For the first time in the history of the Silha Center, the Center drafted and filed an amicus curiae (friend of the court) brief in August in a case that will be argued before the United States Supreme Court this December. The brief was written by Silha Center Director Jane Kirtley with the assistance of Silha Fellow Doug Peters and Silha Research Assistant Thomas Corbett. The brief is available on the Silha Center’s Web site under “Resources” at www.silha.umn.edu.

OIC v. Favish (Docket no. 02-954), is a Freedom of Information Act lawsuit stemming from the efforts of Allan Favish, a private citizen who practices law in Los Angeles, to gain access to the death scene photographs of Vincent Foster, the White House deputy counsel to former President Clinton who was allegedly a victim of a suicide. A full story about the case appears on page 24 of this issue of the Silha Bulletin.

In response to a request for public input from the Department of Homeland Security, the Silha Center filed comments in June on the proposed rules governing the handling of critical infrastructure information, citing several flaws in the rules, such as unclear definitions and restrictions on information sharing between federal, state, and local government agencies. The Comments were drafted by Kirtley and Corbett. A complete story about the proposed rules appears on page 39 of this issue of the Silha Bulletin.

On April 30, Kirtley, with the assistance of Silha Fellow Elaine Hargrove-Simon, filed comments on the Draft Recommendation on the Right to Reply in the On-Line Media for the Council of Europe. If adopted into law, individuals or corporations with Web sites could be compelled to post statements from those who disagree with the content of their site. In June, the Draft Recommendation was revised under the new caption, Draft Recommendation on the Right of Reply in the New Media Environment, which contained very few changes from the original. On September 14, the Silha Center responded with a summary reiterating its initial concerns.

In late August the Silha Center also joined more than two dozen media organizations in an amicus brief in McKevitt v. Pallasch, a case before the U.S. Court of Appeals (7th Cir.) concerning the scope of the federal qualified privilege protecting journalists’ sources. This and other documents are posted on the Silha Center’s Resource page at www.silha.umn.edu.
United States v. Moussaoui

The case of United States v. Moussaoui, in the federal District Court for the Eastern District of Virginia, began with a question: Can the civilian court system handle a highly sensitive, national security case and emerge with its tradition of transparency and public access intact?

After more than a year of wrangling for access by both media outlets and the defendant himself, the answer appears to be no. The government’s recent refusal, on national security grounds, to obey an order by U.S. District Court Judge Leonie Brinkema, creates a possibility that the case against Moussaoui will be dismissed. That would likely result in the French national being labeled an enemy combatant and tried in a secret military tribunal. Moussaoui is the only person who faces charges in an American court in the Sept. 11, 2001, terrorist hijackings.

Brinkema had been concerned with the secrecy surrounding the case since early in the proceedings. In September 2002, she began removing some barriers to public access to the case, modifying an earlier order sealing Moussaoui’s filings due to prosecutors’ fears that the avowed member of al Qaeda might be trying to pass coded messages in his unorthodox, handwritten filings, according to a Sept. 28, 2002, article in The New York Times. Brinkema’s modified order sealed Moussaoui’s handwritten pleadings for 10 days, allowing the government to analyze the filings for potential secret messages before release. (See “Cameras Banned at Trial of Alleged Terrorist” in the Winter 2002 Silha Bulletin.)

Despite the shift, the record of the case remained largely secret. The secrecy intensified in October 2002, when Ramzi Binalshibh, an alleged Sept. 11 co-conspirator, was captured in Pakistan. Between Brinkema’s Sept. 27, 2002 order and the following April, however, only a handful of filings were unsealed, according to a Washington Post article by reporter Tom Jackman.

“Moussaoui and his standby lawyers . . . sought access to Binalshibh, who Moussaoui says will support his claims that he was not involved in the attacks,” Jackman wrote in the April 4, 2003, edition of The Washington Post. “Briefs, oral arguments, even a ruling by Brinkema that the defense should have access to Binalshibh, all have been kept secret.”

A group of media organizations, including the New York Times and the Washington Post, challenged the continued secrecy on April 3. According to an April 4 article in the New York Times, the organizations filing the protest with Judge Brinkema were The New York Times, ABC News, The Associated Press, The Hearst Corporation, the Tribune Company and The Washington Post, as well as the Reporters Committee for Freedom of the Press. The media organizations argued that holding the judicial records under seal violated First Amendment and common-law rights of access to judicial proceedings.

Moussaoui has insisted on acting as his own attorney, but one of his standby defense attorneys said he supported the media’s request.

“We recognize that there are national security concerns, and we certainly don’t believe in compromising national security,” federal public defender Frank Dunham Jr., told The New York Times, “but I can’t imagine that we would take any position other than that the trial — and all pretrial proceedings — should be public to the maximum extent possible.”

The day after the media organizations’ challenge, Brinkema said she was unsure whether the case against Moussaoui could go ahead amid such secrecy, according to an April 5, 2003, article by Minneapolis Star Tribune reporter Greg Gordon.

The judge’s concerns were borne out soon thereafter. On May 13, 2003, the U.S. Court of Appeals (4th Cir.) refused the government’s request to overturn Brinkema’s January 2003 decision granting Moussaoui access to Binalshibh as part of his defense.

“The value of openness in judicial proceedings can hardly be overestimated,” the court wrote, according to a May 14 report in The New York Times. “This value, of providing to the community at large a sense that justice has been done, is particularly relevant in the prosecution of Moussaoui.”

Following the ruling, Brinkema pressed the government for a decision about whether it would comply with her ruling, setting a July 14 deadline for notification. Attorney General John Ashcroft notified Brinkema on the day of the deadline — immediately after the Fourth Circuit announced that it would not review the decision en banc — that the government would not comply with her ruling. According to the Minneapolis Star Tribune, Ashcroft cited national security concerns.

According to the Star Tribune, Brinkema may be compelled to dismiss the charges against Moussaoui. That decision, if upheld on appeal, would force the government to declare Moussaoui an enemy combatant and try him in a secret military tribunal. Among Brinkema’s other options, the Star Tribune reported, are eliminating the possibility of the death penalty for Moussaoui; eliminating any mention by the prosecution of Binalshibh, who was mentioned in the government’s indictment of Moussaoui; or informing the jury that the government refused to produce a requested witness. As the Bulletin went to press, Brinkema had not announced which course she would take.

—Doug Peters
Silha Fellow
The Department of Homeland Security (DHS) in early August 2003 asked immigration Judge Robert Newberry to close the Detroit deportation hearing of a Syrian man with alleged ties to al-Qaeda. The DHS quickly scaled back its request after the Detroit News objected.

The newspaper filed its challenge, the government asked to close only those portions of the hearing involving an FBI memo. Newberry granted the government’s revised request Aug. 12, 2003, according to an Aug. 13, 2003, report in the Detroit News.

Nabil al-Marabih, a 37-year-old Syrian who was on the government’s terrorist watch list in September 2001 and who was detained less than two weeks after the Sept. 11, 2001 terrorist attacks, opposed the government’s effort to close the hearing.

The government’s original closure request came less than a year after a three-judge panel of the federal Court of Appeals held in Detroit Free Press v. Ashcroft, 303 F.3d 681 (6th Cir. 2002) that the First Amendment forbids the wholesale closure of immigration hearings. The Sixth Circuit later refused a government request for the entire court to review the case.

A month after the Sixth Circuit panel’s decision, the Third Circuit ruled that such proceedings are administrative, not judicial, and therefore are not subject to the First Amendment’s presumption of openness. (See “Sixth, Third Circuit Courts Split on Deportation Hearing Question” in the Fall 2002 issue of the Silha Bulletin.)

—Doug Peters
Silha Fellow
U.S. Courts Rule in Access to Courts Cases


courtroom Television Network, LLC. v. State of New York

In July 2003, the Supreme Court for New York County, a trial court, ruled against Court TV's challenge to the constitutionality of the New York state law barring television cameras from trial courts. (See Courtroom Television Network, LLC. v. State of New York, 2003 WL 21787909 (N.Y. Sup. 2003))

Court TV filed suit in September 2001, seeking a declaratory judgment that the section of New York's Civil Rights Law banning audio and visual broadcasting equipment from trial courts violated the First Amendment. The network also asked the court to forbid further enforcement of the law.

Judge Shirley Werner Kornreich denied Court TV's request, ruling that nothing in the state law undermined citizens' right to attend trials and that "audio-visual coverage of trials is neither prohibited nor required under the First Amendment." Accordingly, Kornreich said, a court may impose reasonable restrictions on broadcast coverage of court proceedings.

Kornreich's opinion includes a detailed discussion of the history of New York's stance on broadcasting court proceedings, describing the state's 10-year experiment which allowed televised criminal trials in some situations. The law expired under its own terms and was not reenacted.

Court TV, represented by David Boies, said it would appeal the July 15 ruling.

In her opinion, Kornreich states that it is difficult to pin down state-court policies in "what is essentially a national patchwork quilt of policies."

"Still," the judge wrote, "it is undisputed that today, a substantial majority of states permit audio visual coverage of trial court proceedings."

─Doug Peters
Silha Fellow

The Laci Peterson Murder Trial

Stanislaus County (Calif.) Superior Court Judge Al Girolami has banned cameras and recording devices from the preliminary hearing of murder suspect Scott Peterson. The Aug. 18, 2003, ruling does not bar reporters from the courtroom, but forbids any sort of broadcast, tape recording or still photography of the proceedings.

Defense attorneys appealed Girolami's earlier decision to open the preliminary hearing to the public. An appeals court upheld Girolami's decision on Aug. 27.

Peterson is accused of killing his wife, Laci, who was pregnant with the couple's first child, and dumping her body into the San Francisco Bay.

In denying media requests to televise or otherwise record the hearing, Girolami said he did not want to turn his courtroom into "Reality TV," according the San Francisco Chronicle.

"It involves the victims' families, who will be forced to relive their worst nightmare in a very public way, which unfortunately is necessary to the process. Televising these passionate proceedings is not, however, necessary to the process," Girolami wrote in a six-page ruling.

The ruling stemmed from media requests in July to open Peterson's preliminary hearing, in which evidence supporting the charge against Peterson likely will be discussed.

"At stake is public confidence in a judicial system that abhors taking evidence in secret and assumes that any member of the public may be present to observe its operation," attorneys representing a coalition of media outlets argued, according to Reuters.

The newspapers' requests were joined by requests from broadcasters. News outlets, including Court TV and CNN, had argued for cameras in the proceedings. Both the prosecution and defense, as well as Scott Peterson's family and Laci Peterson's family, opposed televising the proceedings. They cited concerns over the emotional impact on family members, as well as the fear that the presence of cameras would affect the conduct of the proceedings.

In arguing against allowing broadcast media in the courtroom, Peterson's attorneys stated that closing the preliminary hearing would help prevent prejudice against Peterson, CNN.com reported. They added that opening the hearing would defeat the purpose of a gag order the court imposed earlier to calm the widespread media attention paid to the case. CNN's report is available online at http://www.cnn.com/2003/LAW/08/11/Peterson.exarn/index.html.

─Doug Peters
Silha Fellow
Courts Rule in Access to Documents Cases

United States v. Reynolds

Recently declassified government documents were at the heart of a request to reopen a 1953 U.S. Supreme Court case involving the crash of an Air Force plane that killed nine people, four of them civilians. The families of three of the deceased men petitioned the high court for a writ of coram nobis, that is, to correct a judgment it made that was later found to turn on an error of fact. That case is United States v. Reynolds, 345 U.S. 1 (1953). Because the case was decided during the Cold War, legal scholars cite it as setting the precedent that gives the executive branch the power to withhold information from the judiciary when national security could be compromised. The case was invoked in arguments in both the Pentagon Papers and Watergate trials.

In 1948, Albert Palya, William H. Brauner and Robert Reynolds were civilian engineers working with the Air Force to develop secret navigation equipment. On October 6, they joined an Air Force flight crew in a B-29 bomber, flying from Robbins Air Force Base in Georgia to Orlando, Fla., to test the new equipment. However, on the return leg of the flight, the plane crashed in Waycross, Ga., and the three civilians were killed along with six others onboard the plane.

The widows of the three men filed suit under the Federal Tort Claims Act (FTCA). Passed in 1946, the law allows citizens to sue the government for harm caused by its negligence or misconduct. Their attorney was Charles Biddle, who had himself been a fighter pilot during World War I. According to The Washington Post, Biddle was familiar with B-29s and knew they were prone to accidents. In 1950, as part of his preparations for the trial, Biddle requested the Air Force's report of the investigation of the 1948 accident. His request was denied.

Biddle then went to Federal District Judge William Kirkpatrick of the Eastern District of Pennsylvania and informed him that the government had refused his request. Kirkpatrick ordered the government to produce the report. Thomas Finletter, then secretary of the Air Force, responded with a letter stating that it would not be in the “public interest” to do so.

Kirkpatrick scheduled a hearing so that the government could justify its position. At the hearing, a sworn statement from Maj. Gen. Reginald Harmon, the judge advocate general of the Air Force, was presented to the court. Harmon argued that the information contained in the Air Force’s report on the 1948 accident would harm national security. Kirkpatrick decided to review the report himself in camera, but the Air Force would not agree to the arrangement. Kirkpatrick responded by simply entering judgment for the widows on their negligence claims.

The government appealed Kirkpatrick’s ruling to the U.S. Supreme Court, arguing that it could withhold documents on the basis of “public interest.” On March 9, 1953, the Supreme Court agreed in a 6-3 decision, and precedent was set.

Meanwhile, the widows’ suit was remanded and they received smaller financial settlements than they originally sought. “The women went on with their lives.

Nearly 50 years passed.

During the 1990s, the Air Force declassified its airplane accident reports spanning the years from 1918 to 1952. Michael Stowe, a man with a fascination for old airplane crashes, obtained the reports and began offering copies of them for sale on the Internet at http://www.Accident-Report.com/. Judith Loether, Palya’s now-grown daughter, discovered the Web site and ordered a copy of the report concerning the crash.

The report revealed that just prior to the crash that killed her father, the first of four engines caught fire. Rather than slowing the propellers to the first engine, Capt. Ralph R. Irwin, the plane’s pilot, slowed the propellers to the fourth. Then, in another effort to avert disaster, he mistakenly shut off the fuel to the second engine when he should have done so with the first.

Additional findings disclosed that technical orders intended to correct problems with the plane’s rivets had not been implemented, making the plane unsafe for flying; that a collector ring on the first engine had failed; and that neither the flight crew nor the civilians onboard had been properly briefed in safety measures prior to takeoff. Nothing in the report mentioned the secret navigation equipment that had been the focus of the mission.

Family members of the deceased civilians returned to Drinker Biddle & Reath LLP, the law firm that handled their 1950 case, seeking to petition the Supreme Court for a writ of error coram nobis on the basis of these newly-discovered facts, and accusing the Air Force of fraud. In its brief to the high court, attorneys wrote, “United States v. Reynolds stands exposed as a classic ‘fraud on the court,’ one that is most remarkable because it succeeded in tainting a decision of our nation’s highest tribunal. The fraud is clearly established by the Air Force’s recently declassified materials.”

The brief claims that the Air Force wanted to keep the real causes behind the 1948 crash secret because it was a recently-established branch of the military services and also because the safety of the B-29 bomber was coming under question. To further complicate matters, the United States stood at the brink of the Cold War. But the Air Force’s disclosure of the truth concerning the accident, the brief continues, “could not and would not have threatened any facet of secret military research, let alone our national security.”

Attorneys for the family members asked the Supreme Court to vacate its 1953 decision and decide the case anew with the facts contained in the declassified documents. On the basis of the anticipated new decision, the attorneys also requested that their clients be compensated as provided by the Federal Tort Claims Act.

However, on June 23, 2003, the Supreme Court refused to hear the case without comment.

Secrecy News reported on the Supreme Court’s decision not to rehear the case, characterizing the legal status of U.S. v. Reynolds as “unaffected,” adding, “But for some attentive members of the public, the fifty-year-old decision now carries an asterisk, a taint of suspected fraud.”

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR
"The government shouldn’t be able to justify secret arrests simply by invoking the words ‘national security.’"

—Jamie Fellner
Human Rights Watch

**Courts Rule in Access to Documents Cases**

*Center for National Security Studies v. Department of Justice*

A divided federal Court of Appeals (D.C. Cir.) panel ruled this summer that exemptions to the federal Freedom of Information Act (FOIA) allow the government to withhold the names of detainees taken into custody following the September 11, 2001 terrorist attacks.

The ruling in *Center for National Security Studies v. Department of Justice*, 331 F.3d 918 (D.C. Cir. 2003), raised concerns among some human-rights and civil-liberties groups that the government may avoid disclosing public information simply by invoking national security grounds, regardless of whether those grounds are legitimate.

The case began in late October 2001, when a coalition of public-interest groups led by the Center for National Security Studies filed a FOIA request with the U.S. Department of Justice seeking records regarding more than 700 people taken into government custody following the attacks.

The vast majority of those in custody faced deportation for immigration violations. Some, like Zacarias Moussaoui, were criminally charged. At least a handful of others were held as material witnesses to the terrorist attacks. At the time the request was filed, nearly two months after the unprecedented roundup began, the federal government had not released the names of those it was holding. The government’s subsequent denial of the FOIA request prompted the litigation in U.S. District Court for the District of Columbia. The district court ordered the government to disclose the names of individuals detained in the days and weeks following the Sept. 11, 2001, attacks. (See “Center for National Security Studies v. U.S. Department of Justice” in the Fall 2002 Silha *Bulletin*.)

The D.C. Circuit reversed the district court ruling, allowing the government to withhold detainees’ names. The panel majority held that FOIA exemptions allow the government to withhold the names of detainees and their attorneys, as well as other information that could identify the detainees. Judge David Sentelle, joined by Judge Karen Henderson, wrote that where issues of national security are concerned, courts should defer to the executive branch when considering whether to allow the government to withhold information.

Judge Tatel dissented, writing that the court’s willingness to defer to the government “eviscerates both FOIA itself and the principles of openness in government that FOIA embodies.” He asserted that the approach taken by his colleagues risked eliminating judicial review of any executive decisions to withhold information on national security grounds. Such a stance, he argued, endangers the public’s ability to keep tabs on its government. In this particular case, Tatel wrote, there was a strong public interest in knowing whether the government was violating the Constitutional rights of the hundreds of detainees whose identifying information was withheld.

Tatel’s concerns have been echoed by human-rights and civil-liberties organizations, which have criticized the decision. In a release by Human Rights Watch on the day the court announced its decision, the organization’s U.S. program director, Jamie Fellner, said the decision gave the government a potential end-run around the requirements of FOIA.

“The government,” Fellner said, “shouldn’t be able to justify secret arrests simply by invoking the words ‘national security.’”

Human Rights Watch’s release on the decision is available online at: http://www.hrw.org/press/2003/06/us061703.htm.

At issue in the case were exemptions in FOIA that allow the government to withhold law enforcement records for selected purposes. In seeking to withhold the information, the government invoked four separate FOIA exemptions. The court, however, based its decision on only Exemption 7(A), which states that the government may withhold records if disclosure could “reasonably be expected to interfere” with law enforcement investigations.

The government contended, and the court agreed, that identifying those individuals swept up by government investigators in the weeks and months after the terrorist attacks could provide terrorists with a roadmap to the government’s investigation. Providing further information sought by the plaintiffs, including date and location of arrest, could offer even more insight into how the government had organized and orchestrated its investigation, which in turn could allow terrorist organizations to adjust their methods and avoid detection, the government argued.

Attorney General John Ashcroft issued a statement calling the ruling “a victory for the Justice Department’s careful measures to safeguard sensitive information about our terrorism investigations . . . .”

“We are pleased the court agreed we should not give terrorists a virtual roadmap to our investigation that could allow terrorists to chart a potentially deadly detour around our efforts,” Ashcroft said.

Ashcroft’s statement can be found online at http://www.usdoj.gov/opa/pr/2003/June/03_ag_358.htm

The groups seeking the information contended that they had a common-law right of access to government records. The court panel agreed with earlier Supreme Court precedent that such a right exists, but held that in this case, any common law right was superseded by FOIA. The court also rejected the plaintiffs’ argument that they had a First Amendment right to the information. The First Amendment, the panel stated, prevents the government from curtailing speech, but “does not expressly address the right of the public to receive information. Indeed, in contrast to FOIA’s statutory presumption of disclosure, the First Amendment does not mandate a right of access to government information or sources of information within the government’s control.” (Internal quotation marks and citation omitted.)

—DOUG PETERS
Silha Fellow
Courts Rule in Access to Documents Cases

Universal City Studios, Inc. v. Superior Court of Los Angeles County

A California appeals court ruled in late June that sealing documents in civil lawsuits “requires more than a mere agreement of the parties.” The decision in *Universal City Studios, Inc. v. Superior Court of Los Angeles County*, 2 Cal.Rptr.3d 484 (Cal. App. 2d Dist. 2003), involved disclosure of the terms of a settlement agreement between two movie companies, Universal City Studios and Unity Pictures Corp., in litigation brought by Unity Pictures to rescind an allegedly fraudulent clause in the settlement.

Under California law, substantive courtroom proceedings may not be closed and transcripts may not be sealed unless the court finds that an overriding interest exists supporting closure and/or sealing, and that failing to close the proceedings or seal documents would create a substantial likelihood of prejudice against the party claiming the interest. The court must also find that the closure or sealing directly serves the interest of the party seeking to seal the records, and that it could not protect the claimed interest while keeping the court proceedings open. (See “U.S. Court Rulings Affecting Access to Information: South Carolina District Court Bans Secret Settlements” in the Fall 2002 issue of the Silha Bulletin.)

In an opinion written by Presiding Judge Paul Turner, the court held that Universal’s interest in keeping the settlement terms secret did not outweigh the public interest in having court proceedings open. In the absence of such an overriding interest, the court said, contractual language calling for secrecy was not enough to compel sealing of court documents.

