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U.S. Supreme Court Rules on Constitutionality Of Bipartisan Campaign Reform Act

On Dec. 10, 2003, a sharply divided Supreme Court, in *McConnell v. Federal Election Commission*, 124 S.Ct. 619, upheld the constitutionality of the core provisions of the Bipartisan Campaign Reform Act of 2002

(BCRA) which seeks to eliminate “soft money” contributions to federal election campaigns and ban “issue ads” in advance of federal elections.

The Act, also called McCain-Feingold after its chief sponsors in the U.S. Senate, Sens. John McCain (R-Ariz.) and Russel Feingold (D-Wis.), is the most sweeping reform in campaign finance since the Watergate era. The Act will change how federal candidates and political parties raise and spend campaign funds as well as how they, and others, seek to sway voters.

Justice Sandra Day O’Connor again provided the pivotal vote on the high court, joining Justices John Paul Stevens, David H. Souter, Ruth Bader Ginsburg, and Stephen G. Breyer in upholding BCRA “in the main.”

Reviewing the constitutionality of BCRA required the court to examine to what extent Congress may regulate campaign fundraising and electioneering without impairing the First Amendment’s ultimate guarantee: the freedom to criticize the government.

The decision, including its dissents, totaled nearly 300 pages. The high court tackled BCRA by issuing three separate opinions. Justice John Paul Stevens and O’Connor paired to deliver a joint opinion for the court for Titles I and II of BCRA, which contain its key soft money and issue advertising provisions. Chief Justice William H. Rehnquist delivered the opinion of the court for the third and fourth titles of the Act, and Justice Breyer delivered the opinion of the court for BCRA’s fifth title.

***Buckley v. Valeo*: setting the stage for BCRA**

The Supreme Court first examined the interplay between campaign finance reform and the freedom of speech in *Buckley v. Valeo*, 424 U.S. 1 (1976). In 1974, in the wake of Watergate, Congress amended the Federal Election Campaign Act of 1971 to limit campaign contributions and independent expenditures (expenditures not made by the candidate or his or her campaign). In *Buckley*, the court held that preventing corruption and the appearance of corruption was a constitutionally sufficient justification for limiting campaign contributions.

The primary result of the *Buckley* ruling was to create two categories of campaign contributions: hard money and soft money. “Hard money” is contributions “made by any person for the purpose of influencing any election for Federal office.” 2 U.S.C. § 431(8)(A)(i). “Soft money” is contributions made to influence state or local elections. Prior to BCRA, soft money contributions were not limited or regulated by the federal government. The distinction between hard and soft money created a system where contributors would give money to federal candidates up to the federal limits and then funnel their additional contributions to national political parties for activities at the state and local level. The distinction between hard and soft money was blurred by a series of decisions by the Federal Election Commission (FEC) which allowed soft money to be used for mixed-purpose activities which would benefit state and local candidates and federal candidates, such as get-out-the-vote efforts or generic party advertising. The political parties also frequently transferred soft money to independent groups that spent the money on issue advertising, including “attack ads.”

Parties could do this because the *Buckley* court held that preventing corruption and the appearance of corruption was not a constitutionally sufficient justification for limiting independent expenditures. In *Buckley*, the Court ruled that these expenditures could be capped only if those making the expenditures expressly advocated the election or defeat of a clearly identified candidate. Thus, Congress could regulate express advocacy, but not issue advocacy. Express advocacy entails using such “magic words” as “Elect Candidate X” or “Vote Against Candidate Y.” Issue advocacy allows individuals and groups to promote or disparage a candidate so long as they do not expressly use such magic words. Because issue advocacy remained unregulated after *Buckley*, the use of “issue ads” as attack ads mushroomed.

In 1998, the Senate Committee on Governmental Affairs concluded that the “soft money loophole” had led to a “meltdown” of the campaign finance system intended “to keep corporate, union and large individual contributions from influencing the electoral process.” The Committee found that issue ads, although technically independent of federal candidates, were often coordinated or controlled by the candidates’ campaigns.

As a result of these expanded and permitted uses of soft money, soft money accounted for 42% of the over \$1 billion spent by the national political parties in the 2000 election.

Seeking to remove soft money from federal election campaigns and to ban issue advertising which identified, and muddled, federal candidates, Congress passed the Bipartisan Campaign Reform Act of 2002.

The Stevens-O'Connor joint opinion

Title I of BCRA prohibits political parties and candidates from soliciting, receiving, directing, or spending any soft money. The Supreme Court looked to *Buckley* for the appropriate standard of review for the BCRA's restriction on soft money contributions. The Court adopted the standard of review that such restrictions must be "closely drawn" to match a sufficient government interest.

The Court held that the BCRA's restrictions on soft money donations have only a marginal impact on the free speech of contributors, candidates, officeholders, and political parties. The Court opined that the restrictions do "little more than regulate the ability of wealthy individuals, corporations, and unions to contribute large sums of money to influence federal elections, federal candidates, and federal officeholders." Thus, the Court concluded that the federal government's interest in preventing corruption and the appearance of corruption of federal officeholders and candidates was a sufficient government interest and the means chosen were closely drawn.

Title II of BCRA seeks to stamp out attack ads by regulating independent expenditures made for "electioneering communication." These communications include any broadcast, cable, or satellite communication that clearly identifies a candidate for federal office and is made within 60 days of a federal election or 30 days of a primary or a nominating caucus or convention and, in the case of non-presidential or vice presidential candidates, is targeted to a relevant electorate of over 50,000 persons. The Act effectively bars televised or radio issue advertising which identifies a federal candidate in the weeks leading up to elections. "Electioneering communications" does not include print or Internet communications or communications appearing in news stories, commentary, or editorials aired on television or radio, if independent of political parties and candidates.

Title II also prohibits corporations, both for-profit and not-for-profit, and labor unions from using general treasury funds for communications that are intended to, or have the effect of, influencing the outcome of federal elections. This restriction further limits the role of big money in federal campaigns. Corporations and labor unions must now use regulated political action committees to influence federal elections.

The Court found that Congress rightly recognized that attempting to draw a bright line between issue advocacy and express advocacy was futile. The "magic words" requirement of *Buckley* is "functionally meaningless" when parties or groups may run attack ads so long as they do not expressly call for voting for or against a particular candidate. The court held that the First Amendment does not guarantee an inviolate right to engage in issue advocacy to those seeking to influence federal elections.

In sum, the Court in *McConnell v. Federal Election Commission* expanded *Buckley* so that Congress' regulatory reach extends to hard and soft money and to express advocacy and issue advocacy in federal campaigns and elections.

The Rehnquist opinion; the Breyer opinion

The Court, in the opinion written by Chief Justice Rehnquist and joined in its entirety by Justices O'Connor, Antonin Scalia, Anthony M. Kennedy, and Souter, held that many of the plaintiffs in the eleven suits that were consolidated under *McConnell v. Federal Election Commission* lacked standing to pursue their claims. The Court's opinion held unconstitutional BCRA's restriction on contributions by persons under 18 years of age to federal candidates and political parties.

The Court, in the opinion by Justice Breyer and joined in its entirety by Justices Stevens, O'Connor, Souter, and Ginsburg, upheld BCRA's requirements that licensed broadcasters maintain records of requests to purchase air time for campaign purposes.

Dissents

In his blistering dissent, Justice Scalia wrote, "This is a sad day for the freedom of speech. . . . [BCRA] cuts to the very heart of what the First Amendment is meant to protect: the right to criticize the government."

Scalia noted that campaign finance reform tends to benefit incumbents at the expense of challengers. Scalia wrote, however, that even if Congress were acting in good faith to elevate the level of discourse in federal elections, BCRA unconstitutionally limits criticism of the government: "We are governed by Congress, and this legislation prohibits the criticism of Members of Congress by those entities most capable of giving such criticism loud voice: national political parties and corporations, both of the commercial and not-for-profit sort."

Justice Scalia found fault with the underlying logic of the Stevens-O'Connor joint opinion. Where the Court found corruption or the appearance of corruption in large contributions resulting in greater influence, Scalia found such outcomes merely "the nature of politics." Scalia wrote, "If the Bill of Rights had intended an exception to the freedom of speech in order to combat this malign proclivity of the officeholder to agree with those who agree with him, and to speak more with his supporters than his opponents, it would surely have said so." (Similarly, Chief Justice Rehnquist wrote in his dissent, "[A] close association with others, especially in the realm of political speech, is not a surrogate for corruption; it is one of our most treasured First Amendment rights.")

Scalia's dissent favored less regulation of campaign finance, not more: "It is not the proper role of those who govern us to judge which campaign speech has 'substance' and 'depth' and to abridge the rest." Finding that federal election spending amounts to only half what Americans collectively spend on movie tickets, Scalia harangued, "Given the premises of democracy, there is no such thing as too much speech."

Justice Clarence Thomas wrote, "With breathtaking scope, the Bipartisan Campaign Reform Act of 2002 directly targets and constricts core political speech" Thomas wrote that the Court was heading down a slippery slope where regulation of any influential entity was possible, including media corporations. Thomas asked, "What is to stop a future Congress from determining that the press is 'too influential,' and that the appearance of corruption is significant when media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?"

Justice Kennedy sounded a similar alarm in his dissent: "These new laws force speakers to abandon their own preference for speaking through parties and organizations. And they provide safe harbor to the mainstream press, suggesting that the corporate media alone suffice to alleviate the burdens the Act places on the rights and freedoms of ordinary citizens."

Kennedy argued that BCRA discriminated in favor of "giant media corporations" by regulating non-media criticism of candidates via issue ads. He wrote, "[BCRA] is the codification of an assumption that the mainstream media alone can protect freedom of speech. It is an effort by Congress to ensure that civic discourse takes place only through the modes of its choosing."

Believing BCRA to be an "incumbency protection plan," Kennedy warned, "Government cannot be trusted to moderate its own rules for suppression of speech. . . . [T]he people, and not the Congress, decide what modes of expression are the most legitimate and effective."

Kennedy concluded, "The Court, upholding multiple laws that suppress both spontaneous and concerted speech, leaves us less free than before. Today's decision breaks faith with our tradition of robust and unfettered debate."

Access to Information and the U.S. Supreme Court

U.S. Supreme Court Hears Oral Arguments in *OIC v. Favish*

Does the privacy exemption to the federal Freedom of Information Act (FOIA) shield surviving family members from the distress of viewing the death scene photographs of former White House deputy counsel Vincent W. Foster, Jr.? The Supreme Court of the United States considered this question at the oral argument in *Office of Independent Counsel v. Favish*, No. 02-954, on Dec. 3, 2003.

Allan J. Favish, a California attorney whose attempts to gain access to 10 photographs have been resisted by the federal government, represented himself. Patricia A. Millett argued on behalf of the U.S. Solicitor General's office, and James Hamilton, a Washington, D.C.-based attorney in private practice, appeared for the Foster family.

Although Millett conceded that most courts have ruled that privacy interests die with an individual, she argued that the FOIA privacy exemption should be interpreted to encompass not only the record subject, but his surviving family members. She contended that FOIA is intended to accomplish "not maximum exposure but responsible disclosure," and argued that Favish had failed to demonstrate compelling evidence of government wrongdoing in the investigation of Foster's death sufficient to overcome the family's privacy interest. Millett also warned that, if the Court ruled in Favish's favor, photographs of victims of the World Trade Center attacks and of military personnel killed in Iraq would also be subject to release.

Justice Antonin Scalia was skeptical about Millett's interpretation of the privacy exemption, noting that the family's emotional reaction might better be characterized as a "sensitivity" rather than "privacy" interest. But Justice Stephen Breyer argued that history and tradition dating back to ancient Greek tragedy have honored the dead and shown respect for survivors' feelings, suggesting that Congress would have intended the word "privacy" to take this into account. Justice David H. Souter agreed, invoking the 1890 *Harvard Law Review* article authored by Supreme Court Justice Louis Brandeis and his then-law partner Samuel Warren, which first recognized a "right to be let alone."

Hamilton predicted that, if the photographs are released, they immediately will be published on what he characterized as "ghoulish Web sites," and that the family will be subjected to harassment by the media. "There's been five independent investigations of Foster's death. All have concluded it's suicide. It's been 10 years and it's time to give this family some peace," he concluded.

Favish argued for a narrow interpretation of the privacy exemption, contending that "it is not for the Court, with all due respect, to rewrite FOIA." He repeatedly cited to *Dep't of Justice of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), in which Justice John Paul Stevens wrote that the privacy exemption protected "the individual's control of information concerning his or her person." But as Justice Ruth Bader Ginsburg reminded Favish, the *Reporters Committee* case did not involve survivor privacy.

When Justice Sandra Day O'Connor invited Favish to address the second issue in the case – the public interest in access to the photographs – he contended that, based on the available evidence, the government was at least negligent in the investigation of the case. "I think the government can no longer be trusted to filter the raw evidence to the public in this case," he said. But Justice Scalia characterized Favish's contentions as at most "footfaults . . . a mistake here and there. Who cares?"

During his oral argument, Favish referred to the Silha Center's *amicus* brief by name, mentioning two cases on survivor privacy, including *Cordell v. Detective Publications*, 419 F.2d 989 (6th Cir. 1969) which the Silha Center brief cited. (See "*Office of Independent Counsel v. Favish* Will Be Argued Before Supreme Court" in

the Summer 2003 issue of the *Silha Bulletin*.) Chief Justice William Rehnquist asked Favish why these two cases had not been included in his own brief, and Favish replied that he had “filled up [his] 50 pages,” the maximum length permitted by the Court.

The Supreme Court is expected to issue its ruling in the case by June 2004.

—JANE E. KIRTLEY
DIRECTOR OF THE SILHA CENTER AND
SILHA PROFESSOR

Access to Information and the U.S. Supreme Court

Justices Will Not Consider Earnhardt Autopsy Photo Case

Without comment, the U.S. Supreme Court has rejected the petition of a student newspaper at the University of Florida, the *Independent Florida Alligator* (Gainesville), to access the autopsy photos of racecar driver Dale Earnhardt. Access to the photos became restricted after an amendment to Florida’s Public Records Law was passed by the Florida legislature in March 2001, following the accident that killed Earnhardt during the last lap of the Daytona 500 on Feb. 18, 2001. The amendment reversed Florida’s earlier law that for nearly 100 years had allowed autopsy photos to be public. Now anyone wishing to examine autopsy photos must file a court petition and demonstrate “good cause.” The name of the case is *Campus Communications v. Theresa Earnhardt et. al.*, No. 03-484.

Teresa Earnhardt, Dale Earnhardt’s widow, had been instrumental in the passage of the amendment, in part due to an earlier incident where 86 autopsy photos of other racecar drivers, Rodney Orr and Neil Bonnett, were posted on the Internet following their deaths during practice runs prior to the 1994 Daytona 500. Orr’s father, Beacher Orr, had testified on Teresa Earnhardt’s behalf in urging the Florida legislature to pass the amendment.

The *Orlando Sentinel*, along with other newspapers, had originally requested access to the autopsy photos in order that an expert in biomechanics could examine the photos to determine the cause of Earnhardt’s death. According to an article posted on the Web site of the Reporters Committee for Freedom of the Press (RCFP), the expert determined that Earnhardt’s death was the result of “violent head-whipping action” which was contrary to NASCAR’s findings that he had died as the result of a faulty seatbelt. RCFP’s story is available online at www.rcfp.org/news/2003/0703.html. (See “Florida Autopsy Records Remain Sealed” in the Summer 2002 issue of the *Silha Bulletin*, “Autopsy Records Laws Restricting Access” in the Winter 2002 issue of the *Silha Bulletin*, and “New Florida Law Closes Door on Autopsy Photos” in the Summer 2001 issue of the *Silha Bulletin*.)

In 2001, the *Alligator* had filed its own petition to view the photographs to determine whether the official investigations into Earnhardt’s death were adequate. Tom Julin, attorney for the *Alligator*, told the RCFP, “There was a very serious issue about whether NASCAR had covered up the true cause of Dale Earnhardt’s death.” But while that suit was pending, the amendment restricting access was passed. It was applied retroactively to the *Alligator*’s lawsuit, and the petition was denied. The decision was upheld by an appeals court, and the *Alligator*’s appeal to the Florida Supreme Court in July 2003 was denied.

The RCFP reported that the *Alligator*’s brief to the U.S. Supreme court argued that, “the Florida Legislature’s decision to remove autopsy photographs from public view is directly analogous to a governmental decision to remove thousands of books from public library shelves because the government believes that the content of the books is no longer suitable for the public.” That article is available online at www.rcfp.org/news/2003/1204campus.html.

United Press International reported that the *Alligator*'s brief also questioned whether a ban on "viewing and copying of a broad category of traditionally open government records" is "unconstitutionally overbroad because the viewing restriction does not serve a compelling governmental interest."

Julin told the *News-Journal* (Daytona Beach), "Public records should be public to everyone. The law now lets judges pick and choose who gets to see public records. That violates the First Amendment. Autopsy photographs have been open to the public for decades. They have allowed reporters and others to discover malpractice, product defects, and crimes overlooked by medical examiners." Julin added that privacy rights can be protected by a law that allows the photos to be inspected without copying them, according to the *News-Journal*.

Upon hearing the U.S. Supreme Court's decision not to hear the case, Parker Thompson, attorney for Teresa Earnhardt, told the *Orlando Sentinel*, "The Earnhardt case is done. It's over."

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Access to Information and the U.S. Supreme Court

Center for National Security Studies v. Department of Justice

The Center for National Security Studies, joined by other public-interest groups, asked the U.S. Supreme Court to consider whether the government legally may withhold the names of people who were secretly arrested and detained following the terrorist attacks of Sept. 11, 2001.

The groups submitted their petition for *certiorari*, on Sept. 29, 2003. The Court declined to hear the case, *Center for National Security Studies v. Department of Justice*, No. 03-472, on January 12, 2004.

"At a time when thoughtful reasoning is more necessary than ever to avoid unwarranted intrusions into civil liberties," the groups urged, "this Court should hear this case to restore those values."

The case began in late October 2001, when a group of public interest groups led by the Center for National Security Studies filed a federal Freedom of Information Act (FOIA) request with the U.S. Department of Justice seeking records regarding more than 700 people taken into government custody following the attacks. (See "Center for National Security Studies v. U.S. Department of Justice" in the Fall 2002 *Silha Bulletin*). The government's subsequent denial of the FOIA request prompted the litigation in which the U.S. District Court for the District of Columbia ordered the government to disclose the names of individuals detained following the attacks.

The D.C. Circuit reversed the district court ruling, allowing the government to withhold detainees' names. The panel majority held that FOIA exemptions allow the government to withhold the names of detainees and their attorneys, as well as other information that could identify the detainees. Judge David Sentelle, joined by Judge Karen Henderson, wrote that where issues of national security are concerned, courts should defer to the executive branch when considering whether to allow the government to withhold information. (See "Center for National Security Studies v. U.S. Department of Justice" in the Summer 2003 *Silha Bulletin*).

Judge Tatel dissented, asserting that the approach taken by his colleagues risked eliminating judicial review of any executive decisions to withhold information on national security grounds. Such a stance, he argued, endangers the public's ability to keep tabs on its government.

In their petition for *certiorari*, the groups seeking release of the information largely echo Judge Tatel's complaints that such overly deferential review "eviscerates" FOIA. Such treatment undermines the basic

presumption that government information must be disclosed to the public unless the government can clearly prove that the information is exempted under the Act, according to the groups seeking the information.

The petitioners criticized the D.C. Circuit decision as adopting a “toothless form of judicial ‘scrutiny’” that had no precedent in earlier decisions – including decisions involving national security issues.

“Such an approach, as a practical matter, transforms FOIA by judicial fiat into a statute under which citizens request information from their elected leaders and those leaders then decide for themselves what information they wish to disclose,” the groups argued in their petition to the Court.

The government based its decision to withhold the information on four factors, according to the petition. First, it argued that releasing the names of detainees could lead to efforts by terrorist groups to intimidate the detainees. Second, it argued that revealing detainees names could impair detainees’ abilities to work undercover for the government after their release. Third, releasing the names could allow terrorist groups to piece together a blueprint of the government’s investigation. Finally, the government worried that revealing the names could help terrorist groups create misleading evidence to throw off the investigation.

The petitioners argued that none of these rationales hold up – and even if they did, they likely would not apply to all detainees. Under FOIA, the government may edit out information that would be exempt from disclosure, but may not issue a blanket refusal to a request that comprises both disclosable and nondisclosable information.

The petitioners also raised a second question: whether the First Amendment requires that the government release names of those it has arrested, unless it can prove a compelling need for secrecy. The government has argued that the Constitution creates only a government obligation to release names of those who have been criminally charged. Because the detainees have not been charged, the argument goes, there is no obligation to release their names. The petitioners urge the Court to extend this obligation, based on a “logic and experience” test embraced by the Court in *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986). In that case, the Court held that the government’s obligation to open criminal trials to the public also extended to preliminary hearings and jury selection in criminal cases.

Under the logic and experience test, the Court first looks at the underlying purpose of public access to criminal proceedings, which is to allow for public scrutiny of government actions that deprive others of liberty. Then, the Court looks at the historical treatment of the information in question. In this case, the petitioners argued, the fact that the detainees might never be charged with crimes makes public scrutiny even more important than in normal criminal cases. Also, society’s traditional disapproval of secret arrests, coupled with the fact that police blotters detailing arrests are customarily available to the public, argues strongly in favor of disclosure, the petitioners wrote.

The Silha Center was a signatory to an *amicus brief* in this case that was filed by media organizations and civil liberties groups in support of the petition for *certiorari*.

—DOUG PETERS
SILHA FELLOW

Access to Information and the U.S. Supreme Court

M.K.B. v. Warden

On Nov. 4, 2003, the Supreme Court ordered Solicitor General Theodore Olson, on behalf of the Justice Department, to file a reply brief responding to the *habeas corpus* petition of Mohamed Kamel Bellahouel, an Algerian who was detained in Florida by the federal government following the terrorist attacks of Sept. 11, 2001 in *M.K.B. v. Warden* (No. 03-6747).

Should the Supreme Court grant review, it will consider whether the federal district court and the U.S. Court of Appeals (11th Cir.) abused their discretion in closing Bellahouel's proceedings to the press and public and sealing the courts' records. These courts also ordered their clerks to record the case under a secret filing system that kept the case off the public dockets. Lawyers involved in the case have been ordered not to comment, further blocking the press and public from knowing that the proceedings ever occurred.

Bellahouel's case and name came to light only because of a docketing error by the Eleventh Circuit. Dan Christensen, a reporter for the *Miami Daily Business Review*, broke the story in March of 2003.

Bellahouel was released in March 2002 on \$10,000 bond after being held for five months at the Federal Correctional Institute in south Florida. While working as a waiter, Bellahouel allegedly served meals to two of the September 11 hijackers. Bellahouel is married to an American, but faces deportation because his student visa expired. He denies any involvement in terrorism, but is also barred from discussing the details of his case.

Bellahouel's case is a *habeas corpus* appeal protesting his detention, and seeks to force the government to justify his detention. He is represented by Federal Public Defender Kathleen Williams and her chief of appeals, Paul Rashkind.

A heavily redacted version of Bellahouel's petition for review to the Supreme Court was released to the public. Bellahouel challenges the decisions of Miami-based U.S. District Judge Paul C. Huck and the Atlanta-based 11th Circuit's decisions to hold secret proceedings without explanation. The petition states that the courts decided to hold the secret proceedings of their own accord, and not at the request of government attorneys.

Solicitor General Olson had told the Supreme Court that he did not plan to respond to Bellahouel's petition. The Court, however, has directed him to do so. Should the Supreme Court decide to hear *M.K.B. v. Warden*, its decision could control the government's use of secret judicial hearings to protect national security. In reviewing the constitutionality of the government's actions against Bellahouel, the Court would necessarily examine the public's right to know government information.

The Solicitor General's brief was due to the Court on December 3. Under Court rules, however, the high court granted a 30-day extension, pushing the deadline back to January 2004. According to the Associated Press, Solicitor General Theodore Olson told justices in a one-paragraph filing submitted on Jan. 5 that "this matter pertains to information that is required to be kept under seal."

On January 2, as the *Bulletin* was going to press, the Reporters Committee for Freedom of the Press (RCFP) filed a motion on behalf of a coalition of news and legal organizations to intervene in the case, including groups such as the American Society of Newspaper Editors, Radio-Television News Directors Association, Society of Professional Journalists, New York Times Co., CNN, Gannett Co., Inc., and Knight Ridder, Inc. Although such motions normally occur at a lower court level, the RCFP stated that secrecy in the case prevented such action from happening earlier.

