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Judges and Journalists on a Collision Course

The First Amendment to the Constitution guarantees “freedom of the press” - whatever that means. For more than 200 years, the American people have relied on the courts to figure it out.

The mainstream media, traditionally a discontented and demanding bunch of malcontents, repeatedly challenged the courts to define the parameters of the “free press” clause in the broadest possible terms. And whether the issue was prohibiting direct censorship by the government, granting access to government documents and proceedings or recognizing the right of journalists to make mistakes in reporting on matters of public concern without being reduced to bankruptcy by lawsuits brought by unhappy officials, the media have clamored for greater and greater protection. The courts, for the most part, have adopted the media’s arguments and ruled in their favor.

Look at the Supreme Court’s opinions for the past 30 years and you will see an affection, even a reverence, for a rambunctious, contentious press. As Chief Justice Warren E. Burger dryly observed in an opinion he wrote in 1974, “A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like many other virtues it cannot be legislated.”

Given that journalists, especially those who cover the justice system, frequently report things that drive judges crazy, it is amazing that the courts have been so supportive for so long.

But now the bubble may have burst.

The controversy over whether reporters should be compelled to reveal confidential sources in government investigations or face the prospect of jail is symptomatic of a dramatic change in the judiciary’s perception of the role of the news media in contemporary society. What was once seen as a necessity - or at least as a necessary evil - is now an annoyance, at best, and an obstruction to doing justice, at worst.

Although the Supreme Court never explicitly stated that journalists have a constitutional right to refuse to testify before grand juries, over the years, the vast majority of state and federal courts crafted some kind of a privilege for them. It was grounded in the conviction that what might appear to be a perk for the press was really a benefit for the public, guaranteeing a disinterested conduit for information that bypassed the official government line and delivered the truth, without fear or favor.

But nowadays, news organizations are frustrated by increasingly secretive governments at all levels that ignore or rewrite open records laws in the name of security or privacy, stymieing meaningful investigative reporting. And too often, readers and viewers seem to want something besides independence from their news sources anyway. They don’t want to be challenged. They want to see their own biases reinforced, and are quick to cry “foul” when that doesn’t happen.

Some in the news media, desperately jockeying for ratings and circulation while competing to be heard over the cacophony of opinionated talk-radio hosts and bloggers, seem only too happy to oblige.

Or they may get sucked into the desperate game of demonstrating their “objectivity” by giving equal time and space to the exponents of one extreme or the other, or worse, allowing themselves to be used by unidentified partisan operatives to advance some undisclosed agenda.

The result is that the media are perceived by the courts as just another special interest group, pursuing an elusive bottom line while abandoning the time-tested role of sifting through all the chatter and providing the public with context and perspective, which is what earned the press credibility and respect in the first place.

Should we be surprised, then, when Chief Judge Ernest C. Torres of the U.S. District Court in Rhode Island declared that an individual reporter is “ill-equipped” to decide whether a source is entitled to anonymity? Or when Judge Richard A. Posner of the 7th U.S. Circuit Court said he couldn’t see why special rules should apply to people who have been asked to reveal confidential sources just because they call themselves journalists? Or when Judge David B. Sentelle of the federal appeals court in Washington, D.C., asked why a testimonial privilege, if one exists, shouldn’t apply to “the stereotypical blogger sitting in his pajamas”?

Who do these people think they are, anyway? Something special? Well, yes. Judges and journalists are both pretty special, and they have more in common than either might think. In their own ways, both seek the truth, and believe their respective ethical codes are important. Both are under siege from assaults from a hectoring public. And both are essential to a free society.

Without the judiciary, the press cannot succeed. And without the press, neither can our democracy.

-JANE E. KIRTLEY, SILHA PROFESSOR AND DIRECTOR OF THE SILHA CENTER

(This op-ed essay originally appeared in *The Baltimore Sun* on July 5, 2005)



Reporters Privilege News

Supreme Court Denies *Cert.* in Miller/Cooper Cases

After the U.S. Supreme Court declined on June 27, 2005 to hear the appeal involving reporters Judith Miller's and Matt Cooper's refusal to name their confidential sources in the Valerie Plame controversy, it seemed inevitable that the two reporters would go to jail. But a last minute decision by the source to permit Cooper to testify before the grand jury, coupled with *Time* magazine's decision to turn over Cooper's notes to a federal prosecutor, has kept him out of jail. Miller, who is employed by *The New York Times*, never published a story about the scandal. Nevertheless, she was sentenced to the Alexandria Detention Center in Virginia on July 6.

The Plame controversy began after *The New York Times* published an op-ed commentary by former U.S. diplomat and CIA envoy Joseph C. Wilson IV on July 6, 2003. It criticized the assertion by the Bush administration that Iraq had tried to purchase uranium in Niger, a claim cited by the administration as a reason for going to war against Iraq.

Wilson disputed the claim and said that the administration had relied on discredited intelligence.

Just days after the commentary appeared, the identity of Valerie Plame, who is Wilson's wife, as an undercover agent working for the CIA, was made public in a column written by Robert Novak. Novak, a nationally syndicated columnist for the *Chicago Sun-Times* and a CNN show co-host, claimed he received the information about Plame from two "senior . . . officials" within the Bush administration. Subsequently, several other journalists reported receiving the same information. Because the intentional disclosure of an undercover agent's identity by a government official may be a felony under the Intelligence Identities Protection Act of 1982, 50 U.S.C. §§ 421 *et seq.*, a special prosecutor, Patrick Fitzgerald, was appointed to conduct an investigation. Miller and Cooper, as well as other journalists, were subpoenaed in an effort to learn their sources. To date, Novak has not revealed whether he has been subpoenaed or questioned in the case.

The case came before federal district Judge Thomas Hogan in Washington, D.C. In July 2004, in *In re: Special Counsel Investigation*, 2004 U.S. Dist. LEXIS 15360, Hogan rejected Cooper's motion to quash the subpoena seeking his notes. Cooper did not comply, so Hogan ordered him to jail and imposed a \$1,000 a day fine until he complied. However, Hogan stayed the sentence while Cooper's attorney appealed the case. Cooper eventually testified about conversations with Chief of Staff to Vice President Dick Cheney Lewis Libby, after being released by Libby from his confidentiality agreement.

Miller was subpoenaed to testify before the grand jury in August 2004, and Cooper was again subpoenaed to testify in September. Both refused to do so. In October, Hogan held them both in contempt. The fines and sentences against the reporters were stayed pending appeal.

The decision from a three-judge panel of the U.S. Court of Appeals (D.C. Cir.), released in February 2005, rejected a First Amendment privilege in these cases. (See *In re: Grand Jury Subpoena*, 397 F.3d 964 (D.C. Cir. 2005); see also "Plame Update: Journalists Miller and Cooper Appeal Their

Sentences" in the Winter 2004 issue of the *Silha Bulletin* and "Reporters Privilege: *In re: Special Counsel Investigation*" in the Summer 2004 issue of the *Silha Bulletin*, and "Columnist's Story Prompts Investigation into Government Leaks" in the Fall 2003 issue of the *Silha Bulletin*.) On April 19, 2005, the federal appeals court, sitting *en banc*, refused to reconsider the earlier, unanimous ruling of the panel. (See *In re: Grand Jury Subpoena*, 405 F.3d 17 (D.C. Cir. 2005).

The case then was appealed to the U.S. Supreme Court, which denied *certiorari*.

Having exhausted all avenues, on June 29, attorneys for the reporters asked for a two week extension in order to prepare additional evidence they believed would convince Hogan that their clients should not go to jail. Hogan agreed to 48 hours.

During the interval, *Time's* editor-in-chief, Norman Pearlstine, announced that the magazine had decided to turn over all records, notes, and e-mail traffic regarding the case, according to the Associated Press. "The same Constitution that protects the freedom of the press requires obedience to final decisions of the courts and respect for their rulings and judgments," Pearlstine said in a statement. "That Time Inc. strongly disagrees with the courts provides no immunity. The innumerable Supreme Court decisions in which even Presidents have followed orders with which they strongly disagreed evidences that our nation lives by the rule of law and that none of us is above it."

Time Inc. faced fines of \$1,000 per day which retroactively could have added up to \$270,000, according to *The Washington Post*. However, Pearlstine has denied that his decision to release the material was financially driven. *Newsweek's* Michael Isikoff has since reported that one of Cooper's e-mails identified presidential advisor Karl Rove as the person who revealed that Plame was an undercover CIA operative. According to MSNBC, the White House denials of Rove's possible role in the case have "fallen silent." The article is available online at <http://www.msnbc.msn.com/id/8545657/>.

The Associated Press reported that *New York Times'* publisher Arthur Sulzberger, Jr. issued a statement in reaction to Pearlstine's decision, saying, "We are deeply disappointed by Time Inc.'s decision to deliver the subpoenaed records. Our focus is now on our own reporter . . . and in supporting her during this difficult time."

Because of the July 4 holiday, sentencing of Miller took place July 6, and she was immediately sent to jail. She will remain jailed until she testifies, or until the term of the grand jury expires in late October.

The New York Times reported that upon sentencing, Miller told Hogan, "If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press."

—ELAINE HARGROVE
SILHA FELLOW AND BULLETIN EDITOR

"If journalists cannot be trusted to guarantee confidentiality, then journalists cannot function and there cannot be a free press."

— Judith Miller

Reporters Privilege News

Wen Ho Lee v. Department of Justice

Four reporters facing contempt charges were ordered on June 29, 2005, by a federal appeals court to reveal their sources or face fines of \$500 a day. A fifth reporter has been cleared.

The case arose in a lawsuit filed by scientist Wen Ho Lee who, according to a 1999 *New York Times* article, was accused of having stolen U.S. nuclear secrets for China. Lee was indicted on 59 felony counts of copying classified information onto computer tapes, but he was eventually cleared of all but one charge that involved the mishandling of classified information. Lee subsequently brought suit against the U.S. Departments of Energy and Justice under the Privacy Act (5 U.S.C. § 522 a(b)), alleging that personal information about him had been released to the press in violation of the law. Subpoenas *duces tecum* were issued for five reporters – Jeff Gerth and James Risen, both of *The New York Times*, Robert Drogin of the *Los Angeles Times*, H. Josef Herbert of the Associated Press, and Pierre Thomas, formerly of CNN, but who is now with ABC, in order to learn the identities of the government employees who had allegedly leaked information about Lee to the reporters. Although the reporters filed motions to quash the subpoenas, an October 2003 order from D.C. District Court Judge Thomas Penfield Jackson directed the reporters to reveal their sources. (See “Reporters Refuse to Reveal Sources in Spy Case” in the Fall 2003 *Silha Bulletin*.)

Depositions of the journalists began the week of Dec. 15, 2003, but each declined to reveal his source. On August 18, 2004, Jackson found the reporters in contempt of his 2003 order and imposed a fine of \$500 per day. The order to collect the fines, however, was stayed pending appeal. (See “Reporters Privilege: *Dr. Wen Ho Lee v. United States Department of Justice*” in the Summer 2004 issue of the *Silha Bulletin*; see also *Dr. Wen Ho Lee v. United States Department of Justice*, Civil Action No. 99-3380-TPJ (D.C. Cir.)

Judge David B. Sentelle wrote the unanimous opinion for the three-judge panel of the Appeals Court (D.D.C.) in *Wen Ho Lee v. Department of Justice*, 2005 U.S. App. LEXIS 12758. Although Sentelle wrote that an earlier case, *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) held that there is a journalist’s privilege in civil (as opposed to criminal) cases, that privilege is qualified, not absolute, and can be trumped by “requirements of relevance [and] need.” Sentelle further cited *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974), which established guidelines for determining when a court can compel a journalist not directly involved in a case to testify about a confidential

source. Those guidelines require that “the information sought must go to the heart of the matter” and “the litigant must exhaust every reasonable alternative source of information.”

Sentelle wrote that “it is clear that the information Lee is seeking goes to the heart of his case. . . . [T]he relevant information is the identity of the individuals who may have leaked information in violation of the Privacy Act.” Sentelle also found that Lee had exhausted other avenues of investigation, writing, “While Lee did not depose every individual who conceivably could have leaked the information . . . this is not necessary. The lengthy list of possible deponents provided by Gerth and Risen . . . only accentuated the unreasonable burden of discovery they attempt to place on a plaintiff.”

Sentelle wrote that the refusal of Risen, Hebert, Drogin and Thomas to answer questions encompassed in the discovery order was a violation of that order, resulting in contempt. Risen invoked the reporters privilege 115 times; Hebert, 24 times; Thomas ten times, and Drogin eight times. Although invoking the privilege alone did not necessarily violate the Discovery Order, enough questions stipulated by that order went unanswered to find each reporter in contempt. Only Gerth was not found in contempt because the questions he refused to answer were not covered in the Discovery Order.

The Los Angeles Times reported that litigants such as Lee who believe they have been wronged by illegal leaks think that compelling journalists to testify about their sources are “modest intrusions on the news gathering process,” and unless journalists agree to testify, “serious wrongdoing will go unpunished.”

But Lee Levine, attorney for Hebert and Drogin, told *The New York Sun*, “A notion that seemed, as recently as five years ago, to be almost universally accepted, except in an extraordinary case, now seems to be the subject of a great deal of controversy. Something has changed. I’m not sure what it is.”

As the *Bulletin* went to press, according to the *Los Angeles Times*, lawyers representing the journalists had not yet decided whether they would appeal the case, although *Editor & Publisher* reported that the Associated Press may seek a hearing by the Court of Appeals *en banc*.

–ELAINE HARGROVE
SILHA FELLOW AND *BULLETIN* EDITOR

“The notion of reporters privilege that seemed to be almost universally accepted, except in an extraordinary case, now seems to be the subject of a great deal of controversy. Something has changed. I’m not sure what it is.”

– Lee Levine,
Attorney

Utah Newspaper is Protected by Neutral Reportage And Fair Comment Privileges in Libel Case

On May 5, a three-judge panel of the Utah Court of Appeals upheld a trial court dismissal of a defamation suit brought by Salt Lake resident Barbara Schwarz. Schwarz sued *The Salt Lake Tribune* for reporting that federal government employees referred to her as a “FOIA terrorist,” but the paper was protected by the neutral reportage privilege and fair comment privilege, according to the ruling in *Schwarz v. Salt Lake Tribune*, 2005 UT App 206.

Schwarz alleged that an article entitled “S.L. Woman’s Quest Strains Public Records System,” which appeared in the May 11, 2003 edition of *The Salt Lake Tribune*, constituted defamation, libel, and false light invasion of privacy. In a short, unpublished opinion written by Judge James Z. Davis, the court held that, “[a]fter reviewing the content of the article and the undisputed information contained in the record,” the article does not support Schwarz’s claims. The court also held that because the article was not defamatory, the newspaper did not have an obligation to print a retraction or correction.

The Tribune article reports that Schwarz has made more requests for public documents under the Freedom of Information Act (FOIA) than any other person since the enactment of the law in 1996. According to the article, Schwarz has filed dozens of lawsuits against thousands of federal employees for withholding information – information that the government says does not exist. The article also reported that Schwarz set a record for “voluminous litigation” by filing a 2,370-page complaint and naming 3,087 federal government officers as defendants. “Some of the workers,” the article stated, “have dubbed her a ‘FOIA terrorist’ and coined a verb reflective of her unending request letters: ‘Have you been Schwarzied today?’” The article describes all Schwarz’s FOIA requests as related to her beliefs, among other things, that she was born on a secret government submarine compound, is the granddaughter of President Eisenhower, and was once married to a man who is currently serving a wrongful prison sentence for her murder.

Citing *Edwards v. National Audubon Society*, 556 F.2d 113 (2d Cir. 1977), the Utah appellate court held that the article is covered by the neutral reportage privilege because it is an “accurate and disinterested” report of information. Quoting directly from *Edwards*, Davis wrote, “Further, we believe that “[t]he public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.”

Citing Utah case law, the appellate court also held that the article is covered by the fair comment privilege. Under the Utah Supreme Court case, *West v. Thomson Newspapers*, 872 P.2d 999 (Utah 1994), statements involving a matter of public concern that represent the actual opinion of the speaker and are not made for the sole purpose of causing harm, are protected by the fair comment privilege. The court found that the article entitled the newspaper to the privilege because it accurately reported the opinions that people had expressed about Schwarz.

In late March, the Supreme Court denied a petition to review a Pennsylvania ruling that would not recognize the neutral reportage privilege. (See “In Pennsylvania, No ‘Neutral Reportage’ Privilege Recognized” in the Fall 2004 issue of the *Silha Bulletin*.)

–KELLY J. HANSEN MAHER
SILHA FELLOW

“Further, we believe that the public interest in being fully informed about controversies that often rage around sensitive issues demands that the press be afforded the freedom to report such charges without assuming responsibility for them.”

– Judge
James Z. Davis

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FOIA News

Lawmakers Respond to Increasing Government Secrecy with Amendments to Strengthen FOIA

On March 31, 2005, the U.S. Information Security Oversight Office (ISOO) released its annual report on the status of federal security classification programs. Among its findings, ISOO reported that 15.6 million documents were classified last year, almost twice as many as in 2001. Meanwhile only 28 million pages of records were declassified, a significant decrease from the declassification of 204 million pages in 1997, the most since the ISOO began monitoring the programs, according to *The New York Times*. The ISOO report also found that the increased secrecy came at a price of \$7.2 billion last year. The 2004 ISOO report is available online at http://www.archives.gov/isoo/reports/2004_annual_report.pdf.

Thomas H. Kean, the chairman of the 9/11 Commission, told *The Times* that the lack of information-sharing between agencies and increased withholding of information from the public were both related to the government's failure to prevent the Sept. 11, 2001 terrorist attacks. "You'd just be amazed at the kind of information that's classified – everyday information, things we all know from the newspaper," Kean said. "We're better off with openness. The best ally we have in protecting ourselves against terrorism is an informed public."

The increasing government secrecy has also caught the attention of some members of Congress. Sen. John Cornyn (R-Tex.) has made it his goal to make government more transparent by providing greater access to government records. As a former state attorney general for Texas, Cornyn helped reshape the Texas open records laws, Texas Gov't Code Ann. §§ 551 and 552, by reducing turnaround times on information requests for government records and by establishing a state-wide, toll-free hotline for such requests. The hotline handled more than 11,000 calls in 2000 alone. In fact, Cornyn even sued state agencies on a few occasions to force them to comply with lawful requests for information under Texas' open records law.

Now Cornyn is seeking to improve the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, to achieve similar ends. (See "Freedom of Information Act News: Federal Lawmakers Call for Expanded Access to Court Records" in the Fall 2004 issue of the *Silha Bulletin*.) In the first several months of the 109th Congress, Cornyn has already introduced three bills with Sen. Patrick Leahy (D-Vt.) that would make it harder for Congress to hide exemptions to FOIA in legislation, increase oversight of FOIA, and make it easier for the public to request and obtain government records. On July 6, Cornyn told *The Washington Post*, "A number of the reforms included in these bills are pretty basic in a lot of places, including my home state of Texas."

The latest bill, S. 1181, was passed on June 24, 2005, by unanimous consent in the Senate. That bill

requires that any legislation exempting government records from disclosure under FOIA must be "stated explicitly within the text of the bill." According to a Cox News Service story from early June, a 2003 Department of Justice (DoJ) report showed that at least 140 laws had exemptions to FOIA inserted in unrelated legislation. The bill now awaits consideration in the House.

