Minnesota Supreme Court Rules Attorney Could Qualify for Journalist’s Privilege

Justices hold hypothetical privilege would be overcome by Office of Professional Responsibility request

In September 2006 the Minnesota Supreme Court issued a ruling involving a unique mixture of professional responsibility, defamation and journalist privilege law when it determined that an attorney and judicial candidate had an obligation to cooperate with a Professional Responsibility investigation into comments he made regarding his incumbent opponent. The case is In re Charges of Unprofessional Conduct, 720 N.W.2d 807 (Minn. 2006).

The attorney, who was not named in the opinion because of confidentiality requirements of Rules on Lawyers Professional Responsibility (RLPR) 20 and 25, said that he had received a call in July 2002 from “an individual I knew to be a credible and reliable source regarding the work habits of judges on the bench” with information about his opponent’s backed up caseload. He claimed that he verified the information with “another credible and reliable source” and attempted to verify it himself but was denied access to the cases-under-advisement records at the Minnesota Supreme Court pursuant to Rule 5 of the Rules of Public Access to Records of the Judicial Branch.

Nevertheless, using the information he had received from his sources, the attorney’s campaign issued a statement on Aug. 15, 2002, saying, “The problem with my opponent’s performance as a judge is that she doesn’t show up, and she doesn’t do the work. She has one of the highest rates of absenteeism for judges in the district, and, worse, her backlog of undecided and unfinished cases is larger than all of the other district judges combined.”

An ethics complaint was subsequently filed against him alleging that in issuing the statement, the attorney had violated Minn. R. Prof. Conduct 8.2(a), which provides, “[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”

The Director of the Office of Lawyers Professional Responsibility repeatedly asked the attorney to reveal his sources during the course of the ensuing investigation, but the attorney refused. The Director eventually brought a district court action seeking an order finding that his request for disclosure of the attorney’s sources was a “reasonable request” under RLPR Rule 25(a), which states, “It shall be the duty of any lawyer who is the subject of an investigation or proceeding under these Rules to cooperate with the District Committee, the Director, or the Director’s staff, the Board, or a Panel, by complying with reasonable requests . . . .”

The District Court, as quoted in the Minnesota Supreme Court’s opinion, denied the Director’s request, noting that his request was “unreasonable and disproportionate to the complexity and gravity of the alleged ethical violation” and that the Office of Lawyers Professional Responsibility (OLPR) was focusing too heavily on the source issue, which it decided was one of many defenses presented by the attorney. It stated that, “[t]he OLPR is exaggerating the proceedings in attempting to make this something beyond what it actually is, a lawyer disciplinary action.”

The Minnesota Supreme Court overturned the District Court. Analyzing the lower court’s determination under an abuse of discretion standard, the Supreme Court majority opinion, written by Chief Justice Russell Anderson, determined that the district court erred in finding the Director’s request unreasonable. Anderson found that in order to prove that the attorney violated Minn. R. Prof. Conduct 8.2(a), “the director must prove by clear and convincing evidence that the lawyer (1) made a false statement (2) concerning the qualifications or integrity of a judge, and (3) that the lawyer either knew the statement was false or acted with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.”

Anderson noted that the rule is very similar to the United States Supreme Court holding in New York Times v. Sullivan, 376 U.S. 254 (1964), that public officials can only recover defamation damages when the statement in question was made with “‘actual malice’—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.” However, Anderson, relying on past precedents, determined that instead of the “subjective actual malice standard” used for defamation cases, the “objective standard” applies for Rule 8.2(a) because of “different societal interests underlying lawyer rules of professional conduct.” Quoting from the Minnesota Supreme Court’s opinion in In re Graham, 453 N.W.2d 313 (Minn. 1990), Anderson wrote, “Professional misconduct,
although it may directly affect an individual, is not punished for the benefit of the affected person; the wrong is against society as a whole, the preservation of a fair, impartial judicial system, and the system of justice as it has evolved for generations.”

Anderson then considered the reasonableness of the Director’s request that the attorney disclose his sources, stating, “a court evaluating the reasonableness of a Rule 25(a) request should ask whether the request isrationally related to the charges of professional misconduct or to a lawyer’s defense to those charges and whether the request is unduly burdensome in light of the gravity and complexity of the charges.” He continued, “In this case, the identities of respondent’s sources are extremely relevant--indeed, critical--to the ethical violation alleged.”

Anderson determined that it did not matter whether the objective or subjective standard should be used in this case because “[u]nder either standard, evidence that respondent had no sources, that his sources were unreliable or uninformed, or that he misrepresented the information conveyed by his sources would be critical to proof of the requisite mental state.” This high degree of relevancy made the Director’s request reasonable, according to the majority.

The opinion also noted that for policy reasons, lawyers had to comply with OLPR requests. “If courts were routinely to deny the director discovery of a lawyer’s source when a credible source is asserted as a defense to charges of a violation of Rule 8.2(a), enforcement of the rule would become extremely difficult,” he wrote.

The attorney had attempted to defend withholding his sources by claiming a First Amendment journalist’s privilege. However, the majority determined that even if such a privilege existed, which it did not decide in this case, the Director’s request would be an exception to such a privilege. Anderson began a lengthy discussion of journalist’s privilege by observing that the court first had to determine whether the attorney qualified as a “journalist” for purposes of the privilege. Quoting the Second Circuit in Von Bulow ex rel. Auer v. Von Bulow, 811 F.2d 136 (2d Cir. 1987), Anderson wrote that “[c]ourts attempting to define the scope of the class benefiting from the journalist’s privilege have interpreted the class expansively to include anyone who ‘at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation.’” He then held that the attorney could qualify for the privilege. “Given this broad interpretation of the press, respondent may be entitled to assert a First Amendment journalist’s privilege because it appears that he contemplated public dissemination of the information conveyed by his sources at the time he received it.”

But the discussion did not end there. Noting that “a majority of federal circuit courts have held that journalists have a qualified First Amendment privilege against compelled disclosure of their sources,” Anderson wrote that “the standard for overcoming the privilege varies significantly from court to court.”

The attorney had cited the Eighth Circuit’s opinion in Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972), for the proposition that a plaintiff in a libel action must first show “cognizable prejudice” before a court will compel disclosure of a journalist’s sources, with cognizable prejudice existing where the allegedly defamatory statements are “so inherently improbable that there are strong reasons to doubt the veracity of the defense informant or the accuracy of his reports” or there is evidence indicating that the defendant entertained serious doubts about the truth of his statements. Finding that the Minnesota Supreme Court has never adopted Cervantes, Anderson wrote that “[a]ssuming, without deciding, that a First Amendment journalist’s privilege exists and that respondent is entitled to assert that privilege, we conclude that the director has overcome the privilege under the Cervantes standard – the sole journalist’s privilege test urged by respondent by making a ‘concrete demonstration that the identity of [respondent’s] news sources will lead to persuasive evidence on the issue of malice.’”

Anderson also wrote that the state Supreme Court declined to “break new ground” and create a journalist’s privilege in this case because the attorney’s privilege was overcome by the Cervantes standard and because none of the parties had thoroughly briefed the matter. He commented, however, that “[o]ur decision today does not leave journalists without any protection against compelled disclosure of their sources. The Minnesota Free Flow of Information Act, Minn. Stat. §§ 595.021–025 (2004), provides a statutory privilege against compelled disclosure of a journalist’s sources.” Because the attorney did not assert the statutory privilege, the court declined to consider its application.

In his concurrence, Justice Paul Anderson wrote that although he agreed with the outcome of the case, “in a different context, I may well construe the First Amendment journalist’s privilege more broadly than does the majority.” He continued, “My need to concur is further amplified by the fact that, in light of our decision in Weinberger v. Maplewood Review, 668 N.W.2d 667 (Minn. 2003), I do not share the majority’s confidence that the Minnesota Free Flow of Information Act as construed by our court leaves journalists sufficiently protected against improper demands to compel disclosure of their sources.”

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Blogger Ordered Back to Jail for Refusal to Disclose Videotapes
Joshua Wolf approaches record time spent in jail for a journalist

On September 22, freelance journalist Joshua Wolf returned to jail after a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit denied his appeal of an order compelling him to disclose his videotape of a July 8, 2005 protest in San Francisco to a grand jury. Wolf had previously spent 30 days in prison in August 2006 after U.S. District Judge William Alsup found him in contempt of court for refusing to release unaired footage he shot at the protest. Wolf was granted bail while his appeal was pending before the Ninth Circuit, but following the denial of his appeal, the same panel which upheld the trial court’s contempt finding also granted the government’s motion to revoke bail.

Wolf shot the contested videotape at a protest in San Francisco of a Group of 8 (G-8) Summit in Scotland that ended in violence and vandalism, including one police officer who was struck in the head and the attempted burning of a police vehicle. Portions of Wolf’s video were posted on his personal Web site www.joshwolf.net, on a media collective Web site indybay.org, and on KRON-TV San Francisco, a television station that purchased segments from Wolf. Wolf’s attorney Martin Garbus told the San Francisco Chronicle that the balance of the footage does not involve any of the crimes at issue, but instead contains interviews with about 10 protesters who expected confidentiality from Wolf in exchange for removing their identity-concealing masks.

Federal investigators became involved in the case because the damaged police car was partially purchased with federal funds, which the government contends made its destruction a federal crime under 18 U.S.C. § 844(f). Wolf was precluded from citing the California state shield law because most federal courts consider state shield laws inapplicable in federal cases. (For further information on the federal shield law, see “Congress Hears More Testimony on Federal Shield Law” on page 8 of this issue of the Silha Bulletin.) However, the panel of the Ninth Circuit stated in a footnote that even the California state shield law would not provide him any protection because he is a freelance journalist and blogger, without any affiliation to a “publisher, editor, reporter, or other person connected with or employed upon a newspaper, magazine, or other periodical publication, or by a press association or wire service” as required by the applicable state constitutional provision. Cal. Const. Art I, § 2(b).

In its motion to revoke Wolf’s bail, the government contended that the coercive intent of the recalcitrant witness statute, 28 U.S.C. § 1826, required that Wolf be returned to prison following the denial of his latest appeal. The motion stated that the “[c]ontinued release of the defendant in the midst of his sentence vitiates the purpose of the recalcitrant witness statute and unjustly frustrates what six judges have deemed a good-faith and lawful investigation.” The court revoked Wolf’s bail on September 18, and he returned to prison on September 22. The full text of the government’s motion is available online at http://www.joshwolf.net/grandjury/mot-revoke.pdf.

For further background on Wolf and the court opinions affecting him, see “Court of Appeals Orders Freelance Journalist to Hand Over Videotape” in the Summer 2006 issue of the Silha Bulletin.

According to the San Francisco Chronicle, one reason Wolf refuses to turn over the tapes in question is his belief that the federal government is seeking them in order to identify individuals involved in the anarchist movement. The Silicon Valley Watcher, a blog run by a former Financial Times columnist, also questions the government’s motives, describing the justification for federal intervention as a “very shaky argument.” However, FBI spokesman Joseph Schadler refuted that contention by stressing the importance of learning the identities of the witnesses to the destruction and assault. He told the Chronicle that seeking those witnesses is “a huge difference from a fishing expedition for anarchists.”

Apart from his legal troubles, there is some good news for Wolf as the Northern California chapter of the Society for Professional Journalists (SPJ) named him, along with Mark Fainaru-Wada and Lance Williams of the San Francisco Chronicle, as a journalist of the year. A SPJ press release stated that these three merited the award for “upholding the principles of a free and independent press” and choosing to “risk jail rather than reveal confidential sources or turn over to government unpublished portions of their work.” The full text of the release is available online at http://www.spj.org/norcal/2006/2006-EIJ-press-release.pdf. Fainaru-Wada and Williams are currently being held in contempt for refusing to disclose their sources for a series of articles relating to the BALCO steroid scandal. For further information on their case, see “Court Requires BALCO Reporters to Divulge Anonymous Sources or Face Prison” on page 4 of this issue of the Silha Bulletin.

In addition to its award, the SPJ has also awarded Wolf a $30,000 grant from its national legal defense fund to pay his legal fees. This is the largest legal defense grant ever given by the SPJ.

One aspect that distinguishes Wolf’s situation from that of Fainaru-Wada and Williams is his lack of affiliation with mainstream media outlets. Fainaru-Wada and Williams both work for the San Francisco Chronicle, whereas Wolf is a freelance video blogger. Wolf disagrees with the court’s interpretation of what constitutes a journalist, he told the San Francisco Chronicle, “What is a journalist?” he asked. “There’s no journalist license. The easiest way I can see of judging a journalist is whether his peers judge him to be a journalist.”

Wolf’s opinion that, as a blogger, he is entitled to the same protection as other journalists has recently
Reporters Privilege News

Court Requires BALCO Reporters to Divulge Anonymous Sources or Face Prison; Chronicle also Faces Fines

A federal court in California has found the San Francisco Chronicle and two of its reporters in contempt of court for refusing to identify anonymous sources used to write a series of articles and a book relating to steroid use in Major League Baseball. The two reporters, Mark Fainaru-Wada and Lance Williams, have refused to identify their sources to a grand jury since June 2006, and have vowed to continue to do so despite the threat of prison.

Judge Jeffrey White, a federal district judge for the Northern District of California, found the two reporters in contempt of court and ordered them to prison on September 21. However, the two reporters will not be imprisoned until the U.S. Court of Appeals for the Ninth Circuit reviews White’s August 15 order denying the reporters’ motion to quash their subpoenas. An additional agreement stipulates that the San Francisco Chronicle will not oppose any finding that it is in contempt, and the two contempt cases have been consolidated for appeal to the Ninth Circuit. The Chronicle faces fines of up to $1000 per day for up to 18 months if the appellate panel rules against the newspaper and reporters. Neither the fines nor the prison sentence will be imposed until the appellate panel makes its ruling, expected sometime in early 2007. Final written arguments are due to the appellate court by January 12, 2007.

The two reporters were subpoenaed to testify by the United States Justice Department, which is seeking to identify the individuals who gave sealed grand jury transcripts to Fainaru-Wada and Williams which they used as a source for their articles. Although Fainaru-Wada and Williams have not committed a crime in possessing and using the grand jury transcripts for their stories, the individual who provided the transcripts to the reporters may have violated a protective order that sealed the transcripts of the grand jury proceedings for United States v. Victor Conte, CR-04-0044 (N.D. Cal.). Conte was a multi-defendant criminal case which terminated in several guilty pleas, including Bay Area Laboratory Co-Operative (BALCO) founder Victor Conte and baseball superstar Barry Bonds’ personal trainer Gary Anderson, who pled guilty to money laundering and steroid distribution. According to court records, BALCO had many prominent athletes as its clients, including Bonds and fellow baseball star Jason Giambi. (See “San Francisco Chronicle Reveals Grand Jury Testimony in BALCO Scandal” in the Fall 2004 issue of the Silha Bulletin.)

The two reporters have continued to refuse to divulge their sources. They each addressed White to explain their refusal to comply with the prosecutors, with Williams stating that if he were to divulge his sources, he “would be tossing aside everything that I believe as a journalist and a person of integrity.” Fainaru-Wada claimed that, “if I betray my sources, I cannot work any longer in investigative journalism, work that requires above all the ability to keep confidences.” The full text of Williams’ and Fainaru-Wada’s statements to the court are available online at http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/22/MNGHMLAGPV1.DTL and http://sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/09/22/MNGHMLAGQ11.DTL respectively.

Fainaru-Wada and Williams had sought protection from compelled disclosure of the sources who gave them the grand jury transcripts in a May 31 motion to quash subpoenas. In addition to their motion, the two reporters submitted affidavits supporting their position from a wide range of people, including journalist Carl Bernstein; parents of children who have committed suicide due to steroid use; former commissioner of Major League Baseball Francis (Fay) Vincent Jr.; and Mark Corallo, press secretary to former Attorney General John Ashcroft. Included in Corallo’s affidavit is his opinion that under Ashcroft, the Attorney General’s office would not have issued these subpoenas because there was no threat to national security or a public safety issue and that “compelling the reporters to testify in this instance would have an incalculable chilling effect on the press, and would be a waste of government and taxpayer resources.” Several other news organizations also filed an amicus, or friend of the court, brief on behalf of Fainaru-Wada and Williams including the Associated Press, ABC, Inc., Los Angeles Times, The New York Times Company, and The Reporters Committee for Freedom of the Press.

Corallo is not alone in recognizing that the Justice Department may not have issued these subpoenas a few years ago. The May 8, 2006 edition of The New York Sun quoted Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, stating that these subpoenas represent a “shift” towards more subpoenas for journalists that she believes is “based in part on the fact that some pretty influential federal courts have shown they’re not averse to subpoenaing the press.”

In his order denying their motion, Judge White recognized the important role the press plays in informing the citizenry but also cited the necessity of the investigatory role of grand juries and the importance of secrecy for those proceedings to be effective. White described the court as “bound by law governing this case” in ruling against the existence of a general First Amendment reporter’s privilege. In support of his ruling, White cited both Supreme Court and Ninth Circuit precedent finding that reporters cannot assert a privilege to avoid testifying to a grand jury just because the information that reporter received was in confidence.

Fainaru-Wada and Williams also asserted that a common law privilege permitted them to...
protect their sources. White’s opinion acknowledged that although many states have created a reporter’s privilege, the federal courts have been reluctant to follow suit, particularly when the reporter is asserting the privilege at a grand jury hearing. He noted that the Supreme Court’s refusal to recognize a reporter’s privilege in Branzburg v. Hayes, 408 U.S. 665 (1972) is the controlling precedent in his court until either the Supreme Court finds or Congress enacts a federal reporters’ privilege. For further information about a proposed federal privilege see “Congress Hears More Testimony on Federal Shield Law” on page 8 in this issue of the Silha Bulletin.

Finally, Judge White’s order stated that even if a common law reporter’s privilege did exist, it would be overcome by the facts of this case. He refused to engage in a balancing test weighing the harm caused by the leak against the leaked information’s value as suggested by Judge David Tatel’s concurrence in In re Grand Jury Subpoena, 397 F.3d 964 (D.C. Cir. 2005) because such a test would “place greater value on the reporting of certain news stories over others.” Instead, White found any privilege overcome because of the government’s exhaustion of all other alternatives to discover the source of the information, the testimony would not have been cumulative, and the source was important to the investigation. (See “Previously Redacted Portions of Tatel Opinion in Miller Case Released” in the Spring 2006 issue of the Silha Bulletin.)

The Justice Department’s subpoenas in this case are somewhat unusual. According to statements by Attorney General Alberto Gonzalez published in the May 21, 2006 San Francisco Chronicle, the Justice Department has only issued 14 or 15 subpoenas seeking journalists’ sources in the last 14 years. Gonzalez defended the Justice Department’s actions, stating, “We know the importance and appreciate and respect the importance of the press to do its job ... but we also can’t have a situation where someone who does a terrible crime can’t be prosecuted because of information that’s in the hands of the reporter.”

– Scott Schraut
Silha Research Assistant

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gained approval from a California appellate court. In O’Grady v. Superior Court, 139 Cal. App. 4th 1423 (Cal. App. 2006), a three judge panel of the state court of appeals ruled in favor of bloggers who had relied on the California Constitution and state common law in their refusal to turn over their web records. See “Appeals Court Finds That Bloggers Have Same Protection As Journalists, Newsgatherers” in the Summer 2006 issue of the Silha Bulletin.

According to a news.com article, Wolf is the first known blogger imprisoned for failing to cooperate with a grand jury. Wolf has already spent a significant amount of time in prison and is rapidly approaching the 168-day record for an imprisoned journalist held by Vanessa Leggett. As of Dec. 11, 2006, Wolf had spent 112 days in jail.

Despite lack of access to a computer during his confinement in federal prison, Wolf’s Web site is still regularly updated. The site, http://www.joshwolf.net/blog/, contains posts under the pseudonym “Insurgent” that Wolf’s father puts online after receiving letters from his son. The subjects of Wolf’s posts range from drawing parallels between prison regulations and airline security measures to thoughts on prisoner recidivism. Also available are updates on Wolf from his mother, methods of sending him letters or other books, and a link to send money to a PayPal account collecting donations for his legal fund.

As reported by news.com, before returning to prison Wolf told reporters that he does not want to be an “unpaid investigator for law enforcement.” He also stated in a phone interview with the San Francisco Chronicle that being in jail “is not that bad” with the worst part being unable to “go outside when I want a breath of fresh air, and not being able to listen to the kind of music I like to listen to.” Wolf could be imprisoned until the grand jury term ends in July 2007.

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Silha Research Assistant

"[B]ut we also can’t have a situation where someone who does a terrible crime can’t be prosecuted because of information that’s in the hands of the reporter.”