"Because of the exceptional secrecy surrounding this case, [the coalition members] were unaware of its very existence when it was being litigated in the district court, and were therefore unable to move to protect their interests by intervening there," the motion states.

If the motion is granted, it would mean that the coalition would be added as actual parties to the case. The motion is available online at www.rcfp.org/news/documents/20040102-mkbvwarden.pdf.

In a press release on the RCFP Web site, director Lucy Dalglish is quoted as saying, "A free and open society cannot tolerate hiding federal court proceedings from public view." The press release is available online at www.rcfp.org/news/releases/view.cgi?2004_01_02_mkbvward.txt.

Access to Information and the U.S. Supreme Court

Cheney v. United States District Court

On his second week in office, President Bush formed the National Energy Policy Development Group (NEPDG) on January 29, 2001. According to an August 2003 General Accounting Office (GAO) report on the NEPDG, the President charged the task force to develop “a national energy policy designed to help the private sector, and government at all levels, promote dependable, affordable, and environmentally sound production and distribution of energy for the future.” Vice President Dick Cheney was selected to head the group with nine presidential cabinet members and four other senior administration officials assisting him. The NEPDG completed its report on May 16, 2001, which is available online at <http://www.whitehouse.gov/energy/National-Energy-Policy.pdf>.

But the energy task force was plagued by charges that it was dominated by energy industry interests, according to the *Legal Intelligence*, and suspicions arose that individuals from the private sector had advised NEPDG. Because the individuals associated with the energy industry were not affiliated with the government, the Federal Advisory Committee Act (FACA), 5 U.S.C. App. §2, permits their identities and the role they may have played in the findings of the task force to be withheld. Two public interest groups, Judicial Watch and the Sierra Club, filed requests for information under FACA. FACA requires open meetings and open records in instances when the government solicits advice from outside interests.

According to a press release posted on the Sierra Club’s website, the organization is “seeking an accounting of energy industry participation in crafting the Bush Administration’s destructive energy policy, which relies on subsidies to polluting and outdated fossil fuel industries.” The press release is available online at <http://ventana.sierraclub.org/current/cheney.shtml>.

The GAO’s report stated that agency officials participating in the meetings could “not recollect whether official rosters or minutes were kept at the meetings.” Besides the ten NEPDG Principals’ Meetings listed in the GAO’s report, there were other lower-level meetings involving an “interagency Working Group.” Furthermore, the GAO report states that the development of the NEPDG’s National Policy report “involved hundreds of staff from nine federal agencies and several White House offices.” The GAO states that members of the government at all levels of the task force “met with, solicited input from, or received information and advice from a variety of nonfederal energy stakeholders while developing the report.” GAO’s report is available online at <http://www.gao.gov/new.items/d03894.pdf>.

Judicial Watch, Inc. v. NEPDG and *Sierra Club v. Vice President Richard Cheney*, 219 F.Supp. 2d 20 (2002) were combined and decided by Judge Emmet G. Sullivan of the U.S. District Court in Washington D.C. Sullivan ruled that the Vice President must file a proposed discovery plan by July 19. Instead, Cheney appealed the case to the D.C. Circuit in *In re: Richard B. Cheney*, 334 F. 3d 1096 (D.C. Cir., 2003). In that case, Judge David S. Tatel ruled that the information being sought under FACA ought to be disclosed. The Vice President asked the appeals court to rehear the case *en banc*, but it refused. On December 15, 2003, the U.S. Supreme Court agreed to hear the case.

Attorneys for Judicial Watch and the Sierra Club argue that this case is similar to *AAPS v. Hillary Rodham Clinton*, 187 F.3d 655 (D.C. Cir., 1999). In that case, Clinton was chair of a national health care task force, and some subcommittees included private citizens among their members. The federal appeals court ruled that, under FACA, the requested information had to be released.

But Solicitor General Theodore Olson argues that releasing the information about the energy policy task force would compromise the President's powers, writing, "Any construction of the FACA that would permit discovery of the vice president and other presidential advisors in such circumstances would violate fundamental principles of the separation of powers."

In the press release posted on the Sierra Club's Web Site, David Bookbinder, that organization's senior attorney stated, "At some point, the Bush Administration is going to have to realize that the American people want to know what kind of influence energy corporations had over America's energy policies."

The name of the case as it comes before the U.S. Supreme Court is *Cheney v. United States District Court*, No. 03-475. At the time the *Bulletin* went to press, no date had been set for oral arguments.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Court Rules on Access to Information

Port Authority of New York and New Jersey Release September 11

Transcripts

The Port Authority of New York and New Jersey was ordered to abide by its July 2003 agreement with *The New York Times* and release the transcripts of radio transmissions and calls it received the morning of Sept. 11, 2001. On August 28, a decision in Hackensack, N.J., by Bergen County Superior Court Judge Sybil R. Moses required the New York and New Jersey Port Authority to honor its contract despite the Authority's claim that the release would compromise the privacy of the victims' families.

These transcripts detail the first reactions and responses of the Port Authority to the September 11 terrorist attack that killed 2,792 people. *The New York Times* originally sought the actual tapes of the transmissions and calls in an open records lawsuit, *New York Times v. Port Authority* (BER-L-4023-03 and 03-3781), but reached an agreement to instead receive a transcribed version that would also be available to other media outlets, according to *The Legal Intelligencer*. Once that deal had been reached, Judge Moses dismissed the case. However, the Port Authority tried to rescind its deal with the paper, claiming that the material contained on the tapes might upset the victims' families. According to *The Legal Intelligencer*, Judge Moses cited the Authority's own July 21, 2003 memo in her ruling, quoting the memo as saying that the Port Authority would "commit" to the release of the transcripts in order to "resolve the dispute." The release came approximately two weeks before the second anniversary of the terrorist attacks.

Port Authority spokesperson Greg Trevor stated that the agency had initially agreed to hand over the transcripts to *The New York Times* because it determined that a transcribed version of the tapes would allow the media access to the content while saving the victims' families from having to hear the voices of their loved ones' last moments publicly broadcast; however, upon transcribing the tapes, the agency feared that even a transcribed version would have an equally emotional impact, according to the Associated Press.

Trevor also stated that the Port Authority was, "disappointed that (the judge's) ruling did not address the merits of protecting the interests of the families from an invasion of privacy," according to the Associated Press.

In an August 28 press release, the Port Authority stressed its hope that the media would not include material in its reports that might be distressing for the victims' families, stating, "Representatives of media organizations have assured us that they are interested in this material solely to evaluate emergency response on September 11, and to recount heroism. We take them at their word, and fully expect them to refrain from publishing gruesome, gratuitous or personal details that do nothing to further this discussion." The Port Authority's statement is available online at <http://www.panynj.gov/pr/pressrelease.php3?id=406>.

Reaction from the victims' families regarding the release of the transcripts was mixed. Some said that it would offer valuable insight into the attacks and how future ones might be prevented. The Associated Press quoted Monica Gabrielle who lost her husband in the attack, who stated, "Everything should be released. We're coming up on the second anniversary and there are no answers." Gabrielle also said it would be "inhumane" not to disseminate the material and that she did not personally know of any surviving family who did not agree with her. Others felt the publication of the transcripts would do nothing more than force family to relive the loss they experienced. The Associated Press also quoted Carolyn Winston, the sister of a Port Authority officer who perished, who said, "We don't want to hear how he suffered. That's very devastating for the family."

The New York Times had previously sought a voice recording in a similar case involving the Challenger space shuttle explosion. In that case, *New York Times Co. v. National Aeronautics and Space Administration*, 287 U.S. App. D.C. 208, 920 F.2d 1002 (D.C. Cir., 1990), the paper was unsuccessful in obtaining a tape of the Challenger's voice communication during its flight. Then-Circuit Judge Ruth Bader Ginsburg's opinion in that case noted that the recording met the Court's threshold test to qualify for Exemption 6 under the federal Freedom of Information Act which protects personal privacy. The court's test was used to determine if a tape containing the voices of the individuals who perished in the explosion qualified as "personal information." The court concluded that because the tape would "reveal the sound and inflection of the crew's voices during the last seconds of their lives," it should be withheld under Exemption 6 which includes, "personnel and medical files and similar files the disclosure of which would if it would constitute a clearly unwarranted invasion of personal privacy." (See 5 U.S.C. § 552(b)(6)).

However, because *The New York Times* sought the transcribed version of the Port Authority tapes rather than the tapes themselves, the Port Authority could not rely on the ruling in *New York Times v. NASA* to support its claim that privacy interests could be compromised by disclosure.

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Legislators Consider Laws Affecting Access to Information

Student Privacy Protection Act Awaiting Passage

A bill awaiting consideration in the U.S. House of Representatives would provide civil remedies, including money damages, against schools that violate the Family Educational Rights and Privacy Act, or FERPA.

HR 1848, called the "Student Privacy Protection Act of 2003," was introduced in April by Rep. Robert Andrews (D-NJ) and is awaiting consideration by the House Subcommittee for Courts, the Internet and Intellectual Property. The bill was referred to that subcommittee on June 25 and has not moved since.

Passage of the law would create an additional incentive for schools to withhold potentially newsworthy information regarding such issues as campus safety, crime and student disciplinary actions.

Currently, FERPA does not allow students or their parents to sue schools for violations of the federal law. Instead, schools that violate the act can lose federal funding. Students who have been harmed by unauthorized release of private educational records may sue under state law in many states, however. The proposed amendment would have no impact on rights to sue under state law.

FERPA contains broad protections for student privacy and mandates non-disclosure of most student disciplinary records. Schools are allowed, but not required, to disclose final results of student disciplinary hearings involving violent crimes or nonforcible sex offenses, according to an October 2 report by the Student Press Law Center. That report can be viewed at: <http://www.splc.org/newsflash.asp?id=674>.

Open-records advocates, some of whom already viewed FERPA as giving too much latitude to schools considering whether to disclose important information such as campus crime data, say the amendment would create further disincentives to openness on the part of schools, according to the SPLC.

The SPLC report quoted Darin Bakst, president and general counsel of the Council on Law in Higher Education, as saying the amendment was unnecessary because of existing state-law remedies. Adding another layer of potential liability, Bakst said, would “create a litigation nightmare for schools and a lot of frivolous lawsuits.”

—DOUG PETERS
SILHA FELLOW

Legislators Consider Laws Affecting Access to Information

California’s Megan’s Law Extended for Three Years

California’s sex-offender notification law, which the state assembly refused to extend as the legislature’s regular session wrapped up in mid-September 2003, was spared from automatic repeal by a unanimous vote during a special legislative session only two weeks later.

The bill to extend the law, known as “Megan’s Law,” died after falling three votes shy of the required two-thirds majority during a vote on September 13, according to a Sept. 22, 2003, report by the Reporters Committee for Freedom of the Press (RCFP). Not a single member of the assembly voted against extending the law, but most Republican lawmakers abstained from the vote to demonstrate their unhappiness that the bill did not go further in allowing the public to gather information about sex offenders, according to the RCFP.

As the regular legislative session ended, Megan’s Law was set to expire Dec. 31, 2003, which would dramatically reduce the public’s ability to gather information about the more than 80,000 convicted sex offenders in the state. After an outcry from state law enforcement officials and others, the assembly reconvened for a special session September 29, passing the extension by a vote of 78-0 after less than three hours of debate. The state senate already had approved the bill, and then-Gov. Gray Davis signed the bill into law on October 1. The move extends Megan’s Law for three years, until January 2007.

Although Republicans agreed to support the bill in the special session, many advocated for changes that would expand public access to the state’s database of sex offenders. Currently, the state law provides access to the information only at sheriff’s offices or police stations, or through a phone line that costs users \$10 to access and requires that the caller have names or other identifying information of the offenders. Even then, the current system only provides information by zip code, according to the *Los Angeles Times*.

Republican lawmakers asked Democrats to consider putting the entire database on the Internet and to list the home addresses of all offenders. Democrats opposed such changes in the last session, citing concerns that offenders would be subjected to harassment, but they nonetheless agreed to consider such changes when the next legislative session begins in January 2004, according to the *Los Angeles Times*.

—DOUG PETERS
SILHA FELLOW

Court Rules in Access to Proceedings

Press, Public Banned from Enron Courtroom

Houston-based U.S. District Court Judge Kenneth Hoyt barred the public and press from three pre-trial hearings of three ex-Enron executives, including the former Chief Financial Officer of the energy giant. A three-judge panel of the U.S. Court of Appeals for the Fifth Circuit affirmed Judge Hoyt’s ruling in October.

On July 28 and August 26, 2003, Hoyt closed three hearings to the press and public and sealed the transcripts of the hearings. Hoyt ordered the hearings closed of his own accord, rather than at the urging of the ex-Enron executives' lawyers. Of the content of the closed hearings, the *Houston Chronicle* reported Hoyt stated that, "These are matters that do not need to be discussed in public in ways [sic] that embarrasses or humiliates the government or the defense and particularly the court." The former Enron executives face criminal charges including fraud.

Mary Flood, a reporter for the *Chronicle* was among those barred from the court room. On September 2, the *Chronicle* asked the U.S. Court of Appeals for the Fifth Circuit to order Hoyt to release transcripts of the hearings and to cease holding closed hearings. The *Chronicle* argued that Hoyt had not articulated a compelling reason for closing the hearings, nor had the court availed itself of alternative measures which would have infringed less upon the First Amendment.

On October 8, the Fifth Circuit refused the *Chronicle's* request. The Fifth Circuit issued no opinion but simply ruled that the *Chronicle's* request was denied. In a one-sentence docket entry issued with the order, the Fifth Circuit stated that it would consider another challenge to unseal the transcripts and open the hearings should "changed circumstances" arise.

Flood was not surprised by the Fifth Circuit's decision, but was encouraged that "the Fifth Circuit took our request seriously, ruled quickly, and left the door open." The Reporters Committee for Freedom of the Press reported that Flood believed that the *Chronicle* would consider taking further legal action if Hoyt continues to close proceedings without explanation. The *Chronicle* reports that Hoyt has indicated a willingness to do just that, saying he may hold more closed hearings in the continuing criminal cases against the executives.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT

Freedom of Information Act Updates

Media Representatives Required to Sign Non-Disclosure Agreements

In response to a FOIA request in October 2003 from an unidentified entity, the Federal Energy Regulatory Commission (FERC) has released copies of standard non-disclosure agreements (NDAs) that must be signed before requesters may receive "critical energy infrastructure information" (CEII) from FERC. CEII is information concerning proposed or existing critical infrastructure, such as dams, bridges, power grids, and computer systems, that may be vulnerable to terrorist attack. Alasdair Roberts, Associate Professor of Public Administration and Director of the Campbell Public Affairs Institute in Maxwell School at Syracuse University, posted the agreements online at <http://www.foi.net>.

There are three types of NDAs: for media representatives, for state agency representatives and for consultants. The NDA for media representatives requires reporters to "obtain from FERC General and Administrative Law staff written verification that the story as proposed does not contain CEII." If the story does contain such information, a media representative must "agree to make a good faith effort to work with FERC staff to remove the CEII from the proposed story in a way that does not detract from the substance of the story." The NDA further requires media representatives not to disclose "the contents of the CEII, any notes or memoranda, or any other form of information that copies or discloses CEII shall not be disclosed to anyone other than a news media representative who is working on the story, or another person who has been granted access to these same materials by the Federal Energy Regulatory Commission." In addition, any violation of the agreement "may adversely affect [a reporter's] ability to receive CEII from the Commission in the future."

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Freedom of Information Act Updates

University of Louisville Foundation v. Cape Publications

On Nov. 21, 2003, the Kentucky Court of Appeals confirmed that the fundraising branch of the University of Louisville Foundation is a public agency subject to the rules of the Open Meetings Act. The November 2003 decision addressed the decision made in July 2002 by confirming the foundation was a public institution.

The appeals court remanded a Jefferson Circuit Court decision that the privacy exemption in KRS 61.878(1)(a) of the Open Records Act cannot apply to charitable donations by corporations and private foundations. The court found that a donor's identification can remain anonymous under some circumstances. Therefore, the circuit court will need to determine the status of each donor.

The three-judge panel in *The University of Louisville Foundation v. Cape Publications* (NO. 2002-CA-001590-MR) unanimously ruled in the case. Although marked "Not to be published," the opinion is available online at the Kentucky Court of Justice's website at http://www.kycourts.net/Appeals/COA_Opinions.shtm.

Judge Wilfrid Schroder wrote, "This is an issue of fact that needs to be determined on an individual, or case-by-case basis Some gifts may be conditional and disclosure may revoke the gifts. Unless more is known about the individual gifts, we cannot agree with a blanket exclusion of corporations and private foundations from the personal privacy exception to the Open Records Act."

In May 2001, *The Courier Journal* (Louisville) sued the public university under the state's Open Records Law after they were denied copies of minutes, expenditure receipts, the name of donors and the amounts of their gifts. Jefferson County Judge Steve Mershon ruled in July 2002 that the foundation was a public institution.

This decision led to a separate case also pursued by *The Courier Journal* in September 2003 in the Jefferson Circuit Court against the foundation which found the foundation should release the names of corporate and foundation donors and of individuals whose donations have already been made public, and the amounts they gave, according to the Associated Press.

This included the names of 45,000 donors, according to the Reporters Committee for the Freedom of the Press (RCFP). Judge Mershon did allow the university to withhold the names of 62 donors who were promised confidentiality at the time of donation.

Jon Fleischaker, the *Courier-Journal* attorney, told the RCFP that anonymous donations should be held to a higher standard of scrutiny, not less. "In this case it could be an attempt to influence the course of instruction, the course that the university is going to take, in a number of ways," he said.

In 2002, the foundation had assets of \$479 million and more than 1,000 endowed accounts, according to the university's development office Web site.

The foundation appealed Mershon's order in September 2003. The newspaper appealed the judge's decision that the foundation can withhold the names of 62 donors. Those appeals were still pending as of late November, the Associated Press reported.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Freedom of Information Act Updates

Freedom.org Conducts Survey on International Freedom of Information Laws

More than 50 countries have now passed freedom of information laws, according to a survey released on Sept. 28, 2003 to mark the first annual “Right to Know Day” by freedominfo.org, an online network of freedom of information advocates. More than half of the freedom of information laws have passed in the last decade. Seven additional countries passed laws last year, including India and Pakistan.

Freedominfo.org reported that the new laws have increased awareness around the world on issues such as public safety, corruption and human rights. Freedominfo.org included the survey and a sample of more than 40 news stories based on records released through the access laws online at <http://freedominfo.org/survey.htm>.

For example, Press Trust for India, in New Delhi, reported on Sept. 11, 2003 that New Delhi residents used the Right to Information Act to compel authorities to finish construction projects. A sewer under construction since 1983 was finally finished after residents began requesting information about its progress.

The “Right to Know Day” was established by the Freedom of Information Advocates Network based in Budapest, Hungary and Sofia, Bulgaria. Advocates in 20 countries held events such as conferences, awards, release of studies, and workshops on September 28 and 29.

In Romania, non-governmental organizations held a press conference on September 29. They presented the results of a FOIA campaign on how public authorities used public money for advertising in the media and information on how to file a FOIA request. More information is available online at <http://www.foiadvocates.net/rkd.htm>.

Freedominfo.org is edited by a multinational volunteer editorial board. George Washington University’s National Security Archive hosts and staffs the site. Grants from the Open Society Institute, the John S. and James L. Knight Foundation, and the John D. and Catherine T. MacArthur Foundation underwrite the site.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Freedom of Information Act Updates

Study Finds Many Rhode Island Agencies Do Not Comply with Open Meeting Laws

Brown University released the results of a study that found that most Rhode Island public agencies fail to comply with the state’s Open Meetings Law. The study, published in September 2003 by the Taubman Center for Public Policy, focused on 23 quasi-public state agencies. Quasi-public agencies in Rhode Island perform basic government functions, such as managing landfills, sewage treatment plants, bus systems and airports.

The study analyzed how well quasi-public agencies comply with parts of the Open Meetings Law. The study concluded that only a little over 34 per cent of quasi-public agencies submitted all their 2002 meeting minutes to the secretary of state, and none of the agencies submitted their minutes within the statutory deadlines. In addition almost none of the quasi-public agencies gave “clear statements” about the nature of business to be discussed in executive session. Overall, the study characterized the “general pattern of nondisclosure . . . is disturbing.”

The 25-page report placed the findings in the context of past abuses by quasi-public agencies and an upcoming referendum that could change how the agencies are monitored. “Given a history of scandal behind quasi-publics [state agencies], monitoring their behavior will be paramount,” the report stated.

The Providence (R.I.) Journal-Bulletin reported that some agencies are questioning those findings, saying that they do file minutes of their meetings with the secretary of state. The study acknowledges that the findings may

reflect problems with the way records are kept at the secretary of state's office and not problems with the agencies, but this still meant that members of the public could not obtain the information under the law.

"The public should care because these agencies are spending millions of their tax dollars, and they have to know what's going on," Darrell M. West, director of Brown's Taubman Center for Public Policy, told *The Providence Journal-Bulletin*. "The quasias are where the real money is in Rhode Island government," he added.

The study also found that not a single agency analyzed in the report submitted all of its minutes on time. Under state law, public agencies are required to submit their minutes to the Secretary of State's Office within 35 days of the meeting. At least six agencies did not submit any minutes in 2002.

The Brown report also revealed a large discrepancy in the amount of information different agencies chose to include in their reports. This ranged from less than one page to as many as 48.

The study is available online at

http://www.brown.edu/Departments/Taubman_Center/FOI/PDF/quasipublic2003.pdf.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Endangered Journalists Around the World

Cambodia

Chuar Chetharith, a journalist for Ta Prohm radio, was shot and killed outside of his office in Phnom Penh on Oct. 18, 2003. Although it was unclear who was responsible for the drive-by shooting, many believed the killing to be an act of "political intimidation," according to the Index on Censorship.

The Cambodia Daily reported that the killing occurred only days after Prime Minister Hun Sen publicly warned Ta Prohm radio, which is affiliated with the royalist FUNCINPEC party, that it should stop broadcasting programs that "specialized in critically dissecting . . . his speeches." A Reuters report stated that Cambodia's radio stations are known to take partisan positions.

U. S. State Department spokesman Adam Ereli told Reuters, "The United States deplores all acts of violence in Cambodia. We are particularly concerned by violence directed against journalists."

"A culture of impunity in Cambodia must not be tolerated," he added in a written statement.

Iran

On Sept. 23, 2003, Tehran's deputy prosecutor general charged Intelligence Ministry agent Mohammad Reza Aghdam Ahmadi with "semi-premeditated murder" in the death of Canadian-Iranian journalist Zahra Kazemi, according to a Reuters report.

Kazemi died July 10 after taking photographs of protesters who were demonstrating outside of Tehran's Evin prison, causing tense diplomatic relations between Iran and Canada and, according to Reuters, drawing attention to the power struggle between conservative Iranian hard-liners who run the judiciary and the reformist-controlled Intelligence Ministry. (See "Endangered Journalists Around the World" in the Summer 2003 issue of the *Silha Bulletin*.)

The Associated Press reported that, according to the prosecutor, Ahmadi was the only interrogator who spent long periods of time alone with Kazemi. The prosecutor also claimed that the agent gave some contradictory statements about Kazemi's treatment. Ahmadi has pleaded innocent to the charges, and from the outset the Intelligence Ministry has called the accusations "sheer lies."

On October 28, a report by Iran's reformist-dominated parliament pointed responsibility at hard-line Tehran prosecutor Saeed Mortazavi. According to the Associated Press, Mortazavi, the top official in the prosecutor's

office, was blamed for illegally detaining the Canadian photojournalist and then covering up facts surrounding her death while in custody in July. Officials initially claimed that Kazemi died of a stroke; a subsequent investigation later prompted leaders to admit that she had indeed been beaten while in custody.

According to the Associated Press, it is likely that Mortazavi will now be “summoned for questioning” in Ahmadi’s trial. It is not yet known if actual charges will be filed against Mortazavi.

BBC News reported on Nov. 4, 2003, that Iranian lawyer Shirin Ebadi, a recipient of the Nobel Peace Prize, will represent Kazemi’s family at the trial. At the time the *Bulletin* went to press, court proceedings had been temporarily postponed in order to give Ebadi and her team of lawyers time to research the case.

