

# U.S. Supreme Court Weighs California's Ban on Violent Video Game Sales

*Silha lecturer Paul Smith urges justices to find state law unconstitutional*

On October 18, 2010, Paul Smith, a veteran of more than a dozen Supreme Court oral arguments, spoke to an overflow crowd at the University of Minnesota's Cowles Auditorium for the 25th Annual Silha Lecture about another case that he was about to argue before the Court. In that case, *Schwarzenegger v. Electronic Merchants Ass'n*, No. 08-1448 (2010), Smith argued against the State of California, which he said "tried to take the doctrine of obscenity for minors ... and apply it to violence in video games." Smith argued that the Court should not create a new exception to the First Amendment allowing states to prohibit the sale of violent video games.

Currently a partner with Jenner & Block's Washington, D.C. office, Smith specializes in commercial and telecommunications litigation, intellectual property, and election law. Among his best-known Supreme Court cases are *Lawrence v. Texas*, 539 U.S. 558 (2003) and *United States v. American Library Ass'n*, 539 U.S. 194 (2003). Smith clerked for U.S. Supreme Court Justice Lewis Powell in 1980-1981. In 2010 he was named one of National Law Journal's "40 Most Influential Lawyers of the Decade."

Smith's most recent Supreme Court case was prompted by California's 2005 passage of California Civil Code § 1746, which prohibited the sale of violent video games to any person under the age of 18. The statute had a two-part definition for "violent video game." First, the game must be one "in which the range of options available to a player includes killing, maiming, dismembering, or sexually assaulting an image of a human

being." Second, those options must be portrayed in the game in a way such that "[a] reasonable person, considering the game as a whole, would find appeals to a deviant or morbid interest of minors ... is patently offensive to prevailing standards in the community as to what is suitable for minors ... [and] as a whole, lack[s] serious literary, artistic, political, or scientific value for minors." The definition in the California statute is a reformulation of the rule of law announced in the landmark U.S. Supreme Court case *Ginsberg v. New York*, 390 U.S. 629 (1968) which upheld a New York statute prohibiting the sale of adult magazines to minors. The *Ginsberg* test is identical in every respect to the test in §1746, except that *Ginsberg* bans

works that "appeal[ed] to ... prurient interests," not "deviant or morbid interests of minors." Under the California law, stores which sell prohibited video games to minors would be subject to fines of up to \$1,000.

Trade groups representing video game developers challenged the California law in federal district court as facially unconstitutional, and

sought a preliminary injunction to prevent its enforcement, arguing that video games are a protected form of expression under the First Amendment. In a 2005 ruling, United States District Judge Ronald Whyte found, as a threshold matter, that "[n]either the Supreme Court nor the Ninth Circuit has ever extended the *Ginsberg* analysis beyond sexually-obscene material." The state argued that *Ginsberg* should apply to § 1746 because the rationale in *Ginsberg*—protecting children from harm that exposure to the material would cause—also applied to violent video games. For example, Whyte wrote, the state argued that it "could regulate a minor's access to games about embezzling, bomb building, and shoplifting, without violating the First Amendment, if a causal connection with

"It has never been understood that the freedom of speech did not include portrayals of violence. What's next after violence? Drinking? Smoking? Movies that show smoking can't be shown to children?"

—Justice Antonin Scalia  
U.S. Supreme Court

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FOR THE STUDY OF MEDIA ETHICS & LAW  
SCHOOL OF JOURNALISM  
& MASS COMMUNICATION



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# Director's Note: The WikiLeaks Quandary, and a Welcome

As the *Bulletin* goes to press, Julian Assange, the founder and editor-in-chief of WikiLeaks, is in custody in the United Kingdom. He faces extradition to Sweden to answer questions regarding alleged sex offenses. Assange, his lawyers, and his many supporters claim that the charges are simply a pretext to silence the controversial distributor of thousands of classified documents, including, in late November 2010, embarrassing U.S. embassy cables.

## DIRECTOR'S NOTE

Despite calls from political figures to charge Assange with crimes ranging from theft of government property to espionage, Attorney General Eric Holder faces significant legal hurdles, not the least being whether the government even has jurisdiction over an individual who is neither an American citizen nor located in the United States.

Journalists and open government advocates are conflicted in this case. They support access to information. They are disappointed that the Obama administration, after promising greater transparency, has continued to thwart it. And they are skeptical of claims that these disclosures genuinely threaten national security and international diplomacy.

On the other hand, WikiLeaks' seemingly indiscriminate release of documents, apparently without thorough review to assess what risks they might pose to safety or privacy, makes many legacy journalists uncomfortable – even those like *The New York Times* or the London-based *Guardian* which have received and subsequently published many of them.

In an op-ed essay published by *The Australian* newspaper on December 8, Assange claims that WikiLeaks has created “a new type of journalism: scientific journalism.” This he describes as utilizing the Internet, as well other media outlets, not only to report the news, but to provide readers with links to the original documents that form the basis for a story so that they can judge for themselves whether it was reported accurately. “Democratic societies need a strong media and WikiLeaks is part of that media,” he writes. <http://www.theaustralian.com.au/in-depth/wikileaks/dont-shoot-messenger-for-revealing-uncomfortable-truths/story-fn775xjq-1225967241332>

Some contend that what WikiLeaks is doing is not “journalism.” Serving as a conduit for leaked government

records, they argue, does not make it “part of that media.” By distinguishing WikiLeaks from the mainstream media, they suggest that Assange and his colleagues should not be covered by statutes such as reporter's shield laws, or by the strong constitutional protections against prior restraints on the press recognized by the U.S. Supreme Court in cases like “the Pentagon Papers.” *New York Times v. United States*, 403 U.S. 713 (1971)

But the reality is that “doing journalism” is what makes a journalist, a journalist. A fearless and independent press challenges the status quo, questions authority, and allows the public to keep an eye on the government, especially when government resists that oversight. It is sometimes unpopular and often controversial. Yet it is essential to a free society.

From an ethical perspective, any entity that claims to be part of “the media” should be accountable. It should take responsibility for its decisions, and explain how they are reached. But the First Amendment was never intended to protect only “responsible” journalists. Declaring WikiLeaks a media outlaw is a risky undertaking. Journalists should think long and hard before doing so.

\* \* \*

We welcome you to a new volume of the *Silha Bulletin*. You will notice a new approach to our editorial content, as well as a new design. From an editorial perspective, our staff of graduate and law students explores current topics by taking a more thematic approach than in the past. In this issue, you will find longer articles that wrestle with complicated issues arising in digital media, including freedom of information, video games censorship, access, and intellectual property. We also include an overview of some of the legal and ethical questions prompted by the most recent election, as well as developments in international law.

We hope that our re-designed *Bulletin* complements and enhances that new approach in ways that are both user-friendly and aesthetically pleasing. We are very grateful to Steve Wolf, a senior graphic designer at Goody Clancy in Boston, for his generous donation of time and expertise in assisting us.

We invite you to let us know what you think.

– JANE E. KIRTLEY

SILHA PROFESSOR OF MEDIA ETHICS AND LAW  
SILHA CENTER DIRECTOR

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harm to children could be established.” *Video Software Dealers Ass’n v. Schwarzenegger*, 401 F. Supp. 2d 1034 (N.D. Cal. 2005)

Whyte rejected the state’s arguments, writing that “[n]o court has previously endorsed such a limited view of minors’ First Amendment right,” and that therefore § 1746 was a content-based restriction on protected First Amendment expression to which strict scrutiny applied. Under a strict scrutiny analysis, a content-based restriction on expression is constitutional only if the state can justify the regulation by a “compelling state interest” and that the regulation is the “least restrictive means” of achieving that interest. Whyte issued a temporary injunction blocking enforcement of the law until the issue of its constitutionality could be determined.

Two years later, Whyte heard arguments on whether the law withstood strict scrutiny. Whyte found that “prevent[ion of] violent, aggressive and antisocial behavior by minors who play video games,” are compelling state interests “except to the extent they intend merely to control a minor’s thoughts.” Whyte acknowledged that whether these harms are truly compelling is subject to debate. For example, Whyte noted that in the case *American Amusement Machine Ass’n v. Kendrick*, 244 F.3d 572 (7th Cir. 2001), 7th U.S. Circuit Court of Appeals Judge Richard Posner argued that “[t]o shield children right up to the age of 18 from exposure to violent descriptions and images would not only be quixotic, but deforming; it would leave them unequipped to cope with the world as we know it.” Nevertheless, Whyte found that “the government has a compelling interest in protecting the physical and psychological well-being of minors.” *Video Software Dealers Ass’n v. Schwarzenegger*, 2007 U.S. Dist. LEXIS 57472 (N.D. Cal. 2007)

However, Whyte found that § 1746 was not the least restrictive means of achieving those interests. Whyte wrote that the definition of “violent video game” in the statute “has no exception for material with some redeeming value, and is therefore too broad. The definition could literally apply to some classic literature if put in the form of a video game.” Whyte noted that in borrowing language from *Ginsberg* in drafting the language of the statute, “there is some precedent for finding the definition sufficiently narrow to meet constitutional standards.” But Whyte found that the statute was nonetheless not the least restrictive means because studies submitted to the court showed that early adolescents might react to violent imagery differently than older adolescents. Therefore, Whyte concluded, because the act applies to all people under 18, and not only those who would be adversely affected by violence depicted in video games, the law was not narrowly tailored. Finding that the law failed to pass strict scrutiny, Whyte permanently enjoined the state from enforcing the law.

The state appealed to a panel of the 9th U.S. Circuit Court of Appeals. The Court noted that the state’s attempt to apply *Ginsberg*’s standard outside the bounds of sexually prurient materials was “an invitation to reconsider the boundaries of the legal concept of ‘obscenity’ under the First Amendment.” The appellate panel found that “*Ginsberg* is specifically rooted in the [Supreme] Court’s First Amendment obscenity

jurisprudence,” which has “consistently addressed obscenity with reference to sex-based material” and not violence-based material. Therefore, the panel “decline[d] the State’s invitation to apply the *Ginsberg* rationale to materials depicting violence, and hold that strict scrutiny remains the applicable review standard.” *Video Software Dealers Ass’n v. Schwarzenegger*, 556 F.3d 950 (9th Cir. 2009)

The panel wrote that although the state submitted myriad psychological testimony on the purported adverse effects of violent video games on children, “[n]one of the research establishes or suggests a causal link between minors playing video games and actual psychological or neurological harm ... [i]n fact, some of the studies caution against inferring causation.” Therefore, “although [the panel] does not require the State to demonstrate a ‘scientific certainty,’ the State must come forward with more than it has.” Concluding that the state had not met its burden, the panel affirmed Whyte, and held the law unconstitutional.

Despite losing twice in lower courts, the State of California appealed § 1746’s constitutionality to the U.S. Supreme Court, which granted *certiorari* on the question of “whether a state regulation for displaying offensive, harmful images to children is invalid if it fails to satisfy the exacting ‘strict scrutiny’ standard of review.”

In addition to the merit briefs in the case, which largely reiterated arguments made in the district and appeals court, several media law advocacy groups filed an *amicus* brief on behalf of the Electronic Merchants Association. The groups filing the brief included, among others, the Reporters Committee for Freedom of the Press, The First Amendment Center, and the Society of Professional Journalists. The brief argued that creating a First Amendment exception for the government to prohibit violent speech is the edge of a dangerous slippery slope towards chilling other protected speech. Reporters may be less apt to report in detail on news stories involving violence out of fear that they would open themselves up to sanctions by the government, the brief argued.

In the November 2 oral arguments, many of the Court’s questions to State Assistant Attorney General Zackery Morazzini focused on why the state singled out video games for regulation when other forms of expression also include violent content. Associate Justice Sonia Sotomayor asked Morazzini “Could you get rid of rap music? Have you heard some of the lyrics of some of the rap music ... that have been sung about killing people and about other violence directed to them?” Similarly, Chief Justice John Roberts and Associate Justice Ruth Bader Ginsburg asked why not also ban violent movies, books, or music. Morazzini replied that studies have shown negative psychological effects of video games, which is what prompted the law in the first place, whereas the negative effects of rap music, books, or movies have not been proven. Justice Elena Kagan then asked whether, if a new study came out demonstrating the negative effects of violent movies on children, the state could ban those movies. Morazzini declined to answer Kagan’s question directly.

Justice Antonin Scalia’s questions probed Morazzini on the

historical role of violence in Western culture. “Some of the Grimm’s fairy tales are quite grim to tell you the truth,” Scalia said, “are you going to ban them too?” “Not at all, your honor,” Morazzini replied. Later in the argument Scalia expressed concerns about creating a new category of unprotected, violent speech. “I am concerned with the First Amendment, which says Congress shall make no law abridging the freedom of speech. ... It has never been understood that the freedom of speech did not include portrayals of violence. What’s next after violence? Drinking? Smoking? Movies that show smoking can’t be shown to children?” Scalia asked. Before Morazzini could respond, Justice Samuel Alito, poking fun at Scalia’s notorious adherence to constitutional originalism, interjected with a question that prompted laughter from the audience: “I think what Justice Scalia wants to know is what James Madison thought about video games. Did he enjoy them?” Scalia replied, “No, I want to know what James Madison thought about violence. Was there any indication that anybody thought, when the First Amendment was adopted, that there ... was an exception to it for speech regarding violence? Anybody?” Morazzini did not offer an answer.

During Smith’s argument, the Court focused on whether harm to children might result from exposure to violent video games. Roberts pointed out that in *Ginsberg*, there was also competing psychological testimony on both sides of the case, and that therefore the Court could rely on its “common sense” as much as on expert testimony in assessing the harm to children. Roberts also asked whether the level of violence depicted in some video games is greater than the kind historically permitted in children’s movies, books, and songs. “We do not have a tradition in this country of telling children they should watch people actively hitting schoolgirls over the head with a shovel so they’ll beg [for] mercy, being merciless and decapitating them, shooting people in the leg so they fall down,” Roberts said. “We protect children from that.” Smith responded by noting that it had been parents, not the government, that historically shielded children from that level of violence, and that “[t]he question before this Court is whether you are going to create an entirely new exception

under the First Amendment, whether parents need to have such a new exception created, and whether or not if you are going to do it you could possibly figure out what the scope of that exception is.”

Smith’s arguments before the Supreme Court reflected points made two weeks earlier in his Silha Lecture. In the lecture, Smith said that research that is supposed to support restricting violence in video games does not provide enough evidence to “draw a law that is workable.” He added that it

“We do not have a tradition in this country of telling children they should watch people actively hitting schoolgirls over the head with a shovel so they’ll beg [for] mercy, being merciless and decapitating them, shooting people in the leg so they fall down. We protect children from that.”

—Chief Justice John Roberts  
U.S. Supreme Court

is important for the law to distinguish between sexual materials and violent materials, and that there is a principled First Amendment basis for restricting speech based on the former and not the latter. “[Violence] is a part of minors’ lives in a way that explicit sexuality is not a part of their lives,” Smith said, “and so it is, because of that reality, difficult to figure out how you could draw a statute that says [the films] ‘Star Wars’ and ‘Lord of the Rings’ are over here, but

[the game] ‘Grand Theft Auto’ is over here.”

In his lecture, Smith did not speculate on how he believed the justices would be inclined to vote, but said that he was optimistic about his chances because of strong First Amendment values on the current Court. Although the Court has become more conservative in the past 15 years, Smith said, it has not “done much cutting back on First Amendment rights.” He added that in at least one recent free speech case, *United States v. Stevens*, 130 S.Ct. 1577 (2010), the majority opinion, written by conservative Chief Justice Roberts “could’ve easily been written by Justice Brennan, the famous advocate of First Amendment rights.” For more on the *Stevens* Case, see “Supreme Court Strikes Down Law Banning Depictions of Animal Cruelty, Citing ‘Alarming Breadth’ of Statute” in the Winter/Spring 2010 issue of the *Silha Bulletin*. A ruling in *Schwarzenegger v. Electronic Merchants Ass’n* is expected by late June or early July 2011.

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

— GEOFF PIPOLY  
SILHA RESEARCH ASSISTANT

# 2010 Midterm Election Ads Spark Lawsuits; Journalists' Contributions Raise Ethical Questions

The midterm elections of 2010 saw a variety of issues involving media ethics and law: lawsuits and threatened lawsuits over campaign ads, a reporter detained by private security guards, and a revived discussion about whether reporters and other news commentators should make political contributions.

## MEDIA AND POLITICS

### ***Murkowski Threatens to Sue TV Stations Running Pro-Miller Ads***

Lawyers for Sen. Lisa Murkowski (R-Alaska) threatened legal action against local television stations which aired a campaign ad on behalf of her opponent, Republican candidate Joe Miller. Murkowski's campaign claimed the ad contained false statements and could expose the stations to legal liability.

According to an October 5 post on Anchorage television station KTUU's website, an ad titled "Arrogant Lisa Murkowski—You Lost!" painted a negative picture of Murkowski, who ran against Miller as a write-in candidate after losing to him in Alaska's Republican primary election. The ad accused Murkowski of having "not earned" her Senate seat because she was initially appointed to the seat by her father, Frank Murkowski, after he vacated the seat to assume Alaska's governorship in 2002. Although Murkowski was initially appointed to her seat, she won re-election in 2004. The ad also claimed that Murkowski improperly influenced the absentee vote count in the Republican primary, and that she attempted to manipulate Alaska's Libertarian Party into giving her its spot on the ballot for the general election after Murkowski lost to Miller, according an October 4 story posted on Alaska Dispatch, a news and politics website. *The Washington Post* reported October 4 that Libertarian party chairman Scott Kohlhaas said that although he met with Murkowski's campaign manager after the primary, he did not feel "manipulated."