In a press release the day the Senate passed S. 1181, Cornyn said, "If Congress is to establish a new exemption to FOIA, it should do so in the open and in the light of day . . . The default position of our government must be one of openness. If records can be open, they should be open. If good reason exists to keep something closed, it is the government that should bear the burden – not the other way around."

President Lyndon Johnson signed FOIA in 1966, enacting one of the first laws anywhere in the world to presume that government records should be available to the public. *The Post* reported that FOIA has enabled many people to obtain government information about themselves while also providing a way for the media to get access to government records. A May 2005 Government Accountability Office (GAO) analysis of FOIA implementation and use showed that 91 percent of FOIA requests were granted in full and another three percent were granted in part. However, the report also found that some agencies were much less likely to grant requests than others. The GAO found that the State Department, the Central Intelligence Agency, and the National Science Foundation each granted fewer than 20 percent of FOIA requests in full. Additionally, since 2002, backlogs of FOIA requests have increased 14 percent, often resulting in delays that last years. The concerns with some of these problems seem to have bolstered Cornyn's campaign to improve FOIA.

The bill passed by the Senate on June 24 was only one part of that campaign. The language of S. 1181 was actually taken from a section of a larger piece of legislation proposed by Cornyn and Leahy earlier this year. On February 16, 2005, the senators introduced the Openness Promotes Effectiveness in Our National Government Act of 2005 (OPEN Government Act), S. 394. An identical companion bill in the House, H.R. 867, was also introduced by Rep. Lamar Smith (R-Tex.) on that same day. The OPEN Government Act's major provisions would remake FOIA in the model of the Texas open records laws.

Among its major provisions, the OPEN Government Act would allow independent journalists, such as freelancers and bloggers, to qualify for fee waivers even if they are not affiliated with any media institution and do not publish regularly. FOIA currently only names "representatives of the news media" as being able to request a fee waiver.

"You'd just be amazed at the kind of information that's classified - everyday information, things we all know from the newspaper. We're better off with openness. The best ally we have in protecting ourselves against terrorism is an informed public."

– Thomas H. Kean,
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FOIA Amendments, continued from page 5

Journalists and others in the media not associated with a major organization or publisher can have problems showing they qualify for a waiver of fees, typically costs of the records search and reproduction costs. The proposed language would expand and clarify who qualifies for a fee waiver by allowing the agency to take into consideration the requestor's previous publications and the stated intent of the requestor.

Second, the OPEN Government Act would require the Attorney General to notify the Office of Special Counsel whenever a court, after hearing a lawsuit brought by a requestor who has been denied access to records, rules that an agency has improperly withheld documents under FOIA. The Special Counsel would also be required to make an annual report to Congress detailing the number of such court rulings and the subsequent actions undertaken by the Office in response to the court decisions.

Third, if an agency went beyond the 20 working-day time limit for responding to an FOIA request, the exemptions available to that agency would be restricted. FOIA contains nine specific areas under which records may be withheld from the public. Instead of the usual nine possible exemptions, an agency taking longer than the time limit could only withhold the documents for three reasons: if the release would harm national security, if it would disclose information protected under the Privacy Act, 5 U.S.C. § 552a, or if it disclosure is otherwise prohibited by law.

Fourth, the OPEN Government Act would require each agency to establish a tracking system for FOIA requests. Under that system, each FOIA request must be assigned a tracking number. Within 10 days, the agency would also be required to provide to the requestor the tracking number and an estimated date when the request will be processed. Each agency would also need to establish a telephone hotline or Internet Web site to allow requestors to monitor the progress of their request through the use of the agency-provided tracking number.

Finally, the act would create an Office of Government Information Services to oversee compliance with FOIA and conduct audits of agencies receiving FOIA requests.

The third bill, the Faster FOIA Act of 2005, S. 589, was introduced by Cornyn and Leahy in March. If it becomes law, the Faster FOIA Act will create a 16-member committee to examine FOIA request delays and make recommendations on how best to avoid future delays. The chair and ranking members of the Senate Committee on the Judiciary and the House Government Reform Committee would each appoint three members of the committee while the Attorney General, director of the Office of Management and Budget, the Archivist of the United States, and the Comptroller General would each appoint one member. Reps. Brad Sherman (D-Calif.) and Smith introduced an identical bill, H.R. 1620, in April.

Other lawmakers have also taken an interest in expanding government secrecy. In March 2005, Rep. Henry Waxman (D-Calif.) wrote a letter to Christopher

Shays (R-Conn.), chairman of the House Subcommittee on National Security, Emerging Threats and International Relations, expressing his concerns that government records were increasingly being exempted from public release on uncertain grounds.

Waxman wrote, "Unfortunately there is growing evidence that the executive branch has increased the amount of information withheld from the American public and misused rapidly proliferating designations such as 'sensitive but unclassified,' 'for official use only,' 'sensitive homeland security information,' and 'sensitive security information' to block the release of important government records." He continued by noting that his staff had found that those designations were often "absurd overreactions to vague security concerns" that were used, in some cases, "to cover up potentially embarrassing facts, rather than to protect legitimate security interests."

As part of his response to these perceived problems, Waxman has proposed a bill that would modify several government access laws, including FOIA. The Restore Open Government Act of 2005, H.R. 2331, was originally introduced in the House by Waxman in the final days of the 108th Congress, although it was not considered for passage before Congress adjourned. (See "Freedom of Information Act News: Federal Lawmakers Call for Expanded Access to Court Records" in the Fall 2004 issue of the *Silha Bulletin*.)

One of the Restore Open Government Act's key provisions would revoke a memo written by Attorney General John Ashcroft on Oct. 12, 2001. That memo said that the DoJ would defend any agency claiming an FOIA exemption to prevent release of documents unless the claim "lacked a sound legal basis." The Ashcroft memo has been viewed by many as a reversal of a memo previously written by Attorney General Janet Reno that had stated that FOIA's presumption of access meant the DoJ would not defend a claimed FOIA exemption unless "the agency reasonably foresees that disclosure would be harmful to an interest protected by that exemption."

Other provisions of the Restore Open Government Act would reverse an Executive Order issued by President George Bush in November 2001 that made it easier for outgoing presidents to keep presidential papers and records from public release, and require greater transparency in inter-agency committee meetings by amending the Federal Advisory Committee Act (FACA), 5 U.S.C. App. 2. The FACA provision in the Restore Open Government Act was inspired by the withholding of documents and information relating to Vice President Dick Cheney's National Energy Policy Development Group.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

FOIA News

FOIA Requestors are Charged High Fees by Government Entities

The U.S. government has told a citizen advocacy group that it will have to pay \$372,799 in search fees before its Freedom of Information Act (FOIA), 5 U.S.C. § 552, request can be processed. In November 2003, People For the American Way (PFAW) requested records explaining why many federal court proceedings for immigrants detained after Sept. 1, 2001 had been placed under seal. That request was initially denied by the Department of Justice (DoJ) in December 2003. The DoJ claimed that the release of that information would violate the privacy of the detainees. Elliot Minberg, vice president and legal director for PFAW, sued in August, saying that the records should be released because privacy was not an issue. He pointed out that the group was willing to accept redacted records and was not seeking information on the identities or names of any of the immigrant detainees. The PFAW request is available online at http://www.pfaw.org/pfaw/dfiles/file_482.pdf.

After polling 93 U.S. Attorneys Offices and receiving responses from 88 of them, the DoJ agreed to conduct a search of the records after demanding that PFAW first pay \$372,799 in search fees in advance. In a letter to PFAW, the DoJ claimed that the additional burden on already overworked staff and offices would require 13,316.25 hours of searching at the price of \$28 per hour of work. The DoJ pointed out that FOIA requires that only the first two hours of search time not be charged. However, levying the search fees would not guarantee that any documents would be found or that the documents found would not be withheld under an exemption to FOIA. Also not included in the price was the standard 10-cents-per-page copying fee for documents ultimately provided to PFAW. The DoJ response letter is available online at http://www.pfaw.org/pfaw/dfiles/file_481.pdf.

After the first two hours of searching for requested records, FOIA provides that “reasonable search fees” must be charged to a requester who is not a member of the news media or requesting the information for an educational or non-commercial scientific institution. However, an exception also provides that those fees may be waived in cases where release of the records “is in the public interest

because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester”

In a public statement, Ralph G. Neas, president of PFAW, said the DoJ had “taken the ‘free’ out of Freedom of Information.” He added, “It’s clear that this is just the latest tactic in the Justice Department’s ongoing effort to hide information from the American public, particularly about ‘secret’ legal proceedings for immigrants held for months and sometimes years in the wake of the terrorist attacks.” The statement is available online at <http://www.pfaw.org/pfaw/general/default.aspx?oid=17777>.

The Tuscaloosa News Requests Information from County Sheriff

In a related development, an Alabama sheriff announced on April 1, 2005, that he would charge \$38 an hour for freedom of information requests that take more than 15 minutes to fulfill. On March 30, Tuscaloosa County Sheriff Edmund Sexton was ordered by Tuscaloosa County Circuit Judge Scott Donaldson to release police records at issue in a freedom of information lawsuit by *The Tuscaloosa News*. The new policy applies to searches even if the requestor will only view the records onsite; copies cost an additional one dollar per page.

Sexton justified the new policy after determining that records searches can often take longer when private or sensitive material must be redacted. In those cases, the records must be copied, the private material redacted from the copies, and new copies made. The price of \$38 per hour was arrived at by averaging Sexton’s hourly salary and the hourly salary of his chief deputy, Ron Abernathy.

The Tuscaloosa News reported that Robert Spence, the Tuscaloosa County attorney who defended Sexton in the freedom of information lawsuit, said the new policy was reasonable. “We can’t produce [the records] without copying them,” Spence told *The Tuscaloosa News*. “The reason for that is with the material redacted, the only way we can do that is through the copying process.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

People for the American Way President Ralph G. Neas said the DoJ has “taken the ‘free’ out of freedom of information.”

FOIA News

Federal Court Rules Delaware FOIA State Resident Restriction Unconstitutional

“It seems reasonable that noncitizens should have the same access to public records as Delaware citizens.”

- U.S. District Judge Joseph Farnan, Jr.

On May 13, 2005, U.S. District Judge Joseph J. Farnan, Jr. granted summary judgment in favor of a New York man who claimed that the Delaware Freedom of Information Act (FOIA), DEL. CODE ANN. tit. 29 §§ 10001-10005, was unconstitutional in *Lee v. Minner*, 2005 U.S. Dist. LEXIS 8892. Matthew Lee, a New York consumer rights advocate, journalist, and lawyer, had argued that because Delaware’s FOIA only provided Delaware residents with access to public records, the law violated the Privileges and Immunities Clause of the U.S. Constitution. Farnan agreed, finding that Delaware failed to show that it had a substantial reason to deny non-residents access to public records. “As the ‘corporate home’ for thousands of corporations in the United States,” Farnan wrote, “Delaware’s regulations have nation-wide political and economic impact, and therefore, it seems reasonable that noncitizens should have the same access to public records as Delaware citizens.”

The dispute began when Lee started examining business practices of banks and financial service companies, including allegations of predatory and discriminatory lending. In 2003 he sought documents from the Delaware’s Attorney General’s Office, Banking Department, and Insurance Department relating to a settlement negotiated between the state and Household International, Inc. Amid investigations into the lending practices of Household by prosecutors and agencies from all 50 states and the District of Columbia, Household had agreed to a settlement in 2002, establishing a \$484 million national fund to repay past borrowers. Lee’s request for Delaware’s settlement records was denied on the grounds that he was not a Delaware resident and that the records were exempt from release under the Delaware FOIA as “investigative files, attorney client privileged, and attorney client work product.”

Lee did not challenge the claimed investigative files exemption, focusing instead on the fact that his Delaware FOIA request had been denied because he was a non-resident. Arguing that the residency restriction in Delaware’s FOIA violated his right to practice a “common calling,” one of the fundamental rights guaranteed by the Privileges and Immunities Clause, Lee sued both the governor of Delaware, Ruth Ann Minner, and the state attorney general, M. Jane Brady, in federal court. Farnan found Lee’s argument persuasive, determining that the law made him unable to “practice his common calling as a

journalist and consumer activist on the same terms and conditions as journalists and consumer advocates who are citizens of the State of Delaware.”

Although Delaware could have retained the law if it was necessary to protect a substantial interest of the state, Farnan wrote, “In this case, the Court is not persuaded that Defendants have demonstrated how nonresidents’ access to public documents and information harms the State any more than access by residents.” Moreover, Farnan concluded that the restriction ineffectively guarded any interests Delaware might have in keeping public records from non-residents, since the state determined Delaware residency based merely on the mailing address of Delaware’s FOIA requestors. Farnan found that “noncitizens can and apparently do access documents and information through Delaware citizens”

Farnan did side with the state on one issue, however. Although Lee had claimed that both the attorney general and governor had denied him access to public records, Farnan disagreed. He ruled that Minner should be dismissed as a defendant from the case since there was no evidence “that the Governor has enforced or threatened to enforce [Delaware’s] FOIA against Plaintiff.”

On May 14, Lee told *The (Delaware) News Journal*, “Thank God for the Constitution. It’s been a long time coming.” Richard McKewan, Lee’s attorney, said that considering the fact that so many businesses were incorporated in Delaware, the denial of records to non-residents was “not only unconstitutional, it was unconscionable.” McKewan added that the suit did not seek any damages from the state, but he said that Lee would be seeking to recoup his attorney fees and court costs from Delaware.

Brady, who also spoke to *The News Journal*, maintained that the non-resident restriction in Delaware’s FOIA was reasonable. “We defended the statute, and we did it well,” she said. “I won’t apologize for that.” Before deciding whether to appeal Farnan’s decision, Brady said she will talk to attorney generals in other states with non-resident restrictions in their freedom of information laws, such as Pennsylvania and New Jersey. At the time the Bulletin went to press, no appeal had been filed in *Minner v. Lee*.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

FOIA News

Coffin Photos Released Following FOIA Request

On April 28, 2005, the Pentagon released hundreds of photos of flag-draped caskets of American soldiers, in response to a lawsuit arising from a Freedom of Information Act (FOIA), 5 U.S.C. §552, request by Ralph J. Begleiter, a University of Delaware professor and former CNN correspondent. Begleiter, who sought all photos of the caskets of soldiers who died in Iraq and Afghanistan since October 2001, filed his request “to further the public interest in an educated citizenry and to inform the public debate on important matters of U.S. foreign policy,” according to his court complaint, filed in federal district court in Washington, D.C. on October 4, 2004. The complaint stated that Begleiter sought the images “as part of his academic research into the public tolerance for international aggression and the casualties of war.”

The Washington Post reported that the more than 700 photos, which were taken by military photographers as part of a standard military practice of documentation, were of deceased soldiers’ coffins from 2001 through 2004. *The Atlanta Journal-Constitution* wrote that there was also “a handful of photos [of victims’ coffins] from Vietnam and Korea.” The release of the photos preempted a ruling in the lawsuit.

Begleiter filed his FOIA request in April 2004, but had no success in getting any of the photos released. According to his complaint, Begleiter had made six requests under the FOIA to Dover Air Force Base and Air Mobility Command between April and September of 2004, but as of Oct. 4, 2004, the Department of Defense (DoD) had not provided any of the records Begleiter requested. By failing to respond to Begleiter’s requests within the statutory twenty-day period, the DoD in effect denied those requests.

After the photos’ release, Begleiter told *The Washington Post*, “This is an important victory for the American people, for the families of troops killed in the line of duty during wartime and for the honor of those who have made the ultimate sacrifice for their country.”

This was actually the second batch of similar photos released under FOIA. *The New York Times* reported that the first photos of military coffins was released in April 2004, in response to an FOIA request by Russ Kick, who runs the Web site The Memory Hole, available online at www.thememoryhole.org. However, *The New York Times* reported at the time that “the Pentagon, which has blocked news organizations from taking their own pictures of similar scenes, said releasing the photographs was wrong.” (See “‘Family Privacy’ Concerns Result in Ban on Coffin Photos” in the Spring 2004 issue of the *Silha Bulletin*.)

For more than 10 years, the Pentagon has maintained a ban on media coverage of the returning war dead. According to *The Washington Post*, that ban began in 1991 during the Gulf War. *The Los Angeles Times* reported that “analysts said [the ban] was

prompted by embarrassment after President George H. W. Bush was shown by three television networks in split-screen images. In one box, the president chatted breezily with White House reporters, sometimes joking. In the second frame were somber images of returning caskets from the U.S. assault on Panama.”

The New York Times reported that “[the Pentagon] said its policy . . . was meant to protect the privacy of military families.” Whether or not the photos invade the privacy of military families has been a subject of intense debate. After the 2004 release of photos to The Memory Hole, *The New York Times* covered a Senate debate on the Pentagon ban, which, according to *The Times*, “. . . won the backing of the Republican-controlled Senate . . . when lawmakers defeated a Democratic measure to instruct the Pentagon to allow pictures.” The Democratic measure was an amendment to the proposed 2005 Pentagon spending plan.

Senator John McCain (R-Ariz.) voted to allow media photographers at Dover. McCain told *The New York Times* he thought the images posed no danger to privacy because “[t]hese caskets that arrive at Dover are not named; we just see them.” Frank R. Lautenberg, (D-NJ), who proposed the measure, also told *The Times* that media coverage “would bring an end to the shroud of secrecy cloaking the hard, difficult truth about war and the sacrifices of our soldiers.”

The San Francisco Chronicle reported that, of the photos released in April 2005, “most don’t list a date or location, and the Pentagon blacked out the faces of soldiers around the caskets in many of the pictures for privacy reasons.”

Begleiter told *The Washington Post* that “this significant decision by the Pentagon should make it difficult, if not impossible, for any U.S. government in the future to hide the human cost of war from the American people.” However, *The Post* reported that the Pentagon’s decision to release the photographs would not result in a lifting of the ban.

Despite the Pentagon’s assertions, freedom of information activists have claimed victory. Meredith Fuchs, general counsel of the National Security Archive, a nonpartisan research institute that, along with the Washington office of Jenner & Block, supported Begleiter in his claim, told *The Atlanta Journal-Constitution*, “These are the kind of documents that directly serve the core purpose of FOIA . . . Everyone says a picture is worth a thousand words. Well, the pictures have an impact and help people understand what war is really about in a way that nothing else does.” Images of the coffins can be viewed at the National Security Archive, available online at www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB152/index.htm.

—PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Media coverage would bring an end to the shroud of secrecy cloaking the hard, difficult truth about war and the sacrifices of our soldiers.

— Senator
Frank R. Lautenberg

FOIA News

Lardner v. Department of Justice

A *Washington Post* reporter has won a partial victory in requesting government documents about the presidential pardon power. In *Lardner v. Department of Justice*, 2005 U.S. Dist. LEXIS 5465, federal district Judge John D. Bates (D.D.C.) ruled on March 31, 2005 that the Department of Justice (DoJ) must disclose the names of unsuccessful pardon applicants, and the names of individuals who wrote letters of support of pardon applications or were listed as character references on pardon applications, to the extent they appear in requested documents. However, the DoJ was not required to disclose any names that appear in documents or portions of documents that the DoJ has otherwise properly withheld under FOIA.

As part of his research, George Lardner, Jr., sent Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests to the DoJ starting in March 2001 seeking the names of unsuccessful pardon applicants, all letters of advice (the reports from the Attorney General or his designee to the President advising whether to grant or deny requests for pardons) generated from 1960 to 1989, and the complete files of the pardon applications of 25 prominent individuals such as John Ehrlichman, James Hoffa, and Julius and Ethel Rosenberg.