Iraq

Ahmed Shawkat, editor of independent Iraqi weekly newspaper *Without Direction*, was shot and killed on Oct. 28, 2003. Police told the Associated Press that Shawkat had gone up to the roof of his office’s building to make a phone call. Two unidentified men followed him to the roof, shot Shawkat, and fled.

The *Boston Globe* reported that Shawkat had recently “ignored letters warning him to close the paper after he published articles criticizing radical Islamists.” His daughter Roaa Shawkat told the Associated Press, “He calls for democracy and our people don’t understand the meaning of democracy. Maybe the Islamists have taken a stance against him for that reason.”

According to the *Globe*, Shawkat had long been an outspoken critic of Saddam Hussein, and he had been imprisoned six times for writing articles that condemned Hussein. However, even in postwar Iraq, Shawkat “never let the dangers deter him,” remaining committed to educating Iraqis through his writing on the world outside “Hussein’s police state.”

Ivory Coast

A French journalist working for the Paris-based radio station Radio France International was killed by a police officer in Ivory Coast’s main city of Abidjan on Oct. 21, 2003, the French Embassy told Reuters. Jean Hélène was shot outside national police headquarters while waiting for the release of opposition party activists, who had been arrested several days earlier after they were suspected of plotting assassinations.

Unidentified police officers told the Associated Press that Hélène was sitting in his car waiting to interview the opposition figures when a policeman confronted him to ask him what he was doing. After the two briefly exchanged words, the officer twice fired an AK-47, hitting Hélène in the back of the head.

Sergeant Theodore Sery, the policeman believed to be responsible for the killing, was promptly arrested. If convicted, he faces at least 20 years in prison, according to a BBC report.

The BBC report noted that Hélène was an experienced journalist who had reported from Africa for many years. According to the (London) *Daily Telegraph*, the Ivory Coast remains rather unsettled after a civil war last year brought about by an attempted overthrow of President Laurent Gbagbo’s government. The war ended in January 2003, with 3,800 French troops helping to keep peace between the government military forces in the south and rebel groups in the north.

Anti-foreign sentiment is common among government supporters in the south, where Abidjan is located, according to an Associated Press report. A Reporters Without Borders (Reporters Sans Frontières – RSF) news release claimed that an RSF mission to Ivory Coast in October 2002 found that “the president’s office, the communications ministry and state-run media had joined sensationalist privately-owned papers in encouraging people to believe the foreign press was partly responsible for the war,” making the area even more dangerous for foreign journalists. The release is available online at http://www.rsf.org/article.php3?id_article=8333.

Nepal

Journalist Gyanendra Khadka was killed Sept. 7, 2003, in Jyamire, in Nepal's eastern Sindhupalchowk District, according to *The Hindu* newspaper. He was a reporter for the government news agency Rastriya Samachar Samiti (RSS).

A news alert by the Committee to Protect Journalists (CPJ) stated that, according to RSS, a group of suspected Maoist rebels abducted Khadka from a school where he taught part-time, led him to a nearby field, tied his hands to a pole and slit his throat. The International Federation of Journalists reported that no arrests were made.

The *Pittsburgh Post-Gazette* reported on December 1 that "as a correspondent for . . . RSS, Khadka had filed news reports about the activities of the violent rebels. To the Maoist insurgents, that made him a spy."

According to CPJ, Khadka was the first journalist to be killed in Nepal since the rebels withdrew from a cease-fire with government military forces in August.

Spain

A jailed Al-Jazeera journalist charged with being a member of al-Qaida was released on \$7,000 bail on Oct. 23, 2003, after a Spanish judge accepted a doctor's report stating that the reporter suffered from heart trouble. According to the Associated Press, Tayssir Alouni, a Syrian-born Spanish national, was arrested September 5 at his home on the outskirts of Grenada and was questioned extensively. He was charged soon after with "alleged financing, logistical support and recruitment for al-Qaida," according to the *Los Angeles Times*, and had since been held in police custody.

The Associated Press reported that while Alouni did admit to transferring approximately \$4,000 from individuals in Spain to individuals abroad, he claimed that he was "merely expressing solidarity with the Arab community, not supporting terrorists."

Alouni gained recognition two years ago when he interviewed Osama bin Laden shortly after the September 11 attacks. The International Federation of Journalists reported that the Oct. 7, 2001, interview was broadcast in part by CNN.

Al-Jazeera spokesman Jihad Ballout told the Associated Press, "We have all faith in him [Alouni]. . . We believe [Alouni's] release came as good news for the media community at large."

On November 30, according to *The Washington Post*, Alouni was awarded a peace prize by the Francisca Mateos foundation, a Spanish non-governmental organization "dedicated to international cooperation and social work within Spain."

Zimbabwe

In September 2003, state officials in Zimbabwe shut down the country's only independent newspaper after it failed to register for a license required by the government under new media laws passed last year. These laws require media organizations to register under the Access to Information and Protection of Privacy (AIPPA) Act, which imposes severe restrictions on media content.

According to the Associated Press, Zimbabwe's Supreme Court had ruled that *The Daily News* broke the law by initially refusing to register for accreditation with the state media commission. Executives from the paper claimed that the new laws were an attempt by the government to "stifle" independent journalists. The government already runs the country's two other newspapers as well as the only television and radio broadcast station.

The Daily News did file for a license once the paper was shut down, however, and asked the Administrative Court to allow the paper to continue to publish while its application was being processed by the media commission.

According to Agence France-Presse, the Administrative Court allowed *The Daily News* to resume publishing and ordered that the media commission license the newspaper by November 30. But only one issue was published before police shut down the newspaper's offices for a second time, claiming that the judgment by the Administrative Court did not give it permission to immediately continue publishing. Instead, officials insisted that the newspaper could not operate until it actually had a license in hand. The media commission, meanwhile, rejected the court order to license *The Daily News* and subsequently filed an appeal with the Supreme Court.

"Zimbabwean authorities will stop at nothing to prevent the country's sole independent daily from appearing," Reporters Without Borders (RSF) secretary-general Robert Ménard said in an RSF press release. "They must halt . . . this unacceptable harassment of the newspaper's directors and employees." The release is available online at http://www.rsf.org/article.php?id_article=8351.

In the meantime, *The Daily News* has been publishing stories on a website that is hosted in South Africa, where the chairman of the company that runs the *Daily News* – the Associated Newspapers of Zimbabwe (ANZ) – also heads Econet Wireless Group. "We wanted to continue to be in touch with our readership," Econet CEO Sam Nkomo told Mark Glaser of the Online Journalism Review (OJR). "But we do know that our paper is read by the general mass of our population, and our Web site will only be accessed by a few people. We thought that it was better to keep a few informed than everybody be uninformed." According to OJR, fewer than one percent of Zimbabweans have Internet access. The OJR article is available online at <http://www.ojr.org/ojr/glaser/1066860746.php>.

On December 19, a Bulawayo administrative court issued a decision lifting the ban on *The Daily News*. According to the RSF Web site, the presses for *The Daily News* immediately began to roll. But later that same day, Zimbabwe police shut down the newspaper's operations again. RSF secretary general Robert Menard issued a statement, saying "We urge the authorities to allow *The Daily News* and its print works to operate freely in line with the court ruling."

On December 10, RSF awarded the Reporters Without Borders – Foundation de France 2003 prize in the Media category to *The Daily News*.

At the time this *Bulletin* went to press, the Supreme Court had still not yet heard the *Daily News*' case for accreditation.

—ELIZABETH JONES
SILHA RESEARCH ASSISTANT

Reporters' Privilege Update

Columnist's Story Prompts Investigation Into Government Leaks

Syndicated columnist Robert Novak's article in which he named a CIA operative has prompted a Department of Justice (DoJ) investigation into White House leaks and has raised ethical questions for journalists concerning the publication of classified information.

Novak's July 14, 2003 column in the *Washington Post* addressed the controversy surrounding the administration's assertion earlier that year that Iraq had attempted to purchase uranium from Niger in order to make weapons of mass destruction, an assertion that was later proven to be based on false information. Novak's column specifically noted the criticism of former U.S. ambassador Joseph Wilson who, upon returning from an investigatory trip to Niger, reported that the uranium purchase claim was specious, a belief he later detailed in

an op-ed article in *The New York Times*, and which was also critical of the Bush administration's pre-war intelligence.

Novak named Wilson's wife, Valerie Plame, as the CIA operative on weapons of mass destruction who had suggested that Wilson be sent to Niger in the first place. Novak has said he "learned the CIA operative's identity from two senior Bush administration officials in the course of preparing a piece on Wilson's conclusions," according to CNN.com (The story is available online at <http://www.cnn.com/2003/ALLPOLITICS/09/30/wilson.cia/index.html>).

Revealing the name of a covert agent is a federal crime under the Intelligence Identities Protection Act (50 USCS §§ 421 et seq.). Wilson has stated that he believes the leak was designed to discredit him for his open disapproval of the administration's pre-war intelligence such as that voiced in his op-ed article.

Novak has refused to name his sources for the story, telling the *Chicago-Sun Times*, "That would be the end of my journalistic career – reporters don't divulge sources." If Novak were to be called upon to testify as to the identity of his sources, he would invoke a "reporter's privilege" not to disclose information obtained during the course of their journalistic activities. The Supreme Court has not recognized such a privilege outright. But many courts have adopted tests balancing the reporter's privilege against the needs in a particular case. Generally, confidential information, such as Novak's unnamed source, receives greater protection than non-confidential information, such as edited portions of a broadcast news story.

Novak's disclosure has prompted a discussion in the media about journalistic ethics. An article featured on the Poynter Institute's web site entitled, "Take Three Steps to Avoid Future Novaks" proposes a series of questions a journalist must consider during the newsgathering process. Written by Poynter's Ethics Group Leader & Diversity Program Director Aly Colón, the article suggests that Novak, "might have benefited from a more rigorous decision-making process" before he published his column. One of the key questions Colón points to is whether or not publishing a name is essential to the story. Colón argues that journalists must juggle their obligation to publish a complete, comprehensive account while still bearing in mind that publishing confidential information might not do anything to enhance the story and could even compromise the interests of others. Colón writes, "Journalists who elicit sensitive information from sources need to review that information with them, making sure both the journalist and the source understand the consequences of divulging it."

Others have echoed Colón's view. *Editor & Publisher* quoted dean Orville Schell of the Graduate School of Journalism at the University of California, Berkeley, who stated, "It was and is unethical to finger somebody in intelligence, particularly when that person has nothing to do with the issue – she was simply a sacrificial lamb."

The criticism Novak has faced since the onset of the investigation illustrates the tension journalists face when trying to report the news accurately while still adhering to ethical guidelines. As a reporter, Novak apparently determined that the disclosure of Plame's identity was essential to the story, and yet would not endanger her in any way. To complicate matters, if Wilson's assertion that the disclosure was meant to harm him proves to be credible, some have argued that Novak was used as a tool of the government to discredit its opposition.

On December 30, as the *Bulletin* was going to press, Attorney General John Ashcroft recused himself from the leak investigation, giving rise to speculation that senior administration officials were involved in Plame's disclosure, according to *The Boston Globe*. Patrick Fitzgerald, a career prosecutor who is the U.S. attorney in Chicago, will be taking Ashcroft's place.

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Reporters' Privilege Update

Reporters Refuse to Reveal Sources in Spy Case

On Dec. 18, 2003, James Risen and Jeff Gerth, two reporters with *The New York Times*, defied a federal judge's order and refused to reveal their sources for a story concerning former nuclear scientist Wen Ho Lee. The two reporters may face contempt of court charges, which could include the imposition of fines, or jail time.

The story, published in *The New York Times* on March 6, 1999, concerned suspicions that Lee, who worked at Los Alamos laboratory in New Mexico, had leaked information to the Chinese regarding the miniaturization of warheads that could be launched towards multiple targets from a single warhead. In their original story, Risen and Gerth said that Paul Redmond, head of the CIA, was stunned at the news of the leak. "This is going to be as bad as the Rosenbergs," he reportedly said at hearing the news, a reference to Julius and Ethel Rosenberg, who were executed for treason after passing nuclear secrets to the Soviets in the 1950s.

Following the publication of Risen and Gerth's story, Lee was indicted on 59 felony counts for allegedly copying classified information onto computer tapes, and was kept in solitary confinement for nine months. But little evidence against him ever materialized, and Lee eventually pleaded guilty to only one charge of mishandling classified information about nuclear weapons.

After three years of pretrial discovery, Lee brought suit against the government under the Privacy Act (5 U.S.C. §552a(b)), alleging that personal information about him had been released by the government to the press. The information included Lee's employment history, his personal finances, and the results of lie detector tests. Five reporters, including Risen and Gerth, were issued subpoenas *duces tecum*, meaning that the reporters were required to bring any relevant material with them to testify.

The three other reporters are Robert Drogin of the *Los Angeles Times*, Josef Hebert of The Associated Press, and Pierre Thomas, who earlier worked for CNN, but now works for ABC News.

Each of the reporters filed motions to quash the subpoenas, but on Oct. 9, 2003, D.C. District Court Judge Thomas Penfield Jackson issued an order that the five reporters must reveal their government sources for the stories they published about Lee. Although the District of Columbia has a shield law, Jackson wrote that it does not apply, saying this case is a federal case and is ruled by federal law rather than local law. "Congress has never enacted a federal counterpart to the D.C. Shield Law, and [Lee's] sole cause of action in this case is predicated upon a federal statute creating both the [reporters'] duty to act and [Lee's] private right to enforce it in a federal district court."

Jackson also stated that Congress had never passed a federal shield law. Any national reporters privilege that might exist is based on *Branzburg v. Hayes*, 408 U.S. 665 (1972), Jackson wrote, a case which "acknowledged that 'news gathering is not without its First Amendment Protections' and left to the lower courts the task of deciding in individual cases when the interests of justice trumped a reporter's reasons for withholding information to protect news sources when summoned to testify."

Jackson cited a D.C. Circuit case, *Carey v. Hume*, 492 F.2d 631 (1974), where the court ruled that a reporter's "asserted claim to privilege should be judged on by its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony." Jackson also cited a second D.C. Circuit case, *Zerilli v. Smith*, 656 F.2d 705 (1981), writing, "the *Zerilli* court asserted that 'in the ordinary case the civil litigant's interest in disclosure should yield to the journalist's privilege.' However, if the information sought is 'of central importance' to the civil litigant's case, reporters may be compelled to disclose their sources, but 'only after the litigant has shown that he has exhausted every reasonable alternative source of information.'"

Jackson stated that Lee has "diligently [pursued] direct proof that officers or employees of one or more defendant agencies were the original disseminators of the information about him to the news media." Jackson found that the 20 depositions taken by Lee of the government officials quoted in Risen's and Gerth's story were all inconclusive regarding the identity of the individual(s) who gave the reporters information about Lee.

Lee's first requests to the Department of Justice for information were answered with objections in May 2001, calling his requests "over-broad, oppressive, duplicative," as well as "privileged" and that there were too many people to interview. Jackson cited the Department of Energy's (DOE) response for information, which read, "DOE responds that it has made reasonable inquiry and that information known or readily obtainable is insufficient for DOE to admit or deny the truth of the requested information." Jackson characterized the DOE's response as "typical."

Jackson concluded, "[O]nly the journalists can testify as to whether defendants were the sources for the various news stories." Once again citing *Zerilli*, Jackson continued, "The Court reminds the journalists that the *Zerilli* exhaustion-of-alternative sources requires only that all 'reasonable' sources of evidence be tapped. It does not require proof positive that the knowledge exists nowhere else on earth but in the minds of the journalists and their anonymous confidants."

At the time the *Bulletin* went to press, there was no additional information as to whether Risen and Gerth would be facing contempt of court charges.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Reporters' Privilege Update

FBI Obtains Reporters' Notes in Homeless Hacker Case

Adrian Lamo, a 22-year-old Californian, hacked into the intranet computer system at *The New York Times* in 2002, where he gained access to the personal information of well-known contributors to the paper's op-ed section. He also allegedly ran up a large tab by creating fraudulent accounts on the costly Lexis-Nexis news database.

As criminal charges against Lamo moved forward, other media outlets faced a potentially greater invasion than the one suffered by the *Times*: government subpoenas seeking reporters' notes of interviews with the so-called "Homeless Hacker." The FBI's efforts to obtain reporters' notes was short-lived, however. On Oct. 7, 2003, less than a month after the agency had sent letters demanding that reporters preserve their notes of interviews with Lamo, the FBI apologized and asked that reporters "voluntarily" preserve records of their interviews, according to an Oct. 8, 2003, Associated Press report.

Lamo turned himself in shortly after a warrant was issued for his arrest and was charged Sept. 9, 2003 for the *Times* break-in. He also has publicly admitted breaking into the systems of other large corporations, including Microsoft, according to a Sept. 10, 2003, report in *The New York Times*. Once inside the *Times*' system, prosecutors charge that Lamo had access to personal information, including the Social Security numbers, of contributors, including former President Jimmy Carter. Lamo allegedly also managed to create five separate Lexis-Nexis accounts and accumulated more than \$300,000 in charges for viewing news archives on the electronic service.

Ten days after Lamo was charged, the FBI notified 13 reporters about possible subpoenas for notes regarding Lamo's hacking of the *Times*' computer system, apparently in an effort to gather additional evidence. Letters went to staff reporters at the Associated Press and Wired News, among other outlets, according to an Oct. 1, 2003 report in *Editor & Publisher Online*. FBI agent Christine Howard told Wired News that any reporters who had contact with Lamo should expect to be contacted by the bureau, according to a Sept. 22, 2003 Wired News report.

Authorities have previously attempted to subpoena reporters' notes regarding Lamo, who has sought publicity for his hacking exploits in the past, Wired News stated. An MSNBC story on Lamo prompted demands for

reporters' notes in 2002, according to Wired News. The demand was dropped in May 2002 after it was found to violate the Department of Justice (DoJ) Attorney General's guidelines (28 C.F.R. 50.10).

The DoJ guidelines state that a reporter's notes are subject to subpoena only when "the information sought is essential to a successful investigation – particularly with reference to directly establishing guilt or innocence." Further, a subpoena may only be issued only after the department has exhausted efforts to gather equivalent information from non-media sources, according to the Wired News report. Moreover, "guidelines stipulate that the feds have to negotiate with the news media before they can even contemplate sending out a subpoena," the report stated.

Lee Tien, an attorney with the Electronic Frontier Foundation, told Wired News that, in view of the current political climate, the DoJ's action was not surprising.

"This administration has been less than solicitous of the First Amendment," Tien said. "So it should come as no surprise that they're treating journalists' notes as just another source of information."

According to a Sept. 26, 2003 report by the Reporters Committee for Freedom of the Press (RCFP), the letters sent to reporters by the FBI stated that the order was pursuant to the Electronic Communications Transactional Records Act, which was modified by the USA PATRIOT Act. The act applies to "providers of electronic communication service(s)," according to the RCFP report. "It is unclear," the RCFP report noted, "why the FBI has chosen to include reporters or their employers in the category of 'providers of electronic communication.'"

News organizations applauded the FBI's decision, noting that the FBI acknowledged that it had failed to follow proper procedures in demanding the interview notes. The *Detroit Free Press*, in an unsigned October 13 editorial, said the debate over law enforcement access to reporters' notes went to the heart of the First Amendment. "The ability of the media to function freely, fulfilling its watchdog role over the institutions of this society, would be greatly hampered if the government had the at-will ability suggested in the FBI letter to seize a reporter's notes. Certainly sources, particularly the many whistle-blowers who turn to the media, would be intimidated."

—DOUG PETERS
SILHA FELLOW

Reporters' Privilege Update

McKevitt v. Pallasch

On August 8, 2003, a three-judge panel of the U.S. Court of Appeals (7th Cir.), ruling in *McKevitt v. Pallasch*, 339 F.3d 530 (2003), ordered Abdon Pallasch and Robert C. Herguth of the *Chicago Sun-Times* and Flynn McRoberts of the *Chicago Tribune* to turn over their taped conversations with an FBI mole, David Rupert, who had infiltrated the Irish terrorist group the Real IRA.

The reporters had contracted with Rupert to write his biography. The interview tapes were sought by the defense counsel for Michael McKevitt, an Irish national who was standing trial in Ireland for membership in the Real IRA, a banned organization, and for directing terrorism. McKevitt hoped that the tapes would assist in cross-examining Rupert, a witness for the prosecution.

The reporters claimed that the tapes were protected from compelled disclosure by a federal common law reporter's privilege grounded in the First Amendment. The appeals court's opinion, written by Circuit Judge Richard A. Posner, flatly rejects that argument, stating, "We do not see why there needs to be special criteria merely because the possessor of documents or other evidence sought is a journalist."

The Seventh Circuit acknowledged the unsettled judicial history of the reporter's privilege doctrine since *Branzburg v. Hayes*, 408 U.S. 665 (1972), the landmark Supreme Court opinion on the issue. But the Seventh Circuit court distinguished this case from *Branzburg*. In *Branzburg*, the reporters sought to protect the

confidential identities of their sources. In *McKevitt*, however, the panel opined, “There is no conceivable interest in confidentiality in the present case. Not only is the source (Rupert) known, but he has indicated that he does not object to the disclosure of the tapes of his interviews to McKevitt.” The court continued, “When the information in the reporter’s possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure.”

The panel opinion found that the reporters, rather than trying to protect the confidentiality of their sources, were instead trying to protect against the dissemination and misappropriation of proprietary information that they hoped to include in Rupert’s biography. Thus, the court reasoned that their First Amendment argument failed.

The Silha Center, along with many of the nation’s leading news and publishing organizations (including ABC, the American Society of Newspaper Editors, the AP, CBS, McGraw-Hill, NBC, *The New York Times*, *Newsweek*, *Time*, the Tribune Company, TBS, the *Washington Post*, the Society of Professional Journalists, NPR, and the Reporters Committee for Freedom of the Press), submitted an *amici curiae* brief urging the Seventh Circuit to rehear the case *en banc*. The brief argued that a waiver of the privilege by a source should not eviscerate the reporter’s privilege: “[T]he reporter’s privilege belongs to the reporter, not the source, and cannot be waived by the source.”

On October 20, the full Court of Appeals declined to rehear the case. Pallasch has stated that the reporters do not intend to petition the U.S. Supreme Court for review of the case. He stated, “We would rather have this be the law in [the] three states [of the Seventh Circuit, Illinois, Indiana and Wisconsin,] as opposed to all fifty.”

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT

Reporters’ Privilege Update

Tripp v. Department of Defense

Linda Tripp, whose taped conversations with Monica Lewinsky precipitated the impeachment of President Clinton, on Oct. 31, 2003, settled her claims against her former employer, the Department of Defense (DoD), for releasing personal information about her. Tripp’s settlements totaled \$595,000.

Tripp’s lawsuits arose from two events. In 1998, *The New Yorker*, acting on information provided anonymously by Pentagon sources, reported that Tripp had failed to disclose to an arrest for grand larceny while a minor on her DoD security application. In 2000, *The Stars and Stripes*, an independent newspaper published by the DoD, reported that Tripp was seeking a job at the Department’s George C. Marshall European Center for Security Studies in Garmisch-Partenkirchen, Germany, also citing unnamed sources in its report. Tripp was not hired for that position, but worked with the DoD through 2001, when she was fired after not following the traditional practice of political appointees of resigning at the end of a presidential administration.

Tripp’s Privacy Act claim

Tripp sued the DoD under the Privacy Act, 5 U.S.C. § 552a, the federal law that prohibits the government from releasing certain personal information about individuals without their consent. After settling her claim, Tripp declared, “This is a long awaited first step toward holding the government accountable under the Privacy Act.” She continued, “The government should never be permitted to use Privacy Act protected information to discredit a political opponent.”

Reporters’ privilege blocks Tripp’s *Stars and Stripes* subpoena

Prior to settling the suit, Tripp’s attempts to obtain the names of the sources of the *Stars and Stripes* report failed. The District Court for the District of Columbia, in *Tripp v. Dep’t of Defense*, 284 F.Supp.2d 50 (D.D.C. 2003), held for the DoD. The court, in an opinion by District Judge Emmet Sullivan, stated that “[u]nder the First Amendment, reporters enjoy a qualified privilege against compelled disclosure of sources and information obtained through news gathering activities.”