—DOUG PETERS
SILHA FELLOW

Transcripts Unsealed in Terrorist Case

I In early June 2003, New Jersey Superior Court Judge Marilyn Clark agreed to unseal previously secret transcripts of bail hearings for Mohammed El-Atriss, who admittedly provided fake ID cards to two of the 19 hijackers involved in the Sept. 11, 2001 terrorist attacks.

At the first of the hearings, held Nov. 19, 2002, testimony against el-Atriss was compelling enough to convince Clark to double the 46-year-old’s bail from $250,000 to $500,000, according to a June 25, 2003, report in *The New York Times*.

Clark’s decision was in response to a motion by media companies to unseal the transcripts. The documents were released later in June, according to the *New York Times* report. *The New York Times* further reported that the transcripts contained testimony from Passaic County investigators indicating that a business partner of El-Atriss had been investigated by the FBI for links to terrorism and that El-Atriss might have had contact with two more September 11 hijackers, in addition to the two to whom he provided ID cards.

El-Atriss held a press conference to deny all of the charges and to threaten a lawsuit against the Passaic County for mistreatment he allegedly suffered during his six-month confinement, according to the *New York Times* report. Federal authorities also downplayed the importance of the testimony contained in the transcripts, saying that El-Atriss was not considered a threat to national security.

El-Atriss accepted a plea deal in February in which he pleaded guilty to one state count of selling simulated documents. He was sentenced to five years’ probation and a $15,000 fine.

Initially, El-Atriss’ attorney stated that releasing the transcripts could jeopardize national security but dropped their argument when no government agency opposed disclosure, according to a report by the Reporters Committee for Freedom of the Press (RCFP). Defense counsel then argued that releasing the transcripts could ruin El-Atriss’ reputation by publicizing that what El-Atriss had stated was erroneous testimony, wrongly associating him with terrorism. The RCFP report is available online at http://www.rcfp.org/news/2003/0613inrere.html.

—DOUG PETERS
SILHA FELLOW
The court was not persuaded by the Regents' argument that the law does not apply to their efforts to hire a new president.

Court Rules in Access to Meeting Case

*Star Tribune Co. v. University of Minnesota Board of Regents*

The Minnesota Court of Appeals ruled that the Board of Regents of the University of Minnesota violated the Minnesota Open Meeting Law (OML) and the Minnesota Government Data Practices Act (GDPA) when it secretely interviewed candidates to fill the post of university president. (See *Star Tribune Co. v. University of Minnesota Board of Regents*, 667 N.W.2d 447 (Minn. App. 2003).) The court of appeals affirmed a district court ruling that the Regents violated these laws and must disclose data on the candidates.

The Regents conducted closed meetings with selected candidates for the university presidency, citing the candidates' confidentiality concerns. The Minneapolis *Star Tribune*, the St. Paul *Pioneer Press*, the *Minnesota Daily* (the student newspaper at the university), as well as other media groups sought data on the unsuccessful candidates directly from the Board of Regents under the GDPA. The Regents refused to divulge the information. The media then sued and sought an order compelling disclosure. The media argued that the information must be disclosed under the GDPA, and that the Regents had violated the OML.

After losing at the district court level, the Regents, on appeal, again argued that the GDPA and the OML did not apply to their search for a university president. Finally, the Regents argued that the Minnesota Constitution precludes the application of both the GDPA and the OML to the university’s and the Regents' efforts to find a president. The Regents claimed that they could choose not to follow the GDPA and the OML because the university is independent and self-governing under the state constitution.

In an opinion by Judge James C. Harten, the court of appeals held that both the GDPA and OML apply to the procedures that the Regents employed to find a new university president and that the Minnesota Constitution does not exempt the university from complying with those laws.

The court found that the GDPA explicitly states that it applies to the university as a state agency. The court was not persuaded by the Regents' argument that although the GDPA applies to the university generally, it does not apply to Regents' efforts to hire a new president. The court found that the GDPA statute contains no language to that effect.

The court of appeals also held that the OML applies to the university as a public body and applies to the procedure used by the Regents to hire a news president. Although the OML includes exceptions, the statute provides no exceptions for Regents engaged in recruiting a new president.

Lastly, the court of appeals denied the Regents' argument that the university is exempted from following the GDPA and OML because the university is independent under the Minnesota Constitution. The court recognized that the Regents have a "constitutional mandate to control and manage the university." The GDPA and OML, however, impose only procedural restrictions on that control. The acts do not affect the substantive control and management the Regents exert on behalf of the university.

The court of appeals noted that many states have considered whether searches for public university presidents should be open, and that although decisions have been inconsistent, the trend is toward public presidential searches.

On August 27, the Minneapolis *Star Tribune* reported that the Regents will appeal the case to the Minnesota Supreme Court.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT

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In June, a divided Supreme Court upheld the constitutionality of a federal law that, in exchange for federal funding for Internet access, requires public libraries to install Internet filtering software to protect minors from pornography.

In United States v. American Library Association, Inc., 123 S.Ct. 2297 (2003), the Supreme Court held that Internet access at public libraries cannot be considered a traditional or designated public forum. Thus, the Court did not review the law under strict scrutiny, the highest standard of review for any law.

Strict scrutiny requires that the government be pursuing a compelling government interest through its action, and that the means employed by the government to effectuate its goal are necessary; that is, there is no less restrictive means that would accomplish the government’s goal with less burden on freedoms and liberties.

In 2000, Congress passed the Children’s Internet Protection Act (CIPA; particularly 20 USC § 9134 (f) and 47 USC § 254 (h)) to encourage public libraries, in exchange for federal funding for Internet access, to block Internet child pornography and other obscene images, and to prevent minors from using the libraries’ computers to gain access to visual depictions that would be harmful to them, such as pornography and violence (See “Developments in Internet Law: The Internet and Public Libraries” in the Summer 2002 issue of the Silha Bulletin.). The goal of the government – blocking child pornography and obscenity and protecting minors from harmful materials – is recognized as a compelling government interest.

The question the Supreme Court faced is whether the means chosen went too far. Strict application of CIPA results in some constitutionally-protected speech being filtered. An adult library patron attempting to access Internet sites that are filtered because they contain visual depictions harmful to minors would need to ask library staff to turn off the filters to view the blocked Web sites.

A group of libraries, library patrons, web site publishers, and related parties successfully challenged the constitutionality of the statute in 2002 in the federal court in the Eastern District of Pennsylvania. (American Library Ass’n, Inc. v. U.S., 201 F. Supp.2d 401 (E.D.Pa. 2002)) The group argued that the law violated the free speech guarantees of the First Amendment. Pursuant to CIPA, a special three-judge panel heard the case, and agreed that the law was unconstitutional.

The Supreme Court reversed that decision. The opinion of a four-Justice plurality – consisting of Chief Justice Rehnquist and Justices O’Connor, Scalia, and Thomas – was joined by Justices Kennedy and Breyer, who wrote separate concurring opinions. Accordingly, a majority of the high court held that “public libraries’ use of Internet filtering software does not violate their patrons’ First Amendment rights.” These six justices held that CIPA “does not induce libraries to violate the Constitution, and is a valid exercise of Congress’ spending power” and does not “impose an unconstitutional condition on public libraries.”

The four-justice plurality opined that Internet access in public libraries is neither a “traditional” nor a “designated” public forum requiring heightened constitutional protections.

Public forums are public property where people gather to express ideas and exchange views. A traditional public forum is one that has long been used by the public for assembly and expression. Examples of traditional public forums include streets, sidewalks, and parks. A designated public forum is one that has not been traditionally used for public assembly and debate, but the government has opened for use by the public as a place for expressive activity. Examples of designated public forums might include public university facilities used by student groups or a theater in a public museum. Any government restriction based on the content of the speech in either a traditional or designated public forum must satisfy strict scrutiny.

The Supreme Court found that Internet access at a public library is neither a traditional public forum, nor is it a designated public forum. Such access is not a traditional public forum because of its novelty. It is not a designated public forum because the government has not made an affirmative choice that Internet access at public libraries constitutes a public forum.

The plurality cited Arkansas Educational Television Comm’n v. Forbes, where the Supreme Court, in 1998, held that public forum principles do not generally apply to public television stations’ editorial judgments regarding what private speech they present to viewers. (523 U.S. 666 (1998)) The Court in Forbes held that broad rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations.” Allowing broad rights of access for outside speakers “would risk implicating the courts in judgments that should be left to the exercise of journalistic discretion.”

The plurality found Internet access in public libraries to be analogous to the public television circumstances in Forbes. The plurality reasoned that libraries have broad discretion to make content-based judgments, such as excluding pornography, in deciding what free speech is available to the
Courts Rule in Internet Cases
Minneapolis Librarians Reach Settlement

In August 2003, the City of Minneapolis settled a lawsuit brought by a dozen of its public librarians who alleged that workplace exposure to Internet pornography made the city's downtown library a hostile workplace. Since 1997, when the library began offering computers with Internet access to its patrons, the computers allegedly became a "magnet" for users who sought images "displaying virtually every kind of human sexual conduct," according to the suit which was filed in federal district court in Minneapolis on March 24, 2003, in an effort to stop patrons from viewing explicit Web sites in an area where the librarians, as well as the public, would be exposed to the images. At times, librarians who asked the computer users to refrain from viewing obscene sites were met with threats, according to the Minneapolis Star Tribune.

Although one of the librarians complained to then-library director Mary Lawson, staffers believed she did not take their complaints seriously, the Star Tribune reported, prompting a group of librarians to file suit against state and federal agencies. Several librarians then filed an Equal Employment Opportunity Commission Complaint, and in 2000, guidelines designed to curtail viewing of obscene sites were adopted by library officials. However, in 2003, twelve librarians filed suit against state and federal agencies for three years of suffering in Adamson v. Minneapolis Public Library, No. 03-2521.

At the encouragement of Judge Jonathan Lebedoff working with new library director Kit Hadly, a settlement of $435,000 was awarded to the librarians. Even though a majority of the trustees of the Minneapolis public library oppose the installation of filtering software, as a condition of settlement, library officials will consider installing Internet filters, as well as making changes in policies regarding the printing of Internet materials and penalties for library patrons who access pornography on city library computers. Penalties may include banning individuals from city libraries for up to a year; viewers of child pornography could lose library privileges permanently. Under current policy, patrons who view obscene sites could have their privileges suspended for 90 days.

In a joint statement, the plaintiff librarians said, "We believe the financial settlement in this case sends a strong message to libraries around the country." The plaintiffs cited the stance of the American Library Association favoring open access to information at libraries as contributing to the delay in resolving the dispute. (See "Librarians File EEOC Complaint in Minneapolis" in the Winter 2001 issue of the Silha Bulletin.)

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT
—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR

U.S. v. ALA, continued from page 9

Justice Kennedy wrote in his concurring opinion that because library patrons can simply ask library staff to unblock web sites when constitutionally-protected Internet material is being filtered, "there is little to this case." The government's compelling interest outweighs such a minor burden on free speech, Kennedy reasoned.

Justice Breyer agreed. In his concurring opinion, Justice Breyer reasoned that "the comparatively small burden" that CIPA imposes was constitutional. Breyer agreed with the plurality that the public forum doctrine is inapplicable to the case, that strict scrutiny does not apply, and that the statutory provisions of CIPA are constitutional, but arrived at these conclusions differently than the plurality, applying a form of higher scrutiny than the plurality did, but still not going so far as applying strict scrutiny.

Justice Stevens, in a dissenting opinion, argued that CIPA is unconstitutional as it is too broad and results in a large amount of valuable, constitutionally-protected material being filtered: "Rather than allowing local decisionmakers to tailor their responses to local problems, the Children's Internet Protection Act operates as a blunt nationwide restraint."

In a separate dissenting opinion, Justice Souter, joined by Justice Ginsburg, wrote, "There is no good reason . . . to treat blocking of adult enquiry as anything different from the censorship it presumptively is." These justices argued that conventional strict scrutiny applied to CIPA and that the law is unconstitutional.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT
Courts Rule in Internet Cases

*A.A. v. New Jersey*

U.S. Circuit Judge Dolores K. Sloviter ruled that there is a compelling state interest in posting the address of convicted sex offenders on the Internet, overriding their privacy interest. The case, *A.A. v. New Jersey*, U.S. App. 16853 (2003), considered Megan's Law, a statute that requires the address and other information about sex offenders to be released to the community in which they live. Sloviter cited an earlier case, *Paul P. v. Farmer*, 227 F.3d 98 (3rd Cir. 2000), quoting, "Megan's Law's fundamental purpose... is public disclosure." (Emphasis in the original.)

New Jersey was the first state in the country to adopt Megan's Law, named after Megan Kanka, a 7-year-old girl who was abducted in New Jersey in 1994. She was raped, then murdered by a neighbor who was a convicted sex offender. Following the passage of Megan's Law, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act. That act gives states federal funds on the condition that each state adopt its own law designed after New Jersey's Megan's Law.

*A.A. v. New Jersey* began in the U.S. District Court in New Jersey, where Judge Joseph Irenas ruled in December 2001 that Megan's Law did not constitute further punishment for sex offender crimes, and therefore did not violate their rights under the Constitution's Ex Post Facto and Double Jeopardy clauses. However, Irenas found that the convicted offenders' argument that disclosure of their home addresses violated their right to privacy had merit. (See *A.A. v. New Jersey*, 176 F. Supp. 2d 274 (2001)). Both sides appealed to the Third Circuit, but the case was placed on hold while another case, *Smith v. Doe*, was before the U.S. Supreme Court. The high court eventually ruled that posting certain information on the Internet, including certain personal information such as name, age, and personal description, did not constitute a punitive measure. (See *Smith v. Doe*, 123 S. Ct. 1140 (2003); see also, "Sex Offender Registration Ruled Not Punitive," in the Winter 2003 issue of the SILHA Bulletin.) Sloviter cited *Smith v. Doe*, writing, "The purpose and principal effect of notification are to inform the public for its own safety, not to humiliate the offender."

Sloviter wrote that Megan's Law was designed to provide information about convicted sex offenders to a community. But in addition, information such as an individual's address is important to everyone in a mobile society. "The Registrants' argument ignores both the need to access information in a mobile society and the difference between the system of notification at issue here..." Sloviter added that unless addresses of convicted sex offenders were available on the Internet, parents might find themselves the owners of a new house just down the street from an offender. "Indeed," she wrote, "discovering this information after the fact undermines the stated goal of New Jersey, which is to enable parents to prevent or avoid placing potential victims at risk."

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR

Internet Updates

**Internet Stalking Bill Approved in Ohio**

The Ohio Senate approved a bill that would ban cyber-stalking, according to the Dayton Daily News. Cyber-stalking, or Internet stalking, is defined as continual harassment of an individual via online services, such as e-mail. More than 40 states have already enacted similar legislation. Under Ohio's new legislation, cyber-stalking is punishable by sentences ranging from 180 days in jail and a $1,000 fine to 6 to 18 months in jail with a fine up to $5,000, depending on the specifics of each case.

The Electronic Privacy Information Center (EPIC), a civil rights organization, has expressed concern over the increase in statutes similar to Ohio's. According to the Associated Press, David Sobel, an attorney for EPIC, sees potential for unnecessary legal battles as states adopt similar laws. "People get very agitated in an online discussion, but I don't think any of us would like to see the government step into those situations and prosecute people for what might be very strong language."

**"Star Wars Kid" Sues Classmates**

Wired News reports that the family of Quebec teenager Ghyslian Raza, who has come to be known as the "Star Wars Kid," has sued the families of the four teenagers who stole, manipulated and published a video of himself in a mock light saber battle. Since the video hit the Internet, Raza has dropped out of school and is currently in a children's psychiatric ward where he will remain "for an indefinite amount of time" as a result of incessant teasing by his classmates. Raza and his family are seeking $160,000 in damages.

Raza has received much support online because of his ordeal, including a petition to include him in the next *Star Wars* movie. The petition has received over 80,000 signatures and is available online at http://www.petitiononline.com/Ghyslainpetition.html.

**Los Angeles Man Sentenced for Anarchist Web site**

U.S. District Judge Stephen Wilson in California's Central District rejected Sherman Austin's claim that his Web site listing links to bomb making sites was an effort to educate the public about police brutality, according to the Associated Press. Austin pleaded guilty to distributing information related to explosives in a plea bargain with prosecutors. Although the plea bargain recommended that Austin serve four months in jail, Judge Wilson sentenced Austin to a year in prison and a $2,000 fine. Austin accepted the plea bargain in the hopes of evading a terrorism enhancement charge that could have carried with it a 20-year sentence, according to the Associated Press.

—INGRID NUPTALL
SILHA RESEARCH ASSISTANT
Courts Rule in Internet Cases

United States v. Jarrett

The United States Court of Appeals (4th Cir.) ruled that an anonymous person who hacked into another individual’s computer and turned that individual into authorities for possessing child pornography did not act as an agent of the government. The case, United States v. Jarrett, 338 F.3d 339 (4th Cir. 2003), reversed a district court ruling that the anonymous person, identified by the Associated Press as a physician in Turkey who treated victims of child abuse, had acted as an agent of the government.

The Turkish physician, named “Unknownuser” in court documents, had posted an image on the Internet with a program attached known as Trojan Horse. When individuals downloaded the Unknownuser’s image to their computers, Trojan Horse would allow him to hack their computers. In July 2001, Unknownuser gained access to the computer of Dr. Bradley Steiger, where he found evidence of child pornography. He copied the files and sent them to United States law enforcement officials who were able to identify and apprehend Steiger. Steiger was subsequently convicted of sexual exploitation of minors and sentenced to 210 months in prison.

On Dec. 3, 2001, Unknownuser e-mailed Kevin Murphy of the Montgomery, Ala. police department, saying that he had found “another child molester” identified as William Jarrett and asking how to contact the FBI. The following day, Unknownuser sent Murphy files he had downloaded from Jarrett’s computer. The FBI initiated an investigation, and Jarrett was eventually charged with one count of manufacturing child pornography and seven counts of receiving child pornography. Jarrett moved to suppress the evidence against him claiming it had been gathered in violation of his Fourth Amendment rights. His motion was denied.

But after Jarrett entered a guilty plea, the government revealed that there had been e-mail correspondence between Unknownuser and FBI agent Margaret Faulkner. In a Dec. 19, 2001 e-mail, Faulkner thanked Unknownuser for his help in apprehending Jarrett. In what the appeals court characterized as a “wink and a nod,” Faulkner continued, “[A]s long as you are not ‘hacking’ at our request, we can take the pictures (found on alleged child pornographers’ computers) and identify the men and take them to court. We also have no desire to charge you with hacking. You are not a US citizen and are not bound by our laws.” In a later e-mail Faulkner wrote, “You have not hacked into any computer at the request of the FBI or other law enforcement agency. You have not acted as an agent for the FBI or other law enforcement agency. Therefore, the information you have collected can be used in our criminal trials.”

On the basis of this new information, Jarrett asked the court to reconsider his earlier motion to suppress the evidence against him. The district court granted his motion, and allowed him to withdraw his guilty plea, finding that law enforcement agencies and Unknownuser has “expressed their consent to an agency relationship.” At this point, the government appealed the case to the federal appeals court.

Circuit Judge Diana Gribbon Motz wrote the unanimous opinion for the three-judge panel. To decide the case, she applied a three-part test. First, she wrote that courts “should look to the facts and circumstances of each case in determining whether a private search is in fact a Government search.” She placed the burden of proof on the defendant to show that “the Government knew of and acquiesced in the private search and the private individual intended to assist law enforcement authorities.” And finally, Motz wrote that there must be “evidence of Government participation in or affirmative encouragement of the private search before a court will hold it unconstitutional. Passive acceptance by the Government is not enough.”

Based on the three-part test she set forth, Motz found that Unknownuser had acted as an individual, rather than an agent for the government, because the correspondence between Unknownuser and Faulkner had occurred after Unknownuser had gained access to Jarrett’s computer. Because Unknownuser had not contacted authorities for seven months between his information concerning the Steiger and Jarrett cases, Motz ruled that his communication with U.S. law enforcement did not constitute an “ongoing” relationship. She continued, “[N]othing indicates that the Government had any intention of reestablishing contact with him. ... Although the Government’s behavior in this case is disconcerting, the Government was under no special obligation to affirmatively discourage Unknownuser from hacking.”

At the time the Bulletin went to press, no word had been given as to whether Jarrett would appeal the ruling of the appeals court.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR
Courts Rule in Internet Cases

Putnam Pit v. City of Cookeville

On August 20, 2003, Sixth Circuit Court of Appeals Judge Guy Cole, Jr. ruled in Putnam Pit v. City of Cookeville, No. 01-6599 (2003) that Geoffrey Davidian’s First Amendment rights have not been violated by the City of Cookeville, affirming the earlier judgment of a federal district court jury.

Davidian had become fascinated by the city of Cookeville when he learned that one of its citizens, Darlene Eldridge, had been murdered. The crime had never been solved. He traveled to Cookeville to explore the story of the murder in what he referred to as a “journalistic enterprise.” A few days after arriving in town, he was stopped for speeding. While being prosecuted for the speeding ticket, Davidian asked that city officials allow him access to city records in an attempt to investigate the murder. Davidian’s requests were denied. In May 1996, Davidian began to publish and edit a small tabloid he named The Putnam Pit that focused on alleged government corruption in Cookeville. In December 1996, Davidian quit publishing his newspaper in hard copy, and posted it to the Internet instead.

The city of Cookeville also had its own Web site. Between 1997 and 2001, the site had a “local links” page. On Oct. 15, 1997, Davidian sent Steve Corder, who was in charge of developing and maintaining the city’s Web site, an e-mail requesting that the city post a link to The Putnam Pit. Corder never responded to Davidian’s request, but forwarded his e-mail to other city officials. Those officials also did not respond to Davidian’s request.

A few days later, Davidian wrote another e-mail to City Manager Jim Shipley requesting a link from the city’s Web page to The Putnam Pit. Although the city had not previously implemented a policy regarding links from its Web site, Shipley promulgated a standard limiting links to not-for-profit corporations. At the time, The Putnam Pit was a for-profit Tennessee corporation.

