SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW

Bulletin

Volume 10, Number 4 Summer 2005

Inside this Issue

SCHOOL OF JOURNALISM & MASS COMMUNICATION
COLLEGE OF LIBERAL ARTS
UNIVERSITY OF MINNESOTA

Media Repulse Ban on Katrina Coverage

In the aftermath of Hurricane Katrina, Federal Emergency Management Administration (FEMA) officials refused to allow journalists to accompany workers on boat missions to rescue and recover victims and also directed that no photographs of the dead be taken. Days later, after a lawsuit was filed against the government, officials quickly changed course.

On Sept. 6, 2005, Reuters reported that FEMA officials responded to its inquiry about the policy with an e-mail stating, "We have requested that no photographs of the deceased be made by the media." The "request" became an order on September 9 when Army Lt. Gen. Russel Honoré said there would be "zero access to the recovery operation" and Terry Ebbert, New Orleans' homeland security director, "said recovery efforts would be done with dignity, 'meaning that there would be no press allowed'," the Associated Press reported.

CNN filed suit against FEMA in federal District Court in Houston, Texas on September 9. In the motion to the court requesting an emergency temporary restraining order (TRO) against the government, CNN's lawyer Charles Babcock wrote, "The government's total ban on coverage of the victim recovery process is an unconstitutional prior restraint on publication in violation of the First and Fourteenth Amendments to the United States Constitution."

In a brief to the court in support of the TRO, Babcock cited the Pentagon Papers case, *New York Times v. United States*, 403 U.S. 713 (1971) to support the case against prior restraint on the press, and *Richmond Newspapers, Inc. v. Commonwealth of Virginia*, 448 U.S. 555 (1980) and *Globe Newspapers Co. v. Superior Court*, 457 U.S. 596 (1982) to support the argument for access to public events that were historically open to the press.

U.S. District Court Judge Keith P. Ellison granted the order and the parties reconvened the next day, September 10, to continue with a full hearing. By that time, the government had already decided to reverse course. "Army Lt. Col. Christian DeGraff promised that recovery teams would not bar the media from watching. Satisfied, CNN agreed to put its case on hold," the Associated Press reported.

Keith Wyatt appeared on behalf of the government in the suit. He told Ellison that he had participated in several conference calls between September 9 and 10 with various FEMA and Department of Justice officials. "During the course of the proceedings, we discussed some of the statements that apparently Gen. Honoré has made during press conferences, and ultimately we contacted the Katrina Joint Task Force . . . the policy now is that there will be no impediment to press access," Wyatt said.

"Decisions about running photos are up to members of the news media," FEMA spokesperson Mark Pfeifle said after the lawsuit was settled. "Out of respect for the deceased [and their families] . . . FEMA has asked that images not be shown. But it's up to the media whether they're shown or not."

"There's not a directive," he said. "It's just a request that FEMA people have made to members of the media."

FindLaw columnist Julie Hilden wrote that CNN had a particularly strong case and would have likely won in court had the government not backed down. "First, as CNN pointed out, the [government's total ban] policy was what is known as a 'prior restraint': Rather than punishing violations through the criminal or civil law, the government was ensuring, by denying access, that journalists had no means to cover retrieval of bodies in the first place. The law's extremely strong preference is to allow photographs to take pictures, and writers to write, first - and to let the government try to punish them, based on the specific facts, later. Second, this is the kind of speech that the First Amendment was written to protect," Hildren wrote in her September 13 column.

The initial order not to take photos of the hurricane dead was reminiscent of the government's policy against allowing journalists to photograph coffins containing the bodies of American soldiers who died while serving in Iraq and Afghanistan. (See "FOIA News: Coffin Photos Released Following FOIA Request" in the Spring 2005 Silha *Bulletin* and "Family Privacy Concerns Result in Ban on Coffin Photos" in the Spring 2004 issue of the Silha *Bulletin*.)

Cliff Schiappa, the Associated Press's regional photo editor for the Midwest, was quoted as saying, "Photographs of flood victims' bodies is part of the overall coverage of Hurricane Katrina. When choosing an appropriate image, we do not want to be gratuitous, but rather put the image in context of the flood and suffering. The government is very concerned about the recovery efforts being done in a dignified manner, as it should be done. As members of the media, it's our job to show the world that such an effort is being made and carried out."

After the lawsuit's resolution, Jim Walton, CNN Newsgroup president, was quoted as saying, "We believe very strongly in the free flow of information and felt it was necessary to have access to tell the full story."

Katrina, *continued on page 6*

Reporters Privilege News

Deep Throat's Identity Revealed At Last

"Mark Felt provided information he was not authorized to provide. But he served the country by doing so."

– Floyd Abrams, First Amendment Attorney

For years, guessing the real identity of Deep Throat, who had guided *Washington Post* reporters Bob Woodward and Carl Bernstein to secrets of the Nixon administration and the Watergate break-in, was a popular game among many people interested in American politics. However, Woodward and Bernstein had vowed never to disclose Deep Throat's identity until their source had died. But in May 2005, Mark Felt, who had been the second in command of the Federal Bureau of Investigation (FBI) during the Watergate era, acknowledged that he was the source Woodward and Bernstein had sworn to protect.

Woodward's book, *All the President's Men*, explains how *The Washington Post* covered the story of the Watergate break-in and the subsequent collapse of the Nixon administration. Felt was identified in Woodward's book only as "Deep Throat," an unidentified but high-ranking government official who met Woodward on several occasions secretly in the middle of the night in a parking garage in Washington, D.C. During their meetings, Deep Throat led Woodward to information to supplement his investigative reporting. Speculation as to the identity of Deep Throat never died down, even years after the fact. People such as Watergate-era Assistant Attorney General Henry Peterson, Deputy White House Counsel Fred Fielding, and even ABC's Diane Sawyer have been suggested as possibilities, but no one could be certain because Woodward and Bernstein promised not to reveal the identity of their source until after the person had died or had released them from their promise.

A *Vanity Fair* article, "I'm the Guy They Called Deep Throat," written by John D. O'Connor, an attorney and friend of Felt's daughter and grandson, Joan Felt and Nick Jones, was published May 31. In the article, O'Connor said that Felt and Jones called him "to discuss the wisdom of Felt's coming forward." The former FBI second-in-command had "recently admitted his secret identity . . . to intimates" but was resolved to tell no one else. His daughter and grandson, however, "considered [Felt] a true patriot," and "were beginning to realize that it might make sense to enlist someone from the outside to help him tell his story, his way, before he passed away, unheralded and forgotten." The *Vanity Fair* article is available online at http://www.vanityfair.com/commentary/content/articles/050530roco02.

Joan Felt and her brother, Mark, encouraged their father to reveal his role in Watergate. O'Connor wrote, "They explained that they wanted their father's legacy to be heroic and permanent, not anonymous." But there has been concern that the decision was not Felt's alone. Aged 91 and ailing, reports that Felt has dementia raised questions as to his capacity to come forward at this time. *Newsweek's* Evan Thomas wrote in a posting at MSNBC.com that the Felt family at one point called in freelance writer Jess Walter to help write the elder Felt's story. But Thomas wrote that Felt was little help to Walter, and was "unable to recall any details. [He] did acknowledge he was Deep Throat on most days – but on other days he would deny it." Thomas's story is available online at www.msnbc.msn.com/id/8101507/site/newsweek/. A press release from PublicAffairs, noted that *A G-Man's Life: The FBI, Being "Deep Throat," and the Struggle for Honor in Washington*, authored by Felt and O'Connor, will be published in the spring of 2006. There have been reports that there may be a film in the works as well.

On June 2, *The Washington Post* published an excerpt from Bob Woodward's then-forthcoming book, *The Secret Man: The Story of Watergate's Deep Throat*. In the article, Woodward explained how, as a young naval officer, he initially met Felt in one of the White House's waiting rooms and introduced himself. Later, when Woodward was beginning his journalism career, he connected with Felt again, who acted at times as a mentor, but only on the condition that Woodward never reveal his ties to Felt, the FBI or the Justice Department.

One of the biggest questions surrounding the Deep Throat mystery is: Why did Felt agree to his role as a confidential source? Woodward has written that there are four reasons:

- Felt believed he was protecting the FBI by revealing some of the information the agency possessed in the hopes that public and political pressure would build, thereby holding the Nixon administration accountable for its wrong.
- Felt believed that the Nixon administration was trying to manipulate the FBI for its own benefit.
- Felt was driven by disappointment because he believed that he was in line for the director's position following the death of J. Edgar Hoover. L. Patrick Gray III was named director instead.
- Felt, who once worked bringing World War II Nazi spies to justice, "liked the game," according to Woodward. "I suspect in his mind I was his agent," Woodward wrote.

More than thirty years after Watergate, many reporters are facing contempt charges for refusing to reveal their confidential sources. (See "*New York Times's* Judith Miller Released After 85 Days; Dole Suggests Identities Law Not Violated" on page 3 of this issue of the Silha *Bulletin*, "Judges and Journalists on a Collision Course" and "Reporters Privilege News: *Wen Ho Lee v. Department of Justice*" in the Spring 2005 issue of the Silha *Bulletin*, "Reporters Privilege: Dr. Wen Ho Lee v. United States Department of Justice: in the Summer 2004 issue of the Silha *Bulletin* and "Reporters Refuse to Reveal Sources in Spy Case" in the Fall 2003 issue of the Silha *Bulletin*. See also "Reporters Privilege: Weinberger v. Maplewood Review in the Summer 2004 issue of the Silha *Bulletin*, "Courts Rule in Reporter Privilege Case: Weinberger v. Maplewood Review" in the Summer 2003 issue of the Silha *Bulletin*, "Minnesota Shield Law Facing Test" in the Winter 2002 issue of the Silha *Bulletin*, and "Reporters Subpoenaed, Detained," in the Summer

Deep Throat, *continued on page 4*

Reporters Privilege News

New York Times's Judith Miller Released After 85 Days; Dole Suggests Identities Law Not Violated

After spending 85 days in jail at the Alexandria Detention Center, *New York Times* reporter Judith Miller was released on Sept. 29, 2005. According to the Associated Press, her source, identified as Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff, had reportedly called Miller in prison and urged her to testify before a grand jury. Miller did testify to the grand jury on September 30, spending several hours doing so before going home.

Silha Center director and Silha Professor of Law Jane Kirtley told *The New York Times*, "The inescapable conclusion that some could draw here is that after a certain period of time, when the reporter is fed up with being in prison, she will make a concession. I'm not saying that's what happened here. But that's the appearance. The danger is that it will embolden others in more common garden-variety investigations to say to the judge, 'All you have to do is stick the reporter in jail, and we'll get what we want.'"

Miller was jailed for refusing to testify before a grand jury concerning the identity of confidential sources in the Valerie Plame controversy. The 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. Wilson's commentary 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 the claim and said that the administration had relied on discredited intelligence.

But days after the commentary was published, the identity of Valerie Plame, Wilson's wife, who was an undercover agent working for the CIA, 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, claimed he received the information concerning Plame from two "senior . . . officials" within the Bush administration. Subsequently, several other journalists reported receiving the same information. Because 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*., a special prosecutor, Patrick Fitzgerald, was appointed to conduct an investigation. Miller, along with other journalists, was subpoenaed in an effort to learn her sources.

The reporters moved to quash the subpoenas. Their cases eventually reached the U.S. Supreme Court, which declined to hear the appeal of Miller and *Time* magazine's Matt Cooper. At that point, Cooper's source decided to permit Cooper to testify (as had other reporters in the case), but Miller still refused to comply with the court order. On July 6, Judge Thomas Hogan of the U.S. Court of Appeals for the D.C. Circuit ordered Miller – who never published a story about the Plame controversy – to jail. (See "Reporters Privilege News: Supreme Court Denies Cert in Miller/Cooper Cases" in the Spring 2005 Silha *Bulletin*; see "*In re: Grand Jury Subpoena*, 397 F.3d. 964 (D.C. Cir.)" and "Plame Update: Journalists Miller and Cooper Appeal Their Sentences" in the Winter 2004 issue of the Silha *Bulletin* and "Reporters Privilege: *In re: Special Counsel Investigation*" and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue of the Silha *Bulletin*.)

According to *The Washington Post*, while in jail, Miller received a steady stream of visitors that includes "prominent government and media officials" during the 30 minutes she is allotted for visitors each day. *The Washington Post* reported that Miller's visitors have included Gonzalo Marroquin, the president of the Inter-American Press Society and director of the Guatemalan daily *Prensa Libre*, John R. Bolton, U.S. ambassador to the United Nations, former "NBC Nightly News" anchor Tom Brokaw, and former U.S. senator Bob Dole (R-Kan.). Following his visit, Dole wrote an opinion piece published by *The New York Times* on August 18.

Dole, who was one of the sponsors of the Intelligence Identities Protection Act, explained in his *New York Times* article that he believes that law may not have been violated in this case. "The [Intelligence Identities Protection Act] was intended to protect covert intelligence operatives whose lives would be endangered if their identities were publicly disclosed," Dole wrote. "One of the requirements is that the federal government must be taking 'affirmative measures' to conceal the agent's intelligence relationship with the United States. Yet we now know that [Plame] held a desk job at C.I.A. headquarters and could be seen traveling to and from work."

Dole further wrote that Miller should not be jailed for refusing to name her source because "she has never written a word about the C.I.A. flap." Dole advocated the passage of a federal shield law, currently before Congress as the Lugar-Pence bill (named for Senator Richard G. Lugar (R-Ind.) and Representative Mike Pence (R.-Ind.)), saying, "As someone with a long record of government service, I must admit that I did not always appreciate the inquisitive nature of the press. But I do understand that the purpose of a reporter's privilege is not to somehow elevate journalists above other segments of society. Instead, it is designed to help guarantee that the public continues to be well informed." Dole also noted that the argument that granting a privilege could result in the loss of evidence relating to a criminal investigation, writing, "This argument ignores the dozens of whistle-blowers who would not share information about government wrongdoing . . . unless they felt reporters could protect their identities." (See "Federal Shield

Miller, *continued on page 6*

"[Miller's] imprisonment . . . will be even more troubling if it turns out that no violation of [the Act] has occurred."

– Sen. Bob Dole

Reporters Privilege News

Deep Throat, *continued from page 2*

2002 issue of the Silha *Bulletin*. See also "Vanessa Leggett Released from Jail" in the Winter 2002 issue of the Silha *Bulletin.*) The revelation of Deep Throat's identity has prompted conversations about the use of confidential sources and the need for a federal shield law. (See "Federal Shield Law Debated in Hearings Before Senate Judiciary Committee" on page 5 of this issue of the Silha *Bulletin*; see also "Reporters Privilege News: Federal Shield Law Introduced in 109th Congress" in the Winter 2005 issue of the Silha *Bulletin*.)

Barry Sussman, the *Washington Post* editor who supervised Woodward and Bernstein during the Watergate era, who is now the editor of the Nieman Watchdog Project, wrote in an online article, "Deep Throat was nice to have around, but that's about it. His role as a key Watergate source for the *Post* is a myth, created by a movies and sustained by hype for almost 30 years." Sussman continued, "It wouldn't be correct to say we never got any help from him. In October 1972, Deep Throat gave us confirmation on an important story dealing with dirty tricks. But that's it . . .. An investigator in Miami who helped us one time was a lot more important than Deep Throat."

Sussman further claims that Deep Throat's true identity remained hidden because "his contribution was unimportant. Don't believe for a minute that [*Post* editor Ben] Bradlee wouldn't have asked his name had the *Post's* reputation been riding on what he was telling us." Sussman's article is available online at http://www.niemanwatchdog.org/index.cfm?fuseaction=background.view&backgroundid=0051.

Kathleen Hall Jamieson, director of the Annenberg Public Policy Center at the University of Pennsylvania, told *The Baltimore Sun*, "The lesson of Watergate, if not the legacy of 'Deep Throat,' is that anonymous sources aren't the end of a reporter's search, but a beginning. The real danger of Watergate, the journalistic enterprise, is that young journalists mislearned the lesson and overvalued the anonymous source and undervalued the legwork."

Others believe that anonymous sources are essential to preserving democracy. Floyd Abrams, the First Amendment attorney representing Judith Miller, told *The New York Times*, "Mark Felt served the public enormously by breaking ranks and assisting in the exposure of ongoing repeated governmental misconduct. I think he'll be remembered well when the history of this period is written.. . . Like a lot of important sources, he provided information he was not authorized to provide. But he served the country by doing so."

Former *Washington Post* reporter Lou Cannon told *The New York Times*, "'We've had all this stuff about anonymous sources and God knows yes, we all know anonymous sources are overused. But this really shows you, this story would have never come out if we had a rule against anonymous sources."

–Elaine Hargrove
Silha Fellow and *Bulletin* Editor

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Reporters Privilege News

Federal Shield Law Debated in Hearings Before Senate Judiciary Committee

On July 20, 2005, the United States Senate Committee on the Judiciary heard testimony from journalists, congressmen, lawyers and a professor regarding the proposed federal reporter shield law, also known as the "Free Flow of Information Act of 2005." Noticeably absent from the proceedings was a representative from the Department of Justice, Deputy Attorney General James B. Comey, who had been scheduled to testify but cancelled at the last minute.

A Justice Department spokesperson said Comey had instead been called to a House Republican meeting on the USA PATRIOT Act and could not attend. Sen. Patrick Leahy (D-Vt.) expressed disappointment that Comey did not attend and testify, saying, "I looked forward to a meaningful exchange on the issues." Comey did issue a written statement that criticized the bill, calling it "bad public policy primarily because it would broadly bar the government from obtaining information about media sources, even in the most urgent of circumstances affecting the public's health or safety or national security." He also said, "The bill would seriously jeopardize traditional notions of grand-jury secrecy and unnecessarily delay the completion of criminal investigations."

However, Comey's statement was issued before the bill was revised to state that reporters would be required to reveal a source if "the disclosed identity of the source is necessary to prevent imminent and actual harm to national security."

The newspaper *The Hill* reported that Senator Dianne Feinstein (D-Calif.) "criticized the new provision as 'extremely broad'."