Tripp had argued that the *Stars and Stripes* could not avail itself of reporters' privilege because the newspaper is a government-controlled internal information organization and not a part of the "press," warranting First Amendment protection. However, the U.S. Supreme Court has ruled in *Lovell v. City of Griffin*, 303 U.S. 444 (1938), that "press" should be defined broadly to include "every sort of publication which affords a vehicle of information and opinion." In addition, various courts have referred to *Stars and Stripes* as a newspaper or a part of the media. Importantly, the Congress, in a 1989 report by the House of Representatives Committee on Armed Services stated that articles in *Stars and Stripes* should "enjoy the full protection of the First Amendment, and military personnel on the frontiers of freedom must enjoy their first amendment rights."

Citing other cases and legislative language regarding *Stars and Stripes*, the D.C. court found that the publication and its employees qualify for First Amendment protection including reporter's privilege. Further, the court found that Tripp did not try hard enough to uncover the desired information from sources other than the *Stars and Stripes*, and did not exhaust all reasonable alternatives.

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT

Journalists Grapple with Issues of Ethics

Media Pool Party to Presidential Plot to Visit Troops

On Thanksgiving Day, President Bush took a top-secret flight to Baghdad to celebrate the holiday with U. S. troops. According to *The Washington Post's* Mike Allen, one of the pool reporters who accompanied the president, the surprise trip was "aimed at boosting soldiers' morale and steadying Bush's political standing." Although plans for the visit were weeks old, only a few of Bush's closest aides had been informed of the trip in advance. And it was mere hours before the flight that a small group of reporters and photographers – about half the size of the rotating pool of journalists that is usually permitted aboard Air Force One – were told that they would be spending the holiday in Iraq.

Previously, according to the *Post's* Howard Kurtz, White House officials had told reporters that Bush would be spending Thanksgiving at his Texas ranch and would be speaking to soldiers in Iraq via telephone. Deputy press secretary Claire Buchan even detailed the President's holiday dinner menu at a briefing on November 26. Although some journalists understood the reason for the deception, others claimed that more journalists should have been informed of the truth.

"In this case, it's justified," Bob Schieffer, CBS's chief Washington correspondent, was quoted as saying in Kurtz's November 28 article. "It was extremely important for the president to demonstrate that he's willing to go where those young men and women he sent over there have gone. If reporters "were going with a military operation in Baghdad, they'd keep it off the record."

The *Wall Street Journal's* Dorothy Rabinowitz agreed. Claiming that journalists routinely keep secrets during wartime, she wrote on December 2, "Most of the press, it should be said, understood perfectly well that there were good reasons the security requirements for the president's trip were what they were."

On the other hand, Philip Taubman, Washington bureau chief for *The New York Times*, was quoted by Kurtz as saying that "in this day and age, there should have been a way to take more reporters. People are perfectly capable of maintaining a confidence for security reasons. It's a bad precedent."

Indeed, although journalists are usually selected to travel with the president through a routine rotation, Kurtz noted that "news executives were uncertain whether standard procedures had been followed" with regard to the journalists chosen to go on Baghdad trip.

Kurtz quoted Kathryn Kross, CNN's Washington bureau chief, as saying, "Apparently the White House put together its own group of people to accompany the president on this trip, and we're real interested to learn their reasons for doing that."

In addition to lying to much of the press regarding the President's whereabouts, White House officials also required those journalists who were informed to keep mum. According to Allen, the trip's pool reporter, journalists aboard Air Force One were asked to remove the batteries from their cell phones so movements could not be tracked. Even though many were en route to relatives' homes for the holiday, they were instructed not to tell family members or employers about the trip. Finally, reporters were not permitted to file stories until Air Force One was safely above 10,000 feet on its return trip to Washington. Allen's pool report is available on *Editor & Publisher's* website at http://www.editorandpublisher.com/editorandpublisher/headlines/article_display.jsp?vnu_content_id=2042956.

"Although journalists routinely keep secret details of military operations, as they did during the war in Iraq, it is highly unusual for them not to reveal a major presidential trip overseas," wrote Kurtz on November 28. By keeping the plans secret, those journalists who went on the trip unwittingly allowed the news outlets with which they were affiliated to provide information to the public that the pool reporters knew to be incorrect.

Some, like the *Post's* Dana Milbank, thought the agreed secrecy was appropriate. "There's plenty of room to debate whether the journalists on the flight to Baghdad should have been allowed to tell their editors and their families, but I see nothing wrong with having information on an embargoed basis in order to protect the security of the president and the reporters themselves. The alternative would have been to skip the flight entirely."

However, Tom Rosenstiel, director of the Project for Excellence in Journalism, was critical of the reporters who did not reveal the secret plans. "That's just not kosher," he was quoted as saying in Kurtz's article. "Reporters are in the business of telling the truth. They can't decide it's okay to lie sometimes because it serves a larger truth or good cause. . . . What reporters have done by going along with this is to help Bush politically."

Practical objections aside, perhaps the broader criticism is that the trip became a story in the first place. Jay Rosen of New York University wrote on his Web log "Press Think" on December 3 that events such as Bush's secret trip are "co-equal with the publicity they generate and could not exist without that publicity." After all, he claimed, if the secret had gotten out, the trip would have been cancelled, and the "news" would have ceased to exist.

"These decisions by journalists [to keep the flight a secret] were not incidental to Bush's decision to go but integral to it," Rosen wrote. "Would the trip have made sense, would the danger have been justified, if reporters and camera crews were not taken along? The answer is clearly no. But this means that the press is part of the presidency, an observation that, while true enough, makes it harder to cover the presidency as an independently existing thing." The article is available online at http://journalism.nyu.edu/pubzone/weblogs/pressthink/2003/12/03/bush_trip.html.

Rick MacArthur, publisher of *Harper's Magazine*, said in a radio interview with Amy Goodman of "Democracy Now!" that "The proper thing to do in this case [would have been] to refuse the secrecy agreement and say we're not going to be participants in a photo opportunity . . . and if that aborts the trip, well, it aborts the trip."

But the University of Missouri's Geneva Overholser wrote on December 4, "If the White House press refused to participate in every photo opportunity that advanced a president's political agenda, they'd be out of business. Half of what they DO is photo ops. It's just that this one was in Baghdad, not the Rose Garden (author's emphasis)." The article is available online at <http://www.poynter.org/column.asp?id=54&aid=56555>.

“Cynics may claim that the visit to Iraq was only ‘theater,’ without any real strategic significance, but this misses the point entirely,” wrote *The Wall Street Journal*’s Max Boot on December 1. “A large part of modern warfare must be waged in the public arena. The battle over symbols and images can be as important as the battle for any hill or town.”

Lou Boccardi, recently retired president of the Associated Press, posted this response to Rosen’s online article: “We ought to be a little less frenzied about the Bush Baghdad journey. It doesn’t represent the end of journalism as we know it. Nor is it the last time we’ll all turn out to cover something important that might also have a political value to the player(s). The secrecy was reasonable. . . .If presidential ‘disappearances’ start to become routine, then we have a different issue to deal with and I’m sure the press en masse would rise up, and properly so. [But] this was one of a kind.”

—ELIZABETH JONES
SILHA RESEARCH ASSISTANT

Journalists Grapple with Issues of Ethics

Jackson Interview Strikes Sparks Between CBS, *The New York Times*

A *New York Times* article written by reporter Sharon Waxman and published on Dec. 31, 2003 has sparked a controversy between two respected news media organizations – *The Times* and CBS News. In her article, Waxman stated that the CBS news magazine “60 Minutes” had struck multi-million dollar deal to do an interview with entertainer Michael Jackson. It is widely considered unethical practice to pay anyone to do a news interview.

The deal allegedly involved airing an entertainment special with Jackson in November 2001, with the option to show a second special at a later date. A deal for \$5 million was struck, and Jackson was advanced \$1.5 million, the *Times* reported.

Ed Bradley of “60 Minutes” had gone to Jackson’s home in February 2003 to do an interview with the pop star, but Jackson refused to go on camera until he received the balance of the \$5 million. According to the *Los Angeles Times*, Bradley waited for two days, and finally left without the interview. Jackson reportedly had spoken to actor Marlon Brando, who had advised him not to do the interview with Bradley.

The second special, featuring Jackson’s newest album, “Number Ones,” was made following Bradley’s cancelled interview. The strategy was to air the special before Christmas to boost album sales, according to a story in the *Washington Post*. But when Jackson was charged with seven counts of child molestation, Waxman stated that CBS executives delayed its broadcast, deciding to show it only after Jackson agreed to appear on one of its news programs to address the accusations.

On Christmas Day 2003, Bradley interviewed Jackson once, according to Waxman, the singer agreed to a deal where he would be paid another \$1 million. The interview was broadcast on December 28. The previously postponed entertainment special was then scheduled for broadcast on Friday, January 2.

A business associate of Jackson’s, speaking on the condition of anonymity, told Waxman that “In essence” CBS paid Jackson for the [Christmas Day] interview, “but they didn’t pay him out of the ‘60 Minutes’ budget; they paid him from the entertainment budget, and CBS just shifts around the money internally. That way ‘60 Minutes’ can say ‘60 Minutes’ didn’t pay for the interview.”

Waxman stated that the Jackson associate had spoken out because he had been denied access to the singer since the arrival of Leonard Muhammad, a senior official in the Nation of Islam, who had recently been added to Jackson’s group of advisors. The associate also said that he was to have been paid a commission for negotiating the deal with CBS, but had not yet received the money. The associate was later identified as Dieter Wiesner, who, according to a column posted on foxnews.com, is the owner of legal sex clubs in Germany.

According to the *Daily News* (New York), CBS issued a statement calling *The New York Times* story “misleading and false,” and said that Waxman’s story was based on a “single admittedly disgruntled source within the Jackson camp.” Charles Koppelman, identified by the *Daily News* as an advisor of Jackson, said that the entertainer received no payment for his interview with Bradley. CBS has also denied paying Jackson additional money above what was agreed upon for the entertainment special, according to the *Daily News*. *The New York Times* responded with a statement saying their story was “balanced and accurate.”

Waxman has come under attack for her reporting by Roger Friedman of Fox News, who claimed in a posting on January 2 that she took information from stories posted on foxnews.com and from Ian Drew, a reporter for *US Weekly*, for her own story on Jackson. According to Friedman, Drew’s stories contained inaccuracies, including a claim that Johnnie Cochran had taken over as Jackson’s attorney in the child molestation case. “This is whom Waxman relied on for her reporting,” Friedman wrote.

Friedman further accused Waxman of other missteps, saying that a story appearing in *The New York Times* two weeks earlier had contained a quote that was taken out of context from an interview with Harvey Weinstein, the head of Disney’s subsidiary, Miramax. Weinstein reportedly said, “All the great executives have been driven from the company. I think there is no camaraderie anymore . . .” Weinstein was talking about working conditions at Disney in 1994, but, according to Friedman, Waxman framed the quote as though Weinstein were talking about Roy Disney’s resignation from Disney’s board only three weeks earlier.

“So throw Waxman’s name on the same list as those of disgraced reporters Jayson Blair, Lynette Holloway, Rick Bragg, Bernard Weinraub, Charlie LeDuff and who know who else at the Times,” Friedman concluded. His article is available online at www.foxnews.com.

In response to Friedman’s accusations, Waxman told *The New York Post*, “My story is accurate. The sourcing is solid and I’m not interested in responding to specious reporting about my sources, who I am determined to protect. Roger Friedman is clearly not the kind of reporter to check his stories and he never called me. His reporting is inaccurate.”

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Journalists Grapple with Issues of Ethics

Cronkite Faces Lawsuit for Breach of Contract

Legendary broadcaster Walter Cronkite faces a lawsuit for breach of contract after backing out of a deal with a Florida production company to appear in what Cronkite thought were educational video segments that were to air on public television stations.

After determining that the segments were more commercial than educational, Cronkite backed out of the deal last May, according to a report in *The New York Times*. “Mr. Cronkite does not do product endorsements, and will not,” said Marlene Adler, Cronkite’s chief of staff.

Cronkite’s decision prompted the production company, WJMK Inc., to file a federal lawsuit in New York. The suit, seeking \$75,000 in damages, was filed September 17.

Cronkite and CNN anchor Aaron Brown were hired by WJMK to replace longtime “60 Minutes” broadcaster Morley Safer as hosts of the “American Medical Review” video segments. Safer cut his ties with the company in Spring 2003, and just before Cronkite’s announcement, Safer demanded that the company stop using his video segments in connection with the broadcasts. Safer’s attorney said his client had repeatedly complained to WJMK about the commercial nature of the segments it produced, according to *The New York Times* report.

CNN's Brown backed out of his deal with WJMK on May 7, the same day Safer wrote to WJMK demanding that his video segments no longer be used. Cronkite opted out of his deal the next day.

According to the *Times*, health care companies paid WJMK \$15,000 to have their products featured in the video segments. The journalists were to provide general introductions to the video segments.

After the initial *Times* report was published, a May 12, 2003, editorial in *The Christian Science Monitor* called the use of well-known journalists as infomercial pitchmen a "double-whammy to credibility." The Monitor lauded the decisions of some public television stations not to air the video segments and warned local stations to be vigilant in reviewing material submitted for broadcast.

"Both journalistic and advertising ethics require that the distinction between selling soap or drugs, and delivering the news, remains clear," the *Monitor's* editorial said. "Local stations must more thoroughly examine the nature of material they receive, and who pays for it, before deciding to put such prepackaged programming on the air as news."

Cronkite, often called "the most trusted man in America" for his rapport with viewers during his years as a news anchor, says that he was told he would be involved in filming educational segments, not infomercials, according to a Sept. 18, 2003 Associated Press report.

—DOUG PETERS
SILHA FELLOW

Journalists Grapple with Issues of Ethics

Jayson Blair Update

Ex-*New York Times* reporter Jayson Blair could have been prosecuted for his dishonest and inaccurate reporting if the *Times* had chosen to pursue the case with federal prosecutors, according to an article in Stanford Law School's Fall 2003 issue of *Stanford Lawyer*. Blair resigned from the *Times* on May 1, 2003, after he was found to have plagiarized material and falsified information in several dozen stories. *Times* publisher Arthur Ochs Sulzberger, Jr., called it "a huge black eye" for the publication, as the incident resulted in the resignation of two top *Times* editors and raised questions about the current condition of the journalism profession. (See "Jayson Blair and *The New York Times*" and "Newspapers Face the 'Blair Effect'" in the Summer 2003 issue of the *Silha Bulletin*.)

In a May 15, 2003 report by the *New York Daily News*, Columbia Law Professor John Coffee claimed that Blair could have been charged with mail fraud, a federal felony. Mail fraud law (18 U.S.C. §1343) states that an employee should provide "honest services" to his or her employer. According to *Stanford Lawyer*, Blair certainly "deprived the *Times* of its right to honest services." The article states that under the current mail fraud law, an individual can be prosecuted "for any act that might constitute an intentional breach of a contract, or a violation of a workplace rule."

Coffee was quoted in the *Daily News* as saying, "A reporter who never interviews the sources he purports to interview and never visits the places he purports to visit falls so far short of providing an honest product that he can be seen as defrauding his employer within the statute."

Blair would have been the second reporter to be prosecuted for mail fraud allegedly committed in the course of his employment, according to the *Daily News*. R. Foster Winans, a former financial columnist for *The Wall Street Journal*, was charged under the mail fraud law and served nine months in prison. (See *Carpenter v. United States*, 484 U.S. 19 (1987)). Winans was convicted of insider trading after leaking information from his columns to stockbrokers before the columns were published. The stockbrokers then traded stocks by estimating how the information, once published, would affect stock prices. Winans received some of the profits.

Because the *Times* chose not to cooperate with federal prosecutors, no charges were made against Blair. Instead he is “getting the Hollywood treatment,” according to an October 15 article posted by *Editor & Publisher Online*. Showtime is currently planning a movie about Blair’s tumultuous career that, according to the Associated Press, will air on the pay cable channel sometime in late 2004 or early 2005.

—ELIZABETH JONES
SILHA RESEARCH ASSISTANT

Journalists Grapple with Issues of Ethics

U.S. Supreme Court Refuses to Review *Rossignol v. Voorhaar*

The U.S. Supreme Court has refused to review a federal appeals court ruling that the government officials violate the Constitution when they make bulk purchases of newspapers to prevent critical stories from reaching the public. The Supreme Court’s Oct. 7, 2003, decision in *Rossignol v. Voorhaar*, 124 S.Ct. 135 (2003), effectively ends four years of litigation in the case.

The appeals court ruling was announced on Jan. 16, 2003, in *Rossignol v. Voorhaar*, 316 F.3d 516 (4th Cir. 2003). (See “Local Governments Stifle the Press: Buying in Bulk Violates the Constitution” in the Winter 2003 *Silha Bulletin*).

The case began after several off-duty sheriff’s deputies in St. Mary’s County, Md., decided – with the sheriff’s knowledge and approval – to sweep the county in the early hours of election day 1998, purchasing all available copies of *St. Mary’s Today*, a local newspaper published by Kenneth Rossignol. Rossignol’s paper had a history of highly critical coverage of the sheriff’s office. That day’s issue contained a story revealing that a friend of the sheriff and candidate for county attorney had once been convicted of unlawful carnal knowledge of a minor.

The sheriff, Richard Voorhaar, contributed \$500 to the bulk purchase, and deputies spent the early morning hours of election day depleting newsboxes and buying up copies distributed to county convenience stores and other outlets. By 7 a.m., according to the appeals court decision, the deputies had purchased at least 1,300 copies of the newspaper, about 20 percent of the paper’s total press run.

Rossignol, the publisher, sued, alleging that the sheriff and his deputies violated Rossignol’s Constitutional rights under the First Amendment. The district court dismissed the lawsuit, saying that the deputies were acting as private citizens in making the purchases, not as government agents. Because the deputies were not acting “under color of law,” the court ruled, no Constitutional violation occurred.

The Fourth Circuit, in a panel decision written by Chief Judge Harvie Wilkinson, strongly disagreed with the district court’s decision. Because the deputies were acting, in part, to prevent criticisms of themselves in their official roles, Wilkinson wrote, their actions “are more fairly attributable to the state.” The panel found not only that the deputies were acting as government officials in making the purchases, but that their actions “clearly contravened the most elemental tenets of First Amendment law.”

Having found both government action and a Constitutional violation, the appeals court then remanded the case to the district court, basically ordering the lower court to rule in favor of the newspaper. Hoping to avoid that result, the deputies on Jan. 28, 2003, petitioned for *en banc* rehearing by the entire Fourth Circuit. The Fourth Circuit denied rehearing on March 12, 2003, and Voorhaar filed a petition asking the U.S. Supreme Court to hear the case. The Supreme Court denied the request in an order filed October 6.

—DOUG PETERS
SILHA FELLOW

Roundup: Ethical Issues in the Media

The following is a collection of recent ethical issues involving reporters, editors, and other media professionals:

PLAGIARISM, FABRICATION, AND ERRORS

Catherine Fitzpatrick: *Milwaukee Journal Sentinel*

In June 2003, Milwaukee Journal Sentinel fashion reporter Catherine Fitzpatrick wrote a lighthearted feature on the history of the bikini bathing suit. Later that month, according to Milwaukee Magazine, an editor from the Waukesha Freeman noticed some striking similarities between Fitzpatrick's report and an anonymous Internet story that had been appearing for years on such web sites as bikiniatoll.com, vipmodel.com, and absolutebikini.com. On June 26, Journal Sentinel editors suspended Fitzpatrick and published an editor's note informing readers that "much of the reporting and writing in [Fitzpatrick's story] came from an Internet report whose authorship is uncertain."

Unidentified newsroom sources told Milwaukee Magazine that a subsequent investigation into Fitzpatrick's work revealed at least six more articles in which sentences that had been quoted word for word from other sources were not attributed. But Journal Sentinel editors did not initially publicize these additional occurrences. Instead, Fitzpatrick accepted a confidential settlement offered by the newspaper and agreed to resign.

Milwaukee Magazine reporter Peter Robertson wrote that although editors did eventually make public Fitzpatrick's additional inaccuracies on August 3, neither Fitzpatrick's name nor the word "plagiarism" was mentioned, and no link was made between these cases and the earlier editor's note. "Editors now face serious questions about whether they attempted to cover up the scope of the problem," Robertson claimed.

Lynette Holloway: *The New York Times*

New York Times reporter Lynette Holloway resigned from the newspaper in September 2003, shortly after the Jayson Blair scandal, after "dozens of errors" were discovered in her stories. According to the *New York Post*, Holloway's mistakes were first noticed while she worked for the metropolitan desk and continued to be observed even after she was promoted to the media section. Her error-ridden July 7, 2003, story about music executive Steve Gottlieb, the founder of TWT Records, was the last time Holloway's byline appeared in the *Times*.

The inaccuracies in the Gottlieb story were so extensive, according to the *Post*, that the *Times* subsequently ran a 2,175-word story to correct the errors on July 14. That story was written by another reporter.

Holloway left more quietly than did Blair. *Times* spokeswoman Catherine Mathis was quoted in the *New York Post* as saying only that Holloway and the *Times* "reached an amicable settlement."

Jim Van Vliet: *The Sacramento Bee*

Jim Van Vliet, a longtime sports reporter for *The Sacramento Bee*, was fired after he claimed to have filed a story about an Aug. 6, 2003, San Francisco Giants game from the stadium, but actually watched the game elsewhere on television, according to Sports Editor Armando Acuna. A statement from Acuna that announced Van Vliet's firing was printed on the front page of the August 20 sports section and stated that the reporter had "violated basic journalistic values and ethics as practiced by *The Bee*."

Further, the statement said Van Vliet had also used unattributed quotes from other news sources. In an August 20 report by the Associated Press, Acuna said that *The Bee* was checking that Van Vliet's other stories had been correctly attributed.

Bee Ombudsman Tony Marcano wrote in an August 24 article, "Some readers may ask, What's the big deal? The game story that Van Vliet wrote was accurate – he got the score right, he highlighted the turning points of the game, and he quoted some players. What difference does it make if he watched the game on TV? . . . It wasn't a matter of accuracy, but credibility. Readers have to be able to trust every word that's in an article, dateline included."

The Associated Press stated that Van Vliet had been working at the paper since 1969, when he began as a high school correspondent.

James Forlong: Sky News

James Forlong, a former correspondent with Britain's Sky News, committed suicide at his home on Oct. 4, 2003. According to the (London) *Daily Telegraph*, Forlong had recently been fired for fabricating a report about the war in Iraq.

James Forlong was embedded aboard the U.S.S. Kitty Hawk during the Iraq war. According to a CNN.com article, he was suspended in July after a BBC documentary series about the war displayed his false footage. Scenes purported to be live action shots of a missile launch aboard a submarine were actually reconstructed or archived images.

Forlong resigned soon after the documentary aired and admitted publicly at the time that "in ten years of unblemished service with the company, [it was] a single lapse of judgment."

An October 6 BBC News report quoted his wife, Elaine, as saying that "James had been shattered by the recent blow to his career as a journalist."

CONFLICT OF INTEREST

Eric D. Snider: Provo Daily Herald

Provo (Utah) *Daily Herald* reporter Eric D. Snider was fired in August 2003 after failing to reveal his personal involvement in a story he wrote August 8, the Associated Press reported. Snider had worked for the *Herald* for six years, according to *The Salt Lake Tribune*.

The Associated Press report stated that Snider's story discussed the closing of a local theater production of Neil Simon's play, "Rumors." Publisher Samuel French, Inc. had been told that the local producers had deleted profanities from the script. Such changes violate copyright laws, and after Samuel French told Simon about the script alterations, Simon did not consent to the requested modifications. Producers were not willing to include the profanities, so the play was forced to close early.

Snider wrote, "How Samuel French learned of the alterations is a mystery. . . ." But Snider himself was one of the tipsters, having made an anonymous call to the publisher to ask about whether the script changes would be legal. Snider knew that another *Herald* staffer, who happened to be performing in "Rumors," had also called the publisher. It was through these two phone calls that Samuel French became aware of the deletions to the script and notified Simon, according to *The Salt Lake Tribune*. In a statement written on Snider's personal website (available online at <http://www.ericdsnider.com>), he claimed that Samuel French "said they were acting on info from Simon's lawyer, not from an anonymous tipster. All of this led me to believe that though I had spoken with them, it was not my conversation that had led to the play closing." As a result, Snider did not admit his involvement to reporters until after the story was published.

The Poynter Institute's Bob Steele was quoted in a *Salt Lake Tribune* article as saying that Snider's story was unfair to readers and to those involved with the play because of his "specific and significant involvement in the story. He supplied the tip that led to the copyright action, which . . . led to him writing about it."