Following this decision, Shipley wrote Davidian, saying, “I do not feel the City should be allowing any links to private businesses. . . . Therefore, I must decline your request to be linked.”

Davidian, who does not reside in Tennessee, informed Shipley that he would then change The Putnam Pit into a not-for-profit corporation in order to meet the requirements. Shipley told Davidian that Cookeville would still not provide a link. Shortly thereafter, Shipley changed the standard for links to the city’s Web page, saying that linked pages must “promote the economic welfare, industry, commerce, and tourism in the local area to be linked to the web site.” This change in standard further meant that links were no longer limited to not-for-profit corporations.

Davidian responded by adding a page to The Putnam Pit entitled “Commerce and Tourism, Cookeville, Tennessee,” and once more requested the city provide a link to his page. City officials again denied his request, saying that the only thing Davidian had on his page that promoted commerce and tourism was its headline. In 1997, Davidian filed suit against the Shipley in his role as Cookeville’s City Manager in state court, alleging that the city violated his civil rights under both state and federal law.

Attorneys for Cookeville had asked that the suit be removed to the federal district court for the Middle District of Tennessee. By the time the case came to trial at that court, Cookeville had abandoned its “local links” page. A jury was asked to determine whether The Putnam Pit met the city’s eligibility requirement by promoting Cookeville’s economic welfare, commerce and tourism. The jury determined that The Putnam Pit did not, and the city’s motion for summary judgment was granted on the federal claims, while the state claims were dismissed.

Davidian appealed the decision to the Court of Appeals (6th Cir.). In an opinion issued July 2000, Cole, writing for a unanimous three-judge panel, applied a two-part analysis to determine whether Cookeville’s Web site fit a designated or a nonpublic forum. First, we look to whether the government has made the property generally available” and secondly, “whether the exclusion of certain expressive conduct is properly designed to limit the speech activity occurring in the forum” and that the restrictions to speech fit within the parameters of the forum’s purpose.

The city may establish eligibility requirements for linking sites to its web page. Cole wrote, and Davidian has no entitlement to a link from the city’s site. But despite that, the city cannot deny Davidian a link to The Putnam Pit based solely on the viewpoints he posted there. Cole ordered a new hearing at the trial level to review the city’s refusal to allow Davidian to link to its Web page.

The jury had to determine whether Davidian’s Putnam Pit was eligible for a link to Cookeville’s Web page based on the city’s requirement that only Web sites that promoted commerce, tourism, or industry of the Cookeville area could be linked, and if so, whether the denial of the link to The Putnam Pit constituted viewpoint discrimination. In 2001, the jury decided that Davidian’s publication did not fulfill Cookeville’s requirement, canceling out the need to consider the second question.

Davidian appealed the new ruling of the district court on two facial challenges, claiming that the standards for “local links” on the Web site for the city of Cookeville, Tenn., should be void due to vagueness under the Due Process Clause of the Fourteenth Amendment and were also unconstitutionally overbroad under the First Amendment. The Silha Center joined an amicus brief supporting petitioner. In 2003, Cole, writing his second ruling on the case, for a different three-judge panel, stated that because these points had not been raised when the case was before the lower court, they cannot be raised now.

Cole’s unpublished opinion, meaning that it cannot be cited as precedent, is binding only on the parties involved in this case.

The Putnam Pit is available online at http://www.putnampit.com.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR
Courts Rule in E-Mail Cases

Batzel v. Smith

The U.S. Court of Appeals (9th Cir.) in June ruled that a provision in the Communications Decency Act of 1996 (CDA) may shield moderators of Internet listservs and operators of websites from liability for disseminating defamatory postings created by others. (See Batzel v. Smith, 333 F.3d 1018 (9th Cir. 2003)).

The high-tech case had decidedly low-tech beginnings. According to court documents, in the summer of 1999, a Los Angeles area handyman named Robert Smith claimed that Batzel, an attorney, allegedly boasted of being the granddaughter of "one of Adolf Hitler's right-hand men." Smith said he later overheard Batzel telling another person that she was related to Heinrich Himmler, and that Batzel had told him she had inherited her large collection of paintings from relatives.

Smith, wondering whether Batzel's collection could have included pieces acquired through Nazi plunder, sent an e-mail to the Web site of the Netherlands-based Museum Security Network, which he had found through an Internet search engine. Smith's e-mail described Batzel's alleged characterizations of her Nazi ancestry and the provenance of her art collection. The message continued:

"I believe these paintings were looted during WWII and are the rightful legacy of the Jewish people... I do not know who to contact about this, so I start with your organization."

Ton Cremers, the operator of the Web site and the then-Director of Security at Amsterdam's renowned Rijksmuseum, received the message and decided to include it in a periodic compilation of messages and news regarding stolen art that he then mailed out to the site's listserv subscribers.

When Batzel learned of the mailing, she sued both Smith and Cremers for defamation in the United States District Court for the Central District of California. Batzel claimed that the information was false and that she had lost clients as a result of its publication. She further claimed that she was subjected to a bar association investigation and that her social reputation had suffered.

The district court ruled that "provider or user of an interactive computer service" refers only to Internet service providers. Section 230(f)(2) of the CDA defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server..." The district court ruling meant that Cremers, as the operator of a Web site -- and not an Internet service provider -- was not protected by the CDA.

A three-judge panel of the appeals court, in an opinion by Judge Marsha Berzon, held that although publication of Smith's e-mail in a non-electronic form could have given rise to liability, Cremers' publication of the e-mail via the Internet was shielded by § 230(c)(1) of the CDA. That section provides that "[i]n no provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."

Judge Ronald Gould filed an opinion concurring in part and dissenting in part.

The appeals court held that § 230(c)(1) extends to providers of services such as e-mail listservs. The court added that, even without recognizing listservs as interactive computer services, § 230(c)(1) would still control, because it protects both providers and users of interactive computer systems.

Statutory immunity is available only if the allegedly defamatory material was created or developed by someone other than the provider or user of the interactive computer service, the opinion noted. The court said that Cremers enjoyed such immunity because he had neither written the allegedly defamatory e-mail nor made significant editorial changes, and thus could not be considered the creator or developer.

Although such a determination normally would end discussions under § 230(c)(1) analysis, the court said, the facts of this case created additional wrinkles. Because Smith had said he did not intend for Cremers to publish his message and did not even know that the Museum Security Network operated a listserv, the court said it was unclear whether Smith could be considered an information "provider" under the statute. The trial court would have to determine whether, "under all the circumstances, a reasonable person in Cremers' position would conclude that the information was sent for Internet publication, or whether a triable issue of fact is presented on that issue."

Creating such a standard, the court said, would avoid creating a situation in which users and providers of Internet services could freely publish defamatory material that clearly was not intended for publication.

The issue of immunity under the CDA came to the appeals court before the case had been resolved by the district court. Cremers appealed the district court's decision to allow the case to go forward, despite Cremers' claim of immunity under a California statute barring lawsuits brought for the purpose of stifling free speech. (See Cal. Civ. Proc. Code § 425.16). Berzon and Judge William Canby, Jr. nullified the district court's ruling and remanded the issue, saying that the district court must consider whether Cremers' belief that Smith intended his message for publication was reasonable.

A finding that the belief was reasonable would immunize Cremers from liability under the CDA. A finding that Cremers should have known that Smith did not intend his message for publication, however, would allow Batzel's case to move forward.

Judge Gould dissented, saying the court had improperly extended the immunity that Congress had sought to establish in § 230(c)(1). Gould said that the reasonableness standard was unworkable, because it required Internet publishers to judge the subjective intent of those who sent information. An easier method -- and one more consistent with the intent of Congress -- would be to judge only the actions of the defendant, Gould wrote. In this case, the fact that Cremers actively selected Smith's message for publication was enough to eliminate the immunity provided by § 230(c)(1). The section was created, Gould wrote, to prevent the chilling effect on speech that would occur if service providers whose systems served as conduits for millions of messages each day were responsible for policing the content of each one.

—DOUG PETERS
SILHA FELLOW
On June 30, 2003, the Supreme Court of California reversed an appeals court decision that the tort of trespass to chattels—the concept of someone interfering with another's personal property—cannot be applied to a company's electronic communications when used by a former employee to send e-mail to individuals still working for that company.

*Intel v. Hamidi*, 30 Cal. 4th 1342 (2003), arose from actions taken by on Kourosh Kenneth Hamidi, who had worked for Intel as an engineer until 1995, when he was fired. Hamidi then created an organization called FACE-Intel (Former and Current Employees of Intel) and posted a Web site posting claims of Intel's alleged mistreatment of its employees. In addition, Hamidi sent six mass e-mails using Intel's electronic mail system, reaching as many as 35,000 employees with each mailing. The e-mails were critical of Intel, and of the company's business practices, and warned current employees that these practices could harm their careers, urging them to leave Intel and work elsewhere. Hamidi offered to remove from his mailing list any employee who asked him to, and complied with any requests he received.

Intel attempted to block Hamidi's mass mailings, but he used different sending computers to thwart the company's efforts. In 1998, Intel sued Hamidi and FACE-Intel, resulting in an injunction that prohibited Hamidi from e-mailing Intel employees. Hamidi appealed, and in 2001, Sacramento’s Third District Court of Appeal affirmed, saying that trespass to chattels—interference with someone's personal property—had occurred when Hamidi “disrupt[ed Intel's] business by using its property . . . .” Hamidi then petitioned the California Supreme Court for review.

Justice Kathryn Mickle Werdegar wrote the opinion for the majority, ruling that Hamidi did not cause any physical damage to any of Intel’s property. He had used his own computer to send his letters from his home, and therefore did not trespass on Intel’s property. Comparing e-mail to other electronic forms of communication, Werdegar wrote, “[T]he contents of a telephone communication may cause a variety of injuries and may be the basis for a variety of tort actions (e.g., defamation, intentional infliction of emotional distress, invasion of privacy), but the injuries are not to an interest in property, much less real property, and the appropriate tort is not trespass.” Electric signals, she wrote, should not be considered as “[T]iny messengers rushing through the hallways of Intel’s computers and bursting out of employees’ computers to read them Hamidi’s missives . . . .” Such fictions promise more confusion than clarity in the law.” Werdegar further wrote that Intel “must, but does not, demonstrate some measurable loss from the use of its computer system.”

As to Intel’s claim that the company suffered losses over the time employees spent deleting Hamidi’s e-mails, Werdegar stated that Intel could not assert a property interest against employees’ time because employees are not chattels in the legal sense of the term. “Whatever interest Intel may have in preventing its employees from receiving disruptive communications, it is not an interest in personal property, and trespass to chattels is not an action that will lie to protect it,” Werdegar wrote.

As for restricting the use of spam, Werdegar wrote that excluding undesired communications from one’s e-mail might “create substantial new costs, to e-mail and e-commerce users and to society generally, in lost ease and openness in communication and in lost network benefits.” In adopting a rule treating computer servers as real property for purposes of trespass law, “We would be acting rashly,” Werdegar stated.

In a dissenting opinion, Justice Richard Mosk wrote, “Intel correctly expects protection from an intruder who misuses its proprietary system, its nonpublic directories, and its supposedly controlled connection to the Internet to achieve [Hamidi’s] bulk mailing objectives—incidentally, without even having to pay postage.”

Mosk further cited *America Online, Inc. v. IMS*, 24 F. Supp.2d 548 (E.D. Va. 1998), where unwanted e-mails had forced America Online to devote technical resources and staff time to defend its system against the unwanted messages. “The company was not required to show that its computer system was overwhelmed or suffered a diminution in performance; mere use of the system by the defendant was sufficient to allow the plaintiff to prevail on the trespass to chattels claim.”

Asked by the *Los Angeles Times* if he plans to resume his mass e-mailings to Intel employees, Hamidi replied, “Absolutely. I am going to use the privilege to the max.”

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR
The ordinance required that the cross burning must have been done with intent to intimidate.

Courts Rule in Freedom of Speech Cases

*Virginia v. Black*

Eleven years after its landmark hate-speech decision in *R.A.V. v. St. Paul*, 112 S.Ct. 2538 (1992), the U.S. Supreme Court last spring upheld a Virginia law criminalizing the burning of crosses with the intent to intimidate. The case, *Virginia v. Black*, 123 S.Ct. 1536 (2003), was decided April 7, 2003, in a plurality opinion by Justice Sandra Day O’Connor.

The law in question, Va. Code Ann. § 18.2-423 (1996), states in part: “It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the property of another, a highway or other public place. . . . Any such burning of a cross shall be prima facie evidence of an intent to intimidate a person or group of persons.”

The plurality held that the First Amendment did not bar a law banning cross burning “with the intent of intimidating” others, because such intimidation constituted a threat. However, the court held that the statute’s *prima facie* evidence provision, as interpreted by jury instructions in one of the cases before the court, was unconstitutional. Because of that, the court overturned one conviction where the jury was instructed that the act of burning a cross, in and of itself, was prima facie evidence of an intent to intimidate. In another instance, where no such instruction was given, the court vacated the conviction and remanded for further inquiry as to intent to intimidate.

After the U.S. Supreme Court granted *certiorari*, the Virginia legislature enacted a new cross-burning statute without the prima facie evidence provision, but the new law did not repeal the old one, the Court noted.

A decade before Black, in 1992, the Supreme Court in *R.A.V.* had set the standard for hate-speech laws. In that case, the Court struck down a St. Paul, Minn., city ordinance that criminalized certain specific messages, including burning crosses and swastikas, when those messages were intended to stir up anger on the basis of “race, color, creed, religion or gender.” Because the ordinance only applied to messages focused on arousing anger based on one of those categories, the Court held that it constituted a content-based speech restriction in violation of the First Amendment.

The Virginia law reviewed in *Black*, however, was different in significant respects, the Court said. First, the ordinance banned only cross burning. Second, it made no distinctions about what person or group the message was intended to reach. Third, and most importantly, it required that the cross burning must have been done with intent to intimidate. Those distinctions allowed the justices to find that the law did not violate the Constitution because cross burning with the intent to intimidate constitutes a threat, speech that is not protected by the First Amendment. Also, because the law does not single out specific groups for protection, the justices did not see it as impermissibly content-based.

The first three sections of Justice O’Connor’s opinion were joined by Chief Justice Rehnquist and Justices Scalia, Stevens and Breyer. Justices Souter and Scalia issued opinions that concurred in part and dissented in part. Justice Thomas dissented, saying that the burning of a cross was not speech at all, but conduct that should receive no First Amendment protection.

—Doug Peters
Silha Fellow
Courts Rule in Freedom of Speech Cases

Nike v. Kasky

Nike will pay $1.5 million to the Fair Labor Association, a workers’ rights group, after settling a five-year-old case regarding the truth of the shoe company’s advertisements and statements regarding its overseas manufacturing plants. The case raised issues about the extent of protection the Constitution provides to political statements made as a part of commercial speech.

Under the Constitution, political speech is the most protected type of speech. Commercial speech, although protected by the Constitution, is entitled to far less protection. For example, false or misleading advertising is not protected speech, but false or misleading political speech is. In short, the government may regulate commercial speech far more than political speech.

Nike had created advertisements, written letters, and issued press statements to its customers, potential customers, and the public generally, defending its overseas practices. In 1998, Marc Kasky, a San Francisco labor activist, sued the company for false advertising, claiming that the company had lied to the public. Kasky alleged that Nike ran Third World sweatshops to produce its products and did not, as the company claimed, protect workers’ rights overseas. (See “Can Press Releases Be Considered Commercial Speech” in the Winter 2003 issue of the Silha Bulletin.)

Last year, the California Supreme Court ruled that Nike’s speech was commercial speech after applying a three-part analysis which looked to the speaker, the intended audience, and the content of the message. (See Kasky v. Nike, Inc., 45 P.3d 243 (Cal. 2002)) The court held that advancing an economic transaction was not a necessary condition for speech to be commercial. Justice Joyce Kennard, writing for the court, opined, “Our holding in no way prohibits any business enterprise from speaking out on issues of public importance or from vigorously defending its own labor practices. It means only that when a business ... makes factual representations about its own products or its own operations, it must speak truthfully.”

Nike sought review by the U.S. Supreme Court of the California high court’s decision. Over forty large media companies, including the Associated Press, The New York Times, The Washington Post, ABC, CBS, NBC, Time, and Newsweek – filed friend of the court briefs in support of Nike, claiming that First Amendment protections of free speech would be lessened should Nike be found liable. The Silha Center also filed an amicus brief in the case, available online at www.silha.umn.edu.

The U.S. Supreme Court granted certiorari and heard oral arguments, but ultimately declined to rule on the issues. In June, the high court ruled that it erred in granting review of the lawsuit, dismissing the case and sending it back to the California courts.

Justice John Paul Stevens, joined by Justices Ruth Ginsburg and David Souter, wrote that the California Supreme Court’s decision was not “final,” and that the truth or falsity of Nike’s statements had not been evaluated by the court. He reminded the parties, however, that the high court has long provided “broad protection for misstatements about public figures that are not animated by malice.”

Justices Stephen Breyer and Sandra Day O’Connor would have decided the merits of the case, writing that it was “highly probable” that the California law “disproportionately burdens speech” and was unconstitutional. Justice Anthony Kennedy also dissented from the Court’s decision to return the case to California without a substantive ruling.

The settlement of the case leaves undecided the limits of commercial speech that includes political statements.

In a statement released to the media regarding the settlement, Nike said, “The two parties mutually agreed that investments designed to strengthen workplace monitoring and factory worker programs are more desirable than prolonged litigation.” Patrick Coughlin, Kasky’s lawyer, said his client was “satisfied that the settlement reflects Nike’s commitment to positive change where factory workers are concerned.”

The Fair Labor Association, formed in 1999, includes 179 universities, human rights organizations, consumer groups and various companies.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT
**Courts Rule in Trademark Cases**


The U.S. Supreme Court unanimously ruled in March that a Kentucky sex shop once called “Victor’s Little Secret” did not infringe upon the trademark of lingerie retailer Victoria’s Secret, reversing an earlier ruling by the Sixth Circuit. See *Moseley v. V Secret Catalogue Inc.*, 537 U.S. 418 (2003).

Victor and Cathy Moseley named their Elizabethtown, Ky., retail store “Victor’s Secret” in 1998. In an advertisement for its grand opening, the store promoted “Intimate Lingerie for every woman;” “Romantic Lighting;” “Lycra Dresses;” “Pagers;” and “Adult Novelties/Gifts.” An individual who saw the ad believed that the store’s name used a well-known company’s trademark to sell “unwholesome, tawdry merchandise” and notified Victoria’s Secret of the existence of the Elizabethtown store. In response to a request from Victoria’s Secret that the owners refrain from using the similar-sounding name, the Moseleys then changed the store name to “Victor’s Little Secret.” Victoria’s Secret was not satisfied with the change, however, and filed a complaint with the federal District Court in Kentucky.

Victoria’s Secret made four claims, three of which alleged infringement and unfair competition. The district court ruled in favor of the petitioners on these counts, stating that there was no proof that “Victor’s Little Secret” diminished the value of the better-known trademark. But the Court argued that the Moseleys had violated the Federal Trademark Dilution Act (FTDA), a 1995 amendment to the Trademark Act of 1946 that describes which characteristics make a mark “distinctive and famous.” The FTDA defines “dilution” as “the lessening of the capacity of a famous mark to identify and distinguish goods or services,” and the court found that the two names were indeed similar enough to produce dilution. The court also found that the petitioners’ mark had a “tarnishing effect on the Victoria’s Secret mark.”

The U.S. Court of Appeals (6th Cir.) affirmed the ruling in *Victoria’s Secret Catalogue, Inc. v. Moseley*, 259 F. 3d 464 (6th Cir. 2001): “While no consumer is likely to go to the Moseleys’ store expecting to find Victoria’s Secret’s famed Miracle Bra, consumers who hear the name ‘Victor’s Little Secret’ are likely automatically to think of the more famous store and link it to the Moseleys’ adult-toy, gag gift, and lingerie shop. This, then, is a classic instance of dilution by tarnishing (associating the Victoria’s Secret name with sex toys and lewd coffee mugs) and by blurring (linking the chain with a single, unauthorized establishment).”

The Sixth Circuit’s ruling was at odds with a 1999 ruling by another federal appeals panel. *Ringling Bros. & Barnum & Bailey Combined Shows, Inc. v. Utah Div. of Travel Development*, 170 F. 3d 449 (4th Cir. 1999). In that decision, the Fourth Circuit stated that claims of dilution require proof of “actual harm.” The Supreme Court granted *certiorari* to settle the disagreement.

The rationale behind Justice John Paul Stevens’ majority opinion was based upon pertinent passages of the FTDA, which stated that “the owner of a famous mark” is within his rights to oppose another individual’s mark if it “causes dilution of the distinctive quality” of the famous name (Stevens’ emphasis). “This text unambiguously requires a showing of actual dilution, rather than a likelihood of dilution,” he wrote. “The mere fact that consumers mentally associate the junior user’s mark with a famous mark is not sufficient to establish actionable dilution,” he continued. “Such mental association will not necessarily reduce the capacity of the famous mark to identify and distinguish goods of its owner, the statutory requirement for dilution under the FTDA.”

Although Stevens maintained that a trademark owner does not have to go so far as to prove actual economic harm, a successful dilution claim must nevertheless prove that the damage is more concrete than a consumer simply making a mental link between the two names. “Blurring,” Stevens noted, “is not a necessary consequence of mental association.” The opinion suggested consumer surveys as one means by which actual dilution might be confirmed.

Relying on the definitions and explanations of dilution as outlined in the FTDA, the Supreme Court held that actual dilution—not just the likelihood of it—must be established. Stevens concluded, “There is a complete absence of evidence of any lessening of the capacity of the Victoria’s Secret mark to identify and distinguish foods or services sold” in its stores or catalogs. Since the Court found no evidence of dilution, it remanded the case to the original court, and Victoria’s Secret will have an opportunity to present additional data to support their claim.

*USA TODAY’s* Supreme Court reporter Joan Biskupic suggested that this opinion “raises the bar for companies claiming trademark dilution,” forcing companies to show “hard evidence” of dilution in the effectiveness of the trademark.