– Attorney General Alberto Gonzalez
Reporters Privilege News

Federal Judge Says *New York Times*’ Kristof Must Disclose Source in Civil Defamation Suit

A federal judge has upheld an order requiring *The New York Times* to disclose the identities of anonymous sources used by columnist Nicholas Kristof. On Nov. 2, 2006, U.S. District Judge for the Eastern District of Virginia Claude M. Hilton upheld U.S. Magistrate Judge Liam O’Grady’s October 2006 order requiring *The Times* to reveal the identities of two sources Kristof used in a series of columns written in 2002 about the FBI’s investigation into the 2001 anthrax mailings. Kristof and *The Times* are the defendants in a defamation civil suit, *Hatfield v. New York Times Co.*, 1:04CV807CMHLO (E.D. Va. 2006), filed by former Army scientist Steven Hatfield in 2004 alleging that Kristof’s columns implied he was the 2001 anthrax mailer that killed at least five people. Following Hilton’s ruling, *The Times* filed a motion to dismiss the suit on December 1 on grounds that Hatfield is a public figure and thus precluded from suing for defamation. *The Times* also argued that Hatfield failed to demonstrate that the newspaper published the articles with actual malice as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

Only the last of Kristof’s five columns actually identified Hatfield by name. The previous four referred to him as “Mr. Z” and a “person of interest” to the Justice Department. After the first four columns, Hatfield held a press conference acknowledging the FBI was investigating him in connection with the 2001 anthrax mailer that killed at least five people. Following Hilton’s ruling, *The Times* filed a motion to dismiss the suit on December 1 on grounds that Hatfield is a public figure and thus precluded from suing for defamation. *The Times* also argued that Hatfield failed to demonstrate that the newspaper published the articles with actual malice as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

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According to *The Washington Post*, Kristof identified three of his sources during a July 2006 deposition as those sources released him from his pledge of confidentiality, but he refused to identify two others by name. Kristof said the two remaining sources were FBI employees involved in the anthrax investigation. The full text of the *Post* article is available online at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102301039.html.

Following Kristof’s refusal, Hatfield sought an order compelling Kristof to reveal the identities of the other sources. Hatfield claims he needs to speak to the sources to determine if Kristof was accurate in his reporting. He asserts that because there are discrepancies in the recollections of the conversations between Kristof and his other previously identified sources, Hatfield must speak to the other sources as well.

*The Times* argued that the New York and Maryland reporter’s shield laws protected Kristof, but O’Grady found that Virginia law applied and provided no protection. Virginia does not have a statutory shield law, but its Supreme Court has recognized a qualified privilege in *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974). O’Grady’s order acknowledged that “[c]onfidential sources have been an important part of journalism” but he also found the information held by the confidential sources was central and relevant to the dispute. Therefore, he ordered Kristof and *The Times* to identify the sources. O’Grady’s order is available at 2006 WL 3042741 (E.D.Va. 2006.).

*The Times* appealed O’Grady’s ruling to the District Court for the Eastern District of Virginia and Judge Hilton, who promptly affirmed O’Grady’s decision. Hilton was the judge who originally dismissed the suit back in 2004. Hilton upheld O’Grady’s ruling, noting that it was “not clearly erroneous or contrary to law,” according to a Nov. 2, 2006, Associated Press article. The full text of the article is available online at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003350004.

Despite the court orders, Kristof has continued to refuse to identify his sources. Because of this refusal, O’Grady ruled on November 17 that *The Times* is prohibited from relying on information Kristof received from the two anonymous FBI agents in its defense of the suit. Therefore, while testifying on behalf of *The Times*, Kristof may not refer to his conversations with the agents as support for his columns.

Kristof has said that he will not reveal his sources because of his strong belief in the necessity of offering anonymity to them. He told *The New York Sun*, “… I care tremendously about being able to report and to offer people in government confidentiality for information, and my fear is that, in general, in recent cases there [has] been something of a shadow over our ability to do that.”

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*New York Times* reporter

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The Washington Post

Source in Civil Defamation Suit

Only the last of Kristof’s five columns actually identified Hatfield by name. The previous four referred to him as “Mr. Z” and a “person of interest” to the Justice Department. After the first four columns, Hatfield held a press conference acknowledging the FBI was investigating him in connection with the 2001 anthrax mailer that killed at least five people. Following Hilton’s ruling, *The Times* filed a motion to dismiss the suit on December 1 on grounds that Hatfield is a public figure and thus precluded from suing for defamation. *The Times* also argued that Hatfield failed to demonstrate that the newspaper published the articles with actual malice as required by *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

The only last of Kristof’s five columns actually identified Hatfield by name. The previous four referred to him as “Mr. Z” and a “person of interest” to the Justice Department. After the first four columns, Hatfield held a press conference acknowledging the FBI was investigating him in connection with the mailings but denied any wrongdoing. The parties engaged in an extensive procedural dispute after *The Times* originally won a dismissal of the case by the trial court in 2004, but the case has proceeded on its merits after the Supreme Court denied certiorari of an appellate decision which reinstated the case in March 2006. (See “Defamation Case of Anthrax Mailings Continues” in the Spring 2006 issue of the Silha Bulletin.)

According to *The Washington Post*, Kristof identified three of his sources during a July 2006 deposition as those sources released him from his pledge of confidentiality, but he refused to identify two others by name. Kristof said the two remaining sources were FBI employees involved in the anthrax investigation. The full text of the *Post* article is available online at http://www.washingtonpost.com/wp-dyn/content/article/2006/10/23/AR2006102301039.html.

Following Kristof’s refusal, Hatfield sought an order compelling Kristof to reveal the identities of the other sources. Hatfield claims he needs to speak to the sources to determine if Kristof was accurate in his reporting. He asserts that because there are discrepancies in the recollections of the conversations between Kristof and his other previously identified sources, Hatfield must speak to the other sources as well.

*The Times* argued that the New York and Maryland reporter’s shield laws protected Kristof, but O’Grady found that Virginia law applied and provided no protection. Virginia does not have a statutory shield law, but its Supreme Court has recognized a qualified privilege in *Brown v. Virginia*, 204 S.E.2d 429 (Va. 1974). O’Grady’s order acknowledged that “[c]onfidential sources have been an important part of journalism” but he also found the information held by the confidential sources was central and relevant to the dispute. Therefore, he ordered Kristof and *The Times* to identify the sources. O’Grady’s order is available at 2006 WL 3042741 (E.D.Va. 2006.).

*The Times* appealed O’Grady’s ruling to the District Court for the Eastern District of Virginia and Judge Hilton, who promptly affirmed O’Grady’s decision. Hilton was the judge who originally dismissed the suit back in 2004. Hilton upheld O’Grady’s ruling, noting that it was “not clearly erroneous or contrary to law,” according to a Nov. 2, 2006, Associated Press article. The full text of the article is available online at http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1003350004.

Despite the court orders, Kristof has continued to refuse to identify his sources. Because of this refusal, O’Grady ruled on November 17 that *The Times* is prohibited from relying on information Kristof received from the two anonymous FBI agents in its defense of the suit. Therefore, while testifying on behalf of *The Times*, Kristof may not refer to his conversations with the agents as support for his columns.

Kristof has said that he will not reveal his sources because of his strong belief in the necessity of offering anonymity to them. He told *The New York Sun*, “… I care tremendously about being able to report and to offer people in government confidentiality for information, and my fear is that, in general, in recent cases there [has] been something of a shadow over our ability to do that.” The full text of the article is available online at http://www.nysun.com/article/42811.

If Kristof continues to refuse to divulge his sources, he could be found in contempt of court which is punishable with fines or jail. However, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told *The New York Sun*, “[j]ail is possible, although in my experience that’s pretty rare in libel cases.” The full text of the article is available online at http://www.nysun.com/article/42102.

– Scott Schraut
*Silha Research Assistant*
A former federal prosecutor has demanded that the owner of the Detroit Free Press disclose the name of an anonymous source cited in a 2004 article. An attorney for former Assistant U.S. Attorney Richard Convertino subpoenaed the newspaper on July 12, 2006 as part of a civil lawsuit filed against the United States Department of Justice (Justice Department) and then-Attorney General John Ashcroft in February 2004.

The source, identified in the article as an official at the Justice Department, allegedly disclosed details of an internal investigation into allegations that Convertino withheld evidence while serving as lead prosecutor in the nation’s first terrorism trial after Sept. 11, 2001. The subpoena orders “one or more officers, directors, or managing agents, or other persons who consent to testify on behalf” of the newspaper to disclose the source’s identity. David Ashenfelter, the Free Press reporter who cited the source in a Jan. 17, 2004 article, was not named in the subpoena.

On July 13, 2006, the Associated Press reported that Convertino’s attorney Stephen Kohn told a reporter that the information revealed by the Justice Department official was intended to tarnish Convertino’s reputation and that the source should not be protected. “Propaganda designed to discredit a whistleblower deserves no protection, and, in fact, it raises ethical issues for any responsible journalist to permit a newspaper to be used by the government as an instrument to violate sacred legal protections,” Kohn said.

The subpoena is the latest development in a controversy that began with an investigation into the activities of several suspected terrorists in Detroit in September 2001. The four individuals, Karim Koubriti, Ahmed Hannan, Farouk Ali-Haimoud and Abdel Ilah-Elmardoudi, were later implicated in a terrorist plot to attack targets overseas and in Michigan. According an article published Feb. 19, 2006 in The Detroit News, the case “prompted banner headlines around the world as the first significant terrorism case after Sept. 11, 2001.”

The prosecution, lead by Convertino, resulted in the conviction of Koubriti and Ilah-Elmardoudi for terrorism-related charges in June 2003. Convertino used the testimony of an informant, Youssef Hmimssa, to strengthen the government’s case.

Shortly after the convictions, Convertino was contacted by legislative aides from the Senate Finance Committee and the office of Sen. Charles E. Grassley (R-Iowa), a vocal critic of the Justice Department and chairman of the Senate committee. Convertino was soon reassigned. According to Convertino’s February 2004 complaint, he was removed as lead prosecutor of the Detroit terrorism case on Sept. 4, 2003, a day after he told superiors of his plans to testify. On Dec. 12, 2003, the Detroit Free Press reported that Convertino’s removal drew protest from Grassley, who wrote a series of letters to Ashcroft and other Justice Department officials to voice his complaints. Accompanied by Hmimssa, Convertino nevertheless testified at a Sept. 9, 2003 committee hearing after receiving a congressional subpoena to discuss document fraud practices of terror suspects. On March 28, 2004, The Detroit News reported that Convertino had since accepted a six-month assignment with the Senate Finance Committee in January 2004, following a comprehensive and ongoing Justice Department investigation into his prosecutorial conduct.

After the details of this investigation were leaked to Ashenfelter, Convertino filed a civil lawsuit in federal district court in Washington, D.C. on Feb. 17, 2004. Convertino v. U.S. Dep’t of Justice, Civil Action No. 04-00236 (RCL) (D.D.C. filed Feb. 17, 2004). The former federal prosecutor alleged that an unnamed Justice Department official violated the federal Privacy Act, 5 U.S.C. 552 (2002), by leaking information about the internal probe to news media “that was false and/or misleading, in order to discredit Plaintiff.” The Privacy Act governs the handling and dissemination of information and exempts information contained in “personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.” 5 U.S.C. 552(b) (6) (2002). (See “Settlement Reached in Wen Ho Lee Privacy Case” in the Spring 2006 issue of the Silha Bulletin for additional information and discussion of recent litigation under the Privacy Act.)

In a response filed on March 27, 2006, the Justice Department claimed that it was “without sufficient information to admit or deny” allegations that confidential information was disclosed to Ashenfelter. The Justice Department acknowledged that the article cites “Department officials,” but denied that the article demonstrates that “any ‘officials’ knew of their actions to be unlawful.” The Justice Department has not formally responded to the subpoena. On July 13, 2006, the Associated Press reported that Kohn said the Justice Department investigated the leak, finding that none of the 30 individuals with access to the information admitted to disclosing it to the newspaper.

A Gannett spokeswoman, Tara Connell, also told the Associated Press that the company had just begun to review the subpoena and was choosing not to comment. To date, neither the Justice Department nor Gannett has responded to the subpoena. Since being filed in February 2004, the civil lawsuit

Debate centered on the proposed “Free Flow of Information Act of 2006” S. 2831, which would give federal protection to reporters seeking to protect their sources. Numerous exceptions set forth in the bill, however, would require reporters to disclose their sources when the government has attempted to gain the information elsewhere and a national security concern is at stake. Sen. Richard Lugar (R-Ind.) re-introduced a modified version of the bill in May 2006. He initially introduced it in the Senate in July 2005, and it was first introduced in the House of Representatives in February 2005 by Rep. Mike Pence (R-Ind.).

Witnesses testifying at this hearing included Deputy Attorney General Paul J. McNulty, Professor Steven D. Clymer of Cornell Law School, former Solicitor General Theodore Olson, and attorneys Victor E. Schwartz and Bruce A. Baird. Senator Patrick Leahy (D-Vt.) began the hearings by noting that it was the fourth such hearing by the Judiciary Committee. He said, “[A] minority of the majority of this Committee is still holding it [federal shield law legislation] up. I hope today that they will tell us why, and that it will be a better explanation than simply following the orders of the Bush-Cheney Administration, which opposes the bill.”

Leahy also observed, “While reporter shield legislation has been sitting dormant in this do-nothing Congress, with bipartisan support, the Administration has subpoenaed dozens of reporters.”

— Sen. Patrick Leahy (D-Vt.)

While reporter shield legislation has been sitting dormant in this do-nothing Congress, with bipartisan support, the Administration has subpoenaed dozens of reporters.

Deputy Attorney General McNulty said in his testimony that “[s]ecurity and free speech are not mutually exclusive. Or, as Justice Goldberg famously observed, the Constitution is ‘not a suicide pact.’ Kennedy v. Mendoza-Martinez, 372 U.S. 144,160 (1963).” He argued that the Department of Justice was not seeking to compel information from journalists in greater numbers than it had in the past and called the proposed federal shield legislation “a solution in search of a problem.” He also stated that the bill would hurt the fight against terrorism, saying, “The bill would work a dramatic change in current practice and severely hamper our ability to investigate and prosecute serious crimes, including acts of terrorism.”

After McNulty’s testimony, Senator Arlen Specter (R-Pa.) told him, “I disagree with you” and that “[m]y view is that it’s something that must be addressed legislatively.”

Professor Clymer, who formerly worked at the U.S. Attorney’s office in Los Angeles and continues to work part-time as a federal prosecutor, said that the proposed legislation would not encourage sources to divulge information to journalists because there are too many exceptions within the bill that would force a journalist to reveal the source or go to jail.

Ted Olson spoke in favor of the bill, saying it provides a “much-needed uniform federal standard that effectively balances confidentiality with interests favoring disclosure in some cases.” He added that state statutory and common law overwhelmingly favors a reporter’s privilege and argued that the proposed federal law would not harm national security because of its exceptions.

Victor Schwartz spoke on what he called “potential unintended consequences” of the bill. He said the Free Flow of Information Act would cripple a public official’s ability to succeed in defamation suits by making it impossible to prove the actual malice requirement imposed by New York Times v. Sullivan, 376 U.S. 254 (1964), when a reporter’s
Federal Shield Law, continued from page 8

sources can remain secret. He also argued that the bill “would create an environment where a person’s reasonable expectation of privacy could be violated without repercussion” and where people could violate the law by leaking information but not be punished for it.

But Bruce Baird argued that in his experience as both a former prosecutor and private practitioner, “the legislation being considered should not adversely affect either the prosecution or defense of criminal and regulatory cases.” He argued that “the bill does no more than codify the Department of Justice’s policy regarding issuances of subpoenas to members of the news media.”

According to the San Francisco Chronicle, Specter has said he will push for a vote in the Senate on the bill this year, but The Washington Post reported on Sept. 24, 2006 that passage of the legislation was “doubtful given powerful opposition in the House and from the Bush administration.” As the Bulletin went to press, it was unclear how the mid-term election might change the bill’s chances.

— Ashley Ewald
Silha Fellow and Bulletin Editor

Gannett, continued from page 7

against the Justice Department has been delayed by an ongoing criminal investigation into Convertino’s prosecutorial conduct that began in March 2004. As the criminal investigation continued, the first count of Convertino’s civil complaint, which alleged that the Justice Department retaliated against Convertino as an employee because of his testimony, was dismissed by District Judge Royce C. Lamberth on Oct. 19, 2005. Lamberth dismissed that count because of Convertino’s failure to seek proper administrative remedies before filing the lawsuit. According to The Detroit News, the Justice Department later requested that Lamberth delay the start of the civil suit until April 15, 2006.

According to a Department of Justice press release issued March 29, 2006, Convertino was indicted by a federal grand jury in Detroit “on charges of conspiracy, obstruction of justice and making false declarations in the 2004 terrorism trial United States v. Koubriti,” 336 F.Supp.2d 676 (E.D.Mich 2004). Both the civil and criminal suits involving Convertino are now pending in federal court.

— Christopher Gorman
Silha Research Assistant

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Louisiana state judge has ordered Josh Noel, formerly a reporter for *The (Baton Rouge) Advocate* and presently with the *Chicago Tribune*, to testify in the first-degree murder case of Sean Vincent Gillis. While employed by *The Advocate*, Noel conducted an interview with Gillis in prison during which Gillis confessed to killing eight women, including the woman for whose murder he is facing trial. East Baton Rouge District Attorney Premila Burns brought the motion to compel Noel’s testimony after issues arose concerning the admissibility of other statements Gillis gave to the police. Ed Fleshman, *The Advocate’s* attorney, contended that it was unnecessary for Noel to testify because of extensive physical evidence implicating Gillis, as well as his confessions to the police. According to a quote in *The Advocate*, Noel’s testimony is “at best some icing on the cake.” However, Fleshman’s motion was unsuccessful, as Judge Bonnie Jackson ordered that Noel must testify if called to the stand during the trial, which is expected to begin in February 2007.

Jackson’s order limits the scope of Noel’s testimony to only the information that appeared in his July 2004 article. Pursuant to prison rules, Noel did not record or take any notes during the 10-minute interview, but he included many quotes from Gillis in his article. Among those quotes is a statement from Gillis that the women he killed “were already dead to me,” and his “I don’t know” response when asked why he killed the eight women. The full text of Noel’s article is available online at http://www.crimezzz.net/serialkiller_news/GILLIS_sean_vincent.php.

Linda Lightfoot, executive editor of *The Advocate*, has said the paper will not appeal the order. She was quoted in a Reporters Committee for Freedom of the Press article stating, “I was pleased that the judge narrowed her ruling to the four corners of the article and quite frankly, when you have the case of an accused mass murderer and when the district has indicated there may be problems with the state’s confession, it did not appear to me to be the ideal case to take up on appeal.” The full text of the update is available online at http://www.rcfp.org/news/2006/0531-con-newspa.html.

—I was pleased that the judge narrowed her ruling to the four corners of the article...

—Linda Lightfoot
Executive editor
*Baton Rouge Advocate*
Newsroom Searches
Pennsylvania Supreme Court Rules Paper Does Not Have to Turn Over its Hard Drives; Demand Held “Unduly Intrusive”

On Oct. 6, 2006, the Pennsylvania Supreme Court ruled that Lancaster Newspapers, Inc., does not have to turn over two computer hard drives from its newspapers to the Pennsylvania Attorney General. The decision reverses an order by Senior Common Pleas Judge Barry Feudale and may have implications if the state government subpoenas hard drives in the future.

The government sought the hard drives as part of its investigation into whether Lancaster County Coroner Dr. G. Gary Kirchner improperly allowed reporters access to a county law-enforcement Web site. In conducting its investigation, the Pennsylvania Attorney General issued subpoenas on two separate occasions for computer hard drives owned by Lancaster Newspapers, Inc. The first subpoena was issued in February 2006, and the second in July 2006. Lancaster’s motion to quash the first subpoena contended that the subpoena was overbroad and that it violated the newspaper’s constitutional rights under the First Amendment, and its statutory rights under the federal Privacy Protection Act (42 USCS § 2000aa et. seq.) and the Pennsylvania reporter’s shield law (42 Pa. C. S. § 5942 (2005)). However, Feudale denied this motion, and the Supreme Court refused review because it was an interlocutory order not subject to appeal. (See “Pennsylvania’s Intelligence Journal’s Hard Drives Seized” in the Summer 2006 of the Silha Bulletin.)

In June 2006, Lancaster sought access to documents related to the administration of the grand jury, including the notice submitting the underlying investigation. In their motion, Lancaster contended that a statewide investigative grand jury like the one in this case was inappropriate to investigate the alleged crimes because the investigation did not involve organized crime, public corruption, conduct within more than one county, or require the specialized resources of a statewide body as required by the state law delineating the procedure for investigating grand juries, 42 Pa. C. S. § 4550 (2005). Lancaster contended it needed the submission notice to further its appeal. Feudale granted this motion, but the Attorney General’s office refused to produce the required notice and sought review of Feudale’s order from the state Supreme Court.

In July 2006, the Attorney General issued another subpoena to Lancaster seeking two more computer hard drives. Lancaster moved to quash this subpoena on the same grounds as the February 2006 subpoena, and Feudale again denied its motion. In addition to his denial, Feudale ordered Lancaster to be held in contempt of court with a $1000 per day sanction if it refused to comply with his order. Lancaster then filed an emergency application for review with the state Supreme Court, which granted its motion.

The first part of Justice Thomas Saylor’s state Supreme Court’s opinion, In re The Twenty-Fourth Statewide Investigating Grand Jury Petition of Commonwealth of Pennsylvania, 907 A.2d 505 (Pa. 2006), addressed whether the Court had jurisdiction over this matter even though the orders being appealed were not final but interlocutory. The Court found that unlike Lancaster’s previous appeal asserting the collateral order doctrine that the Court denied, refusal to comply with this second subpoena put Lancaster at risk for contempt sanctions. By risking contempt, Lancaster followed the “traditional route for challenging a grand jury subpoena,” and therefore the state Supreme Court determined that it had appellate jurisdiction.