The Miller ad was funded and produced by Tea Party Express, a

political group financed and controlled by Our Country Deserves Better, a California-based political action committee. Tea Party Express supported Miller in the Republican Primary.

On October 4, Murkowski's lawyer, Timothy McKeever, sent a letter to local broadcasters in Alaska which said the broadcasters were under a "legal and moral obligation" not to air the ad, *The Washington Post* reported. McKeever's letter went on to say that "[w]hen a station broadcasts false or incorrect advertisements, the station can be held liable for such action in a court of law and can lose their broadcasting license," according to Alaska Dispatch. The letter asked the stations not to broadcast the ad until they could verify its substantive accuracy.

KTUU attorney John McKay said he did not believe that a legal challenge to the ad would be successful, according to an October 5 KTUU story. "Stations that I know in town and work with are careful about these things anyways, they wouldn't knowingly run things that are false," McKay said.

Unofficial results had Murkowski winning reelection by more than 10,000 votes, according to *The New York Times* on November 19, but Miller challenged that result in a state lawsuit. When the *Bulletin* went to press, the dispute had not been resolved and an official winner had not been declared, although Murkowski claimed victory on November 17.

### ***Miller Security Guards Detain Reporter***

On October 17, private security guards detained and handcuffed a newspaper reporter who was trying to ask Republican Alaska Senate candidate Joe Miller a question at a public event at an Anchorage middle school. Miller did not deny that his employees—some of whom were active-duty U.S. soldiers—detained the reporter, but claimed that they did so to protect the candidate from threats and aggressive behavior that the reporter displayed.

An October 17 story on the website of Anchorage TV station KTVA reported

that Tony Hopfinger, a reporter for the website Alaska Dispatch, approached Miller with a small digital video camera and asked him questions about whether he was ever formally reprimanded in 2008 when he worked as an attorney for the Fairbanks Northstar Borough, which governs the city of Fairbanks and the region surrounding it. Three men, who did not identify themselves, told Hopfinger to stop asking questions. When Hopfinger continued to ask questions while videotaping Miller, the men restrained Hopfinger, handcuffed him, and led him to the end of the a school hallway where he was held for 30 minutes until police arrived and released him.

According to Miller's version of events, posted on his campaign website the day of the incident, Hopfinger made threatening gestures toward Miller, "in an attempt to create and then record a 'confrontation' with the candidate." Miller's website said that "the blogger [then] physically assaulted another individual and made threatening gestures and movements towards the candidate," at which point the guards detained him.

Hopfinger did not deny shoving one of the security guards, but claimed the guard shoved him first, according to an October 17 report on CNN.com. Lt. Dan Parker of the Anchorage Police Department told CNN that under Alaska law, private security guards are allowed to make "private person arrests," similar to citizens' arrests, but said his department was still looking into whether criminal charges would be filed against the guards.

According to an October 17 blog post by Glenn Greenwald at Salon.com, two of Miller's security guards were active duty U.S. soldiers. Greenwald noted that Department of Defense directive 1344.10 prohibits activity duty military personnel from "participat[ing] in partisan political management, campaigns, or conventions." The *Anchorage Daily News* reported October 18 that Maj. Bill Coppernoll, public affairs officer for the Army in Alaska, said the two soldiers did not have permission from their

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current chain of command to work for a private security detail, but the Army did not know whether their employment was authorized by previous company or brigade commanders.

Coppernoll told the *Anchorage Daily News* that the Army allows off-duty soldiers to take outside employment if the job does not interfere with readiness, risk their own injury or negatively affect the “good order” and discipline of their unit.

### ***Fox News Sues Missouri Democrat Over Campaign Ad***

Fox News Corporation sued Missouri Democratic senate nominee Robin Carnahan for \$75,000 over footage in a Carnahan campaign ad that Fox claims made it appear as though host Chris Wallace endorsed Carnahan.

Politico blogger Josh Gerstein reported September 16 that the ad, which was posted on Carnahan’s campaign website and ran on Missouri television stations, contained footage from a 2006 interview Wallace conducted with Carnahan’s Republican opponent, Roy Blunt, who was a congressman at the time. In the interview and the ad, Wallace said “You just said a moment ago that you have to show that you’re the part of reform ... but some question whether you are the man to do that. Are you the one to clean up the House?” While a graphic showed on the screen, Wallace noted that Blunt paid \$485,000 to a firm connected to disgraced lobbyist Jack Abramoff, and that Blunt aided tobacco company Phillip Morris in 2002 while Blunt was dating a lobbyist for the company. The ad left out Blunt’s answer to Wallace’s question, instead freezing on an image of Blunt while an announcer said “Roy Blunt. The very worst of Washington.”

The lawsuit, filed September 15 in federal court and in which both Fox News Corporation and Wallace individually are named plaintiffs, advances two claims. First, the suit alleges that the ad violated the Copyright Act, 17 U.S.C. §101, *et seq.*, when it used Wallace’s image from the interview with Blunt. Fox News alleges that the network “has filed with United States Copyright Office an application for copyright registration in the FNS interview.” That application was filed September 24,

according to an October 12 story on Reuters’ website.

The suit also claims that Wallace’s privacy was violated under Missouri common law when the ad misappropriated Wallace’s image. Specifically, the suit claims that “the selection of distinctive and stylized camera angles” made it appear as though Wallace was endorsing Carnahan by criticizing Blunt.

Lawyers for Carnahan’s campaign filed a two-page motion to dismiss Fox’s case on October 8. The motion noted that Fox filed its copyright claim to the Wallace interview after it filed its lawsuit against Carnahan. “Because the Fox Network commenced its copyright claim prematurely, the Court cannot grant the Fox Network relief on its copyright infringement claim and must therefore dismiss this claim” under 17 U.S.C. § 411 (a), the motion argued. According to Reuters, the 8th U.S. Circuit Court of Appeals is unsettled on the issue of whether a party can prevail on a copyright claim where the copyright is filed after litigation commences. On November 17, U.S. District Judge Gary Fenner denied Carnahan’s motion to dismiss, noting that although Fox News’s original complaint did not indicate that the interview had been copyrighted, the company subsequently amended its complaint to reflect an effective copyright filing.

In a September 24 post on the website Slate, property law professors Sonia Katyal of Fordham Law School and Eduardo Penalver of Cornell Law School argued that Fox’s case was substantively “bogus” and that the ad’s use of Fox’s footage falls into the “fair use” exception found in § 107 of the Copyright Act. The professors noted that in a fair use claim “courts examine the character of the use. Political commentary and criticism are especially favored. Commercial uses are not.” Fox’s argument that the use of its footage was commercial because it appeared in a campaign ad was weak, the professors wrote, because “courts have repeatedly rejected the proposition that [using video in campaign ads] makes a campaign ad commercial. This is why the claim about Wallace’s publicity rights also fails.”

In addition to fighting the lawsuit in

court, Carnahan’s campaign fired back politically. On September 21, Carnahan said in a press release that her campaign “stands behind” the ad, and although the campaign temporarily removed the ad from its website, the ad continued to air on local television, according to a September 21 post on the *Washington Post* blog 44. Carnahan lost her bid for Senate, and the “media” page of her campaign website—which had continued to host the ad during the campaign—is no longer online.

### ***The Citizens United Decision and the Midterm Elections***

According to experts and government agencies, the Supreme Court’s Jan. 21, 2010 decision in *Citizens United v. Federal Election Commission* had a significant impact on how donors spent money in the 2010 midterm elections.

The ruling struck down portions of a federal campaign finance law, asserting that the law impermissibly discriminated against the First Amendment rights of corporations to support political candidates for office. Justice Anthony Kennedy, writing for the five-member majority, wrote that there is no principled way to distinguish between large media corporations, which effectively participate as speakers in the marketplace of ideas, from other corporations, which were foreclosed by the law from participating in the same way. “If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech,” Kennedy wrote. *Citizens United v. FEC*, 130 S. Ct. 876 (2010)

According to an October 2010 study by the Campaign Media Analysis Group, a nonpartisan organization that tracks money in politics, television advertisement spending by third-party interest groups not associated with a specific candidate for federal office more than doubled in 2010, compared to the 2006 midterm elections.

The amount of money flowing into the midterms was directly attributable to the *Citizens United* ruling, according to Trevor Potter, a former Federal Election Commission (FEC) Chair and critic of the decision. Potter told *The New York Times*

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on October 7 that the Court's ruling was significant for its "psychological" impact on donors. Potter said that even if wealthy donors do not understand the nuances of the case, they understand its thrust to be that citizens and companies are allowed to spend more on political campaigns. Potter added that more "casual observers" believe that corporations may spend unlimited amounts of money after *Citizens United*. "That change in psychology ... has made a difference in terms of the amount of money now being spent," he added. Steven Law, head of the conservative organization American Crossroads, a tax-exempt fundraising group and a supporter of the *Citizens United* ruling, agreed. "The principal impact of the *Citizens United* decision was to give prospective donors a general sense that it was within their constitutional rights to support independent political activity," Law told the *Times*. For more on the *Citizens United* decision, see "Supreme Court Strikes Down Campaign Finance Regulation for Corporations" in the Winter/Spring 2010 issue of the *Silha Bulletin*.

### Journalists Gave More than \$469,000 in 2010 Elections

Two high profile suspensions followed revelations that cable news pundits violated their employer's ethics policies by contributing to political campaigns. But a study of journalists' political donations suggests that fewer journalists consider political donations to be an ethical breach.

On November 5, MSNBC commentator Keith Olbermann was suspended without pay from his on-air role as host of the show "Countdown" after the network discovered that Olbermann donated to the campaigns of three Democratic candidates for federal office.

The donations—each in the amount of \$2,400, which is the maximum individual donation allowed under federal law—were to the campaigns of Arizona Representatives Raul Grijalva and Gabrielle Giffords, and Kentucky Senate candidate Jack Conway. The Grijalva donation occurred on October 28, the same day the congressman was a guest on "Countdown."

NBC News has a policy against employees contributing to political

campaigns without obtaining prior approval from management first because it considers such donations a breach of journalistic ethics, according to a November 7 post on the website Politico.

Olbermann returned to the air on November 9, and on his program that night he said he was unaware of NBC News's policy when he made the contributions. He also criticized the *Citizens United* ruling and the lack of disclosure requirements for donations to nonprofit groups whose primary function

The Center for Responsive Politics found that 235 people who identified themselves as "journalists" or "media professionals" together donated over \$469,000 to various candidates for federal office during the 2010 midterm congressional elections.

is to advocate for candidates. "The point," Olbermann said, was "if I had given the money [to candidates funneled] through the U.S. Chamber of Commerce, you would have never, ever known."

A second MSNBC host—former Republican congressman Joe Scarborough—was also suspended for making donations. On November 19, *New York Times* Media Decoder blogger Brian Stelter reported that NBC News had suspended Scarborough for two days for making eight previously undisclosed contributions of \$500 apiece to Republican candidates with whom he was personally close. In a statement, Scarborough said the contributions were "not relevant to my work at MSNBC" because he made them "to close personal friends and family members and were limited to local races." But he added that "there is nothing more important than maintaining the integrity of [NBC News'] highly respected brand."

The actions of Olbermann and Scarborough are not out of the ordinary for journalists, according to a September 2010 study of FEC filings by the Center for Responsive Politics (CRP), a nonpartisan think tank. The study found that 235 people who identified themselves as "journalists" or "media professionals" together donated over \$469,000 to various candidates for federal office during the 2010 midterm congressional elections—donations which raised questions about

the evolving state of media ethics in the 21st Century.

The study applied a broad definition of "journalist" and "media professional." The CRP's data set included journalists from what it called "hard" news sources, examples of which included *The Washington Post*, *Vanity Fair*, *News Corp.*, *The New York Times*, and Reuters, and from "soft" news organizations such as *ESPN*, *Vogue*, and local community-based news sites.

Some individuals donated thousands of dollars to candidates. CRP reported that 65 percent of the individual donations went to Democratic candidates. Chris Hayes, Washington Editor for *The Nation* magazine gave \$250 to Josh

Segall—an Alabama Democrat and close friend of Hayes. Hayes told CRP that he has a personal rule against donating to politicians, but said he thought the Segall case was different because of his personal friendship with the candidate. His friendship would ethically prevent him from covering the race in Alabama's 3rd Congressional District anyway, Hayes said, so "whatever threat of conflict is already there. It seems like the least of it to throw an extra \$250 on top of it," Hayes told CRP. Hayes was initially slated to be the fill-in host of "Countdown" during Olbermann's suspension, according to a November 7 Politico post, but the network withdrew from that arrangement after discovering that Hayes also donated to candidates.

Other journalists on CRP's list of donors see things differently from Hayes. Pulitzer Prize-winning investigative journalist Seymour Hersh, who donated \$1,000 to Rep. Walter Minnick (D-Idaho) told CRP he sees no ethical conflict with reporters donating to political campaigns. "It's nobody's business," Hersh said. "I'm giving money to people I think are good people." Nicholas Benton, editor-in-chief of the *Falls Church News-Press* in Virginia, who donated over \$4,000 to Democratic candidates and the Democratic National Committee, argued that if journalists are inactive in the political process, they become

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# Courts, Officials Answer Questions Raised by Digital Communication and Public Records

*E-mail 'metadata' is public in Washington; recordkeeping rules apply to social media for federal agencies*

**T**echnological innovations in communication continue to create questions about what constitutes a “public record” for the purposes of state and federal open records laws. In the fall of 2010, one state supreme court ruled on the “metadata” included in e-mails, and the national archivist urged federal agencies to preserve records of their use of social media.

## **Washington State Supreme Court Rules 'Metadata' is Public**

On Oct. 7, 2010, the Washington State Supreme Court ruled that “metadata,” which is information related to the history, tracking, or management of an electronic document, is a public record subject to disclosure under the state’s Public Records Act (PRA). *O’Neill v. City Of Shoreline* 2010 Wash. LEXIS 870 (Wash. Oct. 7, 2010)

The case arose from a public records request Shoreline, Wash. resident Beth O’Neill filed with the city after Shoreline Deputy Mayor Maggie Fimia claimed in a 2006 public meeting that she had received an e-mail, authored by O’Neill, that accused the city council of improper conduct. O’Neill denied sending the

e-mail, and made a series of unfulfilled requests for the original e-mail with all of its metadata, including information about the date, time, sender, and recipient of the original message. Failing to locate the original message, Fimia eventually claimed she must have accidentally destroyed it. O’Neill filed suit against the city under the PRA, Wash. Rev. Code § 42.56.

A trial court dismissed O’Neill’s suit but a state appeals court reversed, ruling that the city had failed to fulfill the request because although it provided O’Neill with a copy of the same message that the original sender sent to another city council member, the metadata on the version sent to Fimia could be different, so the city was required to provide it.

The Washington Supreme Court affirmed the appeals court in a 5 to 4 ruling, remanding the case back to a trial court “to give the City the chance to search for the requested metadata, and to determine whether the City has violated the PRA.” Writing for the majority, Justice Susan Owens said that although the metadata on a message sent or received by a public official pertaining to government business is not usually visible to the senders and recipients, it qualifies as a “public record” under the PRA because it “may contain information that relates to the conduct of government and is important for the public to know.” Specifically, Owens wrote that metadata “could conceivably include information about whether a document was altered, what time a document was created, or who sent a document to whom. Our broad PRA exists to ensure

that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information.”

Calling the case an “issue of first impression,” the Washington Supreme Court relied on a 2009 decision by the Arizona Supreme Court that ruled that, for the purposes of Arizona’s open records law, “metadata in an electronic document is part of the underlying document [and] does not stand on its own.” *Lake v. City of Phoenix*, 218 P.3d 1004 (Ariz. 2009)

The Washington Supreme Court also ruled that pursuant to its attempts to fulfill O’Neill’s request, the city should “inspect Fimia’s home computer’s hard drive for the requested metadata,” adding that “this inspection is appropriate only because Fimia used her personal computer for city business. If government employees could circumvent the PRA by using their home computers for government business, the PRA could be drastically undermined.”

In a footnote, however, the Court said it “address[ed] only whether the City may inspect Fimia’s home computer if she gives consent to the inspection. We do not address whether the City may inspect Fimia’s home computer absent her consent.”

The Court instructed the trial court to find that if the city refuses to inspect Fimia’s home computer, they have “indisputably” violated the PRA, whereas if the city inspects Fimia’s home computer and the search turns up no

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## **Media and Politics**, continued from page 8

mere mouthpieces for campaigns and candidates. “To sit back passively and echo what political candidates and politicians say without providing the readers of an assessment of the relative merits on the standpoint of truth and of facts is a disservice,” he said.

Many large news outlets, including *The New York Times*, Reuters, ABC News, and NBC News have conflict of interest policies that prohibit employees from directly participating in campaigns, which

includes donations, according to the CRP. The Society of Professional Journalists’ Code of Ethics says journalists should “remain free of associations and activities that may compromise integrity or damage credibility.”

Aaron Quinn, a professor of journalism ethics at California State University, told the CRP that journalists are increasingly seen as public figures, which makes their personal decisions to donate to candidates more open

to public scrutiny. He added that the appearance of a conflict of interest is the functional equivalent of an actual conflict. According to Hayes, at a minimum, reporters who donate should at least disclose their donations so that the public will not believe their reporting is compromised. “If you were paying for access,” Hayes told the CRP, “that would be a scandal.”

— GEOFF PIPOLY  
SILHA RESEARCH ASSISTANT

metadata or the same metadata already released to O'Neill, "the trial court must determine, consistent with this court's opinion, whether the City's deletion of the metadata violated the PRA."