Donna Reed: Tampa Tribune

Since July 2003, the *Tampa Tribune* has published more than 30 stories about a local chemical factory and its effect on pollution and public health without disclosing that the *Tribune's* managing editor Donna Reed is married to a man that was laid off from the factory in 2002, according to the *St. Petersburg Times*. Florida health officials had submitted a report to federal officials in June on health problems resulting from the

factory's production of phosphate into a supplement for animal feed. Federal officials ordered a year-long investigation, which is currently underway, according to the *St. Petersburg Times*.

For months, *Tampa Tribune* reporters wrote about the Coronet Industries factory in stories that, according to the September 24 *St. Petersburg Times* report, "detailed the plant's checkered environmental record, recounted heart-wrenching tales of cancer victims who blame Coronet's pollution for their illnesses, and interviewed former employees who say company managers told them to illegally dump toxic materials." The *St. Petersburg Times* called the Coronet story "one of the *Tampa Tribune*'s biggest stories of the year."

Reed's husband, James, was manager of plant logistics and manpower planning at the Coronet Industries factory before he was laid off due to downsizing. Despite their ties to the factory, both denied giving any information to *Tampa Tribune* reporters.

Tampa Tribune publisher Gil Thelen told the *St. Petersburg Times*, "To say we were tough on Coronet because Jim used to work there is a real stretch." But Louis Hodges, the Knight Professor Emeritus of Ethics in Journalism at Washington & Lee University in Virginia, was quoted in the *St. Petersburg Times* story as saying, "The more transparent a news organization can be, the more credibility" it has.

Jeffrey Krasner: *Boston Globe*

A *Boston Globe* reporter whose pro-union sign was displayed in front of cable television cameras in September 2003, was placed on one-week unpaid suspension, according to the *Boston Herald*.

As New England Cable News recorded a broadcast news segment in the *Globe*'s newsroom, the sign posted at business reporter Jeffrey Krasner's desk was visible in the background. The sign "took aim at stalled contract talks," according to the *Herald*. It read, "My standard of living eroding daily," deriding the *Globe*'s advertising slogan, "Your world unfolding daily."

The *Boston Business Journal* reported on September 4 that the sign referred to the ongoing contract negotiations between the *Globe* and the union that represents *Globe* employees, the Boston Newspaper Guild.

Although newspaper employees are entitled to support their union, spokesman B. Maynard Scarborough told the *Herald*, such support should not interfere with media content.

DISCLOSURE OF NAMES

Chicago Sun-Times

The *Chicago Sun-Times* chose to identify a Chicago Cubs fan who interfered with a Cub fielder's attempt to catch a foul ball during Game 6 of the National League Championship Series on Oct. 14, 2003. After the Cubs went on to lose the game, emotional fans angrily blamed the individual who deflected the ball, claiming that if the ball had instead been caught by Cub player Moises Alou, it might have led to a win that would have sent the Cubs to their first World Series since 1945, *Editor & Publisher Online* reported.

According to *Newsweek*'s Seth Mnookin, the fan had received death threats from others in the stands before the game was even over. Security had to escort the fan from Wrigley Field. The next day, a story in the *Sun-Times* identified the fan as 26-year-old Steven Bartman.

"It is the biggest news story in town and this is Chicago," *Sun-Times* Editor-in-Chief Michael Cooke told *Editor & Publisher Online*. "We talked about it for a little while and came down on the side of publishing it. It was not 100 to 0, but the decision was made and on we go."

Mnookin disagreed with the decision, writing on October 16 that "the *Sun-Times* helped further the notion that somehow this one person had ruined the Cubs season. But it was the Cubs who ruined their season . . . The name of the Cubs fan shouldn't have been printed in a mainstream paper."

The Poynter Institute's Bob Steele initially agreed, writing in an October 15 column, "In this case, the value of naming this fan just doesn't carry enough weight compared to the potential negative consequences. He didn't break any laws. He wasn't unethical. He didn't steal the catcher's signs to the pitcher and relay them to the opponents. He didn't yell obscenities at the bullpen pitchers. He didn't intentionally harm someone. All he did was react just as most fans would at that moment. He's already paid a big price for his error."

But once the fan himself issued a public statement, apologizing "from the bottom of this Cubs fan's broken heart," Steele acknowledged that the ethical issue had shifted. "By going public himself, Bartman shifted the issue away from the question of whether news organizations should name him," Steele wrote. "Now that he has stepped forward and expressed regret, it's appropriate for journalists both to identify him and to reflect the tenor of his remarks fairly. The issue has shifted from the question of identification to the need for measured and respectful coverage . . . There is no journalistic purpose served by heightening his vulnerability." Steele's column is available online at <http://www.poynter.org/column.asp?id=36&aid=51470>.

North County Times (southern CA)

In October 2003, the *North County Times*, a newspaper that covers North San Diego and southwest Riverside County in southern California, decided against printing the names of convicted prostitutes and their customers in their paper, opposing a new program proposed by California Police Chief Michael Poehlman. Poehlman's recommendation was to have the police department buy classified advertisements that would list the names.

In an October 14 article from the *North County Times*, Poehlman said that naming prostitutes and those who solicit them would send the message that their activities are not acceptable. He claimed that residents and business owners support the idea.

North County Times publisher Dick High disagreed, saying the notices "would open up a 'Pandora's Box' of negative advertising," according to the article.

Poehlman said he would continue to market the program to other local papers.

Logan Jennings, a columnist for *The San Diego Union-Tribune*, wrote on October 20, "The ultimate challenge for publishers... is justifying the rejection of information copied from court records, the same sort of information that is reported every day in the news columns."

CONTRAVERSIAL LANGUAGE AND VISUALS

Bob Lonsberry: *Rochester Democrat and Chronicle*

A Rochester, N.Y., radio host was fired in September 2003 after making remarks on the air that described the city's African-American mayor as a "monkey" and "orangutan." Although Mayor William J. Johnson, Jr., was never specifically named, Bob Lonsberry, a conservative daytime host for WHAM-AM (1180), made clear to whom he was referring by mentioning Johnson's campaign for Monroe County executive, according to the *Rochester Democrat and Chronicle*.

According to the Associated Press, an orangutan made headlines when it escaped from a cage at a nearby zoo in August. Shortly thereafter, Lonsberry remarked that the animal was running for Johnson's desired office. The host joked, "Headline: Orangutan escapes at zoo, runs for county executive. Fascinating stuff." He made a similar comment a few weeks later while jungle sounds could be heard in the background.

The Associated Press report stated that Lonsberry did apologize for his comments and expressed interest in undergoing "diversity training," initially prompting WHAM-AM executives to simply suspend him. But after Lonsberry subsequently attacked his critics in a web column, officials fired the host, saying in a statement that

“although Mr. Lonsberry expressed a willingness to change, it became obvious to us that he is not embracing diversity.”

Johnson claimed that he did not ask for Lonsberry to be fired and said that he did not take the host’s comments personally, according to WOKR-13, a local Rochester television station.

Lonsberry worked at WHAM for nine years, according to the Associated Press. The station is owned by Clear Channel Communications of San Antonio, Texas.

Rush Limbaugh: ESPN

Conservative radio host Rush Limbaugh resigned as an ESPN sports analyst on the network’s show “Sunday NFL Countdown” after comments he made about Philadelphia Eagles quarterback Donovan McNabb sparked controversy.

On ESPN’s Sunday show on Sept. 28, 2002, Limbaugh said, “I think what we’ve had here is a little social concern in the NFL. The media has been very desirous that a black quarterback do well. There is a little hope invested in McNabb, and he got a lot of credit for the performance of this team that he didn’t deserve.”

An article posted on ESPN.com reported that the National Association of Black Journalists insisted that ESPN “separate itself” from Limbaugh.

“ESPN’s credibility as a journalism entity is at stake,” NABJ president Herbert Lowe said in a news release. “It needs to send a clear signal that the subjects of race and equal opportunity are taken seriously at its news outlets.”

According to an Associated Press report, although Limbaugh claimed that his remarks were not racist, he nevertheless relinquished his post on October 1, saying that “the path of least resistance [was] to resign.” George Bodenheimer, president of ESPN and ABC Sports, was quoted in the report as saying, “We believe that [Limbaugh] took the appropriate action to resolve this matter expeditiously.”

Soon after resigning from ESPN, Limbaugh admitted an addiction to prescription painkillers and spent five weeks in rehabilitation. Upon his return to the airwaves in November, Florida investigators claimed that Limbaugh engaged in “doctor shopping” – searching for doctors willing to write prescriptions illegally, according to the Associated Press. Law enforcement officials also voiced suspicion that Limbaugh may have illegally funneled money to buy the prescription painkillers. Limbaugh has denied the allegations.

Gary Trudeau: “Doonesbury”

Newspapers across the country dropped the Sept. 7, 2003, “Doonesbury” comic strip that mentioned masturbation. The comic, written by Gary Trudeau of Universal Press Syndicate, shows three characters discussing how regular masturbation might prevent prostate cancer.

Among the many newspapers that instead published an alternative strip on that day were the *Washington Post*, *Tampa Tribune*, and *Cleveland Plain Dealer*.

According to the *Milwaukee Journal Sentinel*, newspapers received a letter from Universal Press in July warning editors of the subject matter of the upcoming comic strip. “The strip amusingly captures the ongoing confusion in the media and in the culture at large over sexual candor,” wrote Universal Press editor Lee Salem. “Nevertheless, we also understand that for some papers, the use of the m-word per se . . . may cross the line.”

Newspapers then debated whether to publish the September 7 strip. Those who did, according to a report published on *Editor & Publisher Online*, received little opposition from readers. *San Jose Mercury News* Deputy Managing Editor Steve Wright was quoted in the article as saying, “Each newspaper needs to judge its

own market. You've got to know what your readers can handle. As we predicted, our readership was sophisticated enough to handle the word and handle how it was put in context."

Universal Press released a statement in which cartoonist Gary Trudeau commented, "It's a 'South Park' world now, and younger readers are unlikely to be shocked or confused by anything they find in 'Doonesbury.'"

New York Daily News

The New York Daily News' decision to publish a photo of a murder victim prompted outrage from the man's family members and others, according to a Sept. 4, 2003, report in the *New York Post*.

The photo, according to the *Post*, showed victim Anthony Bartholomew lying on the street surrounded by blood oozing from a head wound. A September 3 story in the *Daily News* said that the trouble began when Bartholomew accidentally bumped into a man while being pushed along in a crowd watching the West Indian American Day Carnival Parade September 1. The man pulled out a weapon and shot Bartholomew in the head.

Bartholomew's mother, Carlita, was quoted in the *Post* report as asking, "Why do I have to see my son lying in a pool of blood?"

The Daily News released a note apologizing for "any anguish caused by the publication of the picture."

TRESPASSING

Steve Kroft: CBS News

Steve Kroft, a news correspondent for CBS News and an investigator for "60 Minutes" was arrested on Sept. 22, 2003, for trespassing on a chemical plant's property.

According to the *Pittsburgh Post-Gazette*, Kroft, accompanied by *Pittsburgh Tribune-Review* reporter Carl Prine and freelance cameraman Gregory E. Andracke, was taking photographs on the Neville Chemical property, a plant located on Neville Island, just west of Pittsburgh on the Monongahela River. CBS News spokesman Kevin Tedesco said the trio walked around the chemical plant for 15 to 20 minutes "undetected and unmolested" before officials there called the police.

Tribune-Review editor Frank Craig told the Reporters Committee for Freedom of the Press that the paper "has published several stories about lax security at chemical and industrial plants, and the reporters were simply working on another such story." According to Craig, newspaper editors wanted to demonstrate the plant's lax security by trespassing.

Each was mailed a citation for \$25 plus court costs, according to the *Post-Gazette*.

—ELIZABETH JONES
SILHA RESEARCH ASSISTANT

***Final Call* Not Required to Pay Damages for Use of Photos**

A New York state court has ruled held that *The Final Call*, the weekly newspaper of the Nation of Islam, did not have to pay punitive damages to Tatia Morsette, a woman the newspaper had falsely depicted as a prison inmate.

Morsette had previously won a \$1.3 million libel award against *The Final Call*. On appeal, however, the New York Appellate Division ruled that New York state law did not allow for punitive damages in the suit because *The Final Call* did not deliberately try to harm Morsette. The Sept. 25, 2003 opinion by Judge Eugene L. Nardelli reduced Morsette's award to \$400,000. *Morsette v. The Final Call*, 764 N.Y.S.2d 416 (App. Div. 2003).

The Final Call used a picture of Morsette from its archives to illustrate an unrelated story in 1997. Morsette's photo ran under the front-page headline "Mothers in Prison, Children in Crisis" and on an inside page under the headline "Mommy is in Jail." On the latter page, *The Final Call* altered the photo to make Morsette appear in prison garb.

Morsette, upon learning of the use of her image, sued. She alleged that *The Final Call* had caused her depression, anxiety and embarrassment, resulting in a gain of fifty pounds.

The Appellate Division cited *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), where the U.S. Supreme Court explained that states retain "substantial latitude" in determining what recovery private individuals are entitled to in common law defamation cases. The Appellate Division reasoned that, in New York, for the court to award punitive damages from a media defendant to a private individual, the plaintiff must prove "malicious, wanton, reckless, or . . . willful disregard for another's rights."

Nardelli opined, "[I]t is precisely the randomness of defendant's conduct and the fact that such conduct was not directed specifically at this plaintiff that requires us to vacate the punitive damages award." The court concluded, "Notwithstanding the defendant's reprehensible, irresponsible conduct, there is no evidence . . . that the malice or ill was directed specifically at plaintiff to support an award of punitive damages."

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT

Baseball Team Freezes out *Denver Post*

Anger over a *Denver Post* columnist's use of a baseball player's negative quote prompted the local professional baseball team, the Colorado Rockies, to refuse to speak to that paper's reporters, according to a Sept. 21, 2003 report in the *Post*.

The exclusion of *Post* reporters lasted only two days – September 19 and 20 – and consisted primarily of manager Clint Hurdle's refusal to attend daily media conferences if reporters from the *Post* were present. The team's general manager, Dan O'Dowd, initiated the ban after reading quotes attributed to Rockies left-fielder Larry Walker in a Sept. 18, 2003, column by *Post* columnist Mark Kiszla.

The issue was not that the quotes used were fabricated or misleading, but that they were passed along from a beat reporter to a columnist.

"The *Post* was unprofessional in a column that was printed (Sept. 18)," a team spokesman said in announcing the decision to refuse access to *Post* reporters, the newspaper reported. "There were quotes that were taken out of context from a player that the columnist never talked to directly." Walker, the outfielder, gave the quotes to the *Post*'s Rockies beat-writer Troy Renck. When asked about sagging attendance at the team's games, Walker told Renck: "I take the fans' side. If I'm a baseball fan, it would be tough to come out here. That's tough when you come out and want to watch the home team win and we're not winning. I have always said the prices [of attending the games] are outrageous from the minute you park your car."

According to the *Post*, Renck relayed these comments to Kiszla, and the two decided that the comments would be more appropriate in a column than in a news report. When questioned the following day by Rockies officials, Walker said the quotes were accurate, but that he would not have provided them if he had known they would be used in Kiszla's column, the *Post* reported.

Denver Post Managing Editor Gary Clark said the *Post*, and particularly Renck, had acted appropriately.

"He did nothing wrong," he said in the *Post* report. "He gave a quote to a colleague, the quote is accurate, and the Rockies do not dispute that."

Internet Updates

Blogger Posts 1938 Article on Hitler, Raising Copyright Issues

An article about Adolf Hitler's retreat in the Bavarian Alps that originally appeared in a 1938 issue of the British magazine *Homes & Gardens* was posted online by blogger Simon Waldman in August 2003. Wired News reported on Sept. 20, 2003, that the article, "Hitler's Mountain Home, a Visit to 'Haus Wachenfeld,'" portrayed Hitler in a favorable light, describing him as a talented architect who "delights in the society of brilliant foreigners, especially painters, singers and musicians."

Waldman, who is the director of digital publishing for Guardian Newspapers, told *The New York Times* that his father-in-law gave him the vintage issue of the magazine. Waldman scanned the article and posted the story on his blog, available online at <http://wow.blogs.com/> in August. *The New York Times* reported that the article received more attention after Waldman made it more prominent on his site and alerted the current editor of *Homes & Gardens*, Isobel McKenzie-Price, in an e-mail that he had posted the article as a historical curiosity.

Waldman's site received 10,000 hits a day. Many visitors downloaded the article, according to Wired News.

McKenzie-Price, citing Britain's copyright laws, asked him to remove the pages. Although Waldman did so, other Web users had already downloaded and exchanged the article, much the same way music, movie and literature is illegally downloaded from the Internet, according to *The New York Times*.

According to Wired News, Waldman posted a reply after he removed the article, stating that he thought the story should be made publicly available for its historical importance. He wrote, "I believe that as I'm not making any money out of this, I'm not depriving you of any money, no one can make money from the scans [too poor quality] and no one has said or inferred anything damaging about Home and Gardens . . . you're being slightly over the top."

The New York Times reported that IPC Media, which owns *Homes & Gardens*, would not comment on the article. "We have already made our feelings known to the person who originally posted the article," a spokeswoman for the company said. IPC was unclear on the exact status of the copyright though.

Peter Jaszi, professor of law at American University, told Wired News that The United Kingdom has a law called "fair dealing" similar to the United State's "fair use" exception to copyright which allows limited reproduction for critical, satirical or educational use, but the law in the United Kingdom is interpreted more narrowly.

Britain's Copyright, Design and Patents Act of 1988 (c. 48) considers use of "reasonable portions" of some copyrighted material to be "fair dealing," provided they are used in private study, criticism and review, or news reporting. Simply posting an article on the Web might not qualify, according to *The New York Times*. The text of the British law is available online at http://www.hmso.gov.uk/acts/acts1988/Ukpga_19880048_en_1.htm.

Professor Allowed to Keep Web Blog Criticizing Homosexuals

An Indiana University (IU) professor's controversial Web log criticizing homosexuals posted on the school's Web site will remain online.

The business school dean asked economics Professor Eric Rasmusen to remove the comments in September 2003. The next day a university attorney determined the blog and its comments did violate any school policies, IU spokesperson Jane Jankowski told the Associated Press on Sept. 5, 2003.

The university allows students and employees to create personal Web pages through its Web site, but does not accept responsibility for their content, Jankowski said.

Rasmusen's blog was linked from his IU biography online. He wrote about why homosexuals should not be teachers, elected officials and doctors, arguing that such positions would put them in contact with minors. He wrote: "Male homosexuals, at least, like boys and are generally promiscuous. They should not be given the opportunity to satisfy their desires."

In the following weeks, Indiana University Chancellor Sharon Brehm said she wanted officials to re-examine the school's rules for personal Web sites.

She told the Bloomington Faculty Council that Rasmusen's blog was "offensive, hurtful and [an example of] very harmful stereotyping," according to the Associated Press on Sept. 17, 2003.

But Rasmusen's right to express his opinions is protected by the U.S. Constitution and IU policy on academic freedom, she added.

Rasmusen, who is a member of the Faculty Council and affiliated with the business school, did not make any comments during the meeting, but spoke later with an unidentified reporter, according to the Associated Press.

"It's hard to say anything interesting on the subject and make everybody happy, but that's no reason not to discuss it," he told the reporter.

On Sept. 19, 2003, a group of faculty, staff and students held a vigil at Showalter Fountain at Indiana University to express their concern, according to university's newspaper, the *Indiana Daily Student*.

The group also gathered at the induction ceremony at the IU Auditorium for Kelley School of Business students.

"This really isn't a freedom of speech issue anymore . . . It's more about the university's lack of policies to protect individuals because of their sexual orientation," Mark Brostoff, an associate director for undergraduate services in the business school, told the *Indiana Daily Student*.

Rasmusen told the *Indiana Daily Student* that he did see a connection between protesting at the induction ceremony and the group's intentions.

"I've gotten the feeling that people on both sides of this are reluctant to really discuss the issues, and it would be a good idea to engage each other and talk about our differences with rational discussions," he said.

Alleged Infamous Cybersquatter Faces Criminal Charges in Florida

An infamous cybersquatter has been charged with operating Web sites that used misspelled addresses to lead children to pornographic sites in October 2003.

U.S. federal agents arrested John Zuccarini, 53, in Hollywood, Fla. on Sept. 2, 2003 in a motel room. Criminal complaint charges were filed against him in the federal district court for the Southern District of Florida on Sept. 3, 2003. The case is *United States v. Zuccarini*, No. 03-M-4156.

Computer & Internet, a part of Andrews Publications, Inc., reported it was the first prosecution in the United States under a provision called the Truth in Domain Names Act, 18 U.S.C. §2252 B(b), which makes it a crime to use misleading Web addresses to entice children to pornography. The text of the Act is available online at <http://www.theorator.com/bills108/hr939.html>.

Zuccarini registered thousands of Internet addresses and was earning up to \$1 million per year from sex sites that paid him when he sent Web users their way, U.S. Attorney James Comey told the Associated Press.

He misspelled items such as Disneyland and Teletubbies, and used names of celebrities such as Britney Spears in which he registered 41 variations, according to a Federal Trade Commission (FTC) press release.

Zuccarini adapted actual Web addresses, leaving out or transposing letters. Computer users who misspelled or mistyped a Web address often ended up in a porn site instead. The practice is known as “typosquatting,” according to *Computer & Internet*.

The affidavit said that children or their parents were directed to Zuccarini’s Web sites accidentally after mistyping domain names. The Web site would then bombard the user with ads for pornography. Robert Fraterrigo, an inspector with the U.S. Postal Inspection Service, alleged that the sites were “mousetrapped” so that users could not employ normal Web browser commands to close out of the sites, forcing them to shut down their computers. Fraterrigo’s deposition is available online at <http://news.findlaw.com/hdocs/docs/cyberlaw/uszuccarini82903cmp.pdf>.

Zuccarini has lost 53 state and federal lawsuits and has had about 200 Web sites taken from him and transferred to copyright holders, according to the FTC. Federal agents were investigating Zuccarini as early as 1999.

In May 2002, at the request of the FTC, the U.S. District Court for the Eastern District of Pennsylvania in Philadelphia permanently barred Zuccarini from launching Web sites or Web pages that belonged to unrelated third parties and misleading Internet users. The court also barred him from participating in advertising affiliate programs on the Internet, and fined him \$1.8 million.

“I am not aware of others who have done it on the scale of Zuccarini,” Marc M. Groman, an attorney in the FTC’s Bureau of Consumer Protection, told the Associated Press.

First Amendment lawyers question whether the charges filed against him will hold up in court. The law “gives the government virtually unbridled discretion to determine who has registered a misleading domain name,” Attorney Doug Isenberg told the Associated Press. Isenberg devoted a chapter to Zuccarini in his book, “The GigaLaw Guide to Internet Law.”

Case Dismissed Against Student Charged With Violent Story on PC

A felony charge against an Oklahoma teen for writing a violent short story in April 2002 about attacking people at his school and leaving it on a school computer was dropped on August 29, 2003.

In April 2002, Brian Robertson found a story entitled “Evacuation Orders” on a high school computer about a military plan for evacuation in the event of a hurricane, according to the Associated Press. The paragraph he found said, “If the order to evacuate is given, you must do so immediately. Be prepared and leave as early as possible, because your life depends on it.”

Robertson told the Associated Press he was intrigued by the militaristic style and added to the story, writing, “Make sure you make every shot count. . . . Life is cheap, ammo is precious. Treat it as such. Try to keep your weapon pretty much well hidden, and scream a bit with everyone else to promote confusion so you can probably make a getaway later.”

“I just thought it was pretty cool,” Robertson told the Associated Press. “I didn’t really know that it was illegal to write it.”

After a teacher at his Moore, Okla. high school found Robertson's story on a classroom computer, an investigation by police led to a charge of "planning to cause serious harm or death" in April 2002, according to *Newsweek*.

Robertson, who was 18 at the time, was charged under a state criminal statute, Okla. Stat. 21 §1378 (A), which states that conspiring an act of violence involving bodily harm against another is a felony, and carries a maximum sentence of 10 years in prison.

His mother, Kathy Robertson told *Newsweek* that the district attorney filed charges, even after a search of their home turned up no guns, plans or other physical evidence. Robertson was also suspended from school and forced to finish his final semester through correspondence classes.

In August 2002, the American Civil Liberties Union (ACLU) of Oklahoma filed a brief in support of Robertson.

District Judge Rod Ring of the District Court of Cleveland County dismissed the case in December 2002 because the criminal statute was both too vague and broad. The prosecutor requested to reinstate the case, and District Judge Gary Snow reversed the decision in January 2003.