The Court then addressed Lancaster’s contention that a statewide grand jury was improperly investigating the matter because according to 42 Pa. C. S. § 4544, a statewide investigating grand jury could not be convened except to investigate organized crime and/or public corruption, conduct occurring within more than one county, or when a county grand jury could not adequately perform the investigation. The Court rejected this claim, finding that 42 Pa. C. S. § 4548(a) allows statewide investigating grand juries to investigate potential violations of the criminal laws of Pennsylvania and that § 4544 only places limitations on the convening of a statewide grand jury in the first instance.

The Court then turned to the merits of the case and whether Lancaster should be required to turn over the two hard drives in question. In its briefs to the court, Lancaster argued that turning over the hard drives was overbroad, that there were less intrusive means available to the Attorney General, and that it was granted protection under the Constitution and federal and state law. It analogized turning over its hard drives to “a surrender of entire file cabinets of the newspaper.” The Attorney General countered by arguing that the information sought, including the internet history and cached content of the hard drives, is not protected. The Court sided with Lancaster, describing the analogy to a file cabinet as “apt.” It also found the district court’s attempt at limiting the intrusion on the newspapers by having a “narrow and limited computer forensic analysis” turned over to the judge before he released it to the Attorney General was insufficient because the examination would still be conducted by the Attorney General’s forensic unit.

The Court found the district court’s method to be unduly intrusive for Lancaster. It specifically noted that the case involves the production of material from the news media, which it said meant that there were heightened First Amendment concerns. It also said it conducted a “careful balancing of the respective interests” in making its determination that the district court’s procedure was unduly intrusive. It concluded its ruling on the merits by stating that “any direct and compelled transfer to the executive branch of a general-use media computer hardware should be pursuant to a due and proper warrant, issued upon probable cause.”

– Justice Thomas Saylor
Pa. Supreme Court
Newsroom Searches
Hewlett Packard ‘Pretexting’ Targeted Journalists

Computer and technology corporation Hewlett Packard (HP) kept the media busy throughout the fall, as news of its spying scandal broke. Executives, including its chair Patricia C. Dunn, resigned, and Dunn and four others were charged with fraud and conspiracy. In addition to spying on its own directors, employees and their family members, HP also allegedly used “pretexting” to obtain the telephone records of at least nine journalists and had plans in the works to infiltrate newsrooms with planted spies, according to numerous press reports.

Newsweek first reported the story on its Web site Sept. 5, 2006. In it, reporter David A. Kaplan wrote that in January 2006, the Web site CNET published an article about HP that included information attributed to an anonymous source. Kaplan reported that because the information could only have been known to a director, chair Patricia Dunn ordered an investigation into 10 directors’ personal telephone records.

Kaplan wrote that the results of the investigation ended in a confrontation with HP director George (Jay) Keyworth II, who admitted to leaking the information but said he would have acknowledged doing so had he been asked directly. In a meeting that followed, director Tom Perkins told Kaplan that he questioned the legality of the methods Dunn employed to find the leaker. A divided board then asked for Keyworth’s resignation, at which point Perkins announced his own resignation. Keyworth refused to resign and remained on the board until Dunn herself resigned in September.

In the four month interval, Perkins and HP fought over whether the reasons for his resignation would be publicly disclosed. Whenever a director resigns from a publicly-held company, the company must file a disclosure with the SEC documenting the reasons for the director’s resignation. HP filed a notice of Perkins’ resignation in May but did not list the reason for his resignation. According to Kaplan’s article, Perkins complained about the omission to HP twice and finally asked the SEC to force HP to disclose his reason for resigning. HP finally filed the report documenting Perkins’ resignation on Sept. 6, 2006.

Kaplan’s article also described the “questionable tactics” used to obtain the directors’ phone records, specifically the use of “pretexting.” The technique involves calling a company and representing oneself as a customer in order to get that customer’s account information. Perkins asked his phone company, AT&T, to investigate whether he had been pretexted and was informed that in January 2006, someone called and used the last four-digits of his social security number to gain access to his phone records. The pretexter was able to convince an AT&T employee to e-mail those records to a yahoo.com account.

The California Attorney General launched an investigation into HP’s actions before the Newsweek article was released. The investigation discovered that the January 2006 pretexting incidents were not the first time the company had used such tactics, and it revealed that nine journalists were also targets of the company’s investigators. Among those targeted were reporters from The New York Times, CNET, Business Week, the Associated Press and The Wall Street Journal.

In a Sept. 8, 2006 New York Times article, Times’ attorney David McCraw said, “We are deeply concerned by reports that the rights of one of our reporters were violated.” He continued, “To the extent that this is a criminal matter, we will cooperate with authorities to make sure any wrongdoing is prosecuted. To the extent it is a civil matter, we will pursue whatever legal recourse is available. We expect as an initial step that HP will make a prompt and full disclosure of what took place in regards to our reporter.”

As the scandal continued to unfold, the media reported in mid-September that detectives working for HP planted e-mail tracking software in a phony e-mail they sent to a journalist at CNET offering to reveal inside information about the company. The plan was to track the e-mail to see if the reporter would forward it to his or her source on HP’s board for confirmation. There were also reports that at least one reporter, Dawn Kawamoto of CNET, was followed.

It was also widely reported that HP’s investigation proceeded in two phases, first between January and August 2005 and again in January 2006. The phases were codenamed “Kona I” and “Kona II.” (The press has reported that Dunn has a vacation home in Kona, Hawaii.) Each phase was instigated after stories appeared in the press revealing extensive details of directors’ meetings, first regarding Carleton S. Fiorina in 2005, the company’s then-chair, and again after the CNET story was published in 2006. The company hired outside investigators to look into the leaks. However, the authorization for the investigation came from Dunn.

The investigation was reportedly overseen by HP’s senior counsel and ethics officer Kevin Hunsaker. In one e-mail exchange widely quoted in the press, Hunsaker asked HP’s manager of global operations Anthony R. Gentilucci how one of the private investigators the company had hired obtained cell and home phone records. “Is it all above board?” he asked.

Gentilucci reportedly responded that the investigator had his employees “call operators under some ruse,” and also wrote, “I think it is on the edge, but above board. We use pretext interviews on a number of investigations to extract information and/or make covert purchases of stolen property, in a sense, all undercover operations.” Hunsaker responded, “I shouldn’t have asked.....”

As details continued to emerge about the controversy, the press reported in mid-September that HP conducted feasibility studies for placing spies in clerical or janitorial positions at CNET and The Wall Street Journal offices in San Francisco. A report authored by Gentilucci was sent to Hunsaker and three others and included headings entitled, “Investigation Activity Update” with a subheading of “Covert Operations.” A separate report sent to Dunn referred to a plan involving the “placement of agent in close proximity to [a] person of interest.”

Hewlett-Packard, continued on page 13
Hewlett-Packard, continued from page 12

On Sept. 22, 2006, HP announced that Dunn was stepping down as chair. In a press release, the board of directors noted that, “[s]he served our board with distinction as chairman for the last year and a half. The board felt it was important to find the sources of the leaks of HP confidential information, and she informed the board that she had taken steps to do so. We have never questioned her intentions, her integrity or her ethics.” It went on to say the board asked her to resign due to the “distraction her presence on our board continues to create.”

Dunn also released a statement in the press release in which she denied any wrongdoing. “I accepted the responsibility to identify the sources of those leaks, but I did not propose the specific methods of the investigation. I was a full subject of the investigation myself and my phone records were examined along with others,” Dunn said. “Unfortunately, the people HP relied upon to conduct this type of investigation let me and the company down,” she continued.

On Sept. 28, 2006, HP’s general counsel, Ann Baskins, also resigned and invoked the Fifth Amendment in refusing to testify before a U.S. House of Representatives Committee on Energy and Commerce hearing. Gentilucci and Hunsaker were also subpoenaed, but also took the Fifth, along with seven other witnesses.

The same day, Dunn did testify at the hearing. In prepared remarks, Dunn said that “the clear impression I had from [HP’s contract investigator] Mr. [Ronald] DeLia was that such records could be obtained from publicly available sources in a legal and appropriate manner” and that she had no reason to believe otherwise since HP’s attorneys were overseeing the process. She added, “I still do not understand whether [pretexting] is or is not legal, as opinions vary.” She also accused Perkins of making “false statements about my having organized and conducted an elaborate spying campaign on HP directors for no good reason except, to paraphrase, a delusion of paranoia.”

Dunn and others at the hearing urged Congress to pass “bright-line laws in this area.” A bill entitled “Prevention of Fraudulent Access to Phone Records Act,” H.R. 4943, was unanimously passed by the House Energy and Commerce subcommittee in March 2006 that would make pretexting illegal. It has not yet been taken up by the full House of Representatives.

Meanwhile California Attorney General Bill Lockyer filed a criminal complaint against HP, Dunn, Hunsaker and three outside contractors on Oct. 4, 2006, charging them with four felonies under California statutes, including fraudulent wire communications, wrongful use of computer data, identity theft and conspiracy to commit those crimes.

Lockyer said that “people inside and outside HP violated privacy rights and broke state law,” but Dunn’s attorney, Jim Brosnahan, issued a statement saying “the charges are being brought against the wrong person at the wrong time and for the wrong reasons. They are the culmination of a well-financed and highly orchestrated disinformation campaign.”

Identified as victims of pretexting in the complaint are reporters Pui-Wing Tam of The Wall Street Journal and Dawn Kawamoto, Tom Krazit and Stephen Shankland of CNET News.com, along with Shankland’s father, Thomas.

In December, Lockyer and HP came to a settlement, with the company agreeing to pay $14.5 million, with $650,000 in fines, $350,000 in the state’s legal fees, and $13.5 million to create a state-run Privacy and Piracy Fund. Lockyer said he planned to meet with the journalists who were targeted to see if they would agree to allow HP to make a payment to a journalism fund in lieu of personal monetary damages.

— Ashley Ewald
Silha Fellow and Bulletin Editor

Pennsylvania Newspaper, continued from page 11

to disclose the grand jury notice of submission. The Attorney General argued that public disclosure could lead to many negative results, including jeopardizing the reputation of individuals subject to grand jury investigations and discouraging disclosure by witnesses. However, the Court agreed with the district court that the notice of submission in this case does not implicate the secrecy concerns set forth by the Attorney General.

Justice Ronald Castille filed a concurring and dissenting opinion that disagreed with the majority’s opinion on the merits of the case. Castille proposed a more deferential approach to Feudale’s rulings, finding that Feudale had not abused his discretion in ordering Lancaster to disclose the hard drives. He described Feudale’s less stringent safeguards as “perfectly reasonable,” and he concluded his opinion by criticizing the majority for interfering with Feudale’s discretion and attempting to “micromanage” the grand jury.

William DeStefano, an attorney for Lancaster Newspapers, said in a statement that the case “signals to prosecutors that asking for reporters’ hard drives is too broad.” DeStefano also noted the great risk taken by Lancaster by appealing this decision because of the $1000 a day fine that would have been imposed had it lost. An article on law.com quoted DeStefano saying that Lancaster “really went out on a limb in appealing this to the Supreme Court.”

Despite the Court’s ruling, there may still be more litigation concerning this matter. Lancasteronline.com has published a statement from George C. Werner Jr., another attorney for Lancaster, that if the notice submission reveals the investigation is limited to Lancaster County, Lancaster may again appeal on jurisdictional grounds to the Supreme Court.

— Scott Schraut
Silha Research Assistant
The “classic conflict” between the government’s legitimate interest in national security and the news media’s legitimate interest in freedom of expression is as old as the United States itself, Prof. Geoffrey Stone told an overflow audience at Cowles Auditorium for the 21st Annual Silha lecture on October 4, 2006. Author of the award-winning book, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism, Stone is currently the Harry Kalven Jr. Distinguished Service Professor of Law at the University of Chicago Law School, where he previously served as dean.

Stone defined the conflict as consisting of three components, each governed by different legal standards: 1) the civil or criminal liability of public employees who leak information to the press; 2) the potential liability of the news media for publishing classified information; and 3) the possibility that journalists could be prosecuted under espionage laws for obtaining classified information.

Citing examples ranging from the “Pentagon Papers” case in 1971 to the more recent jailing of former New York Times reporter Judith Miller and the controversy over the news media’s revelation of the classified NSA wiretap program, Stone explained that although public employees who obtain security clearances waive some of their rights to free expression and therefore can be punished for unauthorized disclosure of information, journalists do not. He contended that the government has never met the high standard of demonstrating a “clear and present danger” to justify legal action against journalists who publish leaked information, but cautioned that the Bush administration’s threat to prosecute newspapers “is unprecedented in American history, and truly dangerous because of the effort to intimidate the media into not publishing information which might in fact be of great public value.”

However, Stone conceded that prosecution of the press for endangering national security would be justified if the government could establish two things: that there was a clear and imminent danger of grave harm to national security as a result of the story, and that the disclosure was of little value to public discourse. This places a very high burden on the government, because the public’s right to know often trumps national security, and the government has traditionally over-inflated claims of national security. However, Stone suggested that reports of troop movements or imminent invasions are examples of “low value” discourse because there is little the public can do about such activities at the time they learn of them.

He also postulated that a reporter could face liability for actions involving national security under certain conditions. Stone noted that if the journalist violates generally applicable laws prohibiting bribery or threatening another person, the First Amendment would not prevent criminal prosecution. Similarly, he suggested that soliciting others to commit the crime of disclosing classified information could be a crime itself. However, Stone argued that “the act of persuading public employees to disclose information is so long and traditionally a part of the newsgathering activity,” that “the First Amendment should protect that conduct.”

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

Judge Rick Distaso, Prosecutor in The People v. Scott Peterson, Visits the School of Journalism and Mass Communication

Judge Rick Distaso of the Stanislaus County Superior Court in California visited the SJMC on November 29 as part of the “Judges in J-Schools” pilot program, launched this year in only three journalism schools in the United States. The Donald W. Reynolds National Center for the Courts and Media and the National Judicial College’s initiative allows judges with extensive experience with the news media to interact with student journalists and share their perspectives. Judge Distaso gave presentations to reporting and writing classes taught by Prof. Ken Stone, Prof. Leyla Kokmen, and Prof. Gayle Golden, as well as to Prof. Gary Schwaitzer’s ethics class. He also joined faculty and students at an informal lunch in the conference center, followed by a conversation led by Silha Prof. Jane Kirtley, who arranged the SJMC’s participation in the program. Judge Distaso fielded questions about his experiences with the print and broadcast media, both as the prosecutor in the high-profile Scott Peterson murder case, and as a sitting judge. A self-described “media junkie,” Judge Distaso raised concerns about sensational press coverage of the courts. But he also acknowledged that covering the judicial branch can be intimidating, and offered tips to young reporters on how best to obtain reliable and accurate information.

After Judge Distaso’s visit, Prof. Golden said, “After living through the frenzied media coverage of the Peterson trial, Distaso had a clear message for my students: prepare yourself with knowledge of the court system, seek help if you don’t understand something, and never forget to be kind and respectful as you report – no matter how pressing your deadline.” Prof. Schwaitzer added, “Most of my students had no experience with news coverage of courts, and most had never met a judge. It was a rare classroom opportunity to spend 75 minutes hearing from and talking with a prosecutor-turned-judge.”
**Endangered Journalists**

American Correspondent Who Faced Charges in Sudan Freed

Paul Salopek’s detention provoked widespread condemnation

A Chicago Tribune reporter who spent nearly four weeks in Sudanese custody after being arrested in the war-torn province of Darfur was released on Sept. 9, 2006. The reporter, two-time Pulitzer Award winner Paul Salopek, was scheduled to face trial on criminal charges of espionage, passing information illegally, and writing “false news.” But before Salopek’s trial could resume on September 10, New Mexico Gov. Bill Richardson traveled to Sudan and successfully negotiated the journalist’s release with Sudan’s president, Lt. Gen. Umar Hassan Ahmad al-Bashir.

According to a Chicago Tribune article published on Aug. 27, 2006, Salopek was on a scheduled leave of absence from the newspaper when arrested on August 6. While on leave, the Tribune reported, Salopek was working on a freelance assignment for National Geographic magazine. As part of the assignment, Salopek and two Chadian nationals were traveling in a sub-Saharan region of Africa known as the Sahel, close to the border between Sudan and Chad. The three men, including Salopek’s interpreter Suleiman Abakar Moussa and driver Idriss Abduraham Anu, were arrested by pro-government forces after crossing the Sudanese-Chadian border into the war-torn province of Darfur. Salopek would later write that they were traded by rebel movement forces for a large box of new uniforms.

Since February 2003, conflict has engulfed that region, making it a dangerous but important place for journalists to be reporting. The New York Times reported on Sept. 15, 2006 that armed conflict between nomadic tribes of Arabic descent and ethnic groups in the region is estimated to have killed hundreds of thousands of people. According to The Washington Post, reporters like Salopek often take advantage of Sudan’s “porous border” with Chad to cover the conflict. It was not clear whether Salopek was engaged in covering the Darfur conflict. On August 28, The New York Times reported that Salopek was the third Western journalist to be detained and charged for crossing the border in August 2006 alone. One of those journalists, Tomo Kriznar, a Slovenian filmmaker, was sentenced to two years in Sudanese prison on similar charges to those brought against Salopek.

The New York Times also reported on August 28 that Sudanese authorities held Salopek, his driver and his interpreter for more than a week without notifying officials from the United States or Salopek’s associates. After nine days, the United States Embassy in the Sudanese capital of Khartoum was notified of the arrest, and Salopek was allowed access to an attorney. According to the Chicago Tribune, the newspaper did not learn of the arrest until August 18 and chose not to report on Salopek’s detention until Sudan publicly filed charges on August 26. Editors from both the Chicago Tribune and National Geographic issued editorial statements and worked with United States and Sudanese officials for Salopek’s release.

On Aug. 28, 2006, the Chicago Tribune reported that Salopek had expressed regret for “crossing into Sudan’s Darfur region without official permission” to individuals who were allowed contact with Salopek during his detention. The following day, the newspaper reported that Salopek, his editors and other supporters “forcefully” denied the espionage charges.

International press coalitions, U.S. State Department officials and a number of elected officials from around the world condemned Sudan’s detention of Salopek and his colleagues. Reporters sans Frontieres (RSF or Reporters without Borders), a Paris-based group that monitors international treatment of the press, denounced the arrest in an August 28 press release. “Salopek and his assistants are media workers who were acting in strict accordance with the rules of their profession. They should be freed at once,” the press release stated, describing the arrest as “ridiculous and disgraceful.”

Sen. Barack Obama (D-Ill.), who was traveling on a fact-finding trip throughout Africa at the time of Salopek’s arrest, issued a statement saying: “This is unacceptable and I expect the U.S. government to take this with the utmost seriousness.” Obama intended to visit Sudan as well, according to the August 29 article published in the Chicago Tribune, but was denied a visa to enter the country by the Sudanese government. On Aug. 28, 2006, National Geographic Online reported that a congressional delegation headed by Rep. Christopher Shays (R-Conn.) had visited Salopek in prison. Assistant Secretary of State Jendayi Frazer, who was in Darfur during Salopek’s detention, raised the issue with Sudan’s foreign minister.

But it was not until Richardson traveled to Sudan with Salopek’s wife, New Mexico resident Linda Lynch, and editors from the Chicago Tribune and National Geographic that al-Bashir agreed to release the reporter, his driver and interpreter. Lynch and Chicago Tribune Editor-in-Chief Ann Marie Lipinski first contacted Richardson’s office in late August. Richardson, who the Albuquerque Journal described as a “frequent diplomatic troubleshooter,” flew to Sudan on September 7 to negotiate directly with al-Bashir for the reporter’s

*Chicago Tribune Reporter*, continued on page 18
Endangered Journalists
Famed Russian Reporter Murdered in Contract Killing

Hailed by newspapers internationally as Russia’s “most famous” and “courageous” investigative reporter, Anna Politkovskaya was shot and killed in the lobby of her Moscow apartment building on Oct. 7, 2006. Politkovskaya, who worked for the Moscow-based newspaper Novaya Gazeta, was known for her reporting on human rights abuses in Chechnya and Russian policy towards the region. The circumstances of her death have led many to speculate that the killing may have been in retaliation for her often outspoken criticism of government officials and policies targeted at Chechnya.

The New York Times reported that Politkovskaya was found dead in the elevator of her apartment building Saturday, October 7. The Washington Post Foreign Service reported that the reporter had been shot in the head and chest and that a pistol and spent bullet casings were found on the floor at her feet. After viewing a surveillance camera outside the building, Russian police identified the suspect as “a young man who was wearing dark clothes and a baseball cap.”

The Washington Post Foreign Service characterized the shooting as an “apparent contract killing,” the killer having left the murder weapon at the feet of the victim as an assassin’s mark. The Australian, a Sydney-based newspaper, also reported that the murder was typical of contract killings in the region. “This is a professional murder,” Vitaly Yaroshevsky, the deputy editor of Novaya Gazeta told The Australian. “We have little doubt that she was killed because of her work. Her reporting made her many enemies. For us her death is a catastrophe.”

On October 10, The New York Times reported that Russian president Vladimir V. Putin, a frequent target of Politkovskaya’s reporting, condemned the killings, suggesting that her death might have been ordered by political exiles from Chechnya to disparage Russia’s international reputation. “The murder has done more damage to Russia – and the current authorities of Russia and Chechnya which she has been covering lately in her work – than Politkovskaya’s articles,” Putin said. The remarks, however, were made two days after the Kremlin held a government meeting that typically results in official statements on any number of domestic issues. The Washington Post Foreign Service reported on October 9.