Although the ruling favors the free flow of information, it raised a thorny issue of privacy that concerned the court's four dissenters. Justice Gerry L. Alexander wrote in his dissent that "I do not believe that what is contained on the hard drive of a public employee's personal home computer, whether it is deemed 'metadata' or something else, is a public record." Alexander said the contents of the home computer could not be considered a public record since it "is not a writing that is 'retained by any state or local agency'" as defined by the PRA.

"More significantly," Alexander wrote, "the majority provides no authority of law for the proposition that a city employee's home computer is subject to such a search or inspection by the employing city."

O'Neill's attorney, Michele Earl-Hubbard, told The Associated Press that although she was disappointed that the Court remanded the case for another proceeding without finding an outright violation of the Public Records Act, "Our Supreme Court here says yes, there are electronic parts of records that may have value, and an agency may not destroy them. That's a big part of the accountability picture."

The Washington Supreme Court is not the first to broach the question of whether e-mails related to state business should be subject to a state open records law request. In February 2010, the state of Alaska released thousands of government-related e-mails sent by Alaska Governor and former Republican vice presidential candidate Sarah Palin, her husband Todd, and her staff using non-government e-mail accounts on services like Yahoo. In October 2008, a state judge ruled that the e-mails had to be retained and preserved subject to records requests, but Palin had argued that they were protected by executive privilege. For more on the Palin e-mails, see "Roundup: Government E-mails as Public Records" in the Fall 2008 issue of the *Silha Bulletin*.

### **National Archives Encourages Agencies to Preserve Social Media Posts**

The Archivist of the United States sent a bulletin to heads of federal agencies on Oct. 20, 2010 titled "Guidance on Managing Records in Web 2.0/Social Media Platforms." In the bulletin, U.S. Archivist David S. Ferriero observed that federal agencies "are using social media and web 2.0 platforms to connect people to government and to share information" and explained that many of the uses of

"Our broad [Public Records Act] exists to ensure that the public maintains control over their government, and we will not deny our citizenry access to a whole class of possibly important government information."

—Justice Susan Owens  
Washington Supreme Court

these media create "federal records" as defined by the Federal Records Act (FRA), 44 U.S.C. § 33 *et seq.*

Under the FRA, "records" are defined as "all books, papers, maps, photographs, machine readable materials, or other documentary materials, regardless of physical form or characteristics, made or received by an agency of the United States Government under Federal law or in connection with the transaction of public business." Federal agencies must preserve records if they provide "evidence of the organization, functions, policies, decisions, procedures, operations, or other activities of the government" or otherwise have "informational value." The U.S. Archivist and the National Archives and Records Administration (NARA) are empowered by the law to promulgate procedures and standards for how records are compiled, catalogued, reproduced, and disposed of. The FRA is distinct from the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* in that it covers the retention and preservation of records rather than their disclosure.

In the October 20 bulletin, listed as

NARA Bulletin 2011-02 and available online at <http://www.archives.gov/records-mgmt/bulletins/2011/2011-02.html>, Ferriero sought to provide agencies with broad "fundamental guidance" rather than "model schedules or step-by-step guidance," and charged agencies to "determine the most appropriate ways to incorporate recordkeeping requirements into their business processes and identify the specific means by which their agencies will fulfill their responsibilities under the Federal Records Act."

Ferriero identified three categories of "social media platforms" which agencies might use: "web publishing," including blogs or microblogs such as Twitter; "social networking," including tools like Facebook and "virtual worlds" like Second Life; and

"file sharing/storage," including video and image sites like YouTube and Flickr as well as online document storage tools like Google Docs. Ferriero observed that "the principles for analyzing, scheduling, and managing records are based on content and are independent of the medium." He proposed that agencies consider whether the information in question is available elsewhere; contains "evidence of an agency's policies, business, mission, etc.;" whether the Web 2.0/social media platform "is being used in relation to the agency's work" and is authorized by the agency; and whether there is "a business need for the information." Ferriero said that the list of considerations was "non-exhaustive," but "if the answers to any of the ... questions are yes, then the content is likely to be a Federal record."

The bulletin said that agencies must consider the "noteworthy records management challenges associated with the use of web 2.0/social media," which it said includes "public expectations that all web content is both permanently valuable and accessible, [that] ownership and control of data [can] reside[] with

# Congress Revokes New FOIA Exemption for Securities and Exchange Commission

On Oct. 4, 2010, President Barack Obama signed House Resolution 5924, the SEC Freedom of Information Restoration Act, into law. The new law repeals § 929I of the Dodd-Frank Wall Street Reform and Consumer Protection Act, which had exempted the Securities and Exchange Commission (SEC) from complying with certain Freedom of

## FREEDOM OF INFORMATION

Information Act (FOIA) requests.

The Dodd-Frank Act, Pub. Law No. 111-203, became law on July 21, 2010. Section 929I of the Act immediately came under fire as journalists and transparency advocates said that the SEC could use it to refuse to comply with FOIA requests if the requests sought records regarding the SEC's "surveillance, risk assessments, or other regulatory and oversight activities." The SEC used § 929I on July 27 to refuse a request by the Fox Business Network (FBN) for information regarding the Bernie Madoff case. On August 3, a consortium of 10 transparency groups sent a letter to Sen. Christopher Dodd (D-Conn.) and Rep. Barney Frank (D-Mass.), co-sponsors of the Dodd-Frank Act, calling for the repeal of 929I and citing concerns about the SEC's record of openness. For more on the

incident involving FBN's information request and early criticism of the law, see "Transparency Advocates Protest SEC's New FOIA Exemption" in the Summer 2010 issue of the *Silha Bulletin*.

According to an October 6 report by the Reporters Committee for Freedom of the Press (RCFP), discussion of a repeal of the provision arose in July, when U.S. Rep. Darrell Issa (R-Calif.), Ranking Member of the House Oversight and Government Reform Committee, formally objected to it. Issa was joined by Rep. Ron Paul (R-Texas) and Senators Patrick Leahy (D-Vt.) and Ted Kaufman (D-Del.). The RCFP also reported that in a September 16 House Oversight and Government Reform Committee hearing, opponents of provision 929I argued that it was "too broad, thereby giving the SEC the power to refuse the disclosure of information that could be crucial to public oversight of the financial system and to prevent future financial crises." The Associated Press reported September 18 that SEC Chairman Mary Schapiro argued in the hearing that the SEC needed the exemption because, in some cases, firms would be reluctant to voluntarily provide information if they knew it could be viewed publicly, including by competitors.

The federal FOIA has nine exemptions, covering disclosures

that could harm national security or "constitute a clearly unwarranted invasion of personal privacy," for example. Exemption 4, which extends to "trade secrets" or "privileged or confidential commercial or financial information obtained from a person" and Exemption 8, which protects information "contained in or related to examination, operating, or condition reports about financial institutions that the SEC regulates or supervises" were cited by transparency advocates who initially protested § 929I as providing enough protection for the SEC and businesses.

Rick Blum, coordinator of the advocacy group Sunshine in Government Initiative, told the RCFP on October 6 that the repeal of § 929I is a "very strong first step," but more reform will be needed. Blum told the RCFP that Exemption 8 "is broad and no one really knows what it means and the SEC has not [previously] overseen or monitored how Wall Street works."

In a September 23 statement, Issa said, "by repealing [§ 929I], we have reaffirmed our commitment to ensure that the SEC will be held to the highest possible standard of accountability and transparency."

— SARA CANNON  
SILHA CENTER STAFF

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a third party," and the fact that content management on web 2.0 and social media services and tools is interactive.

To address these challenges, the bulletin said that agencies "must ensure records management guidance is included in social media policies and procedures" by identifying federal records in those platforms and preserving them, "defining ownership of content and responsibility for managing the records," and sharing policies with employees and the public.

The bulletin acknowledged that in some cases, such as with Flickr or YouTube, privately owned websites might host content that qualifies as

records. "Each agency is responsible for managing its records, whether they reside on a third-party social media platform or are housed within the agency," the bulletin said, adding that "a concern with web 2.0/social media platforms is that a service provider could stop providing their service or delete information from an agency's account." A stop in service or deletion of content would not relieve an agency of "its records management obligations," the bulletin said.

In a November 2 blog post on the NARA website at <http://blogs.archives.gov/aotus/>, Ferriero wrote that "the informal tone" of many of today's

social media "should not be confused with insignificance." He observed that "agencies are still neglecting their recordkeeping responsibilities for email." According to Ferriero, a 2009 NARA report "found that most Federal agencies do not manage their email records in an electronic recordkeeping system, and therefore cannot ensure that these emails are preserved in any recordkeeping system on a regular basis." Moreover, Ferriero said that "archaic 'print and file' practices still exist in many agencies, resulting in the inadequate preservation of messages that meet the criteria for Federal records."

— PATRICK FILE  
SILHA FELLOW AND BULLETIN EDITOR

# Federal and State Courts Consider Proposals to Permit Cameras in Trial Proceedings

*Judges from the U.S. Supreme Court to Minnesota remain divided over issue of access*

Parts of both the federal and state judicial branches are considering expanding video access to courtrooms, but lawyers and jurists are split on the merits of the trend. One recent case—*Perry v. Schwarzenegger*—brought the issue to the U.S. Supreme Court, which stayed a district court judge's order to allow video of the trial to be posted on the Internet. For the time being, a majority of Supreme Court justices who have spoken publicly on the issue oppose allowing cameras in its own courtroom and others.

## CAMERAS IN COURTROOMS

### **Federal Judicial Conference Pilot Program**

The Judicial Conference of the United States announced Sept. 14, 2010 that it would introduce a limited pilot program in which video cameras would be allowed to record proceedings in some civil lawsuits.

How many federal courts will be involved in the program, whether the program will be permissive or mandatory for courts, and when the program will begin are still unclear. The Judicial Conference said those details will be determined by the Conference's Committee on Court Administration and Case Management, according to a September 14 press release. The program will be "national in scope," and "will last up to three years" once it begins, the release said.

David Sentelle, Chief Judge of the U.S. Court of Appeals for the District of Columbia Circuit and Chairman of the Conference's executive committee, told The Associated Press (AP) on September 15 that certain parameters had already been agreed upon. Recording the faces of witnesses and jurors will be prohibited, and all parties to the case must consent to the recording, Sentelle said. Recording of criminal cases would remain prohibited; Federal Rule of Criminal Procedure

53 already bans any electronic media coverage of criminal proceedings. In a departure from previous experiments with cameras in courtrooms, under the proposal the courts will furnish and operate the cameras, as opposed to news media organizations.

The Judicial Conference of the United States was established by Congress in 1922 to serve as the "principal policymaking body concerned with the administration of U.S. Courts," according to the U.S. Courts website at <http://www.uscourts.gov/FederalCourts/JudicialConference.aspx>. Under 28 U.S.C. § 2701 *et seq.*, its determinations and recommendations with respect to administration are binding on all federal courts except the Supreme Court, which sets its own administrative procedures.

The pilot program is not the federal courts' first foray into video coverage of judicial proceedings. In 1990, the Judicial Conference instituted a program which allowed cameras into selected federal district and appellate courtrooms on an experimental basis. Unlike the 2010 proposal, the court did not operate the cameras itself, but allowed media outlets to bring their own cameras into the courtroom. In 1994, the Conference reinstated its ban on cameras, largely due to reaction to coverage of the O.J. Simpson murder trial in California State Court.

Under new rules in 1996, the Conference allowed cameras to record proceedings only in U.S. circuit courts of appeal, leaving the decision to individual circuits whether to allow cameras or not. According to the Judicial Conference, only the 2nd and 9th U.S. Circuit Courts of Appeal currently allow news media cameras to cover oral arguments in their courtrooms. According to a September 15 post on the Politico blog Under the Radar, media outlets rarely do so.

### **Minnesota Pilot Program**

On Oct. 12, 2010, an advisory panel of judges and lawyers approved a pilot program to allow cameras into Minnesota state trial courts on a limited basis, pending approval by the Minnesota Supreme Court.

The seeds of the proposed pilot

program date back to February 2009, when the Minnesota Supreme Court adopted the General Rules of Practice Committee's recommendation to retain the current rule governing cameras at the trial level. That rule, Minnesota General Rule of Practice 4, imposes a presumptive ban on cameras which can be overcome by an order of the trial judge and consent of all parties in the case. However, the Supreme Court instructed the committee to "design a pilot program that will include a study of the impact of televised proceedings on victims and witnesses." For more on the 2009 order see "Minnesota High Court Approves Cameras-in-Court Pilot Program" in the Winter 2009 *Silha Bulletin*.

A majority of the committee recommended implementing the pilot program along guidelines recommended by scholars at the University of Minnesota, including Jane Kirtley, Silha Professor of Media Ethics and Law and Director of the Silha Center. The proposed pilot program would consist of an 18-month study of 500 randomly selected trial court cases, divided into "camera" and "no camera" cases. In order to address concerns that the Supreme Court expressed about there being "no empirical evidence addressing whether the prospect of televised proceedings has a chilling impact on victims and witnesses," the two groups of cases would be analyzed to assess whether victims' or witnesses' testimony was "chilled" as a result of the cameras' presence. According to the majority, the plan was proposed because members of the majority "believe[] this extensive study is necessary to make scientifically valid conclusions about the impacts cameras may have on participants and users of the judicial system."

The decision to adopt the University of Minnesota-recommended program was narrowly adopted by a 7 to 6 vote. A minority of the committee recommended a "substantially scaled-down research study." The minority's approach would involve "informal surveys of participants in proceedings where the media asked for camera coverage." The surveys would include "anecdotal information

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from interested groups during the study period,” and the committee would elicit comprehensive reports on the program after the study was completed. The minority plan proposed a 12-month timeframe for the first phase of the program. Although the minority of the committee acknowledged that this study would lack the scientific validity of the majority’s approach, it believed its approach would “be inexpensive, could be set up more rapidly, and would still address the Court’s concerns about the impacts of cameras.” The committee did not provide specific figures as to the cost of the minority’s proposed program.

In its 2009 order, the Court cautioned that because of economic hard times, the pilot program would have to be revenue-neutral for the Minnesota Judicial Branch. The committee’s recommendation predicted that the majority’s proposed pilot program would cost “at least” \$750,000. Whichever approach the Supreme Court opts to implement, the committee noted that although some cost for the program would probably have to be borne by the Judicial Branch, “direct costs may be covered by independent funds.” The committee recommended that the Court “permit a group of citizens to raise the available funds from outside the courts” and that no matter which approach is implemented, funding should be completely secured before the program goes into effect.

The Court invited public comment on the proposal. Comments were due December 17.

### **California Proposal**

The California Judicial Conference released its proposals for media access to state courtrooms in September 2010. The proposal, called “A Balancing Act: Accommodating the Needs of the Bench, Bar, and Media in the Pursuit of Justice,” is an attempt to reconcile judicial interests in due process and confidentiality with the public’s interest in transparency and openness.

The proposal recommends amending California Rule of Court 1.150, “to set forth an explicit presumption that cameras and other recording devices are allowed in the courtroom unless sufficient reasons exist to prohibit or limit their use.” The current version of Rule 1.150, in place since 1997, establishes

a presumption against “photographing, recording, or broadcasting of court proceedings by the media using television, radio, photographic, or recording equipment,” allowing such devices only “on written order of the judge.” The rule currently does not create a presumption against a judge granting such an order, however.

The California proposal was not limited to photographing or recording proceedings. It also recommends, among other things, adoption of uniform statewide rules for gag orders and orders sealing records, and education of judges on how to clearly communicate the substance of courtroom proceedings to the media.

The committee that drafted the proposal was appointed by California Supreme Court Chief Justice Ronald George, and is comprised of judges from the trial and appellate levels, journalists, First Amendment attorneys and academics. A final version of the plan will be presented to the full Judicial Council in Spring 2011.

### **Cameras Question Reaches U.S. Supreme Court in Perry v. Schwarzenegger**

The controversial case that declared California’s gay marriage referendum, Proposition 8, unconstitutional, *Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (N.D. Cal. 2010), is also significant because of a dispute among the presiding judge, an appellate court, and the U.S. Supreme Court over whether cameras should be allowed to cover the trial in real time. Although the trial judge and a U.S. circuit judge agreed shortly before the trial to allow live video transmission of the proceedings, as well as daily uploads of video to the website YouTube, the U.S. Supreme Court reversed that plan, citing how quickly it was drawn up and a possibility that witnesses might refuse to testify.

In October 2009, a month after the challenge to Proposition 8 was filed, 9th Circuit U.S. Court of Appeals Chief Judge Alex Kozinski appointed a three-judge committee to evaluate the possibility of modifying the 9th Circuit Local Rule 77-3. Local Rule 77-3 permits video recordings of appellate proceedings in the circuit court, but not in district courts where trials are held. The committee

recommended modifying the rule to create a pilot program which would allow video cameras in trial courts. Judge Vaughn Walker, who presided over *Perry*, was a member of the committee. According to the U.S. Supreme Court, Walker had the then-impending *Perry* case “very much in mind at the time [the committee recommended the pilot program] because it had come to prominence then and was thought to be an ideal candidate.” *Hollingsworth v. Perry*, 130 S. Ct. 705 (2010)

Ultimately the committee’s recommendation was adopted by the 9th Circuit Judicial Council, which issued a press release announcing the pilot program on Dec. 17, 2009. Under the program, participating cases would be chosen by the chief judge of the district court in consultation with the chief circuit judge. In the case of *Perry v. Schwarzenegger*, the chief judge of the district was Walker.

On Jan. 6, 2010, Walker issued an order under which *Perry* would be transmitted live on closed-circuit televisions in federal courthouses in other cities around the United States, and posted on YouTube at the end of each day of the trial. Kozinski approved Walker’s order on January 8. Five locations were selected for courthouse broadcasts: Portland, Ore.; San Francisco; Seattle; Pasadena; and Brooklyn, New York. Opponents of cameras covering *Perry* filed an application for a stay of the order to the U.S. Supreme Court on January 9.

