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Citing Family Members' Privacy, Supreme Court Allows Government to Withhold Foster Photos

The United States Supreme Court has rejected a narrow reading of the federal Freedom of Information Act's personal privacy exemption for law enforcement records, allowing the government to withhold information about deceased persons by invoking the privacy rights of surviving family members.

Justice Anthony Kennedy wrote the Court's unanimous opinion in *National Archives and Records Administration v. Favish, et al.*, 124 S.Ct. 1570 (2004), decided March 30. The case arose after California attorney Allan Favish sought access under the federal Freedom of Information Act (FOIA) to death-scene photos of former White House Deputy Counsel Vince Foster, whose body was discovered in a Washington, D.C.-area park in 1993 with a gunshot wound to the head.

Favish challenged the official description of Foster's death as a suicide and sought the release of the photographs to evaluate law enforcement officials' interpretation of the scene and to determine the precise nature and location of Foster's injuries. The government released many of the photos, but withheld 10, including several with graphic depictions of Foster's injuries, on the grounds that Foster's surviving family members had privacy rights that justified nondisclosure. Favish sued for access, and the U.S. Court of Appeals for the Ninth Circuit ordered the government to release four of the 10 photos but held that the FOIA personal privacy exemption 7(c) allowed the government to withhold the rest. The Office of Independent Counsel, which had control of the photos at the time, petitioned the Supreme Court for review. A handful of groups, including the Silha Center and the Reporters Committee for Freedom of the Press, filed *amicus curiae* briefs in support of full disclosure. (See U.S. Supreme Court Hears Oral Arguments in *OIC v. Favish* in the Fall 2003 *Silha Bulletin* and "The Silha Center Files *Amicus Brief* With the United States Supreme Court, Comments with the Council of Europe, And Department of Homeland Security" together with "*Office of Independent Counsel v. Favish* Will Be Argued Before Supreme Court" in the Summer 2003 issue of the *Silha Bulletin*.)

The Silha Center's brief is available online at: <http://www.silha.umn.edu/iocvfavishamicusbrieffinal.pdf>.

The central issues in the case were:

- Whether the federal Freedom of Information Act, 5 U.S.C. § 552, recognizes privacy interests of individuals who are not mentioned in the government records being sought, namely, the relatives of deceased subjects of government records; and
- Whether the Court, when balancing the public interest in disclosure against any existing privacy interests, could consider the impact of "derivative uses" of the information, such as the publication of photographs on the Internet.

The Court answered yes to both questions.

Justice Kennedy's opinion rejected the argument that FOIA's presumption of disclosure required a narrow definition of the term "personal privacy." Although Congress did not expressly indicate a desire to recognize the privacy interests of persons not mentioned in government records, Kennedy wrote that Congress enacted FOIA and its amendments against a backdrop of cultural and common-law recognition of a family's right to control the disposition of a loved one's body and images of the loved one's death.

Favish, continued on page 8



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

Information Security Oversight Office Publishes Its Annual Report

Executive branch agencies classified more than 14 million new secrets last year, according to the latest annual report by the Information Security Oversight Office (ISOO), the agency responsible for the U.S. government's security classification system. ISOO noted a total of 14,228,020 classification decisions in fiscal year 2003, a 25% increase from the 11,271,618 classifications generated in 2002.

"Allowing information that will not cause damage to national security to remain in the classification system, or to enter the system in the first instance, places all classified information at needless increased risk," the ISOO report warned.

The report, submitted to the President in March 2004, provides evidence for the growing public concern that the Bush administration has been too secretive with regard to information and activities.

According to a Dec. 22, 2003, article in *U.S. News & World Report*, the Bush administration "dropped a shroud of secrecy" over the federal government that has continued to increase since the events of Sept. 11, 2001. *The Washington Post's* Dana Milbank wrote on Dec. 23, 2003, "The administration has been unusually successful keeping its policy deliberations out of public view, and millions of government documents – including many historical records previously available – have been removed from the public domain."

Much of this public questioning has come about as a result of events that have occurred over the past several months. For example, the decision by the administration to enforce a pre-existing ban on news coverage and photographs of the coffins of dead soldiers returning to military bases prompted criticism by many who believed that the decision was a result of concern that such photographs would produce declining support for the war. Other incidents, ranging from the resurfaced speculation surrounding Bush's past service in National Guard to the hesitancy shown by administration officials to testify before the September 11 commission, have resulted in increasing public inquiry regarding the degree to which the administration has withheld information from citizens. As the list of subjects about which the White House has been called into question continues to grow, public scrutiny intensifies.

The administration's secrecy is not just a recent phenomenon, however. OMB Watch, a nonprofit research and advocacy organization committed to promoting government accountability, posted on its website in 2002 a list of instances in which the Bush administration had withheld information. Their complete list is available online at: <http://www.ombwatch.org/article/articleview/1145/1/18/>. A few of the listings include:

- In the immediate aftermath of the September 11th attacks, the Bush administration ordered that thousands of documents be removed from agency Web sites. Information such as pipeline maps (showing where they are and whether they have been inspected), airport safety data, environmental data, and even documents that remain available on private web sites were removed from government sites and have not reappeared. (Calls for reopening access to these web sites continue. As recently as May 10, 2004, the Rand Corp. released a study which determined that as many as three dozen sites removed after Sept. 11, 2001 pose little or no risk to American security.)
- At the beginning of November 2001, just before documents from the Reagan administration were to be released, President Bush issued an Executive Order that denied the public's right of access to presidential documents by giving an incumbent or former president veto power over any public release of materials.
- At the end of September 2002, the General Accounting Office announced that the number of freedom of information requests within the executive branch agencies had either held even or declined, but the backlog has increased. In other words, responses for the same (or fewer) number of requests were now taking longer. In its review of implementation of the Electronic Freedom of Information Act Amendments of 1996, GAO found that "agency backlogs of pending requests are substantial and growing government-wide," and that some agencies are not properly making information available through their Web sites or are making it difficult to find the information.
- The Bush administration's refusal to disclose information to Congress or to the public about Vice President Dick Cheney's energy policy task force has raised important questions about access to the administration's top decision-makers.

Maureen Dowd of *The New York Times* wrote on April 4, 2004, "By holding back documents, officials, information . . . by twisting and exaggerating facts to fit story lines, by demonizing anyone who disagrees with its version of reality, this administration strives to create an optical delusion." On Dec. 17, 2004, the *Times'* William Safire criticized "the administration's eagerness to slam the door in the . . . public's face."

"[Bush] has done more in his first term to degrade democracy and foster secrecy in national government than any other postwar president during a comparable period of time," Walter Williams wrote in a Jan. 15, 2004, column for *Newsday*. "The administration continues to invoke national security as the justification for withholding information, but the push for secrecy – now at its most restrictive in decades – began months before [the terrorists attacks on] Sept. 11. Its efforts to hide information has halted the decades of increasing openness in government."

“Allowing information that will not cause damage to national security to remain in the classification system, or to enter the system in the first instance, places all classified information at needless increased risk.”

– ISOO Report

9-11 Commission Reveals Failure to Communicate

In November 2002, President Bush established the National Commission on Terrorist Attacks Upon the United States, or “9-11 Commission.” The 9-11 Commission is charged with “prepare(ing) a full and complete account of the circumstances surrounding the September 11, 2001 terrorist attacks, including preparedness for and the immediate response to the attacks,” as stated on its web site, <http://www.9-11commission.gov/> To date, the Commission has interviewed over 1,000 people in its investigation. Those called to testify before the Commission have offered written as well as oral testimonies. In April 2004, notable individuals called before the Commission included National Security Adviser Dr. Condoleezza Rice, Attorney General John Ashcroft and CIA Director George Tenet.

Although secrecy plays an important role in covert intelligence work, the failure to communicate between intelligence community agencies was cited by some of the Commissions’ interviewees. When former Attorney General Janet Reno testified before the Commission on April 13, 2004, she stated that the FBI was not aware of the significance of the information it had. When it became aware of its importance, it “didn’t want to share” with the rest of the intelligence community. FBI Director Robert Muller III noted in his testimony that, “cultural walls . . . continued to hamper coordination between the FBI, the CIA and other members of the Intelligence Community” prior to September 11. According to a report in the *Houston Chronicle*, the “ingrained culture of secrecy” that encouraged agents to keep information inside their respective agency, “permeates the FBI, CIA and the Defense Department’s alphabet soup of a dozen electronic and military intelligence gatherers.”

Prior to the hearings, in written testimony delivered to the commission on December 8, 2003, New York University Law professor Stephen Schulhofer warned against making additional laws to facilitate the gathering of information as a remedy, stating that “the obstacles of agency culture, resources and lines of communication have mattered and still matter much more.” Schulhofer expressed his concern that the United States was moving away from protecting the liberties of its citizens as instituted policies to increase government power. For example, Schulhofer noted that the “sneak-and-peek” power (§213) of the USA PATRIOT Act can be used in the investigation of “routine” crimes. Schulhofer cited this as an overbroad use of executive power, indicating, “Secrecy and absence of outside accountability are dangerous, and not only because they risk unnecessary invasions of liberty and privacy. They are also a recipe for wasted effort, misdirected resources, and misuse of legitimately acquired information for illegitimate purposes.”

Schulhofer also expressed concern over the Creppy Directive, which requires that “special interest” immigration detention hearings be closed to the press. That policy, Schulhofer stated “permits blanket secrecy in immigration detentions and in immigration hearings without a judicial finding of need.” Schulhofer stated that the Creppy Directive is “unnecessarily broad and ultimately counterproductive” as a tool against the War on Terror, and is an example of the lack of checks and balances on the current administrations policies. (See “U.S. Supreme Court Denies Certiorari in Deportation Hearings Case” in the Spring 2003 *Silha Bulletin*; “Sixth, Third Circuit Courts Split on Deportation Hearings Question” in the Fall 2002 *Silha Bulletin*.)

The transcripts of the Committee’s hearings are available to the public on its web site. However, many of the official documents given to the Commission have remained classified. One document in particular, a Presidential Daily Brief (PDB) from August 6, 2001, was made public only after the Commission pressured the administration to release it following its extensive use in testimony given by National Security Advisor Condoleezza Rice. Entitled, “Bin Laden determined to strike in US,” the PDB provided mostly historical information about Al Qaeda’s presence in the United States.

The Commission has expressed frustration with the Bush administration’s refusal to submit classified foreign policy and counterterrorism documents from the Clinton administration. According to the *New York Times*, former President Clinton is willing to hand over the documents to the Commission, but the Bush administration has withheld “three-quarters” of the files because, “they were ‘duplicative or unrelated’ (or ‘highly sensitive’ and the information in them could be relayed to the commission in other ways.”

The Washington Post reported that the Commission is attempting to interview Al Qaeda members in U.S. custody. Many of these individuals have been held incommunicado since their detention. According to the *Post*, “(A)n ability to directly question them would give the panel a remarkable level of access to detainees held in secrecy and generally off limits to defense attorneys.” The Commission has not disclosed which detainees it would like to interview.

The 9-11 Commission is scheduled to deliver its findings and recommendations on July 26, 2004, having received an extension to its previous May 27 deadline.

“Secrecy and absence of outside accountability are dangerous.”

– Stephen Schulhofer

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

Polls Show Support Strong for PATRIOT Act

Opinions regarding the USA PATRIOT Act have been divided along Party lines, but recently the Act has become a focal point of the president's reelection campaign. President George Bush has aggressively touted the act, criticized by many as an attack on civil liberties, at campaign appearances, while his Democratic challenger, Sen. John Kerry (D-Mass.), has moderated his criticism, according to news reports.