—Elizabeth Jones
Silha Research Assistant
Courts Rule in Trademark Cases


Rick Rush’s painting commemorating Tiger Woods’ first Masters victory at Augusta did not violate the athlete’s trademark rights under the Lanham Act, according to the U.S. Court of Appeals (6th Cir.). Two of the three judges on the panel issued their opinion in September 2003. The court further ruled that Woods’ right of publicity was not compromised by the creation and distribution of the painting. Woods’ ETW Corporation had filed suit against Jireh Publishing, Inc. for using the golfer’s image without permission in a painting featuring other professional golfers and the two caddies from his first Masters win, which Jireh reproduced and sold to the public.

Section 43(a) of the Lanham Act allows an individual to claim trademark infringement in the event that a third party’s use of the trademark, “is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person,” (15 U.S.C 1125(a)). Although Woods argued in his complaint that the unauthorized use of his image, of which he possesses a registered trademark, violated Section 43(a), the appeals court found that the fact the image was used in a painting constituted a form of free expression which is guaranteed under the First Amendment.

As to Woods’ right to publicity, the panel stated that the creative nature of the work precludes any claim of harm to this interest. Judge James L. Graham wrote, “Rush’s work has substantial informational and creative content which outweighs any adverse effect on ETW’s market and ... Rush’s work does not violate Woods’s [sic] right of publicity. We further find that Rush’s work is expression which is entitled to the full protection of the First Amendment and not the more limited protection afforded to commercial speech,” (See ETW Corporation v. Jireh Publishing, Inc., 332 F.3d 915(2003)).

Although Jireh sold copies of Rush’s painting – $700 for serigraphs and $100 for lithographs – the court found that Rush’s work itself did not suggest a commercial transaction. In order for commercial speech to be assigned, the suggestion of a commercial transaction must not only be present in the work, it must be the work’s purpose. The absence of such a suggestion in Rush’s painting meant that the creative nature of it was afforded full protection by the First Amendment. As Judge Graham wrote in the court’s opinion, “Rush’s prints are not commercial speech. They do not propose a commercial transaction. Accordingly, they are entitled to the full protection of the First Amendment. Thus, we are called upon to decide whether Woods’s [sic] intellectual property rights must yield to Rush’s First Amendment rights.”

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Humorist Sued for Trademark Infringement

The Associated Press reported that Fox News decided to drop its trademark infringement lawsuit on August 25 against author and humorist Al Franken following Southern District of New York Federal Judge Denny Chin’s decision not to grant an injunction against the book’s cover. Fox has originally filed suit against Franken claiming that Franken’s new book entitled, Lies and the Lying Liars who Tell Them: A Fair and Balanced Look at the Right, was an infringement on Fox News’ slogan, “Fair and Balanced.” Fox argued that some individuals might confuse Franken’s book as being a Fox product because of the slogan, according to the San-Diego Union Tribune. The Associated Press reported that Franken was “disappointed” by the decision because he had been, “hoping they’d (Fox) keep it going for a few more news cycles.”

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT
Courts Rule in Copyright Cases

Dastar v. Fox

The Supreme Court ruled this summer that the Lanham Act does not prevent the uncredited copying of an uncopyrighted work (see Dastar v. Fox, 123 S. Ct. 2041(2003)). In a unanimous decision delivered by Justice Antonin Scalia, the Court ruled that Dastar’s copying, editing and redistribution of tapes of a television documentary first aired in 1949 did not constitute an infringement under the Lanham Act. The Court’s rationale was based on the fact that Dastar was the originator of the actual materials it sold, and used tapes in the public domain to create its product. Fox’s copyright on the original materials had expired in 1977, placing the documentary in the public domain. Fox reacquired the television rights in 1988.

Fox owned the copyright to a 1949 broadcast documentary based on former President Dwight D. Eisenhower’s book Crusade in Europe. Dastar released its own video set using the tapes of the 1949 broadcast and sold it without crediting Fox as creator of the original documentary from which Dastar’s product had been created. The Court reversed and remanded the 9th Circuit’s earlier ruling, which had held Dastar liable for $1.6 million under Section 43(a) of the Lanham Act, which prohibits the commercial use of “any word, term, name, symbol, or device, or any combination,” without attributing any of the above to the original author (§43 (15 U.S.C. 1125)). The fact that the materials in question had passed into the public domain once the copying occurred weighed heavily in the decision. As the Intellectual Property and Litigation Reporter (IPLR) notes, “Once the copyright in a work expires, not only is the right to prevent copying lost, the author may also lose the right to get any credit at all for the work which it is copied and sold to others.”

Although the Court’s decision is significant regarding the extent to which the Lanham Act protects copyright holders, it is “entirely consistent with the intent espoused in (the Court’s) unanimous decisions of the recent past refusing to extend ‘trademark and related protections into areas traditionally occupied by patent or copyright,’” and is thus only concerned with Section 43(a) rather than with the Act in its entirety, IPLR added.

Delaware Law Weekly also concluded that the Court’s decision in Dastar is similar to that of Eldred v. Ashcroft. In that case, the Court upheld legislative amendments extending the copyright term for authors by an additional 20 years, thus increasing the amount of time before an author’s work enters the public domain (See Eldred v. Ashcroft, 123 S.Ct 1505 (2003); see also “Recent Developments in Copyright Law: Copyright Term Extension Upheld as Constitutional” in the Winter 2003 issue of the Silha Bulletin.) According to Delaware Law Weekly, “The court struck a balance in the cases: It deferred to legislation extending the time a work may be held out of the public domain, but granted substantial freedom to subsequent users of works already in the public domain because of the copyright’s expiration. In the end, that balance is consistent with traditional copyright analysis and long-standing precedent.”

Traditionally, the Supreme Court rarely takes cases involving copyright. When it does, it generally defers to Congress rather than to the Constitution. The Court’s opinion in Dastar v. Fox is not unusual in that the Court again referred to congressional determinations to guide its decision. However, this case could prompt copyright holders to pressure Congress to further extend how long works are kept out of the public realm.

--- INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Silha Fellows Speak at State High School Journalism Convention

Silha Fellows Doug Peters and Elaine Hargrove-Simon presented sessions at the 2003 Minnesota State High School Journalism Convention on Wednesday, September 24. Peters led a session entitled “The Basics of Press Law” that included topics such as defamation, access to public meetings and records, and First Amendment rights of the student press. Hargrove-Simon’s session, entitled “The Right to Know: Where and How to Get the Information You Need” covered Freedom of Information Act and open meeting laws. The convention took place in Coffman Union on the Twin Cities campus of the University of Minnesota.
Courts Rule in Reporter Privilege Case

Weinberger v. Maplewood Review

A Maplewood, Minn. newspaper reporter must divulge the names of anonymous sources used in a story about a fired high-school football coach, the Minnesota Supreme Court has ruled in a 5-2 decision. The case is Weinberger v. Maplewood Review, No. C7-01-2021 (Minn. Sept. 11, 2003).

The decision means that Wally Wakefield, a sports reporter for the Maplewood Review, must comply with an earlier district court order to turn over the identities of sources for 13 anonymous and allegedly defamatory statements made in a January 1997 article about former Tartan High School football coach Richard Weinberger or face a fine of $200 per day. Wakefield's article contained several anonymous statements critical of the coach's treatment of his players and describing circumstances that allegedly led to the district's decision to remove Weinberger as football coach.

The opinion is available online at: http://www.courts.state.mn.us/opinions/sc/current/OPC012021-0911.html.

Justice Alan Page's majority opinion focused on an exception to Minnesota's Free Flow of Information Act, Minn. Stat. § 595.021-.025. The statute sets out a broad protection for confidential sources but contains an exemption for defamation actions in some circumstances. Page found that the exemption applied to Weinberger's case, and four other justices agreed. Justices Helen Meyer and Paul Anderson dissented, saying that the First Amendment interest in preserving a vigorous press outweighed Weinberger's interest in obtaining the names of Wakefield's sources.

The struggle over the identification of the anonymous sources began in the summer of 2000, when Weinberger subpoenaed Wakefield in his defamation case against his former employer, Independent School District 622. When Wakefield refused to comply, the district court ordered him to name his sources. Wakefield appealed to the Minnesota Court of Appeals, which reversed the district court's order and remanded the issue for additional findings. On remand, the district court again ordered Wakefield to identify his sources, and the Court of Appeals once again reversed. The appeals court held that Wakefield could not be compelled to identify his sources if the primary motive for seeking disclosure was to turn the reporter into a witness against his sources. The appeals court also said that Weinberger had not produced evidence showing that the statements in question were false or made with "actual malice" -- that is, with the knowledge that they were false or with a reckless disregard for the truth or falsity of the statements. (See "Minnesota Shield Law Facing Test" in the Winter 2002 issue of the Silha Bulletin and "Reporters Subpoenaed, Detained: Wally Wakefield Subpoena Update" in the Summer 2002 issue of the Silha Bulletin.)

The key to the case is Minn. Stat. § 595.025, the defamation exception to the Free Flow of Information Act. Under the exception, a reporter can be required to identify sources in a defamation action if:

- "[T]he person seeking disclosure can demonstrate that the identity of the source will lead to relevant evidence on the issue of actual malice."
- The person seeking disclosure can show "that there is probable cause to believe that the source has information clearly relevant to the issue of defamation."
- And if "the information cannot be obtained by any alternative means or remedy less destructive of first amendment rights."

For the majority, Justice Page wrote that Weinberger had met all three requirements. On the first requirement, the majority held that "it is self-evident that the identity of the speaker will lead to relevant evidence on the issue of actual malice." The majority found this to be true even though all of the defendants in the case had already been deposed and each had denied being the source of the allegedly defamatory statements.

On the second requirement, the majority held that, if any of the defendants were sources of the allegedly defamatory statements, they would have information clearly relevant to Weinberger's claim.

Finally, the majority considered whether the information sought by Weinberger could be gained through any means "less destructive of first amendment rights." The majority agreed with the district court's analysis that because the sources and the reporter were the only people who knew who made the allegedly defamatory statements, and because the suspected sources already had denied making the statements, "the only other available means to secure that information is from the reporters."

In her dissent, Justice Meyer said the majority's ruling was inconsistent with a "straightforward application of First Amendment principles." Because the state's Free Flow of Information Act was intended to provide reporters with more protection than the First Amendment provides, it makes no sense that an exception to the act would provide less protection than provided by the Constitution, she wrote.

Meyer also noted that the U.S. Supreme Court's ruling in Branzburg v. Hayes, 408 U.S. 665 (1972), dealt only with disclosure of sources in the context of legitimate criminal investigations. The Court in Branzburg.
The majority seemed to “willfully avoid the key legal issues” involved in analyzing libel lawsuits.

—Mark Anfinson, Wakefield’s Attorney

Weinberger, continued from page 21

did not reach the question of whether reporters could be compelled to disclose sources in other contexts, Meyer wrote.

Meyer criticized the majority for failing to properly balance the interests at stake in the case. On one side of the scale, she said, was Weinberger’s interest in the identities of a newspaper reporter’s sources. On the other side was the strong interest in avoiding a “chilling effect” on the press by removing reporters’ ability to back up promises of confidentiality to sources. Meyer said the outcome of such a test was simplified by the fact that Weinberger’s claim did not depend solely on the anonymous statements in the newspaper.

Weinberger could pursue his claim against the defendants even without the newspaper article, because the defendants had made allegedly defamatory statements about the former coach in other settings.

Mark Anfinson, a Minneapolis attorney who represents Wakefield and the Maplewood Review, told the Silha Bulletin that the decision was disappointing, but not unexpected. During the oral arguments in the case, held in March 2003, most justices “expressed quite vividly an animus on the part of the majority of the court toward the idea of these types of privileges for journalists,” Anfinson said.

He added that after the oral arguments, “my sensation basically was like a guy who jumped off a fairly tall building – things were fine until I hit, which of course did happen (when the decision was announced).”

Anfinson said the majority seemed to “willfully avoid the key legal issues” involved in analyzing libel lawsuits. Especially disturbing, he said, was the majority’s apparent eagerness to find that the identity of the sources would provide relevant information about actual malice.

The court’s reasoning made the first prong of the state law’s defamation exception automatic, Anfinson said. The legislature obviously intended the standard to have an impact on a court’s analysis, or it wouldn’t have included it in the first place. “If you have this condition imposed (but) it applies in every single case, you don’t need it,” he added.

Anfinson said the conditions raised by the defamation exception might be met in a case where the plaintiff has no idea who the source might be and needs the information in order to pursue a claim. But that was not the situation in Weinberger’s case, he said.

Anfinson said he will not appeal the ruling, but he added that what happens next is far from a foregone conclusion.

“I have some definite options back at the trial court before we are forced to make a decision about whether Wally is going to disclose,” he said. “I intend to pursue those quite aggressively.”

—Doug Peters
Silha Fellow

THE SILHA CENTER’S WEB SITE CONTAINS MANY HELPFUL TOOLS, INCLUDING LINKS TO LAW AND ETHICS WEB SITES, CURRENT AND PAST ISSUES OF THE SILHA BULLETIN, AND UPCOMING SILHA CENTER EVENTS.

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Courts Rule in Celebrity Privacy Case

Douglas v. Hello!

Rellying more on the British Press Complaints Commission (PCC) Code that regulates media ethics and behavior than on Section 12 of the Human Rights Act of 1998 that addresses privacy rights, Judge Sir John Edmund Frederic Lindsay at the High Court in London (Chancery Division) ruled on April 11, 2003, that when Hello! magazine published unauthorized photos of the November 2000 wedding of Catherine Zeta-Jones and Michael Douglas, it had “spoiled” the exclusive publication of wedding photos in OK!. (See Douglas v. Hello!, [2003] EWHC 786 (Ch), [2003].)

Zeta-Jones and Douglas had contracted with OK! to publish photos of their wedding on the condition that the couple themselves had final say regarding the selection of photos published, in order to protect their professional images as actors while allowing their fans insight to their wedding. But despite extensive security precautions, such as printing wedding invitations with special ink, requiring guests to sign confidentiality agreements and the hiring of several security firms, Rupert Thorpe and his wife, Michelle Day, gained unauthorized access to the wedding, held at New York’s Plaza Hotel. They surreptitiously took photos of the event with hidden cameras, then sent them to Hello!. Hello! ran an edition of its magazine with the stolen photos, some of which were unflattering to the wedding party, while others were accompanied with insulting captions. On Dec. 21, 2000, the Court of Appeals in London ruled that Douglas and Zeta-Jones could go to trial, saying that the couple “have a right to privacy that the English law will today recognize and protect.” (See “British Court Issues Historic Privacy Decision” in the Spring 2001 issue of the Silha Bulletin.) When the trial began in February 2003, the Douglases had brought 13 claims against Hello! Lindsay rejected all but three of them. On the privacy claims, Lindsay wrote that the Human Rights Act of 1998 presently delineates the protection of privacy in the United Kingdom, and that further decisions should be left to legislators. “A judge should therefore be chary of doing that which is better done by Parliament,” Lindsay wrote. “A glance at a crystal ball of... only a low wattage suggests that if Parliament does not act soon... the Courts [will create] the law bit by bit and at the expense of litigants and with inevitable delays and uncertainty, will be thrust upon the judiciary.”

Lindsay found references to privacy protection in the Press Complaints Commission code, which states that “Everyone is entitled to respect for his or her private and family life, home, health and correspondence. A publication will be expected to justify intrusion into any individual’s private life without consent,” and “Private places are public or private property where there is a reasonable expectation of privacy.” Hello! further violated the code through misrepresentation, Lindsay wrote, adding that the PCC Code states, “Journalists must not generally obtain or seek to obtain information or pictures through misrepresentation or subterfuge.”

Lindsay found that the Douglases had not agreed to the deal with OK! to publish their wedding photos merely as a publicity scheme, but because of “a genuine and reasonable belief that thereby an offensive media frenzy would be avoided.” Furthermore, because Hello! knew of the Douglases’ exclusive agreement with OK! to publish the wedding photos, Lindsay described the consciences of Hello! magazine’s management as “tainted; they were not acting in good faith nor by way of fair dealing.” Hello!, Lindsay ruled, effectively “spoiled” OK!’s exclusive coverage of the event.

In July, hearings began to decide what damages, if any, Hello! would have to pay the Douglases and OK!. The BBC wrote that Zeta-Jones and Douglas are seeking £500,000, while OK! is suing Hello! for £1.75 million for loss of sales. At the time that the Bulletin went to press, no decision had been reached.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR
Office of Independent Counsel v. Favish
Will Be Argued Before Supreme Court

On Dec. 3, 2003, the Supreme Court of the United States will hear Office of Independent Counsel v. Favish, a case concerning the privacy rights of deceased individuals and their surviving family members under the Freedom of Information Act (FOIA). The case springs from the attempts of Allan Favish, a private citizen and Los Angeles lawyer, to gain access to the death scene photographs of Vincent Foster, the White House deputy counsel to President Clinton whose body was found in a Washington, D.C. area park after Foster allegedly committed suicide.

Favish, who believes Foster’s death was not the result of suicide, but rather of a government cover-up, requested the photos under FOIA to test his suspicions. The government has withheld the images under FOIA’s Exemption 7(C), which exempts from disclosure records compiled for law enforcement if the release could reasonably be expected to constitute an invasion of personal privacy. Favish contends that Exemption 7(C) applies only to the personal privacy of the subject of the law enforcement information, and not to that individual’s family members.

Favish sued in the federal District Court for the Central District of California for disclosure of the original photos after a previous suit brought by Accuracy in the Media (AIM) in the District of Columbia Circuit was unsuccessful. (See Accuracy in Media, Inc. v. Nat’l Park Serv., 194 F.3d 120 (D.C. Cir. 1999), cert. denied, 529 U.S. 1111 (2000)) Favish had been one of several counsel for AIM in that previous suit. AIM had sought copies of the original death scene photos held by the National Park Service. The California district court denied Favish’s claim. The Court of Appeals for the Ninth Circuit, however, ordered the district court to review the Foster death scene photographs and determine which should be disclosed to Favish. The Ninth Circuit instructed the district court to balance the public benefit in disclosure against the privacy interests of the Foster family in non-disclosure. (See Favish v. Office of Indep. Counsel, 217 F.3d 1168 (9th Cir. 2000).) During the appeals process in the Ninth Circuit, the widow and family of Vincent Foster intervened in the litigation, seeking to assert their “survivor” privacy interests.

Favish has now gained legal access to some of the death scene photographs, but not all. The government petitioned the Supreme Court for review, and the Court agreed to hear the case. This case will be the first time the Supreme Court has considered the question of whether “survivor privacy” exists under FOIA.

Silha Center, Others File Friend of the Court Briefs

The Silha Center filed an amicus curiae (friend of the court) brief in support of Favish’s right of access to the photographs. The Silha Center brief argues that “survivor privacy” does not exist under FOIA. as it was not specifically created by Congress as one of the act’s narrow exemptions. These exemptions govern what material the government may legally keep from the public.

A group of media organizations, including the National Press Club, the Reporters Committee for the Freedom of the Press, the American Society of Newspaper Editors, the Society of Professional Journalists, and the Association of Alternative Newsweeklies, also filed an amicus brief in support of Favish, as did the Association of American Physicians and Surgeons and the Eagle Forum Education & Legal Defense Fund.

Teresa Earnhardt, widow of the late NASCAR driver Dale Earnhardt, filed an amicus curiae brief in support of the Office of Independent Counsel. After The Orlando Sentinel and other media sought the Earnhardt autopsy images to investigate his death, the Florida legislature acted to seal all autopsy photos in the state from disclosure. In July, the Florida Supreme Court declined to hear an appeal from newspapers that such a restriction is unconstitutional. (See “Florida Autopsy Records Remain Sealed in the Summer 2002 issue of the Silha Bulletin, and “Autopsy Records Laws Restricting Access” in the Fall 2002 issue of the Silha Bulletin.)

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT
FCC’s New Regulations Blocked by Appeals Court

The Federal Communications Commission (FCC) approved controversial new media regulations on media ownership in June 2003 by a 3 to 2 vote. But on September 3, 2003, the U.S. Court of Appeals (3rd Cir.) in Philadelphia blocked these regulations.

The order prevented the new rules from going into effect the next day. The previous ownership rules will remain effective until the end of the case’s proceedings in Philadelphia. The court acted on a petition to stay the new regulations filed by Prometheus Radio Project. The full text of the order is available online at http://news.findlaw.com/nytimes/docs/fcc/prpfcc90303stayord.pdf.

Prometheus Radio Project is a Philadelphia group that supports community radio stations. Several organizations, including the Media Access Project, a Washington advocacy group, organized the petition, according to The Washington Post on Sept. 4, 2003.

After much debate among government officials, media representatives and the general public, the FCC loosened media ownership rules on June 2, 2003. In July, the new ownership rules were formalized in a 257-page document.

The review process began in September 2002, required by law under a provision of the 1996 Telecommunications Act, Section 202(h), requiring the FCC to review its media ownership rules every two years.

Last spring, in Fox Television Stations, Inc. v. Federal Communications Commission, 280 F.3d 1027 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit ruled that in every review, the FCC must defend every major ownership rule or strike it from the books.

In the following months, Michael Copps, a FCC commissioner and a Democrat who opposed changing the regulations, held a series of public hearings on media ownership regulations. Public hearings were held in New York City at Columbia University, in Richmond, Va., and other cities throughout the country early this year. According to Medialweek.com, Copps had requested the hearings in order to put pressure on FCC Chairman Michael Powell, a Republican, who had withheld support for the hearings.

The six rules up for modifications were:

- The Dual Television Network Rule (1946) which keeps major networks (ABC, CBS, Fox and NBC) from buying one another;
- The National Broadcast Ownership Cap (1941) which limits a network from owning stations that can potentially reach 35 percent of the national TV audience;
- The Newspaper/Broadcast Cross-Ownership Prohibition (1975) which restricts joint ownership of a daily newspaper and a nearby broadcast station;
- The Radio/TV Cross-Ownership Restriction (1970) that restricts joint ownership of a radio station and nearby broadcast station;
- The Local Radio Ownership Limit (1941) which determines the number of radio stations an entity may own in a local area;
- The Local Television Multiple Ownership (1964), which limits the number of broadcast stations an entity can own in a given market.