On January 13, the Supreme Court voted 5 to 4 to reverse the order. In the *per curiam* majority opinion, the Court first noted that the comment period on the change of Rule 77-3 was, at most, five days, and under 28 U.S.C. § 2071(b), any changes to judicial rules of the federal courts must be accompanied by a 30-day comment period. Judges Walker and Kozinski, the Court noted, invoked the “immediate need” exception. Under § 2701(e), “if the prescribing court determines that there is an immediate need for a rule, such court may proceed ... without public notice and opportunity for comment,” as long as the judge opens the rule for comment after the need passes. The Supreme Court observed that when the pilot program was announced and implemented, no reason for its

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implementation was given by the district or appeals court.

The majority also found that “irreparable” harm would occur if transmission of *Perry* occurred. Specifically, the Court expressed concern that witnesses would be less forthcoming. “The trial will involve various witnesses, including members of same-sex couples; academics ... and those who participated in the campaign leading to the adoption of Proposition 8. This Court has recognized that witness testimony may be chilled if broadcast [and] [s]ome ... witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment.”

The Supreme Court admonished Walker for “attempting to change [the] rules at the eleventh hour” to broadcast a high profile case, and stayed the order allowing the trial to be broadcast.

Justice Stephen Breyer dissented from the stay of Walker’s order. Justices Stevens, Ginsburg, and Sotomayor joined his dissent. Breyer wrote that five days was more than enough time for the parties in *Perry* to object to the rule change, and that “there is no evidence that [irreparable] harm could arise in this nonjury civil case from the simple fact of transmission itself,” noting that 42 states currently allow recording and broadcast of nonjury civil trials. Breyer also argued that, on balance, the interest of the public in transparency in the courtroom outweighs any harm or chilling effect with respect to witnesses, observing that no specific witnesses in *Perry* came forward to say their speech would be chilled.

On November 15, the 9th Circuit U.S. Circuit Court of Appeals issued an order allowing the December 6 oral arguments on Proposition 8’s constitutionality to be broadcast by C-SPAN. The 9th Circuit currently allows cameras in courtrooms. Because the oral argument is an appeal of Walker’s August ruling that the measure was unconstitutional, the proceedings will include presentations by lawyers, but not witness testimony.

### **Public Statements of Supreme Court Justices on the Cameras Issue**

The Supreme Court is not immune from the cameras in the courtroom debate. Some justices on the high court stand firmly behind broadcasting the

Court’s proceedings, while others oppose the idea.

Justices Samuel Alito and Antonin Scalia have both publicly expressed views consistent with their ruling in *Perry*. Scalia has said that the issue of cameras in courtrooms is one issue on which he has changed his mind over the course of his 24-year tenure on the Court. Speaking to an audience at Hastings Law School in September 2010, Scalia said that when he joined the court he was in favor of cameras, but now thinks they should be excluded. According to the *San Francisco Chronicle* on September 18, Scalia said

“Witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment.”

—U.S. Supreme Court

***Hollingsworth v. Perry*, 130 S. Ct. 705 (2010)**

“If I really thought it would educate the American people, I would remain in favor of it.” But instead of educational gavel-to-gavel coverage, he said, most people would see “30-second snippets” on the news that would “distort the public perception of the court.”

Alito expressed similar sentiments in a talk at Drake University, telling a group of law students on October 1 that he is concerned about the public’s potential reaction to oral arguments, which are generally heated, and during which judges interrupt attorneys frequently. “What would ordinary viewers think?” he asked, according to The Associated Press (AP). Alito added that because most cases are extensively briefed in advance of oral arguments, most viewers would have difficulty following the proceedings. He predicted that, were Supreme Court proceedings televised, “viewership would reach historic lows.” Alito also speculated that attorneys’ arguments would be affected. “Whenever an event is televised and the participants think any sort of substantial audience is watching, their behavior is changed,” he said.

Justice Anthony Kennedy, recognized as the current swing vote on the Court, told the Senate Judiciary Committee in 2007 that cameras should not be introduced because the justices themselves would act differently in their

presence. “Please don’t introduce into the dynamic that I have with my colleagues, the insidious temptation to think that one of my colleagues is trying to get a soundbite for the television,” Kennedy said.

Justice Breyer’s views differ from those of Alito, Kennedy, and Scalia. Testifying before the House Appropriations Subcommittee on Financial Services and General Services in April 2010, Breyer said that maintaining transparency in the federal courts was sufficiently important to justify cameras. “If you bring cameras into the oral arguments, there’s a big

plus for the court and for the public. I think they’ll see that we take our job seriously, the lawyers are well-prepared, the judges are well-prepared, and are trying to think out difficult

problems. And for the public to see that, I think, would be a plus. So why not do it?” Breyer added that the discussion over cameras is not one that occurs in a vacuum. “The Canadians [have cameras in their Supreme Court],” Breyer said, “And it’s worked out all right for them.”

The two newest Justices—Elena Kagan and Sonia Sotomayor—have expressed support for allowing cameras in the Supreme Court. In 2009, prior to her confirmation hearing, at which she also said she supported televising Supreme Court proceedings, Kagan told the 9th Circuit Judicial Conference she was in favor of the practice. “I think if you put cameras in the courtroom, people would say, ‘wow,’” Kagan said. “They would see their government working at a really high level.”

Sotomayor also expressed support in her confirmation hearing in 2009. “I have had positive experiences with cameras,” Sotomayor said. “When I have been asked to join experiments of using cameras in the courtroom, I have participated. I have volunteered.” For more *Bulletin* coverage of Kagan and Sotomayor’s views on cameras, see “Kagan Confirmed; Provides Few Hints on Media Law Views” in the Summer 2010 issue and “Critics, Commentators, and Cases Offer Few Glimpses at How Sotomayor can be

**Cameras in Courts**, continued on page 15

# The Media and the Military: Guantanamo Access Rules Loosened; Other Guidelines Set to Limit Leaks

*Meanwhile, the Pentagon and the C.I.A. sue authors over books*

**A**t the same time the Pentagon ostensibly relaxed media access restrictions at the military base at Guantanamo Bay, Cuba, it contracted access and transparency in other areas, specifically through new Pentagon-wide policies on dealing with the media, and suppression of an Afghan War memoir by purchasing and destroying the entire first printing.

## ACCESS

### **Guantanamo Bay**

On Sept. 10, 2010, the Pentagon released new “Media Ground Rules” for reporters covering military commission trials of suspected terrorists at the military base at Guantanamo Bay. Although they are largely consistent with their predecessors, the new rules no longer punish reporters for publishing protected information that had been independently leaked. However, media outlets covering the base say that the rules are still too restrictive. The new rules are available online at <http://www.defense.gov/advisories/advisory.aspx?advisoryid=3260>. A version of the old rules is available via the *Columbia Journalism Review* at [www.cjrarchive.org/img/posts/Gitmo\\_Ground\\_Rules.pdf](http://www.cjrarchive.org/img/posts/Gitmo_Ground_Rules.pdf).

The new rules include a provision allowing members of the news media to publish “what otherwise would be considered Protected Information, where that information was legitimately

obtained in the course of newsgathering independent of any receipt of information while at [Guantanamo], or while transiting to or from [Guantanamo] on transportation provided by DoD.” This provision was added in direct response to an incident in May 2010, when four reporters were banned, under the old rules, from covering proceedings at the Guantanamo trial of Omar Khadr, after they revealed the name of a confidential informant. The informant’s name had already been publicized in other media outlets, including Wikipedia, according to a September 10 story in *The New York Times*. On October 29, Kadhr pled guilty to killing an American soldier in Afghanistan when he was 15 years old. For more on the reporters banned from Guantanamo, see “Limits Persist on Access to Guantanamo Proceedings, Records” in the Summer 2010 *Silha Bulletin*.

The new ground rules are identical to the old rules in some respects. For example, both sets of rules prohibit journalists admitted to Guantanamo from “publish[ing], releas[ing], publicly discuss[ing], or shar[ing] ... Protected Information.” Both sets of rules define “Protected Information” as “necessarily” including classified information, but also “information the disclosure of which could reasonably be expected to cause damage to national security, including intelligence or law enforcement sources, methods or activities, or jeopardize the physical safety of individuals.” Both rules also restrict photography of detainees, Guantanamo personnel, the coastline at the base, or “panoramic views of ... facilities ... that reveal access roads,

facilities layout ... and locations of security checkpoints.”

However, the new rules contain procedural safeguards for journalists the old rules did not. For example, both the old and new rules require that all photographs and video images be submitted to Guantanamo personnel for a security review before the media outlets may release the information. The security review panel has the authority to crop photographs and edit videos before their release. However, unlike the old rules, reporters and photographers can now appeal the decision of the security review panel if the reporters do not believe the information meets the definition of “protected.” Similarly, they may appeal the decision of the panel with respect to cropped photos if they believe that the cropping exceeds what is permitted under the rules. Appeals will be submitted to the security review panel’s superior officer who, within 24 hours of the appeal, must render a judgment agreeing or disagreeing with the panel’s judgment about releasing the photographs, videos, or information.

Some reporters cautiously applauded the rules, particularly the new appeals procedure and the “legitimately obtained” provision. John Walcott, the Washington bureau chief of McClatchy News, told the Reporters Committee for Freedom of the Press (RCFP) on September 14 that the new rules are “a good faith effort by the [Department of Defense] to address the problems that have prevented reporting from Guantanamo to be as complete and accurate as it ought to be.” A McClatchy reporter, Carol Rosenberg of *The Miami Herald*, was among those banned from

**Pentagon Access**, continued on page 16

### **Cameras in Courts**, continued from page 14

Expected to Rule on Media Law” in the Summer 2009 issue.

Justice Ruth Bader Ginsburg once expressed strong support for recording Supreme Court proceedings, but her support may have eroded over the years. During her 1993 confirmation hearing, Ginsburg told the Senate Judiciary Committee that she thought cameras in the courtroom would be “good for the public.” However, in 2005, speaking before the American Bar Association’s

Rule of Law Symposium panel, Ginsburg expressed trepidation about the practice, suggesting that cameras at the appellate level could have negative repercussions at the trial level. “I think what bothers many people, at least me, on the other side, is that if [cameras] were in the Supreme Court, I think it would become a symbol for every court,” she said, “and therefore it would be in every criminal trial in the country. And when I start thinking about witnesses, I don’t want them thinking how

they look to their neighbors.”

In August 2010, while speaking to the Colorado Judicial Conference, Ginsburg declined to answer a question about her current position on cameras in the Supreme Court; instead, Ginsburg “talked about former justices who opposed cameras,” according to an August 28 report from the AP.

— GEOFF PIPOLY  
SILHA RESEARCH ASSISTANT

Guantanamo in May. Rosenberg has since been readmitted.

Walcott also expressed concern, however, over the “legitimately obtained” provision. He told the RCFP that he worried that the broad scope of the term might give the military too much discretion to remove reporters: “Is information that was leaked by someone without authority legally [sic] obtained? My answer is yes, I’m not sure what [the military’s] answer will be.”

In a September 17 editorial, *The New York Times* condemned the new rules as not doing enough to facilitate transparency. The rules are “not remotely good enough,” the *Times* wrote, and the Obama Administration betrayed its campaign promise of transparency and openness when it set restrictive rules for press access to military commissions in the first place. The rules “only serve to remind us of the Obama administration’s original error, which was to try Mr. Khadr for war crimes allegedly committed when he was a child, based on evidence tainted by torture and abuse,” the *Times* declared.

Military spokespeople praised the new rules. According to Pentagon spokeswoman Tanya Bradsher, the rules are a positive step for both the press and the military, because they set clearly defined parameters for dealing with the press, but are more flexible than previous access rules at Guantanamo. “The old ground rules locked us into a procedure,” Bradsher told the RCFP. “These [new rules] give us more levels of control in the appeal process for journalists and organizations.” The RCFP story is available online at <http://www.rcfp.org/newsitems/index.php?i=11555>.

### **The Pentagon and Leaks**

At the same time the Defense Department released the new Guantanamo ground rules, memoranda from high-ranking officials outlined a stricter policy to prevent leaks from members of military to the media.

The first memo, dated July 2, 2010, was titled “Interaction with the Media” and issued by Secretary of Defense Robert Gates. The memo states that although Gates recognizes the Department of Defense’s obligation to disclose information to media outlets in a “timely, accurate, [and] credible” manner, he is

“concerned that the Department has grown lax in how [it] engage[s] with the media, often in contravention of established rules and procedures.” According to the memo, the Department of Defense is the sole release authority for official information to news media in Washington, and all media activities must be coordinated through appropriate public affairs channels.

“The bottom line is if you don’t know what’s really happening, what you have is a story that puts [the Pentagon’s] fables into print, and that’s not what I’m here for.”

—Sig Christenson  
Co-founder, Military Reporters and Editors

The memo warns that any military member who discloses protected or classified information without going through channels specified in the memo can be punished. “Leaking of classified information is against the law,” the memo states, “and will, when proven, lead to the prosecution of those found to be engaged in such activity.”

The memo came nine days after Gen. Stanley McChrystal, then-commander of U.S. forces in Afghanistan, was fired by President Barack Obama for disparaging statements McChrystal made about the administration’s war policy in an interview with *Rolling Stone* magazine. *The New York Times* reported on July 2 that the memo represented a significant crackdown by the Pentagon against leaks to the media, and was “a reassertion by civilian public affairs specialists of control over the military’s contacts with the news media.” The *Times* also reported that although Gates had been planning to institute tighter controls over leaks to the media for several months, the McChrystal incident expedited release of the memo. For more on McChrystal’s termination and its impact on reporting on the military, see “A Reporter, a General, and the Ethics of Covering the War” in the Summer 2010 issue of the *Silha Bulletin*.

Another memo, dated Sept. 2, 2010, issued by Assistant Secretary of Defense for Public Affairs Doug Wilson, reaffirmed the July 2 Gates memo. Wilson’s memo states that the media “is not the enemy” and that “implementation of the

Secretary’s guidance is not a change of policy but a reaffirmation of existing policy.” Wilson wrote that his office would continue to foster positive relationships with members of the media within the bounds of Gates’ July 2 memo.

According to a September 10 story by the RCFP, reporters expressed concern that the access restrictions will undermine their ability to report the

news accurately. For example, Military Reporters and Editors co-founder Sig Christenson told the RCFP that the memos could deter members of the military from speaking to reporters. As a result, Christenson said, the

only information reporters would have would be the official information from the Pentagon. “The bottom line is if you don’t know what’s really happening, what you have is a story that puts [the Pentagon’s] fables into print, and that’s not what I’m here for,” Christenson said. Christenson cited the 2007 Walter Reed Hospital scandal, which exposed inadequate medical care and facilities at the hospital, as an example of why reporters need access to sources within the military. “If the new policy was in place, would those soldiers have talked with *The Washington Post* and would we have learned of the abysmal conditions some of those wounded warriors endured?” he asked. The RCFP story is available online at <http://www.rcfp.org/newsitems/index.php?i=11545>.

Steven Aftergood, author of the blog Secrecy News, a project of the Federation of American Scientists, criticized the crackdown on leaks as impractical. On September 7, Aftergood wrote that “the degree of control over DoD contacts with the media sought by the Pentagon may be impossible to achieve,” given the sheer size and scope of the Pentagon’s operations. Aftergood said that the type of unauthorized disclosures the Pentagon is seeking to eliminate “serve a valuable public policy function, at least when they do not trespass on legitimate secrets, because they enable reporters and others to develop an independent account of events and to generate a more complete



public record.” The Secrecy News post is available online at <http://www.fas.org/blog/secrecy/2010/09/coordination.html>.

Gates told ABC News on July 8 that the memo’s directives had more to do with streamlining information in the name of national security than with suppressing access, and that the memos do not restrict reporters’ ability to cover ongoing combat operations. “If you’re a captain in a unit that has an embedded reporter, as long as you’re within the guidelines and the rules, we expect you to be open with that embedded reporter,” Gates said. “On the other hand, if you’re a captain in this building, working on budget options, I expect you to keep your mouth shut.”

### **‘Operation Dark Heart’**

On Sept. 10, 2010 *The New York Times* reported that the Pentagon had negotiated with former Defense Intelligence officer Anthony Shaffer to purchase the entire first printing of his book, “Operation Dark Heart,” and destroy all 10,000 copies to prevent the book’s release, at least in an unedited form.

The Pentagon claimed that the book, a memoir of Shaffer’s time in Afghanistan which purports to show weaknesses in the United States’ policy there, contained classified and other sensitive information the release of which would compromise national security and the U.S. mission in Afghanistan.

According to the *Times*, Shaffer submitted a manuscript of the book to the U.S. Army for prepublication review in January 2010. Army reviewers initially signed off on the text, saying they had “no objection on legal or operational security grounds” to the book, which at the time was slated for an August 31 release. When Defense Intelligence and CIA analysts saw the manuscript in late July, however, they raised objections. On August 6, Defense Intelligence Agency Director Ronald Burgess released a memo that said the book could “reasonably be expected to cause serious damage to national security,” according to a Sept. 15, 2010 post on Secrecy News. The information consists of, among other things, names of intelligence officers with whom Shaffer served, and information about specific wiretaps performed by the National Security Agency, according to the *Times*.

In early September, Shaffer and the

military reached a compromise: the military would purchase the entire first printing of “Operation Dark Heart” and destroy all copies, while simultaneously redacting passages in the manuscript the military objected to. The edited version was re-released on September 24.

On September 10, Aftergood reported on Secrecy News that several copies of the first printing of the book were already in circulation, and criticized the agreement, arguing that “the mere fact that a government official says certain information could damage national security if it were disclosed doesn’t necessarily make it so.”