But *The New York Times* editorial board supported the change, writing in a July 21, 2005 editorial "Time for a Federal Shield Law" that, "It is a narrow exception that journalists should support, because as William Safire, the retired *Times* columnist, testified yesterday, 'We are not seeking an absolute privilege.' We second Mr. Safire's caution that an imminent threat means an actual and urgent threat, not a potential threat."

In his testimony before the Judiciary Committee, Safire also urged Congress to quickly pass the federal shield law, noting that the lack thereof has had a "chilling effect" on journalists and their potential sources alike.

Veteran First Amendment lawyer (and counsel to Judith Miller and formerly to Matthew Cooper and Time magazine) Floyd Abrams also testified before the Committee. He pointed out that the federal government falls far behind most state and international law on point, asking, "Why should federal law offer no protection for journalists who seek to protect their confidential sources when 49 of the 50 states provide considerable – often all but total – protection? How can the United States provide no protection when countries such as France, Germany and Austria provide full protection and nations ranging from Japan to Argentina and Mozambique to New Zealand provide a great deal of protection?"

University of Chicago Law Professor Geoffrey Stone testified that while an "absolute privilege may go too far… [a] rule that limits the privilege (a) when the government can convincingly demonstrate it needs the information to prevent an imminent and grave crime or threat to the national security or (b) when the disclosure is unlawful and does not substantially contribute to public debate seems to me to strike the right balance. It unduly sacrifices neither compelling law enforcement interests nor the equally compelling interests in promoting a free and independent press and a robust public discourse."

2001 Silha Lecturer Lee Levine testified as well, outlining the history of the "so-called 'reporters' privilege'" and emphasizing the importance of confidential sources. "The recent surge in the number of subpoenas, the increase in the severity of contempt penalties, and the lack of clear guidance concerning the recognition and scope of a reporters' privilege in the federal courts will almost certainly restrict the ability of the American public to receive information about he operation of its government and the state of the world in which we live," Levine said. "There is, therefore, now a palpable need for congressional action to preserve the ability of the American press to engage in the kind of important, public-spirited journalism that is often possible only when reporters are free to make meaningful commitments of confidentiality to their sources," he continued. Levine also noted the high number of articles, many award-winning, that have relied upon anonymous sources.

Matthew Cooper, the *Time* Magazine reporter who nearly ended up in jail alongside Judith Miller before White House senior advisor and Deputy Chief of Staff Karl Rove released him from his pledge of confidentiality, echoed Levine's themes. "It's . . . worth remembering that this privilege is about the public's right to know. Without whistleblowers who feel they can come forward to the reporters with a degree of confidence, we might never have known the extent of the Watergate scandal or Enron's deceptions or events that needed to be exposed. So it's not about journalists as some priestly class, but it is about the public and our democracy," Cooper said.

Cooper also relayed to the Committee that the current state of laws regarding reporters' privilege is confusing and difficult for a reporter to navigate. "Right now, if I pick up the phone and call a Senator or a civil servant and they say, 'Don't quote me on this but' . . . I can't really know what I'm getting myself into assuming that what follows is important and controversial enough to rise to the level of litigation . . .. Will it end up in state court where I have protections? Or in federal court where I may have none?"

Sheild Law, *continued on page 6*

"It's worth remembering that this privilege is about the public's right to know."

–Matt Cooper, *Time* magazine

Reporters Privilege News

Miller, *continued from page 3*

Law Debated in Hearings Before Senate Judiciary Commitee" on page 5 of this issue of the Silha *Bulletin*.)

Dole concluded, "[T]he imprisonment of Judith Miller will be even more troubling if it turns out that no violation of the Intelligence Identities Protection Act has occurred. As she sits in jail, Congress can honor her commitment to principle and her courage, and that of all reporters who have helped to expose wrongdoing by protecting their sources, by passing the Lugar-Pence bill and creating a federal privilege for reporters."

Although there are those who praise Miller, a writers group elected to reconsider its decision to give Miller its Conscience in Media Award in August 2005.

According to a posting on the *Editor & Publisher* Web site, the First Amendment Committee, a subgroup of the American Society of Journalists and Authors (ASJA) had "narrowly" voted to give Miller the award for her "dedication to protecting sources." But the matter came before the board of the ASJA, which voted unanimously not to endorse the committee's decision.

Editor & Publisher reported that ASJA's president, Jack El-Hai, posted an explanation on an internal list serve, saying that there was opposition to giving Miller the award, and that there was "a feeling that Miller's career, taken as a whole, did not make her the best candidate for the award," and that there were "divided opinions on the board over whether her recent actions merit[ed] the award."

Editor & Publisher cited one member, Anita Bartholomew, a freelance journalist, who wrote, "The First Amendment is designed to protect government interference with a free press. Miller, by shielding a government official or officials who attempted to use the press to retaliate against a whistleblower . . . has allied herself with government interference with, and censorship of, whistleblowers. When your source IS the government, and the government is attempting to use you to target a whistleblower, the notion of shielding a source must be reconsidered. To apply standard practices regarding sources to hiding wrongdoing at the highest levels of government perverts the intent of the First Amendment." (Emphasis in the original.)

The *Editor & Publisher* story is available online at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1001008093.

–Elaine Hargrove
Silha Fellow and *Bulletin* Editor

Shield Law, *continued from page 5*

Also testifying were Senator Richard Lugar (R-Ind.) and Christopher Dodd (D-Conn.) co-authors of the bill in the Senate and Representative Mike Pence, their counterpart in the House. Representative Rick Boucher, (D-Va.) is also a co-author. Pence urged his fellow members of congress to quickly pass their proposal.

"[The proposed law] doesn't give reporters a license to break the law in the name of gathering news…It simply gives journalists certain rights and abilities to seek sources and report appropriate information without fear of intimidation or imprisonment, much as, in the public interest, we allow psychiatrists, clergy and social workers to maintain confidences," Pence testified. "Now is the time for the Free Flow of Information Act. Nothing less than the public's right to know is at stake," he concluded.

–Ashley Ewald
Silha Fellow

Katrina, *continued from page 1*

In an e-mail to CNN staff, Walton said the network filed the lawsuit "to prohibit any agency from restricting its ability to fully and fairly cover" the hurricane victim recovery process, according to an article published online at CNN.com.

Army Lt. Gen. Russel Honoré later told CNN's "Late Edition" that "I can't swing a dead cat without hitting a reporter."

Even after the ban was lifted, the *San Francisco Chronicle* reported that the new policy was not being followed everywhere. "On [September 12, 2005] in the Bywater district…[an] 82nd Airborne soldier told reporters that the Army had a policy that requires media to be 300 meters . . . away from the scene of body recoveries in New Orleans. If reporters wrote stories or took pictures of body recoveries, they would be reported and face consequences, he said, including a loss of access for up-close coverage of certain military operations."

The media watchdog website Media Matters for America noted that the "media largely ignored CNN's legal victory over government restrictions on Katrina coverage" in the days following the court decision. "CNN has devoted significant coverage to this story. The cable network's legal victory, however, has gone largely unnoticed by most other major media outlets.. . . Aside from CNN, United Press International was the only outlet to report on September 9 that CNN had filed suit," Media Matters reported on September 14.

–Ashley Ewald
Silha Fellow

Reporters Privilege News

Concern for Confidential Sources Prompts Cleveland's *Plain Dealer* to Withhold Stories

In a column published on June 30, 2005, (Cleveland) *Plain Dealer* editor Doug Clifton revealed that two stories prepared by his staff and based on leaked documents were being withheld from publication. His justification for holding the stories was concern that the reporters, should they be ordered to reveal the names of their sources, would face the same fate as Judith Miller of *The New York Times*. As Clifton wrote, "Publishing the stories would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail. Because talking isn't an option and jail is too high a price to pay, these two stories will go untold for now. How many more are out there?"

Clifton told *Editor & Publisher* that his column aimed to show that "there are consequences" of the Miller/Cooper litigation on the behavior of the press. He told *The New York Times* that he had intended for the public to be "bothered" by his disclosure "that real live news had been stifled." Instead, Clifton's column led to public criticism, a scooped story, subsequent publication of one of the held articles, and finally a leak investigation that could potentially turn into the situation he had hoped to avoid.

The documents in question pertain to a federal investigation into allegations of corruption at Cleveland City Hall during the reign of former mayor Michael R. White. Although the leaked documents implicate White in alleged corruption and bribery schemes, the former mayor has not yet been charged with any crime, according to *The Plain Dealer*.

Clifton received national media attention for his June 30 column. In an interview with *Editor & Publisher*, Clifton stated that the newspaper's lawyers had made the decision to hold the stories because of the risk of prosecution. He said, "[The lawyers have] said, this is a super, super high-risk endeavor, and you would, you know, you'd lose." Clifton added, "The reporters say, 'Well, we're willing to go to jail,' and I'm willing to go to jail if it gets laid on me, but the newspaper isn't willing to go to jail. That's what the lawyers have told us." He compared the situation to that of Matt Cooper and his employer, *Time* magazine, which turned over documents to avoid the risk of a fine, despite Cooper's willingness to go to jail rather than reveal his sources. (Subsequently, Cooper was released from his confidentiality agreement, and testified rather than having to go to jail. See "Supreme Court Denies *Cert.* in Miller/Cooper Cases" in the Spring 2005 issue of the Silha *Bulletin*.)

But Clifton was sharply criticized for his decisions. The controversy arose primarily because of a misunderstanding over whether the stories were held to keep the paper from criminal prosecution, or to protect the sources from potential revelation. *The New York Times* wrote that several editors of major newspapers had seen "no reason to back off such stories," and that "A number of these editors said they were baffled by the paper's move." Among others, *The Times* quoted Paul Steiger, managing editor of *The Wall Street Journal*, as saying, "If documents come to a reporter or news organization and the reporter has not done anything illegal to get the documents, I cannot understand what the basis for a criminal prosecution would be." The Supreme Court has provided support for Steiger's comment in *Bartnicki v. Vopper*, 532 U.S. 514 (2001). In that case, a tape of a conversation was given anonymously to a citizen who then passed the tape on to a radio station, which subsequently played the tape on the air. Though it was determined that the conversation was illegally taped, because the tape's contents were a matter of public concern, and because the station had done nothing illegal in obtaining the tape, the station was exempt from liability in publishing the contents of the tape. (See "U.S. Supreme Court Rules In Historic *Bartnicki* Case" in the Summer 2001 issue of the Silha *Bulletin*, and "*Bartnicki v. Vopper* Topic of Sixteenth Annual Silha Lecture" in the Fall 2001 issue of the Silha *Bulletin*.)

Clifton then wrote a letter to *The Times* specifically criticizing the article's headline: "Most Editors Say They'd Publish Articles Based on Leaks." The headline was later corrected, with the concession that "most" was not an appropriate term for the number of editors interviewed. Clifton agreed with Steiger's comments, but dismissed them as irrelevant to the present issue. He wrote, "The issue is source protection, not criminal liability."

Over the course of the following week or so, according to an interview in the *Columbia Journalism Review*, *The Plain Dealer* continued to work on the stories, trying to get the necessary information without using the documents. Presumably, as soon as the paper was able to get enough information to support the stories without use of the leaked documents, the stories would run. During that time, Clifton refused to describe the stories or the documents upon which they were based.

On July 20, however, another Cleveland publication beat *The Plain Dealer* to the story. The Cleveland *Scene*, an alternative weekly, simultaneously scooped *The Plain Dealer* and criticized Clifton and *The Plain Dealer*'s editorial policies, asserting that Clifton was living up to his reputation as being overly timid as an editor. "In the past, some of the paper's best investigative work has been so diluted by cautious editing and legal advice as to render it almost unreadable," stated the article, whose author was unidentified. Meanwhile, on its front page, the *Scene* published its version of the article it claimed *The Plain Dealer* was holding – an article about documents from the ongoing federal corruption investigation that implicate former mayor White.

White, who was mayor from 1990 to 2002, served three consecutive terms, the longest of any Cleveland

Plain Dealer, *continued on page 8*

"Publishing the stories would almost certainly lead to a leak investigation and the ultimate choice: talk or go to jail."

–Doug Clifton, Editor, *Plain Dealer*

Reporters Privilege News

Plain Dealer, *continued from page 7*

mayor. According to *Editor & Publisher*, the corruption investigation began in 2002, and led to the indictment of one of White's closest consultants and friends, Nate Gray. The records from Gray's bribery trial are sealed. However, some of those records were leaked to *The Plain Dealer* and *Scene* magazine. The leaked records were FBI documents which included allegations that during his term, Mayor White had bartered airport construction and parking contracts in exchange for bribes, paid through Gray.

The day after the *Scene* article ran, *The Plain Dealer* published its own version of the story on page one because, Clifton told *The New York Times*, "The issue of our possessing the documents basically became a moot point." *The Plain Dealer* article referred to a different document than the *Scene* article, however. *The Plain Dealer* mentioned a 115-page FBI affidavit, written by FBI agent Clyde Wallace; the *Scene* article referred to a 64-page report, written by FBI agent Christine Oliver.

The day after *The Plain Dealer* published its version of the story, the United States attorney's office conducting the ongoing corruption investigation requested an investigation to determine the source of the leaked documents, *The Plain Dealer* reported. The investigation initially sought the sources of three documents, acknowledging that the two received by *The Plain Dealer* were separate from the one upon which the *Scene* article was based. The U.S. attorneys, according to *The Plain Dealer*, believed that the defense attorneys in the corruption trials leaked the materials.

The next day, July 23, 2005, a defense lawyer in the bribery case admitted to having leaked a court-sealed document to a *Plain Dealer* reporter, according to *The New York Times*. *The Plain Dealer* reported that that lawyer, Jerome Emoff, told the judge he did not leak the 115-page FBI affidavit mentioned in *The Plain Dealer* article, however. He only admitted to sharing a different document, which he told *Plain Dealer* reporter Mike Tobin was not sealed. Furthermore, *The Plain Dealer* reported that Emoff did not ask for confidentiality from Tobin.

A week into the leak investigation, another document was determined to have been leaked, but that source had already admitted to sharing it with *The Plain Dealer*. As the *Bulletin* went to press, the sources of two of the four leaked documents have not been discovered, and no subpoenas have been served on the reporters. Though the leak investigation continues, *The Plain Dealer* reported that Gray's trial ended on August 17 with his conviction on 36 charges related to bribery of public officials in four cities. He is scheduled to be sentenced in November. The wider corruption investigation presumably will continue, though federal prosecutors have not yet specified who will be investigated next.

–Penelope Sheets
Silha Research Assistant

Reporters Privilege News

Magazine Reporters Not Protected under Alabama's Shield Law

The United States Court of Appeals (11th Cir.) ruled in July that Don Yaeger, a reporter for Time, Inc.'s *Sports Illustrated*, does not have to reveal the name of a confidential source at this time. At first glance, the ruling in *Price v. Time, Inc*., 2005 U.S. App. LEXIS 14331 seems a victory in the ongoing battle over confidential sources and a reporter's privilege to protect those sources. A closer look, however, reveals a potentially chilling effect on news reporting in the magazine industry.

Michael B. Price, former coach of the University of Alabama's "Crimson Tide" football team, sued *Sports Illustrated* for libel after an article alleged that Price took part in a scandalous sexual liaison while at a golf tournament in Pensacola, Fla. That article, dated May 12, 2003, alleged that Price, who is married, visited a strip club, Arety's Angels, twice on April 16, 2003, the day he arrived in Pensacola for the golf tournament. Among other details, Yaeger wrote that that evening in Price's hotel room, the coach "met up with two women, both of whom he had earlier propositioned for sex, according to one of the women, who agreed to speak to [*Sports Illustrated*] about the hotel-room liaison on the condition that her name not be used." That anonymous source told Yaeger that the two women and Price later engaged "in some pretty aggressive sex."

Yaeger devoted a few lines to Price's side of the story, writing, "Reached on his cell-phone . . . Price said that he visited Arety's only once on April 16 – after the [golf tournament's] sponsor's dinner – and denied having sex with two women in his hotel room or even inviting anyone to the room."

Yaeger was also interviewed on a radio show hosted by Paul Finebaum, a sports writer in Birmingham, Ala., but during the legal proceedings, it was agreed that the statements Yaeger made on the radio were not materially different from what he wrote in the article. Therefore, although Price's suit was initially based on the comments Yaeger said on the radio and wrote in the article, the two accounts were treated as a single account of Price's alleged behavior in Pensacola.

Price sued Time, Inc. and Don Yaeger in Alabama state court for libel, slander, and outrageous conduct. The case was then moved to federal district court (N.D. Ala.), based on diversity jurisdiction, which applies when the parties are from different states and the disputed amount of money is greater than the relevant statutory minimum. Price sought $2 million in damages.

Price accused the defendants of malicious defamation, arguing that they either lied about having a confidential source, or that they relied on a source that was clearly untrustworthy. In order to prove that allegation, Price asked Yaeger and Time, Inc. to reveal the name of the confidential source. The defendants objected, citing the Alabama reporter's shield law (Ala. Code § 12-21-142) and claiming a First Amendment qualified reporter's privilege.

The issue of the claimed statutory privilege turned on whether or not the word "newspaper" in the statutory phrase "newspaper, radio broadcasting station or television station" should be construed to include *Sports Illustrated* magazine. The district court ruled that it should not in *Price v. Time, Inc.*, 2004 U.S. Dist. LEXIS 2802 (N.D. Ala., 2004).

The district court also ruled that Price had made a sufficient effort to overcome any First Amendment qualified privilege, and the court granted Price's motion to compel the defendants to reveal the confidential source. At that point, the district court stayed its initial order, and asked the Alabama Supreme Court to decide the state law question of whether or not a magazine employee who is working in a news-gathering capacity is covered by the state statute.

The Alabama Supreme Court refused to answer that question, leaving the district court to do so itself. The court vacated its original order, but issued another that compelled the defendants to reveal their source (see 304 F. Supp. 2d 1294, 1309 (N.D. Ala. 2004)). At that time, the district court also granted the defendant's motion to certify the two privilege issues for interlocutory appeal before issuing a final ruling in the case on the defamation claims. The appeals court agreed to have a panel hear the case, and the district court stayed all proceedings pending the appeals court's judgment. The panel consisted of Judges Ed Carnes, who wrote the opinion, William H. Pryor, and J. Owen Forrester.

