be awarded the Anthology Film Archives Honors Award. Previous recipients include Martin Scorsese, Peter Bogdanovich, Leonard Maltin and others involved in film preservation.

Allen's appearance was sponsored by the Silha Center for the Study of Media Ethics and Law and was in conjunction with the Annual Conference of the Association of Moving Image Archivists at the Hyatt Regency in Minneapolis.

—ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

"Just because you can fix a problem when restoring a film doesn't mean it's a good idea."

—Barry Allen

Overholser, *continued from page 44*

what role that is. We are all ill-served by the current topsy-turvy atmosphere in which perhaps the leading innovator in this more-partisan landscape is the only one constantly to make the overt claim of being ‘fair and balanced.’”

To adopt a credo, Overholser suggests journalists begin to “admire” comedy news, cable TV news, and the entertainment news media in order to learn from the ways in which they succeed. She says to become better, a news organization should maintain transparency, adhere to all ethics codes, commit to an investment in news and news personnel, explain editorial policies and the rationale for choices, and finally, include everyday people in the newsroom in an effort to foster accountability.

Overholser added she believes that process should include the creation of a news council in every state, as well as the inclusion of alternative publications on on-line sources such as <http://www.gradethenews.org>.

Most importantly, Overholser stressed, was a need for an overall accountability through a new type of a nation-wide alliance of journalists. Such a group, she said, would allow the press to “speak out against growing government secrecy, against weakening of the Freedom of Information Act, against the jailing, or prospective jailing, of reporters who are doing what they ought to do, protecting their sources.”

She concluded by offering to the audience her promised credo for a better state of the media. Overholser quoted Walter Williams, founder of the world’s first journalism school, who wrote the “Journalist’s Creed” a century ago. “I believe in the profession of journalism.” Williams wrote. “I believe that the public journal is a public trust. That all connected with it are, to the full measure of their responsibility, trustees for the public. The acceptance of lesser service than the public service is a betrayal of this trust.”

The annual Silha Lecture is sponsored by the Silha Center for the Study of Media Ethics and Law, and is designed to stimulate research and debate on topics related to the convergence of ethical and legal principles, media accountability, the First Amendment and freedom of information. The Silha Center was established in 1984 with a generous endowment gift from Otto and Helen Silha.

—KRISTINE SMITH
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