The DoJ initially refused to release any of the letters of advice, claiming they fell under 5 U.S.C. § 552 (b)(5), or Exemption 5 of FOIA, and the presidential communication privilege. Exemption 5 protects from disclosure any “inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.” Portions of the letters that were released were redacted because the DoJ claimed they were “personal and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy” under U.S.C. § 552 (b)(6), and records or information compiled for law enforcement purposes under U.S.C. § 552 (b)(7)(C). Lardner was given thousands of pages of documents, but a number of them contained redactions.

On Feb. 4, 2003, Lardner sued the DoJ, seeking release of all documents held under Exemption 5, as well as other documents withheld under Exemptions 6 and 7(C). The DoJ filed a motion for summary judgment and submitted a Vaughn index, describing the withheld documents. A year later, the D.C. district court granted Lardner’s motion and issued an order requiring the DoJ to submit a revised Vaughn index that included the dates of the withheld records. But at that time, another case involving presidential records, *Judicial Watch v. Department of Justice*, 361 U.S. App. D.C. 183 (D.C. Cir. 2004) was before the court. The DoJ moved to stay the ruling in the Lardner case pending the decision in *Judicial Watch*. The court ultimately ruled in *Judicial Watch* that the presidential communications privilege only “applies to pardon documents that had been solicited and received by the President or his immediate advisors and that any internal agency documents that are

never seen by the President or his advisors are more appropriately examined under the deliberative process privilege.”

While the decision in *Judicial Watch* was pending, documents from the Ford and Carter administrations were made public at their respective Presidential libraries. At that point, most of the remaining documents Lardner had requested applied only to the Reagan administration.

In the light of these events, the DoJ released additional documents to Lardner, including documents relating to the Reagan administration, although some information from those documents was still redacted under Exemptions 6 and 7(C). However, other documents from the Reagan administration continued to be withheld under Exemption 5. Lardner challenged the withholding of the remaining Reagan papers, arguing that it was not the acting president himself who claimed the privileges.

The DoJ argued against release of these documents, saying that the president must personally invoke the privilege in civil discovery, and that this rule should be “imported” into the context of FOIA. But in the *Lardner* ruling, Bates wrote, “There is no indication in the text of [FOIA] or elsewhere that Congress anticipated – much less demanded – that the decision to withhold documents under Exemption 5 would need to be made personally by the head of the agency (in this case the President).” Additionally, to require the president to do so, Bates ruled, creates a “considerable burden” that would require the President to personally examine the documents at issue every time a citizen seeks presidential records through FOIA.

Bates further ruled that the letters from judges and special prosecutors do not qualify as inter-agency or intra-agency correspondence because they are not considered employees of a federal agency, nor do they serve as outside consultants.

As to the unsuccessful pardon applicants, Bates found that the government bears the burden of proving that a withheld document falls within a claimed exemption, writing that releasing information about those who apply for pardon would shed light on the exercise of pardon power in important ways. “A comparison of successful and unsuccessful applicants would illuminate . . . the circumstances in which the executive chooses to grant or deny a pardon and the factors that bear on that decision,” Bates wrote.

Lardner has written several articles about presidential pardons over the years. As the *Bulletin* went to press, no further information was available as to when his book would be published, or whether the DoJ would appeal the decision.

—ELAINE HARGROVE

SILHA FELLOW AND *BULLETIN* EDITOR

Judge John D. Bates wrote that releasing information about those who apply for pardon would shed light on the exercise of pardon power in important ways.

FOIA News

911 Tapes Must be Released Despite Claims of Harm

Neither a written transcript nor an opportunity to review tapes will satisfy the right of the public to have access to full copies of the audio recordings of 911 emergency calls under Ohio state law. The Ohio Supreme Court unanimously ruled on February 24, 2005 that the Morrow County Prosecutor's office could not withhold copies of 911 tapes related to a murder case, in *State ex. rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 2005 Ohio LEXIS 284 (2005).

Morrow County Prosecutor Charles S. Howland refused to allow the Dispatch Printing Company (Dispatch), publisher of *The Columbus Dispatch*, to have copies of the tape recording of a 911 call placed by the neighbor of a slain mother and son in Iberia, Ohio. Howland was willing to provide Dispatch with a transcript of the neighbor's call, and also allowed a reporter to listen to the tape five times, but when Dispatch requested a copy of the audio tape in January, Howland denied the request. Since Howland was aware that Dispatch also owns radio and television stations, he claimed he wanted to protect the family of victims Diana Cooper and Cameron Bateman from hearing a broadcast of the tape. Howland told the Associated Press that he wanted the family "to be able to bury their children without listening to the screams of the neighbors upon discovering the bodies."

Although Dispatch's broadcasting partners, Ohio News Network and WBNS-TV did not actually air the tapes, Dispatch challenged the denial of access on principle. Dispatch Editor Benjamin Marrison told the Associated Press that a tape provides nuances that are not found in transcripts. There should be no exceptions or the law will be weakened, Marrison said, arguing that Ohio law guarantees access to copies of public records in their original format. On January 25, Dispatch filed an action before the state supreme court to compel Howland and the Prosecutor's office to produce a copy of the 911 tape immediately. The Ohio Supreme Court agreed with Dispatch and issued a peremptory writ of mandamus to compel compliance with their request.

In an unsigned *per curiam* decision, the Supreme Court held that the Ohio Public Records Act, R.C. § 149.43, unambiguously requires a public office to furnish copies of requested public records in the same medium in which the office itself keeps it. The court reiterated the reasoning in its 1996 ruling, *State ex. rel. Cincinnati Enquirer v. Hamilton Cty.*, 662 N.E.2d (Ohio 1996), which held that tapes of 911 calls are public records under Ohio law.

Under *Cincinnati Enquirer*, the court held that since 911 calls are initiated by the caller, and not prepared by attorneys or law enforcement as evidence, there is no investigatory purpose for the tapes. Furthermore, the court reasoned, there is no expectation of privacy in a 911 call; rather, the expectation is that the call will be recorded and disclosed to the public. As in *Cincinnati Enquirer*, the high court emphasized that even later use of the tape or its contents by a law enforcement officer or prosecutor will not change the tape's status as a public record. "Once clothed with the public records cloak," wrote the court, favorably quoting *Cincinnati Enquirer*, "the records cannot be defrocked of their status."

The court reminded Morrow County Prosecutor's Office that the Public Records Act required them to produce copies of public records immediately upon request. If the requester asks for the records in the same medium as the office holds them, the Act requires that the office comply with the request. The court relied on the clear mandate of the law to reach its decision, and did not consider the privacy interests of the victims' family. In a concurring opinion, however, Justice Paul E. Pfeifer echoed his opinion in *Cincinnati Enquirer* and suggested that the Ohio General Assembly change the law. Expressing distaste for a law that allows individual pleas for help to be broadcast on the evening news, Pfeifer suggested a balancing test between the public's right to scrutinize the government and an individual's right to privacy.

Ohio is not the only state to consider the issue of access to 911 tapes. The South Carolina Supreme Court heard arguments on March 2 over whether South Carolina law would allow prosecutors to withhold a 911 tape relating to a North Charleston victim of a police shooting. In a April 4, 2005 decision, *Evening Post Publishing Co. v. City of North Charleston*, 2005 S.C. LEXIS 104, the state's highest court held that the City of Charleston's denial of *The (Charleston) Post and Courier's* request for a 911 tape was a violation of the state's Freedom of Information Act. The ruling overturns a court of appeals decision that found the denial lawful under an exception to Freedom of Information Act found in S.C. Code § 30-4040(a)(3)(B), which allows officials to withhold information that is key to a prospective criminal trial.

The requested 911 tape came from a call made by a video store owner, who told a dispatcher that an African American entered the store in flight from four white attackers, only to be shot and killed by police officers that arrived on the scene. The tape also contained conversations between the dispatcher and the officers. Although the police officers were not prosecuted, the victim's four attackers were later arrested and charged with lynching.

In an unanimous opinion written by Justice Costa M. Pleicones, the state's highest court held that the appellate court had erred in its November 2003 decision on the matter, by presuming that the 911 tape would be evidence in the pending trial. The court explained that the appellate court should have instead required the City to prove a particular harm that would result from releasing the tape. The City argued that it would suffer financial harm if it had to pay for a change of venue due to excessive publicity that release of the 911 tape might generate. According to the Supreme Court, however, financial cost is not the type of harm that the § 30-4-40(a)(3)(B) was designed to prevent. Since the Act's exception is intended to prevent disruption of sensitive police operations, such as stings or arrests, the court held that financial harm is not a proper justification for withholding access to the requested information.

—KELLY J. HANSEN MAHER
SILHA FELLOW

Morrow County Prosecutor Charles S. Howland claimed he wanted to protect the victims' families from hearing a broadcast of the tape.

Access to Courts

Minnesota

On May 6, 2005, the Minnesota Supreme Court amended the Rules of Public Access to Records of the Judicial Branch (Access Rules), bringing an end to a process started in January 2002 to allow greater public access to Minnesota court records on the Internet. Although the Access Rules make some court records available online, most records will still only be available at the courthouse in either electronic or paper form. The Court, which had been considering amendments to the Access Rules proposed by an advisory committee in its final report issued in September 2004, followed most of the committee's recommendations. The Silha Center for the Study of Media Ethics and Law offered both written and oral comments during the public hearings on the Access Rules, available online at <http://www.silha.umn.edu/finalversionremotearchivemncomment.doc>. (See "Access to Courts: Update: Electronic Access to Court Records" in the Fall 2004 Silha *Bulletin*, "Media Access: Court Advisory Committee Files Online Access to Court Documents Report" in the Summer 2004 Silha *Bulletin*, and "Silha Center Files Comments on Records Access" in the Winter 2004 Silha *Bulletin*.)

The advisory committee had recommended taking a "measured step" in a "go slow approach" to making court records available online. Towards that end, the committee had proposed that only court-generated documents – registers of actions, court calendars, indexes, judgment dockets, and judgment orders and opinions – be available online. Citing the need to protect privacy interests and guard against identity theft, the committee comments to the Access Rules noted that restricting Internet access to records created by the courts was "the only practical method of ensuring that necessary redaction will occur. Redaction," the comments continued, "is necessary to prevent Internet access to clear identity theft risks such as social security numbers and financial account numbers." The committee also worried that "Internet access to preconviction criminal records may have significant social and racial implications . . . [for] people of color who may be disproportionately represented in criminal cases, including dismissal." Preconviction records are available online only to the extent that the courts can insure that those records are not searchable by the defendant's name.

The Court appeared to accept those contentions, because its final amendments to the Access Rules were nearly identical to the proposed changes in the advisory committee final report. The court also adopted the most restrictive proposal from the committee for making bulk records available via the Internet. Bulk records are compilations of court documents maintained in a database for analytical or other purposes. The advisory committee had split over three proposals for releasing bulk records to the public. Under the amended Access Rules, anyone can access bulk records consisting of information available to the public on the Internet. However, anyone seeking bulk preconviction records must enter into a nondisclosure agreement with the state court administrator. The nondisclosure agreements prevent anyone obtaining bulk preconviction records from disseminating data that could be used to identify specific individuals in those records. Court records not available online are not available in bulk format.

According to the (St. Paul) *Pioneer Press*, Minnesota Supreme Court Justice Paul Anderson, who chaired the advisory committee, said that the Access Rules would allow broader public access to court records while still protecting privacy interests. "There's going to be easier access to a substantial amount of court information," Anderson said, "which is the way it should be."

However, Mark Anfinson, a committee member and attorney for the Minnesota Newspaper Association, told the *Pioneer Press* that opponents of broader access to court records inflated claims of potential danger. Nonetheless, he remained optimistic that the Access Rules were a step in the right direction. Anfinson said, "I'm convinced that the zone of remotely accessible records will expand until someday . . . essentially everything that I can get at the courthouse that's public will be remotely accessible."

Florida

In March, a Florida committee took a step towards allowing Internet access to most state court records since the Florida Supreme Court imposed a moratorium on such access in November 2003. In a draft report issued on May 6, 2005, the fifteen-member Florida Supreme Court Committee on Privacy and Court Records appeared ready to recommend that the Court adopt broad rules of online access to court records. The Florida committee's work was also discussed in "Access to Courts: Update: Electronic Access to Court Records" in the Fall 2004 issue of the Silha *Bulletin*.

The committee found that records filed with courts sometimes were not necessary for the disposition of cases and that required records often contained information such as social security numbers and bank account numbers that were also unnecessary. Rather than restrict access to court records online, however, the committee proposed that lawyers and litigants, especially those who represent themselves and were more likely to include unnecessary information in court records, be educated to insure effective redaction of sensitive information. Although the committee was cognizant that privacy issues can be implicated by online access to court records, the draft report favored broad access to records as a sound policy. "The judicial branch does not have the power to unilaterally control the use of information lawfully obtained from public court records," the committee wrote. Instead, the committee recommended "that the Florida Legislature and the national Congress enact meaningful privacy reforms to effectively protect the informational privacy interests of citizens."

The draft report suggested changes to the court records access rules, including revising them "to provide that the judicial branch affirmatively seeks to provide general public electronic access to court records through remote means" The committee's proposed changes to the rules would also include a new subdivision specifically addressing

Prior Restraint

Tory v. Cochran

On May 31, 2005, the U.S. Supreme Court ruled that an injunction barring a former client from saying anything in public about the lawyer Johnnie Cochran was an unconstitutional prior restraint on speech. The scope of the Court's ruling was narrow, however, because Cochran had passed away on March 29, 2005, just a week after the Court heard oral arguments in *Tory v. Cochran*, 125 S. Ct. 2108 (2005).

Cochran initially sought an injunction against Ulysses Tory in 2000. Although Cochran had represented Tory over 20 years previously, Tory did not begin harassing Cochran until the latter had received substantial publicity for his role as one of O.J. Simpson's defense attorneys. During that time, Tory had paid others to help him picket and display placards denouncing Cochran and had shouted obscene chants outside of the courts where the attorney was working. Tory also claimed Cochran owed him money and wrote letters demanding payment in return for putting an end to the demonstrations. A California Superior Court found in 2002 that Tory and his putative spouse, Ruth Craft, had defamed Cochran by conducting the ongoing harassment. The court granted an injunction that forbade Tory and any of his "employees, agents, [or] representatives" from picketing or "orally uttering statements" about Cochran or his law firm.

Tory and Craft challenged the Superior Court order, but the California Court of Appeal found the injunction was not an unconstitutional prior restraint. The California Court of Appeal's opinion acknowledged that prior restraints were presumptively unconstitutional, but found that this was a special case since the injunction against Tory "operates 'to redress alleged private wrongs,' not to suppress a legitimate publication."

The Court of Appeal affirmed the Superior Court's ruling that Tory's statements on the picket line placards and his public remarks were "both libelous and slanderous" and that "Tory's statements were false and were made with knowledge of their falsity." As such, the Court of Appeal concluded that Tory's remarks were not protected speech under the First Amendment. The permanent injunction against Tory was also upheld because the Court of Appeal concluded that it was unlikely that monetary damages to Cochran would end Tory's libelous and slanderous conduct. In fact, Tory had admitted to the Superior Court that he would not stop his activities unless the court ordered him to do so.

The California Supreme Court subsequently declined to review Tory's appeal. However, in 2004, Tory and Craft petitioned the U.S. Supreme Court to review the case to decide "[w]hether a permanent injunction as a remedy in a defamation action, preventing all future speech about an admitted public figure, violates the First Amendment."

Initial oral arguments took place on March 22, but after Cochran passed away the next week, Cochran's lawyer, Jonathan Cole, urged the Court to find that

the case was moot. Despite Cole's argument, Justice Stephen Breyer, writing for the seven Justice majority, reasoned that Cochran's death did not make the case moot because the injunction still remained in effect. "[W]e take it as a given that the injunction here continues significantly to restrain petitioners' speech," Breyer wrote, "presenting an ongoing federal controversy."

Despite finding the case was not moot, the Court acknowledged "that the injunction, as written, has now lost its underlying rationale" and "the grounds for the injunction are much diminished, if they have not disappeared altogether." Breyer wrote that because the injunction was "an overly broad prior restraint on speech, lacking plausible justification... the Constitution forbids it."

However, the Court left the door open for further proceedings after granting Cole's motion to substitute Cochran's widow, Sylvia, as the plaintiff in the case. Breyer wrote that an injunction might still be warranted to stop Tory from picketing against Cochran's law firm and wrote that "any appropriate party remains free to ask for such relief." Declining to prevent future litigation brought by Cochran's widow, the opinion continued, "We express no view on the constitutional validity of any such new relief, tailored to these changed circumstances, should it be entered." The Court vacated the judgment of the California Court of Appeal and sent the case back down for further consideration.

Justice Clarence Thomas, joined by Justice Antonin Scalia, dissented. Thomas wrote that review of the case was "improvidently granted" and said that the case should have been dismissed. "Whether or not Johnnie Cochran's death moots this case," Thomas wrote, "it certainly renders the case an inappropriate vehicle for resolving the question presented." California courts could determine the validity of the injunction or whether the case was moot, meaning there was no need for the constitutional ruling by the Court, Thomas argued. The dissent concluded that the Court's decision "invites the doubts it seeks to avoid. Its decision is unnecessary and potentially self-defeating."

Speaking with the Associated Press, Erwin Chemerinsky, a Duke Law School professor who represented Tory, called the case "a victory for the First Amendment." He added, "It clearly reaffirms that any injunctions against speech, in a defamation case, have to be narrowly drawn."

After the decision, Cole told the *Los Angeles Daily Journal* that unless Tory returned to his previous activities, enforcement of the injunction would not be pursued.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Breyer wrote that because the injunction was an overly broad prior restraint on speech, lacking plausible justification, the Constitution forbids it.

Prior Restraint

Johanns v. Livestock Marketing Association

The Supreme Court ruled on May 23, 2005 that cattle owners in the United States are not exempt from paying a fee that subsidizes government ad campaigns for beef, even if those owners disagree with the content of the ads.

The U.S. Supreme Court affirmed the constitutionality of the Beef Promotion and Research Act (Beef Act), 99 Stat. 1597, by a 6-3 vote, ruling against the Livestock Marketing Association (LMA) and the Western Organization of Resource Councils (WORC). *The Wall Street Journal* described the case, *Johanns v. Livestock Marketing Assn.*, 125 S. Ct. 2055 (2005), as “the latest in a series of clashes between smaller farm groups and Agriculture Department marketing efforts backed by agribusiness.”

The disputed portion of the Beef Act outlines a federal policy of promoting the beef industry through advertising and marketing, using funds raised by a fee on all sales and importation of cattle. As Justice Antonin Scalia wrote in the Court’s opinion, the Beef Act directs the Secretary of Agriculture “to impose a \$1-per-head assessment (or ‘checkoff’) on all sales or importation of cattle and a comparable assessment on imported beef products. . . . And the assessment is to be used to fund beef-related projects, including promotional campaigns . . .”

According to the opinion, the checkoff has raised more than \$1 billion since 1988, much of which has been used in beef marketing campaigns – including those using the phrase: “Beef. It’s What’s for Dinner.”

According to *The Wall Street Journal*, these types of marketing fees “are used across agriculture to finance some of the nation’s best-known generic ad campaigns,” including the well-known “Got Milk?” ads.

At issue was whether or not those fees are constitutional if they are used to create ads with which the fee payers disagree. Some cattle producers contend that the checkoff violates their First Amendment rights by compelling them to fund speech attributed to them that they do not endorse. In particular, some cattle producers raise more costly grain-fed steer, which they contend produces beef superior to that from grass-fed cattle, while the generic ad campaigns imply that all beef is of equal quality.