The appeals court considered the "legislative intent in the plain meaning of the statutory language" to determine whether a magazine fell under the definition of "any newspaper" in the statute.

The defendants asserted that two dictionaries and two thesauri show that "newspaper" means more than just a newspaper – specifically, also a magazine. The court dismissed this argument, however, saying that "sometimes judges and lawyers act like lay lexicographers, love logomachy, and lean to logorrhea. And so it is here." First the court rejected the use of thesauri as a tool for definition. Then, the court looked to a larger selection of both general and legal dictionaries, none of which substantiated the claim that a magazine is plainly a newspaper. Newspapers were consistently characterized as comprised of single sheets, folded or stapled, which does not apply to *Sports Illustrated* or other magazines.

The panel also pointed out that in the two industries, newspapers do not see themselves as magazines, nor do magazines see themselves as newspapers. It cited established differences between the awards and professional organizations of the two industries as proof of this distinction.

Finally, the panel asserted that the Alabama legislature itself has repeatedly distinguished between magazines and newspapers, and had it

Price v. Time, *continued on page10*

Because the Alabama shield law applies only to reporters for newspapers and TV stations, magazine reporters are not covered.

–U.S. Court of Appeals (11th Cir.)

Reporters Privilege News

Price v. Time, *continued from page 9*

intended to include both in the shield statute, it would have done so explicitly, as it had in more than 20 other statutes.

Therefore, the appeals court panel upheld the ruling of the district court that a magazine is not a newspaper, and because the Alabama shield law applies only to reporters for newspapers and radio and TV stations, magazine reporters are not covered.

The appeals court ruled differently on the constitutional privilege question, however, vacating the district court's ruling. According to the panel, in order to compel *Sports Illustrated* to reveal its confidential source, Price had to show three things: "[1] that the challenged statement was published and is both factually untrue and defamatory; [2] that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and [3] that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case," citing *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980), *modified on reh'g*, 628 F.2d 932 (5th Cir. 1980) (*per curiam*).

The panel found that Price's "sworn testimony is enough to supply substantial evidence that the statements about his behavior during the Pensacola incident are false," and further ruled that because Price is a public figure, he must prove actual malice – that is, that the defendants "knew that the defamatory allegations they published were false or that they recklessly disregarded the truth." To do so would be extremely difficult without affirming the existence and identity of the confidential source. Therefore, the identity of the source was undisputedly determined to be "necessary to the proper preparation and presentation" of Price's case.

But the panel concluded that Price had not yet taken enough depositions to satisfy the court that he had "no other reasonable means of discovering the identity of the confidential source." Specifically, facts raised during the hearing indicated that one of four women had to be the confidential source, and Price had not asked any of them under oath whether or not she was that source. Therefore, the court ruled that Price had not satisfied the second condition to overcome the qualified privilege.

After Price deposes the four women, the lawsuit can proceed in district court. He is likely to ascertain the identity of the confidential source in this way, but if the four depositions do not lead to the identity of the source, then Price will have satisfied the second condition (as well as the first and third), and the court will re-instate its disclosure order. Price argued that there was no guarantee that the four women would tell the truth in their depositions. The panel stated that because Yaeger's lawyer is an officer of the court, it is his sworn duty to inform the court if he realizes that one of the women is lying under oath. This provides further assurance that, if one of the four women is indeed the confidential source, her identity will be revealed in the depositions.

After the ruling, Price's lawyer, Stephen D. Heninger, told *The New York Times*, "We won the big battle," referring to the shield law ruling. Price now has only to depose the four women involved in the alleged incident to either discover the source or to satisfy the conditions for compelled disclosure. *The Times* reported that Price's depositions are likely to take place in the next few months, and that a trial would begin in 2006.

The more wide-reaching outcome is undoubtedly the strict, verbatim interpretation of the shield statute. Gary C. Huckaby, the lawyer for Yaeger and Time, Inc., told *The Times* that the ruling is likely to have "a chilling effect on the press." He was quoted by *The Times* as saying "There are many instances in which the public is not going to receive information if reporters do not have the ability to protect confidential sources." In fact, the ruling on this issue raises questions about other magazines that are devoted to news, like *Newsweek* and *Time*. At least in Alabama cases, it would seem these magazines will have no state statutory protection to conceal the identities of confidential sources.

–Penelope Sheets
Silha Research Assistant

Prior Restraint

Proposed District Court Rules Raise First Amendment Concerns

On June 21, 2005, the Rhode Island federal District Court issued a proposed draft of its local rules, which govern the handling of cases and supplement federal rules of criminal and civil procedure. Because some aspects of these draft rules present potential restrictions on First Amendment freedoms, they have elicited comments from free speech advocate groups, including the Silha Center. For example, one of the proposed rules would limit the ability of attorneys, parties, court employees and others to discuss cases pending before the court and to release information to the public. Another draft rule would require anyone interested in taking notes during court proceedings to first get approval from the court.

Initially, the proposed rules received a large portion of negative feedback. For example, Philip Weinstein, president of the Rhode Island Bar Association, said, "It's pretty radical. It strikes me as a reaction to the Taricani matter. It seems overly restrictive and a reaction to an unfortunate event."

Jim Taricani was the Rhode Island television reporter who was jailed after refusing to reveal who his source was for a leaked video tape, which had been sealed by the court during a criminal trial of the former Providence mayor on corruption charges. It was later revealed that Joseph Bevilacqua, Jr., a defense attorney in the corruption case, had allowed Taricani to make a copy of the sealed video tape. Rhode Island Chief U.S. District Court Judge Ernest Torres presided over Taricani's case and sentenced him to six months of house arrest. Taricani was released on April 9, 2005, after serving four months of his sentence. (See "Reporters Privilege News: Taricani Given Early Release" in the Winter 2005 Silha *Bulletin*, "Reporters Privilege News: Journalist Sentenced to House Arrest for Refusing to Reveal Source" in the Fall 2004 Silha *Bulletin*, and "Reporters Privilege: *In re: Special Proceedings*" in the Summer 2004 Silha *Bulletin*.)

Although Torres denied that Taricani's case had anything to do with proposed changes, as of mid-August the court has received more than a dozen written comments from attorneys, as well as from newspapers and broadcasters in Rhode Island, the Rhode Island affiliate of the American Civil Liberties Union (ACLU), and the Reporters Committee for Freedom of the Press (RCFP). On August 1, 2005, the Silha Center also submitted written comments, prepared by Professor Jane Kirtley, director of the Silha Center, and Silha Center research assistant Andrew Deutsch. The Silha Center's comments are available online at http://www.silha.umn.edu/Resource%20Documents/commentsrhodeisland.pdf.

Some of the submitted written comments offered input on nearly all of the proposed local rules, while some comments were limited to just one rule. The Silha Center's comments addressed only two of the proposed rules: Proposed Local Rule of General Application (PLR Gen) 110 and PLR Gen 111. PLR 110 states, "Unless authorized to do so by the Court, no counsel, party, court employee, intern, court security officer, United States Marshal or Deputy United States Marshal, shall disclose or disseminate to any unauthorized person information relating to any pending case that is not a part of the public records." The comments cited three faults with PLR Gen 110.

First, the rule would restrict the free speech rights of attorneys by placing a blanket gag order on them. The rule that would be replaced by PLR Gen 110 currently provides a balancing test based on the specific facts and circumstances of each case to determine when and to what extent an attorney may be prevented from communicating information from a case. The current rule meets the standards set forth in *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991). In *Gentile*, the U.S. Supreme Court ruled that although the free speech rights of attorneys could be restricted because they acted as officers of the court, attorneys still retain an important First Amendment right of speech. The Silha Center urged the district court to retain its current rule in order to protect the free speech rights of attorneys.

Second, the comments urged the court not to adopt PLR Gen 110 because its vagueness would create incentives for court employees and personnel to wrongly withhold public documents. Because the local rules also provide sanctions for those violating the rules, an employee might be inclined to keep public records secret rather than releasing them and taking the risk of facing sanctions if the records are not public. The Silha Center argued that this could lead to public records being wrongfully withheld. Kirtley told the Associated Press that the proposed rules amounted to an "unconstitutional prior restraint" giving court employees an incentive to "to withhold information and records contrary to the public trust."

Finally, the Silha Center noted that PLR Gen 110 would presumptively bar anyone involved in a lawsuit from speaking about information related to that action unless they first obtain court approval. In essence, this would create a prior restraint in which court approval would be necessary before information could be communicated. In order to be constitutional, prior restraints must be narrowly tailored to the facts of the situations, whereas the proposed rule would simply apply a blanket rule for all situations.

Similarly, the ACLU's comments stated that PLR Gen 110 "does not take into account the different constitutional implications presented by various factual contexts, such as civil vs. criminal cases, jury vs. non-jury cases, pending vs. completed investigations, etc." The ACLU added that "the rule contains numerous vague, overbroad and undefined terms" and also urged the district court not to adopt the proposed rule.

Rhode Island, *continued on page12*

"The general presumption of openness and full disclosure of information should be the rule."

—Joseph V. Cavanagh, Jr., Attorney

Prior Restraint

Rhode Island, *continued from page 11*

Joseph V. Cavanagh, Jr., an attorney and partner at Blish & Cavanagh, wrote in his comments, "I respectfully suggest that [PLR Gen 110] is not needed. The general presumption of openness and free and full disclosure of information should be the rule; the exception should be the unusual circumstance where, after careful scrutiny, a restriction might be imposed only after a showing of a demonstrated need." The RCFP article is available online at http://www.rcfp.org/news/2005/0713-sct-courtp.html.

The other rule addressed by the Silha Center's comments, PLR Gen 111, includes a provision stating, "Nothing in [the proposed local rules] shall prevent any person from taking handwritten notes during a proceeding in Court, provided that such note-taking has been authorized by the presiding judicial official." The Silha Center urged the court not to adopt PLR Gen 111 because it could undermine the accuracy of news reporting, goes against the long tradition of allowing note taking inside courtrooms when it is not disruptive, and would be similar to an unconstitutional prior restraint. Comments from the ACLU echoed those from the Silha Center, suggesting that PLR Gen 111 be revised to allow note taking unless it is shown to be disruptive during court proceedings.

Torres, who is in charge of revising the local rules, told *The Providence Journal* on August 18 that PLR Gen 110, which would restrict the release of information by counsel, parties, and court employees, was meant to apply only to the release of confidential information. Discussing the criticism and comments on the ambiguity of the proposed rule, which Torres characterized as mostly "paranoid" and "off base," he admitted that "we could have worded it better, and we plan to amend the language." Torres added, "It's likely the rule will be amended, and one thing we will look at is inserting the word 'confidential' to make clear that we are talking about confidential information. That was the intent."

However, speaking about PLR Gen 111, which would require permission for anyone taking notes during a court proceeding, Torres claimed that prudential reasons, such as maintaining decorum in court, made the proposed rule necessary. Torres said that many other courts use similar rules to prevent disruptions that might be caused by note taking during proceedings. He told *The Providence Journal* that if people begin "feverishly" taking notes during a court proceeding, jurors might conclude that the testimony is important, which might taint their perception of the witness's importance and credibility.

The current local rules for the District Court of Rhode Island have not been changed in nearly 20 years. Although the initial deadline for public comments was August 12, Torres extended the deadline to September 30 after receiving a request for more time to prepare comments from George Lieberman, president of the Federal Bar Association's Rhode Island Chapter, and Weinstein, president of the Rhode Island Bar Association.

The Rhode Island District Court's Web site, which includes links to the proposed rules and the written comments submitted to the court, is available online at http://www.rid.uscourts.gov/.

—Andrew Deutsch
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The
Bulletin
is a quarterly publication of
The Silha Center for the Study of Media Ethics and Law

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Access to Government

New Rulings in Cheney and NEPDG Cases Still Restrict Access to Information

Two separate rulings by the U.S. Court of Appeals in Washington, D.C. will keep information related to the work of Vice President Richard Cheney's energy task force from being disclosed. The first case, *In Re: Cheney*, 406 F.3d 723, arose after records were requested under the Federal Advisory Committee Act (FACA), 5 U.S.C. App. § 2, and had been remanded to the appeals court from the U.S. Supreme Court. The other, *Judicial Watch, Inc. v. Department of Energy*, 412 F.3d 125 (2005), arose from a Freedom of Information Act, 5 U.S.C. § 552, request.

In Re: Cheney

In January 2001, President George W. Bush formed the National Energy Policy Development Group (NEPDG). The NEPDG was charged with developing "a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future." Cheney was appointed to head the NEPDG, which also consisted of nine cabinet members and four senior administration officials. The NEPDG released its National Energy Policy report on May 16, 2001, available online at http://www.whitehouse.gov/energy/. (See "Access to Information and the U.S. Supreme Court: *Cheney v. United States District Court*" in the Fall 2004 Silha *Bulletin*.)

Even before the report was released, the Natural Resources Defense Council and others accused the NEPDG of being dominated by energy industry interests. The Sierra Club and Judicial Watch, Inc. also believed that energy industry officials participated in the group's discussions and met with the NEPDG prior to the release of its report.

FACA requires any advisory committee that includes private citizens to hold open meetings and disclose the nature of the participation of those outside members. However, advisory committees made up entirely of federal government employees are exempt from FACA's disclosure requirements. Cheney and the group refused to release minutes of the meetings or disclose who had participated in the deliberations and drafting of the National Energy Policy, claiming that only federal government employees had been appointed to serve on the NEPDG.

The Sierra Club and Judicial Watch filed separate suits under FACA against Cheney, the NEPDG and the members of the group in federal District Court in Washington, D.C., seeking disclosure of details about the group's membership and meetings. The plaintiffs argued that the NEPDG was actually composed of private citizens who are *de facto* members, citing an August 2003 report by the General Accounting Office (GAO) on the group. The GAO report found that the NEPDG utilized many lower-level meetings, in addition to its ten Principals' Meetings, and that the development of the NEPDG National Energy Policy report "involved hundreds of staff from nine federal agencies and several White House offices." Furthermore, the GAO reported that government officials at all levels "met with, solicited input from, or received information with advice from a variety of nonfederal energy stakeholders while developing the report." The full GAO report is available online at http://www.gao.gov/new.items/d03894.pdf.

The cases were combined and first came before the federal District Court in Washington, D.C. in 2002. Judge Emmet G. Sullivan granted the plaintiffs' discovery requests for any documents revealing private citizens who had been consulted by the NEPDG to determine whether they were *de facto* members and whether FACA's requirements applied to the group.

Cheney subsequently asked the Court of Appeals (D.C. Cir.) to direct the District Court to vacate its discovery orders. In 2003, Judge David S. Tatel dismissed the appeal, holding that alternative avenues of relief remained available and that Cheney and the NEPDG members had not met their evidentiary burden. In December 2003, the U.S. Supreme Court agreed to hear arguments for an appeal by Cheney. Writing for the court, Justice Anthony Kennedy stated that executive privilege is meant to protect the "essential functions" of the executive branch, and that discovery requests seeking documents protected by executive privilege would bog down the office of the president. Kennedy concluded that claims of executive privilege should be accorded greater deference in civil suits. The Court vacated the judgment and remanded the case to the court of appeals (D.C. Cir.). (See "Media Access: *Cheney v. Supreme Court*" in the Summer 2004 issue of the Silha *Bulletin*.)

After rehearing the case, the appeals court ruled for Cheney in an opinion written by Circuit Judge A. Raymond Randolph. "FACA is silent," Randolph wrote, explaining that FACA does not indicate whether disclosure is mandated when presidential advisory committees like NEPDG are composed of members who are not federal employees. In applying this to the present case, Randolph continued, "We therefore hold that such a committee is composed wholly of federal officials if the President has given no one other than a federal official a vote in or, if the committee acts by consensus, a veto over the committee's decisions." In drafting FACA, "Congress could not have meant that participation would be enough to make someone a member of the committee.. . . The situation is comparable if an individual, not employed by the federal government, attends meetings or participates in the activities of a Presidential committee whose official membership consists only of federal officials. The outsider might make an important presentation, he might be

Cheney, *continued on page 14*

"Today's decision means that now the public may never know the truth about how these policies were formulated."

–Tom Fitton, President, Judicial Watch

Cheney, *continued from page 13*

persuasive, the information he provides might affect the committee's judgment. But having neither a vote nor a veto over the advice the committee renders to the President, he is no more a member of the committee than the aides who accompany Congressmen or cabinet officers to committee meetings."

In seeking advice on a policy matter, Randolph wrote that the president "has two options. He may choose to form a FACA committee by appointing some of its members from outside the federal government. Or he may choose to form a committee composed only of federal employees and thus exempt from FACA."

Randolph relied on statements from Andrew Lundquist, Executive Director of NEPDG and Karen Knutson, then-Deputy Assistant to the Vice President for Domestic Policy. Lundquist's statement listed Cheney, seven cabinet members, and several other federal officers as comprising the NEPDG. Lundquist's statement also provided the dates of the meetings, stated that the meetings consisted only of federal officers, and statement confirmed that the attendance at NEPDG meetings was strictly limited to federal officers and one federal employee. Knutson emphasized that no outsiders participated in any NEPDG meetings. "Therefore," Randolph wrote, "the NEPDG was not a FACA advisory committee. It follows that the government owed the plaintiffs no duty, let alone a clear and indisputable or compelling one."

Randolph ruled that, under these circumstances, neither Judicial Watch nor the Sierra Club could claim that the federal government owed them information under FACA's provisions. Randolph ordered that district court to dismiss the complaints.

Following the ruling, Jonathan Turley, a George Washington University professor of constitutional and environmental law, told *The Washington Post* on May 11 that the court's ruling creates "an absurd standard" because it required the Sierra Club and Judicial Watch to prove their assertions while at the same time prohibiting them from gathering records of information from the White House. "It's impossible to establish that industry substantially participated in these meetings, if you deny them basic discovery needed to show these facts," Turley told *The Post*.