A *Washington Post*/ABC News survey released in mid-April 2004 highlighted the PATRIOT Act's importance to Bush's reelection bid. That poll, according to an April 25, 2004, report in the *Los Angeles Times*, showed that 63 percent of respondents approved the president's handling of the war on terrorism. A February 2004 Gallup poll showed that a similar percentage of respondents thought the PATRIOT Act was either "just right" or did not go far enough. Only about a quarter of respondents thought the Act was too expansive, according to the *Los Angeles Times*.

Several provisions of the Act are scheduled to expire at the end of 2005, including provisions granting the government broad electronic surveillance powers in cases where terrorist activity or computer fraud is suspected.

Bush stumped aggressively for the renewal and expansion of the PATRIOT Act in an April 20, 2004, appearance in Buffalo, where the "Lackawanna Six" were arrested after Sept. 11, 2001, on suspicion of forming an al Qaeda terrorist cell. According to an April 21, 2004, article in *The New York Times*, administration aides had said the president intends to incorporate "systematic references" to the Act in his campaign speeches and in television commercials between now and the November election. The Buffalo speech, the newspaper noted, marked the third time in four days that Bush had spoken about the PATRIOT Act. Michael A. Battle, the United States Attorney for the Western District of New York, who prosecuted the six men, appeared with Bush and said the PATRIOT Act had been instrumental in the prosecution, according to *The New York Times*. Surrounded by area law-enforcement personnel, Bush told listeners that the Act was essential to national security.

"The PATRIOT Act defends our liberty . . . under the Constitution of the United States," Bush told the crowd, according to *The New York Times*.

The Act has been criticized by liberals and conservatives alike for its potential to infringe on Constitutional rights. The Act includes provisions that allow roving wiretaps of those suspected of terrorist activity and secret access to library records, bookstore purchases and other files.

The continuing public support for the PATRIOT Act has not prevented judicial criticism of some provisions. In January 2004, a federal district court judge in Los Angeles ruled that a section of the Act making it a crime to provide "expert advice or assistance" to terrorist groups was unconstitutionally vague. In her ruling in *Humanitarian Law Project v. Ashcroft*, 2004 U.S. Dist. LEXIS 926 (C.D. Cal. 2004), U.S. District Judge Audrey Collins wrote that the act "places no limitation on the type of expert advice and assistance which is prohibited, and instead bans the provision of all expert advice and assistance regardless of its nature." Thus, Collins continued, the terms "could be construed to include unequivocally pure speech and advocacy protected by the First Amendment."

Collins' decision is the first court ruling to nullify a PATRIOT Act provision, according to a Jan. 27, 2004, report in *The San Francisco Chronicle*.

Collins' ruling, which was amended in March 2004, granted an injunction prohibiting the government from enforcing the expert-advice provision, but only against the Kurdish groups, including the Tamil Tigers, that challenged the law. Collins expressly declined to grant a nationwide injunction against the government.

For earlier *Bulletin* coverage of the PATRIOT Act, see "Inspector General Produces Report on Treatment of Detainees" in the Summer 2003 *Silha Bulletin*; "The War on Terrorism: Balancing National Security and Civil Liberties" in the Winter 2003 *Silha Bulletin*; "Balancing National Security and Civil Rights: Annual Report on Loss of Privacy Since September 11" in the Fall 2002 *Silha Bulletin*; "The PATRIOT Act: How Patriotic Is It?" in the Winter 2002 *Silha Bulletin*.

"[The terms of the PATRIOT Act] could be construed to include unequivocally pure speech and advocacy protected by the First Amendment."

— U.S. District Judge
Audrey Collins

—DOUG PETERS
SILHA FELLOW

Leak Investigation Turns to White House Staff

In April 2004, the investigation into whether individuals in the Bush administration leaked the name of CIA operative Valerie Plame expanded to include possible charges that the White House has mishandled information related to the investigation. According to *The New York Times*, prosecutors are looking into whether the White House “lied to investigators or mishandled classified information related to the case.” This development follows Attorney General John Ashcroft’s recusal from the investigation, and the appointment of U.S. Attorney Patrick Fitzgerald as special prosecutor for the investigation.

The New York Times reported in April that this expansion of the investigation grew out of “contradictions between statements by various witnesses in F.B.I. interviews,” with confirming evidence in the form of “documents, including memos, e-mail messages and phone records turned over by the White House.”

Former Ambassador Joseph Wilson, Valerie Plame’s husband and an outspoken Bush critic, has included the names of those he believes are likely candidates for the person who disclosed his wife’s CIA affiliation in his book released April 30, 2004, *The Politics of Truth: Inside the Lies That Led to War and Betrayed My Wife’s CIA Identity*. In an excerpt from the book posted on Salon.com, Wilson indicated that he believes either Vice-President Chief of Staff Lewis “Scooter” Libby, Senior Director for democracy, human rights and international operations for the National Security Council Elliott Abrams, or chief Bush strategist Karl Rove was responsible for the leak. Abrams was pardoned during George H.W. Bush’s administration for withholding information from Congress in the Iran-Contra Affair.

Wilson also targets syndicated columnist Robert Novak, the reporter who published Plame’s identity in a July 2003 article, as “not so much a scrupulous journalist as he is a confirmed purveyor of the right-wing party line,” (see “Columnist’s Story Prompts Investigation Into Government Leaks” in the Fall 2003 issue of the *Silha Bulletin*). Hinting at Novak’s decision not to disclose the identity of the person who leaked Plame’s identity, Wilson stated, “I will defend his First Amendment rights as a journalist, but I don’t have to like what he did.”

In May 2004, *Los Angeles Times* reported that Fitzgerald has asked reporters for both *The Washington Post* and *Newsday* to answer questions in connection with their coverage of the leak investigation. According to the *Los Angeles Times*, it is not clear what specific questions Fitzgerald intendeds to pose to the reporters should they sit for informal questioning. Although Novak’s article disclosing Plame’s identity was published in *The Washington Post*, it is not clear whether Novak was the reporter indicated in Fitzgerald’s request to the paper.

As the *Bulletin* was going to press, it was learned that Fitzgerald had contacted the *Washington Post*, requesting an opportunity to speak with two of the newspaper’s reporters. According to the *Los Angeles Times*, Eric Lieberman, associate counsel for the Post, said that Fitzgerald had not disclosed what information he sought from the reporters.

The *Los Angeles Times* further reported that *Newsday* had also been approached by Fitzgerald, but *Newsday*’s editor Howard Schneider said that their reporters had not yet spoken to the government. Two additional reporters – Tim Russert from NBC and Matthew Cooper, an employee with Time, Inc.– also received federal subpoenas from the special grand jury investigating the leak, according to reports in the *Los Angeles Times* and *The Record* in Bergen County, N.J. NBC and *Time* have both stated they will fight the subpoenas.

“I will defend
[Robert Novak’s]
First Amendment
rights as a
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what he did.”

– Former
Ambassador
Joseph Wilson

—INGRID NUTTALL
SILHA RESEARCH ASSISTANT

“Family Privacy” Concerns Result in Ban on Coffin Photos

The unauthorized publication of photos depicting flag-draped coffins carrying the remains of U.S. soldiers has touched off a debate over whether the public has a right to see these images. The Air Force released hundreds of such photos in response to a Freedom of Information Act (FOIA) request before the Pentagon ordered the releases to stop, according to an April 24, 2004, *Boston Globe* report.

The photographs were made public April 22, 2004, after Russ Kick, who runs a Web site called the “Memory Hole,” available at www.memoryhole.org, filed a FOIA request. According to *The New York Times*, the posting and republication of those photographs led to confusion over whether some of the photos were of coffins of military dead or of the crew of the Space Shuttle Columbia, which disintegrated upon reentry on Feb. 1, 2003, the starting date of the FOIA request.

Photographs of military casualties arriving at Dover Air Force Base in Delaware, the military’s main mortuary, have been kept out of public view since the first Bush Administration initiated the policy during the Gulf War. Although the White House says privacy interests of the families of the dead soldiers justify the ban, growing public pressure could cause the administration to change the policy, according to the *Boston Globe*. Opponents of the war and of the Bush Administration say the ban is political, arguing that the administration wants to keep stark images of casualties from turning public opinion against the war.

The *Globe* quoted a statement by the liberal political action group Democrats for America’s Future. “President Bush and Karl Rove want to make sure you don’t see the horrific toll the war in Iraq is taking on our brave fighting men and women,” the statement said. “That’s why they are doing everything they can to keep the media away from coffins of the returning war dead.”

Pentagon officials say the policy is under review and that if FOIA compels disclosure of the photographs, the military will release them.

The recent decision by the U.S. Supreme Court in *National Archives and Records Administration v. Favish, et al.*, 124 S. Ct. 1570, could have an impact on the government’s decision. In that case, decided on March 30, 2004, the Court ruled that family members have privacy interests in graphic death-scene depictions of dead relatives. (See “Citing Family Members’ Privacy, Supreme Court Allows Government to Withhold Foster Photos” on page 1 of this issue of the *Silha Bulletin*). Although the privacy theme is similar in both cases, there are some important distinctions. First, the military photos would fall under a different FOIA exemption than the death-scene photos at issue in *Favish*. Under Exemption 6, which allows the government to withhold medical records, personnel files and other similar files, privacy interests are given slightly less weight than in the privacy exemption for law-enforcement records, the provision at issue in *Favish*. Moreover, *Favish* involved death-scene photographs. Photos of military coffins do not show graphic detail and generally do not provide any means to identify the soldiers whose remains they contain. Because of these differences, the government’s decision on the coffin-photo policy could provide an indication of how broadly officials intend to interpret the *Favish* decision.

In a related incident, a Defense Department contractor fired an employee who took a photograph of flag-draped coffins in a cargo plane in Kuwait and sent it to a friend in the United States, who in turn sent the photo to the *Seattle Times*. The newspaper published the photograph, with the permission of the photographer, Tami Silicio, on April 18, 2004. After the publication, the contractor, Maytag Air, fired Silicio and her husband, David Landry, according to an April 25, 2004, *Seattle Times* article.

Reader response to the photograph was intense, according to the newspaper’s editors. Hundreds of letters – nearly all of them supportive of the decision to publish the photograph – poured in via e-mail and the postal service.

After Kick posted other coffin photos on the Internet, the debate over whether such photographs should be published intensified. When, just weeks later, photographs surfaced of Iraqi prisoners being abused by U.S. military personnel, the debate took on new proportions. Clarence Page of the *Chicago Tribune* dubbed digital cameras “weapons of mass photography” in a May 12, 2004 column, and suggested that the media have a duty to publish such photos.

“At the beginning of the Iraq war, the Pentagon strengthened a ban on photographing coffins of dead soldiers returning to Dover Air Force Base in Delaware, a policy that then-Defense Secretary Dick Cheney imposed in 1991 during the first Iraq war,” Page wrote. “The reason given is privacy, which strains believability since the photos do not reveal the identities of the soldiers in the coffins.”

“Interestingly, the Bush-Cheney 2004 presidential campaign exhibited none of that squeamishness about privacy when it included the Sept. 11, 2001, image of a New York City firefighter’s coffin in a campaign ad,” Page continued. “Apparently, the issue is not the photos but who has control of them. Fortunately, in this Internet Age, it is not so easy to keep secrets from the American people.”

As the *Bulletin* was going to press, Sen. Frank Lautenberg (D-NJ) proposed an amendment, §364 to bill S. 2400, that would direct the Pentagon to develop a protocol allowing media coverage of the return of the remains of American military killed abroad. The amendment states that the protocol must also “ensure that the preservation of the dignity” of the return of service members’ remains be maintained. The amendment allows the Secretary of Defense 60 days to develop the protocol.

“The reason given [for barring the photos] is privacy, which strains believability since the photos do not reveal the identities of the soldiers in the coffins.”