In August 2003, Chief District Judge William Hetherington of the District Court of Cleveland County confirmed the district's previous decision in *State of Oklahoma v. Brian Robertson*, Case No. CF-2002-435, available online at <http://www.savebrian.org/pdf/final.PDF>. Hetherington wrote, "There is no evidence that this defendant describes any specifics as to times, dates, or any real particularity, and the State acknowledges there is no evidence of any specific malicious intent on the part of this defendant. The evidence the state relies upon to support a conviction is purely that of a drafted 'plan.'"

Hetherington also found the law to be overly broad and unclear. He added, "To allow for a criminal conviction for merely drafting a plan of violence and nothing more, would clearly violate First Amendment privileges."

Microsoft Shutting Down Some Chat Services To Protect Children

Microsoft Corporation said it shut down its Internet chat rooms in 28 countries on October 14, 2003, because the forums had become a haven for peddlers of junk e-mail and sex predators, according to Reuters.

The Redmond, Wash.-based company closed MSN chat services in Europe, the Middle East, Africa, Asia and much of Latin America. Microsoft introduced an unsupervised chat service only for subscribers in the United States, Canada and Japan, Reuters reported.

The Microsoft action comes after a series of incidents involving children abused by adults they encountered in Internet chat rooms. At least 26 recent child abuse cases in the United Kingdom alone have been directly linked to chat rooms, according to The Dallas Morning News.

In the United States, MSN will require users of its chat service to subscribe to at least one other paid MSN service. The company's ability to obtain credit card numbers will make it easier to track down users who violate MSN's terms of use, according to the Associated Press.

The Associated Press also reported that the company will offer some moderated chat rooms in Canada, Japan, New Zealand and Brazil, where MSN employees will monitor the conversations. Users will also be able to subscribe to an unmoderated service.

"We recognize that is a common, industrywide problem," MSN product manager Lisa Gurry told The Dallas Morning News, "We've taken a look at our efforts to provide a safe environment."

Rob Helm, an analyst with the independent research firm Directions on Microsoft, told the Associated Press that the move also may help MSN trim the number of free users and help boost its overall revenue.

Skeptics, including major European Internet service providers, expressed doubts about Microsoft's underlying motivation. It is more likely that the company is simply eliminating an unprofitable service that presented legal liabilities, according to The Dallas Morning News.

Freeserve, an Internet service provider owned by France Telecom's Wanadoo, accused the company of making a well-publicized move because it was not prepared to invest in policing the chat rooms, the London Guardian claimed.

"All MSN is doing is forcing users to go elsewhere, potentially to non-moderated chat rooms with little or no protection," a Freeserve spokeswoman told United Press International.

Web sites Listed As Terrorist Groups

For the first time, the U.S. added Web sites affiliated with foreign terrorist organizations to its foreign terrorist organization list on Oct. 10, 2003, unidentified State Department officials told Agence France Presse.

A designation as a terrorist organization carries travel and financial restrictions, including the freezing of assets and a prohibition against the issuance of visas to those identified as members or associates. The State Department is unclear how this would work in practice, according to Reuters.

The groups had already been designated by the State Department as terrorist organizations. The listing includes the four sites operated by the Kach and its offshoot, the Kahane Chai.

The Kach, founded by radical Israeli-American Rabbi Meir Kahane, and the Kahane Chai (which means "Kahane Lives") founded by Kahane's son, Binyamin, following his father's assassination in the United States, were first declared terrorist organizations by the Israeli Cabinet in 1994, a month after a Kach supporter killed 29 Muslim worshippers at a West Bank mosque, according to The Washington Times.

The four Web sites are: www.newkach.org, www.Kahane.org, www.Kahane.net and www.Kahanetzadok.com. The sites offer news, commentary and links to other sites of interest to followers of Meir Kahane, according to *The Washington Times*.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

New Laws Promote Consumer Privacy; Curb Commercial Speech

CAN SPAM Act Signed

On Dec. 16, 2003, President George W. Bush signed the Controlling the Assault of Non-Solicited Pornography and Marketing Act (CAN SPAM Act) into law. According to a Fact Sheet available online at www.whitehouse.gov, the law "establishes a framework of administrative, civil, and criminal tools to help America's consumers, businesses, and families combat unsolicited e-mail." The bill went into effect Jan. 1, 2004.

The law requires those who send unsolicited marketing e-mail (spam) to include a return address so that a person receiving the e-mail may notify them and ask them to be dropped from their mailing list. It also requires unsolicited commercial messages to include information telling the recipient that the communication is an advertisement. They also must include the physical address of the sender, and false or deceptive subject lines or headers may not be used. Sexually explicit e-mail must be labeled in accordance with Federal Trade

Commission (FTC) guidelines. The law would also allow the FTC to establish a national “do not spam” list similar to the national “do not call” list. (See “Do-Not-Call” List Faces Questions of Constitutionality,” below.)

Anyone violating the law faces prison terms of up to five years and fines of up to \$2 million. Fines can be tripled in extreme cases.

Sen. Conrad Burns (R.-Mont.) co-sponsored the bill with Sen. Ron Wyden (D.-Ore.). The Associated Press reported that Burns issued a statement following the President’s bill signing, saying, “In a country with ever-increasing reliance on the Internet, I am glad to know that today marks a day where Americans will begin to have some muscle against the spammers out there who flood their mailboxes each day.”

According to the *Daily News* of Los Angeles, the bill was supported by executives from America Online, EarthLink Inc. and eBay Inc.

The New York *Sun* reported that critics of the law are concerned that recipients of spam are not given the right to sue, as is the case with Washington and California state laws. This may be problematic because the federal law supercedes any state law regarding spam. The CAN SPAM law also does not ban unsolicited commercial e-mail unless an individual “opts-out.”

The text of the CAN SPAM Act is available online at <http://www.spamlaws.com/federal/108s877enrolled.pdf>.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

New Laws Promote Consumer Privacy; Curb Commercial Speech

“Do-Not-Call” List Faces Questions of Constitutionality

The much anticipated do-not-call registry, created by the federal government to protect residential phone customers from unwanted telemarketing calls, faced a barrage of legal challenges in late 2003 that seemed likely to derail the registry indefinitely.

On September 23, only a week before the registry’s October 1 start date, a federal judge in Oklahoma ruled that the registry was unconstitutional because Congress had never given the Federal Trade Commission the authority to impose such restrictions, according to a report in the Oct. 21, 2003 edition of the Telecommunications Industry Litigation Reporter. Even as Congress hurriedly passed a bill extending such authority to the FTC, another federal judge was busy finding the registry unconstitutional on other grounds.

That judge, U.S. District Judge Edward Nottingham of the District of Colorado, ruled that the registry violated the First Amendment by impermissibly limiting telemarketers’ commercial-speech rights.

In his opinion, *Mainstream Marketing Services v. FTC*, 2003 U.S. Dist. LEXIS 16807 (D. Colo. Sept. 25, 2003), Nottingham ruled that the do-not-call registry was a restriction on speech that implicated the First Amendment, in part because the government distinguished between calls intended to sell products and calls soliciting charitable contributions. Because he found that the registry implicated the First Amendment, Nottingham applied a test used to determine the Constitutionality of the restrictions on commercial speech. The guidelines for restricting commercial speech come from the Supreme Court’s decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission*, 447 U.S. 557 (1980).

Under the *Central Hudson* test, the state may not restrict lawful, non-misleading commercial speech unless the government can show that the restriction serves a substantial public interest; that the restriction in question directly advances that interest; and that the restriction on speech is no greater than necessary to serve the public interest.

Nottingham acknowledged that there is a public interest in “protecting the well-being, tranquility and privacy of the home,” and that avoiding unwanted speech is a part of that privacy interest. The judge also conceded a public interest in protecting consumers from deceptive and abusive telemarketing practices. But the regulations failed to meet the test’s second part, Nottingham wrote. The do-not-call registry, he wrote, “does not materially advance its interest in protecting privacy or curbing abusive telemarketing practices. The registry creates a burden on one type of speech based solely on its content, without a logical, coherent privacy-based or prevention-of-abuse-based reason supporting the disparate treatment of different categories of speech.”

The U.S. Court of Appeals for the Tenth Circuit quickly overturned Nottingham’s ruling, using the same test that Nottingham used to strike it down. The appeals court’s ruling, in *FTC v. Mainstream Marketing Services, Inc.*, 345 F.3d 850 (10th Cir. 2003), stayed the district court’s permanent injunction pending final resolution of the appeal on the merits. The 10th Circuit has not yet ruled on the merits, but it indicated in its initial ruling that the government’s appeal was likely to succeed.

In its decision, the appeals court noted that *Central Hudson* required a “reasonable fit” between the speech restriction and the public interest. The regulations achieve such a fit, the appeals court said, by requiring that consumers affirmatively opt in to the list. The appeals court also noted that the regulations did not impermissibly exempt non-commercial speech from the registry, because consumers may block charitable solicitations on an organization-by-organization basis.

—DOUG PETERS
SILHA FELLOW

FCC Media Ownership Update

The White House and congressional Republicans came to a compromise on television ownership limits after President Bush threatened to veto an appropriations bill which funded a third of the federal government. On Nov. 19, 2003, the House and Senate had attached a provision to the bill to keep the national television ownership limit at 35 percent for a year. White House negotiators and Republican leaders came to the compromise of 39 percent late on Nov. 24, 2003, according to *The Washington Post*.

The primary effect of the 39 percent limit is that Viacom, owner of CBS, and Fox, which taken together own stations reaching about 38 percent of national viewers, would not have to sell anything. NBC, owned by General Electric, currently has 29 stations that reach about 34 percent of the national audience and could buy two more stations in top markets and five to eight stations in midsize cities, according to *USA TODAY*.

House and Senate bargainers had ignored a previous White House veto threat and agreed to block a Bush administration plan to let any company own television stations watched by nearly half the nation’s viewers, according to the Associated Press on Nov. 19, 2003.

The House and Senate originally agreed to reinstate the 35 percent limit for one year in a provision attached to a \$328 billion spending bill funding the U.S. Commerce, State, Justice, Labor and other departments, according to the Associated Press.

The Federal Communications Commission loosened media ownership rules on June 2, 2003, after much debate among government officials, media representatives and the general public.

Under the new regulations, the percentage share of U.S. households that one owner could reach increased from 35 to 45 percent for the National Broadcast Ownership Cap. A share is calculated by adding the number of TV households in each market in which the company owns a station. (See “FCC’s New Regulations Blocked by Appeals Court,” in the Summer 2003 issue of the *Silha Bulletin*.)

USA TODAY reported that the agreement between the President and congressional Republicans would allow a TV broadcaster to own local stations reaching 39 percent of the national audience, up from 35 percent. It also

would make the 39 percent cap a federal law that cannot be changed by the Federal Communications Commission. In addition, broadcasters would have two years to sell stations if they exceed the cap.

In the negotiations on November 24, Sen. Ted Stevens (R-Alaska), chairman of the Senate Appropriations Committee, backed off from his push for the 35 percent limit in return for concessions.

Democratic lawmakers vowed to fight the compromise, calling it a backroom deal, according to *USA TODAY* on Nov. 26, 2003.

Sen. Byron Dorgan (D-N.D.) criticized the Republicans for modifying a bill already settled on by House and Senate conferees.

“That will undermine the entire process of appropriation conferences,” he said in a letter to Republican leaders, according to *USA TODAY*. He further wrote, “I intend to continue the fight to overturn” the cap.

The House and Senate are expected to vote on the appropriations bill in January or February. Sen. Dorgan could try to block it at that time. Alternatively, he could introduce legislation to roll back the cap to 35 percent, *USA TODAY* reported.

On Jan. 12, 2004, oral arguments will begin at the U.S. Court of Appeals (3rd Cir.) in Philadelphia, the same appeals court that blocked the new regulations in September 2003. The court’s order prevented the new rules from going into effect on Sept. 4, 2003. The previous ownership rules will remain effective until the case is decided.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

U.S. Supreme Court Decides Not to Review Disparagement Case Against *Consumer Reports*

On Nov. 3, 2003, the U.S. Supreme Court said it would not review the decision of the Court of Appeals (9th Cir.) that allows Suzuki Motor Corporation’s product disparagement suit against Consumers Union, the non-profit publisher of *Consumer Reports*, to go forward.

Suzuki’s alleges that *Consumer Reports*’ 1988 review of the Suzuki Samurai as “not acceptable” because it “rolls over too easily” was based on tests rigged by the magazine. When the magazine, in a 1996 anniversary issue, repeated its claims about the Samurai, Suzuki sued. The automaker brought a product disparagement suit in the California courts.

In 2000, Consumers Union won a dismissal of the suit in federal district court. In 2002, a three-judge panel of the U.S. Court of Appeals (9th Cir.) reversed, ruling that the case should go forward to trial. Consumers Union moved for a rehearing by all the judges of the Court of Appeals for the Ninth Circuit, but by a vote of 13-11, the court decided not to rehear the case.

In *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110 (2003), the Ninth Circuit found that Suzuki had shown that a jury might find that Consumers Union had acted with “actual malice” in its review of the Samurai. “Actual malice” under the law means making statements with knowledge that the statements are false or with reckless disregard as to whether they are true or not. Whether such statements were made with the requisite fault is the central question of a product disparagement suit.

In finding that dismissal of the case was inappropriate, the Ninth Circuit noted that Consumers Union was financially overextended when the Samurai article first ran in 1988, and that a “blockbuster” story would have raised the profile of, and provided much-needed fundraising revenue for, the non-profit publisher. The court

further noted that the rollover tests relied heavily on the individual driver's inputs and skill. The Ninth Circuit concluded that Suzuki had raised genuine issues as to whether Consumers Union had purposely avoided information favorable to the Samurai.

On August 13, 2003, Consumers Union petitioned the U.S. Supreme Court to review the decision of the Ninth Circuit. Because the Supreme Court refused to review the case, Consumers Union now faces a jury trial. Both Consumers Union and Suzuki issued press statements expressing their confidence in the outcome of the trial.

In press releases posted to their respective websites, Consumers Union expressed confidence in their case and Suzuki commended the Supreme Court's decision to pass on review.

Jim Guest, President of Consumers Union, stated, "[W]hen we put four SUVs through identical and objective emergency handling tests on the very same course, the Suzuki Samurai tipped up severely and repeatedly while the other three kept all four wheels on the ground." Guest continued, "The Samurai also tipped up when evaluated by other reviewers, and rolled over on American highways where hundreds of deaths and injuries were the result." He also charged, "Suzuki's own internal memos show they knew about the rollover problem and sold the Samurai anyway."

Consumers Union's attorney Michael N. Pollet stated, "Every judge who allowed full consideration of both Suzuki's evidence and ours has ruled that the case should be dismissed because the charges are not supported by the record. We have every reason to believe that a jury would come to the same conclusion."

George F. Ball, Suzuki's managing counsel, countered, "Suzuki is very pleased it will finally be able to present its evidence of Consumers Union's test-rigging to a California jury. While serving as a marketing and fund raising tool for Consumers Union, its false Samurai claims continue to severely damage Suzuki and its dealers." Ball continued, "[K]ey executives from Consumers Union rigged the Samurai tests and misled the public about the Samurai's performance in those tests. By refusing to shield Consumers Union from accountability before a jury, the Supreme Court's action supports the principle that the First Amendment protects honest reporting but it does not protect publishers from a jury trial where there is evidence that the publisher knowingly deceived its readers."

Suzuki's Website is available online at <http://www.suzuki-consumersunion.com/november-105.htm>, and Consumers Union Web site is available at http://www.consumersunion.org/pub/core_product_safety/000573.html

—THOMAS CORBETT
SILHA RESEARCH ASSISTANT

Copyright Updates

Government Holds Hearings on RIAA's Lawsuits, Subpoenas

On Sept. 30, 2003, the U.S. Senate Committee on Governmental Affairs' Permanent Subcommittee on Investigations held a hearing in Washington D.C. into the Recording Industry Association of America's (RIAA) numerous lawsuits and subpoenas of persons it contended downloaded and traded music over the Internet. The hearing, titled, "Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry," also addressed the responsibility of the peer-to-peer networks — online services that allow users to share information, such as music in a digital audio format, over the Internet — to safeguard against the illegal downloading of music.

Sen. Norm Coleman (R-Minn.) amplified the concerns of the Committee in his Subcommittee statement, "Many of (peer-to-peer) users are teenagers or younger. This generation of kids needs to be made aware that they are

engaging in illegal behavior. I do not believe, however, that aggressively suing egregious offenders will be sufficient to deter the conduct of an entire generation of kids.”

The Subcommittee’s witnesses included RIAA Chairman and CEO Mitch Bainwol and a full-time student who recently settled her RIAA lawsuit, Lorraine Sullivan. Bainwol detailed why RIAA had decided to pursue file-swappers in such a contested manner, stating, “The decision to enforce our rights against egregious infringers was taken only after suffering years of mounting harm and trying all other avenues.” Bainwol explained that a public relations campaign meant to educate consumers and warn against file-sharing, filing lawsuits against peer-to-peer networks, and providing opportunities for users to legally download music off the Internet had all proven to be unsuccessful in curbing what he called, “the tidal wave of illegal conduct.” Regarding RIAA’s reliance upon the DMCA’s subpoena provision to obtain the names of downloaders, Bainwol stressed that the Industry was and is only interested in targeting egregious offenders, saying, “[T]he subpoenas issued at the request of RIAA thus far involve infringers distributing, on average, 1,000 copyrighted recordings.”

Bainwol concluded his statement by addressing concerns raised by Internet Service Providers (ISPs) that they were being overwhelmed with subpoenas for identifying information of their consumers. Bainwol suggested that a remedy to this problem would be for RIAA to include multiple Internet Protocol, or IP, addresses on a single subpoena, a tactic that had been previously suggested but declined by the ISPs, according to Bainwol. The IP address is a number unique to one individual’s computer and has been the manner in which RIAA has attempted to identify offenders.

Lorraine Sullivan’s statement to the Subcommittee described the day she received a letter from Time Warner notifying her that her information had been subpoenaed by RIAA, and her overall reactions as a consumer to being sued. “I feel that I have been misled as a consumer of music,” Sullivan said, “I do not burn CDs and yet when I go to the store I see Sony sells ‘writable’ discs. I wondered what I was supposed to put on these discs since downloading is supposedly akin to shoplifting music.” Sullivan went on to state, “Is it any wonder why other consumers such as me found, and still continue to find, it all so confusing?”

A complete transcript of the hearing is available online at

http://www.senate.gov/~gov_affairs/index.cfm?Fuseaction=Hearings.Detail&HearingID=120.

RIAA continues to face intense scrutiny by consumers and advocacy groups for its investigation practices in its hunt for file-swappers. Two of the individuals targeted by the 261 lawsuits RIAA filed this summer have come forward claiming they have evidence that will show they were incorrectly targeted by RIAA for illegally downloading music off the Internet. In September, an Electronic Frontier Foundation (EFF) media release reported that RIAA was prepared to withdraw its lawsuit against 65-year-old Sarah Ward, once it was revealed that Ward’s Macintosh computer could not run the file-sharing program KaZaA, the program RIAA had accused Ward of using to illegally download music. In October, EFF announced that it would be representing California resident Ross Plank in his fight against RIAA’s lawsuit against him. Similar to Ward’s defense, Plank claims that he did not have KaZaA installed on his computer during the period RIAA was investigating, according to an EFF media release.

The cases of Ward and Plank embody the concerns of EFF and other consumer advocacy groups regarding RIAA’s hunt for file-sharers. Neither Ward nor Plank received notification from their respective ISPs that their identifying information had been subpoenaed by RIAA, nor were they notified that they were under investigation. In order to obtain a subpoena for the identity of an Internet user suspected of file-sharing, RIAA need only present a clerk of a federal district court such evidence as a picture of the files being downloaded on a person’s computer to demonstrate a “good faith belief” that illegal activity is taking place. This picture or screen shot is obtained using software that searches the Internet for suspicious filenames and keeps track of each file name found. The good faith belief is based on evidence that RIAA is able to obtain using a copyright-enforcement program that searches files that are being shared and marks those files that are suspicious. In the

case of Ward, her identifying information such as her name, telephone number, and address were released based on an erroneous “good faith belief” that she was doing something illegal.

RIAA did not comment as to whether the copyright-enforcement program had misidentified Ward as an egregious online offender; the *San Francisco Chronicle* reported that RIAA reserved the right to refile against Ward in the future if it was determined that she was, indeed, the culprit.

Despite this criticism, on December 3, 2003, RIAA announced an additional 41 lawsuits against alleged file-swappers, bringing the total number of lawsuits filed to 382, according to CNET News.com. RIAA also continues to offer amnesty to file-swappers under its “Clean Slate” program. To be eligible for the program, one must submit a “Clean Slate” affidavit signed in the presence of a notary public verifying that all illegal files have been deleted and that such activity will not take place in the future. In exchange, RIAA will not engage in legal proceedings against those who participate in “Clean Slate.” Program details can be found on RIAA’s web site at <http://www.riaa.com/>.

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Copyright Updates

RIAA Tries to Enforce Fees for Music Downloads

The Recording Industry of America (RIAA) does not want to prevent you from downloading. It just wants you to pay for it. RIAA’s concern over plummeting record sales has prompted it to file hundreds of lawsuits against individuals who the industry contends have downloaded and shared numerous songs using file-sharing services such as KaZaA or Morpheus. These programs are free for users to install, as are the songs they are able to download using the program. However, other online programs allow users to download songs for a fee, such as Apple’s iTunes and Rhapsody. RIAA would like to see users move toward this type of service as a part of its long-term goal to end the free downloading and sharing of music, according to Reuters. In the meantime, RIAA continues to subpoena Internet Service Providers in order to obtain the identities of file-swappers and to file lawsuits against egregious offenders.

RIAA’s crackdown seems to be working. The number of Internet users who have a file-sharing program not sanctioned by RIAA has dropped since the industry issued its first lawsuits this summer, according to Reuters, with KaZaA being the hardest hit, losing 40 percent of its 7 million users. KaZaA was featured prominently in RIAA’s dispute earlier this year with Verizon Internet Services (see “RIAA Subpoenas Those Who Allegedly Download Music” in the Summer 2003 Bulletin.). In *RIAA v. Verizon Internet Services*, Verizon refused to release the identity of one of its customers who had used KaZaA to download and share music. The Associated Press quoted Sen. Norm Coleman (R-Minn.) on the issue who said, “The RIAA has a problem, KaZaA has a problem, the technology folks have a problem.” Coleman is chairman of the Senate Governmental Affairs’ Permanent Subcommittee on Investigations which held hearings into RIAA’s recent onslaught of subpoenas and lawsuits (see “Government Holds Hearings on RIAA’s Lawsuits, Subpoenas” on page 35 of this issue of the *Silha Bulletin*).

Concerns over online sharing reach beyond the fiscal concerns of RIAA. CNET News.com reported that college students would be more than willing to download pirated software rather than pay for it, according to the “Internet Piracy on Campus” study released by the Business Software Alliance (BSA) in September 2003. The study’s executive summary described the downloading of music as the “gateway” to downloading software, noting that 89 percent of the thousand students surveyed admit they do not always pay for the commercial software they download. The study also noted that educators who “fail to communicate that piracy is wrong” are partly to blame for students’ attitudes. The study is available online at <http://www.bsa.org/resources/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=2396>.

The issue of pirated software may prompt the termination of file-sharing programs like KaZaA. Businesses such as Microsoft, Apple, and other major software manufacturers could unite against free file-sharing services in order to promote the “pay for it” programs such as Apple’s iTunes. Although songs at Apple’s site can be purchased for 99 cents per song, programs such as Microsoft’s Access or Apple’s FinalCut Pro would be likely to cost users at least a hundred dollars for the convenience of obtaining music online.

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Copyright Updates

Norwegian Court Upholds Decision to Acquit “DVD Jon”

On Dec. 22, 2003, the Oslo Court of Appeals in Norway upheld the January 2003 decision of Oslo’s City Court, acquitting Jon Johansen, known as “DVD Jon,” of charges that he violated copyright law through his development and distribution of DeCSS, a software program that enables DVDs to be copied. The lower court had ruled in January 2003 that Johansen had done nothing wrong in developing the software that cracked DVD protection codes, and then publicized the software on the Internet. (See “Appeals Court Rules Ban on Hyperlinks Constitutional” in the Winter 2002 issue of the Silha Bulletin.)