A summary of the FCC’s actions follow:

Dual Television Network Rule

The rule remained the same to promote competition in the national television advertising and program acquisition markets. Locally, the FCC determined the rule preserved the balance of negotiating power between networks and affiliates.

Local Television Multiple Ownership Limit

Significant changes were made to this rule. A company may own two television stations in markets with five or more television stations, but only one can be in the top four in the ratings. In a market with 18 or more stations, a company can own three stations, but only one can be among the top four in the ratings.

National Broadcast Ownership Cap

The percentage share of U.S. households one owner could reach increased from 35 to 45 percent. A share is calculated by adding the number of TV households in each market in which the company owns a station.

Local Radio Ownership Limit

The FCC did not change the existing limits on local radio ownership, but redefined its definition of a radio market. Commercial and noncommercial radio stations now count towards the number of stations in a market. Clusters of radio stations that currently exceed this limit will stay intact, but the clusters will not be allow to stay intact if they are sold. The FCC will permit cluster sales to small businesses, which would be required to keep them for three years.

Cross-Media Limits

The new cross-media limits replaced the existing Newspaper/Broadcast Cross-Ownership restriction as well as the Radio/Television Cross-Ownership Limits. Previously, radio and television combinations were permitted under some circumstances, but common ownership of a radio and/or television and a newspaper was generally banned.

The FCC found that newspaper publishers’ involvement in television and radio would improve the quality and quantity of news available to the public.

FCC Chairman Michael Powell and Commissioners Kathleen Abernathy and Kevin Martin voted to adopt the changes, while Commissioners Michael Copps and Jonathan Adelstein dissented.

FCC, continued on page 26
"Bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation until now a handful of giant conglomerates are in the saddle."

—Commissioner Michael Copps

"Toward the end, the Localism Task Force will advise the Commission on steps it can take and, if warranted, will make legislative recommendations to Congress that would strengthen localism in broadcasting," Powell said in a statement.

The initiative also includes speeding up the activation of low power FM radio stations. In September 2003, the FCC staff will submit to the FCC a Notice of Inquiry (NOI) on localism that will supplement the task force.

The inquiry is expected to address areas such as license renewals and network-affiliate rules as well as newer localism issues such as "voice tracking" on radio, according to the statement.

Powell still maintains support for the new regulations. Changes to the new regulations have not been embraced by all members of Congress. Some Republicans have said openly that they will have the provision overturning the FCC rules removed from the bill when it goes to conference committee, where it must be merged with a Senate bill, according to The Denver Post on July 24, 2003.

In September, critics of the decision in both houses will try to push legislation to roll it back. On September 11, 2003, the Senate opened debate with bipartisan support on a resolution that would repeal all of the new media ownership. The Senate approved a resolution on September 17 to repeal all of the new regulations by a vote of 55 to 40. Administration officials expressed relief that the vote indicated the measure would not be able to withstand a presidential veto, according to The New York Times.

The New York Times also reported that the sponsors of the Senate resolution acknowledged they still face long political odds before the resolution would become law in its current form. Senator Byron L. Dorgan, (D-N.D.), the chief sponsor of the resolution, and other members of senate will continue to take steps to repeal the media rules by attaching amendments to other measures headed for floor action.

In the House of Representatives, Republican leaders have opposed repealing the new regulations and have refused to bring it to the floor.

The Bush administration has threatened a veto if Congress tries to upset the new policy, according to The Philadelphia Inquirer. Congress would need two-thirds of its members to override the president's veto.

—Anna Nguyen
Silja Research Assistant

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"I am confident and proud of the job we have done. I believe that our actions will advance our diversity and localism goals and maintain a vigorously competitive environment," wrote FCC Chairman Powell in a press statement on June 2, 2003.

Commissioner Copps, disagreeing with the decision wrote, "Let us remember that this is only the latest, most radical step in a twenty-year history of undermining the public interest. Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation, until now a handful of giant conglomerates are in the saddle."

The release of the new FCC regulations triggered several legal challenges. The Associated Press reported that the National Association of Broadcasters said the changes did not go far enough. The group filed an appeal in federal court in the District of Columbia to block changes to the definition of radio markets and to overturn rules that prevent television station mergers in some smaller markets.


Congress has taken steps against the changes, which would have gone into effect 30 days later if left unchallenged. In July, the House of Representatives voted 400-21 to approve a spending bill that included a provision restoring a 35 percent cap on national broadcast audience, which the FCC had voted to raise to 45 percent. In the Senate, a bipartisan group was pushing legislation to erase all of the FCC's media ownership rule changes, according to The Atlanta Journal and Constitution on August 24, 2003.

The votes followed criticism from lawmakers that Powell had given little regard to public opinion before the FCC approved the media rules.

"A bare, three-member majority of FCC commissioners has employed a 'damn-the-torpedoes, full-speed-ahead' strategy to hammer through one of the most far-reaching policy decisions in the history of media," Sen. Fritz Hollings (D-N.C.), the ranking Democrat on the Senate Commerce Committee, told The Atlanta Journal and Constitution. In response, FCC Chairman Powell announced on August 20, 2003, a series of initiatives to enhance localism among radio and television broadcasters.
Developments in Media Ethics
Jayson Blair and The New York Times

Earlier this year, the reputation of The New York Times suffered a serious blow after Jayson Blair, a young reporter for the Times, was found to have plagiarized material and falsified information in several dozen stories. The scandal led to the resignation of two top editors and prompted questions about the current state of journalism.

After a summer internship in 1998, Blair, 27, joined the Times staff in 1999. Prior to his employment there, he had been a freelance reporter for The Washington Post and an intern and freelancer for The Boston Globe. In 1996, while a student at the University of Maryland, he was editor of the school's newspaper, the Diamondback.

By many accounts, Blair was an ambitious, assertive reporter. A June 6, 2003, story in Newsday described Blair as "the archetypical young gun. The sort of kid newspapers love." Bob Steele of The Poynter Institute recalled Blair's participation in 1996 in an ethics and leadership seminar designed for college news editors.

"Back then, Jayson Blair had big-time aspirations," he wrote in a column on Poynter's website. "I was impressed by his moxie." The article is available online at: http://www.poynter.org/column.asp?id=36&amp;aid=34217.

"But there were shortcuts and shortcomings," Steele maintained. For example, colleagues noted that his aggressive personality often caused friction. In a May 12, 2003, article for The Boston Globe, Louisa Williams, an assistant managing editor of the Globe during Blair's internship, was quoted as saying, "I had questions about his maturity." The article also quoted David M. Shribman, The Boston Globe's Washington bureau chief at the time, who said, "[Jayson] was the most controversial intern we've ever had. He was kind of sneaky and snoopy with other reporters .... It was plain that I was disapproving of him." In addition, New York Times editors had reservations about Blair's reporting, according to many accounts, due largely to the high number of corrections made to his stories. (The Washington Post's Howard Kurtz reported that 50 corrections were made in 3 1/2 years.) Blair also had confessed to some personal problems with drugs and alcohol, according to Newsday. "Blair's behavior became even more erratic," The Washington Post reported after Blair claimed that he had lost a cousin during the attack on the Pentagon on September 11, 2001, a claim later found to be untrue.

A May 11, 2003, story in The Washington Post reported that in January 2002, New York Times metropolitan editor Jonathan Landman had told Blair that his correction rate was "extraordinarily high by the standards of the paper." In the spring, Landman wrote an e-mail to the newspaper's administrators, stating, "We have to stop Jayson from writing for the Times. Right now." But after a short time off and a stint in an employee counseling program, Blair returned to reporting, this time for the sports department. According to The Washington Post, however, "at [New York Times managing editor Gerald] Boyd's urging," Blair was allowed to cover the Washington, D.C., sniper case, and his byline was on the front page within six days.

The Washington Post's Howard Kurtz wrote, "[There were] so many red flags about Blair's conduct that it's hard to believe Times editors kept promoting him.

In late April 2003, according to the Associated Press, San Antonio Express-News story Editor Robert Rivard was alerted to a April 26 story written by Blair about a Texas woman whose son had recently been killed in the war in Iraq. Much of the material in the story seemed suspiciously similar to a story written on April 18 by an Express-News reporter. Rivard sent an e-mail to Howell Raines, executive editor of The New York Times. Once confronted, Blair acknowledged that he had copied passages from the original story, and he resigned on May 11, 2003, apologizing for his "lapse of journalistic integrity" in a letter to The New York Times.

In the days and weeks that followed, it became clear that Blair's "lapse" had not been an isolated one. The New York Times appointed a team of researchers, reporters, and editors that soon found problems in 36 of 73 articles, including some high-profile stories about the Washington, D.C.-area sniper attacks and the Jessica Lynch rescue. On May 11, The New York Times ran a four-page analysis of Blair's stories, clarifying inaccuracies and encouraging the public's assistance in uncovering more. Additional instances of plagiarism were found in more stories soon after. For example, according to a Newsday report, Blair lifted quotes from a Detroit weekly in 2002 for his own story about black comic-book heroes. In 1996, he took copy from a Wall Street Journal article and used it in a story about AIDS. Blair wrote prolifically, and according to the Associated Press, as many as 600 more articles were investigated. Former colleagues at The Boston Globe and at Maryland's Diamondback publicly voiced doubts over Blair's past work for their publications. In a June 4, 2003, letter sent to the dean and associate dean of Maryland's Phillip Merrill College of Journalism and to the chairman of Maryland Media, Inc., former Diamondback staffers wrote, "Mr. Blair's disgraceful behavior at The New York Times resembled a recurring pattern we witnessed when he worked at the Diamondback." The letter went on to detail several of Blair's "indiscretions," describing instances in which Blair copied quotes, abused the payroll, wrote inaccurate stories based on rumor, and was unavailable for long periods. One extended absence even resulted in publication delays. The Diamondback staffers' letter is available online at: http://www.inform.umd.edu/News/Diamondback/archives/2003/06/12/news5-letter.html.

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Developments in Media Ethics
Newspapers Face the “Blair Effect”

Effects of the Jayson Blair fiasco have been felt far beyond The New York Times offices. At a time when public trust in the media continues to decline, the scandal at The New York Times may have tarnished the credibility of the whole industry. In the wake of the Blair scandal, media professionals, editors and media critics have debated how to avoid a similar breach of ethics in the future and how the trust of the public can be regained.

The St. Paul Pioneer Press began sending out letters to people who had been subjects of the newspaper’s stories, asking them to verify the accuracy of the reporting. The Seattle Times adopted a similar measure, resurrecting a system of accuracy checks the newspaper used in the 1970s and 1980s. According to Seattle Times executive editor Mike Fancher, the system had been curtailed “because it had run its course and was not effective anymore.” In recent years, Fancher wrote in an e-mail to the Bulletin, the paper has tried to establish an environment of personal accountability, so that even small errors were noted and corrected. But this system began to slip over time, and following recommendations of a staff committee, the accuracy checks were reinstated.

Associated Press Managing Editors (APME) president and editor of the Fredericksburg, Va., Free Lance-Star, Edward Jones, was quoted in an article appearing on the Poynter Web site saying, “The public need not be an estranged adversary when it comes to inaccuracies. When asked for input, readers can be a partner in building a credible news report.” However, the Jayson Blair saga seems to indicate the exact opposite: that readers generally do not alert newspapers when they spot inaccuracies. “What amazed me about this scandal is that some of the people Blair weaved into his fabrications didn’t even bother to alert The Times about the misinformation.” Karen Hunter wrote in a May 18 commentary for the Hartford (Conn.) Courant. A study conducted by the Pew Research Center of the People and the Press last year revealed that two-thirds of Americans believe news organizations are unwilling to acknowledge their errors, which could explain readers’ reluctance to contact the newspaper when they notice an error.

APME, gathering reader comments through an e-mail reader advisory network as part of its National Credibility Roundtables Project, also tried to find an explanation for this lack of readers’ feedback when it comes to corrections. It found that readers did not bother to report errors because either they doubted newspapers cared about the mistakes or would listen to them, because they believed navigating a newspaper’s correction system would take too much time, or they thought the error was obvious enough that someone on the paper’s staff would correct it.

Some commentators such as Minneapolis Star Tribune ombudsman Lou Gelfand, believe this apparent disconnect between newspaper and readership could be remedied by an ombudsman or a readers’ representative. In his May 18 column, Gelfand wrote that he was convinced that “the Blair travesty could have been aborted if the Times had an ombudsman with freedom to write a weekly column about issues of ethics, fairness and completeness.”

A panel of distinguished journalists and commentators including former Washington Post ombudsman Geneva Overholser; former dean of the graduate journalism schools at Berkeley and Columbia Tom Goldstein; Wall Street Journal media critic Dorothy Rabinowitz, and Pew Center for Civic Journalism executive director Jan Schaffer discussed the issue of journalistic fraud and the public’s distrust in the media on June 30, 2003 at New York City’s Baruch College. They agreed that the media need to embrace the notion of accessibility, and make greater effort to invite readers’ feedback.

Overholser pointed to the excessive use of anonymous sources as a contributor in the rise of journalistic fraud. “There was fraud [at The New York Times], but it’s a lot easier to have it when you have anonymity. In the sniper coverage, the biggest national news story at the time, this very young man, not from the Washington bureau, was using anonymous sources, and he wasn’t questioned in their use. That really shows how much anonymous sources are with us. And, to our great disadvantage, because anonymity allows people to speak with impunity, to say things they wouldn’t otherwise say, and it robs the reader of the ability to judge.”

The panel also questioned the so-called “star system” that operates in many newsrooms, where certain journalists receive favorable treatment and less stringent supervision, but stopped short of denouncing the system altogether. Overholser pointed out that getting rid of the star system would “pretty well take the air out of journalism.” A transcript of the panel’s discussion is available online at http://www.baruch.cuny.edu/news/freepresstranscript.html.

According to an article published in the Editor and Publisher Online Web site on May 13, 2003, the Jayson Blair saga has prompted newspapers around the country to review their own policies in case they were confronted with a “Jayson Blair” in their own newsrooms. Editors hope to avoid a similar fiasco by keeping a closer tab on expense accounts, reducing the use of anonymous sources, keeping a closer track of corrections, having performance reviews, listening to in-house critics, and performing accuracy checks. But even then, there are some who say that what happened at The New York Times could have happened anywhere. Phil Bronstein, editor of the San Francisco Chronicle, is quoted as saying: “I can imagine someone making something up here and we don’t know it. [But] I can’t imagine it happening over and over...”


—Rex Smith
Developments in Media Ethics
Andrew Gilligan and the BBC

The New York Times has not been the only reputable news organization grappling with ethical issues and reporters. On May 29, 2003, reporter Andrew Gilligan stated on BBC’s “Today” program that an unnamed source had told him that the British government had “sexed up” an intelligence dossier by claiming Iraq could deploy weapons of mass destruction within 45 minutes. That claim has been characterized as being central to the British government’s argument for going to war with Iraq.

Later, Gilligan named weapons expert and Ministry of Defence employee David Kelly as his anonymous source in e-mails sent to members of Parliament. The foreign affairs select committee interviewed both Kelly and Gilligan to determine whether Kelly had played a role in Gilligan’s story. Kelly stated that although he had participated in an interview with Gilligan, he denied the statements Gilligan attributed to him. On July 17, presumably unable to face the stress of the situation, Kelly allegedly committed suicide. Only days later, another inquiry was launched, this time into Kelly’s death, led by Lord Brian Hutton, “to conduct an investigation into the circumstances surrounding the death of Dr Kelly.”

On September 17, Gilligan was called before the Hutton inquiry. During cross-examination by Jonathan Sumption, counsel for the government, Gilligan testified that he had talked with Kelly about the claim contained in the government’s dossier that Iraq could mobilize weapons of mass destruction within 45 minutes, information Kelly had characterized as “unreliable.” Gilligan further testified that claiming the government had “sexed-up” the dossier was “spin” on his part, not Kelly’s, and stated that it was a “slip of the tongue” that led him to describe Kelly as “my intelligence service source” during the May 29 live broadcast.

The (London) Times reported that Gilligan seemed distressed while on the stand September 17; that he was white-knuckled and at times close to tears. Jeremy Gompertz, legal counsel for the Kelly family, said that he would not subject Gilligan to a full cross-examination at the family’s request. “[They] didn’t want you or anybody else to be subject at their hands to an ordeal comparable to that endured by Dr Kelly,” Gompertz told Gilligan.

But during the brief questioning by Gompertz, it was revealed that Gilligan had not taken notes during his initial meeting with Kelly, but had written the notes later, relying on his memory. Those notes have since been lost. Gompertz further questioned Gilligan over another set of notes he typed into an electronic organizer. Although the words “to make it sexier” were included in the notes within quotation marks as though they were spoken by Kelly, Gilligan admitted to the Hutton inquiry that he himself had spoken those words.

Other questions concerned Alastair Campbell, press secretary for Prime Minister Tony Blair, who resigned from his post in August. Gilligan claimed Kelly named Campbell as the person responsible for “sexing up” the dossier. Some of Gilligan’s notes mention Campbell while others do not. Gilligan agreed to allow the Hutton inquiry to examine his files as well as his electronic organizer.

The director of news for the BBC, Richard Sambrook, also took the stand. When asked why the BBC did not air a correction saying that the unidentified source was employed by Intelligence Services as Gilligan had stated, Sambrook replied, “Clearly it would be preferable to be absolutely accurate about it; but equally . . . we had a dilemma because we did not wish to do anything which might lead to the identification of our source.” Sambrook further admitted that before the statement was broadcast, lawyers should have been consulted and a copy of the text should have been sent to 10 Downing Street.

On September 18, Parliament’s Intelligence and Security Committee cleared Blair’s government of falsifying intelligence findings, and further stated that the government’s independence and impartiality had not been compromised in any way, according to The New York Times.

But during his testimony before the Hutton inquiry, Gilligan stated: “You know, politics is an area in which allegations of exaggeration and misleading behaviour [sic] are the stock in trade, they are made daily. It did not seem to us to be as serious as a criminal allegation of sort of bribery or something like that. Perhaps we were wrong about that, but that is how it seemed. That is how we approached the piece. That is how we ran it. It was not intended as the definitive view of the dossier, it was intended as the opinion of one source.”

The last of the hearings for the Hutton Inquiry took place on September 25. A final report is expected to be released by the end of the year.

Simon Jenkins, a columnist for The (London) Times, wrote about the Inquiry in his September 30 column. “The Hutton inquiry has revealed nothing beyond the normal, often flawed, responses of people who work under intense pressure.”

—Simon Jenkins, The (London) Times

Complete transcripts of the Hutton inquiry are available online at http://www.the-hutton-inquiry.org.uk/content/hearing_trans.htm.
The fallout from the professional practices of a single reporter had repercussions for journalism that continue to reach far and wide.

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In addition to plagiarism, Blair was guilty of fabrications as well. On several occasions, according to a June 13 story in Newsday, "people interviewed by Blair now say they never made the statements that he attributed to them." It was further discovered, according to The Washington Post, that Blair had often not traveled to his assigned destinations, but rather had stayed in New York, using a cell phone and falsifying expense reports to give his editors the impression that he was on assignment elsewhere.

The discovery of Blair's deceptive reporting had a devastating effect on morale at the Times. According to Newsday, reporters were curious, angry, and altogether baffled by the Times' apparent willingness to allow "a 27-year-old reporter with a reputation for inaccuracy and erratic behavior to falsify parts of several important national stories." CNN.com reported that there had indeed been awareness and concern in the past over the quality of Blair's work at the Times, yet he continued to work and even be promoted, moving from the police beat to a position at the national desk. On May 14, Raines, Boyd, and publisher Arthur Sulzberger organized a staff meeting to apologize for the oversights that helped Blair successfully plagiarize and falsify material for so long.

But the staff's discontent with the editors persisted, and on June 5, 2003 -- barely a month after Blair's own resignation -- both Raines and Boyd also resigned from The New York Times. According to Howard Kurtz of The Washington Post, "Raines sowed the seeds of his self-destruction with a bruising management style that left him with few allies in his hour of crisis. His relentless drive and determination, great strengths in an editor, also alienated wide swaths of The New York Times newsroom, as people felt excluded and in many cases shoved aside by his autocratic rule."

The fallout from the professional practices of a single reporter had repercussions for journalism that continue to reach far and wide. On June 5, the day that Raines and Boyd resigned, William L. Winter of the American Press Institute wrote, "The truth is that what happened at the Times is a tragedy not only for an amazing journalistic institution, but for the Times writers and editors who have been stained by the ongoing revelations in their newsroom, and for the profession as a whole, now certainly viewed even more skeptically by a public that seems happy at any moment to witness the fall of the powerful ... [today] is a day for reflecting on the special nature of journalism in a democracy, of wondering how and when the best of our newspapers will fully regain its credibility, [and] of considering how all that has happened at The New York Times in the past few weeks may affect the way journalists are viewed by our citizenry."

The full article is available online at: http://www.americanpressinstitute.org/content/p2375_c1381.cfm.

"Journalism is built on trust," noted Jack Shafer, press critic for Slate.com, in an online commentary about the Blair incident. (The article is available online at: http://slate.msn.com/id/2082741/.) And although journalists work diligently to regain the trust of readers, trust within the newsroom seems to be a murkier issue.

In a piece by the Poynter Institute's Chip Scanlan, Scanlan wrote, "Perhaps the only good thing that may come out of the Times case is that more editors will be less likely to give reporters the benefit of the doubt. It's not an editor's job to trust a reporter. It's an editor's job to challenge, to probe, to prosecute a story, to be the ally not of his or her colleague but of the reader who deserves a factual account." (Scanlan's article is available online at: http://www.poynter.org/column.asp?id=52&aid=33725.)