The Wall Street Journal pointed out that debate over these fees “reflects a growing political divide in the Farm Belt,” between “a populist movement” that objects to having their products “lumped in with those from bigger farm operators,” and those “bigger farm operators” themselves.

This was the third case in eight years to come before the Supreme Court challenging a federal program used to fund generic advertising for agricultural products. Unlike the previous two suits, however, the heart of this case was “whether the generic advertising at issue is the Government’s own speech and therefore is exempt from First Amendment scrutiny,” Scalia wrote.

The case began in federal District Court (D.S.D.), where the plaintiffs sued on constitutional and

statutory grounds that did not arise in the Supreme Court case, “. . . in particular, that the [Beef] Board impermissibly used the checkoff funds to send communications supportive of the beef program to beef producers.” Specifically, instead of the checkoff funds being used to promote beef products, they were used to promote the beef program itself, among other promotions to which the plaintiffs objected. The District Court granted the plaintiffs a limited preliminary injunction, but while the case was pending, the Supreme Court ruled in a similar case, *United States v. United Foods, Inc.*, 533 U.S. 405 (2001) (*United Foods*).

That case involved a mandatory checkoff program for generic mushroom advertisements much like the beef program. The Supreme Court ruled that the mandatory fees for generic mushroom advertisements violated the First Amendment. After that ruling, the LMA and WORC amended their complaint, asserting a First Amendment challenge to the beef checkoff program. The government defendants in this case took a different approach than that taken in *United Foods*, however. In this case, the government contended that the advertisements funded by the checkoff are government speech, and therefore outside First Amendment scrutiny – an issue not raised in the mushroom case until “the eleventh hour,” when, as Justice Stephen Breyer noted in his concurring opinion to the present case, the high Court “declined to consider it.” The District Court rejected the government speech contention in the beef case, however, and ruled for the plaintiffs on the First Amendment claim.

That ruling was then affirmed by the U.S. Court of Appeals (8th Cir.). The Court of Appeals, unlike the District Court, did not dispute that the speech in question was government speech. As Scalia wrote, “instead, it held that government speech status is relevant only to the First Amendment challenges to the speech’s content, not to challenges to its compelled funding. Compelled funding of speech, it held, may violate the First Amendment even if the speech in question is the government’s.”

On appeal, the Supreme Court vacated the judgment of the Court of Appeals, and remanded the case. After reviewing two lines of precedent in compelled speech cases, Scalia wrote “We have generally assumed, though not yet squarely held, that compelled funding of government speech does not alone raise First Amendment concerns.” While the respondents did not dispute that, they did dispute that the speech in question was government speech. Instead, they contended that because the Beef Board and its Operating Committee are responsible for (and the beef producers fund) the advertisements, they should not be classified as government speech.

The majority disagreed, holding that the compelled speech was, in fact, the government’s, and therefore not subject to First Amendment scrutiny. Although, Scalia noted that “the Secretary of Agriculture does not write ad copy himself,” the Court found that “the

“Citizens have no First Amendment right not to fund government speech.”

– Justice Antonin Scalia

Prior Restraint

Minnesota Blogger Offers Inside Story

On Canadian “AdScam” Investigation

Equipped only with a home computer, a modem and some explosive information, a Minnesota blogger has become an unlikely player in Canadian politics. Edward Morrissey, who maintains the “Captain’s Quarters” blog, available at www.captainsquartersblog.com, defied a Canadian publication ban on April 2, 2005, when he posted details of testimony by Montreal advertising executive Jean Brault before a government-appointed commission. Under the chairmanship of Justice John H. Gomery of the Superior Court of Quebec, the commission is investigating allegations of large-scale corruption, money laundering and kickbacks by Canada’s Liberal Party.

The political fallout from Morrissey’s disclosure not only threatened to topple Canadian Prime Minister Paul Martin’s minority government, but cast new doubt on the effectiveness of publication bans in the Internet age. Martin did manage to retain the nation’s highest office, however, after Parliament voted on the federal budget on May 24. That ballot, which Martin won by a single vote, was seen by many to be an indicator of the confidence Parliament has in Martin’s administration.

The Gomery Commission was established in 2004 by Martin to probe allegations of massive Liberal Party fraud and corruption. The government scandal, known throughout Canada as AdScam, has its origins in a \$250 million government program from the 1990s designed to enhance the federal presence in Quebec by sponsoring cultural and sporting events after the province’s near-secession in a 1995 referendum. But the sponsorship program became a case study in government malfeasance, as an estimated \$100 million was paid to a handful of Quebec advertising firms with ties to the Liberal Party in exchange for little or no work. Much of that money was then covertly funneled back into Liberal Party coffers. The scandal, called “an unjustifiable mess” by Martin in a televised address to the Canadian public, has engulfed the Liberal Party, which has held power for the past 12 years.

Gomery had imposed a publication ban on the testimony of three witnesses: Brault; Paul Coffin, another advertising executive; and Charles Guite, a former government official and program administrator, all of whom face criminal charges. The publication ban, which prohibits Canadian media outlets from publishing the contents of their testimony before the commission, was intended to enable the three to obtain unbiased juries for their upcoming criminal trials, which have twice been delayed and are now scheduled for the fall. Despite the fact that the Gomery Commission hearings remain open to the public and the news media, Canadian media entities have observed the ban, leading John Tabin of *The American Spectator* to call the contents of the testimony “an open secret in Ottawa.”

Morrissey, a self-styled conservative and Minnesota resident who blogs as a hobby, told *The*

(Montreal) *Gazette*, “Somebody contacted me and said, ‘I’ve got some information on this story.’” Morrissey found the source credible, and, immune to Canadian judicial sanctions, wrote and posted his exposé, entitled, “Canada’s Corruption Scandal Breaks Wide Open.” Among the details of Brault’s testimony were his revelations that he hired Liberal Party operatives, including former Prime Minister Jean Chretien’s brother Gaby, when they were already on the Party’s payroll, and that he made large “untraceable” cash donations to the Party. The testimony was also damning to Martin, who was finance minister at the time under Chretien, because it linked people close to Martin directly to the scandal. *The New York Times* reported that Canadian journalists who have attended the hearings have verified the accuracy of Morrissey’s report.

As a result of his exposé, Morrissey said that traffic on his blog skyrocketed from an estimated 20,000 hits daily to more than 400,000 once news of his report reached Canadians. Morrissey’s account is corroborated by Bob Cox, night editor of the Toronto newspaper, *The Globe and Mail*, who told *The (Minneapolis) Star Tribune*, “Within hours of [the blog] being posted people found it and were passing it around.” Cox continued, “There was a great desire amongst Canadians for information.” Morrissey himself sees his disclosure of Brault’s testimony as a triumph both for free speech and for blogging as a communications medium. “This is a historic moment for blogs,” Morrissey told *The New York Times*. “The point of having free speech and a free press is to have people informed. These information bans are self-defeating for free societies. The politicians know, the media knows, but the Canadian voters are left in the dark and that’s a backwards way of doing things.”

Although freedom of the press is enshrined in provision 2b of Canada’s Charter of Rights and Freedoms, that freedom is not absolute. Judges in Canada have the authority to issue publication bans as a means of insuring a person’s right to a fair trial. Publication bans are defined in subsection 486(4.9) of Canada’s Criminal Code, which states that “no person shall publish in any way . . . any evidence taken, information given or submissions made at a hearing.” A publication ban may be requested by defendants or witnesses in a judicial proceeding. Although they are intended to be issued sparingly, judges have wide discretion in determining their duration; a gag order may be imposed for entire trials or only for certain phases of trials. Any person or media entity who violates a publication ban may be cited with contempt of court and may incur fines and be sentenced to jail time.

In his decision to issue the publication ban on the three witnesses’ testimony, Gomery expressed concern that the high level of media interest in the commission’s proceedings would imperil the

As a result of his exposé, Morrissey said that traffic on his blog skyrocketed from an estimated 20,000 hits daily to more than 400,000.

AdScam, continued on page 18

message set out in the beef promotions is from beginning to end the message established by the Federal Government.” Because the Secretary of Agriculture oversees the program, the Beef Board and its Operating Committee, and “supervises and approves” any promotional materials produced with the assessment fees, the advertisements and messages created by the Beef Board are appropriately classified as government speech.

Furthermore, the fact that the checkoff fees were from a “targeted assessment,” rather than general tax revenue, did not change the Court’s ruling. “Citizens may challenge compelled support of private speech [as the previous two cases did], but have no First Amendment right not to fund government speech. And that is no less true when the funding is achieved through targeted assessments devoted exclusively to the program to which the assessed citizens object,” Scalia wrote.

Chief Justice William Rehnquist and Justices Sandra Day O’Connor, Clarence Thomas, and Stephen Breyer all joined with Scalia’s majority opinion, and Thomas and Breyer each concurred separately. Thomas emphasized that none of the advertisements in question “associated their generic pro-beef message with either the individual or organization respondents.” Because the advertisements were attributed to “America’s Beef Producers,” and not to the individual or group respondents specifically, those respondents’ First Amendment claims of being involuntarily associated with the speech with which they disagree are not valid. As Thomas wrote, “The government may not, consistent with the First Amendment, associate individuals or organizations involuntarily with speech by attributing an unwanted message to them, whether or not those individuals fund the speech, and whether or not the message is under the government’s control.” If the advertisements had been specifically attributed to the LMA or WORC, then, under Thomas’s concurring opinion, perhaps their First Amendment claims would have had merit.

Breyer’s concurring opinion cited the similarity between the present case and *United Foods*, in which he dissented. Breyer maintained that in both cases, the assessment programs were constitutional, and should be considered as “a form of economic regulation,” not speech.

Justice Ruth Bader Ginsburg also filed a concurring opinion, agreeing with Breyer’s description of the program as acceptable economic regulation. She did not agree with the classification of the speech in question as “government speech,” however. Because the government administers dietary guidelines for Americans that ostensibly warn against the consumption of beef, due to its high trans fatty acid content, Ginsburg “resist[ed]” attributing these two seemingly opposing messages to the same source: the government.

Justice David Souter dissented, joined by Justices John Paul Stevens and Anthony Kennedy. Souter argued that the speech in question should not be classified as government speech, because the government does not “put that speech forward as its own.” The fact that the advertisements are attributed to “America’s Beef Producers” and not to the government “all but ensures that no one reading them will suspect that the message comes from the National Government.” Because of that ambiguity, the advertisements’ “governmental origin” cannot be used to justify the infringement upon the First Amendment rights of the dissenters, who not only fund the speech, but are also solely credited with it. Only if the speech is obviously from the government, and the ads attributed to the government, could the First Amendment challenge be considered invalid, Souter argued. Kennedy also filed a separate dissent, saying he “would reserve for another day the difficult First Amendment questions that would arise if the government were to target a discrete group of citizens to pay even for speech that the government *does* ‘embrace as publicly as it speaks.’” (Emphasis added.)

Al Svajgr, the Cattlemen’s Beef Board Chairman, was “thrilled” by the decision, stating in a Beef Board press release, “We believe this is a victory for all cattlemen in the US. Now it is more critical than ever that we come together as an industry to support the checkoff’s educational, research and promotional programs aimed at increasing demand for beef at America’s dining tables.” In the spirit of moving forward, Svajgr added, “We would call on the LMA and WORC to join us in these efforts, with an eye toward increasing long-term profitability for all segments of our industry.”

Thomas Goldstein, one of the lawyers for the respondents, told First Amendment Center legal correspondent Tony Mauro that the decision “is likely to be extremely significant for First Amendment jurisprudence, as it signals that the government has a free hand not only to communicate its own views without oversight by the courts but also to require financial support for that communication from a discrete segment of the population.” Mauro’s article is available online at <http://www.firstamendmentcenter.org/analysis.aspx?id=15308>.

–PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Prior Restraint

Kennedy Faults Gag Order in *Multimedia Holdings* Case

Acting in his capacity as Circuit Justice, United States Supreme Court Justice Anthony M. Kennedy denied a Florida news organization's request to stay two court orders issued in July and August 2004 by the now-retired judge, Robert Mathis. The orders warned of criminal sanctions for any publication or broadcast of transcripts of grand jury testimony in a Florida murder case. Although Kennedy denied the broadcaster's application, he issued a short opinion that reaffirmed the importance of guarding against prior restraints of speech, in *Multimedia Holdings Corp. v. Florida*, 125 S.Ct. 1624 (2005).

First Coast News, a Gannett-owned television news network broadcasting on two Florida television channels, applied for a stay of two orders issued by Mathis, who then presided over a murder trial in the Florida Seventh Judicial Circuit. Following a state attorney's release of grand jury transcripts to First Coast, Mathis' first order suggested that broadcasters and the press would face criminal contempt and misdemeanor charges for disclosing the contents of the transcript. First Coast immediately intervened to stay the order, and Mathis responded by issuing a second order, clarifying that the first order "did not enjoin" the petitioners, but merely pointed out the criminal consequences of any publication or broadcast. (See "Prior Restraints: Florida Judge Bars Publication of Transcripts Released to the Media," in the Summer 2004 *Silha Bulletin*.)

First Coast News argued that the orders were unconstitutional prior restraints on speech, but its petition to the Florida's Fifth District Court of Appeal was denied without comment. Since Florida law does not permit such a denial to be appealed to the Florida Supreme Court, First Coast filed an application for a stay of the orders with Kennedy, Florida's Circuit Justice.

Kennedy found fault with Mathis' first order, declaring that it "bears many of the marks of prior restraint." Kennedy noted that the first order singles out First Coast and "could be interpreted" as placing First Coast on notice that any publication of the grand jury testimony would place it in contempt. Kennedy reasoned, however, that "any chilling effect [the first order] had on speech was substantially diminished by the court's second order."

Kennedy wrote that Mathis' second order made it clear that the court did not initially intend to prohibit

speech by First Coast news, but applied only to the parties in the underlying case. According to Kennedy, the second order foreclosed an interpretation that the first order was meant to put First Coast on notice that it would be found in criminal contempt for broadcasting portions of the transcript. Any other aspects of the order that suggest a particular animus toward First Coast, Kennedy added, are "abated by virtue of the fact that the judge who entered [the orders] has retired from judicial service." Kennedy also noted that although the state had not guaranteed immunity, it did suggest that it would not seek to prosecute First Coast for future publication of the transcripts.

Kennedy expressly pointed out that even informal procedures designed to chill expression can constitute a prior restraint on speech, emphasizing that "warnings from a court have an added weight. . . . If it were to be shown that . . . the second order might give a reporter or television station . . . any real cause for concern," Kennedy wrote, "the case for intervention would be stronger."

Because the second order so diminished the threat implicit in the first order, and because Mathis is no longer on the bench, the circumstances, according to Kennedy, demonstrated no reasonable probability that the full Court would grant a writ of *certiorari*. First Coast attorney George Gabel told the Reporters Committee for Freedom of the Press (RCFP) – who filed an amicus brief in support of First Coast's application – that First Coast considers Kennedy's opinion a victory. "With this ruling," Gabel said to RCFP, "the station can now air the material, and we have a U.S. Supreme Court opinion of lasting value on the prior restraint issue." Gabel told RCFP that First Coast did not plan to seek further review of the case by the entire Supreme Court.

The *Multimedia Holdings* case was not the first in which a Supreme Court Justice, acting in his capacity as a Circuit Justice, denied a request from the media to lift a gag order on the publication of sealed court records. In July 2004, Justice Stephen Breyer denied a request to stay court orders forbidding publication of transcripts of pretrial *in camera* hearings in the Kobe Bryant rape case. (See "Prior Restraints: Justice Breyer Upholds Publication Ban" in the Summer 2004 issue of the *Silha Bulletin*.)

–KELLY J. HANSEN MAHER
SILHA FELLOW

"With this ruling, the station can now air the material, and we have a U.S. Supreme Court opinion of lasting value on the prior restraint issue."

- George Gabel,
Attorney,
First Coast News

defendants' right to a fair trial. Gomery wrote, "Applying judicial experience and common sense, these factors probably make it more difficult than previously to impanel an impartial and dispassionate jury." Although such a publication ban would be a presumptively unconstitutional prior restraint in the United States, the Supreme Court of Canada has ruled in a series of cases that publication bans do not necessarily infringe upon freedom of speech or of the press.

Nevertheless, Canadian courts have to balance competing interests. Gomery wrote, "This matter is a classic case where a balance must be found between two constitutionally protected rights, the right of the public to be informed of matters affecting them . . . and the right of every person accused of a crime to have a fair trial." Nonetheless, Gomery concluded, "A publication ban is needed, as a precaution, with respect to the testimony of the applicants and evidence presented during their depositions, in order to prevent a serious risk to the proper administration of justice, because reasonable alternative measures cannot be sure to prevent that risk." Gomery decided to impose the ban, which also includes Internet communications, until the conclusion of the defendants' trials, when the juries would begin to deliberate. The ruling is available online at <http://www.gomery.ca/en/rulingonapplicationsforpublicationban/>.

As word of Morrissey's blog spread throughout Canada, Canadian media outlets attempting to report the news of Morrissey's disclosure while still being subject to the gag order were placed in a delicate position. "As a Canadian journalist, I can tell you it's frustrating," Cox told the *Star Tribune*. "Every Canadian with a computer can sit down and read it, but we can't publish it." Canadian news reports by the *Toronto Sun*, *The Gazette*, and *The Vancouver Sun* have referred to Captain's Quarters as "an American blog" or "an American Web site" and to Morrissey himself as "a U.S. blogger" and "a Minnesota man" without providing names explicitly.

The caution of Canadian news outlets appears to be well-founded. Gomery Commission spokesman Francois Perreault warned that the disclosure of Brault's testimony by Captain's Quarters does make the testimony public information. According to the *Toronto Sun*, Perreault said, "Anyone who takes that information and diffuses it is liable to be charged with contempt of court. Anybody who reproduces it is at risk." *The Gazette* reported that dozens of Canadian bloggers removed links from their Web sites to *Captain's Quarters* to prevent being cited for contempt.

Morrissey's disclosure may have strengthened the hand of Canadian media entities who were urging Gomery to lift the publication ban. Attorney Mark Bantey, representing the *Montreal Gazette* and other media entities, told *The Vancouver Sun*, "It is now clear that the publication ban is not effective and, in fact, it's almost counterproductive. You can see the interest. People are more interested in the case now than they ever were, because they feel somebody has something to hide. In that sense, the publication ban is backfiring."

Jane Kirtley, director of the Silha Center for the Study of Media Ethics and Law and Silha Professor, agreed. She told attendees at a Law Society of Alberta media and the law seminar in Calgary on April 9 that the initial ban "resulted in the spectacle of the Canadian media attempting to cover without covering this particular testimony and running the risk of being held in contempt themselves."

On April 7, 2005, five days after Morrissey's posting, Gomery lifted the ban on Brault's testimony while leaving the ban in place for the testimony of Coffin and Guite. In Canadian jurisprudence, the effectiveness of a ban is supposed to influence a judge's decision on whether or not the ban should be lifted. In announcing his decision, Gomery said, "It is in the public interest that this evidence with few exceptions be made available to the public." In the days since Morrissey published Brault's testimony, Prime Minister Martin has apologized to voters on prime-time television and has announced that he will call a new election within 30 days of the release of Gomery's report, which is due in December. Gomery's modified ruling is available online at: <http://www.gomery.ca/en/rulingmodifyingpublicationban/m.jean.s.brault.asp>.