Russia’s top law enforcement official, Prosecutor General Yuri Chaika, has been assigned to lead the investigation into the reporter’s death. According to The Washington Post Foreign Service, a spokeswoman for Chaika said that the “investigation will focus on possible links between the killing and Politkovskaya’s work.” Nevertheless, individuals in Russia and abroad have expressed concerns over the government’s handling of the fatal shooting and increasing threats to journalists in the region.

Nevertheless, Putin’s failure to comment on the murder until three days had passed and a slow-moving government investigation into the slaying drew international criticism from government officials and advocacy groups concerned about increasing obstacles to a free press in Russia.

According to the New York-based Committee to Protect journalists, Politkovskaya was the thirteenth journalist killed in Russia since Putin took office over six years ago. And, like many others, the reporter was executed in a “contract-style” killing that remains unsolved. The increasing risk faced by reporters, brought to light by Politkovskaya’s death, comes at a time when Russia has increasing and methodically “wrested control over Russia’s national television networks and national newspapers,” earning the nation an international reputation for its antagonism of the press, the Chicago Tribune reported on October 23.

The World Press Freedom Committee (WPFC), an international organization that coordinates the efforts of 45 journalistic groups that work towards the defense and promotion of press freedom, called on the Russian president to ensure a complete and thorough investigation into Politkovskaya’s murder in a letter sent to Putin on October 10. “This killing raises dramatically the issues of the future of press freedom and of the impunity of the assassins of journalists in your country,” the organization’s chairman, Richard N. Winfield, and executive director, E. Markham Bench, wrote. “Russia’s reputation as a country of law where justice is both done and seen to be done hinges on the action of the state authorities in this case.” In addition to working with the WPFC, Winfield serves on the Silha Center’s advisory board.

On Oct. 19, 2006, after more than a week had passed without an arrest in the shooting of Politkovskaya, U.S. Reps. Adam Schiff (D-Calif.) and Mike Pence (R-Ind.), Co-Chairs of the Congressional Caucus for Freedom of the Press, urged Putin to “undertake all efforts to ensure the safety of journalists in [Russia].”

“Ms. Politkovskaya’s slaying highlights what we see as a growing trend in Russia – unsolved murders of journalists who are critical of the government,” a letter from the congressional caucus to Putin read. “Ms. Politkovskaya was the thirteenth Russian journalist killed during your tenure as president. None of the twelve previous murder cases has been solved and this is of grave concern to us.” A copy of the letter is available online at http://schiff.house.gov/HoR/CA29/Newsroom/Press+Releases/2006/Schiff+Pence+Call+On+Russian+President+to+Halt+Persecution+of+Journalists+and+Fulfill+Promise+to+Inv.htm.

Other international advocacy groups also voiced their concerns in the wake of Politkovskaya’s death. According to the Guardian Unlimited, the press freedom watchdog Reporters Sans Frontiers (Reporters Without Borders) even urged President Jacques Chirac of France to revoke an award, the Grand Cross of the Legion of Honor, given to Putin during his visit to France in September 2006.

—Christopher Gorman
Silha Research Assistant
Endangered Journalists
Russia’s Supreme Court Overturns Acquittals in Klebnikov Case

One month after Russian reporter Anna Politkovskaya was gunned down as she entered her Moscow apartment building, the Supreme Court of the Russian Federation overturned the acquittal of two defendants accused of murdering U.S. journalist Paul Klebnikov. The court also overturned the acquittal of a third man who was linked to the July 9, 2004 slaying, ordering that all three men be retried.

Like Politkovskaya, Klebnikov was killed in what the Committee to Protect Journalists described as a “gangland-style” assassination. Klebnikov, who was appointed as editor of Forbes Russia in February 2004, was shot four times by two gunmen as he stood outside his Moscow office on July 9, 2004. Klebnikov died after being taken by ambulance to a local hospital. After the killing, Russian Prosecutor General Vladimir Ustinov headed the investigation into Klebnikov’s death, though U.S. embassy officials acknowledged that U.S. officials were also involved in the investigation.

The initial investigation proved unfruitful, and speculation about the identities of the killers and the motive behind the contract killing prompted prosecutors and the public to consider a number of different theories. (See “Paul Klebnikov Murdered in Moscow” in the Summer 2004 issue of the Silha Bulletin.) In February 2006, the Los Angeles Times reported that throughout the investigation, sources had come forward, “hinting at the array of stories on which Klebnikov was amassing material — including corruption in the automotive industry, money laundering, links between politics and big money, and the disappearance of millions of dollars in Chechnya,” in attempts to explain the killing. The article is available online at http://www.latimes.com/news/nationworld/world/la-fg-klebnikov14feb14,0,7793353.story?coll=la-headlines-world.

On Nov. 19, 2004, the BBC Monitoring Service reported that Russian police officials had arrested Chechen Musa Vakhayev in connection with the murder. According to the BBC Monitoring Service, representatives of the Russian Prosecutor General’s Office refrained from commenting on the arrest. However, RIA Novosti, the state-run news service, had earlier confirmed that sources “close to the investigation” linked the killing to Klebnikov’s book, Conversation with a Barbarian. On Oct. 1, 2004, the news service reported that Klebnikov’s depiction of Chechen warlord Khozh-Ahkmed Nukhayev “infuriated” the warlord, who is believed to have ordered the assassination.

By June 3, 2005, the Prosecutor General’s Office had arrested two other men, Kazbek Dukuzov and Fail Sadreddinov (news agencies have also reported his name as “Faik Sadreddinov”) in connection with the killing. On Nov. 21, 2005, Interfax News Agency, a Russian news service, reported that the Prosecutor General’s Office had filed criminal charges against the three men. A press release on the office’s website read: “The investigation has established that members of an organized criminal group, which included Chechen Kazbek Dukuzov, his brother Magomed Dukuzov, Musa Vakhayev, Magomed Edilsultanov and others, stood behind the murder.”

On Jan. 11, 2006, the trial of Dukuzov and Vakhayev began in Moscow City Court. At the time, Sadreddinov’s trial was already in progress. After four months of closed hearings, on May 5, 2006, a jury acquitted Dukuzov and Vakhayev, finding that the prosecutors had not proven that the two men acted as gunmen in the July 2004 murder. That same day, Sadreddinov was also acquitted of the charges stemming from his alleged involvement in Klebnikov’s assassination.

Prosecutors appealed the case to the Russian Supreme Court, alleging that the Moscow City Court proceedings violated the Criminal Code of Russia. The Klebnikov family also intended to lodge an appeal, but claim Moscow City Court officials had effectively blocked the family’s attempts to obtain a transcript of the trial proceeding. In an article published on The Committee to Protect Journalists (CPJ) Web site on Nov. 9, 2006, the organization reported that the Klebnikovs filed a request for the transcript in May 2006 but were denied access until September. Russia’s Law of Criminal Procedure, according to the Web site, requires that access to the transcript be given to plaintiffs within three days.

In the months after the lower court acquitted the three men, Ann Cooper, CPJ’s executive director, urged President George W. Bush to discuss the Klebnikov case with Russian President Vladimir Putin. In a letter dated June 28, 2006, Cooper described the procedural violations which led to the acquittal. In addition to holding the trial out of the public view and imposing a gag ordered on all trial participants, Cooper wrote, “Judge Vladimir Usov and other court officials did not stop the defendants or some defense representatives from making threatening statements in court that could have affected the jury, a CPJ source said.”

Cooper also pointed to “compelling evidence” against the two alleged gunmen, much of which was discovered by Richard Behar, an investigative journalist who directs a global media alliance that is investigating the killing called Project Klebnikov. The organization’s Web site can be found online at http://www.projectklebnikov.org. The evidence includes mobile phone records that suggest that the defendants engaged in surveillance of Klebnikov for two weeks before the murder, fingerprints found in the car believed to have been used in the drive-by shooting, and the testimony of an acquaintance who heard the defendants make incriminating statements.

“The secretive nature and questionable conduct of the trial have led to confusion and bewilderment, a result that ill serves the Klebnikovs and the public,” Cooper wrote. “We ask you to engage President Putin on this matter.”

Cooper wrote. “We ask you to engage President Putin on this matter.”

Klebnikov, continued on page 18

American journalist Paul Klebnikov was killed in 2004 in a “gangland-style” assassination.
Klebnikov, continued from page 17

Putin in a dialogue that would result in an open and impartial proceeding that would demonstrate Russia’s commitment to reversing its record of impunity.”

On Nov. 9, 2006, the Russian Supreme Court overturned the acquittals of all three defendants. In a press release issued that day, Klebnikov’s widow, Musa, and other members of the family praised the ruling. “The high court’s willingness to review and rectify the many errors of the trial shows that Russia’s legal system has the ability to monitor itself,” the statement said. “For our family, it means that despite all the delays, we may yet see justice served.

Media organizations, including the CPJ and Reporters Sans Frontieres (Reporters Without Borders) welcomed the ruling. “The Klebnikov case always seemed more complex to us than the theory advanced by the prosecutor,” Reporters Without Borders said in an Oct. 9, 2006 press release. “We demand that a new investigation be initiated that will follow up all likely leads, so that some light can be shed on the identity of the perpetrators and those who hired them to commit this crime.” The statement is available online at http://www.rsf.org/article.php3?id_article_17592.

Igor Korotkov, a lawyer for Dukozov, told the Russian news agency Interfax on November 9 that the defendants maintain their claim of innocence. “We do not doubt an eventual acquittal,” he told reporters.

The case is to be retried in Moscow City Court in the coming months.

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

Chicago Tribune Reporter, continued from page 15

release. He was previously involved in negotiating the release of U.S. citizens around the world, including American hostages held in Iraq, North Korea and Cuba while serving as an ambassador to the United Nations and as a member of Congress.

On September 9, The Washington Post reported that Richardson was invited to Sudan to discuss Salopek’s detention because of a “long relationship” with al-Bashir and Sudan’s ambassador to the United States, Khidir Haroun Ahmed. That relationship began in 1996 when Richardson, while serving as a congressman from New Mexico, negotiated the release of a New Mexico pilot and workers from Red Cross from Sudanese captors. At the time, Ahmed served as Richardson’s translator in meetings with al-Bashir.

According to the Albuquerque Journal, Richardson later thanked the Sudanese president for releasing the journalists on humanitarian grounds. “I emphasized to the president that releasing these men was the right thing to do because Paul Salopek is not a spy, he is my constituent and a respected journalist who was attempting to do his job telling the story of the people, culture and history of the sub-Saharan region,” Richardson said.

On Oct. 9, 2006, Salopek published his account of the 34 days he spent in a Sudanese Jail in the Chicago Tribune. “It was hard not to feel...that our real crime was unspoken: reporting on a humanitarian catastrophe that is largely invisible to the outside world, and that is poised to grow worse in the weeks ahead,” he wrote.

“Worldwide pressure form the journalistic community, in particular our tireless colleagues at the Chicago Tribune and National Geographic gave us heart. So did letters of support from public figures as diverse as Bono and former President Jimmy Carter,” Salopek continued. “Yet for the hapless people of Darfur, there appears to be no such happy ending.” The article is available online at http://www.chicagotribune.com/news/nationworld/chi-061008darfur-story,1,1931925.story?coll=chi-news-hed&ctrack=1&cset=true.

– CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT
Endangered Journalists

US Press Freedom Rating Drops

According to the 2006 Worldwide Press Freedom Index rating, produced by Reporters Sans Frontieres (Reporters Without Borders or RSF), overall press freedom in the United States has declined in the past year. The United States rated number 17 when the first Worldwide Press Freedom Index report was published in 2002. By 2005, the U.S. had dropped to 44. This year, the United States ranks 53.

The index was created using responses from journalists, researchers and legal experts in the nations being evaluated. Researchers from RSF asked 50 questions about press freedom violations, including murders or arrests of journalists, censorship, pressure, state monopolies, punishment of press law offenses, and media regulation. One hundred sixty eight countries were surveyed, but only 139 were included in the final 2006 index. The responses from the 29 countries that were excluded contained unreliable information, according to the report on the index at the RSF website.


The report also stated that “relations between the media and the Bush administration sharply deteriorated after the president used the pretext of ‘national security’ to regard as suspicious any journalist who questioned his ‘war on terrorism.’” Also cited by the report was “the zeal of federal courts which, unlike those in 33 U.S. states, refuse to recognize the media’s right not to reveal its sources, [and] even threatens journalists whose investigations have no connection at all with terrorism.” The federal move toward mandating the disclosure of confidential sources has inspired widespread discussion of a shield law for journalists in the United States (See “Congress Hears More Testimony on Federal Shield Law” on page 8 of this issue of the Silha Bulletin for more information on the federal legislation’s progress).

Canada, which is currently ranked at number 21, also slipped a few places on list due to government challenges to the confidentiality of journalistic sources.

Denmark also suffered a serious drop in status, from sharing first place with a few other European nations in 2004, to being ranked 19 in 2005 due to the international controversy over the publication of cartoons depicting the prophet Mohammed in the Danish newspaper Jyllands-Posten (see “Danish Lawsuit over Mohammed Cartoons Settled” on page 28 in this issue of the Silha Bulletin) near the end of 2005. The publication of the political cartoons and their subsequent publication in Islamic nations by a group of Muslim clerics sparked rioting and protests around the world in early 2006 (See “Controversial Cartoons Lead to Worldwide Concern For Speech, Press Freedom, and Religious Values“ in the Winter 2006 issue of the Silha Bulletin.) The recent settlement of a defamation lawsuit in favor of Jyllands-Posten may turn the tide for Denmark. The paper was sued by a group of Muslim clerics after it refused to apologize for the publication of the cartoons, but the Danish government refused to take punitive action against the paper.

—SARA CANNON
SILHA CENTER STAFF

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Endangered Journalists
Worldwide Media Killings Reach a Record Level

The number of journalists killed in 2006 while working in war-torn regions of the world reached a record high in September, leading the World Association of Newspapers (WAN) to declare 2006 the deadliest year for journalists since the organization began keeping records in 1997. Journalists were killed in more than 20 countries according to an article published on Oct. 5, 2006 by Africa News.

WAN’s CEO, Timothy Balding, spoke specifically of the dangers journalists face when reporting from Iraq and other conflicts in the region. “Journalists in Iraq are not only facing the danger that comes with working in a war zone, they are being hunted down and assassinated simply because they are suspected of cooperating with western news agencies, because of their religious or political affiliation, or because their murderers believe that killing journalists will advance their aims,” Balding said. The announcement was issued by the Paris-based organization on Oct. 5, 2006 and is available at http://www.wan-press.org/rubrique.php2?id_rubrique=706.

According to Africa News, several international organizations record the number of journalists killed each year, but records may vary because of the criteria used by different organizations. WAN includes the deaths of media workers killed in the line of duty or specifically targeted because of their association with media organizations.

In the months before the October 2006 announcement, a number of attacks involving journalists, in Iraq and elsewhere, received national and international attention.

Sudanese Editor Decapitated by Masked Gunmen

The chief editor of a Sudanese daily, Mohammed Taha Mohammed Ahmed, was abducted from his home by masked gunmen. On Sept. 6, 2006, the Associated Press later reported that police officials in Khartoum, Sudan discovered Ahmed’s decapitated body the day after his abduction. On Sept. 8, 2006, Reuters reported that Ahmed’s killers had not claimed responsibility or offered a motive for the murder, prompting Director General of the United Nations Educational Scientific and Cultural Organization (UNESCO) Koichiro Matsuura to call on Sudanese officials to “do all they can to ensure that Mr. Mohammed Taha’s killers are brought to trial.”

Matsuura said in a press release published by UNESCO on Sept. 11, 2006 that “[f]reedom of expression is not only a fundamental right but also a pre-requisite for effective democracy and rule of law.”

Ahmed had drawn protests from Islamic groups in May 2005 for publishing articles that questioned the origin of the Prophet Mohammed in Al-Wifaq, a privately-owned daily. According to the Associated Press, the newspaper was later fined by the Sudanese government and Ahmed apologized for insulting Islamic followers. The Associated Press also reported that “Sudanese were shocked by the gruesome crime, the first of its kind [in Sudan],” and that some commentators, including Diaa Rashwan, an expert on Islamic groups, linked the crime to similar killings by al-Qaeda in the Middle East.

Two Journalists Killed in Iraq in Separate Attacks

Safa Isma’il, a freelance photographer for several Iraqi newspapers, and Hadi Anawi al-Joubouri, a journalist and representative of the Iraqi Journalist Syndicate in the province of Divala, were killed over the course of two days in Iraq. The Committee to Protect Journalists (CPJ), based in New York, condemned the killings on Sept. 14, 2006.

According to the CPJ, Iraq’s Journalistic Freedoms Observatory (JFO) reported that Enad was shot in a photo print shop by two gunmen before being dragged to his car and transported to the east of Baghdad. The gunmen reportedly entered the shop and asked for Enad by name before killing him; police were unable to establish the gunmen’s motive for killing Enad.

JFO reported that al-Joubouri was killed in a region north of Baghdad while en route to the city of Khalis, Iraq. His body was found in his car, which had been riddled with bullets. The CPJ continues to investigate al-Joubouri’s death. “We are outraged by the senseless murder of Safa Isma’il Enad and Hadi Anawi al-Joubouri,’” CPJ Executive Director Joel Simon told The Guardian Unlimited on Sept. 14, 2006. “Journalists continue to be targeted simply because they report the news in Iraq and their murderers have gone unpunished.” The article is available online at http://www.guardian.co.uk/Iraq/Story/0,,1872335,00.html.

According to the BBC monitoring service of international reports, “murder accounts for 64 per cent of work-related deaths among journalists and media support workers in Iraq, with cross-fire and combat-related deaths accounting for the rest. The article, published on Sept. 14, 2006, also reported that the Iraq conflict is the deadliest conflict for journalists in the 25 year history of the CPJ.

Deadliest Attack in Iraq Conflict Kills Nine Staffers

On Oct. 13, 2006, masked gunmen arrived at the studios of Baghdad’s newest television station, Shaabiyat Satellite TV, before the workday had begun. That same day, USA TODAY reported that the masked gunmen forcibly entered the studios and executed seven journalists and two security guards. USA TODAY reported that the killing “was the single deadliest attack on the media since the start of the war,” a conflict that has killed 118 journalists according to the newspaper.

On October 13, USA TODAY reported that the killings at the television station, which is owned by the Justice and Democratic Progress Party, may have been prompted by political sentiment. The television station had not yet aired any programming and failed to win any seats in Iraqi parliament during the December 2005 elections.

“The channel represented all sides in the Iraqi spectrum. We have Sunnis and Shites and Christians and Kurds. One of the victims was Egyptian,” Ammar Karim, an Iraqi reporter working for Agence France-Presse, told USA TODAY. “We are in a dilemma. If you are Sunni, this is a problem. If you are Shiite, it’s also a problem. Christians are another problem. We don’t know what to do.”

— Chris Gorman
Silja Research Assistant

2006 was the deadliest year for journalists on record.
Endangered Journalists
Chinese Journalists Battle Censorship, Yahoo!
Zhao receives lighter sentence; Shi plans to sue Yahoo! for assisting
Chinese authorities using Alien Tort Claims Act

One Chinese journalist accused of leaking state secrets to the foreign press has received a lighter sentence than expected, while another has announced plans to sue Yahoo! for turning him in to authorities.

Zhao Yan, a researcher for The New York Times, was jailed in September 2004 for providing information about former president Jiang Zemin stepping down as Chairman of the Central Military Commission to the Times. The story appeared 12 days before the official announcement. (See “Endangered Journalists: Journalists in China” in the Fall 2004 issue of the Silha Bulletin.)

The charge of revealing state secrets carries a 10 year prison sentence in China. However, those charges were dropped in March 2006, and Zhao was instead convicted of fraud and sentenced to three years in prison after standing trial last June. On December 1, a Beijing appeals court upheld the conviction.

Xinhua News Agency reported that the court convicted Zhao of taking $2,500 from a man on the false promise that he would use official connections to have the man’s 18 month labor camp sentence rescinded. Zhao denies the charges.

According to Jerome Cohen, an American expert on Chinese law and adviser to The Times, the fraud charges were added in order to justify holding Zhao for almost two years while they investigated him.

“Now conviction on the fraud charge helps to ‘save face’ for the law enforcement agencies,” Cohen told the Associated Press in a story on August 25.

Times’ executive editor Bill Keller said the verdict was “vindication.” Keller told the AP, “We have always said that to the best of our knowledge, the only thing Zhao Yan committed is journalism.”

A Beijing judge upheld Zhao’s conviction on appeal on December 1, but his lawyers criticized the proceedings.

“Zhao Yan wasn’t given the opportunity to testify in court. He was not allowed to call witnesses or present certain evidence. They sustained the verdict without having another trial,” attorney Guan Anping told The New York Times.

During the two years Zhao has already served he has not been permitted to see his family, and his lawyers say his health has worsened. The sentence is scheduled to end in September 2007.

Meanwhile, another journalist who is already serving a ten-year sentence for sharing state secrets plans to sue the American company that helped authorities track him down.

Shi Tao, an editor with Dandai Shang Bao (Contemporary Business News) was convicted on April 30, 2005 of sending an internal message warning government officials about unrest during the 15 year anniversary of the Tiananmen Square Massacre to colleagues at an online news service in New York.

The text of the verdict revealed that Yahoo! Holdings (Hong Kong) Ltd. assisted authorities in tracking Shi down. (See “Endangered Journalists: Yahoo! Assists China in Arresting Journalists” in the Fall 2005 issue of the Silha Bulletin.)