But the Blair incident has caused many to wonder if further supervision of journalists is nevertheless necessary. Steven Roberts, media professor at George Washington University, was quoted in a Washington Post article as saying, "There are no official methods of accountability in journalism -- no review boards, no licensing procedures."

For a full story concerning the effects of the Jayson Blair scandal on newsrooms across the country, see "Newspapers Face the Blair Effect" on page 28 of this issue of the Silha Bulletin.

--ELIZABETH JONES
SILHA RESEARCH ASSISTANT

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again." The article is available online at http://editorandpublisher.com/editorandpublisher/headlines/article_display.jsp?vnu_content_id=1886398.

Tom Rosenstiel, director of the Project for Excellence in Journalism made a similar point in the May 11, 2003 four-page self-investigation conducted by a team of seven New York Times journalists where he was quoted as saying: "It's difficult to catch someone who is deliberately trying to deceive you. There are risks if you create a system that is so suspicious of reporters in a newsroom that it can interfere with the relationship of creativity that you need in a newsroom -- of the trust between reporters and editors." Seattle Times executive editor Michael Fancher also admitted in his weekly column on May 25 that even though the Seattle Times has numerous safeguards in place to prevent a "Jayson Blair" from emerging from his staff, the "system is vulnerable in that it presumes people are honorable. Most safeguards aren't designed to catch someone who is dishonest."

However, inaccuracies are not necessarily the result of some character flaw or maliciousness, according to Rex Smith, editor of the Times Union in Albany, NY. In Smith's weekly column on June 7, 2003 he argued that the root of the problem is a lack of energy, which causes reporters to skip making the extra phone call, finding the extra source and also leads editors to overlook errors in their newsrooms. Smith stated in his column that if journalism is to regain the public's trust, it will have to reach back to the three key attributes required of a great journalist: intelligence, curiosity, and energy.

--BASTIAAN VANACKER
PH.D. CANDIDATE AND FORMER SILHA RESEARCH ASSISTANT

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Developments in Media Ethics
Political Cartoons Criticized for Content

Two editorial cartoons received criticism in recent months because readers perceived them as anti-Semitic. A third editorial cartoonist received a visit from a Secret Service agent rather than angry mail.

One of the cartoons, commenting on the Middle East peace process, was drawn by Dick Locher for the Chicago Tribune and published May 30, 2003. His work generated a flurry of angry emails. The cartoon depicted President Bush on his knees on a bridge spanning an area labeled the “Mideast Gulch,” while laying down a path of currency in front of a figure resembling Ariel Sharon, depicted with a large, hooked nose. Meanwhile, another figure resembling Yasser Arafat looked on, arms crossed. The Sharon figure was depicted as being delighted by the money and saying: “On second thought, the pathway to peace is looking a bit brighter.” The cartoon is available online at http://www.comicspage.com/comicspage/main.jsp?file=20030529eddik-a-p.jpg&refresh_content=1&component_id=3&custid=69&catid=1170&dir=%2FLocher.

Letters and emails from readers complained that the cartoon was blatantly anti-Semitic because of its stereotypical portrayal of Jews and implications that Israel is interested in money rather than peace. The Chicago Tribune’s public editor, Don Wycliff, printed a letter from a reader in his June 1, 2003 column who wrote that the cartoon was “blatantly anti-Semitic, reinforcing the long-held racist image of Jews as avaricious and greedy.” Wycliff agreed with the criticism, writing that he was “jolted” when seeing cartoon, and quoted the Chicago Tribune’s editorial page editor, Bruce Dold, who also denounced the cartoon: “I think Dick Locher intended to comment on the influence the U.S. can exert through the foreign aid it provides to Israel. I think that’s all Locher intended. But the cartoon carried several other messages that could be seen as drawing on anti-Semitic symbols and stereotypes. It also implied that the U.S. is bribing Israel to support the road map to peace, but there is simply no evidence to support that. On those levels, the cartoon failed.”

On June 4, approximately 100 protesters demonstrated in front of the newspaper’s offices located in Chicago’s Tribune Tower, demanding an apology from editor Ann Marie Lipinski. In a June 8, 2003 editorial, the editors acknowledged that they “failed to recognize that the cartoon conveyed symbols and stereotypes that slur the Jewish people and that are offensive.”

When interviewed by Editor and Publisher Online, Locher stood by his cartoon. A 1983 Pulitzer Prize winner and former staff cartoonist for the Tribune who is now working on a free-lance basis with the paper, Locher expressed surprise that some viewed his cartoon in such a negative light. Editor and Publisher Online further reported that Locher said he always draws an exaggerated nose on Arafat as well as Sharon, and that exaggeration is a hallmark of political cartoonists. Locher further stated that he was inspired to create the cartoon after he had been discussing the foreign-aid issue with his friends, some of whom are Jewish.

On July 31, The Philadelphia Enquirer ran a cartoon by Tony Auth that some readers perceived as anti-Semitic. The cartoon, available online at http://www.rense.com/general39/antisem.htm, depicted a barbed wire in the shape of a star of David, coralling a group of Palestinians. The paper received about 150 reactions to the cartoon, predominantly negative. Some readers thought the use of the Magen David as a symbol was inappropriate, since the star is the symbol of all Jews, not just Israelis. Some also found Auth’s depiction of people being contained by barbed wire insensitive because of its holocaust connotations. Auth defended his cartoon, arguing that criticism of Israel’s policies does not make one an anti-Semite. Auth further stated that he received support from his paper.

A Los Angeles Times cartoon elicited a completely different response. After a Michael Ramirez cartoon appeared, depicting a man wearing a jacket with the word “politics” on the back and pointing a gun at President Bush in a satirical takeoff of the 1968 photo of a South Vietnamese general executing a Viet Cong officer, Secret Service agent Peter Damos visited the Los Angeles Times. Damos wanted to interview Ramirez because of the government’s policy of questioning anyone who publishes material that can be construed as a threat against the president. After meeting with a Los Angeles Times attorney, the agent was turned away, the newspaper reported. In a letter to U.S. Secret Service Director Ralph Basham, Rep. Christopher Cox (R-Calif.), chairman of the House Homeland Security Committee, criticized the Secret Service for the way the incident was handled, stating that the agency had used “profoundly bad judgment” in deciding to use “federal power to attempt to influence the work of an editorial cartoonist for the Los Angeles Times.” He also wrote that the Secret Service owed Ramirez an apology and the public an explanation “both of how this happened and why it will not happen again.” Ramirez said in a broadcast of NPR’s On the Media of July 25, 2003 that he thought cartoons should be controversial and that any sort of intimidation is not a good thing. Ramirez’ cartoon is available online at http://la.indymedia.org/news/2003/07/73880.php.

These incidents occurred at a time when the number of political cartoonists employed by newspapers continues to decrease. Bruce Plante, outgoing president of the Association of American Editorial Cartoonists, was quoted in an article on the Poynter Web site as stating that fewer than 90 papers have their own cartoonists, down from 200 in the early 1990s. The article is available online at http://www.poynter.org/content/content_view.asp?id=36980.

—nstian Vanacker
Ph.D. Candidate and Former Silha Research Assistant
Orders Issued Regarding Leaks, Access to Proceedings In Washington, D.C. Sniper Case

The Virginia judge presiding over the trial of Washington-area sniper suspect John Allen Muhammad issued two orders over the summer regarding leaks by law-enforcement officials to the media about the high-profile case. The first order quashed subpoenas filed by Muhammad's attorney against several reporters in an effort to find and stop leaks to the media. The second order, however, curtailed the amount of information that law enforcement officials were allowed to provide to the public. Muhammad is one of two alleged gunmen in the Washington, D.C.-area sniper case from the fall of 2002. (See "Ethical Conundrums Puzzle Journalists: Media Coverage and the D.C. Sniper" in the Fall 2002 issue of the Silha Bulletin.)

In May 2003, Prince William (Va.) County Judge LeRoy F. Millette, Jr. issued the first order, which limited the amount of information law enforcement officials are allowed to disclose regarding Muhammad's case. The order responded to ongoing complaints from Muhammad's attorneys about leaks to the press regarding the arrest and prosecution of Muhammad and fellow suspect Lee Boyd Malvo, according the Reporters Committee for Freedom of the Press (RCFP) report. The Washington Post opposed the motion, calling it "vastly overbroad," the RCFP reported. The resulting order stopped short of imposing the restrictions sought by Muhammad's attorney, essentially requiring officers to follow the limitations already imposed by their department. The RCFP's article is available online at http://www.rcfp.org/news/2003/0603muhamm.html.

In late April, Millette agreed to quash subpoenas served on four Washington Post reporters by Muhammad's attorneys. Muhammad's lawyers were concerned about ongoing information leaks to the Washington Post from law-enforcement sources, including the contents of comments Malvo allegedly made during interrogations by police. Muhammad's defense attorneys worried that such leaks could jeopardize their client's right to a fair trial. Millette also denied defense attorneys' requests for a special prosecutor to investigate the source of the leaked information, according to the RCFP, available online at http://www.rcfp.org/news/2003/0424virgin.html.

Earlier, in December 2002, Millette ruled that proceedings against Muhammad could not be televised. Cameras and other recording devices also have been barred from Malvo's upcoming trial in Fairfax (Va.) County Circuit Court, a ruling Judge Jane Marum Roush made in March 2003.

Prince William County has created a special Web site, http://www.pwegov.org/court/special/, where all filings in Muhammad's case are available in .tif format.

Book by Police Chief Charles Moose Can Move Forward

Former Montgomery County, Md., Police Chief Charles Moose's plans to publish a book about the investigation he led into the Fall 2002 D.C.-area sniper shootings, moved forward thanks to a July settlement he reached with the county. Plans to publish the book had stalled due to an ethics investigation by the county into Moose's efforts, while still chief, to sell his story. Under the agreement, Moose agreed to turn over to the county $4,250 he received while still employed as police chief for movie rights to his story, according The Washington Post. Moose also agreed not to divulge any confidential information about the investigation.

Montgomery County law bars officials from exploiting the prestige of public office for personal gain, The Washington Post reported. Moose also signed a separate book contract for $170,000 earlier this year; however, that contract will not be affected by Moose's agreement with the county Ethics Commission. The commission's earlier refusal to allow Moose to profit from his connection with the investigation prompted the chief to file a federal lawsuit on May 14 in U.S. District Court for the Southern District of Maryland. The suit, which alleged that the county violated Moose's First Amendment rights, was dropped as a result of the settlement. Moose resigned in June 2003.

—DOUG PETERS
SILHA FELLOW

The U.S. Supreme Court has declined to hear an appeal in the case of four Philadelphia Inquirer reporters who were punished for interviewing and quoting jurors in the murder trials of the wife of a New Jersey rabbi. When the first trial in the case had ended with a deadlocked jury, Judge Linda G. Baxter issued an order forbidding the media to publish the names of the jurors or contacting them, even after the jurors were discharged. When the newspaper appealed Baxter's order, New Jersey's Supreme Court upheld it. (See "Philadelphia Inquirer Reporters Held in Contempt" in the Summer 2002 issue of the Silha Bulletin.)

Several media groups, including the American Society of Newspaper Editors and the Reporters Committee for Freedom of the Press (RCFP) had urged the Supreme Court to review the case, Philadelphia Newspapers, Inc. v. New Jersey and Fred Neulander, docket no. 02-945. The laws determining whether judges can restrict jurors from talking with the press vary across the country, and even from case to case. A ruling from the Supreme Court may have served to set acceptable standards regarding press interviews with jurors.

The RCFP's amicus curiae brief in the case argued that prohibiting reporters from interviewing jurors has a chilling effect on the press. The RCFP brief is available online at http://www.rcfp.org/news/documents/2003012philadelphia.html.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND BULLETIN EDITOR

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FOIA Updates

Restoration of Freedom of Information Act of 2003

The Restoration of Freedom of Information Act of 2003 has been designed to restore aspects of the Freedom of Information Act altered by the Homeland Security Act of 2002. Currently, under the Homeland Security Act, the government is required to keep confidential certain information that companies voluntarily disclose to the government about potential vulnerabilities such as response time and recovery efforts to terrorist attacks. The law did not clearly define “critical infrastructure” and “voluntarily submitted,” allowing companies to keep information about health and safety issues from the government. One important aspect of the bill would narrow the broad FOIA exemption for “critical infrastructure.”

A definition of “critical infrastructure” was adopted from section 1016(e) in the USA PATRIOT Act (42 U.S.C. 5195c(e)) which reads, “critical infrastructure means systems and assets, whether physical or virtual, so vital to the United States that the incapacity or destruction of such systems and assets would have a debilitating impact on security, national economic security, national public health or safety, or any combination of those matters.” This definition refers to facilities such as bridges, dams, ports, nuclear power plants, or chemical plants.

The term “furnished voluntarily” signifies documents provided to the Department of Homeland Security (DHS) that are not formally required by the department and that are provided to it to satisfy any legal requirement. The definition excludes any document that is provided to DHS with a permit or grant application or to obtain any other benefit from DHS, such as a loan, agency forbearance, or modification of a penalty, according to a sectional analysis from Senator Patrick Leahy (D-Ver.), available online at http://www.senate.gov/~leahy/press/200303/031203c.html.

The American Civil Liberties Union stated that the new Act would clarify the FOIA exemption to be more consistent with established law, remove the restrictions on the government’s ability to act as it sees fit in response to the information it receives and preserve whistleblower protections by removing unnecessary criminal penalties. A letter by the ACLU and other groups from March 2003 supporting the Act is available online at http://www.aclu.org/NationalSecurity/NationalSecurity.cfm?ID=12113 &c=108.

A number of journalism organizations including the American Society of Magazine Editors, National Newspaper Association, Radio-Television News Directors Association and Society of Professional Journalists also wrote a similar letter in support of the new act. The journalistic organizations were concerned that the broad categories of information, particularly information that related to the public’s health and safety, would unnecessarily be shielded from public view.

At the end of June 2003, Congressman Barney Frank (D-Mass.) introduced the U.S. House of Representatives version of the Act (HR 2526). This is the House companion to the Senate bill (S. 609) introduced by Senator Patrick Leahy (D-Ver.) in March 2003.

“Companies should not be able to avoid key health and safety regulations by ‘voluntarily’ disclosing information they are already required by law to disclose, if the government is then forced to keep the information confidential,” Frank said in a statement released by his office.

He added that government authorities should be able to act on information they receive. For example, a defect in a nuclear safety system could be disclosed to a government authority that would be powerless to order the problem repaired before the Restoration of Freedom of Information Act.

Defense Authorization Act of 2004 Amended

After concerns from FOIA advocates, the Senate adopted an amendment to narrow a provision in the Defense Authorization Act of 2004 that would exempt “operational files” of the National Security Agency (NSA).

If the exemption had passed, the agency could automatically turn down requests by citizens for files on how NSA collects intelligence.

NSA officials said that they routinely deny requests for “operational files” or files on how the NSA collects intelligence. The legislation would have simply freed the agency’s staff from the time consuming task of searching for and reviewing those files before sending out rejection letters, reported The Baltimore Sun on May 16, 2003.

Historians, researchers and watchdog groups said the broadly-worded measure threatened to close access to the enormously powerful agency. Critics of the proposal told The Baltimore Sun that the exempt files could include everything from properly classified data, such as the cell phone frequencies used by al-Qaida operatives to harmless information on the radio gear American spies used in the 1960s to eavesdrop in the Soviet Union. On a broader scale, it could include important historical records on the use of signals intelligence and cryptography in U.S. defense history.

On May 5, 2003, the National Security Archive (NAS), a non-governmental and non-profit research institute on international affairs, stated that the proposed exemption would allow the NSA to withhold records currently released under the FOIA.

Public hearings had not been held on the proposed legislation. Although much of the information in the files is classified, the NSA typically released many valuable documents that would not be available to the public if the FOIA exemption was enacted into law, according to The Baltimore Sun.

On May 20, 2003, a Senate Armed Services Committee briefing was chaired by Senator Wayne Allard (R-Colo.), Senator John Cornyn (R-Texas) and

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FOIA, continued from page 33

Senator Hillary Clinton (D-N.Y.) attended the meeting. Representatives from the National Security Archive and Federation of American Scientists (FAS) voiced their concern about the exemption, according to a statement from the FAS on May 22, 2003.

Senator Allard proposed the amendment to remove the National Security Archive exemption on May 2. The amendment defines “operational files” as files of the Signals Intelligence Directorate (the United States’ high technology cryptologic organization in NSA, and its successor organizations) which document the means by which foreign intelligence or counterintelligence is collected through technical systems and files of the Research Associate Directorate, a division of NSA, as well as its successor organizations.

This does not include files that are the only repository of disseminated intelligence, and files that have been added into NSA archives, or its successor organizations.


Maine’s Freedom of Access Law

Maine Gov. John Baldacci signed a bill on May 16, 2003, aimed at forcing law enforcement agencies to observe the state’s Freedom of Access Law.

The bill (L249) requires chief administrators from each municipal, county and state law enforcement agency to certify that the agencies have has a written policy on how to deal with Freedom of Access requests, according to the Bangor Daily News. The law also requires annual certification to be provided to the Maine Criminal Justice Academy, reported the Associated Press.

Each person from a public agency must also be trained to respond to Freedom of Access requests.

A separate bill (LD 1079) was signed by Baldacci on June 23, 2003, to create a panel to examine compliance by police, town, city and school officials with the Freedom of Access law. The text of the bill is available online at http://janus.state.me.us/legis/LawMakerWeb/summary.asp?LD=1079.

The 12 person committee would consist of members from the Maine Senate, Maine House of Representatives, Maine Press Association, Maine Daily Newspapers Publishers Association, Maine Chiefs of Police, members from the public and other government and private organizations.

The committee will submit a report to the Joint Standing on Judiciary Committee by December 15 this year. The committee will make suggestions to improve the state’s current freedom of access laws and access the costs for the changes.

The bills surfaced following a statewide audit in November 2002 by the Maine Freedom of Information Coalition that showed many public agencies were inconsistently complying with the law, according to the Reporters Committee for Freedom of the Press (RCFP).

The Associated Press reported that volunteers went to more than 300 towns, school district offices and police stations across the state and asked to review a public record. The audit showed that citizens’ access to public records was often restricted, in violation of the law.

The volunteers fared worst at police departments. Only two-thirds of the audited departments allowed access to police logs. Municipal offices were the most cooperative, but many of the requested documents were not kept on file.

“No two [police departments] responded the same way,” Judy Meyer, vice president of Maine FOI and editorial page director for the Sun-Journal in Lewiston, Maine, told RCFP. “There was clearly no uniform response to what should be an ordinary request for public information. To have training and a written policy would guarantee that someone in the department at least reads the law once a year and understands how the department should respond to any member of the public.”

Citizen’s Guide on Using the FOIA


The guide includes the scope of FOIA and the Privacy Act, when to use the acts, and what type of records can be obtained. The appendix features sample request and appeal letters.

The 11th edition has an additional bibliography in the appendix of non-congressional materials on using the Freedom of Information Act and Privacy Act of 1974. This includes guides from the National Security Archive and Reporters Committee for Freedom of the Press.


—Anna Nguyen
Silha Research Assistant
RIAA Subpoenas Those Who Allegedly Download Music

The Recording Industry Association of America (RIAA) continues to vigorously utilize the unique subpoena provision in the 1998 Digital Millennium Copyright Act (DMCA) to track down individuals suspected of illegally downloading music, while offering amnesty to those individuals who repent their file-swapping ways. Section 512(h) of the DMCA allows a copyright holder, or the organization representing the holder, to obtain a subpoena from a clerk of a federal district court in order to obtain the name of an alleged copyright infringer from that individual’s Internet service provider (ISP) using that individual’s IP address — a unique number assigned to an individual’s computer which allows him or her to connect to the Internet. Issuance of a subpoena is largely based on the “good faith” representation that the seeker is requesting the information solely to investigate the suspicious downloading of copyrighted materials.

Reuters reported that those individuals who have not yet been served with a subpoena might qualify for an “amnesty program,” titled the Clean Slate agreement. On September 8, RIAA announced the program to coincide with another announcement that it would be suing 261 individuals who allegedly shared copyrighted songs using peer-to-peer software, according to Wired News. On September 9, 12-year-old Manhattan resident Brianna LaHara settled with RIAA, agreeing to pay $2,000, roughly $2.00 per song she downloaded, according to the Washingtonpost.com. LaHara was the first of the 261 individuals to settle with RIAA. Under the Clean Slate agreement, users would protect themselves from a possible RIAA lawsuit by signing a notarized affidavit in which they promise to refrain from downloading copyrighted music. Users would also have to remove from their hard drives any downloads they currently have.

Those individuals who are already facing lawsuits by RIAA for copyright infringement would not qualify. Furthermore, Clean Slate does not protect individuals from being sued by an individual label or songwriter. This loophole prompted one individual to file a lawsuit against the RIAA for what he calls “unlawful business practices,” according to Wired News. Eric Parke, who does not use peer-to-peer software, filed the lawsuit on behalf of the general public of the state of California the day after RIAA announced Clean Slate, Wired News reported.

RIAA’s amnesty gesture comes on the heels of a government inquiry into its subpoena process and practice. As newly elected chairman of the Senate Governmental Affairs Committee, Sen. Norm Coleman (R-Minn.) marked the start of his appointment by probing the number of subpoenas issued by RIAA. Coleman submitted a written request to RIAA for details as to its criteria for tracking down and pursuing copyright infringers, expressing concern that the vigorous nature of RIAA’s tactics might be, “making criminals out of 13- and 14-year-olds,” according to a story by Garnett News Service.

Under section 512(h) of the DMCA, a subpoena may be served on behalf of the copyright holder to the suspect’s ISP, requesting that the user information be released to the copyright holder’s representative in order to facilitate a legal action against the alleged infringer, and that any suspect documents be removed from the user’s server and his or her online access be disabled. The subpoena does not require that the user be notified that identifying information, such as name and telephone number, is being released to a third party. To date, RIAA has reportedly issued over 1,000 such subpoenas. In a response to Sen. Coleman’s request, RIAA stated that it seeks the identities only of those individuals who trade a “substantial amount” of materials, and is not “targeting ‘de-minimus’ users,” according to the Associated Press. RIAA did not define what a “substantial amount” would be. RIAA has faced challenges in its quest, mostly from colleges and universities that often have certain policies intact that prohibit the release of student information.