The advent of electronic communication and the increasing salience of online media have focused attention on the effectiveness of publication bans in the Internet Age. Klaus Pohle, a professor of journalism at Carleton University and an expert in media law, told *The Gazette* that publication bans can be easily circumvented by bloggers, such as Morrissey, and others outside the jurisdiction of the ban. "The technology here has so outstripped the law [because] it's instantaneous," Pohle said. "I can call someone in the U.S. with information from a trial with a publication ban, and it can show up on the Internet in five minutes, easily accessible to anyone with a computer."

While differences of opinion exist within Canada's media law community – some defense attorneys, for example, have voiced their belief in the efficacy of publication bans – the idea that these bans may be artifacts of a bygone media age which have outlived their usefulness resonates with free speech advocates calling for the law to be changed. "If you have government corruption," Morrissey told *The Gazette*, "it shouldn't be hidden behind a publication ban. It should be out there for Canadians to see."

—HOLIDAY SHAPIRO

—ANDREW DEUTSCH

SILHA RESEARCH ASSISTANTS

Prior Restraint

FEC Proposes Rules to Exempt Bloggers From Campaign Finance Law

The Federal Election Commission (FEC), the government agency which enforces federal election law, has issued proposed new rules for overseeing political campaigns on the Internet under the Bipartisan Campaign Reform Act of 2002, Pub. L. 107-155, 116 Stat. 81 (2002), the campaign finance reform law also known as the McCain-Feingold Act. In its “Notice of Proposed Rulemaking,” 70 Fed. Reg. 16,967 (2005), released on April 4, 2005, the FEC proposed that it would not regulate blogging activity. It further proposed that bloggers be considered journalists who may qualify for a media exemption from the campaign finance law’s regulation of political contributions and expenditures. Instead, the FEC will supervise the enforcement of spending limits on political advertising online.

The FEC’S proposals were issued in response to a 2004 ruling in the case *Shays v. Federal Election Commission*, 337 F. Supp.2d 28 (D.D.C. 2004) by U.S. District Judge Colleen Kollar-Kotelly of the District of Columbia Circuit. Kollar-Kotelly’s decision struck down a 2002 FEC rule which had categorically exempted the Internet from campaign finance rules. (See “U.S. District Judge Orders Federal Election Commission to Create New Campaign Regulations” in the Fall 2004 issue of the *Silha Bulletin*.)

In *Shays v. Federal Election Commission*, two of McCain-Feingold’s sponsors, Representatives Martin Sheehan (D-Mass.) and Christopher Shays (R-Conn) filed suit against the FEC, claiming that the rules crafted by the agency to implement McCain-Feingold were insufficient. Kollar-Kotelly agreed, striking down 15 of the 19 regulations challenged by Sheehan and Shays. Among these rules was the FEC’s blanket exemption of Internet politicking from government oversight. Kollar-Kotelly wrote, “The commission’s exclusion of Internet communications from the coordinated communications regulation severely undermines” McCain-Feingold, which was signed into law in 2002 and upheld by the Supreme Court in 2003. Kollar-Kotelly’s opinion continued, “To permit an entire class of political communications to be completely unregulated, irrespective of the level of coordination between the communication’s publisher and a political party or federal candidate, would permit an evasion of campaign finance laws, thus ‘unduly compromis[ing] the Act’s purposes’ and ‘creating the potential for gross abuse.’”

Specifically, the ruling required the FEC to include Internet communications in its definition of “public communications” which are subject to government regulation under McCain-Feingold. The law defines public communications as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising.” In what one FEC commissioner told *The Washington Post* on March 24, 2005, was a “relatively nonintrusive” means of implementing Kollar-Kotelly’s ruling, the FEC’s revised rules propose to “retain a general

exclusion of Internet communications from the definition of ‘public communication’” with the exception of paid political advertising on the Internet. The notice states, “This proposed change addresses the Shays court’s concern about the wholesale exclusion of all Internet communications from the definition of ‘public communications.’” The “Notice of Proposed Rulemaking” is available online at http://www.fec.gov/pdf/nprm/internet_comm/notice_2005-10.pdf.

Blogging, defined by the FEC as the maintenance of a Web site or a blog consisting of “an online personal journal with reflections, comments, and often hyperlinks provided by the writer” would remain unregulated under the proposed rules. “Thus, an individual or volunteer producing or maintaining a Web site or blog . . . from that individual’s own home or elsewhere,” the notice states, “would not make a contribution or expenditure and would incur any reporting responsibilities as the result of that activity.” FEC Chairman Scott E. Thomas told *The Washington Post*, “I think that we’re trying to use this document as some sort of broad hint that, at least at this stage, we don’t plan to regulate the vast majority of what individuals do [online] and the vast majority of what bloggers do.” Thomas continued, “It is designed to give people a pretty clear signal that the FEC never did have any intent to overregulate citizens who want to use Internet technology for communicating in the area of politics.”

The new rules also propose that both online publications and bloggers qualify for a media exemption under the campaign finance law. McCain-Feingold exempts from oversight “any news story, commentary, or editorial distributed through the facilities of any broadcast station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate,” effectively prohibiting any political endorsements these media entities make from being considered a political contribution subject to regulation. The notice states that by including the media exemption, Congress sought to ensure “the unfettered right of the newspapers, television networks, and other media to cover and comment on political campaigns.” Acknowledging that “media operations increasingly take place on the Internet,” citing the work of Salon.com, Slate.com and Drudgereport.com, the FEC proposed to broaden the exemption to media entities that publish exclusively online, as well as to more traditional entities with both off-line and on-line components. The rules further propose that bloggers be counted as journalists who may qualify for the exemption.

The impact of the highly-anticipated new rules upon bloggers and the prospect of new regulations had been the subject of intense speculation in the blogosphere. FEC Commissioner Bradley A. Smith

“I think that we’re trying to use this document as some sort of broad hint that, at least at this stage, we don’t plan to regulate the vast majority of what individuals do online and the vast majority of what bloggers do.”

– FEC Chairman
Scott E. Thomas

caused a commotion in early March when he suggested that the FEC might impose new requirements upon blogging activity. Smith's comments led to the formation of a broad coalition of bloggers from across the political spectrum opposed to any regulation.

The Internet technology magazine *CNET* reported that an online petition collected "thousands of electronic signatures." The petition, which is available online at <http://www.onlinecoalition.com>, declared that regulating blogs would impair the free flow of information and chill political speech online. The petition states, "While paid political advertising on the Internet should remain subject to FEC rules and regulations, curtailing blogs and other online publications will dampen the impact of new voices in the political process . . ." The blogging community has responded positively to the FEC's new proposals, however. Michael Bassik, who created the online petition, told *CNET*, "It appears as though the FEC did a good job of listening to those in the online community in the past few weeks and seems to have incorporated the comments that individual bloggers and journalists have voiced in the past few weeks."

The FEC, however, may not have the last word on oversight of online politicking. Legislation has been introduced in Congress which would entirely exempt political activity on the Internet from the campaign finance law. Sen. Harry Reid (D-Nev.) proposed the bill, S. 678, in March. Reid told *CNET*, "Regulation of the Internet at this time would blunt its tremendous potential, discourage broad political involvement in our nation and diminish our representative democracy. We should avoid silencing this new and important form of political speech." A companion bill, H.R. 1606, was introduced in the House by Rep. Jeb Hensarling (R-Texas). If enacted, the legislation would overturn Kollar-Kotelly's ruling and would and, in the words of *The Washington Post*, "short-circuit the FEC process."

Some critics have also alleged that the FEC's laissez-faire approach to "bloggers for hire" is too lax. While McCain-Feingold requires political candidates and campaigns to disclose payments made to bloggers as they would any other expenditure, bloggers who receive money from a candidate or a campaign need not reveal that fact, and the FEC's proposed rules provide for no new disclosure requirement. This class of bloggers first aroused controversy during events such as the 2004 South Dakota Senate contest between the Democratic incumbent, Tom Daschle, and Republican challenger, John Thune. The *Washington Post* reported that Thune paid \$35,000 to two bloggers who ran Web sites that criticized Daschle and supported Thune. According to *The Post*, neither the Thune campaign nor the bloggers themselves disclosed the financial relationship, although it was included in Thune's financial records. Events like these have pitted disclosure advocates against those who argue disclosure requirements may, in some cases, be unnecessary or too hard to enforce. Richard L. Hasen, a professor at Loyola Law School, told *The Post*, "The concern is that somebody is blogging at the behest of a campaign and nobody knows it." Yet *The Post* reported that some bloggers oppose disclosure requirements on the grounds that few bloggers "would risk their credibility and readership by accepting undisclosed payments – and that those who do would be quickly outed by other bloggers."

The FEC held a public hearing and vote on their implementation on June 28-29, 2005. As the *Bulletin* went to press, the FEC had not voted on implementation of the rules.

—HOLIDAY SHAPIRO
—ANDREW DEUTSCH
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ALONG WITH INFORMATION ABOUT OTHER ACTIVITIES AND
INTERNET LINKS.

Prior Restraint

CPB, PBS and NPR Face Controversy over Funding and Focus of Public Broadcasting

The chairman of the Corporation for Public Broadcasting (CPB) has embroiled the corporation and its two main beneficiaries, the Public Broadcasting Service (PBS) and National Public Radio (NPR) in controversy, after advocating changes in public broadcasting. Kenneth Y. Tomlinson has been at the center of ongoing disputes since he announced that he thought PBS and NPR were biased and liberal. In addition to advocating balanced coverage in public broadcasting, Tomlinson had threatened to withhold funds and grants to PBS from CPB, the non-profit agency that distributes federal government monies to public broadcasters, unless PBS changed its editorial policies. Several recent revelations, including the discoveries that Tomlinson had hired two Republican lobbyists and had paid another Republican to monitor PBS and NPR shows for bias, have contributed to an increasingly contentious debate over Tomlinson's future. The ensuing fallout from these struggles has led to several personnel losses, public disputes between officials at each of the organizations, and calls for Tomlinson's resignation.

Tomlinson, a former editor of *Reader's Digest*, was first nominated to CPB's board by President Bill Clinton in 2000. Since his re-appointment by President George Bush in 2003, Tomlinson has been accused of attempting to inject partisan politics into CPB. A string of recent appointments, hires, and personnel shifts initiated or promoted by Tomlinson at CPB have been one source of controversy. In April 2005, CPB announced that it had appointed two ombudsmen to oversee programming and ensure balanced coverage by public broadcasters. It had been planned that the ombudsmen, Ken Bode, a liberal, and William Schultz, a conservative, would insure unbiased coverage from those getting funds from CPB. Bode is a former dean of the Medill School of Journalism and worked for a variety of media outlets including *The New Republic*, NBC News, PBS and CNN, while Schultz is a former editor at *Reader's Digest*, where he was a longtime colleague of Tomlinson's.

The decision to appoint two ombudsmen aroused concern within the professional journalism community over CPB's intentions. Eric Boehlert, a columnist at Salon.com, wrote that the "dueling-ombudsmen format" was "unprecedented in mainstream journalism." Jeffrey Dvorkin, ombudsman for NPR and president of the Organization of News Ombudsmen, wrote in a June 21, 2005 article that the two CPB ombudsmen seemed like a strange solution to the perceived bias in public broadcasting. Dvorkin wrote, "Many NPR listeners say they are unconvinced about CPB's intentions [to promote balanced coverage], and I agree with them. In my opinion, the idea of a 'political' ombudsman is a contradiction in terms. Ombudsmen are neutral adjudicators, not partisan advocates." Dvorkin's article is available online at <http://www.npr.org/templates/story/story.php?storyId=4712584>.

PBS was brought into the fray when it bowed to pressure from CPB and announced in early June that it would also hire its own ombudsman for the first time.

Additionally, PBS said that it was planning to revise editorial standards and policies that have remained unchanged since they were adopted in 1987. The revision is part of a requirement mandated by the CPB before it will release \$23 million in funds for PBS's National Program Service, which is responsible for producing several shows, including "NewsHour with Jim Lehrer" and "Nova," along with providing online content. An advisory panel created to suggest changes to the editorial standards was headed by Tom Rosenstiel, director of the Pew Charitable Trusts-funded Project for Excellence in Journalism. Rosenstiel said the new standards would offer additional "transparency" about the journalistic methods and conclusions in PBS programs but told *The Washington Post*, "I'd be surprised if this led producers to do things in a dramatically different way."

The hiring of ombudsmen to monitor public programming at CPB is only one of a string of personnel changes at the corporation that have raised concerns in the journalism community and among Democratic members of Congress. In April 2005, CPB's CEO and President, Kathleen Cox, left after the corporation's board declined to renew her contract. Cox was replaced by Patricia Harrison, a State Department official and former co-chairwoman of the Republican National Committee on June 23. Harrison's appointment raised concerns with many critics who felt that she was too closely related to partisan politics to take the top position at CPB. Donna Gregg, CPB's general counsel, and Nancy R. Rohrbach, the senior vice president for corporate and public affairs, also left earlier this year. According to *The New York Times*, Rohrbach told friends that her decision to leave was motivated in part by her frustration with Tomlinson's repeatedly ignoring her advice.

At the same time CPB's board was considering appointing Harrison, public outcry erupted when the Republican-controlled Appropriations Committee in the House of Representatives recommended cutting \$100 million from CPB's \$400 million budget. Although those cuts were restored by the House in a June 24, 2005 vote, Rep. David Obey (D-Wis.), author of the amendment to restore the funding, viewed the results as a mixed blessing because House rules required that the increased funding to CPB be offset by cuts from other programs in the departments of Health and Human Services, Education, and Labor. Moreover, even with the restored funds, public broadcasting budgets were reduced from previous levels, leaving public television without money to upgrade the PBS satellite and without federal assistance to help convert to mandated digital broadcasting.

Tomlinson's performance as chairman has come under scrutiny after recently released documents showed that Tomlinson had hired a consultant to track politically liberal leanings on several public broadcasting shows. Fred Mann, who had previously worked at the National Journalism Center in Virginia, a media organization associated with the conservative Young American's Foundation, was paid \$14,700 to monitor "The Diane Rehm Show" and "The Travis Smiley Show" on NPR, along with the PBS shows

"In my opinion, the idea of a 'political' ombudsman is a contradiction in terms."

– Jeffrey Dvorkin,
President,
Organization of
News Ombudsmen

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“NOW with Bill Moyers” and “Tucker Carlson: Unfiltered.” In his 58-page report to Tomlinson on his findings after monitoring the shows, Mann marked the coverage and guests of each of the shows as “liberal,” “conservative,” or “neutral,” based on the guest’s political leanings and support for the Bush administration. For example, Sen. Chuck Hagel (R-Neb.), was labeled a “liberal” by Mann when he appeared on “NOW” and criticized the war in Iraq. The report is available online at: http://www.npr.org/documents/2005/jun/cpb_pdfs/email.reports.pdf.

When Mann’s activities were first discovered, Tomlinson denied being involved with his hiring and maintained that Cox had signed Mann’s contract before leaving CPB. However, a copy of the contract leaked from CPB showed that Tomlinson had personally signed it. Smiley, who has since left the show that was monitored, told the *Los Angeles Times*, “It is disappointing to know that my work was being monitored in this way, particularly at the taxpayers’ expense. An unpaid intern using Google could have determined our guest list and found very easily that we do a very balanced show every single night.”

Tomlinson also came under fire for hiring two lobbyists to provide strategic advice on an unsuccessful bill in Congress last year that would have increased public radio and television broadcasters’ representation on CPB’s board. Brian Darling, one of the lobbyists, had served as an aide for Sen. Mel Martinez (R-Fla.) before he resigned over the controversy of a memo he wrote encouraging Republicans to politically exploit the Terri Schiavo case. He was paid \$10,000 for his advice. Mark Buse, a former aide to Sen. John McCain (R-Ariz.) was paid \$5,000 for his work, which he said did not involve contact with members of Congress.

As the allegations against Tomlinson began circulating, CPB Inspector General Kenneth A. Konz announced on May 12, 2005, that he would investigate whether Tomlinson’s initiatives constitute illegal interference with the Public Broadcasting Act, 47 U.S.C. § 396. The law established CPB and requires that the CPB and public broadcasting remain free of political partisanship. Sixteen Democrats signed a letter on June 21 asking President Bush to remove Tomlinson as head of CPB for his role in hiring Mann and injecting partisan politics into the CPB.

Some have expressed concern that the ongoing controversy has permanently altered the public’s perception of public broadcasting. Pat Mitchell, President of PBS, told *The New York Times* that he did not sense any chilling effect on programming decisions as a result of the continuing controversy. However, he said, “I do think there have been instances of attempts to influence content from a political perspective that I do not consider appropriate.”

Tomlinson has denied that his actions as CPB chairman are motivated by political partisanship or his personal ideology. “This is not a controversy that I brought to public broadcasting,” Tomlinson told *The Washington Post* earlier this year. “There is an element within public broadcasting that brought this controversy on itself.” Tomlinson has also said that he will not step down as chairman of CPB. “There is no reason for me to step down from the chairmanship,” he told *The New York Times* on June 21. “I am confident that the inspector general’s report will conclude that all of my actions were taken in accordance with the relevant rules and regulations and the traditions of CPB.”

—HOLIDAY SHAPIRO
—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANTS

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Pentagon Launches New Channel

A new channel has joined the line-up of offerings at Time Warner cable and Dish Network – the Pentagon Channel. *The Washington Times* reported that the Pentagon Channel was created with \$6 million in congressional funds. When it began, its target audience was active and retired members of the U.S. armed forces and their families, who could view the channel only overseas or on military posts within the borders of the United States. It was not initially available to the general public.

Operations for the Pentagon Channel are overseen by Allison Barber, assistant deputy secretary of defense for internal communications and public liaison. According to the *San Antonio Express-News*, Barber is also responsible for Armed Forces Radio and Television Service (AFRTS), the Defense Media Center, the armed forces' *Stars and Stripes* newspaper, as well as the Pentagon Channel. Its headquarters is located in Alexandria, VA, which is also headquarters for AFRTS.

Most AFRTS programming is available only to service members overseas as it consists of a collection of individual television programs from various networks such as Fox, CNN and NBC, in order to give service members and their families an overall taste of the programming they are missing while stationed abroad. Such a collection cannot legally be broadcast within United States borders, according to *The Washington Times*. Although the Pentagon Channel's programming does not consist of programs from networks like other AFRTS broadcasts, it also was initially available only to armed forces overseas and on bases and posts within the United States.

Currently, the Pentagon Channel's programming consists of Department of Defense (DoD) briefings, top-of-the-hour news updates, and stories about the daily life and work of service members. According to the February 2005 issue of *Wireless Satellite & Broadcasting Newsletter*, other programs include "Around the Services" which summarizes current events in each branch of the military services; "Studio Five" which consists of conversations with DoD leaders, and "Focus on the Force" which highlights military missions such as those in Iraq and Afghanistan.

The United Press International reported that the Pentagon Channel is now becoming increasingly available through subscription television services at no additional charge. DirectTV does not currently carry the channel, but following a phone call to the company, an unidentified supervisor promised to try to gain access for that company's subscribers. Viewers can also view live coverage streamed on the Pentagon Channel's Web site at www.pentagonchannel.mil.

Barber told *The Washington Times* that the Pentagon Channel tries to avoid accusations that its programming is nothing more than propaganda by offering live coverage of press conferences from beginning to end. In contrast, commercial networks broadcast only sound bites. "It would be propaganda if we tried to spin it," Barber told *The Washington Times*. Other programming includes archival footage from past conflicts, such as the Korean War. "We've found that our military audience finds that interesting to see some of our old camera footage that the [DoD] put together years ago," Barber told *The New York Times*.