In a press release posted on Judicial Watch's Web page, that organization's president, Tom Fitton said, "The court's ruling is without any basis in the text of the open meetings law and is contrary to the intent of the law, which is to allow broad public participation in certain types of meetings between government officials and private lobbyists. Further, it means that, going forward, the public will simply have to take the word of government that no outsiders are improperly influencing the decisions of their government. The American people have a right to know whether lobbyists became de facto members of the Energy Task force, which helped to write our nation's energy policies. Today's decision means that now the public may never know the truth about how these policies were formulated." Judicial Watch's press release is available online at http://www.judicialwatch.org/printer_5309.shtml.

Judicial Watch v. Department of Energy

Judicial Watch, Inc. v. Department of Energy, 412 F.3d 125 (D.C. Cir. 2005), was a ruling on a case that had begun in Washington D.C.'s federal district court. (See *Judicial Watch, Inc. v. U.S. Department of Energy*, 310 F. Supp. 2d 271 (D.D.C. 2004).) Decided June 17, 2005, it arose from a claim by the Judicial Watch and the Natural Resource Defense Council, which had sued eight federal agencies (including the Departments of Agriculture, Commerce, Energy, the Interior, Transportation, and others), alleging that the agencies had violated the disclosure requirements of FOIA. The Government argued that the documents being requested were protected from disclosure under Exemption 5 (U.S.C. § 552(b)(5)), which permits that inter-agency or intra-agency memorandums or letters – those documents containing record of an agency's 'deliberations' among its members – be withheld from disclosure under FOIA. The documents being requested, the government claimed, reflected the 'deliberations' among members of the NEPDG and thus fell under the provisions of Exemption 5. The district court had ordered the Government to release the documents in question, and further stated that the Department of Energy and the Department of the Interior had not adequately searched for documents requested by the plaintiffs and which had been created by agency employees while working for the NEPDG.

The appeals court ruled differently. In his June 17 ruling, Judge Douglas Ginsburg identified two questions that came before the three-judge panel: whether Exemption 5 permits the defendant agencies to withhold documents pertaining not to their own deliberations but to the NEPDG and whether the records of agency employees who were assigned to the NEPDG are "agency records" and therefore subject to disclosure under FOIA.

Ginsburg wrote that to fit the provisions of Exemption 5, a document must be "pre-decisional" as well as "deliberative." Citing *Tax Analysts v. IRS*, 117 F.3d 607 (D.C. Cir. 1997), Ginsburg wrote that "the quality of administrative decision-making would be seriously undermined if agencies were forced to operate in a fishbowl because the full and frank exchange of ideas on legal or policy matters would be impossible." The NEPDG documents requested by plaintiffs, Ginsburg ruled, fit the description of pre-decisional, deliberative documents.

Ginsburg further claimed that the NEPDG documents fit the definition of "intra-agency" communications, citing precedent in *Ryan v. Department of Justice*, 617 F.2d 781 (D.C. Cir. 1980): "When an agency record is submitted by outside consultants as part of the deliberative process, and it was solicited by the agency, we find it entirely

Cheney, *continued on page 16*

Access to Government

Judge Upholds Maryland Governor's Ban on State PIOs Speaking to Two *Baltimore Sun* Reporters

On Feb. 14, 2005, Federal District Judge William D. Quarles ruled that Maryland Gov. Robert L. Ehrlich had not violated *The Baltimore Sun's* First Amendment rights when he sent a November 2004 memo to state public information officers ordering them not to speak to David Nitkin, *The Sun's* State House Bureau Chief, or Michael Olesker, a *Sun* columnist. Ehrlich had openly admitted in the memo that he was barring members of his staff from speaking to the reporters because he contended that both were "failing to objectively report on any issues dealing with the Ehrlich-Steele Administration." Ehrlich further admitted during a radio interview on November 24 that the ban was designed to "have a chilling effect" on "two writers who have no credibility."

On Dec. 3, 2004, *The Sun* filed suit in the federal District Court in Baltimore, challenging Ehrlich's ban against Nitkin and Olesker. The complaint stated that the ban not only affected *The Sun's* right to free expression, but also violated 42 USCS § 1983, which provides redress when federal rights have been violated by a state official misusing his or her state powers. The complaint concluded by asking the court to enter a permanent injunction prohibiting Ehrlich and members of his staff from banning reporters from speaking to the staff.

Talks between the governor and the newspaper stalled during December. On December 28, Ehrlich asked the court to dismiss *The Sun's* complaint. Meanwhile, Nitkin was barred from attending a briefing held by the governor on medical malpractice legislation. (See "Access to Government: Maryland Governor Forbids Employees to Speak to Reporters" in the Fall 2004 issue of the Silha *Bulletin*.)

In his ruling, Quarles wrote that although Ehrlich's memo restricted Olesker and Nitkin's access to some members of his staff, "[it] has not cut off all the *Sun's* [sic] access to public information." Quarles noted that Public Information Act requests made by the reporters were still moving forward, and that although Nitkin had been excluded from one press briefing with the governor, he had been present at three press conferences.

Quarles acknowledged that the press's right to publish news "is expansive. However, the right does not carry with it the unrestrained right to gather information." Quarles cited *Houchins v. KQED*, 438 U.S. 1 (1978), where the Supreme Court ruled that reporters have no right of access to prisons greater than that of ordinary citizens. Quarles wrote, "Although the Constitution establishes the contest between the holders of government information and those seeking access to that information, it does not resolve it. The resolution of the inevitable conflicts between the holders of government information and those seeking access to that information is committed to 'the tug and pull of the political forces in American society'." Quarles concluded, "As the First and Fourteenth Amendments are currently understood in this Circuit, a government may lawfully make content-based distinctions in the way it provides press access to information not available to the public generally."

Quarles concluded that no real harm had come to *The Sun* as a result of the governor's ban of Nitkin and Olesker. "The enforcement of the Governor's memorandum has been implemented in a way that is reasonably calculated to ensure the *Sun's* access to generally available public information. The *Sun* seeks a privileged status beyond that of the private citizen; that desire is not a cognizable basis for injunctive relief." With that, Quarles denied *The Sun's* motion for a preliminary injunction, and granted Ehrlich's motion to dismiss.

However, on April 4, *The Sun* appealed to the federal Court of Appeals (4th Cir.). Writing that "the chilling effect of the Governor's edict is unbounded," and that "No government should be permitted to chill any citizen's speech in the way that the Governor of Maryland has done here," attorneys for the newspaper cited two issues that needed review: whether Ehrlich's ban against Nitkin and Olesker was a form of retaliation and discrimination and a violation of their First Amendment rights; and whether the District Court erred in not recognizing that *The Sun* had suffered irreparable harm by the ban.

In addressing the first issue, attorneys for *The Sun* cited cases such as *Chicago Reader v. Sheahan*, 141 F. Supp. 2d 1142 (N.D. Ill., 2001) and *McBride v. Village of Michiana*, 100 F.3d 457 (6th Cir. 1996), cases where reporters had been denied access to government entities following publication of articles critical of the government. In both cases, the courts ruled that denying access went against constitutional principles when the denial is seen as retaliatory, and attorneys for *The Sun* claimed that Ehrlich's ban is also retaliatory. "As a result," they wrote, "other journalists or members of the public now must worry that they, too, may be banned from receiving basic government information if they express views divergent from official executive policy. The result of the executive gag order . . . is that *The Sun's* speech on matters of public concern, especially speech that questions Maryland's government, is chilled – precisely as the Ehrlich administration intended."

As to the harm caused by Ehrlich's ban, *The Sun's* attorneys wrote, "Because of the severe ramifications even a brief chill has on the exercise of free speech rights, harm is presumed in the face of a First Amendment violation." In contrast, an injunction would cause no harm to Ehrlich "as it merely would prohibit the enforcement of an unconstitutional regulation.. . . The only purported injury the Governor could possibly assert is that journalists will continue to write, and *The Sun* will continue to

Baltimore Sun, *continued on page 16*

"A government may lawfully make content-based distinctions in the way it provides press access to information available to the public generally."

– Judge William D. Quarles

Access to Government

Cheney, *continued from page 16*

reasonable to deem the resulting document to be an 'intra-agency memorandum for purposes of determining the applicability of Exemption 5." Ginsburg further noted that there was no evidence that the Department of Energy had tried in any way to circumvent FOIA's disclosure requirements. Therefore, Exemption 5 provided protection from disclosures of these documents.

As to the second question – whether the records of agency employees who were assigned to the NEPDG are "agency records" – Ginsburg found that "possession is not the proper test of whether a record is within an agency's control." Although the records in question are currently in the possession of the Council on Environmental Quality, they were created or otherwise obtained through the Department of the Interior (DOI), rather than the DOE. Ginsburg wrote, "[The records in question] are therefore within the DOI's control for purposes of the FOIA," and ruled that the DOI should examine and disclose any non-exempt portions of those records.

–Elaine Hargrove
Silha Fellow and *Bulletin* Editor

Baltimore Sun, *continued from page 15*

publish, articles that do not meet the Governor's subjective standards. That type of purported injury is not judicially cognizable."

An *amicus* brief filed May 23 by media groups including *The Washington Post*, *The New York Times*, the Associated Press, and the Reporters Committee for Freedom of the Press, among others, addressed the harm the ban causes to the public. Citing *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986) and *American Broadcast Company v. Cuomo*, 570 F.2d 1080 (2d Cir. 1977), the *amici* wrote, "The constitutional guarantee of free speech serves significant societal interests wholly apart from the speaker's interest in self-expression. By protecting those who wish to enter the marketplace of ideas from government attack, the First Amendment protects the public's interest in receiving the information."

On June 16, *The Sun* reported that attorneys for Ehrlich had filed a 67-page brief stating that *The Sun* had failed to "demonstrate any infringement of its First Amendment rights" and that the ruling of the district court should be allowed to stand.

As the *Bulletin* went to press, no announcement had been made as to when oral arguments in the case might be heard by the appeals court.

–Elaine Hargrove
Silha Fellow and *Bulletin* Editor

FOIA Update

Gonzales' Reconsideration of FOIA Policy May Result in Wider Access to Information

U.S. Attorney General Alberto Gonzales said in July 2005 that he would reconsider his predecessor's policy on the government's handling of Freedom of Information Act (FOIA) requests, a move that brought applause from many in the press. The previous Attorney General, John Ashcroft, had issued a memo in October 2001 assuring federal agencies that the Justice Department would defend agencies' decisions to withhold records whenever a "sound legal basis" existed. The so-called Ashcroft Memo has been criticized as one cause of the tension between the Bush administration and the press and a setback for accountable government. (See "FOIA News: Lawmakers Respond to Increasing Government Secrecy with Amendments to Strengthen FOIA" in the Spring 2005 issue of the Silha *Bulletin*.)

Gonzales said he would revisit the memo. "I'm always happy to reconsider decisions relating to the release of information," Gonzales said in an interview with the Associated Press. "I'll go back and look at it," he said.

Members of the press were quick to respond, urging him to do so. "Where agencies were once encouraged to disclose unless disclosure would do harm, they are currently encouraged to withhold if there are legal grounds for doing so," Tom Curley, AP president and chief executive officer, wrote in a letter to Gonzales. "We think this change was a terrible mistake."

The president of the Associated Press Managing Editors Association and managing editor of the Omaha, Neb., *World-Herald*, Deanna Sands, also sent a letter to Gonzales, saying Americans "deserve a more responsive government."

However, no attorney general has ever changed policy on FOIA requests during a sitting president's tenure, and it is not likely to happen now, according to Stephen Gidiere, an attorney and author of the forthcoming *The Federal Information Handbook*, to be published by the American Bar Association in late September 2005. "The conventional wisdom is that Gonzales will not make any changes to the [Ashcroft] Memo or revoke it," Gidiere said in a recent interview for this story.

Department of Justice FOIA policy has often changed course, however, following changes of administration. The Ashcroft Memo itself was a shift from Attorney General Janet Reno's policy during the Clinton years, which encouraged FOIA requests to be fulfilled unless the government agency in charge of the information "reasonably fores[aw] that disclosure would be harmful to an interest protected by [a FOIA] exemption."

In an article originally written for Sunshine Week – an event advocating open government – Gidiere noted that "Democrats and Republicans have issued dueling FOIA memos for the past three decades." He went on to argue that Gonzales should withdraw the Ashcroft memo altogether and not replace it with anything. "FOIA professionals at the federal agencies are consistently doing their job despite the see-saw policies of the political parties," he wrote.

Gidiere pointed out that "in the three years since the Ashcroft Memo was issued, the legal landscape relating to national and homeland security information has changed," and argued that this made the Ashcroft Memo and its underlying policy unnecessary.

Meanwhile, the Reporters Committee for Freedom of the Press reported in August 2005 that FOIA "requests reached an all-time high in 2004, increasing by 23 percent to more than 4 million separate requests;" however, the majority of these requests were for personal information. Quoting from assessments of government documents reviewed by the Coalition of Journalists for Open Government (CJOG), the article noted that the Social Security Administration received more than 1.8 million requests for such records. It also noted, "The CJOG report notes that those requesters are likely to get the information they seek and get it in a timely fashion. But requesters seeking non-personal information from other agencies got all or some of the information they sought only two-thirds of the time."

–Ashley Ewald
Silha Fellow

"In the three years since the Ashcroft Memo was issued, the legal landscape relating to national and homeland security information has changed."

– Stephen Gidiere, Author and Attorney

Controversial Downing Street Memo Receives Little Coverage in U.S.

The contents of the memo included statements casting doubt on intelligence that Iraq possessed weapons of mass destruction.

On May 1, 2005, *The Sunday* (London) *Times* published an article by reporter Michael Smith containing information from a Downing Street memorandum marked "Secret and Strictly Personal" from July 23, 2002, eight months before Iraq was invaded by coalition troops. The contents of that memo were minutes from a meeting that included statements from senior British officials casting doubt on intelligence suggesting that Iraq possessed weapons of mass destruction at the time. The memo also included an assessment from Sir Richard Dearlove, the head of Britain's Secret Intelligence Service, that intelligence on Iraq's capabilities was being "fixed" to support an invasion of Iraq. Although some have claimed that the Downing Street memo, along with several other documents leaked with it, are newsworthy, the American media initially failed to provide extensive coverage of them.

The minutes from the Downing Street memo show that Dearlove, who is called "C" in the memo, reported in July 2002 that war with Iraq was seen as an inevitability by President George Bush. "Bush wanted to remove Saddam [Hussein]," the memo notes, "through military action, justified by the conjunction of terrorism and [weapons of mass destruction]. But the intelligence and facts were being fixed around the policy." The author of the memo, David Manning, who was then British Prime Minister Tony Blair's foreign policy advisor, also reported that Jack Straw, the British Foreign Secretary, thought it "seemed clear that Bush had made up his mind to take military action . . . . But the case was thin." The full text of the Downing Street memo is available online at http://www.timesonline.co.uk/article/0,,2087-1593607,00.html.

The Downing Street memo garnered substantial media coverage in the United Kingdom at a time when Blair was already taking significant criticism for his decision to support the invasion of Iraq. *The Sunday Times* article was published just four days before the British general election, held on May 5, 2005, and fueled the concerns of many Britons that Blair had relied on questionable intelligence in choosing to support the war in Iraq. Moreover, the authenticity of the Downing Street memo has not been challenged by anyone from either the Bush or Blair administrations. Although Blair, a member of the Labour Party, won a third term as prime minister, his party's majority in Parliament was significantly diminished from 161 seats to just 67.

In the next several days, *The Sunday Times* supplemented coverage of the original Downing Street memo with seven other memos also obtained by Smith. Together, the memos offer a glimpse into the deliberative process and meetings between high level officials from the United States and Britain in the months proceeding the invasion of Iraq. Some critics of the war maintain that the memos show the Bush administration's intent to go to war in Iraq despite public statements by U.S. and U.K government officials that war would be a last resort. Liberal bloggers, upset by the lack of coverage in the United States, began discussing and providing information on the Downing Street memos online. In addition, Web sites such as http://downingstreetmemo.com/ and http://www.afterdowningstreet.org/ were established to provide a rallying point for those interested in giving the Downing Street memos more exposure.

Although the Downing Street memos have attracted substantial attention from a fairly narrow audience online, they initially received little attention by U.S.-based newspapers and broadcasters.

The Minneapolis *Star Tribune*, which published a story on the memo on May 13, 2005, blamed the lack of wire coverage for its failure to cover the Downing Street memo after *The Sunday Times* story broke. Kate Perry, the *Star Tribune* reader's representative, reported in a June 12, 2005, column that Dennis McGrath, the nation/world editor for the paper, said that he initially waited for a wire article. After a week without a wire story, McGrath said he assigned a local reporter to cover the memos. Although that story was finished on May 11, McGrath held off publishing, hoping that the story eventually would make the front page. Other news from Iraq, however, including increased attacks by insurgents and the deaths of several U.S. soldiers, were front page stories on May 11 and 12. After deciding that holding the story any longer would be a mistake, McGrath finally made the decision to run the article on May 13 on page 3.

Other newspapers also blamed their initial failure to cover the Downing Street memo on wire services. In a June 14 article on *Salon.com*, Deborah Seward, Associated Press's (AP) international editor, told reporter Eric Boehlert, "Yes, there is no question AP dropped the ball in not picking up on the Downing Street memo sooner." Seward did not offer any explanation as to why AP failed to cover the story. The *Salon.com* article is available online at http://www.salon.com/news/feature/2005/06/14/ap_memo/

The first front page story on the memos appeared in the *Chicago Tribune* on May 17, 2005. However, as the weeks went by, it became apparent that other newspapers had little or no interest in the Downing Street memos. *The Washington Post*, which was criticized for failing to discuss the memos, noted in a June 15 editorial that there was no reason to publish any stories. The editorial stated that it "appears obvious" that "[t]he memos add not a single fact to what was previously known about the administration's prewar deliberations. Not only that: They add nothing to what was publicly known in July 2002."