RIAA’s pursuit of its agenda of tracking down copyright infringers was enhanced by its January 2003 victory against Verizon Internet Services (See Recording Industry Association of America: Verizon Internet Services, 240 F. Supp. 2d 24 (D.D.C 2003)), the first case to deal specifically with the DMCA’s subpoena provision and the extent to which it is an ISP’s responsibility to disclose customer information. In this case, Verizon contended that it was not obliged to disclose a customer’s identity because Verizon did not store the information directly on its server, but instead only provided a means of connecting to the Internet. On Jan. 21, 2003, Judge John Bates ruled that Verizon must release the identity of the individual to RIAA in order to facilitate further legal action. Verizon appealed.
The government's inability to enforce COPA leaves minors unprotected from the harmful effects of the enormous amount of pornography on the World Wide Web.

—Government's Petition

Supreme Court Review of COPA Sought

On August 11, Solicitor General Theodore Olson, on behalf of the Bush Administration, petitioned the U.S. Supreme Court to again review the Child Online Protection Act (COPA; see 47 USC § 223), which has twice been struck down as an unconstitutional restriction on free speech by the Court of Appeals for the Third Circuit. (See “Bush Urges Passage of Virtual Law on Child Pornography” in the Fall 2002 issue of the Silha Bulletin.)

The government argued in its petition that the government's inability to enforce COPA leaves minors unprotected from the harmful effects of the enormous amount of pornography on the World Wide Web.

COPA defines “harmful to minors” to mean:

any communication, picture, image, graphic image file, article, recording, writing, or other matter of any kind that is obscene or that

(A) the average person, applying contemporary community standards, would find, taking the material as a whole and with respect to minors, is designed to appeal to, or is designed to pander to, the prurient interest;

(B) depicts, describes, or represents, in a manner patently offensive with respect to minors, an actual or simulated sexual act or sexual contact, an actual or simulated normal or perverted sexual act, or a lewd exhibition of the genitals or post-pubescent female breast; and

(C) taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.

COPA punishes Web site operators who expose minors to pornography, unless these operators have made good faith efforts to block minors from accessing their sites. COPA requires Web site operators to use reasonable measures feasible under existing technology to verify age, such as requiring a credit card or a digital certification to verify age. Punishments for violating COPA include fines of up to $50,000 per day that one is in violation of the act as well as jail time. The act specifically exempts Internet Service Providers, search engines, and telecommunications carriers engaged in the provision of telecom service.

Congress passed COPA in 1998 after parts of its predecessor, the Communications Decency Act of 1996 (CDA), were struck down as unconstitutional by the Supreme Court in Reno v. American Civil Liberties Union, 521 U.S. 844 (1997). The Supreme Court found that the CDA violated the First Amendment rights of adults because it banned constitutionally-protected speech, was not the least restrictive means of accomplishing a compelling government interest in protecting children, and was overbroad.

In 1998, one day after COPA was signed into law, the American Civil Liberties Union (ACLU), on behalf of artists, bookstores, and others who post sexually-oriented material on the Internet, sued in the federal courts, challenging COPA as an unconstitutional violation of the free speech rights of adults to see and buy what they want on the Internet. The U.S. District Court for the Eastern District of Pennsylvania agreed and enjoined the enforcement of COPA.

In 2000, the Court of Appeals (3d Cir.) upheld the injunction. The Third Circuit affirmed the district court on different grounds, holding that COPA's reference to contemporary community standards made the act unconstitutionally overbroad. The Third Circuit reasoned that because material posted on-line is available to Internet users worldwide, the contemporary community standards criteria would subject web publishers to “the most restrictive and conservative state's community standards.”

In 2002, the Supreme Court heard the case, vacated the decision of the Third Circuit and remanded the case to that court for further proceedings. The Supreme Court, in an 8-1 decision written by Justice Clarence Thomas, held that COPA's reference to contemporary community standards did not alone render the act unconstitutional, but remanded the case to determine whether the act was unconstitutional in other ways. Justice John Paul Stevens dissented.

The Supreme Court found that COPA’s reliance on contemporary community standards squared with the Court’s long-standing test for defining obscenity. Obscenity is not subject to the free speech guarantees of the First Amendment. In Miller v. California, 413 U.S. 15 (1973), the Court, after more than a decade of turmoil, set out a three-part test for determining whether material is obscene:

(a) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

The Court has found contemporary community standards useful tools in defining obscenity. This criterion seeks to ensure that material is not judged on the basis of personal opinions, nor is the material judged from the viewpoint of an overly-sensitive or insensitive individual or group.

The Court stated “the scope of our decision today is quite limited.” The majority held “only that COPA’s reliance on community standards to identify ‘material that is harmful to minors’ does not by itself render the statute substantially overbroad for purposes of the First Amendment.” The Supreme Court’s decision continued the injunction against the enforcement of COPA and reminded the case to the lower courts for further review of the constitutionality of the act.

Earlier this year, the Third Circuit again struck down the law as unconstitutional, holding that COPA is overbroad, rather than narrowly-tailored as the least restrictive means of protecting children. The court held that the government, in pursuing its compelling interest of protecting children, had impermissibly infringed the free speech rights of adults.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT
Endangered Journalists Around the World

AFGHANISTAN

On August 6, 2003, Afghanistan’s supreme court upheld death sentences for two journalists accused of blasphemy. According to a press release from Reporters Without Borders (RSF), the punishments had been requested a few days earlier by the council of ulama, a group of 13 Muslim scholars. The press release is available online at: http://www.rsf.org/article.php3?id_article=7706.

Sayeed Mahdawi, editor of the weekly newspaper Aftab, and an Iranian reporter, Ali Reza Payam, had been jailed in June due to an article believed by some to be a slur on Islam. Authorities closed down the Aftab after the article, headlined “Holy fascism,” was published in the newspaper on June 11, 2003. The reporters wrote, “If Islam is the last and the most complete of the revealed religions, why are the Muslim countries lagging behind the modern world?” An intervention by President Hamid Karzai released them after one week, but protesting Islamists forced them into hiding on July 3, 2003.

Farangis Najibullah of Radio Free Europe/Radio Liberty wrote, “The case has prompted criticism of the Afghan government for failing to protect press freedom. Meanwhile, many Afghan journalists say politicians and warlords in the country are creating a climate of fear. They say there are dozens of unreported cases of correspondents who have been intimidated or assaulted for publishing critical articles.”

“The court’s ruling puts the transitional government of President Hamid Karzai in a difficult position,” Rahimullah Samander of the Institute for War & Peace Reporting wrote in an article published in The Charlotte Observer on August 22, 2003. “While Karzai has the power to appoint and remove [court] members, he is unlikely to alter the composition of the court, given the fragile nature of his political position.”

At the time of Samander’s report, the journalists were still in hiding. It was unclear whether they remained in Afghanistan.

ALGERIA

In a report by the Agence France-Presse, foreign television journalists were ordered to leave Algeria in early July 2003, part of a government effort to keep them from covering the release of two leaders of Algeria’s banned Islamic Salvation Front (FIS) party. Abassi Madani and Ali Belhadj were at the center of a radical political movement in the 1980s. Belhadj was known for delivering “fiery” anti-government speeches in Algerian mosques.

An unidentified foreign reporter told Agence France-Presse that the official reason for the order was a concern that the presence of reporters was “undermining the sovereignty of the state.” The reporter claimed, however, that “the authorities have asked us to leave so as to avoid giving too much publicity to Belhadj.”

Robert Menard of Reporters Without Borders (RSF) told Agence France-Presse that “the Algerian authorities are deluding themselves if they think they can succeed this way in blocking all information on this subject from appearing in the foreign press.”

According to BBC News, the released leaders are not allowed to participate in any social or political activities.

COLOMBIA

One journalist was killed in Colombia on August 22, 2003, when rebels shot at his vehicle after his driver failed to stop at a rebel roadblock. The group was traveling from Puerto Caicedo to Puerto Asis in Putumayo state. According to The Miami Herald, Juan Carlo Benavides worked for Manantial Estereo, a community radio station, and was intending to cover a meeting between President Alvaro Uribe and regional officials in southern Colombia. His colleague Jaime Conrado was wounded.

A report by the Committee to Protect Journalists (CPJ) claimed that rebels from the Revolutionary Armed Forces of Colombia (FARC) are one of several groups known to control checkpoints in the region. The report is available online at: http://www.cpj.org/news/2003/Colombia25aug03na.html.

According to an August 24, 2003, CNN.com article, FARC rebels had been planning an attack on Uribe during his visit to the area. FARC has attempted to assassinate Uribe on several occasions. The report stated that FARC and a smaller rebel army have spent nearly 40 years fighting the Colombian government. Approximately 3,500 people, mainly civilians, have died during each year of the war.

CONGO

On July 11, 2003, The Democratic Republic of Congo (DRC) sentenced a reporter for the Kinasha, DRC-based newspaper La Tribune to five years in prison for defamation.

In a release by the Society of Professional Journalists (SPJ), Donatien Nyembo Kimuni wrote an opinion piece on June 5, 2003, entitled “Congo Mineral: Workers are Paid Poorly and Exploited,” in which he charged that miners at Congo Mineral were dying due to toxic chemicals and poor working conditions. A protest letter from the Committee to Protect Journalists (CPJ) claimed that Kimuni had based his article on a public mining company report and testimony from local miners, according to journalists at La Tribune. Congo Mineral later published a response in La Tribune but nevertheless filed charges against Kimuni.

SPJ asserted that the harsh sentence was not justified and maintained that the DRC should uphold the importance of free speech, especially since a new power-sharing government was recently implemented.

“As the new government transitions the nation toward a peaceful future, its actions will speak far louder than words,” said SPJ President Robert Leger. "Adhering to the DRC and international guarantees of free speech and human rights will speak volumes.”
GUATEMALA

In July 2003, riots took place in support of Rios Montt, a former dictator accused of killing thousands of Guatemalans during his 18-month rule in the early 1980s. Montt fought a controversial court battle to become the ruling party's candidate in the Nov. 9 presidential elections, in spite of Guatemala's 1985 constitution that prohibits former coup leaders from running for president. After the Supreme Court of Justice (CSJ) ruled against Montt's candidacy on July 20, supporters staged riots in Guatemala City. Journalists attempting to cover the riots were chased, taunted, and victimized by the mobs. According to the Resource Center of the Americas, one reporter died of a heart attack after being chased through the streets; others were doused with gasoline by rioters who tried to set them on fire. Soon after, the Constitutional Court ruled that Montt could indeed run for president.

Seventy journalists later filed a complaint with the government accusing Montt, his supporters and additional government officials of involvement with the attacks, according to The Miami Herald. "The press is the only functioning institution in this country," Mario Antonio Sandoval, vice president of daily newspaper Prensa Libre and president of the Guatevisión cable station told the The Miami Herald. "That is why they either have to control it or scare it."

Jose Ruben Zamora, editor of El Periodico, suggested to the Herald that "high political stakes" may have caused the Montt supporters to protest the journalists' presence. Both Montt and the Guatemalan Republican Front denied responsibility for the supporters' behavior.

HAITI

The Miami Herald reported in August that the Committee to Protect Journalists (CPJ) recently deemed Haiti the hemisphere's second most dangerous nation for the news media. Haiti shares its position with Cuba, with Colombia listed as the most dangerous nation.

The CPJ sent a delegation to Haiti to look into reports of intimidation and violence against journalists. The group noted that two journalists, Jean Dominique and Brignol Lindor, have been murdered and nearly 30 others have gone into exile during the past three years.

Haiti officials disputed CPJ's claim. Mario Dupuy, Haiti's secretary of state for communication, told the Herald, "We are in a democratic transition. All sectors are learning what that means, including the media."

"The Haitian government has failed to protect the safety of the country's journalists who are working in an increasingly hostile and unstable environment," wrote CPJ's Joel Simon, in a February 19, 2003, letter to Haitian President Jean-Bertrande Aristide.

INDONESIA

An American freelance journalist convicted of immigration offenses was released on August 3, 2003, after spending 40 days in jail in Indonesia. An unidentified immigration official told Agence France-Presse that he was deported and barred from entering the country for one year.

According to Reuters, William Nessen spent a month with rebels in Indonesia's Aceh province before surrendering to government officials. An Indonesian prosecutor claims that Nessen's activities were not allowable on his journalist's visa. Agence France-Presse stated that the Indonesian court found him guilty of "reporting without informing authorities."

Nessen, a contributor to The San Francisco Chronicle and The Boston Globe, entered the region before the Indonesian military offensive to put down the rebel movement began.

According to the Society of Professional Journalists (SPJ), the military had been increasingly harsh on journalists working to cover the conflict—eventually keeping them from getting into the region at all. SPJ had called on Indonesian officials to immediately release Nessen.

SPJ President Robert Leger said in a July 8 release, "Democratic countries should work hard to ensure that journalists have more access to war zones than the population in general, not less."

IRAN

Zahra Kazemi

Charges against two Iranian intelligence agents in the beating death of Iranian-Canadian photojournalist Zahra Kazemi, 54, were dropped on September 1, 2003, according to the Associated Press. Tehran's deputy prosecutor general rejected the charges and demanded "further investigations." From the outset, Iran's intelligence ministry called the accusations about the two agents "sheer lies."

Kazemi died in Tehran on July 10, 2003, from a brain hemorrhage apparently brought on by a blow to the head, according to Agence France-Presse. Five arrests were made in July; three individuals were subsequently released. Although Canada has continued to request information regarding the identities of those arrested and charged, no details have been released.

Agence-France Presse reported earlier that Kazemi was arrested on June 23, 2003, after taking unauthorized photographs of protesters who were demonstrating outside of Tehran's Evin prison. Three days later, she was moved to Baghiatollah Azam hospital, where she later died. Initially, Iranian officials maintained that Kazemi became ill after her arrest. On July 16, Vice President Mohammad Ali Abtahi admitted that she had indeed been beaten.

Canadian officials demanded that Kazemi's body be returned to Canada, where she had lived for the past 10 years. Despite those demands, as well as the demands of her son, Kazemi was buried in Iran. As a result of Iran's refusal to comply with the request, Ottawa recalled its ambassador to Tehran, and, according to Agence France-Presse, relations between the two countries are strained.

Reporters without Borders (RSF) told Agence France-Presse that it was "outraged" by Iran's actions. RSF's Robert Menard was quoted in a July
War on Terrorism Affects Civil Rights
Proposed Rules on Critical Infrastructure
Elicit Comments from Silha Center, Others

In response to a request by the Department of Homeland Security (DHS) for comments on its proposed rules governing the handling of critical infrastructure information, DHS received over 100 comments from various parties. The Silha Center was among those submitting comments to DHS critiquing the proposed rules.

DHS, in implementing the Homeland Security Act of 2002, seeks to gather information on the nation’s critical infrastructure, such as dams, bridges, power grids, and computer systems, to protect them against terrorist attack. Under its proposed rules to establish Procedures for Handling Critical Infrastructure Information, DHS hopes to induce businesses to voluntarily submit information about privately-owned critical infrastructure. To reward industry compliance, the Department proposed that any critical infrastructure information submitted to the government by companies be shielded from disclosure and not used against companies in private lawsuits. As proposed, the rules provide broad secrecy, rather than a presumption of openness. (See “Personal Freedoms at Risk: Homeland Security” in the Summer 2002 issue of the Silha Bulletin.)

The Silha Center, in its comments to DHS, warned, “The ability of the press to inform the public about deficiencies in the nation’s critical infrastructure will be undermined by the over-broad protection of business information under the proposed rules. . . . We are concerned that some companies will, in fact, abuse the proposed rules in order to shield themselves from liability and to deprive the public of vital information. Under the proposed rules, DHS will do little, if anything, to discourage this.”

The Silha Center cited several major flaws in the proposed rules. The Silha Center faulted the proposed rules for unclear definitions and the lack of safeguards to protect against businesses submitting extraneous, non-critical infrastructure information to gain government protection of their information. The comments of the Silha Center also criticized the proposed rules for restricting information sharing between federal, state, and local government agencies and for criminalizing government whistle-blowing about deficient critical infrastructure.

The Silha Center concluded, “The Department must narrow the opportunities for companies to abuse these procedures. The Department should be a storehouse of critical infrastructure information, not a dumping ground for industry wrongdoings. . . . The Department cannot rely solely on the good faith of businesses in formulating these proposed rules. Americans will be no safer from terrorism under the approach reflected in the proposed rules.”

DHS to Post Comments on Web Site

The Department has said it will post the comments it received on the proposed rules on its web site, www.dhs.gov. In the interest of public access, in the interim, OMB Watch has posted 64 of the comments received by the Department.

Parties submitting comments include the Federal Energy Regulatory Commission, the Port Authority of New York and New Jersey, ChevronTexaco, Lockheed Martin, MCI, the American Society of Newspaper Editors, the Newspaper Association of America, OMB Watch, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists.

Organizations Call for Input on Rules Regarding Sensitive But Unclassified Information

Seventy-five organizations representing journalists, privacy advocates, environmental groups, librarians, scientists, and others were signatories to an August 27 letter to DHS Secretary Tom Ridge urging openness in drafting rules regarding the sharing of sensitive but unclassified information.

The Department is developing rules for handling this information pursuant to the Homeland Security Information Sharing Act, passed as a part of the Homeland Security Act of 2002. Thus far, however, the Department has not provided for public participation or comment in the rule-making process for the handling of sensitive but unclassified information.

The letter urged Secretary Ridge to provide public notice-and-comment rulemaking: “We ask that the Department of Homeland Security provide the public with a period of sufficient length to review and comment upon draft versions of the procedures before they are finalized.”

Signatories to the letter include the Silha Center, the American Society of Newspaper Editors, the Associated Press Managing Editors, the Freedom of Information Center (University of Missouri School of Journalism), the Newspaper Association of America, the Radio-Television News Directors Association, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT
War on Terrorism Affects Civil Rights
Inspector General Produces Report on Treatment of Detainees


According to the Inspector General’s report, 763 aliens were detained in the 11 months following the Sept. 11 attacks. Many of those detainees were held by the federal Bureau of Prisons at the Metropolitan Detention Center (MDC) in Brooklyn, N.Y., or the Passaic County Jail in Paterson, N.J. The report stated that the most serious abuses were discovered at MDC, where investigators uncovered evidence of physical and verbal abuse of detainees by guards.

Among other findings in the report:
- The FBI made little effort to distinguish between detainees who were suspected of having a connection to terrorism and those who were not considered to be linked to terrorism but were discovered and detained in the course of following investigative leads. That failure, according to the report, significantly affected detainees’ treatment.
- The DOJ instituted a policy that detainees who were considered to be connected to the terrorist investigation had to be cleared by the FBI before they could be removed or released. The ponderous FBI process of clearing detainees often resulted in much longer confinement for detainees. On average, it took the FBI 80 days to clear a detainee of terrorist links, according to the report.
- Many detainees did not have attorneys when confined, and MDC rules regarding phone calls, coupled with an inaccurate list of pro bono attorneys, made it difficult for detainees to obtain representation.

"While the chaotic situation and the uncertainties surrounding the detainees’ connections to terrorism explain some of the problems we found in our review," Fine said in a press release announcing the report, "they do not explain them all."

Just two weeks later, the report took on added significance in light of the D.C. Circuit’s decision to defer to the government’s judgment on what constitutes national security information when considering federal Freedom of Information requests.

The June 2 report was followed less than two months later by another report, also released by the Inspector General’s office, announcing investigations into 34 credible allegations of mistreatment of people detained under the 2001 USA PATRIOT Act. Complaints singled out for investigation include allegations that a prison guard forced a Muslim inmate to remove his shirt and use it to shine the guard’s shoes and that guards subjected one Middle Eastern detainee to repeated body-cavity searches, according to a July 22, 2003 report in Newsday.

—DOUG PETERS
SILHA FELLOW

Daily editorial board said in a statement, and “the [editors] accept the consequences of this mistake in the framework of the law.”

“Iraj Jamshidi has no link or any interest to groups that are hostile to the Islamic republic, particularly the Mujahedeen group,” the board maintained.

Rajavi is despised in Iran, according to Agence France-Presse, due largely to her “cult-like” group’s support of Saddam Hussein during the 1980-88 Iran-Iraq war in which approximately one million individuals were killed, most of whom were Iranians.

Strike/21 Journalists Imprisoned

Over 200 pro-reform journalists attended a one-day strike in Iran on August 8, 2003, to protest the continued lack of media freedom and to call for the release of detained journalists, according to the Associated Press. The day marked the five-year anniversary of the death of Mahmoud Saremi, a reporter who was killed by Taliban rulers in Afghanistan in 1988.

According to the Iran Press Service, the protesters denounced the “miserable conditions” of Iranian journalists. Robert Menard of Reporters without...
War on Terrorism Affects Civil Rights
ISOO Releases Annual Report

The Information Security Oversight Office's (ISOO) annual report indicates that classification of government reports rose in 2002 by 14 percent, while the annual number of reports declassified reached its lowest level in seven years (July 2003, Secrecy News). The ISOO is charged with overseeing the government's security classification system and administers its report to the president annually. A copy of this year's report is available online at http://www.fas.org/sgp/isoo/2002rpt.pdf. In the ISOO's report to the president, ISOO director J. William Leonard notes the rise in classification and drop in declassification as a consequence of functioning in a post-9/11 environment. In an introductory essay to the report, Leonard states that, "the Federal government is confronted with the twin imperatives of information sharing and information protection, two notions that contain inherent tension but that are not necessarily contradictory." Leonard goes on to argue that, although the nation must address the "environment of rapidly evolving threats," government agencies must not allow documents to remain classified longer than is prudent so as to maintain the "integrity of the classification system." Leonard reiterated this sentiment when he announced the need for a reform of classification policy in a June presentation to the National Classification Management Society: Leonard emphasized the need for a "seamless and congruous system for protecting and sharing all types of information, both classified and unclassified." A full copy of Leonard's remarks are available online at http://www.fas.org/sgp/isoo/ncms061203.html.