– Clarence Page,
Chicago Tribune

—DOUG PETERS
SILHA FELLOW

ABC's "Nightline" Honors Iraqi War Dead Despite Protests

On April 30, 2004, in a special expanded version of ABC's "Nightline," host Ted Koppel read the names of 721 Americans who have lost their lives in the war with Iraq. The 40-minute program, entitled "The Fallen," was described by *The New York Times* as showing "pictures of the dead, some in dress uniform, some in fatigues, a few in tuxedos from their high school yearbook pictures, and their names, intoned slowly and carefully by Ted Koppel. The portraits were shown two at a time, just enough to register a name . . ." When there was no picture of the person available, the program ran a photo from the Department of Defense showing the flag-draped coffins as they arrived at Dover Air Force Base.

However, Sinclair Broadcast group, which, according to its Web site at www.sbgi.net "owns and operates, programs or provides sales services to 62 television stations in 39 markets," pulled "Nightline's" broadcast to its ABC affiliates in eight cities – St. Louis, Mo.; Charleston, W. Va.; Springfield, Mass.; Columbus, Ohio; Pensacola and Tallahassee Fla.; and Asheville and Winston-Salem, N.C. In a statement posted on its Web site, the broadcast group stated that the "Nightline" broadcast appeared to be "motivated by a political agenda designed to undermine the efforts of the United States in Iraq." *The New York Times* reported that the eight Sinclair affiliates would replace "Nightline" with a special broadcast, characterized by vice president of Sinclair's corporate relations Mark Hyman as a "balanced report addressing both sides of this controversy."

Sinclair's decision to pull the program elicited a letter from Sen. John McCain (R-Ariz.), who had been a prisoner of war in Viet Nam. According to an ABC press release, available online at www.poynter.org/forum/?id=misc, McCain wrote, "Your decision to deny your viewers an opportunity to be reminded of war's terrible costs, in all their heartbreaking detail, is a gross disservice to the public, and to the men and women of the United States Armed Forces. It is in short, sir, unpatriotic. I hope it meets with the public opprobrium it most certainly deserves."

David D. Smith, Sinclair's president and chief executive officer, responded to McCain's letter by writing, "Senator McCain, together with you, I also support the President's decision to go to war in Iraq. . . [But] I firmly believe that responsible journalism requires that a discussion of these [deaths] must necessarily be accompanied by a description of the benefits of military action and the events that precipitated that action." Smith's letter is available online at http://www.sbgi.net/press/release_2004430_67.shtml.

According to the Associated Press, Robert McChesney, president of Free Press, a national media reform group, questioned Sinclair's reasons for its actions, claiming that Sinclair was motivated by its desire to encourage the Bush administration to change station ownership rules. "The stench of corruption here is extraordinary," McChesney told the Associated Press. The wire service also reported that in 2004, Sinclair made \$65,434 in political donations, 98 per cent going to Republicans, while 2 per cent went to Democrats.

Preliminary ratings for the April 30 edition of "Nightline" indicated that viewers from the program increased by 22 per cent over the previous Friday's show, and increased by 29 per cent over earlier broadcasts of the program that week, according to the Associated Press.

Over Memorial Day weekend, cartoonist Garry Trudeau's Sunday "Doonesbury" strip filled all six panels with the names of U.S. military personnel killed in Iraq. "There is power in seeing actual names instead of numbers," he told Dave Astor of *Editor & Publisher* in an article published May 24. "Honor rolls always help deepen our understanding of what has been lost."

The New York Times quoted Janet Weaver, dean of faculty at the Poynter Institute as saying, "It would seem to me you can read [the list of Americans killed in the war with Iraq] as you read it, depending on your point of view. It's really a Rorschach test."

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

The "Nightline" broadcast appeared to be motivated by a political agenda designed to undermine the efforts of the United States in Iraq.

– Sinclair
Broadcasting

“Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation that, by intruding upon their own grief, tends to degrade the rites and respect they seek to accord to the deceased person who was once their own,” Kennedy wrote.

Under FOIA’s personal privacy exemption for law enforcement records, 5 U.S.C. § 552(b)(7)(C), a court evaluating a records request must weigh personal privacy interests against the public interest in the information. Although the Court, following its 1989 decision in *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), defined the public interest very narrowly, it accepted a broad view of the possible harm to privacy interests implicated here. Instead of evaluating the privacy impact based on the effect of the release of the information, Kennedy’s opinion took into account any and all possible future uses of the information. This combination of a narrow view of public interest and an expansive view of what constitutes an invasion of privacy serves to significantly broaden the government’s ability to withhold information under the FOIA personal privacy exemptions. Kennedy cited the possibility that a convicted murderer, for example, could successfully gain access to death scene images of his victim under Favish’s interpretation of FOIA.

“We find it inconceivable that Congress could have intended a definition of ‘personal privacy’ so narrow that it would allow convicted felons to obtain these materials without limitations at the expense of surviving family members’ personal privacy,” he wrote.

Kennedy also rejected, without elaboration, the argument that Vince Foster’s status as a public official effectively limited his family’s privacy interests.

However, the finding of valid privacy interests, Kennedy wrote, did not end the inquiry. In some instances, public interest in disclosure could overcome such privacy interests, according to the opinion. Kennedy constructed a balancing test that is weighted heavily against disclosure. Where the asserted public interest is based on claims that government officials were negligent or improperly performed their duties, Kennedy wrote, the requester must “produce evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred.” Kennedy added that the Court generally presumes that government officials acted properly, unless there is clear evidence to the contrary. This formulation poses a Catch-22 of sorts for information requesters, since in many cases, the evidence they need in order to overcome the privacy interests is contained in the very documents they are seeking.

Kennedy rejected Favish’s argument that the government had mishandled the investigations into Foster’s death.

“It would be quite extraordinary,” he wrote, “to say we must ignore the fact that five different inquiries into the Foster matter reached the same conclusion. . . . Favish has not produced any evidence that would warrant a belief by a reasonable person that the alleged Government impropriety might have occurred to put the balance into play.”

The opinion distinguished between exemption 7(c), which covers law enforcement records, and exemption 6, which creates a personal privacy exemption for medical, personnel and “similar” files. The law enforcement exemption, Kennedy wrote, is “markedly different” from Exemption 6, in that it places greater weight on privacy interests. The opinion also distinguished between the privacy rights of the family, which the Court acknowledged, and the posthumous privacy rights, if any, of Foster himself. Under the common law, an individual’s privacy interests generally end upon death. Kennedy wrote that an assertion of Foster’s posthumous privacy rights would have raised a different set of issues from those raised with regard to surviving family members’ interests.

Favish responded to the decision by formally requesting that the court rehear the case. He alleged that the court had committed several errors, including failing to take important evidence into account. However, on May 17, the Court rejected Favish’s motion.

The impact of the court’s decision on newsgathering efforts remains to be seen. The practical effect of the decision seems to be an affirmation of longstanding government practices. The federal government has invoked third-party “survivor privacy” interests in many cases, with the blessing of lower federal courts. The *Favish* decision, however, marks the first time the Supreme Court addressed the issue.

“Family members have a personal stake in honoring and mourning their dead and objecting to unwarranted public exploitation.”
— Justice Anthony Kennedy

—DOUG PETERS
SILHA FELLOW

Supreme Court's Ruling in *Favish* Prompts Florida Newspapers To Drop Suit Challenging Law Sealing Autopsy Photos

The *Orlando Sentinel* and *South Florida Sun-Sentinel* announced in April that they were dropping their legal challenge to a Florida law barring the public release of autopsy photographs. The newspapers had challenged the law under Art. I, §24 of the Florida constitution, which guarantees access to public records, in an effort to gain access to autopsy photographs of former NASCAR driver Dale Earnhardt. Earnhardt died in a crash at the 2001 Daytona 500.

The newspapers withdrew their challenges on April 12, 2004, two weeks after the United States Supreme Court ruled in *National Archives and Records Administration v. Favish, et al.*, 124 S. Ct. 1570, that family members have a privacy interest under the federal Freedom of Information Act in preventing release of loved ones' death-scene photographs. (See "Citing Family Members' Privacy, Supreme Court Allows Government to Withhold Foster Photos" on page 1 of this issue of the *Silha Bulletin*.)

"The *Sentinel's* action today signals that we feel it would be difficult to prevail following the United States Supreme Court's decision in the Vince Foster case involving access to autopsy photographs," *Orlando Sentinel* editor Charlotte Hall said in a prepared statement.

At the time of Earnhardt's death, Florida law deemed autopsy photographs to be public records. The *Sentinel* and other media outlets sought access to the photos, prompting Earnhardt's widow to lobby for changes to the law. The state legislature responded quickly, amending the law and blocking the newspapers' access to the photographs. The *Sentinel* reached a private agreement with the Earnhardt family, under which an independent medical examiner viewed the photos and shared his findings with the newspaper. (See "Justices Will Not Consider Earnhardt Autopsy Photo Case" in the Fall 2003 issue of the *Silha Bulletin*, "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*.)

The newspapers' case challenging Florida's new law was different in important respects from the case involving Vince Foster's death scene photographs. In the Foster case, the person seeking access to the photographs was not challenging the validity of the federal law invoked to withhold the photos. Instead, attorney Allan Favish argued that the federal Freedom of Information Act did not recognize family members' independent privacy interests in such photographs. The *Sentinel's* lawsuit, by contrast, was filed as a constitutional challenge to a state law that expressly prohibited the release of the photographs. The newspapers challenged the Florida statutory exemption for autopsy photographs on the basis that it was not tailored to a specific public interest as required by Fla. Const. Art. I, §24(c).

—DOUG PETERS
SILHA FELLOW

"The *Sentinel's* action today signals that we feel it would be difficult to prevail following the United States Supreme Court's decision in the Vince Foster case involving access to autopsy photographs."

– Charlotte Hall,
Orlando Sentinel
editor

ISOO Report, continued from page 6

Individuals close to the administration have gone public within the past several months with their views on what has happened behind the administration's closed doors. Former Treasury Secretary Paul O'Neill collaborated with journalist Ron Suskind on *The Price of Loyalty: George W. Bush, the White House, and the Education of Paul O'Neill*, a book published in January 2004, in which he accuses Bush of planning an invasion of Iraq within days of coming to office, claiming the president used the events of September 11 as an excuse to remove Saddam Hussein. Richard Clarke, the administration's top counterterrorism official before September 11, published *Against All Enemies: Inside America's War on Terror* in March 2004 which harshly criticizes how the Bush administration has handled the terrorist threat and the war in Iraq.

The press and the public seem to applaud these officials' efforts to lift the "shroud of secrecy." Safire noted, "If 'freedom' is the word Bush and Cheney want as the hallmark of their administration, they should begin with freedom of information." Without it, as Joanne Fitzpatrick of the (Quincy, Mass.) *Patriot Ledger* wrote on Nov. 10, 2003, "the administration sows seeds of distrust and division."

—ELIZABETH JONES
SILHA RESEARCH ASSISTANT

U.S. Marshal Orders Reporters to Erase Scalia Speech Tapes

When Antoinette Konz of the *Hattiesburg (Mississippi) American* and Denise Grones of the Associated Press sat in the front row of the auditorium of Hattiesburg's Presbyterian Christian High School on April 7, 2004, where U.S. Supreme Court Justice Antonin Scalia was about to speak about preserving the Constitution, they hoped their tape recorders would aid them in accurately reconstructing Scalia's speech when they wrote their stories for their respective news organizations. But approximately 40 minutes into the Justice's speech, Deputy U.S. Marshal Melanie Rube approached the reporters and demanded they erase their tapes.

According to a May 10, 2004 Associated Press story, Grones initially refused to erase her tape. Rube then took Grones' recorder out of her hands. At that point, Grones showed her how to erase the tape. Rube then reached across Grones and demanded Konz's tape. Konz complied, and was able to retrieve her tape only after erasing it in front of Rube.