Aftergood also criticized the censorship as impractical, given that some copies of the book were already available. Aftergood observed that, given the public’s ability to do a side-by-side comparison between the edited and unedited text, the military’s action actually revealed what it considers “sensitive” information. “Therefore, as a practical security policy matter, it seems that the Pentagon’s best move would be to do nothing and to allow the book to be published without further interference,” Aftergood wrote.

### **CIA Sues Former Agent Over Book**

On October 19, the CIA announced that it is suing a former deep cover agent for a book he published in 2008, claiming that he violated his secrecy agreement with the agency.

The book, “The Human Factor: Inside the CIA’s Dysfunctional Intelligence Culture,” whose author uses the pseudonym Ishmael Jones, is highly critical of the CIA. According to an October 19 post on Politico by Josh Gerstein, Jones said the impetus for the suit was the book’s critical nature. Jones told Gerstein that he believes the CIA has a double standard—permitting the publication of books by, for example, CIA Chief Leon Panetta, but rejecting and fighting publication of books that are critical of the agency.

In the book, Jones wrote that the CIA rejected his initial draft without reviewing it. He later sent back a revised copy, of which about half was redacted by the CIA, Gerstein reported. However, Jones disregarded the CIA’s redactions, and in 2008 published the book anyway.

The lawsuit, filed in July 2010, alleges that publication of Jones’ book violated

the secrecy agreement that all CIA agents sign at the beginning of their tenure at the agency. According to the complaint, Jones’ privacy agreement provided that he “was required never to disclose information or material obtained in the course of employment or other service with the CIA that is classified or that reveals classifiable Information.” Furthermore, Jones agreed “to submit to the CIA for its review all information or materials ... which contain any mention of intelligence data or activities ... which he contemplates disclosing publicly or which he has actually prepared for public disclosure, either during his employment with the CIA or at any time thereafter ... and was further required to receive written permission from the CIA before taking any steps toward public disclosure.”

Panetta defended the lawsuit in a statement, according to Gerstein. “CIA officers are duty-bound to observe the terms of their secrecy agreement with the Agency,” Panetta said. “This lawsuit clearly reinforces that message.”

The CIA has successfully sued former agents in the past over violations of their secrecy agreement. For example, in 1980, the U.S. Supreme Court ruled that the agency could sue Frank W. Snapp III, and demand royalties he earned, because he failed to submit a book he published about CIA activities in Vietnam to the agency for review. The CIA did not contend that Snapp’s book contained any classified information, but nevertheless the Court said that “whether Snapp violated his trust does not depend upon whether his book actually contained classified information.”

The Court also rejected Snapp’s argument that the agreement constituted a prior restraint on his speech, calling it “an entirely appropriate exercise of the CIA Director’s statutory mandate to protect intelligence sources and methods from unauthorized disclosure” in light of the government’s “compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.” *Snapp v. United States*, 444 U.S. 507 (1980)

# Access Limited after California Pipeline Explosion

*Police keep reporters out; utility company cites security concerns in withholding records*

**O**n Sept. 9, 2010, an underground gas pipeline in San Bruno, Calif. exploded, killing four people and wounding 52. Media access to the disaster site and to documentation of other potentially dangerous pipelines was limited both by police responding to the incident and by the utility company.

The explosion occurred around 6:15 p.m. on September 9, according to a September 10 story by the San Jose *Mercury News*. Residents in the area had reported smelling gas in the week leading up to the disaster, which destroyed 31 homes and seriously damaged eight more. Pacific Gas & Electric (PG&E), the utility company that owns and maintains the gas line that exploded, said the line that ruptured was 30 inches in diameter and between 40 and 50 years old.

On September 10, the *Mercury News* reported that San Bruno police had declared the affected area a “crime scene” in “a routine move that limits access to the area until authorities determine that no foul play was involved.” In a blog post on the *SF Weekly* website, Joe Eskenazi wrote September 13 that by using the designation “crime” rather than “disaster,” authorities unnecessarily “kept media out.” Citing § 409.5 of the California Penal Code, Eskenazi said that using the “disaster” designation would have allowed police enough authority to keep “gawkers, looters and others” away from the scene while they searched and cleared it without restricting media access. Section 409.5 states that “Nothing in this section shall prevent a duly authorized representative of any news service, newspaper, or radio or television station or network from entering the areas closed pursuant to this section.” However, Eskenazi wrote that the designation of the area as a

crime scene meant that the exception for reporters pertaining to disaster scenes did not apply. By “treating the entire 10-acre fire zone as the equivalent of a murder room,” he wrote, San Bruno police “severely restricted” media access to the scene.

Eskenazi quoted reporter Michael Cabanatuan of the *San Francisco Chronicle* saying he was “ordered out” of the neighborhood affected by the explosion on the evening of September 9, before the area was declared a crime scene. “We told them that we have access to disaster areas. I did that both individually and with other reporters. But they said ‘no, we won’t let you in,’” Cabanatuan said.

“The very law that gives [authorities] the right to declare a critical incident and exclude the public says the press is exempt from this exclusion. That drives a lot of police, fire, and disaster managers crazy. But that’s how you keep us honest.”

—Anthony Hare  
San Francisco Forensic Institute, UC Berkeley  
Center for Catastrophic Risk Management

Eskenazi also quoted Anthony Hare of the San Francisco Forensic Institute and University of California, Berkeley’s Center for Catastrophic Risk Management, who previously worked as an incident commander with the Oakland Police Department. Eskenazi wrote that the “crime scene” designation “struck [Hare] as odd.” Hare told Eskenazi that “The very law that gives [authorities] the right to declare a critical incident and exclude the public says the press is exempt from this exclusion. That drives a lot of police, fire, and disaster managers crazy. But that’s how you keep us honest.”

Limits to access and transparency continued in the aftermath of the San Bruno explosion. On September 15, San Francisco website The Bay Citizen reported that PG&E was refusing to release information about other

pipelines in the area, citing “security concerns.” The Bay Citizen reported that the disaster “laid bare” concerns over California’s aging gas pipeline system, but that PG&E’s secrecy regarding its network was “raising concern among First Amendment advocates.” The Bay Citizen quoted James Wheaton, senior counsel at advocacy group First Amendment Project, asking “If PG&E knows about risky pipelines, why would they keep that secret?”

Sari Koshtetz, a spokesperson for the Transportation Security Administration (TSA) told The Bay Citizen that it “does not encourage utilities to keep the locations of gas pipelines that are a high-risk for failure from the public” but

discourages utility companies from displaying complete system maps online “for obvious security reasons.” Because PG&E pipeline information is held by a private corporation, it is not covered by the California Public Records Act, Government Code §§ 6250 – 6276.48.

Heather Ishimaru of San Francisco’s KGO-TV reported October 14 that the California Public Utilities Commission (CPUC) announced that it had assembled a team of experts to investigate the explosion. Ishimaru reported that the CPUC would look for “the root cause of the disaster” and review PG&E’s business practices. Ishimaru reported that, in addition to the CPUC investigation, the National Transportation Safety Board (NTSB) is investigating the incident, and PG&E is conducting an internal investigation. The NTSB report is available online at <http://www.nts.gov/Surface/pipeline/Preliminary-Reports/San-Bruno-CA.html>. As the *Bulletin* went to press, none of the investigations had been completed.

—SARA CANNON  
SILHA CENTER STAFF

# Law Firm's Approach to Protecting News Media Copyrights Raises Eyebrows

*Righthaven pursues bloggers and other Internet users who republish content*

In a series of lawsuits that have drawn nationwide attention and controversy, law firm Righthaven and the *Las Vegas Review-Journal* have set out to aggressively pursue bloggers and other Internet users who copy and republish *Review-Journal* stories online. The *Review-Journal*

**COPYRIGHT** has claimed it has a legal right and an economic responsibility to protect its copyrighted content from unauthorized republication, but some have criticized the legal approach as heavy handed.

## ***Righthaven: Locating and Suing Infringers***

According to an October 19, 2010 story by the Bureau of National Affairs (BNA) Media Law Reporter, Righthaven is funded by an affiliate of the *Review-Journal's* parent company, Stephens Media. Former *Review-Journal* Publisher Sherman Frederick explained in a May 28, 2010 blog post on the *Review-Journal* website that Stephens Media "grubstaked" Righthaven, using a term common to mining whereby one company supplies money to a venture in return for some of the venture's profits. In the post, titled "Copyright theft: We're not taking it anymore" Frederick said Righthaven's "only job is to protect copyrighted content."

An August 4 story in the *Las Vegas Sun*, which has closely followed the Righthaven lawsuits, explained that Righthaven employees search the Internet to find websites that have republished portions of *Review-Journal* stories online. Righthaven then buys the copyright for the republished story from Stephens Media and sues the infringer, typically demanding \$75,000 in damages as well as forfeiture of the domain name of the infringer's website. (For more on the early developments of the Righthaven lawsuits, see "News Media Seek Legal Tools to Protect Original Content" in the

Summer 2010 *Silha Bulletin*.)

BNA's Electronic Commerce & Law Report reported on November 2 that Righthaven had filed 167 lawsuits against various online publishers around the country since March 2010. The *Sun* reported October 20 that some of the suits have been settled out of court while others are in "various stages of litigation." A blog dedicated to tracking the suits has court filings and other documents and is located at <http://www.righthavenlawsuits.com>.

## ***Defendants Look to 'Fair Use,' Lack of Standing, or 'Implied License'***

Few defendants who have challenged the Righthaven copyright lawsuits have prevailed, but one defendant successfully had a suit dismissed. In an October 18 order granting a realtor's motion to dismiss, Judge Larry Hicks of the U.S. District Court for the District of Nevada ruled that realtor and blogger Michael Nelson's republication of part of an April 30, 2010 *Review-Journal* article about a new federal housing program was "fair use" under the Copyright Act, 17 U.S.C. § 107 et seq.

Applying the standard four-step test for fair use, Hicks examined the "purpose and character" of Nelson's use of the article, "the nature" of the *Review-Journal* article, the amount Nelson used, and the unauthorized use's "effect on the potential market for the copyrighted work." In his four-page order, Hicks observed that Nelson "reproduced only the first eight sentences of a thirty sentence news article," which contained only the factual information from an article that was "split between factual news reporting and reporter commentary." Hicks ruled that even though the purpose and character of Nelson's use of the article was commercial, it was "likely to have little to no effect on the market for the copyrighted news article" because Nelson's copied portion, which "did not contain the author's commentary ... does not satisfy a reader's desire to view and read the article in its entirety [with] the author's original commentary." Hicks added that Nelson included a link leading readers to the original *Review-Journal*

story. The ruling dismissed Righthaven's suit. *Righthaven v. Realty One Group, Inc., et al.* 2010 U.S. Dist. LEXIS 111576 (D. Nev. Oct. 18, 2010)

The *Sun* reported October 20 that Righthaven CEO Steven Gibson said his firm would not appeal Hicks' order dismissing the case because it had reached a confidential settlement with Nelson prior to the ruling. The *Sun* said Hicks apparently was not aware of the settlement when he made his ruling. Gibson said that if there were no settlement with Nelson, Righthaven would consider appealing the ruling to the 9th Circuit U.S. Court of Appeals. The *Sun* also reported that Gibson said that the ruling indicates that fair use would not be a viable defense in the majority of Righthaven's lawsuits, which involve the posting of entire stories without authorization.

Digital rights advocacy group the Electronic Freedom Foundation (EFF) took on two of the Righthaven suits, countersuing the law firm on behalf of a crime blogger interested in "no body" murder cases and a user-driven political satire and commentary website called Democratic Underground.com. In both cases, the EFF has argued that the websites are protected by fair use. In the case involving the crime blog, the EFF supported its fair use claim by stating the website is "non-commercial" and "benefits the public interest" by "assisting prosecutors and homicide investigators in bringing justice to the friends and families of 'no body' murder victims." In the case involving Democratic Underground.com, the EFF claims that the website's use of a portion of an article about Nevada Republican Senate candidate Sharron Angle was fair use because the user who posted it included only the first five sentences of a story that was 50 sentences long. *Righthaven v. DiBiase*, 2:10-cv-01343-RLH-PAL (D. Nev. 2010) and *Righthaven v. Democratic Underground*, 2:10-cv-01356-RLH-RJJ (D. Nev. 2010)

On November 15, Righthaven filed a motion for voluntary dismissal of the suit against Democratic Underground.com with the Nevada District Court.

**Righthaven**, continued on page 20

Citing the court's ruling recognizing the fair use defense in the *Realty One Group* case, and the fact that the user in the Democratic Underground.com suit also only used about 10 percent of a longer article, Righthaven said in its motion that "in this case, it appears to be in the best interests of Righthaven—and in the best interests of the Defendants—to not exhaust judicial resources on the instant lawsuit and instead allow this matter to be voluntarily dismissed." The motion was filed "in the interest of judicial economy," adding that "though Righthaven firmly believes that the Defendants are liable for copyright infringement ... reasonable minds may disagree as to the legitimacy of a fair use defense." The motion also said that "Righthaven does not anticipate filing any future lawsuits founded upon infringements of less than 75% of a copyrighted work, regardless of the outcome of the instant litigation."

*Wired* magazine blog Threat Level reported October 27 that, as was the case with Democratic Underground.com, many of the Righthaven lawsuits have arisen "not from articles posted by a website's proprietors, but from comments and forum posts by the site's readers." The Digital Millennium Copyright Act's "safe harbor" provision, 17 U.S.C. § 512, generally protects websites from liability for information posted by users if the website quickly removes or disables access to material that is identified in a copyright holder's complaint. However, in order to qualify for the safe harbor provision, websites must meet several criteria, including adopting a copyright policy and notifying users of that policy, having no knowledge of the infringing activity, not benefiting financially from the infringement, and identifying and registering a "designated agent" with the U.S. Copyright Office who can manage copyright "takedown" complaints. Registering a designated agent requires website proprietors to fill out a form and mail it to the Copyright Office along with a \$105 fee. Threat Level reported October 27 that "an examination of Righthaven's lawsuits targeting user content suggests it's specifically going after sites that failed to fill out that paperwork."

Courts have also rejected defendants' challenges based on jurisdiction and

copyright ownership. On October 28, District Judge Gloria M. Navarro denied a motion to dismiss a Righthaven copyright suit filed by Canadian website Majorwager.com. The website claimed that Navarro should dismiss the suit because Righthaven failed to prove that Majorwager.com had sufficient legal contact with the state for the

"Like most writers, I've had my articles posted online without permission. I'm usually glad to get the attention. When I'm not, I ask that they be taken down. That's how these things are handled. People go to court as a last resort, not as a first resort—especially when the infringer is a small nonprofit or a blogger who probably doesn't know better."

—Stephen Bates  
Assistant Professor  
University of Nevada, Las Vegas

federal court in Nevada to hear the case, a doctrine known as "personal jurisdiction." The court cited 9th Circuit precedent in copyright infringement as well as a previous Righthaven case in observing that Majorwager.com "willfully infringed copyrights owned by" Righthaven in an article published by the *Review-Journal*, which it knew is based in Nevada, causing harm to be suffered in Nevada. The court also said that hearing the case in Nevada was "reasonable" because although doing so would place a heavy burden on Majorwager.com in requiring it to litigate a case in a foreign country, that fact was outweighed by the state's interests and the plaintiff's interests. *Righthaven v. MajorWager.com*, 2010 U.S. Dist. LEXIS 115007 (D. Nev. Oct. 28, 2010)

Navarro also rejected Majorwager.com's argument that Righthaven lacked standing to sue because it did not own the copyright to the *Review-Journal* article when the infringement took place. The article was posted in a forum on the website by a user with the pseudonym "CLEVFAN" on March 18, 2010. Stephens Media assigned ownership of the article, as well as the "right to seek redress for past, present and future infringements of copyright" on March 24, and Righthaven

filed suit on April 7.

Navarro said that because Righthaven had rights to sue over "past, present and future infringements," it could sue the website for an infringement that occurred before it owned the copyright to the article. In a footnote, however, Navarro noted that Majorwager.com did not "address the true nature of the

transfer or any other possible defects related to Plaintiff's standing. ... if only a right to sue was transferred; Plaintiff may lack standing." Navarro cited *ABKCO Music v. Harrisongs Music*, 944 F.2d 971 (2nd Cir. 1991), which she said stands for the proposition that the "Copyright Act does not permit copyright holders to choose third parties to bring suits on their behalf."

In its two counterclaims on behalf of Democratic Underground.com and DiBiase, the EFF has claimed that Righthaven solely licenses copyrights from Stephens Media for the purpose of suing infringers, or, in the words of DiBiase's counterclaim: "Righthaven does not have a regular business model of deriving revenue from licensing copyright rights with respect to any information or content other than in connection with litigation, if at all. ... Righthaven's sole revenue is settlements from the copyright infringement cases it has filed."

In a ruling on another Righthaven case, Navarro said the owner of a website devoted to skyscrapers and urban development might be able to assert that the *Review-Journal* provides an "implied license" to republish its stories. *Righthaven v. Klerks*, 2010 U.S. Dist. LEXIS 105307 (Dist. Nev. 2010)

On September 17, Navarro granted defendant Jan Klerks' motion to set aside a default judgment against him. According to Navarro's order, Righthaven sued Klerks on May 19, 2010, and after he failed to respond to a summons, a clerk's default was entered July 9. However,

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before a default judgment was entered, Klerks filed a motion to set aside the judgment, claiming that the summons was sent to the wrong address and therefore he never received it, and that the first he learned of the suit was when a *Las Vegas Sun* reporter called him.