Shi’s lawyer Albert Ho, who is also a legislator in Hong Kong, told IDG News Service that a U.S. civil suit would likely be filed in New York or California in the coming months. Ho said that other Chinese individuals who were identified for Chinese authorities by U.S. companies might join a class-action suit, which would be filed under the Alien Tort Claims Act of 1789, a law that enables non-U.S. citizens to file suit here.

Ho has already filed a complaint on Shi’s behalf with Hong Kong authorities, launching an investigation into whether Yahoo!’s Hong Kong-based holdings could be subject to fines, a civil lawsuit or both for revealing personal information.

Yahoo! contends that the information which identified Shi came from its separate operation in mainland China which is compelled to assist the government when asked. However, Ho says Yahoo!’s Chinese and Hong Kong operations were both part of the same corporate entity, Yahoo! Hong Kong, at the time Chinese authorities were investigating Shi.

Cases like Shi’s and Zhao’s have caught the attention of U.S. lawmakers. In February 2006, a congressional hearing was held criticizing U.S. companies including Yahoo!, Microsoft, Google and Cisco, for censoring online search results in China and turning over to authorities Chinese “netizens” who voice opposition to the Chinese government and its agencies.

One day after the hearing, the “Global Online Freedom Act of 2006 (GOFA)” H.R. 4780, was proposed. If passed, the law would prohibit any cooperation between U.S.-based companies and “Internet-restricting countries,” which would be designated by the President. The bill, currently under review by the House International Relations Committee and the House Energy and Commerce Committee, received support from international human rights organizations and the European Union. (See “Internet Updates: Global Online Freedom Act” in the Summer 2006 issue of the Silha Bulletin.)

“We have always said that to the best of our knowledge, the only thing Zhao Yan committed is journalism.”

– Bill Keller
Executive Editor
The New York Times

– Patrick File
Silha Research Assistant
Media Ethics

Miami Journalists' Ethics Questioned for Appearing on Government Funded Programs

Several fired for appearances on Radio and TV Marti, later reinstated

Two Miami journalists were fired in September for accepting payment to appear on U.S. government-funded anti-Castro radio and TV programs, raising conflict of interest questions.

According to a September 8 article in The Miami Herald, at least 10 South Florida journalists received regular pay for appearances on Radio Marti and TV Marti, Spanish-language stations run by the U.S. Office of Cuba Broadcasting.

Two reporters and one freelance writer for El Nuevo Herald were dismissed on September 7 after their editors were questioned by reporters from The Miami Herald about the journalists’ relationships with Radio and TV Marti. El Nuevo Herald is a Spanish-language daily published by Miami Herald Media Co., the corporate parent of The Miami Herald. According to the September 8 article, reporter and columnist Pablo Alfonso, freelance Cuban culture writer Olga Connor, and staff reporter Wilfredo Cancio Isla received a combined $261,000 in appearance fees over the last five years.

In a front-page letter to Miami Herald readers published on Sunday, September 17, Jesus Diaz Jr., president of the Miami Herald Media Co. and publisher of both papers, called the decision to fire the journalists “painful.” “I approved the dismissals because, as the publisher of these newspapers, I am deeply committed to the separation between government and a free press. Further, our employees violated our conflict-of-interest rules,” Diaz said.

The controversy widened when a further investigation by El Nuevo Herald found that six other employees had received payments since 2001 in amounts ranging from $125 to $3,350 per employee, according to an October 3 letter from Diaz to Miami Herald readers. Only one of these six was still working for Radio and TV Marti when the investigation was launched. None were disciplined. Alfonso and Isla, the previously fired reporters, were also offered their jobs back, according to Diaz’s October 3 letter.

El Nuevo Herald originally reported that the fired reporters had not discussed payments from Radio and TV Marti with their bosses. After evidence that more reporters had taken payments was uncovered, however, Diaz blamed an ethics policy that was “ambiguously communicated, inconsistently applied and widely misunderstood over many years.” Of the eight reporters discovered to have taken payments, six said that they had informed previous editors of the arrangement with Radio and TV Marti, though not all said they had discussed being paid for their appearances.

Diaz announced his resignation in the October 3 letter. He said the events had created an environment that prevented him from leading “…in a manner most beneficial for our newspapers, our readers and our community.”

The controversy in Florida raises ethical questions for other reporters across the country who are paid to participate in government-sponsored programming, according to a September 12 article in The New York Sun. Both The Sun and El Nuevo Herald reported that many nationally-known journalists have received payments for their appearances on Voice of America (VOA) radio for many years.

According to the Broadcasting Board of Governors (BBG) website, accessible at http://www.bbg.gov/bbg_aboutus.cfm, Voice of America broadcasts programs in 44 languages to an estimated 96 million people. “VOA focuses on countries that lack a strong, independent media…broadcasts include original and acquired programs that reflect American life along with discussions on United States foreign and domestic policies.”

The Sun reported that journalists receive $100 to $150 for their participation in a weekly roundtable discussion program on VOA called “Issues in the News.”

Spokesmen for the BBG, which oversees the Office of Cuba Broadcasting as well as Voice of America, told El Nuevo Herald that the payments did not present a conflict of interest. In a September 14 article, BBG spokesman Larry Hart said, “for decades, for many, many years, some of the most respectable journalists in the country have received payments to participate in the programs of the Voice of America.”

El Nuevo Herald reported that a number of journalists acknowledged payments from VOA programs, including Tom M. DeFrank, head of the New York Daily News' Washington office; Helle Dale, a former director of the opinion pages of the Washington Times; and Georgie Anne Geyer, a nationally syndicated columnist. The Sun reported that late journalism luminaries Hugh Sidey of Time magazine and Peter Lisagor of the Chicago Daily News were regular guests on “Issues in the News.”

David Lightman, Washington bureau chief for The Hartford Courant, and a frequent guest on “Issues,” told El Nuevo Herald that he did not cover any governmental agency. “They pay me because I’m a professional and they remunerate me for my time. In general, I do not cover the topics [in the Courant] that we’re talking about [on the show],” said Lightman.

Two days after El Nuevo Herald published his comments on September 16, however, The Courant reported that it had asked Lightman to stop doing the show. Courant Editor Clifford Teutsch said that the arrangement had been approved by Lightman’s editors a number of years ago. In a prepared statement, Teutsch said he had confidence that Lightman had remained independent in splitting time between duties at The Courant and VOA. “However, we’ve decided it’s best to end his participation rather

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Media Ethics

Some Media Knew about Foley Messages Since 2005

Editors say holding story was the right choice

As the scandal over Rep. Mark Foley’s (R-Fla.) explicit e-mail and text messages to House pages swept Washington in September, questions swirled over who knew what, when they knew it, and why nothing was said or done. While much of the outrage was reserved for Republican leadership, news organizations revealed that they had known about or even had copies of the questionable correspondence for months.

Both The St. Petersburg Times and The Miami Herald reported having received copies of e-mails Foley sent to a former page in Louisiana as early as November 2005. Harper’s Magazine and Roll Call had the messages in spring 2006 and AmericaBlog, The New Republic and Time magazine were sent them this past summer, according to Poynter Online.

ABC News’ Brian Ross, credited with breaking the story, told The New York Times that he learned about the e-mail messages in August 2006. None of the news organizations that received copies of the correspondence has disclosed their source.

In what is an increasingly common occurrence in the political news landscape, the e-mails themselves were first made widely available to the public on a blog, www.stopsexpredators.blogspot.com, several days before ABC News posted them on its news web site, “The Blotter,” with a request for any more information readers might have.

Critics accused the news organizations that sat on the story, specifically The St. Petersburg Times, of “chickening out.”

Bob Norman, a columnist for New Times Broward Palm Beach in Fort Lauderdale, asked in his blog “The Daily Pulp,” “Is there no daily newspaper in this state that has any guts left? The St. Pete Times [sic] had the story in November and didn’t run it until ABC News showed the fortitude to break it? What an embarrassing display of that newspaper’s lack of journalistic instinct.”

The St. Petersburg Times replied on September 30, in an editor’s note written by government and politics editor Scott Montgomery and posted on “The Buzz,” the political blog of The St. Petersburg Times. The note said that when the newspaper received copies of the e-mails, the story was pursued, but that editors found nothing overtly sexual in the e-mails it had received. They included Foley’s inquiry about the boy’s well-being after Hurricane Katrina and a request for a photograph as well as an exchange between the page and a congressional staffer discussing whether Foley was out of bounds.

The St. Petersburg Times said it sent two reporters to Louisiana to talk to the page. The newspaper reported that neither the teenager nor his parents wanted to go on record, fearing a media frenzy.

The St. Petersburg Times also said reporters had spoken with Rep. Rodney Alexander (D-La.), the page’s congressional sponsor, as well as Foley, who insisted he was only trying to be friendly.

“So, what we had was a set of e-mails between Foley and a teenager, who wouldn’t go on record about how those e-mails made him feel. …our policy is that we don’t make accusations against people using unnamed sources,” Montgomery said in the September 30 editors’ note.

Miami Herald executive editor Tom Fiedler similarly cited editorial discretion for his paper’s decision not to follow up on the initial e-mails, which the Herald apparently received around the same time as The St. Petersburg Times.

Fiedler told The Washington Post’s online subsidiary, washingtonpost.com, “we determined after discussion among several senior editors, including myself, that the content of the messages was too ambiguous to lead to a news story.”

Although ABC News investigative reporter Brian Ross learned about the e-mails in August, he said he was too busy covering the anniversaries of Hurricane Katrina and of Sept. 11, 2001 to follow up immediately.


Harper’s Magazine was ready to run with a story as early as June 2, Washington editor Ken Silverstein reported in an October 10 post to the magazine’s Web site at http://www.harpers.org/sb-republicans-1160492797.html. However the story was ultimately killed. “We decided against publishing the story because we didn’t have absolute proof that Foley was, as one editor put it, ‘anything but creepy,’” said Silverstein.

Silverstein’s October 10 post was a response to Republican charges that the timing of the story was a “professional hit job” by Democrats and “liberal media” just before November elections.

Silverstein said that although he was disappointed that the June 2 story was not published, he was also relieved, because there was also a possibility that the magazine would wrongly accuse Foley of improper behavior.

Editors who chose not to run with the story earlier have expressed regret tempered with a note of caution similar to Silverstein’s. Neil Brown, executive editor of The St. Petersburg Times said in an October 5 editorial that news organizations that didn’t publish the story before they “had the goods” made the right choice. Brown said, “Nobody in the news business likes to get scooped. We’re not happy about it. We’re also not alone.” Roll Call editor Tim Curran told Poynter on October 16 that he will examine over-the-transom leads more closely in the future. “It’ll make us look more thoroughly at everything that has even a whiff of credibility,” said Curran.

— Patrick File
SILHA Research Assistant
Media Ethics

News Council Upholds Sheriff’s Complaints Against Newspaper

The Seattle Post-Intelligencer does not attend public hearing, responds in print

At an October 21 public hearing, the Washington News Council upheld most of the complaints of “unfair disparagement” that a disgruntled local sheriff filed against the Seattle Post-Intelligencer.

In a lengthy and detailed complaint originally filed with the council on July 28 and later amended September 20, King County Sheriff Sue Rahr claimed that parts of the Post Intelligencer’s yearlong series titled “Conduct Unbecoming” were “inaccurate, misleading, inflammatory” and “unfairly disparaged” the sheriff’s office.

The Washington News Council (WNC), composed of 10 “media members” and 10 “public members,” voted on 11 questions in the hearing, ranging from whether particular events were covered in a “biased” or “unfair” manner to whether the newspaper allowed for “adequate” access to the sheriff’s office for “comment and rebuttal.” The council, which has no legal or official authority to sanction newspapers, voted that the series as a whole was unfair to the sheriff’s office.

WNC President Stephen Silha issued a statement following the hearing: “While the [Post Intelligencer] series has provided a real public service… in the view of the news council, the paper overreached in reporting on Rahr’s role and failed to make adequate corrections and clarifications in a timely way.”

The Post Intelligencer opted out of attending the news council’s public hearing, citing concerns about possible conflicts of interest by the group’s members. Instead the newspaper posted a response to Rahr’s complaint on its Web site on September 28. The 17-page response argued that “when we made mistakes and became aware of them, we published corrections; when it was pointed out that readers could have misunderstood some point, a clarification was forthcoming.”

The response also stated that the individual allegations “do not negate [‘Conduct Unbecoming’s] central truths regarding misconduct, disciplinary lapses and a lack of accountability in the King County Sheriff’s Office.” (The original special series, Rahr’s complaints, and the Post Intelligencer’s response can all be found on the Post Intelligencer’s Web site at www.seattlepi.com.)

After the hearing Rahr praised the WNC. “The public has a right to fair, accurate and balanced information. [The WNC is] doing a great service to the community by taking action that will improve the practice of journalism,” Rahr said.

The WNC is a self-described “outside ombudsman” made up of volunteers whose mission is to “help maintain public trust in the media” through discussing standards in open forums such as October’s hearing and is meant to serve as an alternative for complainants who would otherwise file a lawsuit. (More information about the WNC can be found at the organization’s Web site, www.wanews council.org.)

The WNC is one of three such councils in the nation, with the others in Minnesota and Hawaii. Additional councils are being established in New England and Southern California with $75,000 grants from the Knight Foundation, which were awarded to them by the Minnesota and Washington councils in June 2006.

According to Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, asking a news organization to “explain itself” as the WNC did this fall gives public officials who would be unlikely to prevail in a libel suit an opportunity to “undermine press credibility – and maybe discourage aggressive reporting.”

“In the United States, news organizations ‘explain themselves’ every day by doing their work and publishing their stories. They may choose to share their decision-making process with the public, or they may not. But they owe no explanations to government officials,” said Kirtley in an October 16 commentary for the Web site “Nieman Watchdog.”

WNC President Silha, however, points to the Society of Professional Journalists’ Code of Ethics, which asks journalists to “clarify and explain news coverage and invite dialogue with the public over journalistic conduct.” (Silha is the son of the late Otto Silha and his wife, Helen, who endowed the Silha Center and Silha Professorship.)

Silha responded to Kirtley’s comments in an e-mail, stating, “Government officials who are wronged by inaccurate or unfair journalism have as much right as anyone to a hearing, even though the press rightly holds them to a higher scrutiny than the average citizen. In many cases, precisely because they cannot sue for libel, news councils offer the only place where coverage can be examined in a neutral community forum reflecting citizens’ views as well as journalists’ experience.”

In responding to the Washington News Council vote, Post Intelligencer Managing Editor David McCumber said in an October 23 story in the newspaper, “[The WNC’s] pronouncement, while regrettable, does nothing to diminish the excellent journalism of ‘Conduct Unbecoming.’ Our judges in this matter are our readers, and their feedback to the series has been overwhelmingly positive.”

— Patrick File

Silha Research Assistant
Media Ethics

Bloggers Uncover Altered Reuters Photos

Some say the scandal overlooked key ethical issues

Last summer’s controversy over altered photographs of the war in Lebanon spread quickly from the blogosphere to mainstream media and led to closer scrutiny by readers. But critics contend that key issues in modern photojournalism were overlooked.

On August 6, Reuters withdrew two photographs taken by Adnan Hajj, a freelance photographer who has worked for the wire service since 1993. The first alteration was reported on the blog Little Green Footballs, whose proprietor Charles Johnson is credited with first calling attention to “blatant evidence of manipulation.” On August 5, the blog displayed a Reuters photo of smoking Beirut suburbs with repeating patterns in the smoke and certain identical buildings “almost certainly caused by using the Photoshop ‘clone’ tool,” according to Johnson.

Word spread quickly online, and a second altered Hajj photograph was reported by Rusty Shakelford in the blog The Jawa Report. By August 6, many major news agencies had covered the story. On August 7, Reuters reported that it was no longer working with Hajj and had withdrawn 920 of his photographs. Within 24 hours of the initial report, a number of blogs including Zombietime, Power Line, and Confederate Yankee, challenged the authenticity of news photos coming out of Lebanon, leveling charges of digital manipulation, staged scenes of rescue and destruction, and misleading captions.

Zombietime posted a report titled “The Reuters Photo Scandal: A Taxonomy of Fraud” on August 8, which catalogued inconsistencies or inaccuracies in many photos and captions. The page’s author said it was meant to serve “as an overview of the various types of hoaxes, lies and other deceptions perpetrated by Reuters.”

In addition to the alterations of the original two photographs by Hajj, Zombietime questioned images including a green-helmeted rescue worker who appeared to “parade around” with corpses, scenes of destruction that appeared to have been set up by photographers themselves, confusing or false captions, and a depiction of a wailing Lebanese woman who allegedly posed for photographs among the rubble of several apartments and homes, all identified as her own, throughout the weeks of the conflict.

Reuters immediately disavowed Hajj’s actions, and one editor told The New York Times that the lapse was “human error.” Tom Szulcovenyi, Reuters Global Picture Editor, said, “Reuters has zero tolerance for any doctoring of pictures and constantly reminds its photographers, both staff and freelance, of this strict and unalterable policy.” The news service also announced that it would “tighten” filing procedures and require a senior editor to review all photos from the Middle East.

Fallout from the controversy has been extensive. Israel’s Government Press Office (GPO) met with bureau chiefs from Reuters, The Associated Press, and the Foreign Press Association in September, according to The Jerusalem Post. In the meeting, GPO director Danny Seaman discussed actions that were “fueling anti-Israel sentiment” and warned the chiefs that the government reserved the right to take action against any news organization that was conducting itself unprofessionally. The Jerusalem Post reported that the bureau chiefs were barred by their news organizations from discussing the meeting.

Meanwhile, media watchdogs on the Internet have raised questions about even more photos. A promotional photo in the September issue of CBS’s Watch! magazine slimmed Katie Couric by as much as 20 pounds. When spotted, the magazine’s editor in chief blamed an “overzealous” photo editor for the digital manipulation.

A front-page New York Times photograph of American soldiers at a dance show in Iraq published on August 27 was questioned by readers. A microphone cable in the picture seemed to disappear into thin air, prompting allegations that the photo had been manipulated. The veteran photographer who took the photograph, Jim Wilson, defended it, explaining that low light in the hangar where the photo was taken forced him to use a longer exposure time and resulted in part of the cable being blurred.

The overall response from mainstream media to the Reuters incident was surprisingly quiet, according to some. Tim Rutten, media columnist for the Los Angeles Times, wrote that “the controversy… [wasn’t] nearly as large as it should’ve been.” In a column dated August 12, Rutten pointed out that only a few major American newspapers published stories on the incident. Articles in The Washington Post and the Los Angeles Times focused only on the politics of Johnson’s Little Green Footballs blog. The New York Times reported that it had published eight of Hajj’s photos since 2003, but none had been doctored.

According to Rutten, no major paper seemed willing to take on the larger issue, which was the reliability of freelance photos coming from Lebanon. Zombietime’s August 8 report voiced a similar sentiment: “lost in the frenzy over one particular image is an even more devastating fact: that over the last week Reuters has been caught red-handed in an astonishing variety of journalistic frauds.”

Altered Photos, continued on page 26
Altered Photos, continued from page 25

In an August 17 column for Editor and Publisher, David D. Perlmutter contended, “The stakes are high. Democracy is based on the premise that it is acceptable for people to believe that some politicians or news media are lying to them; democracy collapses when the public believes that everybody in government and the press is lying to them.”

Perlmutter, who is Professor and Associate Dean for Graduate Studies & Research at the University of Kansas’s School of Journalism & Mass Communications and has written books on photojournalism, called on news organizations and professional groups to respond ethically and responsibly. Perlmutter said media organizations had chosen to “stonewall, deny, delete, dismiss, counter-slur, or ignore the problem,” a strategy he called “the practical equivalent of taking extra photos of the deck chairs on the Titanic.”

Perlmutter encouraged news organizations to “correct [your mistakes] with as much fanfare and surface area as you devoted to the original image. Create task forces and investigating panels. I would even love to see special inserts or mini-documentaries on how to spot photo bias or photo fakery—in other words, be as transparent, unarrogant, and responsive as you expect those you cover to be.”

The Society for News Design announced the adoption of its first ethics code at its early September 2006 national convention in Orlando. The National Press Photographers Association adopted an updated code of ethics in July 2004, the code’s first revamp since 1946. Among the nine professional standards outlined in the code, photojournalists are encouraged to “resist being manipulated by staged photo opportunities,” and told, “do not manipulate images or add or alter sound in any way that can mislead viewers or misrepresent subjects.”

August’s photo-altering controversy was not the first since photojournalism went digital. A staff photographer for The Charlotte Observer who was disciplined in 2003 for altering the color in a number of photographs was fired in July 2006 for a similar offense.

In Spring 2003, award-winning Los Angeles Times photographer Brian Walski was fired for submitting a composite image created from two separate photos he had taken in Iraq. (See “Journalists Face the Challenges of Wartime Ethics: Los Angeles Times Photographer Loses Job over Manipulated Photo” in the Spring 2003 Silha Bulletin) Walski’s faked photo of a British soldier directing Iraqi civilians to take cover was featured prominently in a number of major U.S. newspapers. At the time of the 2003 controversy, Los Angeles Times spokeswoman Martha Goldstein said, “This is a very, very rare instance.”
Media Ethics

Pundit Williams Settles with Justice Department
*$34,000 settlement is for overpayment, not conflict of interest*

In October, columnist and pundit Armstrong Williams settled with Justice Department prosecutors and agreed to pay $34,000 over a conflict of interest scandal dating back to early 2005.