David Turner, a spokesman for the U.S. Marshals Service, told the *Washington Post* that "[Rube's] actions were based on Justice Scalia's long-standing policy prohibiting such recordings of his remarks." But Turner added, "Justice Scalia did not instruct the deputy to take that action."

The *Washington Post* further reported that the event at the high school followed an incident involving Scalia and the media earlier the same day at William Carey College. Prior to Scalia's speech at William Carey, college officials told the audience that the event could not be recorded. But college officials had invited the local media, including television reporters, to talk with Scalia at a reception afterwards.

When Scalia saw cameras at the reception, he informed the college's president, Larry W. Kennedy, that he did not give interviews. In a telephone interview with the *Washington Post*, Kennedy said he asked the journalists to leave. Reportedly, both Konz and Grones had been present at the college reception when Scalia's ban was announced.

Ron Harrist, news editor of the AP's Jackson bureau, told the *Washington Post* that the afternoon speech "was a separate event at the high school. There was no announcement not to [record Scalia's speech at the high school]. We feel like [the order to erase] was unjustified. Our reporter was strictly using a recorder to make sure she got what he had to say correct."

Jane Kirtley, Silha Professor and director of the Silha Center, told the *Los Angeles Times*, "This is a major embarrassment. And it is unsupportable as a matter of law. They could have said, 'No Press Allowed.' But if they let the reporters in and there are no ground rules announced in advance, they can't then say you can't report that or you can't use that."

According to a story posted on the Reporters Committee for Freedom of the Press Web site, Scalia sent letters of apology to the two reporters after the incident, stating, "I imagine that this is an upsetting and indeed enraging experience, and I want you to know how it happened," he wrote. "It has been the tradition of the American judiciary not to thrust themselves into the public eye, where they might come to be regarded as politicians seeking public favor."

Scalia further wrote that Rube's seizure of the tapes had been a mistake, stating that she was doing "what [she] believed to be her job," based on Scalia's policy of prohibiting video or audio recordings of his speeches. But he went on to say, ". . . even [those prohibitions] had been clarified and some reporter had broken them, I would not have wanted the tape erased. I have learned my lesson (at your expense) and shall certainly be more careful in the future. Indeed, in the future I will make clear that recording for use of the print media is no problem at all."

In a separate letter, responding to a faxed complaint by Reporters Committee Executive Director Lucy Dalglish, Scalia wrote that he was "as upset as you were" by the seizure of Konz's and Grones' tape, and announced that he was changing his policy regarding the use of recorders to aid print reporters. *The New York Times* reported that Dalglish had also faxed a letter of complaint to Attorney General John Ashcroft, noting that the seizure violated the 1980 Privacy Protection Act, 42 U.S.C.S., §2000aa (b), which states that "it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials . . . possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public

"This is a major embarrassment. And it is unsupportable as a matter of law. They could have said 'No Press Allowed.' But if they let the reporters in and there are no ground rules announced in advance, they can't say you can't report that or you can't use that."

– Jane Kirtley,
Silha Professor and
Director of the
Silha Center

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The Media and Weapons of Mass Destruction

The New York Times

On May 26, 2004, *The New York Times* published a “From the Editors” article admitting that many of the newspaper’s articles about Iraq’s possession of weapons of mass destruction had “depended at least in part on information from a circle of Iraqi informants, defectors and exiles bent on ‘regime change’ in Iraq, people whose credibility has come under increasing public debate in recent weeks.” But *The Times*, one of the nation’s largest and best-respected newspapers, has been accused of “burying” the editor’s note on page 10 of its A section.

Background

Criticism of the media’s coverage of Allied and American intelligence that preceded the war in Iraq has been mounting at least since the *Columbia Journalism Review* printed an article in its May/June 2003 issue entitled “The Lies We Bought” by John R. MacArthur, available online at <http://www.cjr.org/archives.asp?url=/03/3/macarthur.asp>. The turning point in the weapons of mass destruction controversy, according to MacArthur, occurred on Sept. 7, 2002, when President George W. Bush and British Prime Minister Tony Blair met at Camp David and cited a “new” report from the UN’s International Atomic Energy Agency (IAEA) that allegedly claimed that Iraq was “six months away” from building nuclear weapons. MacArthur claimed that only one reporter, Karen DeYoung of the *Washington Post*, sought confirmation from the IAEA to see whether a new report had, indeed, been issued, and learned that none had. But, MacArthur claims, DeYoung did not follow up on that information by questioning the White House.

Additional criticism of the media’s handling of the weapons of mass destruction issue has come from Michael Massing, former executive editor of the *Columbia Journalism Review*. In a Feb. 26, 2004 article entitled, “Now They Tell Us,” written for *The New York Review of Books*, available online at <http://www.nybooks.com/articles/16922>, Massing outlines the key events connecting the weapons of mass destruction reports to the beginning of the war with Iraq. As early as the summer of 2002, Massing claims, “the ‘intelligence community’ was rent by bitter disputes over how Bush officials were using the data on Iraq. Many journalists knew about this, yet few chose to write about it.” Massing characterizes the media’s coverage of the controversy as “highly deferential to the White House,” a tendency MacArthur typifies as “stenographic.”

Judith Miller, who in 2001 shared a Pulitzer Prize for her coverage of al Qaeda and Afghanistan, and Michael Gordon, both of *The New York Times*, wrote several articles covering the weapons of mass destruction topic. Miller, a longtime expert in events in Iraq, relied almost exclusively on scientists and others who were opposed to Hussein’s regime for information.

One of the most controversial of Miller’s and Gordon’s articles, a story entitled “Threats and Responses: The Iraqis: U.S. Says Hussein Intensifies Quest for a Bomb Part” ran on Sept. 8, 2002, the day after the Bush/Blair meeting at Camp David. In their story, they claimed that “Iraq has sought to buy thousands of specially designed aluminum tubes” for the past 14 months. These tubes, they claimed, were to be used as the “casings for rotors in centrifuges, which are one means of producing highly enriched uranium.” They stated that members of the administration warned, “the first sign of a ‘smoking gun’ . . . may be a mushroom cloud.” That morning, according to Massing, the nation’s talk shows featured Dick Cheney, Colin Powell, Donald Rumsfeld, and Condoleezza Rice, who “all referred to the information in the *Times*’ story”, and Rice even used the “smoking gun . . . mushroom cloud” phrase in a later interview with CNN’s “Late Edition.”

Massing claims that David Albright, whom he identifies as a physicist and former weapons inspector who directed the Institute for Science and International Security, researched the claims about Iraq’s use of aluminum tubes for nuclear weapons. Albright found that there was reason to doubt the imported tubes were suitable for such tasks. Instead, he argued that they were more likely used for conventional rockets, which was later confirmed during subsequent inspections. When Albright shared his findings with Miller, she minimized the information, stating instead that the “dominant view” in the administration was that the tubes were, in fact, used for nuclear weapons. But Massing claims that Albright’s interaction with experts and scientists found the opposite opinion to be true among many administration experts; a number of them disagreed with the CIA’s assessment. Albright told Massing, “[H]earing there’s a debate in the government was knowable by a journalist. That’s what I asked [Miller] to do – to alert people that there’s a debate, that there are competent people who disagreed with what the CIA was saying.” But Albright stated that Miller’s articles made it appear that the nation’s best scientists sided with the administration.

Knight Ridder Took a “Hard Look”

Massing claims that “almost alone among national news organizations,” Knight Ridder took a “hard look at the administration’s justifications for war.” Two reporters, Jonathan Landay and Warren Strobel were assigned to interview sources with the military, the intelligence community and the foreign service. Landay and Strobel found several who expressed doubts over the administration’s claims that Iraq could produce weapons of mass destruction. The two journalists filed a report for Knight Ridder in September 2002 saying, according to Massing, that their sources stated, “they have detected no alarming increase in the threat that Iraqi dictator Saddam Hussein poses to American security and Middle East stability.” Although it was well-known that Iraq

Only one reporter, Karen DeYoung of the *Washington Post*, sought confirmation from the IAEA to see whether a new report had been issued, and learned that none had.
– John R. MacArthur

New York Times, continued on page 12

was “aggressively trying to rebuild” its weapons program, “there is no new intelligence that indicates the Iraqis have made significant advances” in their efforts.

Massing continued, “Unfortunately, however, Knight Ridder has no newspaper in Washington, D.C., or New York, and its stories did not get the national attention they deserved.” However, Massing concluded that as time went on, more and more news organizations did begin to note that there was a debate among the intelligence community, and that there was doubt as to the veracity of the claims that Iraq was building up a weapons program.

The “President’s Handmaiden”

Tim Rutten, in his “Regarding Media” column, published in the May 29, 2004 *Los Angeles Times*, wrote that “The adjective ‘circular’ somehow seems inadequate to describe [Miller’s relation to her sources].” Citing an interview with Massing, Rutten quoted him as saying that Miller was “actually promoting the defectors and claiming that the administration was not paying enough attention to the value of their information.” Characterizing *The New York Times* as “the President’s handmaiden,” Massing concluded, “If the *Times* had been as skeptical as it should have been, we would have had a fuller and more vigorous debate.”

The *Times* editors concurred in their editor’s note on May 26, writing, “The problematic articles varied in authorship and subject matter, but many shared a common feature. They depended at least in part on information from a circle of Iraqi informants, defectors and exiles bent on ‘regime change’ in Iraq, people whose credibility has come under increasing public debate in recent weeks. . . . Complicating matters for journalists, the accounts of these exiles were often eagerly confirmed by United States officials convinced of the need to intervene in Iraq. Administration officials now acknowledge that they sometimes fell for misinformation from these exile sources. So did many news organizations – in particular, this one.”

The Shadow of Jayson Blair

The May 26 article continued, “Some critics of our coverage . . . have focused blame on individual reporters. Our examination, however, indicates that the problem was more complicated. Editors at several levels who should have been challenging reporters and pressing for more skepticism were perhaps too intent on rushing scoops into the paper.” But Howell Raines, the former executive editor of the *Times*, who resigned over the Jayson Blair fiasco (See “Jason Blair Update” in the Fall 2003 issue of the *Silva Bulletin*, and “Jayson Blair and *The New York Times*” and “Newspapers Face the ‘Blair Effect’” in the Summer 2003 issue of the *Silva Bulletin*), told the *Houston Chronicle*, “My feeling is that no editor did this kind of reckless rushing while I was executive editor. . . . I can tell you positively that in the 25 years on *The Times* and in 21 months as executive editor, I never put anything into the paper before I thought it was ready. Any of the 30 or so people who sat in our front-page meetings during the run-up to the Iraq invasion and the first phase of the war can attest to the seriousness with which everyone took the story.”

But in another article appearing May 30, written by *The Times* public editor Daniel Okrent, the blame was placed at Raines’ feet. “[R]eporters do not put stories into the newspaper. Editors make assignments, accept articles for publication, pass them through various editing hands, place them on a schedule, determine where they will appear. Editors are also obliged to assign follow-up pieces when the fact remain mired in partisan quicksand.”

Okrent further wrote that previous editorial policy had been a problem. “One old *Times* hand recently told me that there was a period in the not-too-distant past when editors stressed the maxim ‘Don’t get it first, get it right.’ That soon mutated into ‘Get it first and get it right.’ The next devolution was an obvious one.” He also wrote that “coddling sources” had been a problem, particularly protecting the anonymity of those who speak only on the condition their identity be shielded. “A newspaper has an obligation to convince readers why it believes the sources it does not identify are telling the truth. That automatic editor defense, ‘We’re not confirming what he says, we’re just reporting it,’ may apply to the statements of people speaking on the record. For anonymous sources, it’s worse than no defense. It’s a license granted to liars.”