However, Frank Rich, writing for *The New York Times*, took a contrasting view of the new channel, calling it a "brilliant strategy" of the Bush administration. "Conservatives," he wrote in his February 20 article, "who supposedly deplore postmodernism, are now welcoming in a brave new world in which it's a given that there can be no empirical reality in news, only the reality you want to hear (or they want you to hear)."

Nationally syndicated columnist Arianna Huffington, who is also the co-host of National Public Radio's "Left, Right and Center," wrote in a Salon.com article about the public launch of the Pentagon Channel that "The Bush administration has shown a willingness to do just about anything to manipulate public opinion. It paid pundits to say nice things about it. It spent lavishly to create bogus – and, according to the comptroller general – illegal – video news reports on the president's Medicare, education and drug policies. And it has just given us Gannon/Guckert-gate." She calls the mission of the Pentagon Channel "well and good," but continued, "But, as is so often the case with the Bush administration, the Pentagon Channel's programming appears to have been prepared by – to quote Jeff Gannon – 'people who seem to have divorced themselves from reality.'" Huffington's article is available online at <http://www.salon.com/opinion/huffington/2005/02/24/pentagon/>. (See page 27 of this issue of the *Silha Bulletin*.)

A similar channel, Zvezda TV, was launched in Russia in February 2005. Its creation was inspired by the Pentagon Channel, according to an article in *Itogi*, a weekly news publication in Russia. Zvezda, which means "star" in Russian, refers to the star that has been worn on Russian uniforms for decades. The channel will carry programs that "will offer positive examples of patriotism," the station's general director, Sergey Savushkin, told *Itogi*. "We are aimed at a precise target group, those who consider Russia their Homeland with a capital H and do not want to leave their country." However, *Itogi* reported that there are concerns that the station may attempt to influence the 2008 presidential elections.

In an interview with the newspaper *Izvestia*, Savushkin said that although Zvezda was inspired by the Pentagon Channel, the Russian channel's programming "is purely a civilian television project" and will be funded by stockholders. Savushkin said that if the planned programming doesn't gain viewers, stockholders can determine if a change in programming would be required.

"It would be propaganda if we tried to spin it."

– Allison Barber,
Assistant Deputy
Secretary of Defense
for Internal
Communications and
Public Liaison for the
Pentagon Channel

–ELAINE HARGROVE

SILHA FELLOW AND *BULLETIN* EDITOR

Freelance Writers Achieve Settlement from Big Media

Twenty-one freelance writers joined the National Writers Union (NWU), the Authors Guild, and the American Society of Journalists and Authors (ASJA) to secure up to \$18 million in a settlement benefiting thousands of writers whose stories were published online without permission. On March 31, 2005, Judge George M. Daniels of the U.S. District Court for the Southern District of New York signed an Order for Preliminary Settlement Approval in the freelancers' case, *In re Literary Works in Electronic Databases Copyright Litigation*, MDL No. 1739. The settlement halted the copyright infringement class action, marking a potentially large payday for individual writers.

“There will be some freelancers who registered their copyrights who will make six figures under this settlement.”

– Jim Morrison,
former SAJA
President

Daniels' order grants preliminary court approval of the 90-page settlement agreement negotiated by plaintiffs and defendants. Defendants in the action are the Dialog Corporation, Dow Jones & Company, Factiva, EBSCO Industries, The Gale Group, Knight Ridder, Mediastream, NewsBank, The New York Times Company, ProQuest, Reed Elsevier (which includes Lexis Nexis), The Thomson Corporation, The Copley Press, and West Publishing. With some exceptions, the class of plaintiffs provisionally includes all persons who own individual or joint copyrights in a literary work that defendants reproduced, displayed, adapted, licensed, sold, or distributed in any electronic or digital format after August 15, 1997, and who responded to notice of the suit. Generally, if any of the named defendants used a work copyrighted by a member of the plaintiff class without express authorization, the copyright holder will be eligible for a portion of the settlement sum. The settlement agreement is posted on a Web site dedicated to keep freelance writers informed about the class action, available online at <http://www.freelancerrights.com>.

According to a press release from NWU and the ASJA, plaintiffs who registered copyrights for their articles will be paid up to \$1500, and those with unregistered copyrights will receive up to \$60. Amounts will vary according to the terms of the individual's original publication agreement, the date of the publication, and the original figure paid for the article. Jim Morrison, a former president of the ASJA and a participant in the settlement negotiations, told *Wired News*, “There will be some freelancers who registered their copyrights who will make six figures under this settlement.”

A 2001 U.S. Supreme Court ruling, *New York Times Co. Inc. v. Tasini*, 533 U.S. 483 (2001), provided plaintiff freelancers essential leverage during settlement discussions. In *Tasini*, the Court held that when articles previously published in print periodicals are later included in computer databases without the author's permission, it is a copyright infringement. Publishers in *Tasini* contended that they were protected by section 201(c) of the Copyright Act, 17 U.S.C. § 201(c), which grants the privilege of reproduction and distribution to those holding copyright in the collective work. The Court, however, held that § 201(c) would not protect the publishers because the plaintiffs' articles had been reproduced as freestanding works, no longer in the context of the collective work context of § 201(c). Since readers could retrieve the freelancers' articles in isolation from other works, the Court held that publishers infringed authors' copyrights by reproducing and distributing without specific permission.

Jonathan Tasini is president emeritus of the NWU and a member of the plaintiffs' settlement negotiation team. Referring to the *Tasini* decision, Tasini stated in a NWU press release that the current settlement is “the final chapter in a 12-year fight to right a gross injustice.” Gerard Colby, the NWU's president, agreed. “The settlement underscores the fundamental importance of the Constitution's copyright clause,” he said, “and proclaims that the rights of writers and artists to their own creations and to earn a living from them must be respected – even by the nation's most powerful media corporations.”

However, the settlement has raised concerns with librarians, researchers and readers in general who have seen freelancers' articles purged from Lexis Nexis and other online research tools, resulting in “holes” in the information they contain. In an article written for *Duke Law & Technology Review*, Christine Soares wrote, “. . . it is unlikely that the database publishers could risk an incomplete record merely to avoid paying royalties.” Instead, Soares stated, “*The New York Times* has tried to reduce the financial impact of the *Tasini* decision by encouraging freelance writers to contact the newspaper if they wish for their work to remain available. According to the National Writers Union, the assurance of availability will only be given if the author signs a retroactive rights contract relinquishing all rights to additional compensation.” Soares' article is available online at <http://www.law.duke.edu/journals/dltr/articles/2001dltr0025.html>.

A final hearing is set for July 28, 2005 to determine whether the terms and conditions of the settlement proposal are fair, reasonable, and adequate. *The New York Times* reported on nytimes.com that the Times Company “believes the agreement is fair to all parties involved.”

–KELLY J. HANSEN MAHER
SILHA FELLOW

Media Ethics Updates

Newsweek Caught in Unnamed Sources Controversy

In a highly publicized incident involving the use of confidential sources, *Newsweek* magazine came under fire for a report it published in early May 2005. Public criticism of that report led to an apology, a retraction, an investigation, and, eventually, a confirmation of incidents of very similar to those the magazine was condemned for writing about. Instead of remarking upon its seeming vindication, however, *Newsweek* has remained silent on the issue since its retraction.

In its "Periscope" section on May 9, 2005, *Newsweek* reported that a military "probe," undertaken by the United States Southern Command in Miami in response to alleged abuses at Guantanamo Bay, had found evidence that interrogators had, "in an attempt to rattle suspects, placed Qur'ans on toilets and, in at least one case, flushed a holy book down the toilet." According to *The New York Times*, international outrage over the article, actually published May 1, began in Pakistan, when Imran Khan, the legendary cricketer turned opposition politician, summoned reporters to a press conference on May 6 in an effort to draw attention to it. Protests then spread throughout the region and into Afghanistan, eventually resulting in violence that left 17 dead and more than 100 people injured.

CNN.com has reported that the story also prompted a Pentagon investigation into the allegations. General Richard Myers, chairman of the Joint Chiefs of Staff, said in a May 12 press conference that the Pentagon was not able to confirm any such incidents of Qur'an desecration. CNN.com further reported that Pentagon spokesman Larry DiRita phoned *Newsweek* on Friday, May 13, and reported the lack of findings. As editor Mark Whitaker wrote in his May 15 apology in *Newsweek*, "last Friday, a top Pentagon spokesman told us that a review of the probe cited in our story showed that it was never meant to look into charges of Qur'an desecration. The spokesman also said the Pentagon had investigated other desecration charges by detainees and found them 'not credible.'" When Michael Isikoff, who co-authored the piece with John Barry, reached his source again, Whitaker wrote that the source "said he couldn't be certain about reading of the alleged Qur'an incident in the report we cited, and said it might have been in other investigative documents or drafts."

Whitaker wrote that Isikoff and Barry's "information came from a knowledgeable U.S. government source, and before deciding whether to publish it we approached two separate Defense Department officials for comment. One [source] declined to give us a response; the other challenged another aspect of the story but did not dispute the Qur'an charge."

Aside from the difficulties that arise in any use of a confidential source, this lack of explicit confirmation

further complicated the situation. As Slate.com's Editor at Large, Jack Shafer, wrote, "critics are right to damn the magazine for its over-reliance on an anonymous source and for taking the non-denial of a Pentagon source – to whom it showed the story prior to publication – as a kind of confirmation." Shafer's article is available online at <http://www.slate.com/id/2118826>.

Richard M. Smith, Chairman and Editor-in-Chief of *Newsweek*, recognized this same issue and wrote in a letter to readers in the May 30 issue, "[W]e mistakenly took the official's silence for confirmation."

Newsweek's May 15 apology, however, did not satisfy some critics, who called for an official retraction of the story. According to *The Washington Post*, Whitaker and *Newsweek* had thought their May 15 apology equal to a retraction until, "as [Whitaker] said, 'it became clear people weren't quite hearing that and were getting hung up' on the semantics." Reuters reported that White House spokesman Scott McClellan said, "it's puzzling that while *Newsweek* now acknowledges that they got the facts wrong, they refused to retract the story." Indeed, *The New York Times* claimed that the White House and State Department spent May 16, the day after the apology, "assailing" *Newsweek* "for not issuing a retraction despite acknowledging that the official had recently expressed doubt about his own knowledge of the accusation against the guards."

According to *The Washington Post*, the Pentagon's criticism did not stop there. Pentagon spokesman Bryan Whitman deemed the report both "irresponsible" and "demonstrably false." *The New York Times* reported that Pentagon spokesman DiRita called Whitaker's apology "very tepid and qualified...They owe us all a lot more accountability than they took."

Later that day, *Newsweek* issued a formal retraction, saying: "based on what we know now, we are retracting our original story that an internal military investigation had uncovered Qur'an abuse at Guantanamo Bay."

The ethical issues raised did not disappear with the retraction, however. As Silha Professor and director of the Silha Center for the Study of Media Ethics and Law Jane Kirtley told the (Minneapolis) *Star Tribune*, "Any time you publish information attributed to an anonymous source, you put the credibility of the entire news organization on the line. You are saying: 'We have vetted this and we know it's true.'"

However, confidential sources are sometimes the only way to get crucial information about a story. As former ABC News correspondent, Bob Zelnick, told *The Washington Post*, "I don't see how a reporter can function in a sensitive beat without relying on anonymous sources – even one anonymous source if the reporter has confidence in him." Zelnick added,

"We mistakenly took the official's silence for confirmation."

– Richard M. Smith, Chairman and Editor-in-Chief of *Newsweek*

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however, that he would have had “reservations” about publishing the piece, however, because “the potential to inflame is greater than the value of the piece itself.”

Newsweek recognized that its reliance on only one source may have been a lapse of editorial judgment. As Smith wrote in the May 30 issue of *Newsweek*, “The cryptic phrase ‘sources said’ will never again be the sole attribution for a story in *Newsweek*.” He continued: “Tacit affirmation, by anyone, no matter how highly placed or apparently knowledgeable, will not qualify as a secondary source.” As Scott Libin, a member of the Leadership and Management faculty at The Poynter Institute, pointed out, there is a “distinction between relying on a source who confirms an account and relying on a source who doesn’t dispute an account.”

A final issue is that the source was speaking about a report that was merely expected to come out in the future and was not already published. As Jack Shafer of Slate.com noted, *Newsweek*’s “let[ing] its anonymous source predict the contents of a future government document [is] a journalistic no-no as far as I’m concerned.” The *Star Tribune* echoed the same idea: “The big scoop was not the alleged desecration of the Qur’an (it’s been alleged for years by the Guantanamo detainees) but that a forthcoming Army report would corroborate the allegations. If that’s true, [media ethicist Geneva] Overholser said, we would find it out when the report was published, so Isikoff’s small scoop wasn’t worth the risk to credibility that journalists assume when they publish stories based on unnamed sources.”

Since *Newsweek*’s retraction, the situation has become more complicated. *The (London) Guardian* reported on May 26 that “declassified FBI records showed that as early as April 2002 detainees at the US [sic] prison in Cuba had denounced the treatment of the Qur’an by guards.”

According to the Associated Press, the *Newsweek* report also prompted an investigation into the allegations by Brigadier General Jay Hood, who commands the Guantanamo detention center. *The Boston Globe* reported that Hood’s investigation, the results of which were released on June 3, found “five confirmed incidents of Koran [sic] mistreatment at Guantanamo Bay, in which the Muslim holy book

was kicked, stepped on, soaked by water balloons, defaced with a scrawled obscenity, and in one recent case accidentally sprayed with urine. None of the confirmed incidents involve a Koran [sic] being flushed down a toilet . . .” Hood was quoted by *The Boston Globe* as saying, “mishandling of a Koran [sic] at Guantanamo Bay is a rare occurrence.”

The Associated Press reported on June 6, three days after the public release of Hood’s findings, that the Pentagon said that the disclosure of the confirmed incidents of Qur’an mistreatment in the Hood report “has not triggered the kind of public outrage that erupted after” the *Newsweek* report. According to a separate Associated Press report, “the findings [were] released after normal business hours Friday [June 3] evening and after the major TV networks had aired their evening news programs.” Frank Rich, of *The New York Times*, said the report was released “at 7:15 p.m. on a Friday, to assure it would miss the evening newscasts and be buried in the Memorial Day weekend’s little-read papers.”

Despite that timing and the Pentagon’s assertion of a general lack of response, there were several notable reactions, both in Washington and abroad. Senator Joseph Biden (D-Del.) called for the detention center at Guantanamo to be shut down, according to the Associated Press. Biden told the AP that “[Guantanamo] has become the greatest propaganda tool that exists for recruiting of terrorists around the world. And it is unnecessary to be in that position.” *The New York Times* reported that General Richard Myers, the chairman of the Joint Chiefs of Staff, asserted that Guantanamo “should not be closed because some inmates are too dangerous to be released ‘under any conditions.’”

The Associated Press reported on June 5 that Egypt’s Foreign Minister condemned the desecration of the Quran by U.S. military guards and interrogators, saying that those responsible should be held accountable.

As the *Bulletin* went to press, *Newsweek* has not published any further stories on the issue.

—PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

Media Ethics Updates

“Gannon’s” Presence at White House Briefings Leads to Press Credentialing Questions

For two years, Jeff Gannon regularly attended press briefings by White House press secretary Scott McClellan and President George W. Bush. Despite the fact that Gannon often provided McClellan and Bush with softball questions, he drew relatively little attention to himself – at least until Jan. 26, 2005. That was the day Gannon, while asking Bush a question, falsely attributed quotes to Democratic members of Congress. Within days, liberal Web log posters (bloggers), believing that Gannon was a Republican plant at the briefings, had discovered that Gannon was actually James D. Guckert, a politically conservative writer with few journalistic credentials, who previously advertised his services as a gay escort online. Since the discovery of Guckert’s true identity, questions have been raised about press access to the White House and the role of bloggers in the media.

As the bloggers researched Guckert’s past, they discovered that Guckert’s only writing experience came from two sites, Talon News, available online at www.TalonNews.com, and GOPUSA.com. Both sites were founded by Bobby Eberle, a Texas Republican party activist and delegate to the 2000 Republican national convention. Guckert first requested a day pass to the White House press briefings in February 2003, before Talon News existed and while he was working for GOPUSA.com. He was subsequently given day passes to the briefings every day over the next two years, all the time using the name Jeff Gannon.

McClellan initially said that Guckert was provided access to the briefings after it was shown that he worked for a media outlet that published regularly. However, McClellan told *Editor & Publisher* in February that no extensive check into Guckert’s background had been conducted. McClellan, explaining the extent of the check, said, “The staff assistant went to verify that the site [GOPUSA] existed.” McClellan also said that he knew that Jeff Gannon was not Guckert’s real name.

Guckert had also originally requested a press pass from the Standing Committee of Correspondents, a group of Capitol Hill reporters in charge of distributing congressional press credentials, in December 2003. The Standing Committee pass is required before a journalist can be approved by the White House Press Office for a “hard pass” allowing regular access to the White House press briefings. In April 2004, while he was already attending the press briefings, Guckert was informed that his journalistic qualifications were not substantial enough to warrant credentials from the Standing Committee.

Adding to the initial controversy, several bloggers discovered stories by Guckert on Talon News that were nothing more than verbatim transcriptions of Republican and White House press releases. Guckert

has also recently been accused of having plagiarized two stories he posted online with Talon News; one by an Associated Press reporter and another by a former (Waltham, Mass.) *Daily News Tribune* reporter.

Responding to questions of press access to the White House, the board of the White House Correspondents’ Association (WHCA) met on Feb. 28, 2005, to decide whether the press credentialing process should be changed. However, Ron Hutcheson, WHCA president and a Knight Ridder White House correspondent, told *Editor & Publisher* that the board did not believe Guckert was a Bush administration plant and that the press credentialing process looked to be sound overall. “While not perfect,” Hutcheson said, “[the current system] is geared toward letting people in.” He added, “The board felt like none of us were happy about [Guckert] being in the briefing room, but we all view it as the price we pay for a system that favors inclusion over keeping someone out.”

Guckert’s access to the White House also prompted calls from Democratic members of Congress to investigate why and how the White House gave him access to the briefings, suggesting that Guckert might have been a government plant. On March 16 that request was denied by the Republican-controlled House Judiciary Committee, voting along party lines. However, Reps. Louise Slaughter (D-NY) and John Conyers (D-Mich.) filed a Freedom of Information Act, 5 U.S.C. § 552, request seeking Secret Service records of entry and exit logs showing the times Guckert was at the White House.

The Raw Story, an online alternative news source, examined the records and found that Guckert was at the White House on more than two dozen occasions when no press briefings were given. Additionally, the Secret Service logs show that either the entry or exit times for Guckert’s visits to the White House were missing on several occasions. Guckert has denied having any special relation to either the Bush administration or McClellan. The Raw Story article and the Secret Service logs are available online at: http://rawstory.com/exclusives/byrne/secret_service_gannon_424.htm.

The Gannon/Guckert story has also raised questions on media coverage of the incident and the role that bloggers play in the media today. In an opinion piece in the *Los Angeles Times* on March 6, 2005, John Aravosis, who publishes AMERICAblog.com and helped to break some of the first news on the Gannon/Guckert story, wrote that self-censorship and an inability to grasp the importance of Guckert’s presence at the White House briefings had led to decisions by many media outlets to not cover the story. He was also critical of the *Time’s* coverage, writing, “In labeling the story [on

“Consistent with the First Amendment, the White House Correspondents’ Association stands for inclusiveness in the credentialing process so that the White House remains accessible to all journalists. We hope that individual episodes do not obscure the broader principles of a fair and evenhanded credentialing process that serves the goal of free and full exchange of information.”