In January 2005, USA Today uncovered a contract between Williams and the U.S. Department of Education under which Williams was to promote President Bush’s No Child Left Behind Act, 20 U.S.C. § 6301 et seq., on his syndicated television and radio shows and in his newspaper columns, which were distributed through Tribune Media Services (TMS). Williams was also supposed to record two television and radio advertisements. Williams had not informed TMS about the $240,000 contract, and the company stopped running his columns after the revelation.

Disclosure of the arrangement focused scrutiny on the administration’s use of taxpayer money to promote its agendas aggressively through media punditry. (For more information, see “Broadcast Regulation: Congressional Bill Would Reinstate Fairness Doctrine” in the Winter 2005 issue of the Silha Bulletin; “Problems in Media Ethics: Commentator’s Promotion of NCLB Leads to Questions of Ethics” and “Panel Publishes Findings Following Review of CBS ‘60 Minutes’ Broadcast,” both in the Fall 2004 issue of the Silha Bulletin.)

After the USA Today story appeared, the Justice Department launched an investigation into whether Williams was overpaid under the False Claims Act’s prohibitions on false and fraudulent billing. It did not seek to determine the propriety of a paid contract to promote government programs. The settlement, struck between Williams, the Education Department and a subcontractor, Ketchum Communications, is meant to compensate for ads that Williams was paid for but never produced.

— PATRICK FILE
SILHA RESEARCH ASSISTANT

Jane Pauley Sues The New York Times for Fraud, False Advertising

In October 2006, former “Today” show and “Dateline NBC” co-host Jane Pauley sued the New York Times Co. and DeWitt Publishing in a “he said, she said” case involving whether the television journalist knew she was being interviewed for an advertising supplement for drug companies rather than a news article on mental health. Pauley went public with her bipolar disorder in 2004.

Pauley alleged that she was misled into being interviewed for the supplement by an employee of DeWitt who represented herself as a reporter for The New York Times. She claims she was told she would be quoted in a “news article in an informational supplement,” according to the complaint filed in federal district court in Manhattan. Instead, Pauley’s photograph was used on the cover of what was “essentially a paid advertisement for Eli Lily and other manufactures of psychotherapeutic drugs,” according to her complaint. The advertising supplement ran in October 2005, according to the website The Smoking Gun (www.smokinggun.com), which initially broke the story. Pauley has sued for fraud, false advertising and trademark infringement and seeks injunctive relief, lost profits, damages, costs and attorney fees.

Pauley also accused the Times of “intentionally blurring the distinction between advertisements and news” and noted that the Times’ own public editor criticized the newspaper’s practice of allowing advertisers to create ads that look similar to news columns.

The New York Times Co. issued a statement saying the case was without merit. According to the company, “Ms. Pauley’s assistant was told that the article for which Ms. Pauley was to be interviewed would appear in a special advertising supplement and Ms. Pauley agreed to participate.” No additional information was available at press time.

— ASHLEY EWALD
SILHA FELLOW AND BULLETIN EDITOR
A lawsuit filed against the Danish newspaper *Jyllands-Posten* for its publication of political cartoons depicting the prophet Mohammed in October 2005 was settled on October 26, 2006 in the City Court of Aarhus in Denmark.

The suit was brought against the editor-in-chief of the paper, Carsten Juste, and culture editor Flemming Rose, who originally commissioned the cartoons. In the fall of 2005, Rose issued a call for artists to draw the prophet Mohammed “as they saw him.” He said that this was a response to a series of events in Denmark that led him to believe there was an atmosphere of self-censorship in the nation that was being caused by fear of offending Muslims. These included the removal of artwork from a Danish museum exhibit that depicted Mohammed, Christ, and Buddha, and the closing of a theatrical event.

The call for art resulted in the submission and subsequent publication of a series of cartoons depicting Mohammed by the *Jyllands-Posten*. The cartoons caused a relatively minor stir in Denmark compared with the rioting that resulted when they were republished in European and Middle Eastern papers due to the efforts of a group of Muslim religious leaders from Denmark. Over a dozen people were killed in riots across the Middle East, and Danish embassies were vandalized and burned. In one case a Norwegian embassy was also set aflame. Following widespread publication of the cartoons, Danish products were boycotted in Muslim nations and Muslim communities in countries around the world, including the United States and Europe. The ban, however, was ultimately short-lived outside the Middle East. The cartoons were not published in any of the largest American newspapers but were republished in a handful of smaller ones. One of the cartoons was shown briefly on some American news channels. (See “Controversial Cartoons Lead to Worldwide Concern for Speech, Press Freedom, and Religious Values” in the Winter 2006 issue of the Silha Bulletin.)

Representatives of seven Muslim groups in Denmark filed suit after the Danish Director of Public Prosecutions, Henning Fode, refused to press criminal charges. Fode determined that the cartoons were protected by Danish free speech laws and did not violate existing Danish laws against racism or blasphemy.

The plaintiffs sought over $16,000 in damages from the editors of the *Jyllands-Posten*, according to statements made by the groups' attorney, Michael Christiani Havemann, to CNN and *Jurist*, a publication of the University of Pittsburgh School of Law. The lawsuit alleged that the drawings depicted the prophet Mohammed as “belligerent, oppressing women, criminal, crazy and unintelligent,” and stated that the drawings “made a connection between the Prophet and war and terror.” The plaintiffs complained that the cartoons were published “solely to provoke and mock not only the Prophet Mohammed but also the Muslim population,” and were meant to “belittle Muslims.”

The ruling by the City Court in Aarhus stated that it was not reasonable to believe that the cartoons were intended to be insulting or harmful to Muslims. According to translations of the opinion published by the Associated Press (AP), the court opinion said, “It cannot be ruled out that the drawings have offended some Muslims’ honor,” but “there is no sufficient reason to assume that the cartoons are or were intended to be insulting... or put forward ideas that could hurt the standing of Muslims in society.” The ruling concluded that the cartoons were “not offensive... even if the text accompanying the pictures could be read as being derogatory and mocking.”

The plaintiffs in the lawsuit have filed an appeal, and Muslim leaders have voiced their disappointment with the ruling. Ameer ul-Azeem, spokesman for Danish Muslim organization Jamaat-e-Islami, told the AP, “It is not up to the court to decide if Muslims will have hard feelings or not.” Syrian legislator Mohammed Habash who heads the Islamic Studies Centre in Damascus, said the ruling would “widen the gap between the Western and Islamic world” in a statement to the AP. Syria was the location of massive riots and the burning of Danish and Norwegian embassies when the cartoons were published there in February 2006. Mr. Habash also told the AP that “What the *Jyllands-Posten* newspaper did represents a true insult to millions of Muslims who do not follow Danish laws.”

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*Sara Cannon*  
Silha Center Staff
Internet Updates

Internet Roundup

Texas judge says one-year statute of limitation applies to articles on Internet


The piece was published in The Dallas Morning News’ print and online versions and referenced a new program begun by Nationwide, a mortgage payment services company. Nationwide claimed the piece was inaccurate, although both Burns and The Dallas Morning News stood behind the story. Nationwide filed suit 364 days after the article was first printed in the newspaper edition, but Godbey ruled that in failing to serve process on defendants until nearly 10 months after the article appeared, the company did not exercise due diligence in filing and therefore failed to meet the state’s one-year statute of limitations for a libel claim.

Nationwide argued that the statute of limitations continued to run on the Web version of the article, however, because every time a user retrieved the article online, the story was republished and the statute of limitations was “retriggered.” Godbey rejected that argument, invoking Texas’s common law “single publication rule.” That rule holds that multiple printed copies of a single defamatory statement count as a single wrong giving rise to just one action. He also cited a Georgia Court of Appeals case with similar facts, McCandliss v. Cox Enterprises, Inc., 593 S.E.2d 856 (Ga. Ct. App. 2004), where that court barred the plaintiff’s claim by also employing the single publication rule. Godbey noted that the single publication rule applied in print media, and wrote, “the Court sees no rational reason for distinguishing between the Internet and other forms of traditional mass media.”

He then granted Belo Corp.’s motion to dismiss. According to the Associated Press, Nationwide is considering an appeal.

California Supreme Court decides Web site owners cannot be sued for comments posted by a third-party

On November 20, 2006, the California Supreme Court reversed the state Court of Appeals ruling in Barrett v. Rosenthal, No. S122953 (Cal. 2006), a case that has major implications for Web site owners and operators, including some of the Internet’s biggest names. The suit was brought by two doctors against the owner/operator of a message board on alternative health and medicine. The doctors claimed that a man posted a message on the board that defamed them and are suing him for libel in a different action. They argued in this case that the site operator’s role in posting the comments made her a “developer” of the information and therefore its legal creator.

Numerous friend of court briefs were filed by organizations including the Electronic Freedom Foundation (EFF) and the American Civil Liberties Union (ACLU), as well as companies including Amazon.com, America Online Inc., eBay Inc., Google Inc., Microsoft Corp. and Yahoo! Inc. The companies would have had much to lose if the Court had found for the plaintiffs, as all of them maintain websites that allow third-party posting. They argued that Section 230 of the federal Telecommunications Act of 1996 protects Internet publishers from being held liable for allegedly harmful comments written by others.

In its brief, EFF argued that “the specter of civil liability chills the speech” of Internet service providers and users, and will inevitably lead to “protective self-censorship.” They also noted that “Every other jurisdiction addressing Section 230 has given effect to Congress’ broad protections and Internet speech has flourished as a result.”

The questions and comments from the justices during oral arguments in September seemed to hint at the eventual reversal. The Associated Press reported that the doctors’ attorney, Christopher Grell, argued that it would be absurd to allow people to post libelous information online, stating that finding for the defendant would be equivalent to “the total sacrifice of a person’s good reputation.” Justice Carol Corrigan responded, “Isn’t the whole point here that the Internet is just different?” Justice Kathryn Mickle Werdegar reportedly said Grell was making “policy arguments” for “Congress to weigh.”

In her opinion, Justice Corrigan, writing for the unanimous Court, wrote, “We acknowledge that recognizing broad immunity for defamatory republications on the Internet has some troubling consequences. Until Congress chooses to revise the settled law in this area, however, plaintiffs who contend they were defamed in an Internet posting may only seek recovery from the original source of the statement.”

Ann Brick, staff attorney at the ACLU of Northern California, said after the ruling that “[b]y reaffirming that Congress intended to grant protection under Section 230 to those who provide a forum for the views of others, the Court has ensured that the Internet will remain a vibrant forum for debate and the free exchange of ideas.” She continued, “Any other ruling would have inevitably made speech on the Internet less free.”

EFF Staff Attorney Kurt Opsahl was also pleased with the decision. “Courts have consistently interpreted Section 230 to provide broad protections for the platforms upon which free speech has flourished online,”

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Internet Updates
Canada Refuses Request to Block American Web Sites Containing Hate Speech

In August 2006, the Canadian Radio-television and Telecommunications Commission (CRTC), a government agency comparable to the United States’ Federal Communications Commission (FCC), denied a Canadian’s request to allow internet carriers to block two Web sites run by an American neo-Nazi. The Canadian, Richard Warman, made the request after Bill White posted on his Web sites Warman’s home address and called upon his readers to “take violent action” against him.

Warman, a human rights lawyer, had argued successfully before the CRTC in several other cases. After one of his victories, a London, Ontario man was sentenced to nine months in jail for violating Canada’s anti-hate speech laws. In response to that case, White began targeting Warman on his Web sites. Warman initially asked the Internet service providers (ISPs) that hosted the sites to block them. However, Canadian law requires that ISPs first receive permission from the CRTC before shutting down access to any Web site. Warman then applied for relief to the CRTC under section 36 of the Telecommunications Act, arguing that the content on White’s sites violated laws against posting hate material and incitement to violence.

In its decision by letter dated Aug. 24, 2006, the CRTC denied Warman’s request, calling it “unprecedented.” The Commission noted that the ISPs themselves had not made the application, but rather Warman had ex parte. The CRTC said that there was no adequate opportunity for others to weigh in on the matter. It stated, “The Commission considers that the type of interim relief sought in the Application raises serious and fundamental issues of law and policy relating to the mandate and powers of the commission pursuant to the Act. The Commission therefore considers that all interested parties should be afforded an opportunity to provide their views on these important issues.”

The CRTC added that the ISPs also needed notice that an application had been filed regarding their services and must be afforded an opportunity to comment as well.

An attorney for Warman, Bernie Farber, said that the American justice system might be Warman’s only hope for relief. “We’re hoping the criminal justice system might kick in in the United States, which to me, seems logical,” Farber told the Ottawa Citizen. “This man has counseled murder. I can’t imagine he hasn’t been in violation of his own laws.”

Warman did receive some assistance from Google. Its Web site hosting program, Blogger, hosted one of White’s sites, and company officials voluntarily shut down that site after receiving Warman’s complaint. A spokesman for Google said that although Blogger promotes free expression, it cannot be used to incite violence.

White, however, simply started a new Blogger site with a similar address. His first post contains the famous Vietnam-era image of a man with a pistol pointed at his head, doctored to show Warman’s head in his place. The site remains available online.

Canada Research Chair of Internet and E-commerce Law at the University of Ottawa Michael Geist wrote a column about the issue that appeared in the Toronto Star on Aug. 28, 2006 and was also posted on his own Web site, michaelgeist.ca. In it, he agreed with the CRTC that all parties needed a chance to be heard. However, he urged that the “issue should remain on the public agenda as important procedural safeguards should not be used as an excuse to leave it unresolved.” He continued, “[h]ad it addressed the substantive questions, the case would have presented an enormously difficult choice.”

Geist noted that Warman faced a serious threat and the content on White’s site was a clear violation of Canadian law. He also argued that by asking the CRTC to issue a voluntary order, “Warman avoided state-sanctioned censorship and placed the issue in the hands of ISPs.” However, Geist said Warman was asking the CRTC to wade into dangerous territory with his request because “blocking technologies are notoriously overbroad” and because “blocking foreign content establishes a dangerous precedent that can easily be misused.” Geist urged the CRTC to develop a policy framework to deal with these tough issues, noting that Australia has limited content blocking rules.

He concluded, “Even with various legal safeguards, many Canadians would undoubtedly find the blocking of any content distasteful. Yet to do nothing is to leave in place an equally unpalatable outcome that silences those who would speak out against unlawful hate speech for fear of personal harm.”

For further information on Canadian internet regulation, see “Minnesota Blogger Offers inside Story on Canadian ‘AdScam’ Investigation” in the Spring 2005 issue of the Silha Bulletin.

– ASHLEY EWALD
SILHA FELLOW AND BULLETIN EDITOR
Defamation/Libel
Britain’s Law Lords Overturn Ruling Against The Wall Street Journal
Ruling strengthens protections for journalists against libel suits

In October 2006, Britain’s highest court, the Law Lords, overturned a libel judgment against The Wall Street Journal, in the process strengthening protections for journalists and newspapers against libel suits, provided they can prove the article served the public interest and was reported in a serious and responsible manner.

The case, Jameel v. Wall Street Journal Europe, [2006] UKHL 44, centered on a February 2002 article printed in the Journal regarding Saudi Arabian companies’ and businesses’ banking records being monitored at the request of U.S. law enforcement to see whether they were being used to finance terrorist organizations. One of the companies listed was Abdul Latif Jameel Group. The company’s president, Mohammed Jameel, sued the newspaper in Britain, claiming it defamed both him and his company.

British libel laws have been widely considered to be much friendlier for plaintiffs than American libel laws. Although in the United States, truth is an absolute defense to libel and public figures must prove that an article was false and that the publication knew it to be false or acted in reckless disregard of the truth in order to sustain a libel judgment, in Britain the burden is on the publication to show the truth of its story or meet a set of reporting criteria under which judges evaluate the seriousness of the allegations made and the fact checking conducted by the reporter. Using that standard, set in Reynolds v. Times Newspapers Ltd. and Others, 1999 UKHL 45, a jury found for Jameel and awarded him £74,477 (USD) in damages, a ruling which was upheld at the court of appeals in February 2005 after it was determined that only five people had viewed the article online and three of the five were affiliated with Jameel. (See “Dismissed U.K. Libel Suit Could Strengthen Media Protections” in the Winter 2005 issue of the Silha Bulletin.)

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The Law Lords’ decision, however, created a “qualified privilege” defense under which the defendant does not have to prove the truth of the article as long as a judge deems it to be in the public interest and responsibly reported. Lord Leonard Hoffman wrote that “[a]s has often been said, the public tends to be interested in many things which are not of the slightest public interest and the newspapers are not often the best judges of where the line should be drawn.” In this case, the Law Lords found that the Journal article “easily passes that test” because it was “a serious contribution in measured tone to a subject of very considerable importance.”

Hoffman cautioned that “the more serious the allegation, the more important it is that it should make a real contribution to the public interest element in the article” but did note that “allowance must be made for editorial judgment.”

Baroness Brenda Hale wrote, “We need more such serious journalism in this country, and our defamation law should encourage rather than discourage it.”

Even though the articles disclosed information regarding a confidential U.S. government list, Lord Richard Scott wrote that news organizations did not have to follow privacy guidelines set forth by governments. “It is no part of the duty of the press to cooperate with any government, let alone foreign governments, whether friendly or not, in order to keep from the public information of public interest the disclosure of which cannot be said to be damaging to national interests,” he wrote.

In an Oct. 11, 2006 article covering the decision, The Wall Street Journal speculated that as a result of the decision, investigative journalism could increase in the U.K. The article quoted Alan Rusbridger, editor of the London-based Guardian newspaper, saying, “Having this pretty unequivocal declaration is pretty important. We never felt entirely confident” with the previous law.” It also quoted the lawyer who argued The Journal’s case, Geoffrey Robertson, saying that the ruling would allow journalists to “make a genuine contribution to public knowledge rather than parroting back what they are told, often in partisan fashion, by police or politicians.”

New York Times reporter Sarah Lyall called the decision “a huge shift in British law and significantly improves journalists’ chances of winning libel cases in a court system that until now has been stacked against them.” She also quoted Rusbridger, who told The Times, “This will lead to a greater robustness and willingness to tackle serious stories, which is what the judges said they wanted.” He continued by noting that prior to the ruling, “stories weren’t getting in the paper or were being neutered by clever lawyers who knew how to play the game.”

A related action brought by Jameel’s brother for libel involving a separate Wall Street Journal article covering the same general topic was dismissed by the court of appeals in February 2005 after it was determined that only five people had viewed the article online and three of the five were affiliated with Jameel. (See “Dismissed U.K. Libel Suit Could Strengthen Media Protections” in the Winter 2005 issue of the Silha Bulletin.)

— ASHLEY EWALD
Silha Fellow and Bulletin Editor
**Defamation/Libel**

**CNN and Time “Operation Tailwind” Suits Dismissed**

*Judgment marks the end of retracted stories scandal*

A federal district court judge dismissed two libel lawsuits brought by U.S. soldiers against the owners of *Time* magazine and Cable News Network (CNN) in September 2006. The judgment marked the end of a series of lawsuits filed against the news organizations in the wake of discredited reports published by *Time* and aired by CNN in June 1998. The reports, the result of a joint investigative effort by the two news organizations, claimed that the U.S. military used deadly sarin gas to kill American prisoners of war, defectors and Laotian civilians during the Vietnam War. The news stories prompted the Department of Defense to investigate the matter and later repudiate the story, rousing suspicions that the editorial staff at *Time* and CNN had reported on the incident without fully vetting the facts and sources supporting the story.

After an internal investigation headed by First Amendment attorney Floyd Abrams found that “journalistic errors led inexorably to more errors,” CNN retracted the story on July 2, 1998. Then-CNN News Group Chairman, President and CEO Tom Johnson issued a statement acknowledging “serious faults in the use of sources” and apologized to the personnel involved in Operation Tailwind. The text of Johnson’s statement can be found online at [http://www.cnn.com/US/9807/02/tailwind.johnson/index.html](http://www.cnn.com/US/9807/02/tailwind.johnson/index.html).

The managing editor of *Time* magazine, Walter Isaacsen, issued a similar statement on the same day, promising that the magazine would try to avoid making similar mistakes in future collaborations with CNN.

Despite the apologies, military personnel who participated in “Operation Tailwind” as members of the Studies and Observation Group (SOG), a top-secret military unit deployed in the Vietnam War, claimed that the reports had defamed SOG members, some of whom had been interviewed by CNN reporters for the story. Although CNN and *Time* reached monetary settlements with some of the military personnel who participated in the story, including retired Adm. Thomas Moorer, chairman of the joint Chiefs of Staff during “Operation Tailwind,” the *Los Angeles Times* reported on Aug. 3, 1998 that others were planning to file libel lawsuits against the news organizations. Correspondent Peter Arnett and the CNN broadcast’s producers, Jack Smith and April Oliver, were also later named as defendants in individual lawsuits.

According to an article published by *The Washington Times* on July 21, 1998, some individual defendants, including retired Army Col. Eugene McCarley, who headed the operation, sought as much as $6 million dollars in damages for CNN’s and *Time*’s portrayal of the soldiers. On Aug. 3, 1998, McCarley later told the *Los Angeles Times* that the reports depicted the members of SOG as “war criminals.”