The Times’ Nationwide Influence

Especially problematic is the fact that so many newspapers nationwide reprint *The Times* articles in their own pages, Rutten wrote in his *Los Angeles Times* column, comparing the weapons of mass destruction coverage to the problems *The Times* had with Jayson Blair, and *USA TODAY* had with Jack Kelley, “[B]oth men were marginal journalistic figures whose misconduct resulted from editors’ failure to detect their personal pathologies. . . . [But] the reports published in *The Times* between October 2001 and April 2003 are far more disturbing. Not only do they involve false information circulated as the country struggled to make up its mind about the war, but they involve highly regarded reporters and editors of unquestioned accomplishment operating by the rules at the very heart of the journalistic establishment. Moreover, many of these most deeply enmeshed in this failure – particularly reporter Judith Miller and then-Washington bureau chief Jill Abramson, now one of *The Times*’ managing editors – remain deeply involved in covering national security issues.”

“That’s what I asked [Miller] to do – to alert people that there’s a debate, and there were competent people who disagreed with what the CIA was saying.”

– David Albright,
Director of the
Institute for Science
and International
Security

The Media and Weapons of Mass Destruction

The BBC

On May 29, 2003, reporter Andrew Gilligan stated on BBC's "Today" program that the British government had "sexed up" an intelligence dossier by claiming Iraq could deploy weapons of mass destruction within 45 minutes. That claim was characterized as being central to the British government's argument for going to war with Iraq. Gilligan later identified weapons expert and Ministry of Defence employee David Kelly as his anonymous source. Presumably unable to face the stress of the situation, Kelly allegedly committed suicide on July 17, 2003. (See "Andrew Gilligan and the BBC," in the Summer 2003 *Silha Bulletin*.) Kelly's death led to an investigation headed by Lord Brian Hutton, who issued a 328-page report published on January 28, 2004. A 37-page summary is available online at <http://www.the-hutton-inquiry.org.uk/content/rulings/statement280104.htm>.

Hutton Inquiry Conclusions

Hutton concluded that:

- Gilligan's allegations on the May 29 "Today" program that the government knew the 45-minute claim was wrong or questionable were unfounded.
- Although the media play an important role in disseminating information in a democratic society, they should not relay "false accusations impugning the integrity of others," including politicians. ". . . editors [should] give careful consideration to the wording of the report and to whether it is right in all the circumstances to broadcast or publish it." Hutton characterized the BBC's editorial system as "defective in that Mr. Gilligan was allowed to broadcast his report at 6.07 [sic] am without editors having seen a script of what he was going to say and having considered whether it should be approved."
- BBC management was "at fault" for failing to fully investigate Gilligan's notes regarding his statements on the May 29 broadcast, and for not finding that the notes he collected for the story did not support the allegations he made against the government.
- The fact that some BBC executives had knowledge of an e-mail circulating among them expressing concern over Gilligan's reporting techniques during the May 29 broadcast, while BBC's director of news, Richard Sambrook did not, "shows a defect in the operation of the BBC's management system for the consideration of complaints in respect of broadcasts." The e-mail, according to the *Financial Times*, was written by "Today's" editor Kevin Marsh, and stated that Gilligan had produced "a good piece of investigative journalism marred by poor reporting." But the *Financial Times* also stated that Hutton "misinterpreted" Marsh's e-mail.

Fallout for the BBC

On January 28, 2004, the BBC issued a statement on its Web site stating, "The BBC does accept that certain key allegations reported by Andrew Gilligan on the Today programme . . . were wrong and we apologize for them. . . . The [government's] dossier raised issues of great public interest. Dr. Kelly was a credible source. Provided his allegations were reported accurately, the public in a modern democracy had a right to be made aware of them."

The statement continued, "We've already taken steps to improve our procedures. A new Complaints and Compliance structure has been put into place. . . . We have a new set of rules for BBC journalists who wish to write for newspapers or magazines and we will be publishing revised editorial guidelines."

In another statement that day, the BBC announced that Gavyn Davies, Chairman of the BBC, had resigned at the BBC Governors' meeting at 5:00 pm that afternoon. He told the Governors, "There is an honourable tradition in British public life that those charged with authority at the top of an organisation should accept responsibility for what happens in that organisation. I am therefore writing to the Prime Minister today to tender my resignation . . . with immediate effect." The BBC's statement read that "The Governors accepted [Davies'] decision with great reluctance and regret."

The following day, Greg Dyke, BBC's Director-General, also resigned, writing in a statement posted on the BBC's Web site that, "My position . . . has inevitably been compromised by the criticisms of BBC management in the Hutton report. . . . With the departure of both [Davies] and myself . . . I hope that a line can be drawn under this whole episode." Dyke concluded, "Throughout this affair my sole aim as Director-General . . . has been to defend our editorial independence and to act in the public interest."

Upon receiving Dyke's resignation, BBC governors appointed Mark Byford as Acting Director-General. Byford issued his own statement on BBC's Web site, saying that "The manner of [Davies' and Dyke's] departures demonstrates the integrity of both men. The whole Corporation owes them a debt of thanks . . ." In a separate statement he further noted that, ". . . we are now united in looking forward to working with the Board of Governors to ensure the BBC emerges from this difficult time a strong, independent and vibrant organisation, building on the legacy [Dyke] left behind."

Lord Richard Ryder, Vice-Chairman of the BBC since January 2002, was named Acting Chairman upon Davies' resignation. He resumed the Vice-Chairman position when Michael Grade became Chairman on May 17.

The media should not relay false accusations impugning the integrity of others, including politicians.
– The Hutton Inquiry

The BBC's Charter and Its Upcoming Renewal

The BBC is a corporation established under successive Royal Charters. The BBC's twelve governors are appointed "by the Queen on the advice of Government ministers to ensure that the BBC fulfills its obligations." The current charter will expire on Dec. 31, 2006. The Department for Culture, Media and Sport (DCMS) will conduct a review of the BBC, including public comments gathered prior to March 21, 2004. The review will culminate in a Green Paper, and later a White Paper with recommendations for the BBC's future.

In a story filed Jan. 28, 2004 by ONASA News Agency, Prime Minister Tony Blair said the results of the Hutton Inquiry should be considered as part of the charter review process.

BBC's Lawyers' Advice Ignored

Shortly after Hutton published his findings, there were allegations that the BBC's governors had ignored legal advice that Hutton's report was legally flawed. *The (London) Independent* reported on February 5 that BBC attorneys challenged Hutton's statement in an unpublished document, saying that "false allegations impugning the integrity of others, including politicians, should not be made by the media" violate freedom of expression provisions of the European Convention on Human Rights, and also go against case law that "protect certain defamatory publications, even when they cannot be shown to be true." BBC lawyers further stated that newspapers have a complete defense "even where false allegations of fact have been reported, so long as the publication is the result of 'responsible reporting' on a matter of legitimate public interest." Therefore, the law would not require the BBC to verify Kelly's allegation that the government "sexed up" the Iraq arms report.

BBC lawyers further stated that there were 12 key issues Hutton did not consider as he arrived at his conclusions. *The Independent* listed among them:

- Other leading weapons experts testified that the government's report had circulated through various people in an effort to "find a form of words that would strengthen certain political objectives."
- There was evidence that the government itself wanted to "out" Kelly, citing an entry in the diary of Alastair Campbell, Blair's press secretary, which read, "the biggest thing we needed was the source out."
- The fact that the government did not keep records of meetings where the government discussed how the intelligence concerning Iraqi arms would be presented to the public.

Blair's Wars

On May 27, 2004, *The (London) Guardian* reported that a new edition of *Blair's Wars*, a book written by John Kampfner, alleges that the government offered the BBC a compromise following Gilligan's broadcast on May 29, 2003. The compromise required the BBC to issue a statement saying Gilligan's report was wrong; the government would respond that it was a legitimate mistake and that "Today" would have been within its rights to broadcast it. But the compromise was rejected by Dyke and Davies.

Kampfner further alleges that Hutton, former lord chief justice of Northern Ireland, a man with "impeccable legal – and establishment – credentials," had been specially selected by the government to head the inquiry, presumably in an effort to ensure a conclusion favoring the government. Kampfner reported that an unidentified "senior figure" with the government telephoned Davies, urging him not to cooperate with the inquiry. "Hutton was selected by the government," the caller reportedly told Davies. "He is close to the security services and anti-BBC. It's a trap." Davies reportedly dismissed the warning.

When the Hutton inquiry concluded, Kampfner wrote that Blair "knew the government had not just escaped censure, but had been completely exonerated. The BBC had been damned."

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

Shortly after Hutton published his findings, there were allegations that the BBC's governors had ignored legal advice that Hutton's report was legally flawed.

The Media and the Photos from Abu Ghraib Prison

On April 28, 2004, CBS's "60 Minutes II" aired controversial photos of prisoner abuse in Abu Ghraib prison in Iraq. The photos showed Iraqi prisoners in various humiliating situations, while American soldiers looked on or even appeared to actively taunt the prisoners.

The Abuses Come to Light

The Report of the International Committee of the Red Cross (ICRC)

In a report dated February 2004, the ICRC outlined "a number of serious violations of International Humanitarian Law" committed by Coalition Forces in Iraq between March and November 2003. The information was gathered during the ICRC's visits to places of internment by interviewing those being held in the facilities. The main violations, which the ICRC "presented confidentially" to the Coalition Forces, included brutality against persons upon capture and initial custody, sometimes causing death or serious injury; lack of notification to family members that their loved ones had been arrested; physical or psychological coercion during interrogation to obtain information; prolonged solitary confinement in cells without sunlight; and excessive use of force against detained persons resulting in death or injury. Other problems included seizure and confiscation of private belongings of arrested persons, exposure of prisoners to dangerous tasks, and holding prisoners in spaces where there were exposed to shelling.

Not only the coalition forces were implicated in the report. The ICRC also stated that Iraqi police, operating under the responsibility of the Occupying Powers, often used extortion by threatening people they would be handed over to coalition forces if they did not comply. In addition, the ICRC reported that military intelligence officers with the coalition forces had informed its investigators that between 70 and 90 per cent of the people detained had been arrested by mistake, and attributed some of the brutal treatment of prisoners to a lack of proper supervision of some coalition forces soldiers.

The ICRC collected testimonies from prisoners in four military intelligence sections, including the Abu Ghraib Correctional Facility, and other places such as military bases and Iraqi police stations, where prisoners were held.

The ICRC's report is available online at <http://www.cbsnews.com/htdocs/pdf/redcrossabuse.pdf>

The Taguba Report

As a result of the ICRC's report and other allegations of abuse, Lt. Gen. Ricardo S. Sanchez, Commander of the Combined Joint Task Force Seven, requested an investigation of the 800th Military Police Brigade's detention and internment operations from November 1, 2003 onwards. Maj. Gen. Antonio M. Taguba was directed to investigate the allegations of abuse at Abu Ghraib as well as other facilities; specifically, the training, standards, and internal procedures at the prison. Taguba's report, available online at <http://www.cbsnews.com/htdocs/pdf/tagubareport.pdf> concludes that the forces assigned to Abu Ghraib had not been properly trained to humanely interrogate prisoners; that the prison's facilities were inadequate for handling the large number of detainees; that the 800th Military Police Brigade assigned to Abu Ghraib was not trained to handle such a large prison population; and that lines normally separating the distinct functions of military police and military intelligence personnel were blurred.

Taguba's investigation included the review of "numerous photos and videos of actual detainee abuse taken by detention facility personnel." These materials, Taguba reported, "are now in the custody and control of the U.S. Army Criminal Investigation Command."