Even though coverage in major newspapers has increased since May, the broadcast media have ignored the story for the most part. Smith, the reporter who first obtained the memos, expressed his concerns that the American media were still missing a crucial point from the memos. In a June 23, 2005,

Downing Street Memo, *continued on page 20*

Ethical Issues and the Media

Los Angeles Times Issues New Ethics Guidelines

The *Los Angeles Times* issued a nine-page set of ethical guidelines in July 2005, including new policies on minimizing the use of confidential sources, avoiding conflicts of interest, and writing in precise language, according to an article in the *Times*. The paper reported that previous rules have been issued for reporters, "but mostly in a hodgepodge of memos and directives," some of which were unavailable to the entire staff. The *Times* reported that, according to *Times* Editor John S. Carroll, "Now, all employees will be asked to review the guidelines." The guidelines themselves specify that "The standards outlined here apply to all editorial employees and to all work they produce for the *Times*, whether it appears in print, on television or on the Web."

One of the policies highlighted by *Editor & Publisher* in a story dated July 10, 2005 relates to the storage of information about confidential or unnamed sources. The policy states: "Reporters should be extremely circumspect about how and where they store information that might identify an anonymous source. Many electronic records, including e-mail, can be subpoenaed from and retrieved by non-newsroom employees." Carroll told *Editor & Publisher* that the newspaper's technological support staff and corporate employees "don't operate by the same rules as we [in the newsroom] do," meaning that if non-newsroom employees are subpoenaed to divulge sources, they might be required to obtain information stored on newsroom computers. *Editor & Publisher* linked that concern to the decision by Time, Inc. to turn over documents of its reporter, Matthew Cooper, despite Cooper's unwillingness to do so. (See "New York Times's Judith Miller Released" on page 3 of this issue of the Silha *Bulletin*; see also "Reporters Privilege News: Supreme Court Denies Cert in Miller/Cooper Cases" in the Spring 2005 Silha *Bulletin*; see "*In re: Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005);" see also "Plame Update: Journalists Miller and Cooper Appeal Their Sentences" in the Fall 2004 issue of the Silha *Bulletin* and "Reporters Privilege: In Re: Special Counsel Investigation into Government Leaks" in the Summer 2004 issue of the Silha *Bulletin*, and "Columnist's Story Prompts Investigation into Government Leaks: in the Fall 2003 issue of the Silha *Bulletin*.)

The ethics policy also specifically warns of the potential legal ramifications of entering into agreements of confidentiality. "In rare instances, sources may insist that the paper and the reporter resist subpoenas and judicial orders, if necessary, to protect their anonymity. Reporters should consult a masthead editor before entering into any such agreement. Even in the absence of such an agreement, the possibility exists that a prosecutor, grand jury or judge will demand to know a source's identity, forcing the reporter to choose between unmasking the source and going to jail for contempt of court. Such situations are rare, and they should not deter us from investigating sensitive or contentious matters." This policy is reminiscent of the circumstances leading to the jailing of *The New York Times* reporter Judith Miller.

The policy also specified that "Stories should identify sources as completely as possible consistent with the promise of anonymity. In particular, a source's point of view and potential biases should be disclosed as fully as possible. For instance, 'an advisor to Democratic members of the House Foreign Affairs Committee' is preferable to 'a Congressional source.'"

According to a July 15 article in the *Los Angeles Times*, despite these specifications, the policies are broader and less prohibitive that the ethics policies recently issued by some other publications. The article did not specify which other publications had issued policies, but both *The Washington Post* and *The New York Times* have ethics guidelines, available online at http://asne.org/ideas/codes/washingtonpost.htm and http://www.nytco.com/pdf/NYT_Ethical_Journalism_0904.pdf, respectively. (For further information on newspapers and ethics codes, see "Developments in Media Ethics: Newspapers Face the 'Blair Effect' in the Summer 2003 issue of the Silha *Bulletin*.)

Another set of policies focuses on conflicts of interest for reporters, and sets out a number of activities that classify as such and should be avoided by *Times* staff members. Included among those activities are political advocacy, public expressions of political views – including bumper stickers and lawn signs – and voting for sports awards. The specific guideline for the latter is "In general, it is inappropriate for reporters to vote for awards and rankings; doing so could reasonably be seen as compromising their objectivity. For critics, whose job is to express opinions on the merits of creative works, awards voting is less troublesome."

The *Times*' sports editor, Bill Dwyre, told the *Milwaukee Journal Sentinel* that he plans to stop voting and will have his reporters do the same. However, he expressed concern that some sports awards will be less fair as a result of the policy. Specifically, Dwyre cited the Heisman Trophy, which, according to the Heisman Web site, is the award given each year to "the most outstanding college football player." Dwyre told the *Journal Sentinel* that the removal of *Times* staff members from voting will weaken the already low West Coast presence in the contest, which, according to Dwyre, tends to favor East Coast or Midwestern players. Dwyre added, "I don't 100% agree or embrace the policy but I understand it."

A third set of policies highlighted in the *Times* article announcing the new guidelines focuses on precision of language. "Fabrication of any type is unacceptable. . . . We do not manufacture, embroider or distort quotes, either in print or in the video and audio clips posted on our website. Superlatives such as 'biggest,' 'worst' and 'most' should be employed only when the writer has proof."

These policies are part of the nine-page document that was distributed to *Times* employees in July. According to the *Times*, the policies "come not after a scandal, as at some other publications, but at a time when waning circulation and public trust in the news media have led many newspapers to codify their standards." Despite that assertion, there was an incident in April, 2005, involving a reporter who committed some of the mistakes now expressly prohibited by the policies. An April 2005 article in *The New York Times* reported that the *Los Angeles Times* had fired a reporter after an internal inquiry was unable to verify the sources of some quotes in the article, and also found a number of factual errors.

–Penelope Sheets
Silha Research Assistant

The policies come not after a scandal, as at some other publications, but at a time when waning circulation and public trust in the news media have led many newspapers to codify their standards.

Ethical Issues and the Media

Downing Street Memo, *continued from page 18*

column in the *Los Angeles Times*, Smith wrote that the American media had focused on Dearlove's assessment that "the intelligence and facts were being fixed around the policy" while not mentioning that the original memo also noted that "spikes of activity" had already begun by bombing Iraq and putting pressure on Hussein before invading. Smith contended that the importance of the memos extended much further than the American media had conveyed. "The real news," Smith wrote, "is the shady April 2002 deal to go to war, the cynical use of the U[nited] N[ations] to provide an excuse, and the secret, illegal air war without the backing of Congress."

Bush and Blair addressed the Downing Street memos during a joint press conference on June 7, 2005, while Blair was visiting the United States. Steve Holland, the White House correspondent for Reuters, asked, "On Iraq, the so-called Downing Street memo from July 2002 says intelligence and facts were being fixed around the policy of removing Saddam through military action. Is this an accurate reflection of what happened? Could both of you respond?"

Blair responded, saying that "the facts were not being fixed in any shape or form at all." He also reiterated that "all the way through that period [before the invasion of Iraq], we were trying to look for a way of managing to resolve this without conflict." Bush told the reporters that a military response to Saddam Hussein had always been considered a last option. "And somebody said, well, you know, we had made up our mind to go to use military force to deal with Saddam. There's nothing farther from the truth," Bush said.

Some on Capitol Hill are calling for answers from the Bush administration. Rep. John Conyers (D-Mich.) sent a letter to Bush on May 5, 2005, asking him to clarify whether the memos leaked to Smith are authentic and the information contained in them is accurate. In addition to Conyers, 88 other Democrats from the House signed the letter. As the *Bulletin* went to press, the Bush administration has continued to refuse to answer the questions in Conyers' letter. Instead, the administration has maintained that the intelligence on Iraq leading up to the invasion in March 2003 was the best available and that the memos contain information on discussions before a final decision on Iraq had been made.

—Andrew Deutsch
Silha Research Assistants

Ethical Issues and the Media

Miami Herald Columnist Fired After Recording Conversation with Official Who Later Killed Himself

Although *Miami Herald* columnist Jim DeFede will not face criminal charges for secretly taping a telephone conversation he had with former city official, Arthur Teele, Jr., shortly before Teele's suicide, the paper's executive editor has declined to reconsider his decision to terminate DeFede.

"I'm pleased for Jim's sake that he won't face prosecution in this situation," *Miami Herald* Executive Editor Tom Fiedler told the *Herald* in a written statement. "But, as I've said before, my decision in dismissing him was never predicated upon the legal implications of this action, but rather the ethical ones."

Teele, a Miami politician who had been indicted in July 2005 on 26 federal counts of fraud and money laundering, called DeFede late in the day on July 27. DeFede said he recorded the conversation because the politician seemed distraught and DeFede was "concerned with Teele's state of mind," according to *Editor & Publisher*. At one point in the conversation, DeFede asked whether Teele would like to speak on the record but he declined. Nevertheless, DeFede allowed the tape to continue to record as Teele talked about personal problems.

Teele, whose personal, financial and legal troubles had become more and more public in the weeks leading up to his death, shot himself in the head in the *Herald*'s lobby on July 27 only hours after the recorded conversation with DeFede. The *Herald* fired DeFede shortly after he reported to *Herald* publisher Jesus Diaz, Jr., and the *Herald's* legal counsel Robert Beatty that he had taped the 25-minute conversation.

The investigation arose out of Fla. Stat. Ch. 934.03, a Florida law that prohibits recording conversations unless all parties have consented to be recorded or the recording is made in the ordinary course of business. If prosecuted, such violation is a felony unless it is a first offense, in which case it is a misdemeanor. The decision to prosecute lies with the state attorney's office.

"There appears to have been no malicious intent on the part of Mr. DeFede to violate the privacy rights of Mr. Teele, or to utilize the tape for any commercial purpose or to harm or to embarrass Mr. Teele," wrote Assistant State Attorney Joe Centorino in a memo that ended the investigation, the *Herald* reported.

Although DeFede and the state attorney justified the recording in part because DeFede and Teele maintained a friendship outside their journalist-politician relationship, Fiedler said that friendship was "problematic" because DeFede was acting both as a friend and a journalist.

"He was crossing the line both ways," Fiedler told the *Herald* in a written statement. "You can't be going back and forth like that.

"In secretly taping Arthur Teele, Jim violated a fundamental principle that must be followed by all *Herald* journalists, which is that we deal openly – and certainly legally – in all our interactions with the public."

DeFede, who has worked for the *Herald* for three years, has asked to be rehired at the *Herald*, but insists he will not pursue a lawsuit against the paper in order to be reinstated.

"I had hoped they would come to the meeting with an open mind," DeFede wrote in an e-mail to the *Herald* newsroom after a Sept. 20 meeting that reconfirmed his termination, according to *Editor & Publisher*. "But before I even said a word, I was told the decision to fire me was 'irrevocable'."

"There was nothing I could say, no evidence that I could present, which would make them change their minds."

Journalists from across the nation have supported DeFede since his termination, starting blog websites and an online petition that has received more than 500 signatures urging his reinstatement, *Editor & Publisher* reported. Dan Gelber, DeFede's attorney, said the state attorney's finding should encourage the *Herald* to reconsider its decision.

"Clearly the *Herald* made their decision to fire Jim DeFede at the worst possible time," Gelber told *Editor & Publisher*. "They didn't know anything at all other than what they heard in an eight-minute conference call that Jim DeFede participated in [with Diaz and Beatty]. This is not the way to conduct business."

—Jessica Meyer
Silha Research Assistant

"In secretly taping Arthur Teele, Jim violated a fundamental principle that must be followed by all *Herald* journalists which is that we did openly - and certainly legally - in all our interactions with the public."

—Tom Fiedler,
Executive Editor,
Miami Herald

FCC, continued from page 19

Kentucky Public Radio Station Cancels "Writers Almanac" for Offensive Language

" It's not like Keillor's behaving like Howard Stern, but the FCC has been so inconsistent, we don't know where we stand. We could no longer risk a fine."

– Tom Godell, WUKY General Manager

WUKY-91.3 FM, the University of Kentucky's public radio station, canceled Garrison Keillor's daily five-minute program "The Writer's Almanac" for two weeks this summer, due to fears of Federal Communications Commission (FCC) fines for offensive language, according to the *Lexington* (Kentucky) *Herald-Leader*. The program features Keillor, host of the weekly "A Prairie Home Companion," highlighting milestones in literary history and reading a poem.

"The Writer's Almanac" is distributed by American Public Media, which does not edit or select the content. Rather, according to the *Herald-Leader,* Keillor selects the poems to read, and the show's production company, Prairie Home Productions, occasionally issues language advisories to the stations that carry the daily program.

Three poems for which language advisories had been issued contained the word "breast" and the phrase "get high," along with suggestive sexual themes, according to the *Herald-Leader*. Keillor told the *Herald-Leader* in an e-mail that he is proud of the poems he reads. "There isn't one of them I would hesitate to offer to any high school English class. The fact that someone is troubled by hearing the word 'breast' is interesting, but what are we supposed to do with 'A Visit From St. Nicholas' and the 'breast of the new fallen snow'? Should it become a shoulder or an elbow? I don't think so."

It was a string of those advisories that prompted the cancellation at WUKY, the station's General Manager, Tom Godell, told the *Herald-Leader*. "I don't question the artistic merit, but I have to question the language. It's not like he's behaving like Howard Stern, but the FCC has been so inconsistent, we don't know where we stand. We could no longer risk a fine." (For more information on FCC regulations for content, see "FCC Crackdown on Indecency Leads to Historic Fines" in the Winter 2004 issue of the Silha *Bulletin.*)

Godell told the Associated Press, "There's been something like $18 million in [FCC] fines in the last year. That's enough to get our attention." The *Herald-Leader* reported that, according to Godell, WUKY routinely edits potentially offensive language, and had never heard complaints from listeners. But, Godell said that his "concern is that something slips through. We have certain standards of decency, and I expect our national producers to do the same thing."

The Associated Press reported that in early August the station received a "flood" of phone calls and e-mails asking for the show to be put back on the air. Godell said that the listener response was enough to prompt WUKY to reverse its decision to cancel, and to reinstate the program. Godell told the Associated Press, "I think our community has spoken and I think [the language of the poems] isn't an issue for them."

More specifically, Godell told the *Herald-Leader* that the community response is enough to satisfy any concerns the station had about FCC sanctions. "The FCC says any potential complaint has to be measured against community standards. I've now learned what Central Kentucky's standards are. I have ammunition if we were ever faced with a complaint." The program now plays at 7:01 p.m. weekdays on WUKY.

The incident prompted criticism from O. Leonard Press, retired founding director of Kentucky Educational Television. He told the *Herald-Leader* that "The purpose of public broadcasting is not to be safe, but to be useful, good, to give people something to think about, something to grow on. Survival is not more important than being useful." He added, "If Garrison Keillor is less desirable on the airwaves than 'Desperate Housewives,' we've gone a far piece."

The three poems that prompted the cancellation, according to the *Herald-Leader,* were 'Curse of the Cat Woman' by Edward Field, 'Reunion' by Amber Coverdale Sumrall, and 'Thinking About the Past' by Donald Justice. Text and recordings of the poems can be found online at "The Writer's Almanac" website, by searching the archived programs for the dates July 23, August 2, and August 12, 2005, respectively, available online at http://writersalmanac.publicradio.org/#archive.

–Penelope Sheets
Silha Research Assistant

Ethical Issues and the Media

Washington Post Withdraws Sponsorship Of Pentagon "Freedom Walk"

Amid criticism and debate regarding *The Washington Post*'s planned co-sponsorship of a Department of Defense (DoD)-organized event on September 11, 2005, the newspaper withdrew its offer of co-sponsorship, which included donating space to public service announcements promoting the event. The event, according to the DoD website, was intended to "remember the victims of September 11, honor our American servicemen and women, past and present, and commemorate our freedom." Named the "Freedom Walk," the event involved a walk from the Pentagon to the National Mall, followed by a performance by country music singer-songwriter Clint Black. Black, according to *Editor & Publisher*, is a known supporter of the Iraq war, and critics of the war, in addition to some *Post* employees, were concerned that the event had taken on a political, pro-war tone that many saw as inconsistent with *The Post*'s focus on objective, balanced coverage.

The event, which was also sponsored by two Washington, D.C.-area radio stations and a local television outlet, took place less than two weeks before a planned antiwar demonstration called "Operation Ceasefire," which was scheduled to include three days of demonstrations and a concert, beginning on September 24. Organizers of that event criticized the media support of the Pentagon commemoration, arguing that it undermines those media organizations' credibility and objectivity in both war coverage and coverage of antiwar protests, according to *The Post*. One anti-war protestor, Adam Eidinger, told *The Post*, "No common person will see this as not taking sides in this war. This is clearly support for the war because it's being organized by the U.S. military."

Many in the media do not accept the link between the commemoration and a pro-war stance. Jerald Fritz, senior vice president with Allbritton Communications, the parent company of one of the remaining media sponsors, ABC WJLA-TV Channel 7 and Newschannel 8, told *The Post*, "I don't see a tie between supporting our troops and whether or not you support the war. You don't lose your patriotism because you become a journalist. . . . You can still support the troops and be an objective reporter." *The Post*'s publisher, Boisfeuillet Jones Jr., initially maintained that the event "has nothing to do with politics or the war or support of any political position," according to *The Baltimore Sun*.

The Pentagon also denied any relationship between the commemoration and support for the Iraq war. Allison Barber, deputy assistant secretary of defense for internal communications and public liaison, told *The Atlanta Journal-Constitution*, "This is not a statement about the war in Iraq or about any policy decisions. This is a statement about, 'we remember we came under attack, and we're grateful for our men and women in the military who volunteer to serve our country.'"

Members of *The Post*'s representatives to the Washington-Baltimore Newspaper Guild disagreed, however, and adopted a resolution on August 15 protesting the paper's involvement in the event, according to *The Atlanta Journal-Constitution*. *Editor & Publisher* quoted the following passage of the resolution. "*Post* news employees are subject to disciplinary action for participating in political activities that may be perceived as revelatory of personal opinions or bias. *The Washington Post* itself should be held to the same high standard. Moreover, arguments that the Freedom Walk is anything other than a political activity – and indeed, a political activity in support of the war in Iraq – should be put to rest by the prominent participation of country music star Clint Black, best known of late for his war-glorifying song 'Iraq and I Roll.'"