Though many of the lawsuits were later settled after being consolidated in the United States District Court for the Northern District of California, the latest claims were brought by three soldiers whose pictures were featured in the *Time* article and in the CNN broadcasts. As District Judge Jeremy Fogel described them in his Sept. 21, 2006 opinion, the soldiers were “the last remaining plaintiffs in the consolidated action known as the Operation Tailwind Litigation,” *Plancich v. Cable News Networks LP*, 2006 WL 2711744, slip op. (N.D.Cal. Sept. 21, 2006). The case is part of a consolidated action more commonly referred to as *In re Cable News Network and Time Magazine “Operation Tailwind” Litigation*.

Fogel considered whether the three soldiers, Keith Plancich, Denver Minton and Mark Kinsler, could maintain a defamation claim against the news organizations. Two of the claims, those brought by Plancich and Minton, were governed by Florida law, where the former soldiers now reside and originally filed suit. The claims brought by Kinsler, who currently resides in Texas, were governed by that state’s defamation laws. Under both Florida and Texas law, Fogel wrote, “an essential element of a defamation claim is that the publication is ‘of and concerning’ the plaintiff.”

At the time the pleadings were originally filed, the court assumed that any plaintiff who was named, pictured or interviewed in the “Operation Tailwind” reports met the “of and concerning” requirement. But, Fogel wrote, “the publications in question most fairly are characterized as impersonal criticism of the United States government and thus are entitled to absolute protection under the First Amendment.”

The reports were not “of and concerning” the plaintiffs personally, Fogel decided. Fogel, citing Supreme Court decisions in *New York Times v. Sullivan*, 376 U.S. 254 (1964) and *Rosenblatt v. Baer*, 383 U.S. 75 (1966), found that both the article and the broadcasts focused on the conduct of the United States military and the SOG unit, not the conduct of individual officers or soldiers.

Accordingly, Fogel wrote, the soldiers’ theory of liability was, as Justice William J. Brennan, Jr. had concluded in his majority opinion in *Rosenblatt*, “tantamount to a demand for recovery based on libel of government, and therefore...constitutionally insufficient.” Unless it could be shown that defamatory statements concerned a particular

_OPERATION TAILWIND, continued on page 33_
member of the unit or each member of the unit, the “of and concerning” requirement cannot be met. Though images of the soldiers were featured in *Time* and on CNN broadcasts, Fogel wrote, none of the three plaintiffs were “named, quoted or discussed in the broadcasts or the articles.” The soldiers, therefore, could not maintain a claim for defamation against Time Warner, Inc. or AOL Time Warner, Inc., the owners of *Time* and CNN.

Coupled with the dismissal of a related claim by Army Sgt. Michael Hagen on May 19, 2006, who sought damages for emotional distress he claimed he suffered as a result of a reporter’s solicitation of his cooperation with the story, the dismissal of the lawsuit marked the end of *In re Cable News Network and Time Magazine “Operation Tailwind” Litigation*.

On Sept. 26, 2006, the Reporters Committee for Freedom of the Press reported that Kevin Baine, an attorney for CNN and *Time*, had not yet heard whether the three soldiers would appeal the decision. Unless or until they do, he said, “[t]his is a resolution of final claims in a long-standing battle.” The article is available online at http://rcfp.org/news/2006/0926-lib-operat.html.

— Christopher Gorman
Silha Research Assistant

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he said. “By reversing the Court of Appeals, the California Supreme Court has brought California back in line with other jurisdictions and reaffirmed the critical rule that the soapbox is not liable for what the speaker has said.”

**Google, Microsoft remove links to Belgian newspaper articles**

In October, computer giant Microsoft acquiesced to a cease-and-desist letter from Copiepresse, the industry body for French and German language newspaper publishers in Belgium, and removed links to their articles from its search engine, Live Search, and its news aggregator, Newsbot. Microsoft issued a statement saying that it “provisionally” agreed to Copiepresse’s request while refusing to acknowledge the Belgian publisher’s rights.

Microsoft was likely prompted to comply by a Belgian court’s ruling against Google in September. The court ordered the company to remove links to Copiepresse’s newspapers on its Google News site and cache or face a penalty of 1 million euros per day. Google News is a compilation of news articles from around the globe. It typically posts the first few paragraphs of articles with a link to the full article on the original publication’s Web site. It was widely reported on the Internet that Google responded by not only removing links to Copiepresse’s articles on its Google News site but also on its Google search engine.

**New York Times blocks British readers’ access to article about terrorist investigation**

On August 29, 2006, the Associated Press reported that *The New York Times* Web site was blocking British readers from gaining access to a news article detailing the investigation into a terror plot to use liquid explosives to blow up U.S. airliners over the Atlantic Ocean by utilizing Internet ad-targeting technology known as “geolocation.” Geolocation pairs Internet Protocol (IP) addresses with geographical information to determine the IP’s location.

Visitors from British IP addresses who clicked on the link to the article instead received a notice that United Kingdom law “prohibits publication of prejudicial information about the defendants prior to trial.” AP quoted *Times* spokesperson Diane McNulty as saying, “We had clear legal advice that publication in the U.K. might run afoul of their law.” She said that the last time the newspaper blocked a specific article was when it feared confiscation by Canadian authorities of issues containing details about the notorious Homolka sex abuse trial in 1993.

AP further reported that the *Times* also deleted the article from print editions published in Britain or mailed to U.K. subscribers, and stripped the item out of a news service for ships and hotels printed by a company in Liverpool.

Mark Stephens, a London-based media attorney, told *The Guardian* (London) that he did not believe the article violated British contempt law, adding that “it is almost inevitable that the information will come into the public domain in the UK” through postings by bloggers.

— Ashley Ewald
Silha Fellow and **Bulletin** Editor

— Prof. Jane Kirtley
Silha Center Director and Silha Professor
Privacy
Florida Court Extends Defamation Statute of Limitations to False Light Suits

Ruling overturns $18.28 million judgment against Pensacola newspaper

In late October 2006, a state court of appeals in Florida reversed an $18.28 million false light invasion of privacy judgment against the Pensacola News-Journal. Judge Phillip Padovano’s opinion, available at 2006 WL 2986458 (Fla. 1st Dist. Ct. App. 2006), found that the two-year statute of limitations used for defamation actions should be applied to false light actions as well, barring Joe Anderson Jr.’s claim against the paper.

Anderson filed his original complaint on March 21, 2001 for libel and tortious interference with a business relationship after the News-Journal published a series of articles between Dec. 13, 1998 and July 12, 2000. After the trial court granted partial summary judgment for the defendants, Johnson then amended the complaint to include a claim for false light invasion of privacy.

The false light claim was based on a Dec. 12, 1998 News-Journal article about grand jury investigations and evidence demonstrating Anderson’s company, Anderson Columbia, may have been benefiting from campaign contributions and political connections. The article also reported that in 1983, Anderson was sentenced to three years of probation and a $384,000 fine after he pled guilty to mail fraud. The article continued to explain that Anderson’s original three-year probation was extended for two years after a hunting accident involving his wife. The text of the article said that, “while still on probation and before his conviction was reversed, Anderson shot and killed his wife, Ira Anderson, with a 12-gauge shotgun.” Two paragraphs later, the article stated “[t]he law enforcement officials determined the shooting was a hunting accident.”

Anderson brought his amended charge of false light invasion of privacy because he claimed the article falsely implied he had murdered his wife. The News-Journal moved to dismiss this charge as being barred by Florida Statute 95.11(4)(g), which places a two-year statute of limitations for any causes of action for libel or slander. However, the trial court denied their motion, instead ruling that Florida Statute 95.11(3)(p), the four-year statute of limitations applies to false light invasion of privacy.

The opinion then turned to other Florida appellate courts for guidance, concluding that no Florida appellate court had affirmed a judgment for the plaintiff in a false light case and that only one case had upheld a complaint for stating a cause of action for false light. That case, Heekin v. CBS Broad. Co., 789 So.2d 355 (Fla. 2d. Dist. Ct. App. 2001), held that the general four-year statute of limitations applies to false light instead of the two years for libel and slander, with an exception that allowed for use of the two-year statute of limitations if the false light claim is “based on the publication of the same false facts” as a potential libel action.

Padovano’s opinion then certified conflict with the Heekin court’s holding, finding that all false light actions are subjected to a two-year statute of limitations. Because the article in question was published more than two years before Anderson filed his complaint, his action was barred.

Padovano noted that the only difference between Anderson’s libel claim and the later false light claim was the way Anderson characterized the article. He observed, “[s]urely the protections afforded by the statute of limitations cannot be undone by engaging in a semantic exercise such as this.” Padovano also pointed out that many other jurisdictions have resolved this issue in the same way, including Oregon and Washington and noted that the same outcome is suggested in the Comments to the Restatement (Second) of Torts, § 622E Comment (e).

The final portion of Padovano’s opinion addressed three arguments for giving false light a different statute of limitations than libel. Although two distinct harms are represented by the two torts — harm to reputation for defamation and emotional injury for false light — Padovano said that most false light cases are claims that the false impression of the plaintiff hurt his reputation, thereby rendering essentially the same harm as libel. Second, Padovano called the distinction between the two torts “largely academic,” noting that most false light claims would also be defamatory. Padovano explained that Anderson’s claim that the articles implied he murdered his wife is a statement that is not only offensive, but also defamatory. Finally, although false light can be based on statements that are true, unlike in a defamation action, Padovano found that a false light claim and libel-by-implication claim both involve true statements. Therefore, false light should not be granted a longer statute of limitations.

Recognizing that this decision was irreconcilable with Heekin, Padovano certified the issue of whether the same statute of limitations is appropriate for false light invasion of privacy and defamation to the state Supreme Court.

Judge Joseph Robert Benton II joined Judge Padovano’s opinion, but Judge Joseph Lewis concurred only in the result. Judge Lewis contended that this case could be resolved using the exception in Heekin using a two-year statute of limitations for false light actions that simply modify what is actually a libel action. Lewis also
Privacy

Boehner v. McDermott Reheard Before Full D.C. Court of Appeals
Court to decide whether congressman violated federal wiretapping laws

For the fourth time in eight years, the United States Court of Appeals for the District of Columbia Circuit considered whether U.S. Rep. Jim McDermott (D-Wash.) violated federal wiretapping laws by disclosing an illegally-recorded telephone conversation between members of the Republican leadership to the press. On June 23, 2006, the court agreed to rehear the case en banc and vacated an earlier decision reached by a three-judge panel of the court on March 28, 2006. That decision had affirmed a trial court order that required McDermott to pay Rep. John Boehner (R-Ohio) $60,000 in damages and reasonable attorney’s fees. See Boehner v. McDermott, 441 F.3d 1010 (D.C. Cir. 2006). The nine-member court heard oral argument in the case on Oct. 31, 2006 and a decision is pending.

Boehner originally filed the lawsuit in 1998, claiming that McDermott violated federal law by disclosing a taped telephone conversation between Boehner and other Republican leaders to Adam Clymer of The New York Times and Jeanne Cummings of the Atlantic Journal-Constution. The recording was made by John and Alice Martin of Florida, who intercepted the cellular phone call on Dec. 21, 1996. According to court records, the Martins later turned over a tape of the conversation to McDermott, the ranking Democratic member on the House Committee on Standards of Official Conduct, commonly known as the House Ethics Committee. After listening to Boehner discuss tactical strategies for handling the committee’s investigation into then-Speaker of the House Newt Gingrich, McDermott allowed reporters access to the tape.

After details of the conversation were widely published, Boehner brought a civil suit, claiming that McDermott had invaded his privacy. (See “Federal Appeals Court Finds McDermott in Violation of Wiretap Law” in the Winter 2006 issue of the Silha Bulletin.) On March 28, 2006, after more than seven years of litigation, a three-judge panel for the U.S. Circuit Court of Appeals agreed in a 2-1 ruling, finding McDermott civilly liable because he had violated 18 U.S.C. § 2511 (1)(c) (1999), which makes it a crime to disclose “the contents of any wire, oral, or electronic communication” obtained by wiretap if the individual disclosing the intercepted information knows or has reason to know that it was obtained unlawfully. Boehner v. McDermott, 441 F.3d 1010 (D.C. Cir. 2006).

McDermott had relied on the recent Supreme Court decision in Bartnicki v. Vopper, 532 U.S. 514 (2001), to claim that his disclosure of the tape to the press was protected by the First Amendment. In Bartnicki, the Supreme Court ruled that the host of a radio talk show could not be punished for broadcasting illegally-recorded telephone conversations which the host lawfully accepted from a third party. (See “U.S. Supreme Court Rules in Historic Bartnicki Case” in the Summer 2001 issue of the Silha Bulletin.) After the Supreme Court ruled in Bartnicki, an earlier appeal in Boehner v. McDermott was remanded to the D.C. Circuit for reconsideration. 532 U.S. 1050 (2001). In light of Bartnicki, McDermott argued, the First Amendment protects an individual’s right to disclose information that is intercepted through an illegal wiretap, so long as the individual disclosing the information did not participate in unlawfully intercepting the information.

In the 2 to 1 decision on March 28, Judge A. Raymond Randolph rejected McDermott’s argument. Finding that McDermott knew that the Martins had illegally recorded the conversation before disclosing it to the press. Randolph distinguished the case from what the Supreme Court termed a “narrow” holding in Bartnicki. “It is the difference between someone who discovers a bag containing a diamond ring on the sidewalk and someone who accepts the same bag from a thief knowing the ring inside to have been stolen. The former has committed no offense, the latter is guilty of receiving stolen property, even if the ring was intended only as a gift,” Randolph wrote. “The difference between this case and Bartnicki is plain to see.”

According to a Nov. 16, 2005 article published in Roll Call, many news organizations feared that if Bartnicki was not construed to protect McDermott, the threat of future legal action could deter journalists from publishing stories based on material from questionable sources. Randolph’s opinion in Boehner, one of the first cases to address the scope of the Supreme Court’s holding in Bartnicki, was characterized as “fraught with danger” by dissenting Circuit Judge David B. Sentelle. Like McDermott’s supporters, Sentelle concluded that the majority’s opinion misinterpreted the Supreme Court’s ruling in Bartnicki. (See “Federal Appeals Court Finds McDermott in Violation of Wiretap Law” in the Winter 2006 issue of the Silha Bulletin.)

On April 26, 2006, McDermott filed a Petition for Rehearing En Banc, which was granted in June.

– Christopher Gorman
Silha Research Assistant

Florida False Light, continued from page 34
found that the lower court did not have the authority to change the statute of limitations for false light actions.

President and Publisher of the News-Journal Kevin Doyle expressed satisfaction with the decision in an article in his paper stating, “This is a victory for the First Amendment.” He continued, “It’s not just a victory for the News-Journal but also for the (local weekly) Independent News and WEAR-TV and for everyone involved in the media.” The full article is available online at http://www.pensacolanewsjournal.com/apps/pbcs.dll/article?AID=/20061021/NEWS01/610210320/1006.

While the case was on appeal, two related bills were proposed in the Florida legislature. S.B. 1346 and H.B. 1323 would have changed the statute of limitations from four years to two years for false light actions. Both bills died in committee in May.

– Scott Schraut
Silha Research Assistant
FOIA Updates
D.C. Court of Appeals Reinstates Records Request Suit Seeking Data on Illegal Immigrants

The U.S. Court of Appeals for the District of Columbia Circuit has vacated U.S. District Judge Richard J. Leon’s Sept. 28, 2005 decision to dismiss Cox Newspapers’ claims that the Department of Justice (DOJ) improperly withheld records related to a Freedom of Information Act (FOIA) request, 5 U.S.C. § 552. The request was originally filed by the news organization’s Washington Bureau in 2003. In a per curiam decision filed on Nov. 21, 2006, the appellate court pointed to the need to resolve factual disputes in the case before either party’s request for summary judgment could be granted. Without deciding whether the DOJ could withhold records that included personal information identifying illegal immigrants who have been convicted of serious crimes but not deported, the appellate court remanded the case for reconsideration. According to the Court of Appeals, Leon erred in deciding that the privacy interests of the immigrants “far outweigh[s] the public interest” in disclosure without first settling factual disputes between the parties. CEI Washington Bureau, Inc. v. Dep’t of Justice, 2006 U.S. App. LEXIS 28836 (D.C. Cir. November 21, 2006).

“We’re gratified that the judges agreed with us that the trial court shouldn’t have granted the government’s motion for summary judgment. We continue to believe that what we’re seeking is clearly in the public interest.”

– Andrew Alexander
Cox News’ Washington Bureau Chief

The controversy, described by The Atlanta Journal-Constitution as having “broad implications in the debate over illegal immigration and the public’s right to know about illegal immigrant convicts who have not been deported,” began after the Cox Washington Bureau published an article in December 2002. The article claimed that hundreds of illegal immigrants were released from Georgia prisons but were never deported as required by law. A number of individuals who were released but not deported, according to the article, were convicted child molesters, drug dealers and violent criminals.

On Sept. 12, 2003, Cox filed a request for DOJ records under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, seeking access to data on illegal immigrants compiled by the State Criminal Alien Assistance Program (SCAAP). SCAAAP is a program which monitors state penal systems’ handling of incarcerated immigrants in order to allot federal subsidization of detention facilities to states and localities. According to the Nov. 21, 2006 decision, the program requires state and local detention facilities to list the Alien Registration Number, full name, date of birth, unique inmate identifier, foreign country of birth, date taken into custody, date release or to be released from custody of every incarcerated illegal immigrant in their charge. The purpose of requesting this information, an article published by Cox News Service on Oct. 12, 2006 reported, was to assist Cox reporters in investigating the release of immigrants who should have been deported by state facilities.

The DOJ has argued that the agency fulfilled the bureau’s FOIA request when it provided Cox with information that included the native country of illegal immigrants convicted of serious crimes, the date the individual was taken into custody, and the date of their release. In legal briefs originally filed with the United States District Court for the District of Columbia, attorneys for the government argued that requiring the DOJ to release personally identifiable information would invade the privacy of illegal immigrants, outweighing the public interest in disclosing the information. CEI Washington Bureau, Inc. v. U.S. Dep’t of Justice, 404 F.Supp.2d 172 (D.D.C. 2005).

The DOJ, according to Leon’s decision, cited exemptions to FOIA which allow the government to withhold information in “personal and medical files and similar files” and “records or information compiled for law enforcement purposes” if disclosure would constitute an invasion individual privacy. 5 U.S.C. §§ 552(b)(6) and 552(b)(7)(c). Leon agreed that the DOJ was not required to disclose the information because of the need to protect inmates’ personal privacy. Attorneys for Cox’s Washington Bureau appealed the decision soon after. The Atlanta Journal-Constitution, a Cox-owned newspaper, reported that attorneys for Cox argued in their appeal that Leon failed to identify the harm that could result from disclosing the personal information of individuals who evaded deportation. The public has a right to know if the government has failed to deport convicts who should be deported and if the convicts are repeat offenders, Cox attorneys argued.

According to an appellate brief filed by the DOJ, disclosing the names, birth dates, and FBI and Alien Registration numbers of inmates “has the potential to deeply embarrass a vast set of individuals.” According to the agency, SCAAAP records frequently misidentify some individuals as undocumented aliens and allow access to “sensitive and extremely personal information” about inmates. At oral arguments before the appeals court on Oct. 17, 2006, attorneys for the DOJ estimated that as many as 50 percent of the inmates reported in SCAAAP records as illegal aliens may not actually be an illegal alien.

Because a mistake in representing an inmate as an illegal alien may reduce the public interest in gaining access to SCAAAP records and increase the threat to inmate privacy, the court wrote, the accuracy of the DOJ’s claims needs to be resolved. Circuit Judges Randolph, Garland and Griffith wrote: “The accuracy of these factual assertions needs to be determined before this court [or any court] can decide whether the Department properly
invoked the privacy exemptions,” the appellate court wrote. The per curiam decision also pointed to other factual inconsistencies in the case, including a dispute over whether Cox’s request can be limited to recent convictions and avoid infringing upon an inmate’s privacy interest in “letting old convictions fade from memory,” see U.S. Dep’t of Justice v. Reporters Comm. for Freedom of Press, 489 U.S. 749 (1989).

Experts on immigration and media law have expressed differing opinions over whether the privacy rights of inmates and illegal aliens outweigh the public’s right to know that illegal immigrants convicted of serious crimes have been released into the community.

On Oct. 12, 2006, the Cox News Service reported that Ira Kurzban, a past president of the immigrant rights advocacy group American Immigration Lawyers Association, told reporters that illegal immigrants should be extended privacy protections unless the public interest in accessing that information outweighs the individual’s interest in privacy. “The question is: does the public right to know outweigh the privacy interests and the answer is yes in cases concerning government malfeasance,” Kurzban told reporters from Cox News Service.

Mike Cutler, a former federal immigration agent and fellow at the Center for Immigration Studies, said that the withholding of personal information by the DOJ was “outrageous.”

“The privacy law was never intended to protect aliens other than resident aliens and U.S. citizens,” Cutler told Cox News Service. “[The September 28 decision was] a remarkable twist.”

Benjamin Johnson, director of the Immigrant Policy Center, an immigrant advocacy group, acknowledged the public interest in knowing about “the dysfunctions of the immigration system and how it may be failing.” But, Johnson told the Cox News Service, releasing immigrant’s personal information can lead to mistakes in deporting the wrong people, a compelling reason for the DOJ’s decision to withhold the information.

Director of the Silha Center and professor of media ethics and law at the University of Minnesota Jane Kirtley was also quoted in the Cox News Service article, describing the idea that the private interests at stake in the case could outweigh the public interest in knowing the government’s failure to deport immigrant convicts as required by law as “ludicrous.”