– Public statement from the White House Correspondents’ Association

Gannon/Guckert, continued on page 28

Gannon/Guckert, *continued on page 27*

Guckert] ‘White House Notebook’ and treating it largely as a look at the imprecision of attempting to define ‘journalist,’ The *Times* missed the more serious news angle — the apparent breach of White House security by someone with a troubling past.”

In fact, much of the mainstream media, including the largest newspapers and national broadcast news programs, initially gave the Gannon/Guckert story minimal coverage or no attention at all. On February 17, Brian Williams, NBC’s anchor for “NBC Nightly News,” introduced a segment on Guckert’s coverage of White House briefings; however, the other major networks have stayed away. That left online news media, such as Salon.com, and bloggers responsible for most of the early coverage.

Shortly after the initial revelations about Guckert’s past and his ability to acquire access to White House press briefings, he resigned from both GOPUSA and Talon News. He also took his blog, www.JeffGannon.com, offline in early February before bringing it back online at the end of that month. In his first post after coming back online, entitled “Fear and Loathing in the Press Room,” Guckert railed against those who had questioned his credentials and background, writing that “the Old Media and the Left” had unfairly undermined his credibility and questioned his journalistic credentials. Guckert pointed out that he had written more than 500 articles for Talon News, although he admitted that his journalistic background was “fair game” while adding that his personal life should have been off limits. “[B]ecause I am a conservative, [liberals and the media] continue to try to smear me with allegations of behavior that they otherwise would vigorously defend.”

Guckert appeared on CNN with host Anderson Cooper on February 18. He remained defiant, telling Cooper that “the effect of this has been that we seem to have established a new standard for journalists in this country, where if someone disagrees with you, then your personal life, your private life, and anything you have ever done in the past is going to be brought up for public inspection.”

Guckert also appeared at a National Press Club panel discussion entitled, “Who is a Journalist?” The April 8 panel also featured others, including Ana Marie Cox, editor of *Wonkette.com*, and John Stanton, a reporter for *National Journal*, discussing what makes a journalist a journalist. The inclusion of Guckert drew criticism from some in the media along with bloggers. On March 29, Mike Madden, a Gannett News Service reporter and a member of the Press Club’s Professional Affairs committee, which organized the event, defended Guckert’s inclusion. Madden told *Editor & Publisher*, “The idea was talking about [press access] issues and who should be allowed to set up shop [as a legitimate journalist].” He added, “He is there because the panel is presumably going to talk mostly about his case. He was, in large part, the central figure in the case that got us interested in the topic.”

According to *Editor & Publisher*, Guckert was asked several times at the panel event how long it took him to get a pass to the White House press briefings, but said each time that he did not remember. He also said he had not been given preferential treatment to get access to the White House and refused to discuss his past beyond his reporting. Speaking on the title of the event in his opening remarks, Guckert said, “We operate under the illusion of an objective media, but we have all seen, at least in the last election, that the objective media is an ideal we no longer reach. You see a whole new group of journalists, bloggers, who have been the source of a tremendous amount of information, correct or incorrect, that credentialed journalists and mainstream media have used. That phenomenon is going to have to be dealt with in the future.”

In a related development, the Associated Press reported on March 8 that the first blogger had been admitted to a White House press briefing. Garrett Graff, who writes for *Fishbowl D.C.*, a blog hosted by mediabistro.com, was recently given a daily pass for the briefings. Graff, who has covered the Guckert story, also conducted an interview with Guckert in late February. According to the Associated Press, McClellan said, “The briefing room ought to be an inclusive place.” He added that, historically, the White House has admitted “the traditional media and the nontraditional media, as well as colorful individuals with certain points of view from the left and the right.”

On his first post after being admitted to the briefings, Graff seemed unimpressed by the attention he had drawn. “All-in-all it was a very surreal day — anti-climatic almost even,” he wrote. “Something similar happened to bloggers attending the [national political party] conventions last year: There was a big-to-do beforehand and then their writing all seemed sort of pedestrian after all the hype. They were the biggest news they came across.”

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Media Ethics Updates

Albom, *Free Press* Editors Disciplined for Erroneous Column Filed Prior to “Final-Four” Game

On April 1, 2005, as Mitch Albom was working on his nationally-syndicated sports column, he focused on a discussion between two National Basketball Association (NBA) players, Mateen Cleaves and Jesse Richardson, both former teammates at Michigan State University (MSU). Albom, a columnist at the *Detroit Free Press*, has received several awards for his sports writing, hosts his own radio show, provides sports commentary on ESPN, and authored two best-selling books, “Tuesdays with Morrie” and “The Five People You Meet in Heaven.” In his column, which appeared in the *Free Press* on April 3, Albom wrote that Cleaves and Richardson were at the Final Four game against North Carolina on April 2, and that “[t]hey sat in the stands, in their MSU clothing, and rooted on their alma mater.” As it turned out, although Cleaves and Richardson had both told Albom that they planned to attend the game, neither of them actually made it to the game due to scheduling conflicts.

Albom’s editors failed to change the column, written in the past tense, despite the fact that the events had not occurred at the time the column was filed. Of the hundreds of newspapers that received the column from Tribune Media Services only one, the *Duluth (Minn.) News Tribune*, which published the article on April 2, modified it to read that the NBA players “will sit” in their seats, cheering on MSU. On April 3, when readers and others noticed that Cleaves and Richardson were not at the game, Albom’s column became the focus of intense scrutiny and criticism. Although some at newspaper were aware by April 4 that the NBA players had not attended the game, the *Free Press* did not issue a correction until April 7.

Also on April 7, Albom wrote an apology, saying he had “made an assumption in [his] column” about Cleaves’ and Richardson’s attendance, and that writing his column in the past tense “was a bad move.” Albom wrote that “details are the backbone of journalism, and planning to be somewhere is not the same as being there,” admitting that he had not engaged in “thorough journalism.”

Albom’s apology marked only the beginning of the fallout from the column, however. On April 8, Carol Leigh Hutton, publisher and editor of the *Free Press* wrote in the paper that Albom had been suspended while an internal investigation into his previous work was being conducted. Hutton wrote, “Disciplinary action has been taken against five employees, Albom and four others, each of whom had some role in putting the April 3 column into the paper and each of whom had the responsibility to fix errors before publication.” Without specifying the disciplinary actions, she wrote that the decision was made after taking “into account many factors including the seriousness of the offense, the

importance of our credibility, the history of those involved and Albom’s 20 stellar years at the *Free Press*.”

Almost immediately, some alleged that Albom was receiving preferential treatment from the newspaper because of his celebrity status at the *Free Press* and around the country. Alex Jones, director of the Joan Shorenstein Center on the Press, Politics, and Public Policy at Harvard, told *USA TODAY* that the *Free Press* “needs Mitch Albom more than he needs them” but he also added that the *Free Press* “need[s] their reputation more than they need him.”

Others found that despite the fact that Albom faced a deadline to turn in his column before the game, his actions were not excusable. In an April 11 *New York Times* article, Bob Steele, the Nelson Poynter Scholar for Journalism Values at the Poynter Institute, said, “There are plenty of timing challenges in health care, but we do not excuse physicians and nurses who cut corners.”

Although initial responses to Albom’s mistake were mostly critical, *Editor & Publisher* reported that only one newspaper editor at the American Society of Newspaper Editor’s annual conference, held April 12-15, thought that Albom should be fired. Most of the editors said that more facts were needed to make a final judgment, but that if it was a one-time occurrence, Albom should stay with the *Free Press*. The exception was Mike Marshall of *The Mobile (Ala.) Register*, who told *Editor & Publisher* that he believed Albom should be fired. “Given our [credibility] challenges right now,” he said, “I think we have to be tough when it comes to breaching that line.” The *Editor & Publisher* article is available online at: http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1000875897.

While the *Free Press*’ investigation continued, Hutton told *Los Angeles Times* columnist David Shaw that Albom’s “column went through all the natural channels. It was read by a line editor, two copy editors and an editor who read the page proof. But what I want to find out through this other internal review is whether we now have an editing culture here in which . . . our star columnists are not edited as aggressively as they should be.”

On May 16, the *Free Press* published the results of its internal review. The article began by noting that a review of Albom’s previous articles discovered no “evidence of problems similar to an April 3 column in which Albom, with an editor’s knowledge, misled readers by writing about events that never occurred at a basketball game.” The second paragraph, however, noted that “the inquiry found that Albom at times has used quotes from newspapers, TV program or other publications without indicating that he did not gather the material himself, in violation of *Free Press* rules on crediting sources. In several instances,” the report continued, “Albom did not

“Albom, with an editor’s knowledge, misled readers by writing about events that never occurred at a basketball game.”

– From the
Detroit Free Press
report

Albom, continued on page 30

credit quotes exclusively gathered by another media organization.”

The report found that Albom, along with other columnists at the *Free Press*, had often received preferential treatment compared to reporters when editors allowed columnists to use quotes without attribution. Unlike other columnists, the report found that Albom used quotes that were changed from their original sources, “seeming to be livelier in some cases.” The review discovered that Albom used quotes and details without attribution “from publications from New York to Australia to Hartford.” In an interview with the *Free Press* investigators, Albom defended the use of quotes in his columns as “essentially accurate” and maintained that he never intentionally deceived readers into thinking he spoke with someone directly when he used quotes from other sources.

Sports editor Gene Meyers confirmed to the reviewers that sports columnists were given more leeway than other reporters. “It was understood that Mitch, because he was a columnist, would use quotes on occasion from printed or broadcast sources. As long as the quotes were accurate, we did not insist on attribution to the original source,” he said. Meyers added that the practice was accepted for other columnists and predated Albom’s 20 years with the *Free Press*.

However, the report pointed out that the policy of allowing columnists to use quotes without attribution appeared to violate the *Free Press*’ ethics policy. The report found that when the policy was updated in 2004, it was circulated to all *Free Press* staff members who were required to sign forms acknowledging they had received the policy. The ethics policy states, in part, “We don’t mislead readers. We do not publish made-up material, such as false names, unless it is obvious to the reader, as in a column or illustration that is unmistakably satirical or fanciful. We quote people accurately. We don’t imply we have witnessed events we haven’t seen or been in places we haven’t been.” The *Free Press* ethics policy is available online at: http://www.freep.com/help/ethics_policy.htm.

The report also focused on Albom’s image among his colleagues and his treatment at the *Free Press* compared to other reporters and columnists. Greg Crawford, a features copy editor, said it was understood that Albom was to be edited more lightly than others at the *Free Press*. Crawford told the reviewers, “Nobody ever came up to me and said don’t touch [Albom], but there are lots of subtle clues. With columnists here, management kind of encourages a cult of personality.”

The report also discussed a decision by the *Free Press* not to run a review of Albom’s book, “The Five People You Meet in Heaven.” Thom Fladung, the *Free Press* managing editor, had originally asked Marta Salij, the *Free Press* book reviewer, to write a review of Albom’s book. When he was turned down by Salij, who said it was against her policy to review colleagues’ work, a freelancer from Cleveland, Carlo Wolff, was hired to write the review instead. Calling the novel “mawkish” and “superficial,” Wolff wrote, “Where some attempt to write the Great American Novel Albom seems content to write the Great American Postcard.”

After talking to Albom, Hutton made the decision not to publish Wolff’s review. In an Oct. 5, 2003, *Free Press* column explaining the decision, she wrote, “In the end, it came down to a decision about how I want the *Free Press* to treat its employees.” The report noted that “[t]o many on the staff . . . the episode underscored Albom’s stature as a coddled star.”

In his first column back from suspension on May 1, 2005, Albom wrote that he had been through dark times in the weeks since his initial apology. Although he apologized again for his April 3 column, he remained defiant. “I made a careless mistake in a column,” he wrote. “It wasn’t malicious. It didn’t harm the subjects. But it was factually incorrect in four paragraphs. I assumed something would happen that didn’t.” Albom was also critical of the response to his column, calling it “[a]n explosion that mixed the criticism I deserved with a lava flow of anger, hate, self-righteousness and people who once called themselves friends preferring to act as my judge and jury.”

Hutton has maintained that the undisclosed discipline of Albom and his editors was sufficient to correct the problem. She told *Editor & Publisher* on May 16, “I didn’t realize that I had failed to be clear about the policy. There will be no discipline on anyone because it is clearly a newsroom-wide problem. The blame is on me,” she said. “I have to take it.”

In the same article, however, David Zeman, a *Free Press* reporter who co-authored the newspaper’s May 16 report with three others, argued that the newspaper was still trying to downplay Albom’s mistakes. Zeman noted that the title of the May 16 article, “Albom probe shows no pattern of deception,” said nothing about the fact that Albom frequently failed to properly attribute quotes and sometimes changed quotes. “I think some people may find a disconnect between what the headline says and what the story below lays out,” Zeman said. He also pointed out that while the review found that other columnists did the same thing, Albom used more unattributed quotes than others. “I think it is unfair to give the impression that any of our columnists have been shown to be lifting quote to the extent that [Albom] has.” Zeman added, “I would hate to see all of our columnists lumped in to the same group as Albom.” The *Editor & Publisher* article is available online at: http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1000921290.

In a public statement released by Albom on May 16, he said, “I have always been proud of my journalism, and I am glad that this long investigation has validated my hard work and my reputation. I am also glad this puts to rest so many false and baseless rumors.” He concluded, “I thank the readers who have always stood by me. They are the people I write for.”

Hutton has said that the *Free Press* will be reviewing and revising its ethics policy to address the concerns raised by the review of Albom’s columns.

Endangered Journalists

French Journalist Released

A French journalist and her interpreter have been freed after being held hostage for five months in Iraq. Florence Aubenas, a correspondent for the French daily newspaper *Liberation*, and Hussein Hanoun al-Saadi, were taken captive in Baghdad January 5, 2005, according to *The (London) Guardian*. They were finally freed on June 12. The following day Aubenas arrived in Paris where she was greeted by French president Jacques Chirac and members of their family.

Aubenas had been working in Baghdad since Dec. 16, 2004. According to *Liberation's* editor Serge July, Aubenas has worked for the newspaper for 19 years, covering conflicts in Rwanda, Kosovo, Algeria and Afghanistan, writing articles and books about her experiences. "She is a very experienced journalist," July told Reporters Without Borders (Reporters sans Frontieres, RSF). Her last story, entitled "The Vote Between Boycott and Death," was published in *Liberation's* January 6 edition, and focused on the risk for those Iraqis participating in the upcoming election, according to ANSA English Media Service.

The BBC reported that Aubenas and Hanoun had left the Mansur Hotel on January 5 to conduct interviews with survivors from the fighting in Fallujah as well as female candidates for the upcoming Iraqi elections. Aubenas told the *International Herald Tribune* that a group of people stopped the car she was riding in with Hanoun as they tried to leave a refugee camp. According to her account, Aubenas was taken to a small basement room that was two meters wide, four meters long and not high enough to stand up in. She was blindfolded, chained at her wrists and ankles and given strict orders not to make any noise. After two days a man was brought into the room and put on another mattress about a yard from her. Aubenas said they were not permitted to communicate. When the two were allowed a brief visit outdoors in May, Aubenas learned that the other prisoner was Hanoun. They were fed meals of rice and eggs, were allowed to use a toilet twice a day, and to shower once a month.

Following Aubenas' and Hanoun's abduction, French President Jacques Chirac issued a plea to French journalists not to go to Iraq following the four-month hostage ordeal of two other French journalists, Georges Malbrunot and Christian Chesnot, released December 2004. (See "Endangered Journalists: French Journalists Freed" in the Fall 2004 issue of the *Silha Bulletin*.)

Agence France Presse reported that Sky Italia cable television broadcast an undated 50-second videotape of Aubenas on March 1. That tape, according to the Associated Press, had been dropped off at the offices of an unidentified news agency in Baghdad. Nothing in the tape gave any indication as to who was holding Aubenas captive or her location. Agence France Presse reported that Aubenas said, "I am French. I am a journalist with *Liberation*. Please help me. My health is very bad. I'm very bad psychologically also. This is urgent now. Help me! I ask especially Mr. Didier Julia, the French deputy. Please Mr. Julia. Help me! It's urgent. Mr. Julia help me!"

The Guardian reported that *Liberation* as well as French authorities asked French television stations not to air the video. Another video on CD-ROM had been obtained by French officials a few days earlier, but was not broadcast at the request of French authorities. In that CD-ROM video, Aubenas did not mention Julia.

Julia, an Arabic-speaking member of the ruling Union for a Popular Movement (UMP), formerly lobbied on behalf of Saddam Hussein's regime and has contacts with Syria and the former Baathist regime in Iraq, according to Agence France Presse. Julia is currently under criminal investigation for the role he played in a failed effort to free Malbrunot and Chesnot. Upon their release, Malbrunot and Chesnot told Agence France Presse that Julia's attempts at their release actually put their lives in danger. *The Guardian* reported that French officials described Aubenas' request for Julia's help as "bizarre" and said that Aubenas must have been told by her captors to ask for Julia's assistance.

On March 3, Agence France Press reported that French Prime Minister Jean-Pierre Raffarin demanded that the kidnappers communicate "only with official French services," saying it was "unacceptable" for Julia to act alone in mediating Aubenas' release. By March 29, Raffarin announced that French officials had "steady contacts" with Aubenas' Iraqi kidnappers and had received "reassuring information" about her safety. But Raffarin told Agence France Presse, "Please understand that I must keep these discussions a secret. Prudence remains the rule."

The day before Aubenas and Hanoun were released, the head of RSF, Robert Memard, told Agence France Presse that three weeks after her kidnapping, Aubenas' abductors had demanded \$15 million in ransom. But when the French foreign ministry took issue with Memard's allegation, he said he had "badly expressed himself." The French government has denied that any ransom was paid for the release of Aubenas or Hanoun.

Following Aubenas' release, *The New York Times* reported that Romanian journalist Marie Jeanne Ion told Romanian television Antena 1 that she and Aubenas had been held in the same cell. "She was telling me all the time 'of course we won't die, of course we'll get out, they won't kill us.' If she wasn't there, we would have gone crazy." Ion and two other Romanian journalists had been kidnapped on March 28, 2005, and released May 22. (See "Romanian Journalists Freed" on page 32 of this issue of the *Silha Bulletin*.)

However, Aubenas has avoided answering questions about any of the Romanians, and has denied that she was held in the same cell with them. According to the *Hamilton Spectator* (Ontario, Canada), Aubenas has hinted that her silence has to do with protecting French intelligence sources in Iraq.

—KRISTINE SMITH

SILHA RESEARCH ASSISTANT

—ELAINE HARGROVE

SILHA FELLOW AND *BULLETIN* EDITOR

"[Aubenas] was telling me all the time 'of course we won't die, of course we'll get out, they won't kill us.'"

— Romanian journalist
Marie Jeanne Ion

Endangered Journalists

Romanian Journalists Freed

Concern for the journalists' welfare became a major issue in Romania, where thousands rallied to call for their release.

Three Romanian journalists and their translator were released on May 22, 2005 after almost two months captivity in Iraq. The freed journalists are reporter Marie Jeanne Ion and cameraman Sorin Dumitru Miscoci, both from the Bucharest-based television station Prima TV, and Eduard Ovidiu Ohanesian, 37, a reporter from the daily newspaper *Romania Libera*. They were released along with their Iraqi-American guide and translator, Mohammed Monaf. According to the press freedom organization Reporters without Borders (Reporters San Frontières – RSF), Romanian presidential spokesman Adrian Saftoiu announced that the four were unharmed. *The (London) Independent* reported that the journalists' captors, a previously unknown group calling itself the Muadh ibn Jabal Brigade, stated that it had decided to free the captives after Romanian Muslims and a Saudi cleric campaigned on their behalf, although *The Irish Times* reported that the circumstances of the hostages' release "were not immediately clear." The journalists and their guide returned to Romania on May 23.