Navarro ruled that Klerks' motion met the standard of "good cause" required to set aside the default judgment. She noted not only that "he promptly retained counsel and filed the instant motion" as soon as he learned of the complaint, but that he provided a "meritorious defense" against the suit. Although not ruling on the merits of the arguments, Navarro said that a "fair use" analysis "weighed in favor" of Klerks, particularly because his blog is a nonprofit venture, because the *Review-Journal* article in question was "primarily informational," and because the effect on the market is limited because infringing "because the same article was viewable to the public for free on the Las Vegas Review-Journal's Website."

Moreover, Navarro said Klerks' "most meritorious defense" was "implied license," which the U.S. District Court for the District of Nevada ruled in *Field v. Google*, 412 F. Supp. 2d 1106 (Dist. Nev. 2006) "can be found where the copyright holder engages in conduct from which the other party may properly infer that the owner consents to his use." Klerks claimed the *Review-Journal* "offered the article to the world for free, encouraged people to save and share the article with others without restrictions, and permitted users to 'right-click' and copy the article from its website." Righthaven instead claimed that "allowing a user to copy an entire article and post it to the user's website is similar to allowing a user to copy a library book and distribute the copies; a practice that it notes is illegal under current copyright laws," Navarro wrote. Nevertheless, she found that Klerks "made a plausible argument based on the recent cases addressing the copying of works taken from the internet."

### **Critics Question Righthaven's Approach; Newspaper is Unapologetic**

Outside of court filings, critics of the *Review-Journal* and Righthaven have raised questions about the long-term

impact of a zealous legal approach to protecting news media copyrights.

Sherwin Siy, deputy legal director for Public Knowledge, a public interest group based in Washington D.C., told BNA's Media Law Reporter on October 19 that "if somebody is infringing on somebody's copyrights, they certainly have a right to sue. I don't think there is any debate about that. [But] the existence of copyright law isn't a license to abuse it either." Siy said Righthaven's approach is "turning our legal system into a moneymaking enterprise."

Stephen Bates, an assistant professor at the University of Nevada, Las Vegas' school of journalism, told the *Las Vegas Sun* for an August 4 story, "Like most writers, I've had my articles posted online without permission. I'm usually glad to get the attention. When I'm not, I ask that they be taken down. That's how these things are handled. People go to court as a last resort, not as a first resort—especially when the infringer is a small nonprofit or a blogger who probably doesn't know better."

Criticism has been most acute when Righthaven suits have targeted unexpected defendants. For example, Righthaven sued former Senate candidate Angle on September 3 for republishing numerous *Review-Journal* stories on her campaign website. *Review-Journal* Publisher Sherman Frederick had long been an outspoken Angle supporter on his blog, and the newspaper endorsed Angle on October 3.

Steve Friess, writing for the AOL blog Politics Daily on September 10, observed that the lawsuits could strain relationships between *Review-Journal* reporters and their sources. Friess reported that one suit targeted the website of *Anthony Curtis' Las Vegas Advisor* tourist magazine after the magazine posted online a *Review-Journal* story reporting the results of a survey conducted by the magazine. Friess said the *Review-Journal* story "was itself the result of a scoop the Advisor handed to the paper, and now threatens the reporter-source relationship between the Advisor and the [*Review-Journal*]'s entertainment scribe."

According to the *Sun* on August 4, Curtis learned of the suit in June when a *Sun* reporter asked him for a comment

about it. "It's ironic and stupid," Curtis said. "If they're going to sue us for quoting us, that gets really stupid."

Frederick was unapologetic in his May 28 blog post. "It is our primary hope that Righthaven will stop people from stealing our stuff," he wrote. "It is our secondary hope, if Righthaven shows continued success, that it will find other clients looking for a solution to the theft of copyrighted material." The Threat Level blog reported August 30 that Righthaven had added a second client, Arkansas-based WEHCO Media, parent company of the Little Rock *Arkansas Democrat-Gazette* and the *Chattanooga (Tenn.) Times Free Press*.

The *Review-Journal* reported November 12 that Frederick had stepped down as publisher, and was replaced by Advertising Director Bob Brown. He was also replaced as Stephens Media CEO by Michael Ferguson, the company's former chief operating officer.

According to an October 6 report by BNA's Electronic Commerce & Law Report, a panel of media lawyers speaking at a September 25 conference focused on "Media Law in the Digital Age" said that online publishers should expect to see more lawsuits of the Righthaven variety. Christopher A. Wiech, an attorney in the Atlanta office of law firm Troutman Sanders, said that because it is unrealistic for many individual bloggers to hire a lawyer to defend their use of a single article, many are likely to accept settlements of "a couple thousand dollars." If Righthaven is successful in getting these types of settlements, Wiech said, "you're going to see more and more types of entities like this pop up."

On September 24, The Associated Press (AP) reported that AP President and CEO Tom Curley called for better enforcement mechanisms to limit unlicensed and unauthorized use of news online. In remarks at a training program run by AP Managing Editors at the First Amendment Center in Nashville, Tenn., Curley said the AP was engaging in efforts to track websites that "scrape" AP content systematically without paying for it.

The *Sun* reported September 25 that Mark Hinueber, vice president and general counsel of Stephens Media,

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# Updates: Punishments for Music Copyright Infringers

*Thomas-Rasset faces million-dollar damages; judge shuts down LimeWire*

Recording companies won two recent copyright infringement cases in an ongoing battle with online networks that facilitate music sharing and their users. Meanwhile, the U.S. Supreme Court declined to hear arguments on whether

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individuals sued for infringement in such cases should

be subject to lower damages if they can show they were unaware that their activities violated the law.

### **In Third Trial, Minnesota Woman Ordered to Pay \$1.6 Million for Downloading**

On November 3, 2010, a federal jury returned a verdict against Brainerd, Minn. resident Jammie Thomas-Rasset to pay \$1.6 million in damages to the companies that own the rights to 24 songs that she downloaded.

The November verdict is the latest installment in a series of three proceedings against Thomas-Rasset, all of which arose out of the same set of facts. In two previous cases, juries returned verdicts against Thomas-Rasset and in favor of the record companies who brought the suit in the amount of \$222,000 and \$1.9 million respectively. For more on Thomas-Rasset's first two trials, see "Music Industry Wins First Internet Piracy Case" in the Fall 2009 *Silha Bulletin*.

The first verdict against Thomas-

Rasset was overturned because of deficiencies in the jury instructions. The second verdict award was reduced to \$54,000—or \$2,250 per song—by Chief U.S. District Judge Michael Davis in January 2010. Davis, calling the damage award "monstrous" and "shocking," wrote that although jury awards are an effective deterrent against people illegally downloading copyrighted music, "the need for deterrence cannot justify a \$2 million verdict for stealing and illegally distributing 24 songs for the sole purpose of obtaining free music." *Capitol Records, Inc., et al v. Thomas-Rasset*, No. 06-1497 (D. Minn. Jan. 22, 2010)

Following Davis's reduction in damages, the plaintiff record companies offered Thomas-Rasset a different arrangement: if she accepted a damage award of \$25,000 to be paid to a musician's charity, the plaintiffs would not challenge Davis' reduction order, according to a January 27, 2010 post on CNet News.

Thomas-Rasset rejected both the plaintiffs' offer and Davis' reduction, opting instead for a separate re-trial on the issue of damages alone. At her November 1 trial for damages, her attorney, Kiwi Camara, argued that Thomas-Rasset did the plaintiffs no actual harm. According to a November 3 story in the Minneapolis *Star Tribune*, Camara told the jury that although "she may have engaged in the conduct, that doesn't mean they can take her head and stick it up on a pole." Camara also told the jury that his client was selectively targeted for litigation by the music industry, arguing that the case was only pursued by the plaintiffs to prove that suing individuals—and not just the

networks they use to download music—can work as a strategy to combat piracy, according to the *Star Tribune*. Camara told the jury that millions of other people download music exactly as Thomas-Rasset did, but that most of them are not sued; some merely receive letters threatening a lawsuit, Camara said. "The only difference is that they picked her out in order to make headline news," he said.

Neither Thomas-Rasset nor Camara spoke to the press following the November verdict. She has not said whether she will appeal the damage award.

### **Judge Shuts Down Peer-to-Peer Network LimeWire**

On October 26, 2010, U.S. District Judge Kimba Wood issued a permanent injunction against peer-to-peer file sharing client LimeWire, ceasing its operations. The injunction followed a May 11, 2010 order in which Wood ruled against LimeWire in a copyright infringement suit brought by 13 record companies. Wood's May 11 order not only found LimeWire liable for infringement, but held the network's founder personally liable as well.

LimeWire is a program that allows users to search other LimeWire users' computers for digital music, movies, or any other type of file. The case arose when the music companies—who, according to Wood's May 11 order, represent "the vast majority of copyrighted sound recordings sold in the United States"—sued LimeWire and its founder and CEO Mark Gorton in federal district court for the Southern District

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### **Righthaven**, continued from page 21

said he was encouraged that the AP is also taking aim at unlicensed use of its news content. Hinueber spoke during a presentation sponsored by the Las Vegas Chapter of the Society of Professional Journalists. He said he hoped that efforts by the AP and others would deter copyright infringers, and that "Righthaven isn't the only solution to this problem." The *Sun* reported Hinueber called for "some sort of digital rights

agency" that could help protect copyright and license content.

According to the *Sun*, Hinueber said that although the lawsuits have generated negative publicity for the *Review-Journal* and may have created problems for reporters whose sources were sued, the lawsuits would continue. "I think the benefits are worth the negative publicity," he said.

Friess defended the Righthaven suits

in a July 28 post on the *Las Vegas Weekly* website. "Offenders think they deserve a polite warning, but I'm all for scaring the hell out of them," Friess wrote. "The thing that's killing the media is the devaluation of its assets, something in which [the media] is a willing participant. This could be a first step toward reminding people that information may want to be free, but those who provide it have bills to pay, too."

— PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

of New York. The plaintiffs claimed that because LimeWire's users transmitted copyrighted music over the network, the company should be liable for copyright infringement. *Arista Records, LLC, et al v. Lime Group LLC*, No. 06-CV-5936 (S.D.N.Y. May 11, 2010)

Wood agreed with the plaintiff, and found LimeWire liable for direct infringement on a theory of secondary liability. Wood found that although LimeWire never actually stored and directly distributed copyrighted music, because it distributed "infringement-enabling products [and] services, [it] enable[d] direct infringement on a massive scale, making it impossible to enforce [copyright] protection effectively against all direct infringers."

In addition, Wood wrote that because "in internal communications, [LimeWire employees] regularly discussed the fact that LimeWire users downloaded copyrighted digital recordings through the program, [and] tested [the program] by searching for infringing content" and because the company "marketed LimeWire to users of Napster and similar programs, and promoted LimeWire's infringing capabilities," the company intentionally encouraged people to use its program to infringe. Wood also wrote that the company's failure to take actions to mitigate infringement despite knowing that infringement was occurring was evidence that the company induced copyright violations.

Wood's May 2010 decision relied heavily on *MGM Studios, Inc. v. Grokster*, 545 U.S. 913 (2005), where the U.S. Supreme Court extended and clarified its rule from *Sony Corp. of America v. Universal Cities Studios, Inc.*, 464 U.S. 417 (1984). In *Sony*, the Court held that if technology has "significant, noninfringing uses," the proprietors of that technology could not be held liable for copyright infringement—known as the "Sony Safe Harbor" rule. The *Grokster* decision concerned peer-to-peer technology similar to LimeWire. There the Court found that although peer-to-peer technology could be used for noninfringing purposes, the vast majority of downloads over the Grokster network were of copyrighted materials, and that Grokster's owners and operators promoted it for that purpose. The Court

observed that Grokster had sought to market its services to "former Napster users," which indicated "a principal, if not exclusive, intent ... to bring about infringement" and that it had not "attempted to develop filtering tools or other mechanisms to diminish the infringing activity." Therefore, the court reasoned that "one who distributes a

"[Thomas-Rasset] may have engaged in the conduct, that doesn't mean they can take her head and stick it up on a pole."

—Kiwi Camara  
Attorney for Jammie Thomas-Rasset

device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties." For more on the *Grokster* decision, see "U.S. Supreme Court Rules in *Grokster*" in the Summer 2005 issue of the *Silha Bulletin*.

In the May 11 ruling, Wood noted that following the *Grokster* decision LimeWire began requiring users to click a box affirming that they would not use the software for infringement purposes as a condition of downloading the program. "The notice and statement of intent requirements, on their own, do not constitute meaningful efforts to mitigate infringement," Wood wrote, adding that the company's "failure to utilize technology to create meaningful barriers [was] a strong indicator of intent to foster infringement."

Wood also found Gorton personally liable for infringement on the same theories of liability as the corporation. Wood wrote that precedent established that "an individual, acting as a corporate officer, who has the ability to supervise infringing activity and has a financial interest in that activity ... is personally liable for infringement," citing *Stumm v. Drive Entertainment, Inc.*, 2002 U.S. Dist. LEXIS 7762 (S.D.N.Y. 2002) (emphasis in original). Wood found that the evidence showed that Gorton was the company's "ultimate decisionmaker," whose approval was required for "any major strategic and design decisions," and that Gorton benefited financially from LimeWire's infringing activities. A

preliminary hearing date of May 2011 has been set to determine how much Gorton and LimeWire must pay in damages.

In her October 26 order, Wood noted that in the months since she found LimeWire liable for infringement, millions of songs and videos continued to be shared over LimeWire's network. She permanently enjoined LimeWire from

continued existence, writing that "based on the record of both proven intentional inducement of infringement, and continued inducement of infringement even

after the Court found [liability], the evidence warrants injunctive relief."

### **High Court Denies Certiorari in 'Innocent Infringer' Case**

The U.S. Supreme Court denied *certiorari* to a case that could have tested whether an individual found guilty in a file sharing infringement case may use an "innocent infringer" defense to limit her damages. Justice Samuel Alito dissented from the Court's denial, arguing that the court should consider the legal viability of the defense.

The case, *Maverick Recording Company, et al v. Harper*, No. 5:07-CV-026-XR (W.D. Texas, Aug. 8, 2008), arose when a group of record companies sued then-high school student Whitney Harper under the Copyright Act, 17 U.S.C. § 101 *et seq*, for downloading 39 copyrighted songs using the peer-to-peer program KaZaa.

The plaintiffs moved for summary judgment, asking the court to enjoin Harper from downloading any more music, and requested damages of \$750 per song—the minimum amount under the Copyright Act—for a total of \$29,250. Harper argued that "due to her age—sixteen years old at the time of the infringement—and technological experience, she did not intentionally violate Plaintiffs' copyrights and should therefore be considered at most an innocent infringer." Under § 504 (c)(2) of the Copyright Act, "where the infringer ... was not aware and had no reason to believe that his or her acts constituted

# Journalism Suffers amid Drug Wars in Mexico

## *Journalists are skeptical about government solutions*

**I**ncreasing violence in Mexico has led journalists there to question whether doing their jobs is worth risking their lives. The situation has drawn worldwide attention to the chilling effect created when drug trafficking cartels and law enforcement intimidate and terrorize news media and reporters who scrutinize their activities.

On Sept. 8, 2010, the Committee to Protect Journalists (CPJ) released a 42-page report, titled “Silence or Death in Mexico’s Press” that detailed how “crime, violence, and corruption are destroying the country’s journalism.” Among the report’s findings were that more than 30 journalists or media workers have been murdered or have disappeared since Mexican President Felipe Calderon launched a military offensive against the country’s powerful drug cartels in December 2006. The report said that 22 journalists have been murdered in that time, eight of whom were killed “in direct reprisal for reporting on crime and corruption.” Additionally, the report said three media support workers have been killed and at least seven journalists have gone missing. Dozens more have been attacked, kidnapped, or forced into exile,

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the CPJ report said.

“The influence of organized crime over nearly every aspect of society, including government, police, and prosecutors, has made Mexico the deadliest nation for the press in the Western hemisphere and one of the world’s most dangerous places to exercise the fundamental human right of free expression,” the report said. The report is available online at <http://cpj.org/reports/2010/09/silence-or-death-in-mexicos-press.php>.

U.S. media have taken notice of the threat to the Mexican press. In an August 16 story, the *Los Angeles Times* explained that Mexican journalists use the word “narco-censorship” to describe reporters and editors who, “out of fear or caution, are forced to write what the traffickers want them to write, or to simply refrain from publishing the whole truth.”

According to the *Los Angeles Times*, Mexican journalists, especially in the cities of Ciudad Juarez, Durango, and Reynosa, avoid reporting on the specifics of the cartels’ drug production, smuggling, organized crime operations, and infiltration of local government because drawing attention to those activities would be likely to draw federal efforts to halt them. Warnings to local media by the drug cartels can come in the form of the disappearance of reporters or a deadly hail of bullets.

The *Los Angeles Times* reported

that in July 2010, four journalists were kidnapped after covering the revelation that the warden of Durango’s Gomez Palacio prison had allowed inmates to go out on nighttime killing rampages. The kidnapped reporters were released only when their employers agreed to broadcast videos sent to them by a cartel that purported to show corrupt police officers admitting, at gunpoint, to working for a rival cartel. One of the kidnapped reporters told the *Los Angeles Times* that over the course of five days he was tortured, beaten with a board, and threatened with “an ugly death.”

When traffickers attacked a military garrison in Reynosa with machine guns and hand grenades, part of a larger coordinated attack launched across the country in late March 2010, it made the front page of the *Los Angeles Times*, but was not reported in the local Reynosa media out of fear of reprisals.

CPJ also reported that bribes can drive coverage, or lack thereof, as much as fear. The organization interviewed journalists in Reynosa who said many reporters take bribes from the drug traffickers to slant their stories or withhold coverage. Stories about kidnappings and extortion are generally considered off-limits.