Leonard details a complicated classification system in his remarks, one burdened with inconsistent or confusing administrative details. For example, Leonard states, "One of the great fallacies is the belief that the Federal Government uses a three-tier classification process--TOP SECRET, SECRET and CONFIDENTIAL. In reality, the Federal Government has so many varieties of classification that is can make Heinz look modest at the number of varieties it offers." Leonard stresses that a "simplified framework" for the declassification process is essential to a coherent policy, and that such a policy serves to enhance the nation's agenda; "Our ability to share and leverage information is the source of American power and might in the 21st century. It is the source of our economic strength. Our military power, our intelligence and law enforcement prowess, and our technological research and development superiority are highly dependent upon effective information sharing that entails taking vast amounts of information from disparate sources and synthesizing it in timely and unprecedented ways. Whether on the battlefield, in the analyst's or criminal investigator's office, or in the laboratory, it is the innovative application of information in heretofore unfathomable ways that provides our Nation the decisive edge in undertakings such as the global war on terrorism."

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Surveys on Access to Information Released

A recent survey commissioned by the First Amendment Center and American Journalism Review indicates that 46 percent of Americans believe the press has too much freedom. This number is up four percent from the previous year and just slightly higher than the average for the past seven years, despite the fact that the government's Freedom of Information policy (FOI) has become more restrictive in the past two years.

Another survey conducted by the General Accounting Office (GAO) details the effect of this change on the granting of Freedom of Information requests. In October 2001, Attorney General John Ashcroft issued a memorandum outlining the Bush administration's FOI policy. The new memorandum focused on Exemption 5 of FOIA, which permits federal agencies to refuse to disclose inter- and intra-agency documents, such as memos, used in arriving at policy decisions. Ashcroft urged agencies to consider "the institutional, commercial, and personal interests at stake," and said that the Justice Department would defend decisions to withhold records "unless they lack a sound legal basis."

According to GAO's report detailing the survey findings, just under half of the government agencies surveyed—forty-eight percent—reported that they are not releasing less information than they were before Ashcroft's directive took effect.

However, thirty-one percent of those officials surveyed reported that their agencies are releasing less information, and seventy-five percent of those agencies said the reduction was due to Ashcroft's directive.

Among the nearly 200 agencies surveyed were the CIA, the Department of Justice and the Department of Defense, but the GAO survey report does not provide information on which agencies responded in what manner. Also, the report does not indicate if the agencies that reported no change in disclosure typically had more restrictive disclosure policies prior to the directive. It is therefore difficult to ascertain what type of information is being restricted from the public because of Ashcroft's memorandum. To read GAO's report, go to http://www.gao.gov.

By contrast, some public officials at the state level are doing more to give the media greater access to more information in the hopes of preserving the public's right to know. For example, in August 2003, Governor Jim Doyle signed a bill augmenting Wisconsin's open records law to give more access to the media and the public, as well as streamlining the process by which those records can be obtained. An Associated Press report quoted Jeff Hovind, publisher of the Waukesha Freeman and president of the Wisconsin Freedom of Information Council, "This bill by and large removes those barriers for the vast majority of those records and allows citizens as well as the media to have the unfettered access to the information that the Legislature intended."

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT
Journalists, continued from page 40

Borders (RSF) claimed that the nonviolent protest was "symptomatic of the discontent within the profession."

"The Islamic Republic of Iran is the biggest prison for journalists in the Middle East," RSF said in a statement quoted by the Iran Press Service. At least 21 journalists were imprisoned in Iran at the time of the protest, according to Agence-France Presse.

On July 13, 2003, Agence France-Presse reported on three of those arrests, stating that Hossein Bastani and Vahid Ostad-Pour of the pro-reform Yas-e-No daily, and Shahram Mohammadi-Nia, director of the weekly Vaught, were arrested in Tehran on July 11 and 12, 2003. According to the World Association of Newspapers (WAN), Mohammadi-Nia was accused of publishing a photograph and article deemed unacceptable. Bastani and Ostad-Pour had published an article telling readers of an order from the intelligence ministry to refrain from printing an issue of Yas-e-No that highlighted recent demonstrations.

TAWAIN

A Taiwanese journalist was founded guilty of sedition by Taiwan's High Court in late July, according to the Associated Press.

Hung Cheh-cheng was accused of reporting about planned military exercises using classified information. The defendant claimed he was innocent and argued that it was a reporter's duty to uncover information from other than official sources.

"Do reporters have to wait for handouts from public relations departments before they can write anything?" he asked.

The High Court sentenced Hung to one and a half years in prison but immediately granted him a three-year parole. The Taiwan News stated that Hung "expressed grave disappointment at the verdict on grounds it declared him to be guilty but allowed him to remain free."

"The [suspended sentence] is the worst scenario I had expected as it cast a stigma on my character but deprives me the opportunity of being imprisoned for the sake of the freedom of the press," he told reporters after walking out of the courthouse, according to The Taiwan News report.

Asia program coordinator Kavita Menon for the Committee to Protect Journalists (CPJ) was quoted in a CPJ release as saying, "It is outrageous that Hung Cheh-cheng has been sentenced for reporting on matters of clear public interest," she said. "We call on the Taiwan government to reconsider its commitment to press freedom by denouncing this ruling and ensuring that journalists are free to conduct their work without fear of government harassment."

VIETNAM

A Vietnamese man was arrested on July 10, 2003, after pretending to be a journalist for seven years. Agence France-Presse reported that colleagues alerted police after they became suspicious.

According to the South China Morning Post, Lai Ngoc Oanh, 56, "allegedly forged identity papers and used a fake name" to work for the Thoi Bao Kim Thanh newspaper. He is likely to face charges of fraud and forgery.

Reporters in Vietnam have traditionally been bribed by gifts and small amounts of cash in order to persuade them to attend meetings or write favorable reviews, according to Agence France-Presse. Oanh, a former car mechanic, claimed that he earned more money posing as a journalist than he did as a mechanic.

An unidentified spokesperson from the weekly newspaper told the South China Morning Post that Oanh had attended press conferences and product launches while claiming to be a representative of the newspaper, but he had never written a story.

—Elizabeth Jones
Silja Research Assistant
New Developments in the War in Iraq
Jessica Lynch Book, Television Projects Negotiated

In November, “I Am Soldier, Too: The Jessica Lynch Story” will hit the bookstands. Pfc. Jessica Lynch was able to negotiate a book deal with the publisher Alfred A. Knopf after her honorable discharge from the military in August.

Lynch, a supply clerk, and her unit were ambushed March 23 in southern Iraq after making a wrong turn. She suffered multiple broken bones; 11 of her comrades were killed and five other members of the 507th Maintenance Company were taken prisoner. The other members of her unit were released later.

The authorized biography will be written by former New York Times reporter Rick Bragg and published by Knopf, a division of Random House, according to The Washington Post.

The Associated Press reported that financial terms were not disclosed, but a source close to the negotiations said Lynch and Bragg will split a $1 million advance, with any royalties going to Lynch. The source spoke to the Associated Press on condition of anonymity.

Concerns have been raised including how much Lynch remembers of her capture and Bragg’s authorship. He resigned from The New York Times on May 28, 2003, after it was discovered he failed to give credit to an intern’s reporting, according The Washington Post.

Initially, Lynch became the most sought interview by television networks after returning from Iraq in April.

Some networks sent gifts. For example, Katie Couric of NBC News sent Lynch a bundle of patriotic books, including Rudolph Giuliani’s memoir, Leadership. Diane Sawyer, of ABC News, sent a locket with a photograph of Lynch’s family home in Palestine, W.Va., The New York Times reported.

But the Times also noted that CBS News’ pitch of a two hour documentary with other projects by other divisions of its corporate parent, Viacom, raised concerns among critics about the independence of news divisions owned by large media corporations.

The New York Times reported that Betsy West, a CBS News senior vice president, wrote to Lynch’s military representatives, stating that “Attached you will find the outlines of a proposal that includes ideas from CBS News, CBS Entertainment, MTV networks and Simon & Schuster publishers.” West’s letter continued, “From the distinguished reporting of CBS News to the youthful reach of MTV, we believe this is a unique combination of projects that will do justice to Jessica’s inspiring story.”

According to The New York Times, the proposal said that CBS Entertainment told CBS News that “this would be the highest priority for the CBS movie division, which specializes in inspirational stories of courage.” Simon & Schuster, the proposal stated, “is extremely interested in discussing the possibilities for a book based on Jessica’s journey from Palestine, West Virginia, to deep inside Iraq.”

MTV Networks, West’s letter continued, was offering a news special, a chance for Lynch and her friends to be the co-hosts of an hour long music video program on MTV2, and even a special edition of its hit program “Total Request Live” in her honor. “This special would include a concert performance in Palestine, West Va., by a current star act such as Ashanti, and perhaps Ja Rule,” the proposal said, as reported in The New York Times.

CBS News spokeswoman Sandy Genelius told the Associated Press on June 16 that there was a clear distinction between the request for an interview with Lynch and possible deals with MTV, Simon & Schuster and other Viacom divisions.

“Most of the other network proposals did have some entertainment proposals or tie-in attached to them,” Genelius said, citing comments made to her by a spokesperson for Walter Reed Army Medical Center.

Even though CBS complained that The New York Times “selectively quoted” the letters, the network refused to make the correspondence public, reported the Associated Press.

The Associated Press reported on September 15, 2003, that the first television interview was granted to ABC with Diane Sawyer. The interview will air on Nov. 11, 2003.

—Anna Nguyen
Silha Research Assistant
In early July, only 23 embedded reporters remained in Iraq compared to 700 embedded reporters at the height of war. According to Editor and Publisher, the remaining embedded reporters included one each from The Washington Post, The New York Times, and the Stars and Stripes, while two were from The Washington Times. The Associated Press had three embedded reporter and Reuters has one. The magazine speculated that editors limited their resources to that region due to budget constraints and because situations in Liberia, North Korea and Israel had escalated during summer.

The Associated Press reported that as of August 14, 2003, most of the remaining reporters were embedded with the 4th Infantry Division near Tikrit, the hometown of Saddam Hussein, about 120 miles north of Baghdad. The division had been particularly active in searching for Saddam, members of his former regime and guerrilla fighters.

Jules Crittenden

U.S. Customs officials have returned most of the 55 items confiscated from Boston Herald reporter Jules Crittenden when he arrived at Logan International Airport on April 19, following an assignment reporting on the war in Iraq, the Associated Press reported in late July. "I’m happy about the decision," Crittenden told the Boston Herald.

Crittenden had been embedded with the U.S. Army’s Third Infantry Division to cover the war for the Boston Herald, and had also written a number of pieces for the Poynter Institute about his experiences in Iraq, available online at www.poynter.org. (See “Journalists Face the Challenges of Wartime Ethics,” in the Spring 2003 Silha Bulletin.)

The items returned to Crittenden include reporting equipment belonging to the Herald, decorative items he purchased in Kuwait, as well as souvenirs he collected from heaps of war-related rubble, the Boston Herald reported. The Boston Herald's attorney, Jeffrey Hermes, said he was pleased with the decision. "I think it reflects a change in policy with regard to Iraq and the changed circumstances there, and an understanding that the regulations put in place following the Gulf War are no longer appropriate under the current state of affairs," Hermes told The Associated Press.

However, Crittenden did not get everything back. In a decision on July 17, customs officials said they would not return a 4-foot-by-6-foot painting of Saddam Hussein, which was appraised at $800, according to Reuters. Crittenden will not face charges for taking the painting out of the country because, according to a law enforcement official, the artwork was not deemed valuable enough to merit prosecution.

Besides the painting, Crittenden also did not receive military gear issued to him as an embedded reporter, the Boston Herald reported.
New Developments in the War in Iraq
Reports of Military Deaths in Iraq Stir Controversy

The number of U.S. soldier deaths in Iraq is higher and remains underreported by the media, according to a news analysis by *Editor and Publisher* editor, Greg Mitchell, on July 17, 2003. Press and television reports on July 17, 2003, reported that 33 U.S. soldiers died in combat since President Bush declared the end to major fighting on May 2, wrote Mitchell. The actual number was 85 that included a large number of non-combat deaths, according to a Web site called Iraq Coalition Causality Count. Available online at http://lunaville.org/warcausalties/Summary.aspx, the organization tracks deaths by numerous causes in the United States, Britain and other countries. The numbers are based on official U.S. Department of Defense and U.S. Central Command (CENTOM) press releases and the British Ministry of Defense. CENTCOM, headquartered at MacDill Air Force Base in Tampa, Fla., is one of nine Unified Combatant Commands assigned operational control of U.S. combat forces.

The site describes each death using details from the military along with the name, age and home town of each fatality. The site also tracks wounded soldiers. *Editor and Publisher* found the details about the soldiers’ deaths sketchy or vague. Mitchell said that selectively reporting these 33 deaths implied they were the only deaths that counted.

The article charged the media with providing a misleading sense of the recent U.S. death toll in Iraq. Mitchell used the example of the press regularly reporting “combat” deaths, but downplaying other deaths, including accidents, suicides, and other causes. These types of deaths outnumber the deaths from hostile fire.

An analysis of the 85 deaths by *Editor and Publisher* revealed that nearly as many U.S. military personnel died in vehicle accidents, 17, as from gunshot wounds, 19. Ten died after grenade attacks and seven died from accidental explosions and another seven died in helicopter crashes. Six soldiers were killed by what is described as “non-hostile” gunshots or accidents, and three drowned.

As of August 27, 2003, 280 U.S. soldiers, 49 British soldiers, one Danish soldier and one Spanish soldier had died, according to the Iraq Coalition Causality Count Web site.

Some examples of Mitchell’s charge can be found in the media. For example on August 27, 2003, *The Atlanta Journal and Constitution* reported U.S. military fatalities since May 1 exceeded the deaths from March 20 to April 30 during the actual war. Figures from the Pentagon and U.S. Central Command showed 140 deaths occurred since May 1. This was two more than the number killed from March 20 to April 30, according to the newspaper.

The newspaper also reported the number of deaths as a result of hostile action since May 1 was 62, roughly a third of the total (178) hostile deaths since the operation began in March from Pentagon data.

Cox News Service reported on August 26, 2003 that figures from the Pentagon and U.S. Central Command showed 140 deaths occurred since May 1, two more than the number killed from March 20 to April 30. Similarly, the news service only reported the number of deaths as a result of hostile action since May 1 was 62.

Some media outlets have given more details about the total number of all types of deaths. On August 25, 2003, the Associated Press reported that a soldier died of a non-hostile gunshot wound. This brought the number of soldiers killed since major combat was declared over to 138. The article added, “A total of 276 soldiers have died in combat or by accident since the war began March 20.”

Mitchell wrote a follow up in *Editor and Publisher* online on July 22 that said the original story received the largest amount of feedback since he began at the magazine four years ago. Many readers raised similar questions about how the media and U.S. military reported deaths. On the other hand, one reader wrote there are always a large number of non-combat deaths in any action and that the number of American deaths is overplayed. The reader said that Mitchell should put that in perspective.

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ANNA NGUYEN
SILHA RESEARCH ASSISTANT
French-based group Reporters Without Borders (RSF) protested the treatment of journalists by U.S. troops, in a statement July 31, 2003 available online at http://www.rsf.org/article.php?id_article=7678. The statement was issued following incidents involving a number of journalists, none of whom are American citizens, that were beaten or detained by U.S. troops after the war was declared over on May 1.

**Islamic Republic Iran Broadcasting Reporters Detained by U.S. Troops**

The RSF statement focused on two Iranian journalists and documentary producers, Soheyl Karimi and Sa’id Abutaleb, both from Islamic Republic Iran Broadcasting (IRIB), were producing a documentary in the vicinity of Al-Kut and Diwaniah when they were detained by American troops in the southern town of Diwaniah on July 1, 2003. A spokesperson for the US-British forces said the two had been arrested for “security violations,” RSF reported.

The Voice of the Islamic Republic of Iran, the broadcast radio branch of Islamic Republic of Iran Broadcasting, reported that on August 25, 2003, the families of the two documentary producers held a demonstration in front of the United Nations office in Tehran, Iran, marking the fifty-fifth day of their relatives’ detention.

**Kyodo News Service Journalist Detained by U.S. Troops**

A separate incident, reported by Kyodo News Service, involved Kazutaka Sato, a journalist from Japan Press. According to Sato’s colleague, Mika Yamamoto, on July 27, 2003, Sato was reportedly beaten by U.S. soldiers while he and Yamamoto filmed the aftermath of civilian damage caused by a U.S. raid in Baghdad’s Mansur district. “The soldiers had set up a cordon across which journalists were not allowed to cross and we began filming from behind the line. Even though we remained behind the line, soldiers continued ordering us to stop filming,” Yamamoto wrote in an e-mail interview with The Toronto Star on August 2, 2003. Yamamoto told Kyodo News Service that U.S. soldiers threw Sato to the ground, tied his hands and detained him for an hour. Yamamoto said the soldiers also confiscated Yamamoto’s and Sato’s camera.

“They kept him until other foreign journalists began to appear on the scene,” Yamamoto wrote in his e-mail interview with The Toronto Star. “As soon as others started arriving, the soldiers’ attitude became far less aggressive and they immediately began removing the wire from around Sato’s wrists.”

Sato and Yamamoto had been in Iraq on an assignment for Japan’s Nippon Television Network. Sato is the leader of Japan Press, a group of independent Japanese journalists that covers conflicts around the world.

On July 29, a senior US military official said that the US military was investigating the allegations by Sato, but did not believe that the troops detained the journalist, the Kyodo News Service reported.

**Cameraman with Al-Jazeera Arrested by U.S. Troops**

The leading Arab news network Al-Jazeera reported on July 28, 2003, that one of its cameramen was arrested by U.S. troops on July 26 in the northern Iraqi city of Mosul as he filmed an attack on American soldiers.

“Our colleague Nawfal al-Shahwani was released overnight, but they [the US soldiers] confiscated the tape he’d made,” Yasser Abu Halala, the Qatar-based channel’s correspondent in Baghdad, told Agence France Presse.

A U.S. military spokesman who was interviewed by Agence France Presse said he was unaware of the incident.

**Hurriyet Newspaper Journalists Detained by U.S. Troops**

Four Turkish journalists, Yalçin Dogan and Özdemir Ince from Hurriyet newspaper, and Faruk Balıklıçı and Ferit Aslan from Dogan News Agency, were detained for an hour and a half by U.S. troops on July 26. The troops returned the journalists’ equipment, but the photos they had taken of soldiers with a digital camera were erased, according to the RSF report.

**Freelance Cameraman Richard Wild Shot by U.S. Forces**

On July 5, 2003, British journalist Richard Wild, 24, was killed in Iraq, only two weeks after he had arrived in Baghdad, according to the Associated Press.

The freelance cameraman, a Cambridge University graduate, was approached on a crowded street corner and fatally shot at close range by an assailant who ran off into the crowd and disappeared. His co-workers told the Associated Press that Wild was eager to become a war correspondent and had been working on a story about the looting of Iraq’s natural history museum during the war.

Michael Burke, an independent British TV producer in Baghdad, speculated in comments to the Associated Press that Wild, who was working alone at the time of his death, might have been mistaken for an American soldier as a result of his Western style of dress and short blond hair. According to The Guardian, Wild was not carrying equipment that would have clearly identified him as a journalist.
Silha Center Hosts Ethics Forum on October 2, 2003

The highly-publicized Jayson Blair scandal at The New York Times, together with more recent ethical violations by other journalists, has prompted important questions regarding journalists' behavior. On October 2, 2003, the Silha Center for the Study of Media Ethics and Law hosted a panel discussion to explore why journalists cheat and how news organizations might work to prevent it.

The panelists were Dr. Wendy Barger, media ethics professor at the University of St. Thomas; Eric Black, journalist, Minneapolis Star Tribune; Gary Hill, co-chair of the National Society of Professional Journalists Ethics Committee and investigative and special segments editor at KSTP-TV (Channel 5) in the Twin Cities; and Kenny Irby, visual journalism group leader at the Poynter Institute in St. Petersburg, Florida. Silha Professor and Silha Center Director Jane E. Kirtley moderated the panel.

Each panelist offered insight into the complex ethical concerns surrounding plagiarism and fabrication. According to Black, journalists may cheat for a variety of reasons, including insecurity and ambition. Primarily, though, the main cause for plagiarism may be that the violation lacks real definition. Although journalists are instructed not to plagiarize, the boundaries of plagiarism often remain unclear.

Fabrication also lacks definitive limits, Irby noted, and it is a particularly problematic issue for photojournalism. Technological advances have allowed for easier and more convincing alterations of photographs, provoking questions over how much freedom photographers and designers should have to make changes to pictures. Without specific guidelines, it remains difficult to determine at what point the modification of a visual image becomes unethically misleading.

Hill pointed out that, contrary to what many believe, a sense of ethics is not intuitive. Rather, ethics should be considered a skill set that must be cultivated within individuals. So just how can journalists nurture their ethical sensibilities? Barger offered a few suggestions. First, despite the rigorous demands of the newsroom, reporters need to find time to reflect on their craft and to discuss possible ethical difficulties with their colleagues. Second, journalists need to rebuild their relationship with the public and be more open about the practices of their industry. Increasing public demands prompt increasing newsroom competition, which leads to hasty—and sometimes inaccurate—journalism. Finally, citizens themselves should bear some responsibility for the quality of journalism. A public that rewards dishonorable reporting with its attention and trust does not advance the argument for more ethical practices in the newsroom.

—Elizabeth Jones
Silha Research Assistant
EIGHTEENTH ANNUAL SILHA LECTURE

KENNETH STARR
FORMER FEDERAL JUDGE AND INDEPENDENT COUNSEL

“POLITICAL LIBERTY:
CAMPAIGN FINANCE AND THE
FREEDOMS OF SPEECH AND ASSOCIATION”

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