Others were concerned not specifically with Black's prominent role, but rather the conflict of interest for *The Post*. *The Post's* media writer Howard Kurtz told readers in an online chat, "I wish *The Washington Post* were not co-sponsoring this event. It is an operation by the Pentagon – a place that we devote substantial resources to covering – and therefore subject to all kinds of interpretations. It is not the same, in my view, as the corporate side of *The Post* handing out awards to the best teachers or other kinds of nonpartisan civic activities."

The Guild resolution also questioned the dual purpose of the event – to commemorate the victims of 9/11 and to support the troops. "The Guild supports *The Post*'s stated intention of honoring the nation's veterans, including those who have served in Iraq. But *The Post* undermines this goal by lending its support to a political event that links the Sept. 11, 2001 attacks to the war in Iraq – a link that *The Post*, in its reporting, has shown to be false."

The day the resolution was passed, *The Post* announced its withdrawal from co-sponsorship. "As it appears that this event could become politicized, *The Post* has decided to honor the Washington area victims of 9/11 by making a contribution directly to the Pentagon Memorial Fund," Eric Grant, a spokesman for the paper, was quoted by *The Post* as saying. "It is *The Post*'s practice to avoid activities that might lead readers to question the objectivity of *The Post*'s news coverage."

The DoD issued a press release in response to the decision by *The Post*, saying "It is unfortunate that *The Washington Post* has made this decision not to support the 'Freedom Walk,' but we welcome their donation to the Pentagon Memorial Fund. This is a commemorative event to honor the memory of the victims who died in the attack on the Pentagon and to highlight the yet to be constructed Pentagon Memorial."

The New York Times reported that several thousand people participated in the walk, and despite a few incidents involving protesters, overall "war protesters were in short supply." Secretary of Defense Donald Rumsfeld was quoted as saying to the crowd participating in the walk, "This is a special day, a day of remembrance, of tribute. This is the first march for freedom. Looking at the size of this crowd, I suspect it won't be the last."

–Penelope Sheets
Silha Research Assistant

"It is *The Post's* practice to avoid activities that might lead readers to question the objectivity of *The Post's* news coverage."

—Eric Grant,
Washington Post
Spokesman

Internet Pornography Rulings Raise Concerns About Fourth Amendment Protections

Although the U.S. Court of Appeals for the Second Circuit found fatal flaws in an affidavit that produced a search warrant in a child pornography sting, it nonetheless upheld a conviction on August 18, based solely on precedent set by the same circuit just two weeks earlier.

In *United States v. Coreas*, 2005 WL 1983916 (2005), the Second Circuit raised First Amendment concerns in refusing to present a finding contrary to *United States v. Martin*, 2005 U.S.App. LEXIS 16143, No. 04-1600 (2nd Cir. 2005), a partner case in which the court found the affidavit flawed but still not completely lacking probable cause to validate a search warrant.

"Child pornography is so repulsive a crime that those entrusted to root it out may be tempted to bend or even break the rules. If they do so, they endanger the freedom of us all."

—Judge Jed Radkoff

The danger in allowing the conviction based on evidence seized on a faulty search warrant is infringing on users' First Amendment rights to participate in a forum for discussion of child pornography by deterring those who only wish to use the forum and not receive downloaded pictures with a threat of conviction. (Articles on these issues in the Silha *Bulletin* include: "Internet Censorship: *Ashcroft v. ACLU* in the Summer 2004 issue of the Silha *Bulletin*; "Courts Rule in Internet Cases: *United States v. American Library Association*" and "Courts Rule in Internet Cases: Minneapolis Librarians Reach Settlement" in the Summer 2003 Silha *Bulletin*; "Bush Urges Passage of Virtual Law on Child Pornography" in the Fall 2002 Silha *Bulletin*; "Developments in Internet Law: House Passes Amendment to Child Pornography Protection Act" in the Summer 2002 Silha *Bulletin*; "Supreme Court Strikes Down Virtual Child Pornography Law" in the Spring 2002 Silha *Bulletin*; "Librarians File EEOC Complaint in Minneapolis" in the Winter 2001 Silha *Bulletin*; "Zoning the Internet: A Possible Solution to Internet Pornography Problems" and "The Child Online Protection Act of 1998: Will CDA II Be Found Constitutional" in the Winter 1999 Silha *Bulletin* and "Cyberporn and Dangerous Judicial Precedent" in the Summer 1998 Silha *Bulletin*.)

Authorities seized 100 computerized images involving child pornography from Willie Coreas' home after executing the warrant, *The Legal Intelligencer* reported. Based on this evidence, Coreas was indicted in March 2002 on 10 counts of possession of child pornography under 18 U.S.C. §2252(A)(5)(B).

Had the evidence been suppressed, as it was in partner cases *United States v. Strauser*, 247 F.Supp.2d 1135 (E.D.Mo.2003) and *United States v. Perez*, 247 F.Supp. 459 (S.D.N.Y. 2003), the court would have had to base its decision only on Coreas' affiliation with the site.

"Coreas broke no laws in joining the group and visiting its website, provided that he did not download any child pornography while there (and there was no allegation that he did)," Judge Jed Radkoff wrote for the court. Many of the activities Candyman facilitated, such as members' chatting with each other, are protected by the First Amendment."

The judicial branch in the United States is built on a system of *stare decisis* – a doctrine of precedent under which it is necessary for courts to follow earlier decisions on the same points when those points arise in a later case. Because the Second Circuit heard both *Martin* and *Coreas*, although two different panels reviewed each of the cases, the panel in *Coreas* was bound to the *Martin* decision, despite spending much of the opinion discrediting that holding and siding with the dissent.

"[W]e believe *Martin* itself was wrongly decided and sets a 'dangerous precedent," Radkoff wrote. "Nonetheless, since the *Martin* case was heard first, we are compelled, under established rules of this circuit, to affirm Coreas' conviction."

By the time Coreas was indicted, the validity of the warrant already was under attack. FBI Special Agent Geoffrey Binney, who began hunting for child pornography Web sites in late 2000, supplied false information related to the "Candyman" Web site to obtain the search warrant. The site offered members an interactive means to exchange information and receive e-mails with photographic attachments. The *Coreas* court noted that Binney did not challenge the District Court finding that the information was false and recklessly included.

In his report, Binney indicated that, once a person joined the site, he automatically would receive e-mail messages other members sent to the group when in fact there were three e-mail options – one of which allowed a person to opt out of receiving any e-mail messages. Later research found that more than 85 percent of the Candyman members opted out of all e-mails, Radkoff wrote.

Binney further falsely reported the method by which a person joined the web site and indicated, incorrectly, that each of the 24 persons who became subject to a search based on the affidavit had received approximately 108 images of child pornography.

Under the Fourth Amendment, there must exist a reasonable ground to believe that a person is committing a crime or that items linked to a specific crime will be found at a particular location.

"Child pornography is so repulsive a crime that those entrusted to root it out may, in their zeal, be tempted to bend or even break the rules," Radkoff wrote at the beginning of his opinion. "If they do so, however, they endanger the freedom of all of us."

In Coreas' case, the Second Circuit found that Binney bent the rules to a point where Coreas' First and Fourth Amendment rights were compromised. Radkoff wrote that there was no longer probable cause and that the "Government had no knowledge of what Coreas had received – even though, as subsequently determined, this was information it could readily have obtained from Yahoo if it had sought to do so."

The panel nevertheless upheld the conviction.

Martin was convicted of possession of child pornography based in part on the "Operation

Child Porn Cases, *continued on page 26*

New Editorial Guidelines, Other Changes at the BBC

The British Broadcasting Corporation (BBC) is undergoing a number of changes due to criticism of its editorial policies and the ongoing review of the BBC's Royal Charter. Three important outcomes of these changes are a new set of editorial guidelines, and a proposed restructuring of the BBC's governance system and funding scheme.

The new editorial guidelines were developed after a May 2003 report seriously criticized the BBC's editorial policies. That report was undertaken to investigate the suicide of Dr. David Kelly, Britain's chief advisor on Iraq's weapons program, according to The (London) Guardian. Called the Hutton Report after its sole investigator and author, Lord Hutton, the report highlighted the dispute between the BBC and Downing Street over the nature of the intelligence that was presented to the British public as evidence for going to war. A BBC reporter, Andrew Gilligan, alleged that the government's intelligence figures as to the nature and capacity of Iraq's weapons program had been "sexed up" and were misleading, an allegation that triggered a series of events ending in Kelly's death. Although Hutton's inquiry led to the resignation of Prime Minister Tony Blair's communications director, Alastair Campbell, both Blair and much of Whitehall were left more-or-less unscathed by the report. The BBC, on the other hand, received the brunt of Lord Hutton's blame for the controversy, and two higher-ups resigned in the report's wake: Gavyn Davies, the chairman of the BBC's board of governors, and Greg Dyke, the director general. The Guardian wrote that those resignations left the BBC in its most difficult situation in its history. (See "Andrew Gilligan and the BBC" in the Summer 2003 issue of the Silha Bulletin.)

In addition to responding to Lord Hutton's critique, the BBC considered the changing nature of media coverage in the multimedia world and changes in broadcasting code implemented by Britain's Office of Communication, (OFCOM) which oversees and regulates communications in the U.K., in developing the new guidelines, which were released on June 23, 2005.

Specifically, the guidelines, which became effective on July 25, seek to address several concerns that have arisen in media coverage in the five years since the 2000 revision of the guidelines, according to *The* (London) *Times*. As a BBC press release of June 23 stated, one of the most important changes was the acknowledgment of "An explicit commitment for the first time that 'for the BBC accuracy is more important than speed.'" Specifically, the policy affirms that accuracy is not simply a matter of correct facts, but also a weighing of all evidence and information "to get at the truth."

Another highlighted policy, and one that is a major change for the BBC, is the institution of a time delay "when broadcasting live coverage of sensitive and challenging events, such as the [September 2004] school siege at Beslan [North Ossetia]," the BBC press release noted. The delay, according to *The Guardian*, will last several seconds, just enough time to allow editors to cut any particularly graphic or offensive images before they are aired.

According to *The New York Times*, during the Beslan siege, cameras broadcast live images of blood-stained hostages, many of whom were children, fleeing the school that had been occupied for three days by armed militants. After the crisis, according to *The Guardian*, news executives at several networks, including the BBC, admitted that the intense competition to cover the story had led to mistaken editorial choices.

Although the time delay fits into the overall notion of speed no longer being of paramount importance for the BBC, some reporters are concerned about its use. Jean-Francois Julliard, an editor at Reporters Without Borders (Reporters sans Frontiéres, RSF), told *The New York Times*, "It could be a dangerous precedent. In some cases I could understand that some editors might want to use it. But they must say they are using it. It should be a very transparent process. If they say it is live when it is not, that is a lie."

On the other hand, time-delay footage is not new, especially in the world of 24-hour news channels. *The New York Times* noted that other British networks, as well as international media such as CNN, have the capacity for time delayed coverage as well. The BBC told *The New York Times* that the time delays "would be used only in exceptional circumstances."

Other BBC guidelines released deal with the nature of, justification for, and supervision of the use of investigative techniques in gathering news. The policy states, "Any proposal to undertake an investigation into crime or serious anti-social behaviour [sic] must be referred to a senior editorial figure . . .." The policy requires clear justification for the use of deception or the use of any undercover work. Furthermore, there must be explicit approval for each instance in which secret recording devices are used, and those too must be clearly justified. Along with these strict monitoring guidelines, the new policy says that approval must be received before employing anyone with a criminal history, including production team members and undercover operatives. These were the policies highlighted as "key changes" in the BBC press release. A full listing of the new editorial guidelines is available online at http://www.bbc.co.uk/guidelines/editorialguidelines/.

The new guidelines, though unrelated to the BBC's Royal Charter, come in the midst of the BBC's decennial charter review, which is designed to assess how the BBC is fulfilling its role in serving the public and to assess its future, according to the BBC Charter Review website, available online at http://www.bbccharterreview.org.uk/. The BBC's charter, first instituted in 1927 and reviewed roughly every ten years since, is due to expire on December 31, 2006. When the next charter beings on January 1, 2007, any changes recommended during the review will be adopted.

Changes at the BBC, *continued on page 28*

The new editorial guidelines were developed after a May 2003 report seriously criticized the BBC's editorial policies.

Child Porn Cases, *continued from page 23*

Candyman" search warrant and his involvement with two other child pornography Web sites. The court upheld Martin's conviction on August 4 and denied suppression of the evidence found as a result of the flawed search warrant affidavit.

Judge John M. Walker, writing for the majority in *Martin*, defended the decision by saying it in no way gave the government "an unchecked license to search citizens' homes simply because they are members of an offensive or disreputable group. Rather, it recognizes that, depending on the totality of the evidence proffered in the affidavit, a substantial likelihood of criminal activity may exist if an individual is a member of an Internet e-group whose purpose is unlawful."

The dramatic difference of opinion between the panels sets up a possible rehearing *en banc*, meaning all the judges on the court would resolve the issue, Coreas' attorney Herald Price Fahringer told *The Legal Intelligencer*.

"This is a very, very dramatic division in the circuit," Fahringer said. "It couldn't be more stark. We are extremely optimistic that a petition for a rehearing *en banc* will receive serious attention."

—Jessica Meyer
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Copyright News

U.S. Supreme Court Rules in *Grokster*

On June 27, 2005, the U.S. Supreme Court ruled in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S.Ct. 2764 (2005), and entered the legal battle between Hollywood and peer-to-peer file-sharing software programs. Although the Court held that Grokster and StreamCast, two companies that created peer-to-peer file-sharing software allowing users to download and share music and movies stored on other users' computers, could be liable for the copyright infringement by individuals using their software, the Court did not address whether or not the companies were actually liable for that infringement. Now that the Supreme Court has weighed in on the issue, it will be left to lower courts to decide how to handle copyright infringement cases brought against software companies for indirect infringement.

The case began when Metro-Goldwyn-Mayer Studios, along with other movie studios, music recording companies, and several performing artists, (collectively "MGM") sued Grokster and StreamCast in 2001 in California's Central District federal court claiming that the two companies had infringed on copyrighted material by allowing file-sharing uses to download songs and movies. The suit was an attempt to shut down companies providing file-sharing software in the wake of thousands of lawsuits, filed in the United States and worldwide, seeking civil damages from individual users infringing on copyrights by downloading files. (See "RIAA Announces More Lawsuits to Hobble Online Music Sharing" in the Fall 2004 Silha *Bulletin*.)

Grokster and StreamCast initially moved for summary judgment, relying on an earlier Supreme Court case, *Sony Corp. Of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), also known as the "Betamax case." In *Sony*, the Supreme Court ruled that a company selling a product capable of substantial noninfringing uses was not liable if consumers using that product nonetheless infringed on third parties' copyrights. The trial court in *Grokster* concluded that although Grokster and StreamCast were aware that most users were downloading and sharing copyrighted material, the software programs were capable of substantial noninfringing uses. Based on *Sony*, the court held that the companies were not liable for the copyright infringement by those using their software. The Ninth Circuit Court of Appeals affirmed that decision in August 2004.

MGM appealed to the Supreme Court, arguing that *Sony* should be overruled because its protection was too broad and allowed companies such as Grokster and StreamCast to escape copyright liability even when they knew that their software was being used to violate copyright law. The Supreme Court agreed to hear the case and ruled unanimously that Grokster and StreamCast could be liable for contributory copyright infringement if they knowingly induced users to infringe copyrights. However, the Court stopped short of overruling *Sony*. Despite the unanimous opinion, the Court split 3-3-3 on how to interpret *Sony*'s application when there is evidence of an individual or company inducing copyright infringement, perhaps foreshadowing the uncertainty that lower courts will face in applying the *Grokster* standard.

Justice David Souter, delivering the opinion of the Court, wrote, "We hold that one who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement." Souter pointed out that nearly 90 percent of the files traded on Grokster's and StreamCast's peer-to-peer software were copyrighted material, and that both of the companies had conceded that they were aware infringement occurred with most downloads. The Court also pointed out that Grokster and StreamCast had attempted to capture the customer base of Napster, another popular file-sharing program that had a known market for infringement; had taken no steps to prevent infringement; and had a commercial reason to increase use, which was predominantly infringing, because they generated revenue by selling advertising space in their software.

Souter also discussed the balance between protecting artistic works and ensuring technological innovation, writing that "the administration of copyright law is an exercise in managing the trade-off" between the two needs. He added, "[I]t may be impossible to enforce rights in the protected work effectively against all direct infringers, the only practical alternative being to go against the distributor of the copying device for secondary liability on a theory of contributory . . . infringement."

Souter wrote that *Sony*'s safe harbor should not protect a product that is "good for nothing else but infringement, [because] there is no legitimate public interest in its unlicensed availability, and there is no injustice in presuming or imputing an intent to infringe." *Sony* did not apply, the Court found, when statements or actions showed an intent to promote infringement. "The inducement rule . . . premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful purpose."

However, the clarity of the Souter's opinion for the Court was undermined by the two concurring opinions. Although the Court's opinion declined to address the scope of *Sony* in cases where there was no evidence of an intent to induce infringement, in the first concurrence, Justice Ruth Bader Ginsburg, joined by Chief Justice William Rehnquist and Justice Anthony Kennedy, took a narrow interpretation of *Sony*. "[T]here was evidence," Ginsburg wrote, "that Grokster's and StreamCast's products were, and had been for some time, overwhelmingly used to infringe, and that this infringement was the overwhelming

Grokster, *continued on page 30*

"We hold that one who distributes a device with the object of promoting its use to infringe copyright, is liable for the resulting acts of infringement."