“The appeal is rejected,” Judge Wenche Skjeggstad stated, one of the seven-member panel of judges and data experts ruling unanimously in the case. The panel ruled that Johansen was free to make copies of any DVDs he legally obtained, so long as the copies were for his personal use. The panel also ruled that since a scratch can make a DVD unusable, it was more reasonable under copyright laws to make a personal copy of a DVD than to make a copy of a book, according to an article in the Toronto Star.

Johansen’s attorney, Halvor Manshaus, senior associate with Advokatfirmaet Schjødt AS, told the Associated Press, “The balance between the rights of intellectual copyright holders has been clearly defined.”

Johansen was 15 years old when he originally developed the software that enabled him to watch DVDs on a Linux-based computer that was not equipped with DVD-viewing software. He posted the codes on the Internet in 1999 and “became a folk hero among computer hackers,” according to SiliconValley.com. The article is available [online at www.siliconvalley.com/mld/siliconvalley/news/7549667.htm?template=contentModulesØKOKRIM](http://www.siliconvalley.com/mld/siliconvalley/news/7549667.htm?template=contentModulesØKOKRIM), Norway’s Economic Crime Unit, originally brought the charges against Johansen at the request of the Motion Picture Association of America (MPAA). In its appeal of the lower court’s decision, ØKOKRIM requested that Johansen be given a suspended jail sentence, a \$3,000 fine and that his computer equipment be confiscated.

The MPAA, which represents Hollywood studios such as Walt Disney Company, Universal Studios and Warner Brothers, has said that programs like DeCSS cost the U.S. motion picture industry \$3 billion annually in lost sales, according to Canada’s National Post’s Financial Post & FP Investing. “The actions of serial hackers such as Mr. Johansen are damaging to honest consumers everywhere,” The New York Times quoted the MPAA as stating. “While the ruling does not affect laws outside of Norway, we believe this decision encourages circumvention of copyright that threatens consumer choice and employment in the film and television industries.”

According to the Toronto Star, ØKOKRIM had two weeks to decide whether to appeal the decision to Norway’s supreme court. On January 5, Reuters reported that Norwegian police had decided not to appeal the case.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Copyright Updates

Florida Man Convicted under DMCA

The first jury-trial conviction under the Digital Millennium Copyright Act (17 USCS §§ 1201 et seq.), or DMCA, may land a Florida man in federal prison for 30 years. Thomas Michael Whitehead was convicted in Sept. 22, 2003 of one count of conspiracy, two counts of selling broadcast decryption hardware – specifically, satellite descrambling hardware – and three counts of violating the DMCA, according to CNET News.com. The Associated Press reported that Whitehead had been selling DirecTV access cards to people who did not want to pay for the service. Whitehead will be sentenced on January 26, 2004. At the time the Bulletin went to press, no further information was available.

Whitehead was found guilty of violating the DMCA's anti-circumvention provisions. Under the DMCA, hardware that can be used to bypass anti-copying devices is a violation of this provision. To view the DMCA in full, go to <http://www.copyright.gov/legislation/hr2281.pdf>.

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

International Media Law

Russian Election Law Overturned

Russian law restricting the way the media report election campaigns was overturned by that country's constitutional court on Oct. 30, 2003. According to a report posted on Internews Russia, the law “[banned] the media from publishing critical reports or predictions about what consequences a candidate's victory might entail. [The media were] also banned from publishing information that might sway voters' preference.” The Financial Times (London) reported that the law also prevented media outlets from failing to provide equal time to all candidates, and prohibited “top public officials” from making endorsements.

Under the law, media outlets could face being shut down after two warnings. The Financial Times reported that two newspapers, identified only as “local,” had been fined. Other media outlets had received warnings. Another was being investigated for covering only the Communist party, while the national magazine Kommersant Vlast had received a reprimand for an article it printed that was critical of Yuri Luzhkov, the mayor of Moscow. The (London) Times reported that three newspapers in Kaliningrad were being taken to court for simply identifying one candidate as the son of a man who had been murdered.

The Financial Times quoted Mikhail Melnikov, an analyst with the media watchdog, The Centre [sic] for Journalism in Extreme Situations, as saying, “No one has closed down a media outlet, but journalists are now thinking twice before risking criticism.”

The new law was passed, according to the Manchester Guardian Weekly, as a reaction to the “black public relations” of earlier political campaigns in Russia, when journalists were paid by one candidate to smear the reputation of their competitor. The Financial Times credits passage of the law in part as a reaction to Sergei Dorenko, a journalist who had a weekly program with the ORT network. Dorenko was known for his “savage, unbalanced attacks” on any presidential hopeful who was perceived as an enemy of the man controlling ORT, businessman Boris Berezovsky, who is now in exile. Currently no independent nationwide television networks exist in Russia. All three are under state control, according to the Financial Times.

The new election law made it illegal to report on candidates' backgrounds, analyze their policies, or suggest who might win. The New York Times reported that some news organizations decided to omit election coverage completely in order to avoid being accused of “bias and electioneering.” However, the Financial Times quoted Alexander Veshnyakov, head of the federal election commission as saying, “The role of the media around election time is the most delicate and subtle of issues The law is designed to apply the principle of balanced reporting. It provides the media with more responsibility.”

During arguments before the Russian constitutional court, Internews Russia reported that the attorney for opponents of the law, Pavel Astakhov, argued, “An election held in the conditions of a total ban on any information beside that released by candidates and political movements cannot be considered free and democratic.”

Following the constitutional court’s October 30 ruling, Boris Nadezhdin, first vice-chairman of the Union of Rightist Forces faction in the State Duma and also one of the people initiating the petition to repeal the campaign law, told Izvestia, “The most outrageous provision was ruled flat-out unconstitutional. . . . The law on the news media and the Constitution take priority over the Law on Basic Guarantees of Russian Federation Citizens’ Electoral Rights.” Izvestia’s article was reprinted in translation in the Nov. 26, 2003 issue of the Current Digest of the Post-Soviet Press.

In what Izvestia characterized as a “crucial decision,” the court defined the criterion by which general information is to be distinguished from election campaigning. Under the new ruling, journalists may report on objective, verifiable information; they may express a “positive or negative” opinion when reporting about a candidate, and they may make an “expression of preference.” On the other hand, “campaigning,” the court ruled, involved “intent” on the part of the journalist to “secure support” for a specific candidate. But legal experts in Russia agree that proving intent is nearly impossible.

One of the benefits of the constitutional court’s ruling, according to Izvestia, is that political debates can now be televised live. Prior to the ruling, television executives were leery of broadcasting live debates for fear that they might be accused of campaigning under the old law’s more vague definition.

According to Izvestia, 73 per cent of Russian Federation citizens would prefer to watch a live broadcast of political debates.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

International Media Law

International Criminal Court Sentences Three Journalists for Crimes of Incitement, Crimes Against Humanity

Three journalists were sentenced by a three-judge panel on Dec. 3, 2003 by the International Criminal Tribunal for Rwanda (ICTR), located in Arusha, Tanzania.

Ferdinand Nahimana, founder of Radio Télévision des Mille Collines (RTLM), Jean-Bosco Barayagwiza, a high ranking board member of the Comité d’initiative of the RTLM and founding member of the Coalition for the Defence [sic] (CDR), and Hassan Ngeze, Chief Editor of Kangura newspaper, were convicted of genocide, incitement to genocide, conspiracy, and crimes against humanity, extermination, and persecution. Nahimana and Ngeze were sentenced to life imprisonment while Barayagwiza was sentenced to 35 years imprisonment. It was the first time since 1946 that an international tribunal has convicted a journalist for disseminating information. At that time, judges at the Nuremberg Trials sentenced propagandist Julius Streicher to death by hanging.

The three-judge panel, made up of Navanethem Pillay, Erik Møse, and Asoka de Zoysa Gunawardana, ruled that the three journalists had been responsible for inciting Rwanda’s Hutu majority to kill a portion of Rwanda’s Tutsi population. During 100 days in 1994, nearly 800,000 people were killed in Rwanda, most of them Tutsis, with “a brutal efficiency that surpassed that of the Nazis,” according to the Edmonton Journal (Alberta, Canada). The judges contended that Nahimana, Barayagwiza, and Ngeze had used the twice-monthly newspaper to “poison the minds of Hutus,” mobilizing them to massacre Tutsis, while radio broadcasts was used to lure Tutsis to churches, schools, hospitals, and roadblocks where they were trapped and killed.

The Kangura published articles with messages that stereotyped Tutsis as wicked, and having the characteristics of liars, thieves, and killers. Tutsi women were portrayed as femme fatales who would try to dilute Hutu blood by marrying Hutu men. Ngeze published “The Ten Commandments of the Hutu” in December 1990, warning Hutu men to stay away from Tutsi women. Although Ngeze had saved the lives of several Tutsi in 1994, Judge Pillay told him that “Your power to save was more than matched by your power to kill . . . by words and deeds caused the death of thousands of innocent civilians.”

“The power of the media to create and destroy human values comes with great responsibility,” the panel concluded. “Those who control the media are accountable for its consequences.”

Alison DesForges, a New York-based expert on Rwanda who wrote a 771-page Human Rights Watch report on that country’s 1994 genocide, testified at the journalists’ trial. DesForges told the Washington Post Foreign Service “It’s an extraordinarily important decision because it does recognize that media can be used to kill. Using media to disseminate hate. There is a larger meaning for the whole world, including America, that sends a message about the responsibility of the media.”

The ICTR’s decision sets a worrisome precedent, however. The International Herald Tribune carried a story on Dec. 6, 2003 stating that this decision could enable dictators to try to use this decision to prosecute legitimate journalists who simply present fact and opinions governments would rather not have discussed. In that same story, The International Herald Tribune also reported that six journalists were detained in Rwanda for “inciting sectarian behavior” and that the Rwandan statutes that allow their arrests stunt free expression and democracy.

The Washington Post Foreign Service reported that Ngeze’s attorney, Washington-based John Floyd said that the verdict was unfair and curbed freedom of speech. “The freedom of expression has stepped backward for 50 years. This would never have lasted in the U.S. Court. These men would have had their rights to democratic expression.

According to a story posted on MSNBC.com, lawyers for Nahimana and Ngeze have said they would appeal their clients’ sentences, but because Barayagwiza’s sentence was reduced from 35 to 27 years, it cannot be appealed.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Celebrities and Privacy

Photographers Cleared in Princess Diana Privacy Case

On Nov. 28, 2003, a French court in Paris cleared three photographers accused in a civil case of breaching privacy laws when Princess Diana and Dodi Fayed were killed in a car crash in Paris on August 31, 1997.

Jacques Langevin of the Sygma Corbis agency, Christian Martinez of the Angelis agency and freelancer Eric Chassery were among eight photographers originally following the couple’s car. All the photographers have been acquitted of involuntary homicide and charges of non-assistance at the scene of an accident in a case decided earlier. But, according to BBC News, Fayed’s father, Mohamed Al Fayed, launched a civil case based on French privacy laws against Langevin, Martinez and Chassery. Had they been found guilty, each could have faced maximum sentences of a year in jail and a fine of \$53,600, according to Agence France Presse.

The case hinged on a principle of French law holding that the inside of a car, even on a public road, is as private as the inside of the house, according to The (London) Guardian. An earlier case involving French pop star Michel Sardou established the principle.

In clearing the three photographers, The Guardian reported that the court ruled that although the photographs that were taken revealed the interior of the couple’s car, the pictures, which were never published, did not reveal

“any intimate gesture or behaviour [sic]” between Princess Diana and Fayed, and that “The couple were not unaware that they were exposing themselves to being photographed when leaving the hotel,” the verdict read.

Martinez’ lawyer, Valerie Rosano, applauded the decision, saying, “This is an excellent decision, which confirms the principle of the freedom of the press and the right to information.” Her quote appeared in The Royal Archive, a Web site covering news about Britain’s royal family, together with a statement from the French press photographers association, ANJRPC-Freelens, which read, “It is what we were hoping for. It is totally legitimate because though we have often heard the word paparazzi what they are is photo-journalists [sic]. And what they did that night is what they always do in such circumstances: take pictures.”

Fayed’s father has appealed the decision, saying, “Here we have another judge . . . who seems determined to sweep the whole tragic affair under the carpet, thereby aiding the continued cover-up.” The Royal Archive reported. However, a report by BBC News stated that “lawyers in Paris say they see no legal reason to overturn the judgement [sic].” Fayed has been campaigning “relentlessly” for a “full public inquiry” into the cause of the accident that killed his son and Princess Diana. In mid-December, the Associated Press reported that Michael Burgess, the British royal family’s coroner, announced that an inquest into Princess Diana’s and Fayed’s deaths would begin on Jan. 6, 2004.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Celebrities and Privacy

Schwarzenegger’s Campaign Staffers Required to Sign Confidentiality Agreements

During his whirlwind bid to become governor of California, Arnold Schwarzenegger required campaign staffers to sign detailed confidentiality agreements, according to the *Los Angeles Times*. Such agreements are common in Schwarzenegger’s previous line of work, according to the report, but rare in politics.

“I’ve been working on campaigns in California for 15 years, and I’ve never been asked to sign one,” said Tom Shortridge, director of Campaign Experts Consulting of Los Angeles, the Reporters Committee for Freedom of the Press reported on Sept. 24, 2003.

In the entertainment world, such agreements are intended to prevent employees of celebrities from cashing in on their inside – and potentially embarrassing – knowledge of the rich and famous and their private lives. But some worry that confidentiality agreements in political campaigns could prevent voters from getting a clear and accurate view of the candidate by chilling the political speech of his or her current and former campaign workers.

The agreements prohibited campaign workers from revealing information about Schwarzenegger or his family, friends, associates and employees. The agreements also barred photographing the candidate or making “any sketches, depictions or other likenesses” of Schwarzenegger or his family, friends and associates.

The Los Angeles Times obtained a copy of the five-page agreement, the existence of which was supposed to have remained secret. The agreement states, in part, that Schwarzenegger had devoted “substantial effort and expense . . . to limit the constant efforts of the press, other media, and the public to learn of [his] personal and business affairs,” according to the newspaper’s Sept. 19, 2003, report. According to the agreement, violators could be forced to pay as much as \$50,000 per transgression.

The week after the *Los Angeles Times* article was published, Richard Blow, the former executive editor of *George* magazine and author of a recent book about that magazine’s founder, John F. Kennedy, Jr., voiced concerns about Schwarzenegger’s use of confidentiality agreements in his campaign. In a Sept. 27, 2003, op-ed

piece in *The New York Times*, Blow said such agreements often were used unfairly, or as tools to hide past transgressions. A man asking to lead a state with 34 million residents, Blow said, ought to provide more transparency.

“Confidentiality agreements allow Mr. Schwarzenegger to enter the public arena with very little of the risk that every other noncelebrity politician must live with: that the public will learn unfortunate truths about him,” Blow wrote. “If a candidate isn’t willing to take that chance, perhaps he shouldn’t be running in the first place.”

Schwarzenegger’s eagerness to secure vows of silence from his campaign staff was revealed around the same time that Schwarzenegger announced his support for a state constitutional amendment to strengthen California’s public disclosure laws, according to the Reporters Committee.

—DOUG PETERS
SILHA FELLOW

Celebrities and Privacy

Barbara Streisand Loses Privacy Lawsuit to Environmentalists

Singer/actress Barbra Streisand’s privacy lawsuit against a man who took aerial pictures of her Malibu estate and then posted them on his Web site was dismissed by a trial judge in Los Angeles on Dec. 3, 2003. A photograph of her Malibu estate will remain on the Internet, and she must pay the defendant’s attorney’s fees.

Kenneth Adelman, a retired software engineer, and his wife Gabrielle have been taking pictures of the California coastline to “promote coastal preservation,” according to a statement on their Web site, www.californiacoastline.org. Adelman himself has taken approximately 12,700 photographs of the California coastline to create a “baseline photographic index” which were arranged sequentially by longitude and latitude, then posted on Adelman’s Web site. According to Adelman’s statement, the Web site has been accessed free of charge by government agencies, universities, scientists and conservation groups. Detailed prints of the digital photographs are also available for sale.

Image 3850 depicts the Malibu estate of Barbra Streisand. A complaint filed by Streisand’s attorney, John M. Gatti, accused Adelman of violating Streisand’s right to privacy because his photographs were shot at a very high resolution that “[showed] details that would be impossible to see via the naked eye while viewing from a public vantage point. For example, the layout of Plaintiff’s pool and the positioning of her parasols and deck chairs is clearly visible from these photographs. The interior of the home, positioning of the windows, the French doors, the balconies, and all aspects of her residence and guest house that face the beach . . . are similarly visible. The photographs also clearly identify those routes that could be used to enter her property.”

Streisand’s lawsuit included three counts of invasion of privacy; violation of misappropriation of the right to publicity code, and violation of California’s Anti-Paparazzi Act.

Besides Adelman, Streisand also sued Layer42.Net, which provides the web hosting service for Adelman’s Web site, and Pictopia, which offered “quality prints” of Adelman’s coastal photographs for sale. In total, six prints of Streisand’s estate had been sold at the time the case went to court. Two of them were purchased by Streisand herself, and another by one of her neighbors.

Streisand’s attorneys had contacted Adelman, asking him to remove the photograph from his Web site. Adelman refused, citing his First Amendment rights. Adelman’s attorneys filed a motion to dismiss the case under California’s Anti-SLAPP law (anti Strategic Lawsuits Against Public Participation; Code of California Civil Procedure § 425.16) which was design to curb the number of abusive lawsuits that attempt to limit public participation and free speech in matters of public importance. “My goal in bringing the Anti-SLAPP motion was to protect the integrity of this historic photographic database of the California coast and to ensure that the public has unfettered access to the photographs and the other data it provides,” Adelman said in a press release posted on his the California Coastline Web site.

Judge Allan J. Goodman of State Superior Court in Los Angeles County West District, wrote the opinion in the case, *Streisand v. Adelman et al*, Case no. SC 077 257. Photographs of the coastline, including the Streisand estate, are legitimately newsworthy, Goodman wrote, because “protection of the California coastline is a matter of great public interest, spanning the history of the state Indeed, the right of the people to ownership of, or access to, tidelands originated in Roman law.” Goodman further cited the California Coastal Zone Conservation Act of 1972 as well as Public Resources Code §30006 and §30012, which specifically states: “The Legislature finds that an educated and informed citizenry is essential to the well-being of a participatory democracy and is necessary to protect California’s finite natural resources. . . .” Goodman also cited a posting on Streisand’s own Web site on December 10, 2002, where she herself addressed environmental concerns. That posting is available online at http://www.barbrastreisand.com/statements_subArchives.html#environment. The photograph is also newsworthy, Goodman wrote, because it does depict Streisand’s estate. Describing her as a “voluntary public figure who speaks out on environmental issues,” Goodman wrote, “The facts that this plaintiff lives where she does and how she conducts herself in relationship to her surroundings are matters of public interest.”

Goodman also cited a 1989 *People* magazine article about Streisand where she “consented to publication of photographs of her property, including but not limited to the area depicted in Image 3850.” The photographs in *People* “include interior as well as exterior photographs, all of a quality equal to or better than Image 3850, albeit smaller in size.”

Furthermore, even though the view of Streisand’s property that Adelman captured for his Web site was not one normally available to the public, there is no reasonable expectation that one’s yard should not be viewed from the sky. Goodman cited Civil Code §659 and Public Utilities Code §21402 and 21403, saying that “California has repudiated the old common law doctrine of ownership of the sky. Flight is lawful if in compliance with federal height restrictions” Goodman reasoned that “[A]erial views are a common part of daily living; there is nothing offensive about the manner in which they occur, nor in the manner in which this particular view was obtained.” (Emphasis in the original.)

As to Adelman’s photograph itself, Goodman stated, “At its most detailed, the photograph at issue reveals no truly private place. . . . [T]he aerial view is distant, if not remote – Image 3850 is a depiction of the coastline with adjacent houses, yards, recreational facilities and streets – and not a peering into this plaintiff’s private residence or private residential area; no persons can be recognized in the image even when the image is enlarged. It is undisputed that [Adelman] was engaged in his avocation of photographing the California coastline for an ecological history project and did not take Image 3850 with any other purpose in mind. . . . The posting of Image 3850 on defendant Adelman’s website was done with the same purpose; when it was done, it too was not done in a manner highly offensive to a reasonable person.”

Documents for the case, including Streisand’s complaint and Goodman’s ruling, are available online at www.californiacoastline.org.

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Post War Iraq Updates

Coverage of Bush Admission Debated

Before the most recent war in Iraq, the Bush administration implied that Saddam Hussein had played a role in the Sept. 11, 2001 attacks. A Washington Post poll conducted in August 2003 showed that 69 percent of Americans did believe that Hussein had been involved, according to Editor & Publisher. However, on Sept. 17, 2003, President Bush admitted for the first time that evidence did not exist linking Hussein to the attacks.

Bush's admission came after Vice President Dick Cheney appeared on NBC's "Meet the Press" on Sept. 14, 2003, where Cheney commented on the poll, saying that "it's not surprising that people make that connection. . . . If we're successful in Iraq then we have struck a major blow right at the heart of the base, if you will, the geographic base of the terrorists who had us under assault now for many years, but most especially on 9/11."

An Editor & Publisher editorial found the coverage of Bush's admission varied among newspapers. For example, of the twelve daily papers ranking highest by circulation, the Los Angeles Times, the Chicago Tribune (both owned by the Tribune Company) and the Dallas Morning News ran the story on the front page. Newspapers with smaller circulations that carried page one stories about Bush's admission included The Boston Globe, The Seattle Times and the Seattle Post-Intelligencer.

By contrast, The New York Times ran the story on page 22; USA TODAY on page 14; The Washington Post on page 18; and Newsday on page 41.

According to Editor and Publisher, the New York Post and the Wall Street Journal did not mention Bush's statement.

Some newspapers ran editorials commenting on the Bush administration and the media's role that may have contributed to the public's perception of the link.

An op-ed column by Paul Waldman, co-author of *The Press Effect: Politicians, Journalists, and the Stories that Shape the Political World*, found fault with both the Bush administration and the news media. Waldman wrote in his column, published in the Washington Post, "The administration's critics think they know whom to blame for this: President Bush and those who work for him. I think they're right. But I would also name an accessory: The nation's media, which have yet to find a clear and effective way to report incorrect impressions and untruthful statements, particularly those that emanate from the White House."

David Reinhard, an associate editor of *The Oregonian* of Portland, Ore., did not find the revelation newsworthy. He wrote in a commentary on Sept. 22, 2003, "This is news? The fact is the Bush administration never claimed over the last two years that there was a 'Saddam-Sept. 11 link.'"

Reinhard wrote that the issue became a "media fetish" in light of the Washington Post poll and those against the war, both in the political and the public realm, thought the Bush administration should be blamed for the misconception. "The administration didn't debunk a viewpoint it never advanced," Reinhard added.

The Seattle Post-Intelligencer featured an editorial on Sept. 23, 2003, by columnist Chicago Tribune Clarence Page. He acknowledged that the White House never definitively declared a link between Iraq and September 11, but the Bush administration chose its words in ways that expertly avoided declaring such a link even as they strongly suggested one.

Page gave an example from a televised address in which President Bush made his case for an invasion of Iraq in October 2002. "We know Iraq and the al-Qaida terrorist network share a common enemy: The United States of America," the President said.

Page also wrote that, based on mail he received from his readers and from polls conducted on the matter of Iraq's involvement of the September 11 attacks, most Americans saw the war with Iraq connected to the terrorist attacks.

Hussein was captured by U.S. forces on December 14, and on January 8 was officially declared a prisoner of war. When the Bulletin went to press, it was uncertain in what court he will be tried, or for what crimes.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Post War Iraq Updates

Bush Bypasses National Media in Favor of Regional Broadcasters

The Bush administration, displeased with the news coverage of the war in Iraq, bypassed the national media outlets by using five regional broadcasting companies to disseminate his message more directly to the American public. Andrew Kohut, director of the Pew Research Center for the People and the Press, told The Washington Post that White House is savvy in strategizing to bypass the national media because viewers tend to trust their local news more than network television.

President Bush granted a series of exclusive interviews to Cox Television, Hearst-Argyle Television, Tribune Broadcasting, Belo and Sinclair Broadcast Group on Oct. 13, 2003, to discuss improvements in Iraq. This was an effort to reach news organizations that do not regularly cover the White House, according to Associated Press.