The group was seized near their hotel in Baghdad on March 28, 2005, just hours after they had finished interviewing Iraqi Interim Prime Minister Ayad Allawi. According to RSF, the journalists had arrived in Iraq only five days earlier. The Associated Press reported that Ion first telephoned the Prima TV newsroom and that she later sent a text message to the station reporting the kidnapping. RSF's report is available online at http://www.rsf.org/article.php3?id_article=13018.

On March 30, Al-Jazeera, the Qatar-based satellite television network, broadcast a video showing the hostages alive. A second video, showing the hostages handcuffed and with guns pointed at their heads, was aired by Al-Jazeera on April 22. The kidnappers threatened to kill the journalists at 2:00 p.m. on April 27 if Romania did not withdraw its 800 troops from Iraq. According to the Associated Press, the kidnappers also sent an audio tape from the hostages in which Ion appealed to Romanians to take to the streets "to save our lives and put pressure on authorities to meet the demands of the kidnappers."

The Romanian government responded by asking the kidnappers to extend the April 27 deadline. The government also asked the kidnappers to free Ion before the Orthodox Easter because Christian Orthodox Romanians consider mistreatment of women a sacrilege. Yet the government refused to comply with the group's demand, stating that Romania's foreign policy would not change as a result of the kidnapping. On May 6, the Associated Press reported that Romanian Foreign Minister Mihai Razvan Ungureanu had released a statement saying, "We will not yield to blackmail."

Concern for the journalists' welfare became a major issue in Romania, where thousands rallied to call for their release. The Associated Press reported that Romania's Islamic League and members of the Arab and Kurdish communities in Romania also demonstrated for the journalists' freedom. The Associated Press further reported that the Romanian government appealed for help from a Sunni religious group, the Muslim Ulema Council, and that on April 28, the group's leader, Harith al-Dari, called

upon the kidnappers to free the hostages. *The Independent* reported that support of the journalists by Romania's Arab and Muslim communities and the intervention of the Muslim Ulema Council served to persuade the kidnappers to release their hostages.

The journalism community, which had campaigned for the Romanians' release, expressed relief at the news of their freedom. RSF released a statement saying, "This is of course excellent news. The three journalists had been held for 55 days and we are extremely relieved to learn of their release." RSF's statement is available online at http://www.rsf.org/article.php3?id_article=13881

The release of the Romanian journalists offered fresh hope to press freedom groups that others in captivity would also soon be released. French reporter Florence Aubenas of the daily newspaper *Liberation* and her guide Hussein Hanoun Al-Saadi had been kidnapped in Iraq on Jan. 5, 2005. RSF stated, "We are also interpreting this news as an encouraging sign" for Aubenas' and Hanoun's release. RSF added, "... we must seize this moment to step up our efforts" to secure their freedom. RSF's statement is available online at http://www.rsf.org/article.php3?id_article=13881. Aubenas and Al-Saadi were subsequently released on June 12. (See "French Journalist Released," on page 31 of this issue of the *Silha Bulletin*.)

On May 27, the Associated Press reported that two men, the journalists' guide Mohammed Monaf, who had been captured with the journalists and appeared in the videotapes taken by the captors, together with his business partner, Omar Hayssam, had masterminded the kidnapping while they were in Romania. The Associated Press reported that Hayssam, a wealthy businessman, was being investigated by the Romanian authorities for tax evasion and fraud. According to the Associated Press, Hayssam "apparently hoped that 'saving' the journalists would help him get clemency," although Hayssam has denied any involvement with the kidnapping. A Romanian court issued arrest warrants for the two men on May 27. RSF stated that it was "outraged" by the news.

According to the Committee to Protect Journalists (CPJ), at least 30 journalists have been abducted in Iraq since April, 2004. CPJ reported that two of the kidnapped journalists have been killed and that 27 have been freed. CPJ's report is available online at <http://www.cpj.org/news/2005/Iraq23may05na.html>. RSF reported on May 3, 2005 that the war in Iraq is the deadliest for journalists since Vietnam. According to RSF, 56 journalists and media personnel have been killed in Iraq since combat began in March, 2003. RSF's report is available online at http://www.rsf.org/article.php3?id_article=13652.

—HOLIDAY SHAPIRO

SILHA RESEARCH ASSISTANT

Endangered Journalists

ABC News Reporter Claims He was Fired for Refusing to Travel to War Zone

Richard Gizbert, a Canadian journalist who worked for ABC News in London, has sued his former employer in a British employment tribunal, alleging that he was unfairly dismissed for refusing to accept war-zone assignments in Iraq. Gizbert's legal argument, according to *The (London) Guardian*, focuses on an alleged violation of U.K. employment law – specifically, that an assignment in Iraq would jeopardize Gizbert's health and safety, violating Section 100 of the U.K.'s Employment Rights Act. Gizbert told the *Ottawa Citizen*, “this is the first time the [health and safety] clause is used this way. That clause was written envisioning a factory floor or a locked fire door.” If Gizbert prevails, he will receive more than \$4 million in damages.

Gizbert, who joined ABC News in 1993, has reported from multiple war zones, including Bosnia, Chechnya, Somalia and Rwanda. Gizbert told *The Guardian* that, “like most war correspondents I drifted away from it. I wanted to spend more time with my kids. I'd done my bit.” Gizbert renegotiated his contract with ABC News in 2002. Under his new contract, according to the *Los Angeles Times*, Gizbert would take a salary cut and spend his time “. . . baby-sitting the London bureau – covering politics and European news – while reporters were sent on war assignments. The payoff, for him, was that he would no longer be asked to cover war.”

According to *The Guardian*, only a few months after Gizbert's new contract began, he was asked to go to Afghanistan. Gizbert refused, citing his no war-zone contract. He later refused two requests to go to Iraq.

The *Ottawa Citizen* reported, “Mr. Gizbert learned last June [2004] – a month before his [new] contract expired – that he was being replaced with a reporter who would agree to travel to war zones.”

Gizbert told the *Los Angeles Times* that there was a meeting in which ABC News' London bureau chief Marcus Wilford told him, “‘We've decided to terminate you. ABC wants to replace you with a correspondent who will travel to war zones.’ I said, ‘You're firing me because I won't go to war zones?’ ‘No,’ he said, ‘we're terminating you and replacing you with someone who will.’ And I said: ‘Isn't that the same thing?’”

The major factual dispute in the case turns on ABC's stated policy on war zone reporting and Gizbert's account of how that policy was actually used. According to Agence France Presse, ABC News is part of the News Security Group, a London-based group of broadcast news organizations, founded in 2000, that has established a set of guidelines to protect journalists in conflict zones. One of those guidelines is that ‘assignments to war zones or hostile environments must be voluntary.’ The News Security Group was founded by the BBC, Reuters, ITN, CNN, and APTN, according to Rodney Pinder, who directs the International News Safety Institute, a non-governmental organization that, like the News Security Group, is committed to the safety of journalists and media staff. After its founding, other news agencies joined the News Security Group, including CBS News, NBC News, and ABC News. According to the *Los Angeles Times*, all

organizations that are a part of the group have agreed to uphold the list of safety standards, including the voluntary war-zone policy.

Jeffrey W. Schneider, vice president of media relations at ABC News, confirmed that policy, telling the *Los Angeles Times*, “war zones are always voluntary assignments. We respect the personal decision of anybody who works for us regarding their desire to travel to a war zone.”

Gizbert, however, contends that ABC's policy was not truly voluntary. According to *The Guardian*, Gizbert maintains that he received e-mails from ABC News president David Westin describing the voluntary war zone policy, “but [Gizbert] says the reality is different. As Iraq grows more perilous . . . he says executives are ‘putting real pressure on their people to go,’ alleging ‘a climate of fear at ABC and other networks.’”

Gizbert's health and safety legal argument “. . . tests new legal waters,” according to the *Ottawa Citizen*. Gizbert told the *Citizen* that ABC asked him to choose between his two children, now aged 12 and 14, and “an assignment that means his children would be raised without a father.” According to the nonprofit Committee to Protect Journalists (CPJ), as of May 17, 2005, at least 41 journalists have died on duty in Iraq since hostilities began in March 2003. Most were killed in crossfire, but others were murdered.

Robin Allen, a specialist in employment law, told *The Guardian*, “it is unlawful in the UK to dismiss an employee for raising a *bona fide* complaint of breach of health and safety. The issue in this case will therefore turn on the extent to which this was a *bona fide* complaint and whether it was the reason for the dismissal.” Allen continued, “Placing an employee in a situation that threatens ‘real immediate jeopardy’ – and Iraq qualifies here – raises health and safety issues.”

Gizbert's hearing, originally scheduled for June 14-16, 2005, has been delayed three times thus far, according to the U.K.-based *Press Gazette*. The *Press Gazette* reported that the tribunal has now called for more time for the proceedings and for key witnesses to appear in person. The hearing is now set to last six days, double the originally planned three, and has been postponed to September 23.

Gizbert told the *Press Gazette*, “this case is not just about me. Many news organizations are having difficulty finding reporters to cover this war, especially since westerners have become targets of bombings and abductions.” He described his firing to *The Guardian* as an attempt “to send a chill across the network.” He also said that if he does not win the case, “then any news organization that wanted to get rid of someone could simply assign them to somewhere that is unacceptably dangerous. And when the journalist refuses, the organization could simply sack them, with impunity.”

–PENELOPE SHEETS
SILHA RESEARCH ASSISTANT

“It is unlawful in the UK to dismiss an employee for raising a *bona fide* complaint of breach of health and safety.

– Attorney
Robin Allen

Silha Forum Addresses Ethics of Shielding Sources

The ethical issues raised when journalists are forced to choose between serving time in jail for contempt or face the consequences of revealing the identity of a source provided the basis for a Spring Forum sponsored by the Silha Center for the Study of Media Ethics and Law, “Confidential Sources: Where Ethics and Law Collide,” on April 27, 2005, in the McNamara Alumni Center on the University of Minnesota campus.

The event, which was cosponsored by the national Society for Professional Journalists (SPJ) and the local Minnesota Pro Chapter of SPJ, featured a three-person panel discussing the ethical and legal issues reporters face when dealing with confidential sources. The panel featured David Kidwell, a reporter for *The Miami Herald* and a finalist for the 2004 Pulitzer Prize. Other panelists were Kerri Miller, the host of Minnesota Public Radio’s “Midmorning” and a former investigative journalist, and Paul Hannah, a media lawyer at Kelly & Berens who has helped to defend journalists and publishers in confidential source cases. The panel was moderated by Jane Kirtley, the Silha Professor at the University of Minnesota School of Journalism and Mass Communication and director of the Silha Center.

Kirtley began the forum by noting that journalists in the United States are largely unregulated, and there are no requirements or tests one must pass before becoming a reporter. This fact, combined with a spate of cases in which reporters have been subpoenaed to testify before grand juries recently has increased public attention to the question of who is a journalist. Congress has also entered this discussion, in the context of a proposed federal reporter’s shield law. (See “Reporter Privilege News: Federal Shield Law Introduced in 109th Congress” in the Winter 2005 issue of the *Silha Bulletin*.)

Kidwell brought a unique perspective to the panel discussion, because he served 15 days of a 70 day jail sentence in 1996 after he refused to testify about a jailhouse interview he had with John Zile, charged with murder of his seven-year-old stepdaughter. Kidwell had been writing about the developing case, but wanted to get Zile’s side of the story in the interest of balanced reporting. Because Florida law bars reporters from speaking with inmates, Kidwell concealed his identity as a reporter when he went to jail to interview Zile. During the interview, Kidwell discovered that Zile had provided a confession to a state prosecutor after he had requested a lawyer, but before he had been given the opportunity to meet with one. Kidwell subsequently reported this fact. Meanwhile, Zile’s first trial resulted in a hung jury.

During the second trial, Zile’s lawyer asked the court to suppress the evidence of the confession. Kidwell speculated he was subpoenaed to testify by the prosecutor to ensure that evidence was not excluded. Kidwell fought the subpoena unsuccessfully before the trial court and was sentenced to 70 days for contempt of court. While Kidwell was appealing the ruling, he was released from jail by a federal court judge, but not before he had served 15 days for refusing to give any information about his interview with Zile. Zile was convicted of first degree murder in 1997 and Kidwell’s sentence was reduced to time served after several years of litigation.

Kidwell said that the subpoena was nothing out of the ordinary for him at the time, adding that he had been subpoenaed about a dozen times since he has been a reporter. “Usually when you get a subpoena,” he said, “you toss it to the media lawyers and you forget about it . . . and it goes away.” That regular practice, Kidwell said, led him to take for granted his role as a reporter; he never considering the extent of his ethical responsibilities until he faced jail time in the Zile case.

Kidwell said he made an ethical decision to adhere to his promise. “It wasn’t about the law,” he said, “it was about a promise I made.” Kidwell said the promise was to his source and it meant that “I am who I say I am, I am going to be fair and impartial, and I am not going to allow myself to be used as a tool by one side or the other.” Kidwell explained that was a decision he made separate from the legal ramifications; one he was willing to back up with time in jail rather than breach the promise to his source. He described it as a profoundly personal decision, but one he made on his own. He cautioned the audience, “Don’t ever let a publisher, an editor, or a media lawyer define your ethics. You need to define your ethics now.”

In her comments, Kerri Miller emphasized the fact that as a broadcast journalist, she often faced different issues when dealing with sources than do print journalists. Although broadcast journalists use anonymous sources in their reporting, Miller said that the need for video means those sources are rarely seen on camera and consequently they do not become a focal point of the story. However, she noted that all journalists face the similar pressures. Discussing an article in the *Columbia Journalism Review* about the Judith Miller and Cooper cases by Bob Woodward, one of the journalists who helped expose the Watergate cover-up in 1972, Miller said that Woodward “didn’t think this was the kind of situation that [Judith] Miller and Cooper should go to the wall on. He did not think they should go to jail for [refusing to reveal their sources].”

Miller added that the sources themselves can also be problematic, especially in the political arena where sources often provide tips to reporters to advance their own agenda. Divisions between reporters and their editors and managers can provide additional pressure, Miller told the audience. “The real world [situation is] that most of the management does not want to pay legal fees [for reporters]. The last thing they want is a reporter to make a stand.”

Hannah agreed with Miller, saying, “There is always going to be tension – lots of tension – between the reporters, and their editors, and the managers because their interests are not the same.” He said that it was often a difficult task for courts to resolve reporter shield law questions. That task is made more difficult by the fact that the relationship between a journalist and a source is normally a very personal one, far removed from the legal world. “Ultimately, the question of whether or not a reporter decides to testify is not based on the law,” he said. “It comes down to a question of ethics.” Hannah added, “When the relationship between a reporter and a source are being established . . . there’s no lawyer

“I am who I say I am, I am going to be fair and impartial, and I am not going to allow myself to be used as a tool by one side or the other.”

– David Kidwell,
Staff Writer,
The Miami Herald

there.” Lawyers only come into the picture once the promises of confidentiality are being discussed in court, he said, typically after a source has gotten into trouble for the information provided to a journalist.

Kidwell acknowledged that, “It’s really difficult to blame Pat Fitzgerald,” the prosecutor in the Judith Miller and Cooper cases, “when four out of five reporters who have been subpoenaed in this case have somehow cut a deal to testify in this case. Every time a reporter cuts a deal, to rationalize away his promise, that hurts me [as a reporter]. The time has come to say, ‘No.’”

Making a stand, Kidwell said, ensures that the law will follow. After Kidwell had served his time in jail, the Florida Legislature passed a shield law in 1998, giving reporters a qualified privilege to refuse to divulge sources. More importantly, the experience proved to his current sources, and any sources he might have in the future, that he is willing to uphold his promises. Additionally, Kidwell pointed out that he has not been subpoenaed since he went to jail because prosecutors and other lawyers also expect him to keep his sources and their information confidential.

Kidwell urged aspiring journalists at the presentation to seriously consider the topics of the discussion and left with one final word of advice on thinking about their ethics and their sources. “One of the main problems that we have is people coming to journalism for the wrong reasons. We really, really need people who have it squared away in their head that this is an important function and without it, democracy can’t survive.”

The panel discussion was attended by approximately 90 students, faculty, and members of the local journalism and legal communities. Silha Center events are designed to stimulate research and debate on topics related to the convergence of ethical and legal principles, media accountability, the First Amendment, and freedom of information. The Silha Center was established in 1984 with a generous endowment from Otto and Helen Silha.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

Court Access, *continued from page 12*

electronic access to court records. “To promote efficiency and accountability,” the proposed amendment states, “courts should aspire to provide access to court records in electronic form.”

Carol LoCicero, a Florida attorney who has been monitoring the committee’s work and represents a media coalition that has urged the committee to make all records available at the courthouse available online, told the Reporters Committee for Freedom of the Press (RCFP) in March 2005 that broader access would greatly benefit the media. “Reporters can do their job better the more that they can gather information and data, and compare cases and prepare for hearings they’re going to cover by having the full case file at their fingertips,” she said. The RCFP article is available online at: <http://www.rcfp.org/news/2005/0331-sct-commit.html>.

The committee will be considering public comments before it makes its final recommendation and report to the Florida Supreme Court in on August 15, 2005. The Court will then consider the recommendations before writing and promulgating new rules.

Federal Courts

A Senate bill proposed on April 18, 2005, would allow electronic coverage of federal court proceedings at the discretion of the judge presiding over the case. The Sunshine in the Courtroom Act of 2005, S. 829, would allow district and federal appellate courts, including the U.S. Supreme Court, to permit “the photographing, electronic recording, broadcasting, or televising to the public of court proceedings . . .” District court judges would also be given the discretion to obscure or disguise the face and voice of witnesses at trial who request such protections.

The bill was introduced by Sen. Chuck Grassley (R-Iowa) and is co-sponsored by 10 others. In his introductory remarks on the Senate floor, Grassley said, “I believe the First Amendment requires that court proceedings be open to the public, and by extension, the news media. The sun needs to shine in on the federal courts.” He added, “There are many benefits and no substantial detrimental effects to allowing greater public access to the inner workings of our federal courts.”

According to RCFP, should the bill become law, it is still likely that the Supreme Court would resist cameras in its courtroom. Justice David Souter told a congressional committee in 1996, “I can tell you the day you see a camera come into our courtroom, it’s going to roll over my dead body.” Other justices have expressed similar feelings about allowing cameras into the Supreme Court. The RCFP article is available online at: <http://rcfp.org/news/2005/0425-bct-senate.html>.

Sen. Charles Schumer (D-N.Y.), one of the bill’s co-sponsors, introduced similar legislation with Grassley in 2001 and 2003, although neither bill received a vote in the Senate. The Sunshine in the Courtroom Act of 2005 is currently under consideration in the Senate Judiciary Committee.

—ANDREW DEUTSCH
SILHA RESEARCH ASSISTANT

TWENTIETH ANNUAL SILHA LECTURE

October 24th, 2005

7:00 p.m. - Cowles Auditorium

Hubert H. Humphrey Center

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

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

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



The Silha Lecture is free and open to the public. No reservations are required.
For further information, check the Silha website at: www.silha.umn.edu
Or contact the Silha Center at (612) 625-3421 or silha@umn.edu.

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