Some of the pictures were taken by various soldiers with digital cameras and cell phones with photo capabilities. The photos were sent home via phone or e-mail to family and friends stateside. According to CBS News.com, the photos came to the attention of the Pentagon after a soldier received some of the photos from a friend, then turned them over to military commanders. CBS did not identify either the soldier or the officers to whom he gave the photos, although Taguba identifies Specialist First Class Joseph M. Darby as one person who discovered evidence of abuse and turned it over to military law enforcement.

To date, seven enlisted soldiers have been slated for courts martial. *The New York Times* reported that the proceedings are being held "deep inside the American compound [in Iraq] and in full view of the Arab press." Reporters sit at the back of the room, but no cameras or tape recorders are allowed. Although certain Iraqi officials have attended, such as Baktiar Amin, the Iraqi Human Rights Minister, *The New York Times* reported that Human Rights Watch has stated that American occupation authorities have denied international human rights groups permission to attend the trials.

The photos came to the attention of the Pentagon after a soldier received some of the photos from a friend, who then turned them over to military commanders.

Abu Ghraib, continued on page 16

The Media Become Involved

The Denver Post

One of the earliest reports of coalition forces abusing Iraqi detainees appeared in *The Denver Post* on April 12, 2004. Staff writer Miles Moffeit had requested information on alleged assaults on troops by other military personnel in a Freedom of Information Act request. Although the focus of Moffeit's article was that such cases are often handled leniently, he briefly mentioned two incidents of military abuse of Iraqi citizens, one of them an Iraqi prisoner. The case file notes, Moffeit reported, stated that the "investigation did not establish sufficient evidence to prove or disprove that [the soldiers] had committed the offenses."

CBS's "60 Minutes II" and *The New Yorker*

News of the abuse was broadcast nationwide on the April 28 edition of "60 Minutes II" on CBS. (The Associated Press reported that this was when President Bush learned of the existence of the photos, although he had been previously aware of the abuse.) A few days later, a story, "Torture at Abu Ghraib" appeared in the May 10, 2004 *New Yorker*, followed on May 17 by "Chain of Command," and on May 24, "Annals of National Security." All three articles had been written by Seymour M. Hersh, who won the Pulitzer Prize in 1970 for his documentation of the My Lai massacre in Viet Nam. Although neither CBS nor *The New Yorker* identified by name the person or persons who presented them the photos, Cox News Service reported that they were digital photos taken by a number of soldiers assigned with the forces serving at Abu Ghraib.

The Associated Press reported that CBS News held the photos for two weeks before airing them, at the request of Gen. Richard B. Myers, chairman of the joint chiefs of staff. Myers cited concerns for the safety of American hostages and the concern for escalated fighting in Fallujah as his reason for delaying the broadcast. Myers' fears seemed justified when, on May 11, an Islamic militant Web site posted a video showing the beheading of Nick Berg, an American civilian. His executioners claimed that Berg was executed in retaliation of the abuses of Iraqi detainees at Abu Ghraib.

In the Senate Armed Services Committee hearing on May 7, during questioning from Senator Mark Dayton (D-Minn.), Myers said that he did not ask CBS to delay broadcast of the story. Instead, he testified, he only wanted to keep the pictures from public dissemination. "[The Red Cross] report had been around since January. What was new was the pictures. I asked for the pictures to be delayed," Myers told the committee.

In an interview with the Associated Press, "60 Minutes II" executive producer Jeff Fager explained his reason for delaying the broadcast. "News is a delicate thing. The natural thing is to put it on the air. But the circumstances were quite unusual and I think you have to consider that." News anchor Dan Rather acknowledged that CBS delayed broadcasting the story for two weeks at the end of the program.

But Poynter Institute's journalism values scholar Bob Steele told the Associated Press, "You'd have to be convinced that these other American lives are truly on the line. I would want to have a very specific and short time period [to withhold the news]."

The photos have prompted discussions among editors about how to run photos of abuse, or whether they should be run at all. Many editors chose to run text on the front page, with photos appearing on inside pages where the story continues. In an article in the May 11, 2004 *New York Times*, David Carr wrote that *Washington Post* executive editor Leonard Downie Jr. said, "What is on the front page is more difficult to avoid than what is inside. The people who follow a story inside are usually more prepared for what they see when they get there." Nevertheless, Carr wrote, the media still face criticism that they are promoting an anti-war agenda by publishing the photographs.

The Justice Department and Department of Defense Memos

The May 24 issue of *Newsweek* revealed that after the Sept. 11, 2001 terrorists attacks, the Bush administration "created a bold framework to justify" stripping al Qaeda and Taliban prisoners of their Geneva Convention protections. A series of memos obtained by *Newsweek* revealed "secret legal opinions [had been drafted] by lawyers from the Justice Department's Office of Legal Counsel, and then endorsed by the Department of Defense and ultimately by White House counsel Alberto Gonzales. . . ." *Newsweek's* report continued, stating that ". . . Rumsfeld himself, impressed by the success of techniques used against [al] Qaeda suspects at Guantanamo Bay, seemingly set in motion a process that led to their use in Iraq."

The Wall Street Journal, *The New York Times* and the *Washington Post*, along with other newspapers, each ran their own stories about the memos. An editorial in the June 9 *Washington Post* read, "[These memos are] a matter of grave concern because the use of some of the methods that have been reported in the press is regarded by independent experts as well as some of the Pentagon's legal professionals as illegal. . . . This week, thanks again to an independent press, we have begun to learn the deeply disturbing truth about the legal opinions that the Pentagon and the Justice Department seek to keep secret."

Courts martial of the enlisted men charged with prisoner abuse are held "deep inside the American compound [in Iraq] and in full view of the Arab press."

– *The New York Times*

State Access to Information

Age Restriction on Access to Information in Louisiana Challenged

Prompted by a persistent teenager, a Louisiana legislator has introduced an amendment to the state's public records laws that would eliminate the requester's age as a factor in determining whether to release public information. State law currently requires that information requesters be 18 years old or older. No other state has such an age requirement, according to the Student Press Law Center.

Michael Barker, a 17-year-old junior at Jena High School, contacted Rep. Tommy Wright, D-Jena, about the law after being denied access to public information about purchases made by his school, according to the SPLC. The SPLC's coverage is available online at http://www.splc.org/newsflash_archives.asp?id=782&year=2004.

Barker sought the information because of a personal interest in public policy decisions, but he told the SPLC that he is also concerned about the potential for Louisiana's law to stifle the student press.

Barker's unsuccessful efforts to get access to school board records spurred him to contact Wright, who agreed with Barker that the law needed to be changed.

"There shouldn't be any reason we would want to not share public information with someone who is less than 18 years old," Wright told the SPLC.

The Louisiana House of Representatives passed the bill, HB 492, on April 16, 2004, by a vote of 102-0. The state senate received the bill on April 19 and referred it to the committee for government affairs the following day.

—DOUG PETERS
SILHA FELLOW

Maine Enacts Law Reforming Access to Public Documents

Governor John Baldacci signed a bill on May 11, 2004 making it easier to obtain public records in Maine. The Maine Senate passed the bill just days before in a unanimous vote during the final hours of the legislative session. The legislation came in response to a statewide audit of access to public records in Maine which it found that access was often more difficult than intended under the Maine Freedom of Access Act. The new law seeks to create a more uniform policy while broadening access to public documents. Passage of the statute was hailed by the Maine Press Association on its website, www.maineypress.org, as "the broadest package of public access reforms in the 45-year history of Maine's Freedom of Access Act."

A statewide audit to determine how easily public documents could be obtained under Maine's Freedom of Access Act (FAA), Maine Code tit. 1 § 401 - 521, popularly known as the "Right to Know" Act, was conducted by the Maine Freedom of Information Coalition (FOIC) on Nov. 19, 2002. That day, the FOIC sent more than 100 volunteers to 310 Maine public offices to request documents defined as public under the FAA. The results of the audit disclosed that Maine public documents were frequently unavailable because government employees and officials did not have access to or were unable to retrieve the documents. In addition, many agencies incorrectly believed public documents to be confidential or imposed identification requirements not permitted under Maine law.

The audit also discovered that charges to produce and compile public documents varied greatly across the state. Agencies charged as little as 15 cents per page to as much as \$6 per page, as required by the Caribou Police Department.

In response to the audit, a new law, Maine PL 2003, Ch. 185, §1, passed in 2003, now requires that chief administrators from state law enforcement agencies develop a written policy to respond to public record requests and that those policies be certified annually. The law also requires each public agency to have at least one person trained to respond to public document requests. In order to further study public agencies' compliance with the FAA, Governor Baldacci created a 16-member committee last year to report on that issue. The committee was comprised of business leaders, local residents, government officials and members of the media, including Judy Meyer, who is president of the FOIC and also an editorial page editor of the *Lewiston Sun-Journal*. The committee discovered that the law, which already requires most documents to be publicly available, had been undercut more than 500 exceptions shielding records from public access. Findings of the committee also showed that neither the FAA nor its many exceptions had been regularly evaluated since originally adopted more than 40 years ago as the "Right to Know Act," Maine PL 1954, Ch. 219.

The revised FAA, as supplemented by the bill signed into law by Governor Baldacci in May, now mandates public bodies to specifically cite state law authority before moving into a closed-door, executive session. Previously, executive sessions required only that a motion for an executive session laid out the nature of the business to be discussed and no specific exception. Public agencies and officials must now also provide access to anyone requesting to inspect or copy any public record during business hours to within a reasonable time. Although "reasonable time" is not defined in the FAA, no such requirement existed previously.

The revised law also limits costs of compiling and copying public records to only those fees reasonable to recoup costs. No limit on fees existed before, but now they cannot exceed \$10 per hour, after the first hour of staff time, for each request. No specific limit beyond the "reasonable fee" requirement exists for the first hour of staff time. Furthermore, agencies must provide estimates of the total time and costs to fulfill the request. If those costs will exceed \$20, the requester must be notified and agree to pay the costs before the documents are produced.

State Access, continued on page 18

The Maine Press Association and Maine Daily Newspaper Publishers Association joined the FOIC in applauding the new legislation. Both of the associations helped to form the 16-member committee to study the FAA, facilitated reporting to the Maine Legislature and provided recommendations on the final drafting of the bill. Michael Mahoney, legal representative to the associations, praised the bill in a public statement saying, "It was a long haul that, at time, required real patience on our part, but I believe that the final product was well worth the wait."

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

South Carolina Judge Rules that Public Records Used in Criminal Investigation Remain Public

Public records used in criminal prosecutions are not exempt from South Carolina's open-records law and must remain available to the public, a state circuit court judge ruled in March 2004.

Judge Paula H. Thomas of the state's 15th Judicial Circuit issued the unpublished ruling in *Sun Publishing Company, Inc. v. Waccamaw Regional Transportation Authority, Inc.*

Prosecutors seized financial records of a public transportation authority after a series of articles published in February 2004 by *The Sun News* (Myrtle Beach) triggered investigations into the authority's finances and accounting methods by both the authority's board and law-enforcement agencies. The board investigation resulted in the firing of the transit authority's CEO, Benedict Shogaolu. The newspaper had sought the financial records under the state open-records law, South Carolina Code Ann. §30-4-10 et seq., but prosecutors refused to release the files, claiming an investigative records exemption.

Under §30-4-40(a)(3), investigative records are exempt from public disclosure only if they were compiled for investigative purposes, are not otherwise available by law, and if release would cause harm to the agency, such as by revealing investigative techniques or identifying informants.

In her March 11, 2004, ruling, Thomas ordered the immediate release of the financial records, saying that use of public records by law enforcement officials does not convert those records into exempted investigative records.