The effort by President Bush to reach about 10 million Americans through the regional broadcasters came two days after it revealed that soldiers in Iraq have sent form letters home to local newspapers asserting that the U.S. troops had been welcomed by the Iraqi people. (See “Letter Writing Campaign By Soldiers Not What It Appears” on page 44 of this issue of the Silha Bulletin.) In the president’s interviews with the regional broadcasters, he mentioned improvements to Iraq’s hospitals and schools, stating that “there’s a great deal of consistency” in the administration’s actions and “a very clear strategy” while expressing “a sense that people in America aren’t getting the truth.”

In an interview with Hearst-Argyle, the President said, “I’m mindful of the filter through which some news travels, and somehow you just got to go over the heads of the filter and speak directly to the people,” according to The Washington Post.

On National Public Radio, Grant Rampy, senior correspondent with Tribune Broadcasting, said each of the five reporters had eight-minute interviews. Tribune Broadcasting is a regional network with 20 broadcast affiliates owned by the Chicago Tribune, Rampy said. They were told that the White House requested they focus on the economy, Iraq and the war on terror, he said. Some in the national media say the White House strategy is an attempt to avoid harder questions.

“It’s much more often the case in doing local or regional interviews that reporters come to the interview at least a bit star-struck, at least a bit less prepared for how to focus the interview on questions and answers in the public interest and a bit more willing to accept what the White House position is on matters of controversy,” said Mark Halperin, ABC News political director to The Washington Post.

Halperin also said he intended no slight to regional reporters, but that President Bush is “more sophisticated” about avoiding the national media “than anybody who has ever held the job.”

A CBS report labeled the Bush Administration’s actions as a “public relations equivalent of a declaration of war,” according to Television Week. Television Week further reported that CBS News White House correspondent John Roberts had stated during a newscast that local news interviewers would not question members of the Bush administration as strenuously or as insightfully as the White House press corps.

Cissy Baker, Tribune Broadcasting’s vice president for news operations, told Television Week that the Tribune did not go easy on the president. She said Rampy, who is the station group’s Washington correspondent, has his own White House work space and independent standup location, from which he files about 20 live shots a day. “We are on a par with any network correspondent,” Baker said.

Post War Iraq Updates

Letter Writing Campaign by Soldiers Not What It Appears

U.S. Army officials have determined that copies of an identical letter portraying the American occupation of Iraq in a positive light and which were sent to various U.S. newspapers do not warrant further investigation.

The letter stated that soldiers restored order in the city of Kirkuk, established police and fire departments there, and were greeted every day by thankful Iraqi citizens. The Boston Globe printed one of the letters, allegedly sent by Pfc. Adam Connell, containing such quotes as “The quality of life and security for the citizens has been largely restored, and we are a large part of why that has happened.”

Approximately 500 letters, supposedly written and signed by individual U.S. soldiers, were mailed out and at least 11 newspapers from Massachusetts to California printed them. However, Gannett News Service reported on Oct. 12, 2003, that the letters were not written by the soldiers who signed them, but were form letters written by senior officers.

The letter-writing campaign was organized by personnel of the 2nd Battalion of the 503d Airborne Infantry Regiment, stationed in Kirkuk in northern Iraq. Lt. Col. Dominic Caraccilo, the commander of the 2nd Battalion, said that the letter writing campaign was his idea and not sanctioned by the Bush administration, according to the Associated Press.

“It gave our soldiers an opportunity to let their respective hometowns know what they are accomplishing here in Kirkuk,” Lt. Col. Caraccilo wrote in an e-mail to ABC News. Caraccilo also said the letter was written by his staff, edited by him and then passed on to the soldiers. He said some soldiers chose not to send the letters home.

Army spokesman Joe Burlas said no evidence has been found that the soldiers who participated in the letter-writing were forced to do so. “There was no arm-twisting involved,” Burlas told The Boston Globe, “It was not organized by headquarters. We didn’t know about it.”

The staff at The Olympian newspaper in Washington state became concerned when they received two letters a few days apart, identical except for the signatures, Managing Editor Jerry Wakefield told The Associated Press. The Olympian did not print the letters, however, because the newspaper has a policy against printing form letters, according to the Great Falls Tribune Online. On Oct. 14, 2003, “All Things Considered” on National Public Radio (NPR) reported that one of the letters arrived at The Olympian signed by Specialist Alex Moroy. His stepmother, Moya Moroy, told NPR that her stepson knew nothing about it, but had instead complained about low morale among soldiers in Iraq and reported mixed success in his unit’s postwar mission. She said she was taken aback to see her stepson’s name on such a positive letter.

Others, however, suggest the Bush administration is behind the letter-writing campaign, in the hopes of putting a more positive spin on the war in Iraq. CounterPunch, a bi-weekly newsletter available online that is edited by Alexander Cockburn, columnist for The Nation, and Jeffrey St. Clair, author of *Been Brown So Long it Looked Like Green to Me: The Politics of Nature*, carried an article by Stan Goff. Goff, identified as a retired Special Forces master sergeant, is also the author of *Hideous Dream: A Soldier’s Memoir of the US Invasion of Haiti* and of the forthcoming *Full Spectrum Disorder*.

Goff wrote that the letter campaign was executed “coincidentally, at the same time the Bush administration launched its counteroffensive against critics of the war – and given the progress of the war, a counteroffensive against reality.” Goff characterized the campaign as an “Escape from accountability.”

Goff’s article is available online at www.counterpunch.org/goff10172003.html.

Post War Iraq Updates

Jessica Lynch Update

In an interview with Diane Sawyer of ABC's "Primetime Live" on Nov. 11, 2003, Pfc. Jessica Lynch revealed details of her rescue from an Iraqi hospital where she had been treated for injuries, as well as the fact that she did not engage in gun battle in the ambush where she was captured because her rifle jammed.

Lynch, a supply clerk, and others in her unit were ambushed March 23 in southern Iraq after their truck made a wrong turn towards the city of Nasiriyah, which was considered hostile territory. Eleven of her comrades were killed and five other members of the 507th Maintenance Company were taken prisoner; Lynch herself suffered multiple broken bones. Controversy has surrounded the way the Pentagon and the media have reported the ambush and Lynch's subsequent rescue. (See "Questions Surround Rescue Operation of Pfc. Jessica Lynch" in the Spring 2003 Silha Bulletin and "Jessica Lynch Book, Television Projects Negotiated" in the Summer 2003 Silha Bulletin.)

In an interview with the Associated Press on Nov. 11, 2003, Lynch said that she was disturbed that the military seemed to over-dramatize over her rescue by U.S. troops and spread false stories that she "went down" shooting in an Iraqi ambush. According to Lynch's medical records, she suffered spinal fractures and other broken bones and had been sodomized. Iraqi doctors have disputed the sexual assault allegations, according to the Associated Press.

Lynch's book, released November 1 and entitled, *I Am a Soldier, Too* points out that despite the "tension and drama" of the military videotape showing gun-toting U.S. soldiers rushing into an Iraqi hospital to rescue her, the hospital staff never resisted, and even offered the troops a key that gave them access to various areas of the hospital.

In the "Primetime Live" interview with Sawyer, Lynch said that she was bothered when she found out about the false stories. "It hurt in a way that people would make up stories that they had no truth about. The other four people in my vehicle aren't here to tell that story. So, I would have been the only one to have been able to say, yeah, I went down shooting . . . but I'm not about to take credit for someone or something that I didn't do," she said.

On Nov. 9, 2003, NBC aired "Saving Jessica Lynch." According to Nielsen ratings, the docudrama attracted 14.9 million viewers. However, controversy surrounded the production because of the conflicting accounts of what actually occurred.

The Austin American Statesman (Texas) reported that the movie was written last spring within days of Lynch's rescue from an Iraqi hospital. The movie combines the official Pentagon version with the story of an Iraqi lawyer, Mohammed Odeh Al-Rehaief, who reportedly led American troops to Lynch. NBC bought the rights to Al-Rehaief's account and made him, not Lynch, the focal point of the film. Lynch did not participate in the NBC production.

The film addresses the controversy by hinting that the Bush administration and the Pentagon urged the Army to rescue Jessica and quickly made footage of the daring mission available to U.S. media, according to The Austin American Statesman. In July, a BBC documentary, "War Spin: Jessica Lynch," indicated the rescue was exaggerated in a public relations ploy.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Post War Iraq Updates

Media, Military Meet in Conferences to Discuss Coverage of War in Iraq

Conference Examines Effectiveness of Embedded Reporters Program

A conference on the media's role in Operation Iraqi Freedom, held from Sept. 3-5, 2003 at the U.S. Army War College in Carlisle, Pa., considered the successes and drawbacks of the embedding program during the war in Iraq. Among the topics discussed were whether members of the media were objective, or became too involved with sources, and whether the military's ground rules prevented more negative images of war.

Approximately 90 individuals, including top wartime commanders, journalists, military historians, academics and researchers participated. Students from the war college, which prepares military officers for top leadership positions, also attended the conference, according to Milwaukee Journal Sentinel.

During the course of the conference, military officers revealed that the Army had arranged for an embedded U.S. television crew to film airborne troops moving through the desert, hoping that Iraqi commanders would realize how far north the U.S. forces had advanced, according to Reuters. In addition, the Army also arranged for journalists to televise U.S. tanks going through Baghdad to prove the U.S. was in charge after Iraqi government claims that American troops were trapped hundreds of miles from the city.

"I just wanted them to report what happened. If having the media report accurately is using them, then they were used," said Col. David Perkins, who organized the attack.

The United States lost the "information objectives campaign" when most embeds left, Marine Col. Glenn Starnes said during the conference, referring to coverage that now focuses on soldiers being ambushed and killed. The embedded reporters got "all the news out, not just the sensationalism," Starnes said, who led troops in heavy fighting in Nasiriyah, according to Milwaukee Journal Sentinel.

James Fisher, an assistant professor from the University of Utah's Department of Communication, who has also reported from several war zones, said at the conference that he believed that the coverage provided by embedded reporters was tainted because they were not only "looking through a soda straw, but that they were looking through an American soda straw," according to Milwaukee Journal Sentinel.

Fisher also questioned whether Defense Department ground rules, which, for example, forbid showing dead U.S. troops, meant that only images portraying a more positive view of the war were released.

The Military Reporters and Editors Second Annual Conference

The Military Reporters and Editors (MRE) held its second annual conference from Oct. 2-4, 2003, in Crystal City, Va.

MRE, formed two years ago, has lobbied the Pentagon for better media access to the military, according to Editor & Publisher. (See "Journalists on the Frontlines: Military Reporters Join Forces to Fight Access Restrictions" in the Fall 2002 Silha Bulletin)

About 100 journalists attended the conference, which included panels on topics related to media coverage such as the role of women in war, the visual images of war and how to cover the military on and off the battlefield.

Democratic presidential candidate and retired Army Gen. Wesley K. Clark gave the keynote address, in which he accused the Bush administration of using the September 11 attacks as a pretext to invade Iraq, and manipulated the facts about Saddam Hussein's weapons of mass destruction in order to topple his regime, The Florida Times-Union (Jacksonville) reported. In an article released by Bulletin Broadfacing Network, Inc., Clark further stated, "Nothing could be a more serious violation of public trust than to consciously make a case

for war based on false claims. We need to know if we were intentionally deceived,” He further accused the administration of violating principles of American democracy.

Clark called for an investigation into the manipulation of intelligence, and recommended that the investigation be done by an outside body, according to the The Florida Times-Union.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Post War Iraq Updates

Rules for Embedded Reporters Loosened

The Pentagon’s journalist embedding program has loosened its rules in recent months, according to Editor & Publisher on Sept. 25, 2003.

Originally, the program restricted reporters to specific assignments with military units, banned reporters’ movements between units and would not let them return if they left their assigned units. But in September, Editor & Publisher reported that about 35 embedded media representatives can move from group to group, embed for shorter periods of times and essentially come and go as they please.

“In post-conflict [Iraq] a different set of circumstances are in place,” Major Peter Mitchell, a spokesman for U.S. Central Command in Florida, which oversees the embedding program said, according to Editor & Publisher. He explained, “There is a different face on the mission and operational security is not as critical as it was. There is more flexibility.” Each unit commander can still decide if a reporter can be embedded depending on the unit’s security needs, Mitchell told Editor & Publisher.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Post War Iraq Updates

***Los Angeles Times* Reporters Injured in Baghdad Blast**

Three reporters from the Los Angeles Times were injured on New Year’s Eve when a car bomb went off near the Nabil, a restaurant where they were celebrating. Four local support personnel for the newspaper were also injured. The Washington Post reported that five people died in the attack; CNN.com reported that seven lost their lives. All of the deceased were Iraqi nationals.

According to CNN.com, the three wounded reporters were Rome Bureau chief Tracy Wilkinson; Chris Kaul, who had previously been assigned to the newspaper’s Mexico bureau; and Ann Simmons, a correspondent who was normally based in Los Angeles. The Washington Post identified one of the supporting personnel as Mohammed Arrawi, the technical director of the Los Angeles Times bureau in Baghdad. The Washington Post did not identify the other three supporting staff members.

The wounds of all the Los Angeles Times employees were described by CNN.com as “not life-threatening.”

The Nabil was often frequented by Westerners, according to CNN.com, and that night the restaurant had planned a New Year’s Eve party with belly dancers and live music. The explosion, occurring at 9:22 p.m. local time, was the result of a suicide car bomb made up of a ton of explosives, CNN.com reported. According to the Washington Post, the Nabil was located on a busy corner with little protection such as sandbags. There were, however, private security guards on site. A little over 30 people were in the restaurant at the time the bomb was detonated.

CNN reporter Satinder Bindra reported that three or four nearby buildings were flattened by the explosion, and four cars were “smashed to smithereens.”

The Daily News (New York) reported that the restaurant's owner, Nabil Hanna, stated, "There were no special guests [at the restaurant that night], not too many foreigners, and it was just a normal dinner. This was supposed to be the last of 2003. This was supposed to be a happy new year."

—ELAINE HARGROVE-SIMON
SILHA FELLOW AND *BULLETIN* EDITOR

Post War Iraq Updates

***Los Angeles Times* Reporter Dies in Baghdad**

Veteran Los Angeles Times correspondent Mark Fineman died Sept. 23, 2003 of an apparent heart attack while on assignment in Baghdad. He was 51.

Fineman was waiting in the offices of the Iraqi Governing Council for an interview when he complained of chest pains and collapsed, colleagues in Baghdad said. Taken to a hospital, he could not be revived, according to Associated Press.

When he first felt ill, Fineman sought shelter in a small guard hut. He then chatted with a Nepalese Gurka sentry in broken Hindi, a language he had learned on his two tours as a foreign correspondent in South Asia, according to the Los Angeles Times. "It was classic," Alissa J. Rubin, the *Los Angeles Times* reporter who was with Fineman at the time, said in a story filed with that paper. "Mark wasn't feeling very well and he still couldn't stop himself from engaging [with another]," she said.

The Los Angeles Times reported that Fineman had worked for the paper for 17 years. He reported for the Times from the Philippines, India, Cyprus and Mexico City, and had been the paper's Caribbean correspondent based in Florida. Before joining the Times, Fineman had been a foreign correspondent for the Philadelphia Inquirer.

He won a variety of awards during his career, including the Overseas Press Club award in 2001, a National Headliners award in 1991, an American Society of Newspaper Editors award for deadline writing in 1987 and a George Polk award in 1985. He was a graduate of Syracuse University.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Post War Iraq Updates

Reporters Honored at War Memorial

Senior Bush administration officials and media executives honored four American war journalists by unveiling a plaque in their memory at the War Correspondents Memorial Arch in Burkittsville, Md .

About 200 people attended the memorial ceremony on Oct. 1, 2003, including Deputy Defense Secretary Paul Wolfowitz, NBC anchor Tom Brokaw and family members of those who died, according to Reuters.

Elizabeth A. Neuffer, a reporter for The Boston Globe who died May 9, 2003, in an auto accident in Iraq, Michael Kelly of The Atlantic Monthly and The Washington Post, and David Bloom of NBC News, and Wall Street Journal reporter Daniel Pearl, who was kidnapped and murdered in Pakistan in January 2002 while reporting on the Al Qaeda terrorist network, were added to the War Correspondents Memorial Arch.

Kelly and Bloom died in April while embedded with US forces invading Iraq.

Reuters reported that Kelly, Bloom and Neuffer are among 18 journalists who died in Iraq since the U.S. invasion in March. (See "Journalists Who Lost Their Lives in the War with Iraq" in the Spring 2003 Silha Bulletin.)

It was the first time since the Civil War that U.S. journalists who lost their lives covering military conflicts were honored at the War Correspondents Memorial Arch, according to the Boston Globe. The memorial was originally erected in 1896 by George Alfred Townsend, a columnist for the Chicago Tribune who had been the youngest war correspondent of the Civil War. Information about the memorial arch is available online at <http://www.civilwarhome.com/Gathland.htm>.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Post War Iraq Updates

Soldiers Cleared in Death of Cameraman

A U.S. military investigation has cleared U.S. soldiers who mistakenly shot and killed Reuters cameraman Mazen Dana.

Dana's death occurred on Aug. 17, 2003 near a U.S.-controlled prison outside Baghdad. The soldiers thought Dana's camera was a rocket-propelled grenade launcher, according to the U.S. army. A journalist told the Washington Post that Dana and others had secured permission from a soldier to shoot videotape. (See "New Developments in the War in Iraq: Reuters Cameraman Shot by U.S. Forces," in the Summer 2003 Silha Bulletin.)

Tom Glocer, Reuters' chief executive, along with international media organizations, have requested that U.S. Defense Secretary Donald Rumsfeld conduct a more in-depth investigation of Dana's death. New York-based Committee to Protect Journalists and Paris-based Reporters Without Borders also voiced their concerns about the circumstances of Dana's death.

Human Rights Watch charged that the over-aggressive reactions by U.S. forces, as in Dana's case, were putting journalists and other civilians in unnecessary danger, according to a written statement.

"As attacks against them continue, U.S. soldiers are sometime resorting to deadly force in a reckless and indiscriminate way," Joe Stork, acting executive director of Human Rights Watch's Middle East and North Africa Division, told Agence France Presse.

After the U.S. soldiers were cleared, Glocer wrote another letter to U.S. Defense Secretary Donald Rumsfeld expressing his "deep dismay that neither Reuters nor Mazen Dana's family were properly informed of further developments in the case." Lt. Col. George Krivo, a military spokesman, told the Associated Press that an official investigation had concluded that "although a regrettable incident," the soldiers "acted within the rules of engagement."

"Specifically, neither [Reuters nor Dana's family] was advised directly of the completion and findings of your investigation, which were instead communicated in a haphazard way by a military spokesman responding to journalist questions in Baghdad," Glocer wrote.

Glocer also requested a full copy of the report. At a news briefing in Baghdad, the Associated Press reported that Lt. General Ricardo Sanchez, U.S. commander in Iraq, told a Reuters reporter, "It is not standard policy for us to release investigations to the public upon completion."

Sanchez added that the "average citizen" has access to government information through the Freedom of Information Act and that he understood "that in the case of the investigation with Reuters, there is a FOIA request on the table," according to the Associated Press.

Dana was the second Reuters correspondent to die since the war began March 20. Reuters cameraman Taras Protsyuk, an Ukrainian journalist, died April 8 after an American tank fired at the Palestine Hotel in Baghdad as U.S. troops took the city. In August 2003, a U.S. Central Command investigation showed that American forces

acted in self-defense when they fired on the Palestine Hotel, according to the Associated Press. (See “Journalists Who Lost Their Lives in the War with Iraq” in the Summer 2003 issue of the Silha Bulletin.)

Markiyanyan Lubkiskyy, the head of the Ukrainian Foreign Ministry’s press service, told the BBC, “While accepting the arguments that the US military personnel were acting in difficult circumstances and conditions, the Ukrainian Foreign Ministry still believes that the investigation should continue in order to obtain more specific results.”

Lubkiskyy concluded that “it is impossible to consider the issue over and done [with] on the basis of the conclusions reached by the U.S. side, as at issue is moral and legal responsibility which should be assumed by the military personnel guilty of Taras Protsyuk’s death.”

Sarah DeJong, human rights and safety officer of the London-based International Federation of Journalists, told Editor & Publisher, “A lot soldiers there are quite young and quite terrified. It’s normal for them to treat just about everyone with a great deal of suspicion.”

Citing the Palestine Hotel report, DeJong said that the problem is the military does not seem to be learning anything from these incidents and appears to be justifying them.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT

Ken Starr Presents 18th Annual Silha Lecture

The 18th Annual Silha Lecture featured Kenneth Starr, whose presentation, “Political Liberty: Campaign Finance and the Freedoms of Speech and Association” provided a unique perspective on the controversial Bipartisan Campaign Reform Act, also known as McCain-Feingold.

McCain-Feingold, which President Bush signed into law on March 27, 2002, amends the Federal Election Campaign Act of 1971. Starr is a member of the legal team representing Sen. Mitch McConnell (R-Ky.) in his constitutional challenge to the Act.

In May 2003, a three-judge federal court panel in Washington, D.C., issued a 1,638-page opinion striking down parts of the statute, including the ban on national party committees raising “soft-money” from corporations, unions and others. Other sections of the law were upheld, including a ban on soft money solicitation by federal officeholders. The panel later stayed the ruling, and the U.S. Supreme Court declined to lift that stay pending its own review of the case. The Supreme Court heard oral arguments on Sept. 8, 2003, and issued its ruling on Dec. 10, 2003. (See “U.S. Supreme Court Rules on Constitutionality of Bipartisan Campaign Reform Act” on the front page of this issue of the Silha Bulletin.)

The legal team argued that McCain-Feingold violates the First Amendment rights to free speech and association by restricting political spending by individuals and groups. “It has taken our nation into territory previously viewed as off limits to governmental regulation,” Starr said.

Starr discussed *Buckley v. Valeo*, the first campaign finance case brought to the Supreme Court in 1976. The Court’s decision effectively overruled two parts of the 1974 Federal Election Campaign Act, which imposed mandatory spending limits on all federal races and limited independent spending on behalf of federal candidates.

The Court ruled that such restrictions violated the First Amendment guarantee of freedom of expression, finding that spending limits on political campaigns reduce the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.

“But among the critical things the court did was to draw a line between contributions to political action groups on one hand and expenditures by candidates on the other hand,” Starr said.

Starr said that the Supreme Court treats matters of political campaign financing carefully. “This is political regulation of activity that goes to the heart of representative government,” he said.

Starr contrasted McCain-Feingold with the Supreme Court’s 1964 ruling in *New York Times v. Sullivan*. In *Sullivan*, Starr said, ordinary citizens pooled their resources to buy an ad in *The New York Times* in order to increase national exposure to the struggle for civil rights in the South. This, Starr said, was a perfect example of political speech and free association as guaranteed by the First Amendment.

The First Amendment was rightly viewed as the sentinel guarding the vast dynamic of society called expression, he said. “Pause for a moment and note. This was a paid advertisement . . . the vehicle was through the advertising department,” he added. Under McCain-Feingold, publication of a similar ad could, under some circumstances, constitute a crime, he suggested.

Starr cited the American Civil Liberties Union (ACLU) as an example of the broad spectrum of groups whose speech would be affected under McCain-Feingold. Under the statute, it would be a crime for the ACLU to broadcast an ad on radio or television advocating a particular civil liberties issue if the ad mentioned a candidate for public office by name and was broadcast close to the election.

Starr also pointed out that the new Act only covers television and cable, exempting print media and the Internet. “McCain Feingold has abruptly reversed the trend of deregulation of the media itself and more precisely citizens’ use of the media to convey citizens’ messages and to express their views and concerns,” Starr said.

A partner with the law firm of Kirkland & Ellis, Starr was the Independent Counsel on the Whitewater matter. He also served as Solicitor General of the United States from 1989 to 1993 and as a U.S. Circuit Judge, D.C. Circuit, from 1983-1989.

Starr spoke to an audience of approximately 470 at the Ted Mann Concert Hall on the West Bank of the University of Minnesota Twin Cities campus on Nov. 6, 2003. University faculty, staff and students, as well as media and legal professionals and members of the general public, attended the lecture.

In conjunction with the lecture, the University of Minnesota bookstore sponsored a book signing for Starr’s new book *First Among Equals: The Supreme Court in American Life*. The book examines the influence of the Supreme Court on American culture.

The annual Silha Lecture is supported by a generous endowment provided by the late Otto Silha and his wife, Helen.

—ANNA NGUYEN
SILHA RESEARCH ASSISTANT