– Justice David Souter

Changes at the BBC, *continued from page 25*

The current review is a three phase process, the second stage of which was completed on May 31, 2005. The review began in December 2003 with an initial period of research and public consultation, headed by Britain's Secretary of State for Culture, Media and Sport, Tessa Jowell. The focus of that consultation was to determine what the public likes and dislikes about the BBC, according to the department's charter review website, available online at http://www.culture.gov.uk/broadcasting/bbc_charter_review. That research was then used as the basis of the Green Paper review of the BBC's charter. That paper, entitled "A Strong BBC, Independent of Government," and written by Jowell, was published on March 2, 2005, and included initial recommendations for the next charter period of the BBC. It is available online at http://www.bbccharterreview.org.uk/publications/cr_pubs/pub_bbcgreenpaper.html.

One of the most significant changes recommended by Jowell is a restructuring of the governance system of the BBC. Currently, the BBC is managed by a board of governors, which Jowell described as both "cheerleader and regulator" of the BBC. Instead, Jowell proposed two separate bodies, a BBC Trust and an Executive Board. The Trust would have ultimate authority, and be "the custodian of the BBC's purposes, the Licence [sic] Fee and the public interest," including management of BBC budgets and strategy. The Executive Board would be responsible for the everyday management of the BBC's services, and would be accountable to the Trust. Michael Grade, who is Chairman of the BBC until 2008, would be the first Chairman of the Trust.

One of the most controversial topics under review is the BBC's license fee for public service broadcasting (PSB). Currently, every TV owner in Britain is required to pay a license fee, which goes to the BBC to fund its public service programming. The BBC is the sole recipient of the license fees, and is therefore the only broadcast organization receiving funds for PSB. In this light, the current funding scheme might be interpreted as a suppression of speech of the other networks, because they are not receiving the same funds as the BBC. Indeed, many other commercial broadcasters see the BBC's license fee as an unjust monopoly on funding for PSB, and many advocate a sharing of that public money among multiple broadcasters, in exchange for a greater amount and variety of PSB, shown on multiple networks. One of the major alternate proposals, according to a BBC Worldwide Monitoring article, is the idea of a "top-slice," or portion, of the BBC's license fee being allocated to other broadcasters.

OFCOM also advocates a top-slice approach. According to *The Scotsman*, OFCOM suggested that the government could collect the license fee income that will be generated by the anticipated growth in the number of British households with televisions, and put that income into a separate fund for the BBC's competitors. The BBC would receive the same amount of money it currently does (roughly GBP 2.8 billion a year), and the "extra" license fee income (or rather, the money that comes as the number of TV's in Britain continues to expand) would go to other stations.

Despite this debate over the appropriateness of the license fee as it now stands, Jowell told Parliament in a statement about the Green Paper, "[A]lthough not perfect, we believe [the license fee] remains the fairest way to fund the BBC." According to *The* (London) *Guardian*, although Jowell did not recommend restructuring the fees right away, she did recommend that the BBC's funding be reviewed in 2012 – the year in which Britain will have completely switched from analog to digital television. According to the same article, Jowell told a House of Lords committee that that switchover "would cause such vast changes to broadcasting that the option of top slicing the licence [sic] fee had to be kept alive." If the top slice were deemed necessary in the future, Jowell specified that the proposed BBC Trust would have the power to institute it, according to *The Guardian*. Jowell also mentioned a second alternative to the license fee, that of a subscription fee, to help fund PSB after 2016. Her statement to Parliament can be found in the "press notices" section of her department's broadcasting website, available online at http://www.culture.gov.uk/broadcasting/.

After the release of the Green Paper, there was a phase of public feedback and monitoring that ended on May 31. The information garnered from that research and feedback will then be taken into account when Jowell writes her White Paper, due this fall. The White Paper, which will contain more detailed proposals for the next charter period, will be followed again by more public monitoring and feedback, after which the charter review process will be complete. The recommended changes will then be adopted at the start of the new charter, January 1, 2007, and the BBC will be officially renewed for another ten years or so.

Amid these changes, the BBC allegedly came under fire from Prime Minister Tony Blair in September for its coverage of Hurricane Katrina. According to a September 19 article in *The* (London) *Daily Telegraph*, chairman and chief executive of News Corporation Rupert Murdoch relayed Blair's criticisms of the BBC, which were the subject of a private conversation between Murdoch and Blair, at a seminar hosted by former U.S. President Bill Clinton. Murdoch was quoted by *The Telegraph* as saying, "Tony Blair – perhaps I shouldn't repeat this conversation – told me yesterday that he was in Delhi last week and he turned on the BBC World Service to see what was happening in New Orleans. And he said it was just full of hate for America and gloating about our troubles." That private conversation, according to *The* (London) *Independent on Sunday*, took place on September 15.

Blair's alleged comments were met with rival criticisms of Blair's relationship with Murdoch, and are expected to further test the strained post-Hutton

Changes at the BBC, *continued on page 32*

Copyright News

Jerry Falwell Loses Domain Name Case

Christopher Lamparello may maintain his Web site criticizing Rev. Jerry Falwell, despite the similarity between Lamparello's domain name and the minister's trademarked surname, according to a ruling by the U.S. Court of Appeals (4th Cir.) on August 24, 2004.

In reversing the lower court's ruling, the court in *Lamparello v. Falwell*, 2005 U.S. App. LEXIS 18156, found no trademark infringement or false designation, saying that there was little likelihood of confusing Lamparello's site with something Falwell endorsed.

Circuit Judge Diana Gribbon Motz, writing for the court, said "Lamparello has made no attempt to imitate Reverend Falwell's Web site" and that "[n]o one would believe that Reverend Falwell sponsored a site criticizing himself, his positions, and his interpretations of the Bible."

Lamparello launched his Web site, www.fallwell.com, in 1999 after hearing Falwell speak about his views on homosexuality. The site is dedicated to criticizing Falwell and advocating against views he promotes, particularly Falwell's anti-gay political agenda.

Falwell, a nationally known minister who holds common law trademarks on "Falwell" and "Jerry Falwell," among others, contacted Lamparello in October of 2001 and again in June of 2003 with letters demanding Lamparello discontinue use of the domain name or other similar names.

Eventually, Lamparello filed suit against Falwell and his ministries, seeking a court order allowing him to continue using the domain name. Falwell in turn alleged trademark infringement, false designation, unfair competition and cyber squatting. Falwell argued that Lamparello was unfairly using his trademark, which is intended to protect the genuineness of a product, and gaining an unearned audience by using Falwell's name.

A key element to trademark infringement, according the Lanham Act, 15 U.S.C. §1114, is whether the mark is used in a manner likely to confuse consumers. Although both domain names are identical except for the additional double "l" in Lamparello's, the Fourth Circuit said the similarity in the names alone was not enough given the contrasting nature of the web pages.

"Lamparello can only be liable for infringement and false designation if his use of Reverend Falwell's mark would be likely to cause confusion as to the source of the Web site found at www.fallwell.com," Motz wrote. "After even a quick glance at the content of the Web site at www.fallwell.com, no one seeking Reverend Falwell's guidance would be misled by the domain name – www.fallwell.com – into believing Reverend Falwell authorized the content of the Web site."

The web pages are indeed strikingly different from one another. Falwell's site – www.falwell.com – clearly indicates support for Falwell and his political agenda and offers outlets for visitors to learn more about Falwell and the organizations he supports. The home page shows a picture of Falwell, advertisements for home Bible study and links to purchase items associated with Falwell, among other links.

In contrast, Lamparello's home page includes a disclaimer across the top of the home page indicating that the site is in no way affiliated with Falwell or his ministry. Embedded in the disclaimer is a link to Falwell's site. Lamparello's home page tells a story about his first television encounter with Falwell and says, "That was the first time in my life that I ever felt unworthy of the love of God." Below that story is a link that reads, "Click here to continue to fallwell.com to see why Rev. Falwell is completely wrong about people who are gay or lesbian."

Falwell tried to argue that Lamparello was in violation of the "initial interest confusion" doctrine of the Lanham Act, which "forbids a competitor from luring potential customers away from a producer by passing off its goods as those of the producer's . . . ," Motz wrote. But this claim requires the alleged violator to have profited by use of the trademark, and failed because Lamparello did not earn any money by posting gripes on his Web site.

"Profiting financially from initial interest confusion is thus a key element for imposition of liability under this theory," Motz wrote. "Applying the initial interest confusion theory to gripe sites like Lamparello's would enable the markholder to insulate himself to criticism – or at least to minimize access to it."

Finally, Motz wrote, Lamparello and Falwell do not offer similar goods and services, and the parties also agreed that Lamparello's site had no "measurable impact on the quality of visits" to Falwell's site.

Because the domain name passed the likelihood of confusion test, the court never reached the issue as to whether the Lanham Act applied only to commercial speech. The court also disposed of the cyber squatting claim because Falwell was unable to show that Lamparello had a bad faith intent to profit from using the [www.fallwell.com] domain name, an element required under 15 U.S.C. §1125 (d)(1)(A).

"The result proves this is still America," Lamparello said in a telephone interview with the Associated Press. "Just because someone who's a lot more powerful than I am demands that I do something doesn't mean I should do it."

—Jessica Meyer
Silha Research Assistant

The Fourth Circuit said the similarity in the names alone was not enough given the contrasting nature of the web pages.

Copyright News

Grokster, *continued from page 27*

source of revenue from the products. Fairly appraised," she continued, "the evidence is insufficient to demonstrate, beyond genuine debate, a reasonable prospect that substantial or commercially significant noninfringing uses were likely to develop over time." Ginsburg concluded that *Sony* required reversal of the Ninth Circuit because Grokster and StreamCast failed to qualify for its safe harbor, regardless of the companies' intent to induce infringement.

Justice Stephen Breyer, writing the second concurrence and joined by Justices John Paul Stevens and Sandra Day O'Connor, found Ginsburg's interpretation of *Sony* too narrow to support continued technological innovation. Although Breyer agreed with the Court that Grokster and StreamCast should be liable for inducing infringement, he determined that *Sony* should continue to be broadly interpreted. In *Sony*, Breyer observed that Sony, which had been sued for copyright infringement when it began selling Betamax VCRs, was aware that nearly all of those using its VCRs were potentially violating copyrights by taping television shows and movies.

"[O]f all of the taping actually down by Sony's customers," Breyer noted, "only around 9% was of the sort the Court referred to as authorized," which was roughly equivalent to the number of users downloading noninfringing material with Grokster's and StreamCast's software. This, he wrote, "reveals a significant future market for noninfringing uses of Grokster-type peer-to-peer software" just as *Sony* showed a significant market for noninfringing uses of VCRs. Breyer's chief concern was that Ginsburg's concurrence might result in an unwarranted narrowing of *Sony*. Nonetheless, Breyer wrote, "Services like Grokster may well be liable under an inducement theory."

Members of Congress were quick to applaud the Court's decision in *Grokster*. The Ninth Circuit's decision affirming summary judgment in favor of StreamCast and Grokster prompted Sen. Orrin Hatch (R-Utah) to propose the Inducing Infringement of Copyrights Act in Congress last year. Although that bill failed to pass the Senate after receiving criticism from the technology industry, it would have made anyone intentionally inducing copyright infringement liable as an infringer. The ruling from *Grokster* appears to conclude that copyright holders are already protected from those who induce infringement.

In a public statement, Hatch, who is chairman of the Senate Intellectual Property subcommittee, said, "Prudence and respect for the role of the courts suggest Congress wait until it becomes clear how today's decision will play out in the lower courts before there is a rush to legislate." Hatch added, "Obviously, if it appears that U.S. industries, technological innovation or consumers are ultimately harmed by [the Court's] decision, Congress should consider a legislative solution that appropriately balances consumer interests, innovation, and intellectual property rights." Hatch's statement is available online at http://hatch.senate.gov/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=1372.

Those in the technology industry continue to worry that the *Grokster* case would have an adverse impact on innovation and future product development. Jennifer Granick, executive director of the Center for Internet and Society at Stanford Law School and a former co-counsel for Grokster, told the Associated Press on June 28, 2005, that the decision sent a clear message to small businesses. "The big entrenched interests continue to enjoy a lot of success in the law. The little guys constantly have uphill battles."

Copyright holders praised the Court's decision, however. According to *internetnews.com*, Don Verilli, who argued MGM's case in front of the Supreme Court, told a group of Congressional staffers, "The court said if you build a business plan based on inducement, you're going to be held responsible for that." Verilli added, "It's not about technology, it's about how businesses use it." The *internetnews.com* article is available online at http://www.internetnews.com/ent-news/article.php/3521421.

Wired News reported that the European Commission is considering a directive that would adopt the inducement standard announced by the Court in *Grokster* in criminal copyright infringement cases. The directive, if adopted by the European Union (EU), would criminalize "attempting, aiding, or abetting and inciting" acts of copyright infringement. The proposal is to be considered by the EU parliament later this year. The *Wired News* article in available online at http://www.wired.com/news/politics/0,1283,68418,00.html.

The proposed directive has been criticized for failing to add certainty to a changing area of law. Urs Gasser, professor of law at the University of St. Gallen in Switzerland and a fellow at the Berkman Center for Internet and Society at Harvard Law School, told *Wired News*, "The [proposed directive] uses vague language and unclear standards that increase or add uncertainty to [the software and industrial technology] market that is very much in a state of flux."

—Andrew Deutsch
Silha Research Assistant

International Libel

Film Director Roman Polanski Wins Defamation Case

In an unusual libel trial in a British court that included testimony by Polish film director Roman Polanski via video link to avoid extradition, a unanimous jury in Britain's High Court ruled against American magazine *Vanity Fair* and awarded Polanski £50,000 (approximately $87,000) in damages. The *Vanity Fair* article, written by Lewis Lapham in July 2002, described an event involving Polanski in August 1969, claiming that while on his way from London to California to attend the funeral of his murdered wife, Sharon Tate, Polanski had stopped at a restaurant in New York where he had tried to seduce a young woman.

Lapham's article claimed that Polanski, accompanied by actress Mia Farrow, had gone to Elaine's for dinner while on a layover in New York. There he met Beatte Telle, identified in the article as a young Swedish model. According to Lapham, Polanski pulled a chair next to Telle and "slid his hand inside her thigh and began a long honeyed spiel which ended with the promise 'And I will make another Sharon Tate out of you'."

During proceedings, Polanski responded to questioning by his attorney, John Kelsey-Fry by saying the *Vanity Fair* article was "the worst thing ever written about me. It is obvious that it's not true. I don't think you could find a man who would behave in such a way but I think it was particularly hurtful as it dishonours [sic] my memory of Sharon."

The trial was remarkable for two reasons. First, prior to the jury trial, a Feb. 10, 2005 House of Lords ruling by Lord Donald James Nicholls of Birkenhead addressed whether Polanski could give his testimony and otherwise monitor the hearing by video conference link from Paris. In 1977, Polanski pleaded guilty to unlawful sexual intercourse with 13-year-old Samantha Geimer in California. Because of an extradition treaty between the United States and Britain, Polanski could have risked extradition if he went to London to testify. Polanski, now a French citizen who has lived in France for 30 years, risks no extradition from that country because France has not signed a similar treaty with the U.S.

Nicholls ruled that "a fugitive from justice is not as such precluded from enforcing his rights through the courts of this country.. . . It could mean that for so long as a fugitive remained 'on the run' from the criminal law, his property and other rights could be breached with impunity. That would not be right. Such harshness has no place in our law. Mr. Polanski is not a present-day outlaw. Our law knows no principle of fugitive disentitlement." Accordingly, Polanski was permitted to testify via video link from a hotel room in Paris. The Nicholls ruling was the third on the video link question, which had begun in High Court, which had ruled in Polanski's favor. On appeal, however, that decision was overturned. When the case came before the House of Lords, the majority affirmed the High Court's decision, ruling for Polanski.

Second, even though *Vanity Fair* is widely circulated in the United States (approximately 1.13 million copies), the British court asserted jurisdiction because approximately 55,500 copies are circulated in England, Wales, and France. Nicholls noted that because "Mr. Polanski's reputation is international . . .. He is entitled to bring this action in this country in respect of the publication of the offending article which took place here." It is well known that Britain's libel laws typically favor defendants in defamation cases.

In arguing the case before the jury, attorneys for *Vanity Fair* maintained that Polanski's reputation was "beyond repair," making it impossible to defame him. According to *The* (London) *Daily Telegraph*, Polanski himself admitted during his testimony that "It was all casual sex for years after Sharon's death. I was unable to maintain any lasting relationships after her death." Before the case went to the jury for its deliberations, the trial judge, David Eady, warned the jury to focus on the defamatory issues in the case, saying "we are not a court of morals." Although much had been reported about Polanski's lifestyle and his attitude toward casual sex, Eady told the jury that people's sex lives are "generally speaking private matters," and the jury was not there to judge Polanski's personal lifestyle, according to a report by *The* (London) *Guardian*. In his arguments before the jury, Kelsey-Fry told the jury that the case was about getting to the truth.

Edward Perlberg, Telle's boyfriend in 1969, testified that the *Vanity Fair* article was accurate, and that although he himself had not heard the conversation between Polanski and Telle, Telle had told him in a taxi on the way home that Polanski had said that he would give her a screen test and that he would "make another Sharon Tate of me." But further testimony, including that of Farrow as well as Tate's sister, Debra Tate, indicated that the chronology stated in the Lapham article was incorrect. The incident between Telle and Polanski had occurred after Tate's funeral, not before. However, attorneys for *Vanity Fair* maintained that the basic facts in the story were correct. During his testimony, Polanski did admit going to Elaine's and meeting Telle, but denied any comparison between her and his deceased wife. "It is an abominable lie," Polanski told the court.

Finally, Telle, who is actually Norwegian, never took the stand. *The New York Times* reported that during Perlberg's testimony, he stated that he did not now know where Telle lived, or even whether she still was alive. However, once the verdict had been reached, Telle surfaced. In an interview with the (London) *Mail on Sunday* she said that although *Vanity Fair's* attorneys had contacted her "several times" to testify in the case, she ignored them. "I just wanted to put them off," she said. With the trial over, Telle told the *Mail* about the 1969 incident at Elaine's, "[Polanski] came over to the table . . .. [He]

Polanski, *continued on page 32*

"I find it amazing that a man who lives in France can sue a magazine that is published in America in a British courtroom."