Patricia O'Connor, editor of *The Sun News*, praised the ruling, which came exactly one week after the newspaper sued for the records. "Judge Thomas' decision from the bench was well-reasoned and followed the statute to the letter," a March 12 article in *The Sun News* quoted O'Connor as saying. "It upholds an important democratic principle that allows the public to inspect and review public records and the actions of public officials."

The newspaper's original series, which ran in February, as well as follow-up articles, are available online at: http://www.myrtlebeachonline.com/mld/myrtlebeachonline/news/special_packages/investigating_wrta/

—DOUG PETERS
SILHA FELLOW

Kansas Governor Signs New Bill Expanding FOIA Access

On May 17, 2004, Kansas Governor Kathleen Sebelius signed Senate Bill 552 into law, expanding public access to government records under the Kansas Open Records Act (KORA), K.S.A. § 45-215, et seq. The amended law, which goes into effect on July 1, contains a provision allowing those suing the state for a bad faith denial of access to public records to recover their attorney fees if a judge determines the records should have been released. The attorney fees provision was lobbied for by the Kansas Press Association in response to a lawsuit filed by local Kansas paper against the state in 2003.

The Garden City Telegram requested reports on railroad crossing safety from the Kansas Department of Transportation (DOT) in 2003. The DOT refused to release the reports to the newspaper and *The Garden City Telegram* successfully sued the state in *Telegram Publishing Co. v. Kansas Department of Transportation*, 69 P.3d 578 (Kan. 2003). Although the newspaper spent \$13,000 in attorney fees on its lawsuit, the district court judge determined that it could only recover the legal expenses incurred prior to the filing of lawsuit, amounting to just \$1,400. The amendment to KORA now allows the entire cost of attorney fees to be recouped.

Another provision of Senate Bill 552 allows public access to records on donations to public agencies "if the donation is intended for or restricted to providing" payment or personal benefits "to a named public officer or employee." Under prior law, records on such donations were considered confidential and not publicly available. In addition, law enforcement agencies which fail to provide public access to records on criminal investigations will have to explain in writing why they are denying access. A final provision requires documents discussing the qualifications of anyone appointed to fill a vacancy in an elected office to be publicly accessible. No such requirement existed under KORA previously.

Anti-War Demonstrators Come Under Federal Surveillance

On Feb. 10, 2004, the U.S. Attorney's office for the Southern District of Iowa withdrew its subpoenas ordering Drake University administrators and antiwar activists to provide information to and appear before a federal grand jury, respectively. The subpoena delivered to David Maxwell, President of Drake University, evoked memories of federal government surveillance of activists during the Vietnam War. The withdrawal of the subpoenas capped what had been a tumultuous week for those attending, teaching and working at Drake, which originally stemmed from an antiwar meeting at the university in November 2003.

The Drake chapter of the National Lawyers Guild (NLG), composed of law students at the Drake University Law School, hosted an event on campus on Nov. 15, 2003, advertised as "Stop the Occupation! Bring the Iowa Guard Home!" The NLG, an association dedicated to protecting civil liberties and minority rights, is headquartered in New York City but has chapters located in nearly every state and at more than 100 law schools across the nation, including Drake.

The antiwar event featured speakers on topics addressing the war in Iraq and terrorism. It also included an afternoon session training protesters in nonviolent resistance, designed to prepare those planning to attend a protest at the Iowa National Guard Headquarters in Johnston, Iowa, the next day. Although largely peaceful, the event resulted in the arrest of 12 protesters for trespassing on the Iowa National Guard military base. One of those arrested was also charged with resisting arrest and assault.

Despite the arrests, nearly three months passed with little notice of the events taken by Drake administrators. But on Feb. 3, 2004, the U.S. Attorney's Office for the Southern District of Iowa issued a subpoena to Maxwell ordering him to turn over the identities of the students who had either helped organize or who had attended the NLG event on November 15, along with any records the university possessed pertaining to the substance of the event. In addition, four local activists who had protested on November 16 were served with subpoenas ordering them to testify before a federal grand jury investigating the incident. Jason Dunn, co-president of the Drake chapter of the NLG, thought the subpoenas "laughable," according to a Mar. 5, 2004 article in *The Chronicle of Higher Education*. Dunn added, "You don't need a subpoena to find out who we are. There are only about four to six of us on any given day. Everyone in the law school knows who we are."

The Iowa activists subpoenaed, along with other activists around the country, were alarmed at the possibility that the federal government was attempting to use scare tactics to silence dissenters. Contributing to those fears was the fact that the subpoenas were delivered by Jeff Warford, a Polk County Sheriff's Deputy, who identified himself to at least two of the activists as a member of a Federal Bureau of Investigation-Joint Terrorism Task Force. However, Stephen O'Meara, the U.S. Attorney prosecuting the case, explained in a press release shortly after the issuance of the subpoenas that they were only issued "to determine whether there were any violations of federal law, or prior agreements to violate federal law, regarding unlawful entry onto military property" and were not related to terrorism threats. The Polk County Sheriff's Office later announced in a public statement that Warford should have identified himself more clearly and that his position on the Joint Task Force was unrelated to his delivery of the subpoenas.

One day after the delivery of the subpoenas, U.S. District Court Judge Ronald Longstaff issued a gag order barring Drake administrators, faculty and staff from discussing the subpoena against the university. In the following days, the gag order was broadened to bar anyone from even acknowledging the existence of the subpoenas. The university administrators were not even allowed to let students know about the possible release of their names without facing a criminal contempt of court charge. Yet mounting criticism from the NLG, the American Civil Liberties Union (ACLU) and other groups around the country, along with pressure from the media, helped bring matters to a head. On February 10, the U.S. Attorney's Office announced that it was withdrawing its subpoenas against Drake and the activists as well as requesting that the gag order be lifted. Judge Longstaff complied with the request.

The NLG President Michael Avery said in statement on NLG's website, www.nlg.org, "The government was forced to back down in this case and it shows that people can and should stand up to the government when it is abusing its powers." Avery emphasized the importance of this decision not just to civil liberties groups, but to all people, claiming that it showed that "the American people cherish their right of free expression and the right of political groups to dissent from government policies." Drake administrators responded to the lifting of the gag order and the withdrawal of the subpoenas by holding a forum discussion on the lessons learned from the incident on campus. In contrast to the original meeting which was sparsely attended and not even covered by the Drake student newspaper, the February 19 event drew a capacity crowd to one of Drake's largest lecture halls. The university administration was largely praised by faculty and students for its refusal to comply immediately with the subpoena and for considering student interests and civil liberties.

Exactly what sparked the FBI's interest in the events organized by Drake law students remains unknown, but expanded investigative powers in the wake of the Sept. 11, 2001 attacks seemed at least partly responsible. Shortly after the attacks, Attorney General John Ashcroft issued guidelines allowing FBI agents to attend any event which is open to the public, including political events and student-organized meetings and conferences. The new guidelines marked a substantial departure from previous FBI policy. Following the extensive federal investigations into student expressive activities during the 1960s and 1970s, FBI and other federal law enforcement agents had been barred from investigating student protesters and activists without reasonable cause to suspect them of engaging in unlawful activities.

On Nov. 23, 2003, *The New York Times* reported that it had obtained a confidential FBI memorandum circulated to local law enforcement officials nationwide on Oct. 15, 2003, detailing how the FBI had collected information on

The Iowa activists subpoenaed, along with other activists around the country, were alarmed at the possibility that the federal government was attempting to use scare tactics to silence dissenters.

training and organization of antiwar protesters. The memorandum urged local law enforcement officials to report any suspicious activity at protests or antiwar events to the FBI as a way to counter possibly violent demonstrations and suggested that such activities might be related to terrorism. That same article quoted Anthony Romero, executive director of the ACLU as saying, “The FBI is dangerously targeting Americans who are engaged in nothing more than lawful protest and dissent. The line between terrorism and legitimate civil disobedience is blurred, and I have serious concern about whether we’re going back to the days of [former FBI director, J. Edgar] Hoover.” The FBI maintains that its interests in antiwar demonstrations and protests are no different from any other large scale event vulnerable to violence or terrorism.

The memorandum urged local law enforcement officials to report any suspicious activity at protests or antiwar events to the FBI.

– *The Chronicle of Higher Education*

Yet, events prior to those at Drake suggest that the federal government’s interest in student organizations might involve more than one isolated incident. Around the same time that the subpoenas were being delivered to Drake and the activists in Iowa, U.S. Army officials were visiting the University of Texas at Austin, seeking information about a student-sponsored conference on that campus. Sahar Aziz, a Muslim law student, hosted the near-capacity, university-approved event entitled, “Islam and the Law: Questions of Sexism” on Feb. 4, 2004.

Two U.S. Army lawyers from Fort Hood, located about two hours away, had attended the event. They later claimed to be preparing for a future assignment to handle legal matters between the U.S. military and local Muslims in southwestern Asia. Deborah Parker, a spokeswoman for the Army’s Intelligence and Security Command, told *The Chronicle of Higher Education* that the lawyers wanted to “understand Muslim law so they would not do anything wrong by accident,” according to a Mar. 26, 2004 article. But Malcolm Greenstein, Aziz’s lawyer, told *The Chronicle* on Mar. 5, 2004, that two Army intelligence agents subsequently showed up at the law school on February 9 looking for Aziz and others who had attended the “Islam and the Law” conference.

The agents were reportedly looking for the names of “three Middle Eastern-looking men.” The Army lawyers who had attended the conference claimed that one of the three men had questioned them intently about their identification and reasons for attending the event. The Army lawyers became suspicious of the man and intended to pass information pertaining to the suspicious man’s identity, or the identities of his associates, to the FBI. The Army agents sent to the university had sought out Aziz, who coordinated and ran the conference, to see if she had information on anyone who had attended the conference or the identity of the man who had questioned them.

By federal law, the Department of Defense, including the Army, is barred from investigating civilians unless the FBI has asked for assistance first. However, the FBI had no knowledge of the Army agents’ actions inquiring about the men at the conference or looking for Aziz. Parker told the Associated Press on Mar. 15, 2004, that the actions of the intelligence agents were the result of “a lapse in judgment” but noted that “[i]t was not something that was done maliciously.” A press release by the Army Intelligence and Security Command, responsible for conducting intelligence and information operations for the military, issued on March 12, 2004, stated that the agents and “their detachment commander exceeded their authority by requesting information about individuals who were not within the Army’s counterintelligence investigative jurisdiction.” The statement went on to explain that refresher training on the Army’s limits of investigative jurisdiction would be provided to prevent such future incidents. It is unclear whether the Army lawyers or their commander would face any punishment.

A third incident, also at the University of Texas at Austin, involved a Freedom of Information Act request made by a University of Texas freshman. The student, Mark Miller, requested maps and layouts of the underground access tunnels from the University of Texas on Dec. 16, 2003. Miller had previously inquired about the layout of the underground tunnels and had been told that tunnels and information about them were not available to the public.

On Jan. 30, 2004, federal law enforcement agents telephoned Miller. The agents said they were from the FBI and Secret Service, and informed Miller that they wanted to interview him regarding a potential threat to the public safety. Miller was quoted in a May 6, 2004 *Daily Texan* article as saying that the agents asked whether he belonged “to any student activist organizations,” “had ever thought of joining any student activist organizations” or had considered bringing a lawsuit through the ACLU.

Although the tunnel information was never released to Miller on the grounds that it was not public under a homeland security exception to the Texas open records law, the question of how the FBI and Secret Service learned of Miller’s FOIA request remains unanswered, at least for the time being. The FBI and Secret Service have refused to publicly comment, stating only that the incident is part of an ongoing investigation. Both university officials and federal law enforcement officials agree that it is not typical for one to share information about FOIA requests with the other. Although exactly how the federal agents learned of Miller’s FOIA request remains unknown, sometime shortly after Miller made his FOIA request, federal authorities had visited the university to check on its preparedness for possible terrorist threats.