The situation appeared to be especially desperate in Ciudad Juarez in September 2010, after an intern

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an infringement of copyright, the court in its discretion may reduce the award of statutory damages to a sum of not less than \$200.”

The district court agreed with Harper, and found that although she infringed on the plaintiffs’ copyrights when she downloaded the music, she was unaware that her actions constituted infringement. The plaintiffs argued that warning labels they placed on compact discs—the common source for music found on to peer-to-peer networks—was sufficient notice to defeat Harper’s innocent infringer argument. Even though Harper

was aware that compact discs contain labels indicating that the material on them is copyrighted, U.S. District Judge Xavier Rodriguez wrote that “a question remains as to whether Defendant knew the warnings on compact discs were applicable in this KaZaA [sic] setting.”

The plaintiffs appealed to the 5th U.S. Circuit Court of Appeals, where a three-judge panel reversed Rodriguez’s ruling. The panel wrote that Harper “cannot rely on her purported legal naivety [sic] to escape paying damages, and that “one need only have access to [a] CD and see that the recording is subject

to copyright” to know that the music is copyrighted. *Maverick Recording Company, et al v. Harper*, 598 F.3d 193 (5th Cir. 2010)

On November 29 the Supreme Court denied certiorari. In his dissent, Alito wrote, “there is a strong argument that §402(d) does not apply in a case involving the downloading of digital music files. This provision was adopted in 1988, well before digital music files became available on the Internet.”

— GEOFF PIPOLY  
SILHA RESEARCH ASSISTANT



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photographer for local paper *El Diario* was shot and killed by gunmen when he was leaving a shopping mall at lunchtime on September 16, according to *The New York Times* on September 20. Another intern was injured in the attack. The following Sunday *El Diario* published an open letter on its front page under the headline “What Do You Want from Us?” according to the *Los Angeles Times* blog La Plaza. The letter, according to a translated version on La Plaza, addressed the “Gentlemen of the different organizations that are fighting for the Ciudad Juarez plaza: ... we ask that you explain what it is you want from us, what you’d intend for us to publish or to not publish, so that we know what is expected of us. You are at this time the de facto authorities in this city because the legal authorities have not been able to stop our colleagues from falling, despite the fact that we’ve repeatedly demanded it from them. Because of this, before this undeniable reality, we direct ourselves to you with these questions, because the last thing we want is that another one of our colleagues fall victim to your bullets.”

However, the letter was “not a surrender,” according to the version on La Plaza, “It also does not signify we’re giving up on the work we’ve been producing. This is about a truce with those who have imposed the force of their law upon this city, so long as the lives are respected of those who dedicate themselves to the task of informing.”

*The New York Times* reported that although the government had condemned the September 16 killing, its investigation had not identified a suspect or motive. “Such investigations have a history of shifting theories and little resolution,” the *Times* reported, adding that the 2008 murder of *El Diario*’s police reporter remains unsolved; the case’s lead prosecutor was also killed.

According to the CPJ report, corruption and fear pervade the investigations of crimes against journalists, despite the establishment of a federal special prosecutor’s office for investigating such crimes in 2006 under President Vicente Fox. For example, the report highlighted the unsolved 2009 murder of Durango crime reporter Bladimir Antuna García. Juan López Ramírez, the state’s lead

prosecutor for crimes against journalists, blamed “grand chaos” in the Mexican criminal trial system as the reason so little investigating had been done; no authorities had spoken to witnesses since the day after the murder.

CPJ reported that Víctor Garza Ayala, owner of *El Tiempo de Durango*,

“The full enjoyment of freedom of expression [in Mexico] ... is up against serious and diverse obstacles, including most notably the murder of journalists and other very serious acts of violence against those who disseminate information, ideas and opinions, and the widespread impunity in those cases.”

—Catalina Botero Marino,  
Special Rapporteur for Freedom of Expression  
of the Inter-American Commission on  
Human Rights and Frank La Rue, United  
Nations Special Rapporteur on Freedom of  
Expression and Opinion

Antuna’s principal employer, had another theory for why the investigation had not gone anywhere: state officials “know perfectly well who killed him. They don’t need an investigation,” he said. “They are either afraid of who did it or they are in business with them.”

The situation has become serious enough for the United Nations to send two envoys on an official visit. Following a 15-day trip in August 2010, the Special Rapporteur for Freedom of Expression of the Inter-American Commission on Human Rights (IACHR) and the United Nations Special Rapporteur on Freedom of Expression and Opinion said Mexico requires “urgent attention” because “the full enjoyment of freedom of expression ... is up against serious and diverse obstacles, including most notably the murder of journalists and other very serious acts of violence against those who disseminate information, ideas and opinions, and the widespread impunity in those cases.”

According to Agence France-Presse (AFP), on August 17, the U.N. envoys said they support efforts to have crimes against media workers recognized and investigated at a federal level. The CPJ report asserted that the Mexican

government has “a federal obligation” to address the problem, citing protections for freedom of expression and the press in the Mexican constitution, as well as the fact that Mexico is a signatory to the International Covenant on Civil and Political Rights, which guarantees the right “to seek, receive, and impart

information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media,” and the American Convention on Human Rights, which not only guarantees rights to free expression but also states that every individual has “the right to simple and prompt recourse ... for protection against acts that violate his fundamental rights.” In March 2010, the U.N.

Human Rights Committee found that the Mexican government had failed to take effective action to protect the press and bring assailants to justice, CPJ reported.

On August 7, hundreds of reporters marched in Mexico City while thousands more marched elsewhere in the country to protest the ongoing threats against journalism, according to a report on the CBS News website. Marcela Turati, head of an organization formed to assist reporters threatened by organized crime called Journalists on Foot, said the march was “the first march organized by journalists calling for the protection of journalists.” CBS News reported that Turati said although the march was “an important first step ... we need more follow-up, more mechanisms to protect journalists.”

On August 24, Madrid-based Spanish language news service EFE reported that four media unions, along with magazines and journalism foundations, issued a statement calling on the government to take “forceful” action to end the “atmosphere of affronts and violence” against Mexico’s journalists and defend freedom of expression and of the press.

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# International Courts Favor Newsgathering Rights

## *Canadian and European rulings expand reporter's privilege*

**R**ulings in two foreign courts—the Grand Chamber of the European Court of Human Rights (ECHR) and the Canadian Supreme Court—favored journalists' rights to protect confidential sources in fall 2010.

### ***European Court Rules Arrest and Search Violate Human Rights***

In a September 14 decision, the ECHR

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ruled that law enforcement authorities in the Netherlands

violated a magazine's rights to "journalistic freedom of expression" when they forced the magazine to hand over photographs of an illegal street race after arresting the magazine's editor and threatening to close its offices in order to search them. *Sanoma Uitgevers B.V. v. the Netherlands*, App. No. 38224/03 (Eur. Ct. H.R. Sept. 14, 2010)

The case arose after journalists from *Autoweek* attended the race, near a small town outside of Amsterdam in January 2002. Race participants allowed the journalists to take photographs on the condition that participants' identities would remain undisclosed. Police were present at the race and eventually closed it down, but no arrests were made, according to the court opinion.

On Feb. 1, 2002, six days before *Autoweek* published its story about the race, police contacted the magazine and demanded that it hand over copies of its photos. When editors refused the request by phone, police detectives went to the magazine company's offices and served them with a summons issued by Amsterdam's public prosecutor. Under Netherlands law, a summons to produce materials in connection to a criminal investigation does not have to be approved by a judge. When the magazine's editor in chief continued to refuse to produce the photographs, he was placed under arrest and police threatened to shut down the offices of Sanoma Uitgevers, *Autoweek's* publisher, while they removed all computers and searched them and the building for the

photographs. The ECHR noted that the closure would have limited the ability of Sanoma Uitgevers' dozens of other magazines and 180 websites to cover the February 2 wedding of the Netherlands' Crown Prince. After negotiations with prosecutors, as well as a phone call to a judge, the magazine's lawyers surrendered the photographs "under protest" at 1:20 a.m. on February 2.

The magazine lodged a complaint with the Regional Court in the Netherlands, asking that the seizure be ruled unlawful, the photos returned, any copies in police possession destroyed, and any evidence based on their content be ruled inadmissible. In a Sept. 5, 2002 hearing, the public prosecutor revealed that the summons had been issued not because of the street race but because authorities believed that a car used by some of its participants might have been used in a series of robberies. Ultimately the court ordered the photos returned, but declined to invalidate the seizure. The Netherlands Supreme Court declined to hear an appeal, ruling that the Code of Criminal Procedure did not allow a declaratory ruling that the seizure or the use of the seized item was unlawful once it had been returned.

The ECHR was established by the European Convention on Human Rights which was adopted by the Council of Europe in 1953. Individuals or nations who claim that a Council member has violated the Convention can file an appeal with the Court. The publisher's complaint to the ECHR argued that the search violated Article 10 of the Convention, which states, "everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority" and that "the exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society." A seven-judge panel of the ECHR ruled 4 to 3 in March 2009 that no violation of the Convention had occurred. Despite "a regrettable lack of moderation" demonstrated by police and prosecutors, the Court said, domestic courts were entitled to balance

the interests of preventing crime with the need to protect journalists' sources, and the crime in this case was serious enough to justify interfering with publishers' rights, especially since there was no other way to identify perpetrators.

On Sept. 14, 2010, the 17-judge Grand Chamber of the Court—which is the ECHR's "court of last resort"—reversed the lower panel's ruling. The Court focused primarily on the fact that Netherlands law does not require judicial oversight for the issuance of the summons, which could impose a "chilling effect" on journalists and their sources, even where no search or seizure is actually executed.

The Court observed that "in its earlier case-law [it] has found various acts of the authorities compelling journalists to give up their privilege and provide information on their sources or to obtain access to journalistic information to constitute interferences with journalistic freedom of expression." It cited *Goodwin v. United Kingdom*, 123 Eur. Ct. H.R. (1996), in which the Court established the "vital public interest in the protection of the ... journalist's source" as well as *Roemen and Schmit v. Luxembourg* 102 Eur. Ct. H.R. (2003), *Ernst v. Belgium* 359 Eur. Ct. H.R. (2003), and *Tillack v. Belgium* App. no. 20477/05, Eur. Ct. H.R. (2007), where "the Court found that searches of journalists' homes and workplaces ... constituted interferences with their rights guaranteed by paragraph 1 of Article 10."

The Court also observed that the Netherlands trial court had ruled that the government's interest should outweigh the journalists' rights "more so as the undertaking to the journalistic source concerned the street race whereas the investigation did not concern that race," and instead involved "grave crimes." The Court said it "does not consider this distinction to be crucial" because the serious of the underlying case was "irrelevant for the purposes of determining whether there has been an interference with the right of journalists" to protect their sources.

The Court continued: "While it is true that no search or seizure took place in the present case ... a chilling

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## News-gathering, continued from page 26

effect will arise wherever journalists are seen to assist in the identification of anonymous sources” because sources will be unwilling to trust promises of confidentiality in the future. The Court added, “News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest.”

The Court said that the decision to compel journalists to disclose their confidential source should be made by a judge, rather than a prosecutor who “is a ‘party’ defending interests potentially incompatible with journalistic source protection and can hardly be seen as objective and impartial so as to make the necessary assessment of the various competing interests.” The deciding judge should apply “clear criteria, including whether a less intrusive measure can suffice to serve the overriding public interests established,” the Court said.

The Netherlands argued that it met the necessary threshold because a judge had been consulted before the photographs were turned over and the Regional Court had ruled on the magazine’s appeal, but the Court rejected this argument. There was a “lack of any legal basis for the involvement of the investigating judge” who was consulted the night the summons was issued, the Court observed, since the Netherlands Criminal Code does not require it. “Being nowhere required by law, it occurred at the sufferance of the public prosecutor,” the Court said.

“Secondly,” the Court continued, “the investigating judge was called in what can only be described as an advisory role. Although there is no suggestion that the public prosecutor would have compelled the surrender of the CD-ROM in the face of an opinion to the contrary from the investigating judge, the fact remains that the investigating judge had no legal authority in this matter. ... Thus it was not open to him to issue, reject or allow a request for an order, or to qualify or limit such an order as appropriate.”

On the issue of the post-disclosure appeal, the Court said “it is clear ... that the exercise of any independent review that only takes place subsequently to the handing over of material ... would undermine the very essence of the right to confidentiality.”

News media supporters praised the

ECHR ruling. Geoffrey Robertson QC, counsel for a coalition of intervening news media and advocacy groups, called the ruling “an acid test for the Court and for media freedom across Europe,” according to international free expression advocacy group Article 19 on

“It is not inconsistent, either in principle or in fact, to give judges the authority to exempt a journalist from testifying, when his ... rights are found to be paramount.”

—Canadian Supreme Court Judge Louis LeBel  
*Globe and Mail v. Canada*, 2010 SCC 41 (Can.)

September 16. Robertson said the ruling “sets a high benchmark for protection of journalistic materials and will force police and prosecutors across Europe, from Russia to France, to change their practices.”

Article 19 reported that intervening organizations included itself, the Media Legal Defence Initiative, the Committee to Protect Journalists, Guardian News and Media Limited, and the Open Society Justice Initiative. Support also came from The Associated Press, Bloomberg News, the European Newspaper Publishers Association, Condé Nast Publications, Hearst Corporation, the National Geographic Society, the New York Times Company, Reuters, Time Inc., the Washington Post Company, and the World Association of Newspapers and News Publishers, Article 19 said.

### **Canadian High Court Extends Privilege to Journalist Testimony and Civil Cases**

The Supreme Court of Canada ruled on October 22 that a journalist’s privilege—a right to protect confidential sources from disclosure—can extend to testimony in civil cases, not just subpoenas for documentary evidence in criminal investigations. *Globe and Mail v. Canada*, 2010 SCC 41 (Can.)

In May 2010, the Court ruled in *R. v. National Post*, 2010 SCC 16 (Can.) that although journalists do not have a constitutional right to shield the identity of their sources, a privilege can be applied on a case-by-case basis through a four-part balancing test called “the Wigmore criteria.” The *National Post*

case involved a criminal investigation by the Royal Canadian Mounted Police, and a search warrant seeking possibly forged bank documents. For more on that case, see “Canadian Justices Say No to Privilege, Yes to Publication Ban” in the Summer 2010 issue of the *Silha Bulletin*.

The *Globe and Mail* case was distinguished from the *National Post* case because it involved the law of Quebec, which uses a civil code system rather than a common law system, and also because it involved a reporter having been

called to personally testify and disclose confidential sources in the context of a civil trial. The underlying case involved a dispute over government funds issued to, and allegedly misused by, media corporation Le Groupe Polygone Editeurs Inc. Pursuant to its defense against the allegations, Groupe Polygone subpoenaed *Globe and Mail* reporter Daniel Leblanc to testify and disclose a confidential source for his reporting on the scandal. Groupe Polygone also sought and received a judicial order banning Leblanc from reporting any further stories on the scandal, including details about confidential settlement negotiations between it and the Attorney General of Canada. The trial court judge refused to recognize the existence of a journalist-source privilege and the newspaper’s objections were dismissed. The Quebec Court of Appeal declined to hear the *Globe and Mail*’s appeal on the issue of privilege, and dismissed the newspaper’s attempt to “discontinue” Polygone’s suit against the government.

The opinion for a unanimous nine-member Supreme Court, written by Judge Louis LeBel, first rejected the *Globe and Mail*’s argument that the Quebec Charter, roughly equivalent to a state constitution, provides a basis for journalist-source privilege because of provisions that protect freedom of expression, the right to information, and rights for individuals “bound to professional secrecy by law.”

Citing the Court’s reasoning in *National Post*, particularly “the difficulty

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in defining such a ‘heterogeneous and ill-defined group of writers and speakers’” LeBel wrote that “freedom of expression under the Quebec Charter cannot constitute the basis for recognizing a class-based, quasi-constitutional journalist-source privilege.” The Court also said that although the right to information “can ... inform the protection of the confidential relationship between journalists and their sources, it cannot constitute the basis for recognizing that privilege” because the right conferred by that provision “is limited to the extent that access to information is already provided for by law ... and [therefore] does not broaden the scope of the right, [and] cannot be the source of a quasi-constitutional right to the protection of journalists’ sources.”

On the issue of the Charter’s protection for “professional secrecy,” LeBel first observed that journalism is not included in the list of 45 professions subject to the Quebec Professional Code; its inclusion was contemplated but ultimately rejected. Moreover, LeBel wrote that “there is no basis for drawing an analogy between professional secrecy and journalist-source privilege” because “the associations of journalists are not regulated” and because “journalism is not a profession of the type that professional secrecy traditionally purports to protect.” The Court’s reasoning was based on a definition of “professional secrecy” that requires that there “be a law that imposes an obligation of silence on an individual” and an “obligation” that is “rooted in a helping relationship.” The “helping relationship” is described as one “where the beneficiary of the privilege seeks out the professional for personal help or assistance” and “the obligation of confidentiality is ‘in the exclusive interest of the person who disclosed [the information], and in the context of a helping relationship.’” Because the legislature did not include journalism in the list of 45 professions subject to professional secrecy, and because “the relationship between journalists and their sources is not one that would often result in such a ‘helping relationship,’” LeBel said the protection for professional secrecy does not extend to journalism.

However, the Court also ruled that

the common-law “Wigmore criteria” for determining whether journalist’s privilege applies to a case can be imported into Quebec’s civil law system. Under the four-part test, a court must determine whether the communication “originate[d] in a confidence that the identity of the informant will not be disclosed,” whether the confidence is essential to the relationship in which the communication arises, and whether the relationship is one which should be diligently, deliberately, and consciously fostered in the public good. If the first three requirements are met, “the court must last consider whether in the instant case the public interest served by protecting the identity of the informant from disclosure outweighs the public interest in getting at the truth.”