–Graydon Carter, Editor, *Vanity Fair*

Changes at the BBC, *continued from page 28*

Report relationship between the BBC and Downing Street. Greg Dyke, the former BBC Director General, told *The Independent on Sunday*, "If it's an accurate record, Mr. Murdoch has provided a fascinating glimpse of his private relationship with Mr. Blair. It may not come as a great surprise that the Prime Minister aims to please Murdoch but it comes as a bit of a shock he goes this far. Mr. Blair, it might be said, is hardly the best judge of the impartiality of news coverage given his behaviour [sic] in the run-up to the Iraq war."

The BBC said in a statement that it had not received any complaint from Downing Street, "so it would be remiss for us to comment on what has been reported as a private conversation." However, the BBC did receive complaints from some if its viewers that its coverage of Katrina was too critical of and focused on Bush, according to a BBC News article, available online at http://news.bbc.co.uk/1/hi/uk/4257190.stm. In response to those complaints, BBC world editor Jonathan Baker said that most of the agency's coverage of Katrina had been "absolutely down-the-line straightforward reportage," adding that the president had made himself the "figurehead" of the governmental response to the disaster, according to the BBC News article.

Not all coverage of Murdoch's disclosures focused its critique on Blair, however. Nick Ferrari of *The* (London) *Evening Standard* echoed some of Blair's alleged concerns in an article on September 21, saying that although Murdoch has his own motives to highlight any rift between Downing Street and the BBC, the BBC's coverage was altogether too biased against Bush. "Of course Mr. Murdoch has a commercial interest in doing down the BBC. But it was high time the highhanded BBC attitude towards the U.S. was exposed." According to *The Telegraph*, Clinton agreed with Blair's alleged comments, saying that though the reports were factually accurate, the BBC's coverage had been "stacked up" to highlight Bush's role in the mishandling of the disaster. Downing Street has declined to comment on the incident. (For additional information on media coverage of Hurricane Katrina, see "Media Repulse Ban on Katrina Coverage" on the first page of this issue of the Silha *Bulletin*.)

–Penelope Sheets
Silha Research Assistant

Polanski, *continued from page 31*

just stood there. He just stared at me for ages.. . . Perhaps I reminded him of Sharon Tate." Telle told the *Mail* that Polanski had never touched her; that he had never claimed "to make another Sharon Tate of her," saying that she did not even know who Polanski was until Perlberg told her later. Describing herself to the *Mail* as "a starving model" at the time, Telle said she had not paid attention to the commotion that had erupted when Polanski arrived at Elaine's. It was not until *Vanity Fair's* attorneys tried to contact her that Telle claimed she thought much about the evening.

Graydon Carter, *Vanity Fair's* editor, told the *The Guardian* after the jury's verdict, "I find it amazing that a man who lives in France can sue a magazine that is published in America in a British courtroom. As a father of four children, one of them a 12-year-old daughter, I find it equally outrageous that this story is considered defamatory." As the *Bulletin* went to press, there was no word as to whether attorneys for *Vanity Fair* would appeal the decision.

–Elaine Hargrove
Silha Fellow and *Bulletin* Editor

International Libel

Jurisdiction in Libel Suit Against *The Washington Post* Online Rejected by Canadian Appeals Court

Ontario's Court of Appeal ruled on Sept. 16, 2005 that a former United Nations employee cannot sue *The Washington Post* for defamation in Canada. The Appeal Court's ruling overturned a January 2004 ruling by the Ontario Superior Court in *Bangoura v. Washington Post*, 2004 CanLII 26633 (ON S.C.), which had determined that the Canadian court had jurisdiction to hear the case.

The plaintiff in the case, Cheickh Bangoura, had been employed by the United Nations from 1987 to 1997. During that time, Bangoura had lived in numerous countries. In January 1997, while he was living in Kenya, *The Washington Post* published two 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 Ontario. However, the articles were also posted on the newspaper's Web site. The *Guelph Mercury* (Ontario, Canada) reported that as a result of the articles, Bangoura was placed on administrative leave until the end of his contract a month later. His contract was not subsequently renewed, although 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 claimed that the damage to his reputation have been felt the most there, making it difficult for him to find employment or secure promotions. He sought an order directing *The Washington Post* to make the articles inaccessible from its Web site and to publish a retraction. In addition, Bangoura sought $10 million in damages for, among other things, intentional interference with economic advantage, infliction of mental anguish and negligence. Bangoura also sought reimbursement of court costs.

In the lower Canadian decision in the case, Justice Romain W.M. Pitt applied eight factors from *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.) that provided guidelines for analysis regarding the jurisdiction question. Pitt ruled that given the international reach of *The Washington Post*, the newspaper's editors should have foreseen that the articles could have impacted Bangoura no matter where he lived. Pitt added, "*[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 is not, then it should be," Pitt wrote. His opinion is available online at http://www.canlii.org/on/cas/onsc/2004/2004onsc10181.html. (See "Internet Updates: Settlement Reached in *Dow Jones v. Gutnick*" in the Fall 2004 issue of the Silha *Bulletin*.)

In writing the unanimous Appeal Court decision, Justice Robert Armstrong addressed the same eight factors of jurisdiction set forth in *Muscutt*, and found that none of them applied. Among the reasons Armstrong cited were:

- Bangoura's affadavit did not give specific details as to what damages he sustained.
- *The Washington Post* could not have foreseen that Bangoura would have come to reside in Ontario three years after the articles were published. Armstrong wrote, "To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide [to reside] long after the publication of the defamation."
- The articles in question "did not reach significantly into Ontario." At the time the articles were printed, only seven residents of Ontario were subscribers. And although the articles were available free of charge through *The Post's* Web site for fourteen days following their publication in the newspaper, only one person in Ontario has paid to access the articles since then – and that was Bangoura's own attorney.

Armstrong further noted that there is a difference in the way U.S. and Canadian law deal with defamation, but that these differences should not affect the comity between the two nations. Citing *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), Armstrong wrote, "[P]ublic officials could only succeed in a defamation claim where they could establish that the defamatory statement was made 'with knowledge that [the information] was false or that with reckless disregard of whether it was false or not'." Armstrong added, "Courts in the District of Columbia and in other American jurisdictions have uniformly held that libel judgments rendered in foreign courts where the law does not comport with the principle set forth in [*Sullivan*] and its progeny are repugnant to the public policy of those jurisdictions and must therefore be denied recognition.. . . [Pitt's] conclusion does not take into account that the rule in [*Sullivan*] is rooted in the guarantees of freedom of speech and of the press under the First Amendment of the U.S. Constitution.. . ."

Finally, Armstrong wrote that *Dow Jones & Co. Inc. v. Gutnick* (2002), 210 C.L.R. 575 (H.C.A.), a case involving a defamation lawsuit between an Australian businessman and Dow Jones' magazine *Barron's*, did not apply. In that case, Gutnick was living in Victoria, Australia, at the time *Barron's* published its magazine and posted an article in its online edition about Gutnick, which he claimed defamed him. Furthermore, at the time the defamatory article was published, there were 1,700 residents in Victoria who subscribed to *Barron's* online, a number substantially greater than the number of Ontario residents who might have seen *The Washington Post* article about Bangoura. (See article cited above; see also "Recent Developments in Defamation Law: *Dow Jones & Co. Inc. v. Gutnick*" in the Winter 2003 issue of the Silha *Bulletin*.) Armstrong's ruling is available online at http://www.ontariocourts.on.ca/decisions/2005/september/C41379.htm.

According to the Canada's *National Post*, Bangoura has not yet decided whether he will appeal the ruling in the case.

–Elaine Hargrove
Silha Fellow and *Bulletin* Editor

> "To hold otherwise would mean that a defendant could be sued almost anywhere in the world based upon where a plaintiff may decide to reside long after the publication of the defamation."
>
> – Justice Robert Armstrong

Student Press News

Hosty Ruling Could Result in Fewer Freedoms For University Newspapers, Students

" I fear it's just a matter of time before a university prohibits a student group from bringing an unpopular speaker to campus or showing a controversial film based on the *Hosty* decision."

–Mark Goodman, Executive Director, Student Press Law Center

The U.S. Court of Appeals (7th Cir.) ruled on June 20, 2005, that a public university administrator could not be held liable for any First Amendment violations that may have occurred when she required that the student newspaper be approved by university officials before being published. In making its ruling, the Seventh Circuit determined that the standards in the U.S. Supreme Court case of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which allows high schools to regulate content of student publication, also applies to public universities and colleges. The decision by the court in *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (*en banc*), reversed the rulings of a three-judge panel of the Seventh Circuit and a federal district court in favor of the students.

The case was brought by three students at Governors State University (GSU) in Illinois who worked as editors and reporters at the *Innovator*, the campus' student-run newspaper. Margaret Hosty, Jeni Porche, and Steven Barba all began working at the Innovator in the spring of 2000. After Hosty wrote an article in October 2000, critical of the administration at the university and attacking the integrity of Roger Oden, dean of the College of Arts and Sciences, the university asked that the paper print a retraction and apology, claiming that the factual premises of the article were incorrect. When the *Innovator* refused to retract the article or print the administration's response to it, Patricia Carter, dean of student life, contacted the *Innovator*'s printer, Regional Publishing, and said that all future issues of the *Innovator* had to be reviewed by the administration before they could be published.

Charles Richards, who owns Regional Publishing, told the *Chicago Reader*, "[Carter] told me that Regional Publishing was not to print any more issues of the Innovator without first calling her personally and then she, herself, or someone else from the administration department would come to our printing plant, read the student newspaper's contents, and approve the paper for printing by us." Richards claimed to have told Carter that the request sounded illegal; however, he was worried that he would not be paid if he published another copy, since the university paid publishing costs of the paper. The *Chicago Reader* article is available online at: http://www.chicagoreader.com/hottype/2005/050701_1.html.

After the *Innovator* was not published during November and December 2000, Hosty, Porche, and Barba filed suit in federal district court, claiming that the university had violated their First Amendment rights by imposing a prior restraint. The district court ruled in favor of several defendants, including administrators, faculty, staff, and trustees, finding that they had either done nothing wrong or that they were protected by qualified immunity, meaning they had carried out discretionary acts in the performance of their jobs without violating the students' clearly-established constitutional rights. However, the district court determined that Carter had violated the First Amendment rights of the students, and also concluded that Carter's actions were not protected by qualified immunity.

On appeal, a unanimous three-judge panel of the Seventh Circuit affirmed the district court's ruling. However, Carter's request for a rehearing before the entire Seventh Circuit was granted, and re-argument while the court was sitting en banc was heard on January 8, 2004. Nearly 18 months later, on June 22, 2005, the full Seventh Circuit issued its ruling, reversing the previous ruling in favor of the students by a 7-4 vote.

The court rested its decision on the U.S. Supreme Court case of *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988). In *Hazelwood*, the Court determined that a high school principal could decide not to publish articles in a student newspaper, which was part of the high school curriculum, in order to protect younger students from inappropriate content and to prevent an invasion of privacy. The GSU students claimed, and the district court and Seventh Circuit panel agreed, that *Hazelwood* did not apply to a college setting where the student newspaper was an extracurricular activity.

But Judge Frank Easterbrook, writing for the majority of the full court, found the students' argument unpersuasive, noting that the *Innovator* received university funds through student service fees. He wrote that because "private speech in a public forum is off-limits to regulation even when that forum is a classroom of an elementary school then speech at a non-public forum, and underwritten at public expense, may be open to reasonable regulation even at the college level – or later . . .. We hold, therefore, that *Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."

The court's analysis turned next to whether the *Innovator* was an established public forum, meaning it could not be regulated by the university, or whether it was a non-public forum, subject to regulation for legitimate educational reasons.

"The *Innovator* did not participate in a traditional public forum," Easterbrook wrote. Nonetheless, the majority concluded that "by establishing a subsidized student newspaper the University may have created a venue that goes by the name 'designated public forum' or 'limited-purpose public forum.'" The court found that a designated public forum existed because the university had "declare[d] the pages of the student newspaper open for expression and thus disable[d] itself from engaging in viewpoint or content discrimination while the terms on which the forum operates remain unaltered."

Hosty Ruling, *continued on page 35*

***Hosty* Ruling**, *continued frompage 34*

Even though the court found that the *Innovator* was a designated public forum exempt from content regulation, Easterbrook wrote that "even if student newspapers at high schools and colleges operate under different constitutional frameworks, as both the district judge and our panel thought, it greatly overstates the certainty of the law to say that any reasonable college administrator had to know that rule." Because the law was not clearly established with respect to Carter's actions, the majority held that she was protected by qualified immunity and could not be sued for her actions.

Judge Terence Evans, who had written the Seventh Circuit panel's earlier decision in favor of the GSU students, was joined by three other judges in the dissent. Evans wrote, "The majority's conclusion flows from an incorrect premise – that there is no legal distinction between college and high school students. In reality, however, the [Supreme] Court long has recognized that the status of minors under the law is unique in many respects. Age, for which grade level is a very good indicator, has always defined legal rights." Evans argued that *Hazelwood* was not applicable to college student publications because college students are older and more mature than high school students. Additionally, Evans cited the differences between elementary and secondary schools, which have a mission to inculcate values, as opposed to colleges and universities, which exist to foster intellectual curiosity and facilitate the exchange of ideas, as evidence that the two should not be treated the same.

Evans described Carter's actions as a prior restraint, clearly unconstitutional under the circumstances. "Few restrictions on speech seem to run more afoul of basic First Amendment values," he wrote. Evans concluded, "I believe that Hazelwood does not apply, no pedagogical concerns can justify suppressing the student speech here. Dean Carter violated clearly established First Amendment law in censoring the student newspaper. I would affirm the judgment of the district court."

Mark Goodman, executive director of the Student Press Law Center (SPLC), said in a press release, "This decision gives college administrators ammunition to argue that many traditionally independent student activities are subject to school censorship. I fear it's just a matter of time before a university prohibits a student group from bringing an unpopular speaker to campus or showing a controversial film based on the *Hosty* decision." The SPLC press release is available online at: http://www.splc.org/newsflash.asp?id=1034&year=2005.

Irwin Gratz, president of the Society of Professional Journalists (SPJ), was also dismayed by the ruling. In a statement, Gratz said, "It is a sad day for journalism in the United States. In the states covered by this ruling, students will now spend eight years with prior review and censorship as part of their journalistic experience." Gratz's statement is available online at: http://www.spj.org/news.asp?ref=507.

SPLC and SPJ were among a group of 25 media organizations that submitted an *amicus* brief in support of the GSU students in Hosty.

According to an SPLC article, Hosty said she will appeal the decision to the Supreme Court. "Understandably, I am dismayed by the court's opinion, and find it troubling and grossly flawed," Hosty said. "It demonstrates a considerably deficient comprehension on the part of the majority of the appellate judges of the allegations, university policy, deposed statements, material documents, and timeline of events evidenced by said items, which might be why the court reached such an erroneous decision." The SPLC article is available online at: http://splc.org/newsflash.asp?id=1035&year=2005.

–Andrew Deutsch
Silha Research Assistant

NEA To Increase Education about Student Rights, Available Resources

During its July 2005 national conference, the National Educator's Association (NEA) resolved to increase education among its members about student press rights and the resources available to protect them. The Student Press Law Center (SPLC) reported that the resolution was introduced by Charles Haas, the student newspaper adviser at Randolph High School in Randolph, N.J.

Haas said the inspiration for his resolution was the recognition that nearly 20 years had passed since the Supreme Court's ruling in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), which held that students' freedom of expression rights could be limited in school-sponsored media. (See "Hosty Ruling Could Result in Fewer Freedoms for University Newspapers, Students" on page 34 of this issue of the Silha *Bulletin*.)

The SPLC quoted Haas as saying, "I believe that there have been any number of decisions at the state level – and sometimes even at the local level – that have softened the impact of *Hazelwood*. So that's basically what my goal was, to take a snapshot of where we are, 20 years after *Hazelwood*, and inform people that *Hazelwood* is not necessarily a totally slammed door."

An NEA spokesperson, Staci Maiers, said the NEA will begin publishing educational pieces about student press rights in its publications within a year.

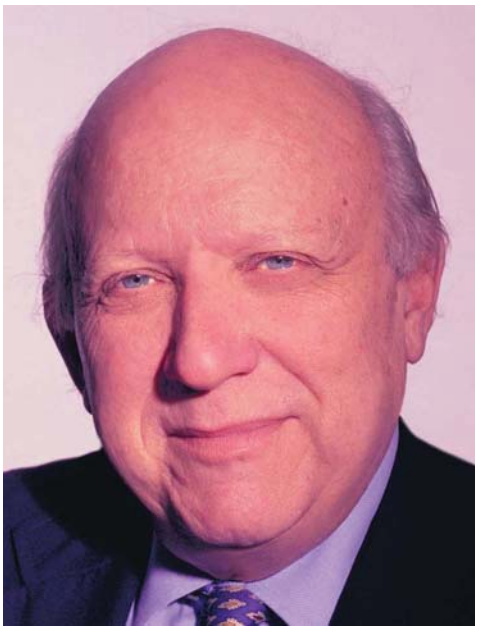
–Ashley Ewald
Silha Fellow

TWENTIETH ANNUAL SILHA LECTURE

October 24th, 2005

"Confidential Sources of Journalists: Protection or Prohibition?"

7:00 p.m. - Cowles Auditorium
Hubert H. Humphrey Center
~Book Signing to Follow Lecture~



Floyd Abrams is a partner in the New York law firm of Cahill Gordon & Reindel, and is the William J. Brennan Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism. He represents *New York Times* reporter Judith Miller in her on-going attempt to protect her sources in the Valerie Plame leak investigation.

Mr. Abrams has argued frequently before the U.S. Supreme Court, and was co-counsel to *The New York Times* in the "Pentagon Papers" case. He is a widely-quoted commentator on media law, and has appeared on television programs ranging from *Nightline* to Jon Stewart's *The Daily Show*.

Mr. Abrams is the author of a new book, *Speaking Freely: Trials of the First Amendment* (Viking 2005), which recounts highlights from his career as a First Amendment attorney.

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