Murray Polner, an Army veteran and author, wrote in an opinion article for *Newsday* on Mar. 16, 2004, that “when Americans are intimidated into genuflecting before official policies they loathe rather than be allowed the freedom to express ‘an open mind and a brave reliance upon free discussion,’ as the late deeply respected American jurist Learned Hand once put it, then we are in very, very deep trouble.” Polner worries that the incidents at Drake and the University of Texas represent a policy of increased federal surveillance into student activists in an effort to silence dissent. Other free expression and civil liberty advocates also speculate that these incidents are not the end of increased federal government surveillance of antiwar activities and protesters. These concerns are likely to continue to fuel debate over where security needs end and freedom of expression begins in a post-Sept. 11 world.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Scalia Tapes, continued from page 10

Although Scalia will now allow print reporters to tape his speeches, Barbara Cochran, president of the Radio-Television News Directors Association, wrote him a letter of complaint, stating in part: “You have written that you will allow newspaper reporters to use their recording devices to assure the accuracy of their stories. Surely, television and radio reporting should be just as accurate. One of the reasons that the public turns to television and radio for its news is because they can see and hear for themselves exactly what took place. To exclude television cameras and audio recording is the equivalent of taking away pencil and paper from print reporters. Your policy puts television and radio journalists at a distinct disadvantage.” Cochran’s letter is available online at <http://www.rtnda.org/news/2004/041204.shtml>.

The incident in Hattiesburg was one of many occasions when Scalia has asked reporters not to cover his appearances with electronic devices. One highly publicized incident occurred in March 2003. Scalia was given the “Citadel of Free Speech Award” by the City Club of Cleveland, Ohio, for his work in support of the First Amendment. Scalia barred both television reporters and camera crews from covering the event, even though the City Club usually tapes speeches for broadcast on public television, according to the Associated Press. Terry Murphy, C-SPAN’s vice president and executive producer, wrote a letter in protest to the City Club, stating that the ban on broadcast media “begs disbelief and seems to be in conflict with the award itself.” He continued, “How free is speech is there are limits to its distribution?” According to the Associated Press, the *Hattiesburg American* and the Associated Press filed a lawsuit, *Hattiesburg American v. U.S. Marshals Service*, in U.S. District Court in Jackson on May 10. The reporters are seeking a declaration that Rube’s actions violated the First, Fourth, and Fifth Amendments to the Constitution as well as the Privacy Protection Act, and further seek to bar the Marshals Service from repeating such seizures in the future. In addition, the lawsuit asks for guarantees to keep the federal agency from erasing tapes regardless of whether the seizure is lawful or not. Finally, plaintiffs seek \$1,000 in damages for Konz and Grones.

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

“It has been the tradition of the American judiciary not to thrust themselves into the public eye, where they might come to be regarded as politicians seeking public favor.”

— Justice
Antonin Scalia

New York Times, continued from page 12

Tom Rosenstiel, director of the Project for Excellence in Journalism, told the *Hartford (Conn.) Courant* that although newspapers make mistakes, the May 26 editor’s note in *The Times* “is different in that the issue we’re talking about is of greater political and journalistic impact than most other stories.” He added that *The Times*’ reporting “had a huge influence on the nation’s decision to go to war.” He continued, “The Bush administration, rightly or wrongly, perceives *The New York Times* as a liberal newspaper, and the fact that *The Times* gave credence to these charges had special weight. Journalistically, *The Times* is the newspaper of record, the paper with the most resources, the most people covering intelligence. The fact that they were vouching for these sources gave it a seal of approval to other journalists and legitimacy to the Bush administration.”

***The Times*’ Efforts to Make It Right**

In characterizing *The Times* coverage of the weapons of mass destruction controversy, the editors wrote in their May 26 note, “In . . . reviewing hundreds of articles written during the prelude to war and into the early stages of the occupation, we found an enormous amount of journalism that we are proud of. In most cases, what we reported was an accurate reflection of the state of our knowledge at the time, much of it painstakingly extracted from intelligence agencies that were themselves dependent on sketchy information. And where those articles included incomplete information or pointed in a wrong direction, they were later overtaken by more and stronger information. That is how news coverage normally unfolds.” The note concluded, “We consider the story of Iraq’s weapons, and of the pattern of misinformation, to be unfinished business. And we fully intend to continue aggressive reporting aimed at setting the record straight.”

According to Okrent’s May 30 column, executive editor Bill Keller began an internal examination of the articles in question. The results of that investigation were published on May 26 and contained a listing of pertinent articles, broken down by category, with links to each article. Comments were interspersed indicating corrections (some credited to Knight Ridder) or updates. The article is available online at www.nytimes.com/critique.

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

Chicago Media Want Senate Candidate's Divorce Records

The sealed divorce files of a Republican Senate candidate and his actress ex-wife were the talk of Chicago-area politics in the days leading up to the March 16, 2004 Illinois primary. The candidate, 44-year-old Jack Ryan, won the nomination, and has continued to resist efforts to get the California divorce records unsealed.

Ryan has repeatedly said that he asked a judge to seal the files, which include child-custody issues, in order to protect Ryan's young son.

"I'm a father first. I love America. But I love my son the most, and I want to keep him sealed off . . . from this election," Ryan said. "There are some things more important than this campaign, and he's that."

Both the *Chicago Tribune* and Chicago television station WLS-Channel 7, have requested that the documents be unsealed. California Superior Court Judge Robert Schnider announced in March 2004 that he favored unsealing any documents that did not threaten the privacy of Ryan's son. Schnider then sent the matter to a court referee, who will determine which, if any, of the sealed records could be released without jeopardizing the child's privacy, according to a March 29 Associated Press report. Schnider did not give a timeline for resolution of the issue.

An April 15, 2004, article in the *Chicago Tribune* quoted Ryan as saying he supported a quick resolution to the controversy.

"Those things having to do with my son, the idea is to keep them private," Ryan said. "Those things having to do with me, they'll release those. And I am very happy with that outcome. And our inclination is to go as fast as possible to get that done."

The sealed records, which Ryan says would harm his young son if released, were not sealed until 2001, two years after Ryan's divorce from actress Jeri Ryan. The judge refused an earlier request to have the records sealed, noting that possible embarrassment to Ryan did not outweigh the need for transparency in court proceedings, according to reports. Schnider later reconsidered, citing concerns for Ryan's son. Ryan's opponents in the state's Republican primary for U.S. Senate hinted during the race that the records were sealed to prevent the release of politically damaging information about Ryan. Media reports occasionally refer to rumors about what that information might be, but the substance of those rumors has not been published.

Although many have called for full disclosure from Ryan, some commentators have voiced concerns about the scope of the public's right to know about political candidates.

"In modern politics, it is 'The Dilemma,'" wrote Pat Gauen, a columnist for the *St. Louis Post-Dispatch* on March 22, 2004. "Voters have a right, even duty, to judge character flaws. But does that empower them to strip Jack Ryan's life bare for the examination? And even if there is no privacy for a candidate, is there also none for an ex-wife and son who made no choice to seek public office?"

—DOUG PETERS
SILHA FELLOW

Those things having to do with my son, the idea is to keep them private. Those things having to do with me, they'll release those."

— Jack Ryan,
Candidate

Kansas, continued from page 18

Several groups lobbied for the amendments to KORA including the Kansas Press Association, Kansas Association of Broadcasters, the Kansas Attorney General's office, local government officials, local school boards and teachers' groups. Doug Anstaett, executive director of the Kansas Press Association, told the Reporters Committee for the Freedom of the Press, in an article published May 25, "We are pleased that we got some improvements [in KORA] but it definitely wasn't sweeping." The full article can be found online at <http://www.rcfp.org/news/2004/0525govkat.html>. Anstaett was quoted in a May 18, 2004 Associated Press article as saying that the Kansas Press Association would continue to press for broader access to public documents and more amendments to KORA in the Kansas Legislature next year. One change Anstaett would like to see involves an exception to KORA that prevents records containing "information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy" from being released. "Information of a personal nature," is not defined in the statute.

The Kansas Press Association had lobbied for additional changes to KORA including making public all records on total compensation paid by the state to public employees. The House bill to amend KORA contained such a provision, but it was stricken from the final version passed by the Senate. Attorneys at the state's three largest universities, Kansas State, the University of Kansas, and Wichita State University, claimed that the requirement would violate state workers' right to privacy. Currently, only information on the name, job title and salary of public employees is available through KORA.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

19th Annual Silha Lecture Focuses on Journalism Ethics

On Wednesday, October 13, 2004, Geneva Overholser will deliver the Nineteenth Annual Silha Lecture, “High hopes and dire warnings: In search of a credo for today’s journalists.” As the editor of the *Des Moines Register*, Overholser led the paper to the 1990 Pulitzer Prize Gold Medal for Public Service for a series on the rape of an Iowa woman. She has also been a syndicated columnist for the Washington Post Writers Group, ombudsman of the *Washington Post* and columnist for the Columbia Journalism Review. She has been a member of the editorial board of the New York Times, deputy editorial page editor and editorial writer for the *Des Moines Register* and reporter for the *Colorado Springs Sun*.

Overholser currently holds the Curtis B. Hurley Chair in Public Affairs Reporting at the University of Missouri School of Journalism’s Washington, D.C. program. She is also a much-cited ethics commentator and media critic and writes the weblog “Journalism Junction” posted at www.poynter.org.

The Lecture, sponsored by the Silha Center for the Study of Media Ethics and Law based at the University of Minnesota’s School of Journalism and Mass Communication, will be held at Coffman Memorial Union Theater on the East Bank of the University of Minnesota’s Minneapolis campus at 7:00 p.m. The lecture is free and open to the public; no reservations are required. For further information, check the Silha Center’s web site at www.silha.umn.edu, or contact the Silha Center at 612-625-3421 or by e-mail at silha@tc.umn.edu.

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

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Two of the memos are available online at http://online.wsj.com/public/resources/documents/military_0604.pdf and http://www.nytimes.com/packages/html/politics/20040608_DOC.pdf

The British Press – The Daily Mirror

On May 1, 2004, the *Daily Mirror*, a British tabloid, ran photos purportedly of soldiers from the Lancashire Regiment beating an Iraqi prisoner. Two soldiers, identified only as “Soldier A” and “Soldier B,” had called the *Mirror* in February 2004 to offer the newspaper the photos, according to *The (London) Independent*. However, on May 15, the *Mirror* reported that, despite “rigorous checks,” the photos were a hoax. An investigation by Royal Military Police had concluded that a truck shown in the photo was a type not used by British military in Iraq at that time.

According to the *Manchester Guardian Weekly*, Sly Bailey, chief executive of the *Mirror*’s parent company, Trinity Mirror, ordered editor Piers Morgan to apologize for publishing the photographs. Morgan reportedly refused, then left the newspaper. Deputy editor Des Kelly took Morgan’s place, and the *Mirror* ran an apology to its readers.

In a May 21, 2004 article in *PR Week*, Julia Hobsbawm wrote, “The black-edged daily’s front-page headline ‘Sorry. We were hoaxed’ has obvious parallels with the BBC’s obsequious apology straight after the Hutton Inquiry when Gavyn Davies resigned and it sacked . . . Greg Dyke. . . . It has become a ritual act of cleaning for the media to apologise [sic], allowing all other argument to disappear in exchange for contrition.” (See “The Media and Weapons of Mass Destruction: The BBC” on page 13 of this issue of the *Silha Bulletin*.)

Hobsbawm concluded her *PR Week* article, writing, “Being wrong about the pictures doesn’t mean [Morgan] was wrong about the story Running simulated pictures of real abuse is ethically wrong, but using this to bury the real truth about what our soldiers get up to may be worse.”

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