The Court observed that “neither the Civil Code nor the Code of Civil Procedure explicitly provides for the recognition in the civil litigation context of journalist-source privilege, which now exists in the common law jurisdictions. A gap in the codified law exists, and the question becomes one of determining the appropriate way of filling it.”

The Court ruled that although there is debate over whether judges can apply common-law principles where the civil code does not provide guidance, “the creation of a framework to address these issues represents a legitimate and necessary exercise of the power of the court to interpret and develop the law” and therefore “it is not inconsistent, either in principle or in fact, to give judges the authority to exempt a journalist from testifying, when his ... rights are found to be paramount.” Therefore, the Court ruled, “Despite its common law origins, the use of a Wigmore-like framework to recognize the existence of the privilege in the criminal law context, as established in *National Post*, is equally relevant for litigation subject to the laws of Quebec.”

The Court extensively reviewed the Wigmore criteria and provided guidance on their application to civil law: “the relevant considerations ... when a claim to privilege is made in the context of civil proceedings, include: how central the issue is to the dispute; the stage of the proceedings; whether the journalist is a party to the proceedings; and,

perhaps most importantly, whether the information is available through any other means.” It also said that the Wigmore criteria should apply to the specific circumstances involving Leblanc and the *Globe and Mail*.

However, the Court declined to decide whether Leblanc’s claim of privilege should allow him to refuse to testify, instead ruling to “remit the matter to the Superior Court for a consideration of Mr. Leblanc’s claim, in accordance with these reasons.”

The Court also overturned the lower court’s ban on Leblanc’s publishing further stories about the Polygone scandal. LeBel wrote that the lower court should have given both parties an opportunity to submit briefs in support or opposition to the ban. “A publication ban, which by its very nature infringes the constitutional rights of the party against whom it is imposed, cannot, absent extraordinary circumstances not present here, be imposed *ex proprio motu*,” or without hearing from the parties, LeBel wrote. In his analysis of the issue, LeBel said that any confidentiality agreement between parties to a lawsuit “does not, and cannot, extend to the media. Neither Mr. Leblanc nor the *Globe and Mail* did anything—illegal or otherwise—to obtain the information published in the article.” LeBel added, “I am reluctant to endorse a situation where the media or individual journalists are automatically prevented from publishing information supplied to them by a source who is in breach of his or her confidentiality obligations.”

*The Montreal Gazette*, in an October 23 story, said the ruling “boosted” and “reinforced” freedom of the press in Canada. According to the *Gazette* Leblanc told reporters “The big victory is the recognition of journalistic work, the protection of sources that has to weigh in the balance when these issues are raised in court.”

*The Globe and Mail* reported October 23 that its editor-in-chief, John Stackhouse, said the ruling “set a very high bar for disclosure of sources in investigative journalism,” adding that “journalists and their sources don’t enjoy blanket protection, but we can continue to pursue investigative journalism,

# Journalists Question Implications of Covering Quran Burning and NYC Muslim Community Center

*Media sought ways to report on controversy without perpetuating it*

A controversy simmered in the weeks leading up to Sept. 11, 2010 around a pastor's threat to burn a Quran and a proposal to build an Islamic cultural center in lower Manhattan, commentators and media organizations considered how much the news media might perpetuate the scandal they were covering, and its backlash.

Pastor Terry Jones of the Dove World Outreach Center in Gainesville,

## MEDIA ETHICS

Fla. received international media attention when he

threatened to burn copies of the Islamic holy book, the Quran, on the ninth anniversary of the Sept. 11, 2001 terrorist attacks in New York City and Washington, D.C.

According to *The Washington Post* on September 10, Jones first announced his plans to burn copies of the Quran on July 12, 2010 with a series of statements on Twitter that culminated with the statement "9/11/2010 Int Burn a Koran Day [sic]." On September 7, ABC News reported that Jones had also announced on Facebook on July 12 that September 11, 2010, would be "International Burn a Koran Day," and that members of his church would burn copies of the Quran on that day.

News about Jones' plans spread quickly. EuroIslam Info, a Harvard University sponsored news site that covers "news and analysis on Islam in Europe and North America," picked up the story on July 14 and posted it in its

"Islamaphobia Observatory" section, and the story spread online among Islamic communities, particularly via Facebook. The September 10 *Washington Post* story reported that in early August, chain messages were circulating on Facebook protesting Jones' page and calling for its removal. Dozens of groups were formed to protest the page, which was removed in early September.

Jones later connected his planned Quran burning with the "Ground Zero Mosque"—a frequently used name for the proposed Islamic cultural center in lower Manhattan known as Park 51—saying he would not burn the book if the center was moved. Park 51 garnered news coverage as early as Dec. 8, 2009, when *The New York Times* devoted a front-page story to the project. The story quoted the lead organizer of the project, Imam Feisal Abdul Rauf, as saying that the project organizers wanted to "push back against the extremists."

Controversy picked up significantly for Park 51 when a community planning board in New York City approved its preliminary plans on May 6, 2010 and The Associated Press (AP) produced a story about it the same day. The story included quotes from those supporting and opposed to the project, and was published by *USA Today* on May 7. CNN also covered the project's approval on May 7, as did other national news media. *The New York Post* ran a story on May 6, 2010, with the headline "Panel Approves 'WTC' Mosque."

According to an August 16 story on Salon.com, the term "Ground Zero Mosque" was first used when Laura Ingraham, co-hosting "The O'Reilly Factor" on Fox News, interviewed Rauf's wife, Daisy Rauf, about the project.

According to the Salon.com story, Ingraham applauded the project at the time.

Alissa Torres, a contributor to Salon.com whose husband was killed in the 2001 attacks, wrote September 7 that she received an e-mail from a New York television reporter on May 6 who wrote, "I am working on a story today about the proposed mosque project at the WTC site. I am interviewing the developers but I am also trying to look for family members who think building a mosque at the site is a bad idea." In her article, Torres said that the query seemed "a bit leading," and wrote that she felt the media were trying to exploit those who lost loved ones in the attacks by "trying to create a controversy where there is none, in raking over wounds that—nine years later—still hurt."

Salon.com's August 16 story stated that Park 51 never should have been a controversy in the first place because "they have had a mosque in the same neighborhood for many years. There's another mosque two blocks away from the site. City officials support the project. Muslims have been praying at the Pentagon, the other building hit on Sept. 11, for many years."

Meanwhile, national news media considered how to cover Jones' proposed Quran burning in light of threats of violence and reprisals against U.S. troops and citizens abroad. *The Washington Post* reported September 10 that the first large protest in response to the planned Quran burning took place in Indonesia on September 4. On September 6, protesters in Kabul burned an effigy of Jones and chanted "Death to America," according to the *Post*.

**Quran Burning**, continued on page 30

**Newsgathering**, continued from page 28

including confidential sourcing, knowing the courts view public interest as paramount."

However, Professor Jamie Cameron of York University's Osgoode Hall Law School told *The Globe and Mail* she was disappointed that the Court has refused to recognize "the constitutional status

of the newsgathering relationship," and that the case-by-case standard was too uncertain for such a critical part of investigative reporting. Cameron said a shield law is needed to "give this confidential newsgathering relationship the legal protection it requires."

Nevertheless, *Globe and Mail* lawyer

William Brock said "the Supreme Court has clearly stated not only that journalistic-source privilege exists in Quebec, but also that a confidential source should only be revealed where it is vital to the integrity of the administration of justice."

— PATRICK FILE  
SILHA FELLOW AND BULLETIN EDITOR

On September 7, Gen. David Petraeus, commander of U.S. and international forces in Afghanistan, released a statement saying, “Images of the burning of a Koran would undoubtedly be used by extremists in Afghanistan—and around the world—to inflame public opinion and incite violence.” Pakistani publication *Dawn* quoted Pakistani President Asif Ali Zardari on September 9 saying that Jones’ plan, if carried out, would “cause irreparable damage to interfaith harmony and also to world peace.”

In a television interview on ABC News’ “World News,” on September 9, President Barack Obama said that burning Qurans could “greatly endanger our young men and women in uniform who are in Iraq, who are in Afghanistan.” In a news segment following the interview, ABC reported that “across the world, crowds took to the streets to protest the planned burning of the Quran” with September 9 protests in Pakistan and Afghanistan being the largest. CBS News reported on September 12 that the protests in Afghanistan lasted for three days, from September 8 to September 10, killing two and injuring four.

According to the September 9 “World News” report, the U.S. State Department issued a worldwide warning that day for Americans traveling abroad, out of fear that Americans might be targeted if the planned burnings went forward. U.S. Secretary of Defense Robert Gates also placed a personal call to Jones to warn him of the potential national and international security threats, ABC News reported. According to *The Washington Post* on September 10, Secretary of State Hilary Clinton also contacted Jones to ask him not to go forward with the burning.

Amid the warnings and calls for Jones to halt his plan, the AP and Fox News both announced that they would not air any footage of the planned Quran burnings if they took place. According to TVNEWSER, a blog on MediaBistro.com, CNN, NBC, ABC, and CBS all planned to cover the event.

*The Boston Globe* reported on September 9 that Michael Clemente, Senior Vice President at Fox News, said in a phone interview that the network’s

decision not to broadcast was “about judgment.” Clemente told the *Globe* that Jones was “one guy in the middle of the woods with 50 people in his congregation who’s decided to try, I gather, to bring some attention to himself . . . there are many more important things going on in the world than that. I don’t know what they will be this weekend, but I am sure

“Whether it’s the coverage of the plans to build an Islamic center in Lower Manhattan or reporting on the United States’ interrogation of potential terrorists, misinformation is as common as good information.”

—Kelly McBride  
Media ethicist, The Poynter Institute

they will be more important than that.”

Tom Kent, deputy news director for the AP, sent out a memo to AP staff on September 9 informing them of the decision not to broadcast the planned Quran burning and offering guidelines on how to limit coverage of it to one story a day. “AP policy is not to provide coverage of events that are gratuitously manufactured to provoke and offend. In the past, AP has declined to provide images of cartoons mocking Islam and Jews,” the memo read. The memo stated, “should the event happen on Saturday [September 11], the AP will not distribute images or audio that specifically show Qurans being burned, and will not provide detailed text descriptions of the burning. With the exception of these specific images and descriptions, we expect to cover the Gainesville event, in all media, placing the actions of this group of about 50 people in a clear and balanced context.”

Kelly McBride, a media ethicist at the Poynter Institute, wrote in a September 9 blog post that “Whether it’s the coverage of the plans to build an Islamic center in Lower Manhattan or reporting on the United States’ interrogation of potential terrorists, misinformation is as common as good information.” McBride urged editors to use caution in their coverage of Jones’ plan to burn a Quran and the Park 51 project, in light of the potential for international backlash.

Jim Osteen, executive editor of *The*

*Gainesville Sun*, said in an e-mail to McBride that his newspaper was “trying to keep our readers informed without alarming them, or giving this misguided pastor more of a stage than is deserved. While we can’t escape the reality of what is likely to happen Saturday, we are committed to not sensationalizing the event.”

Mike Thomas, a columnist for the *Orlando Sentinel* was more direct in his criticism of the media: “I ask you: If a sad little man burns some Qurans in the woods, and the media aren’t there to film it, is it news? Of course not.” Thomas wrote.

“We created the Rev. Terry Jones from dust. And in two weeks, to dust he shall return. Then we’ll move on to the guys who plan to run over the Quran at their monster-truck pull. Whatever it takes to keep your attention.”

Jones announced September 9 that he had canceled his planned Quran burning, claiming that Florida Imam Muhammad Musri had promised to broker a deal with the group planning to build Park 51. In a televised press conference, Jones said that he would fly to New York City the following Saturday to meet with “the Imam at the ground zero mosque.” Jones told ABC News on September 9 that Rauf had “agreed to move [Park 51]. And we have agreed to cancel our event on Saturday. Americans don’t want the mosque there and of course Muslims don’t want us to burn Korans,” Jones said.

However, in an interview with Christiane Amanpour for the ABC program “This Week,” Rauf denied that any deal was made, or that he had even spoken with Jones or Musri. He said that he and his partners in Park 51 were not going to “toy with our religion or any other” and would not “barter. . . . We are here to extend our hand to build peace and harmony.”

On September 11, Jones appeared on NBC’s “Today” show and announced that he and members of the church

### **Quran Burning**, *continued from page 30*

would not burn copies of the Quran. “We will definitely not burn the Quran, no. Not today, not ever,” Jones said. Jones explained that his church would not go forward with its planned Quran burning, even given the announcement that the plans for Park 51 would not change. He said that he had received over 100 death threats, and that he believed that “God is telling us to stop,” but that he also hoped he would have a chance to speak to Rauf. He stated that his goal had been “to expose that there is an element of Islam that is very dangerous and very radical,” and that he felt his church had “accomplished that mission.”

On September 9, the Westboro Baptist Church of Topeka, Kan. announced plans to burn a copy of the Quran along with an American flag on Sept. 11, 2010, according to the *Kansas City Star*. News website The Daily Beast reported on September 11 that the Church carried out the plan. The burning was covered by local television stations, but was not rebroadcast by any national news organizations, according to The Daily Beast. The Westboro Baptist Church also burned a copy of the Quran in 2008, The Daily Beast reported, without igniting international controversy.

The Westboro Baptist Church also

protests funerals and preaches that America is “damned to hell,” according to its website. Westboro’s funeral protests were the subject of a case before the U.S. Supreme Court, *Snyder v. Phelps*, in the fall of 2010.

On September 14, CNN reported that in the period surrounding Sept. 11, 2010 “at least three copies of the Quran were burned,” in the United States, and that at a “counterdemonstration in London, anti-American protesters burned the Stars and Stripes and a copy of the U.S. Constitution.”

– SARA CANNON  
SILHA CENTER STAFF

### **Mexican Press**, *continued from page 25*

The statement, published in the Mexico City daily *La Jornada*, said that numerous attacks against journalists have “gone unpunished” and the cases remain “without deep investigations,” according to EFE. “Threats, intimidation, kidnappings and attacks on communications media, moreover, have become a common practice, mainly among the security forces and serving politicians,” the groups said, while “organized crime, especially, has shown no mercy.” The statement was published on behalf of the National Journalists Front for Freedom of Expression, whose members include the National Press Editors Union, the Independent Union of *La Jornada* Workers, the Notimex Workers Union, and the union that represents workers at Puebla’s *El Sol* newspaper. *Contralinea* and *Zocalo* magazines, the CIMAC news agency, the Manuel Buendia Foundation and several attorneys also signed the statement, EFE reported.

Although reporters are often reluctant to report on the cartels’ organized crime operations out of fear of drawing federal scrutiny, CPJ said that federal investigators and prosecutors are better prepared and have better resources than local authorities to take on threats to press freedom. A federal solution “offer[s] hope for a more effective response,” the report said. “The higher level of scrutiny serves as a check

against the corrupting power of criminal organizations.” CPJ also claimed that federalization of the problem would send an important message of international accountability. “The more Mexico allows the flow of information to be controlled by drug cartels and dishonest local officials, the more it erodes its status as a reliable global partner,” the report said.

CPJ and Mexican press freedom advocates support reforms that would add crimes against free expression to the federal penal code, make federal authorities responsible for investigating and prosecuting attacks on the press, and establish accountability at senior levels of the national government.

In the meantime, CPJ reported November 9 that the Mexican government announced the launch of a program aimed at protecting at-risk journalists. According to CPJ, the Ministry of the Interior said it expects to offer protective measures such as bodyguards, armored cars, or stipends to allow journalists to relocate to other parts of the country, and that although the program will initially use federal police, it will eventually involve state law enforcement. “According to the CPJ, Mexican press groups expressed “considerable skepticism” about the plan, complaining that it “is designed and run entirely by government officials who have no understanding of what it’s like to

be a journalist in Mexico.”

In a 2008 meeting with a delegation from CPJ, President Calderón said “the government agrees with the idea of federalizing crimes against freedom of expression,” and pledged to put forward a proposal in the context of a broad constitutional amendment to address the spiral of violence and its effect on civil rights more generally. In spite of promises like Calderón’s and increasing international attention, including urgent calls for reform from both advocacy groups and the U.N., investigations and accountability has remained primarily local, CPJ reported.

Legislators themselves pose a central obstacle to a legislative approach to federalization, CPJ reported, because they consider the move politically imprudent. Gerardo Priego Tapia, a former leader of the Congressional committee on press attacks, said that politically powerful state governors, especially in some of the states with the highest levels of anti-press violence, oppose federalization as an infringement on states’ rights and their own authority. Priego also said corrupt officials who cooperate with organized crime also fear federalization “because those ties may be exposed.”

– PATRICK FILE  
SILHA FELLOW AND *BULLETIN* EDITOR

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## **Silha Spring Ethics Forum: April 4, 2011, 7:00 p.m.**

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**Featuring Mark Feldstein, author of “Poisoning the Press: Richard Nixon, Jack Anderson, and the Rise of Washington’s Scandal Culture”**

Feldstein is a journalism professor at the University of Maryland, was an investigative reporter for CNN, ABC, and other news outlets for two decades, earning dozens of journalism awards, including an Edward R. Murrow Achievement Award, and two George Foster Peabody Awards. He received a bachelor’s degree from Harvard and a doctorate from the University of North Carolina.

Douglas Brinkley, Professor of History at Rice University and author of “The Wilderness Warrior,” called “Poisoning the Press” a “crucially important, brilliantly illuminating work of intense scholarship.” Cokie Roberts, news analyst at ABC and NPR, called it a “fast paced tour-de-force” and “riveting and often eye-popping.”

**More details to be announced at [www.silha.umn.edu/events](http://www.silha.umn.edu/events). Please join us on April 4!**