As the Bulletin went to press, there was no word on when the case would be taken up again by the District Court.

— CHRISTOPHER GORMAN
SILHA RESEARCH ASSISTANT

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The Georgia Supreme Court held the meeting was political in nature and not in preparation for litigation, thus it was not encompassed by the attorney client privilege.

FOIA Updates
Georgia Supreme Court Rules Newspaper Can Access Notes from Closed County Meeting

On July 6, 2006, the Georgia Supreme Court ruled that a closed meeting of the Decatur County commissioners and their subsequent refusal to disclose documents from that meeting violated the state’s open meetings and open records acts. The 5 to 2 decision, Decatur County v. Bainbridge Post Searchlight, Inc., 2006 Ga. Lexis 468 (Ga. 2006), emphasized the importance of open meetings for public agencies and narrowly construed the “attorney-client” exception for the state’s open meetings law.

The meeting in question took place after a Decatur County grand jury began an investigation into alleged impropriety in its overtime and vacation pay policies. The grand jury forwarded its proposed “presentments” for the May 2005 term to the commission to allow it an opportunity to respond to the investigation. In Georgia, grand juries can provide judges with presentments that notify a judge about their investigative findings. Presentments can lead to civil or criminal proceedings, but do not necessarily guarantee them. After receiving the presentments, the commissioners held a private executive session with their attorney during a regularly scheduled public meeting to formulate a response to the presentments. In compliance with Georgia Code § 50-14-4(b), the Chairperson of the commission executed an affidavit stating that the meeting was devoted to material covered by an unspecified exception to the state Open Meetings Act, Georgia Code §§ 50-14-1 et seq.

Two days after the meeting, The (Bainbridge) Post-Searchlight asked the commissioners for any documents from the meeting, but that request was denied. The commissioners told the newspaper that closing the meeting was authorized, and the documents discussed in it were a confidential response to the proposed grand jury presentments. The newspaper filed two additional requests for the documents, but those requests were denied as well. The paper then filed suit in Decatur Superior Court on July 19, 2005, alleging violations of Georgia’s Open Records Act and Open Meetings Act. The paper asked the court to order the release of the documents, to prohibit future violations of the acts, and to award attorney’s fees and costs. The trial court found the commissioners violated the Open Meetings Act by conducting the closed session and violated the Open Records Act by not providing the paper with the requested grand jury presentments. The commissioners then appealed.

On appeal, Justice George Carley’s opinion for the state Supreme Court held that the trial court erred in granting the declaratory orders forcing release of the documents and prohibiting future violations on procedural grounds, but affirmed that the closed meeting and subsequent refusal to release the documents violated the Open Records and Open Meetings Acts. Because a lower Georgia court released the grand jury presentments on August 1, the trial court’s order forcing their release was moot and therefore not considered by the Supreme Court. The Supreme Court did find that the trial court erred in issuing its order prohibiting future violations by the commission, ruling that a court should not issue an order requiring a person to obey a law he already has a duty to follow.

However, despite the Supreme Court’s finding that the trial court’s grant of injunctive relief was in error, it nevertheless considered whether the commission violated the Open Records and Open Meetings Acts because the trial court had awarded the paper attorney’s fees for prevailing in its suit. Georgia Code § 50-18-73(b) allows for attorney’s fees for the plaintiff in a lawsuit if the defendant is found to have violated either the Open Meetings or Open Records Acts. The Supreme Court affirmed the award of fees to the newspaper.

The commissioners had argued that closing the meeting was within their rights under Georgia Code § 50-14-2(1), which allows meetings to be “closed in order to consult and meet with legal counsel pertaining to pending or potential litigation….” However, the Supreme Court rejected this defense, stating that the “attorney-client” exception should be narrowly construed.

The Court cited a Georgia Court of Appeals opinion, Claxton Enterprise v. Evans County Bd. of Commissioners, 549 S.E.2d 830 (Ga. Ct. App. 2001), that found the Evans County Board of Commissioners improperly closed a meeting to discuss potential litigation involving a county attorney. It quoted the Claxton opinion, stating “To construe the term ‘potential litigation’ to include an unrealized or idle threat of litigation would seriously undermine the purpose of the Act…. [W]e hold that a meeting may not be closed to discuss potential litigation under the attorney-client exception unless the governmental entity can show a realistic and tangible threat of legal action.” The Supreme Court then found that in this case, the presentments did not create a threat of litigation, and the topic of the meeting was political instead of in preparation for litigation.

The commissioners claimed that a Georgia statute meant to protect public officials from premature disclosure of grand jury proceedings authorized them to close the meeting because they were discussing grand jury presentments. However, the Court rejected that argument as well, noting that the newspaper did not seek access to secret grand jury documents because the grand jury itself had released the documents. In the Court’s view, the commissioners could not rely upon a veil of secrecy that the grand jury disregarded by releasing the presentments.

Justice Harold Melton, joined by Justice Robert Benham, dissented from the majority, finding that the attorney-client privilege applied because the commissioners were subject to potential litigation. Melton wrote that the commissioners needed their attorney’s advice on how to deal with the investigation conducted by the grand jury and therefore were within the statutory exception. He also stated that even though the grand jury permitted the presentments to leave the grand jury room, that did not constitute a waiver of confidentiality as asserted by the majority. He concluded by stating that the open government statutes in question were designed to allow monitoring of public officials but not to “pierce the confidentiality of legal proceedings and potential proceedings…”
FCC Updates

FCC Investigates Video News Releases

Unhappy broadcasters file an appeal asking inquiries to stop

The Federal Communications Commission (FCC) sent letters to 42 holders of 77 television broadcast licenses in August 2006, asking whether their stations had properly labeled “video news releases” and identified their source and sponsorship prior to broadcast as required by a unanimous April 2005 ruling by the five-member Commission. The inquiry came after the Center for Media and Democracy (CMD) released a study in April 2006 that identified the 77 violations for failing to properly label the video spots over a 10 month period. The spots, which have been described as “video press releases,” are created by corporations or the government and are sometimes aired and presented as news reports. The Center for Media and Democracy refers to them as “fake news.” The Radio-Television News Directors Association (RTNDA), however, called the study flawed and urged the FCC to back off of its investigations.

Video news releases came under increased scrutiny after it was discovered that the Bush administration paid to produce spots on some of its initiatives, including No Child Left Behind, and then gave them to broadcasters who subsequently aired them as authentic news broadcasts. (See “Commentator’s Promotion of NCLB Leads to Questions of Ethics” in the Fall 2004 issue of the Silha Bulletin.) The Society of Professional Journalists has condemned the use of video news releases without full disclosure and has cautioned broadcast companies against their use.

After the ruling was released in April 2005, FCC Commissioner Jonathan S. Adelstein told the Washington Post, “We have a responsibility to tell broadcasters they have to let people know where the material is coming from. Viewers are hoodwinked into thinking it’s really a news story when it might be from the government or a big corporation trying to influence the way they think. This will put them in a better position to decide for themselves what to make of it.”

After the FCC issued letters to the 42 license holders, Adelstein made similar statements. “The public is misled by individuals who present themselves to be independent, unbiased experts or reporters but are actually shills promoting a prepackaged corporate agenda,” he said in a statement issued to the press.

According to the Center for Media and Democracy study, none of the 77 violations it found included video news releases paid for by the federal government. Instead, they were produced by corporations and trade groups, including Panasonic, General Motors, Procter & Gamble and the American Dental Association.

A co-author of the Center for Media and Democracy’s study, Diane Farsetta, said the organization was pleased with the FCC’s decision to begin official inquiries. “We commend the FCC for taking the issue of fake news seriously,” she said. “With the FCC’s investigations involving, hopefully TV stations will finally practice full disclosure.”

The communications director for an organization called Free Press, which has launched an online activist campaign called “No Fake News,” also applauded the FCC’s decision. “The official FCC probe puts the nation’s biggest media companies on notice that their viewers won’t stand for fake news on the public airwaves,” Craig Aaron said. “We hope the FCC will back up its strong statements on covert propaganda with decisive action.”

In October, however, the RTNDA filed an appeal with the FCC, asking it to stop its investigations and calling the study flawed. The organization pointed to the Commission’s own past rulings that sponsorship rules do not apply when there is no compensation for the material broadcast. It said that video news releases were used by broadcast media in much the same way the print media uses press releases, and it argued that the FCC’s investigations had a “chilling effect” on the dissemination of newsworthy information to the public. The RTNDA also criticized the methodology and accuracy of the Center for Media and Democracy study, pointing out that it did not have video evidence of all the violations it recorded in its study and that some of the violations the CMD study reported were actually instances in which video from news releases were used as the backdrop to pieces that actually criticized the product the releases were created to promote.

The Center for Media and Democracy responded to the RTNDA’s appeal with a point-by-point rebuttal on its website (available at http://www.prwatch.org/node/5282), and Tim Karr, the campaign director of Free Press, an organization that worked with the CMD on its study, called the RTNDA’s appeal “a spurious attempt to smother an investigation and undermine the public interest.”

After the CMD study was released in April, the Society of Professional Journalists (SPJ) applauded the Center’s work and issued a statement calling unattributed use of video news releases “irresponsible and misleading.” It noted, however, that it did not endorse the CMD’s call for an FCC investigation. The SPJ’s Ethics Committee co-chair Fred Brown said, “It’s never a good idea when government tells journalists what they can and cannot do. We would oppose any expansion of the FCC rule. Instead, we would call on television to clean up its own act.”

“The public is misled by individuals who present themselves to be independent, unbiased experts or reporters but are actually shills promoting a prepackaged corporate agenda.”

– Jonathan S. Adelstein
FCC Commissioner

– Ashley Ewald
Silha Fellow and Bulletin Editor
FCC Updates
FCC Backtracks on Some Indecency Rulings, Continues to Pursue Others in Court

On Nov. 7, 2006, the Federal Communications Commission (FCC) backtracked on some of its previous decisions that television networks had aired indecent material. Specifically, it reversed its ruling that the use of the word “bullshitter” in 2004 by a guest on the CBS program “The Early Show” was indecent. It also reversed a ruling against ABC for language in several episodes of its former series “NYPD Blue” on a technicality.

The agency reviewed its rulings after having been granted 60 days to do so by the U.S. Court of Appeals for the Second Circuit in September. The appeals court had temporarily barred enforcement of some of the FCC’s indecency standards while the Commission reconsidered some of its rulings after a lawsuit was brought in April 2006 by ABC, CBS, and Fox television networks and some of their affiliates. The suit asked the court to permanently prevent the FCC from enforcing its strict new indecency rules, calling them unconstitutional. (For more information concerning the FCC’s increased stringency, see “FCC Crackdown on Indecency Leads to Historic Fines” in the Winter 2004 issue of the Silha Bulletin and “Bush Signs Broadcast Decency Enforcement Act; May Increase Fines for Indecent Programming” in the Summer 2006 issue.)

The lawsuit, Fox Television Stations, Inc. et al. v. Federal Communications Committee, No. 06-1760-ag(L), was filed by the stations after the FCC increased monetary penalties for the broadcast of profanities and other material it deemed indecent. Fines are now as high as $325,000 per incident. The stations have typically run afoul of the rules when celebrities have sworn on air during morning talk shows or award ceremonies. The stations argue that they should not be held liable when “fl eeting, isolated and in some cases unintentional” profanities are uttered on air and that the FCC’s inconsistent enforcement has chilled speech and violated the First Amendment.

In spite of its reversals, the FCC upheld its March 2006 ruling that use of certain four-letter words by celebrities during Fox’s broadcast of the “Billboard Music Awards” in 2002 and 2003 was indecent. FCC Chairman Kevin J. Martin said, “Hollywood continues to argue they should be able to say the F-word on television whenever they want … the commission again disagrees,” he said.

But one commissioner, Jonathan S. Adelstein, dissented from the FCC’s ruling, alleging that the reversals were made to improve the Commission’s case in the Second Circuit rather than on the merits. “Litigation strategy should not be the dominant factor guiding policy when 1st Amendment protections are at stake,” Adelstein said.

The case will now presumably continue at the Second Circuit. Duke University law professor and telecommunications expert Stuart M. Benjamin told the Los Angeles Times that “[t]his makes it all the harder to claim we’ve got a set of clear, consistent rules, which is what the FCC’s claim has been all along.”

– ASHLEY EWALD
SILHA FELLOW AND BULLETIN EDITOR

THE SILHA CENTER FOR THE STUDY OF MEDIA ETHICS AND LAW IS LOCATED IN THE SCHOOL OF JOURNALISM & MASS COMMUNICATION AT THE UNIVERSITY OF MINNESOTA
Federal Communications Commissioners listened to public grievances for nearly eight hours at hearings in California, as the FCC considers changes to ownership rules.

The two hearings, held October 3 in Los Angeles and El Segundo, were the first of six such events meant “to fully involve the American people in its review of our media ownership rules,” according to FCC Chairman Kevin Martin, in a September 8 press release.

Hundreds turned up at the two California hearings, often clapping and cheering for those who complained about media consolidation’s effects on programming choices and independent television and radio stations, and booing the few who spoke up in support of “big media.”

In 2003, the FCC’s five commissioners voted 3 to 2 to relax restrictions on several aspects of media ownership, including allowing companies to own up to three television stations in major markets, and allowing common ownership of a television station, radio station and a newspaper in a single market, commonly referred to as “cross-media ownership.” At the time, Chairman Kevin Martin wrote that he believed the commission’s actions would “advance our diversity and localism goals and maintain a vigorously competitive environment.”

The move resulted in a firestorm of controversy. Three million Americans contacted the commission with complaints, and Congress soon voted to limit the changes the FCC made. A number of legal challenges were also raised, and in June 2004, the Third Circuit U.S. Court of Appeals sent the rules back to the FCC for a rewrite. (See “FCC’s New Regulations Blocked by Appeals Court” in the Summer 2003 issue of the Silha Bulletin.)

Commissioners Jonathan Adelstein and Michael Copps, who attended the California hearing, voted against the 2003 changes. Copps’ dissenting statement, issued at the time said, “Step by step, rule by rule, bit by bit, we have allowed the dismantling of public interest protections and given a green light to the forces of consolidation, until now a handful of giant conglomerates are in the saddle.”

Hearings such as the one in California and another scheduled for December 11 in Nashville are meant to give the public an opportunity to have their voices heard directly by FCC commissioners.

Many voiced concerns at the California hearing about the limited diversity offered in markets controlled by a few large corporations. “Without diversity in ownership and participation, our democracy is in danger,” said U.S. Rep. Maxine Waters (D-Cal.).

On November 1, Waters filed a petition asking the FCC to deny the Tribune Company’s request for a waiver of the cross-ownership rule and its request to renew the broadcast license for Los Angeles’ KTLA-TV. “The Tribune Company is clearly in violation of rules that were established to increase diversity and to prevent the creation of an over-concentrated media market,” Waters said in a November 2 press release.

Mike Mills, bass player for the band R.E.M., was also among the voices speaking out against consolidation. According to Mills, a band like his owes its success largely to local radio play and would not have the same opportunity to succeed today. “Radio conglomerates have taken the local out of local radio to such a degree that... radio in Atlanta sounds like radio in Denver, Los Angeles, Nashville or Washington, D.C.,” said Mills. Mills asked the commissioners, “is American radio better than it was 10 years ago?”

— PATRICK FILE
SILHA RESEARCH ASSISTANT
Copyright

Canada’s Supreme Court Rules for Freelancers, Against Newspapers

Papers must now pay or obtain permission to republish articles in electronic databases

In October 2006, the Supreme Court of Canada issued a ruling protecting copyrights for freelance writers. The Court’s decision in the class-action suit Robertson v. Thomson Corp., 2006 SCC 43, prohibits newspapers from republishing articles written by freelance writers in electronic databases without compensation to, or consent from, the writers. However, newspapers may still include the articles in CD-ROMs that serve as electronic versions of those papers.

The suit was brought by freelance writer Heather Robertson, who wrote two articles in 1995 for The Globe and Mail (The Globe), a leading Canadian newspaper. After The Globe ran her stories in the print version of its paper, it included them in three electronic databases: a commercial database named Info Globe Online, the electronic version of the Canadian Periodical Index named CPI.Q, and CD-ROMs containing The Globe and several other Canadian newspapers. Robertson objected to these uses of her stories, and brought an action for copyright infringement on behalf of herself and all contributors to The Globe other than those who died on or before Dec. 31, 1943.

In its 5 to 4 decision in favor of Robertson, the Court first noted the overlapping copyrights at issue. Under the Canadian Copyright Act (The Act), Robertson, as a freelance author, owns a copyright in the articles she submitted to The Globe. In addition to Robertson’s copyright, The Globe owns a copyright in its daily newspaper as a collective work or compilation of newspaper articles. As copyright holders, The Act grants Robertson and The Globe the sole right to “reproduce the work or any substantial part thereof in any material form whatever.” Therefore, Robertson is entitled to produce or reproduce her articles, and The Globe is entitled to produce or reproduce its newspaper.

After establishing the copyrights at issue, the Court framed the relevant issue as whether or not the electronic databases reproduced the newspaper itself, or simply the original articles that constituted the newspaper. To resolve this issue, the Court looked at what it described as the “foundation stone” of copyright—the “originality” of the work being reproduced. For the newspaper, the Court found the originality to lie in its editorial content; in other words, its selection of stories and the stories themselves. Therefore, for the newspaper to be reproducing its copyright material, the editorial content of the newspaper had to be preserved and presented in the context of the newspaper. The Court acknowledged that the newspapers may be reproduced without advertisements, in a different layout, or with different fonts, but stated the articles may not be “decontextualized to the point that they are no longer presented in a manner that maintains their intimate connection with the rest of the newspaper.”

The Court then analyzed the ways in which the articles were reproduced in the three databases. For Info Globe Online and CPI.Q, the articles were stored and presented in a database that was constantly expanding and changing as more articles were added. The Court viewed these databases as collections of individual articles instead of reproductions of the paper despite references on the articles to the newspaper like its date and page number. It went on to describe these databases as “compilations of individual articles presented outside of the context of the original collective work from where they originated.” Therefore, reproduction of freelance writers’ stories in these two databases constitutes copyright infringement.

The arrangement of the articles on the CD-ROMs differed from the other two databases. Although it was also searchable for individual articles, upon finding one, other articles from that edition’s newspaper are presented in a frame opposite of the article being viewed. To the Court, this was sufficient for the reproduction to remain faithful to the essence of the individual work, by offering “a compendium of daily newspaper editions.”

After deciding the primary issue in the case, the Court resolved two subsidiary issues. The first involved whether Robertson and other freelance writers impliedly licensed The Globe to republish their articles, a matter the Court remanded to the trial court. The second involved certain members of the class who were staff members for The Globe, who the Court found had no copyright in articles they had written because they were staff members of The Globe and therefore the copyright of their articles vested in the newspaper.

Four justices partially dissented from the majority. The dissenting justices noted that the republished stories were dated and included the section, page number, headline, and by-line of the individual articles. They also concluded that a collection of articles from a newspaper is a reproduction of the paper, and therefore integrating it into a database did not strip the paper of its copyright protection.

The Canadian Court’s opinion is reminiscent of a United States Supreme Court case, New York Times Co. v. Tasini, 533 U.S. 483 (2001). In Tasini, electronic publishers copied articles freelance authors had contributed to different periodicals without the authors’ permission. Justice Ruth Bader Ginsburg’s opinion for the Court ruled in favor of the authors for very similar reasons as the Robertson Court. The dissent in Robertson quoted Justice Stevens’ dissent in Tasini and also referenced Tasini’s aftermath where The New York Times Co. pulled all affected articles from its online databases. (See “Freelance Writers Achieve Settlement from Big Media” in the Spring 2005 issue of the Silha Bulletin.)

After the Court made its decision, Robertson expressed her pleasure in the Canadian Press. Robertson said, “The victory in principle is there for the freelance writers.” She continued, “To be compensated for electronic republication of our work, that’s the most important thing.” Robertson’s sentiments were echoed by chairman of the Writers’ Union of Canada Ron Brown, as he stated in a Writer’s Union press release, “We are pleased that the Supreme Court has ruled that freelance writers can

Copyright, continued on page 44
It was a landmark fall for student newspapers at Florida State University, South Dakota State University and across California. Meanwhile, reports from Australia say that the student press there may be in peril.

Gannett purchases college newspaper

For the first time ever, a major news corporation has acquired a student newspaper. In late July, The Tallahassee Democrat, a daily owned by Gannett, purchased The FSView & Florida Flambeau, the independent student newspaper at Florida State University in Tallahassee. Robert Parker, former publisher and owner of twice-weekly FSView, told The New York Times on August 7 that the decision to sell was to ensure “long-term growth and success.”

Patrick Dorsey, publisher of The Democrat, said that the student newspaper’s paid staff of about 18 will benefit from professional training and career opportunities, while The Democrat is acquiring a “well-run operation with a very desirable audience.” Dorsey has said that The Democrat intends to take a hands-off approach with the FSView and that the student staff will notice few changes.

In an August 7 editorial, the Michigan Daily questioned the acquisition, saying corporate ownership could imperil the “traditionally maverick role student newspapers have played in debate and dialogue over the issues of the day.”

Colby Atwood, a media analyst and vice president of Borrell Associates media research firm, said that while most college newspapers are “not for sale,” the transaction could cause ripple effects if corporate sponsorship were to take hold. Many colleges might be interested in possible mentorship opportunities and financial support.

College journalists sue to attend university president interviews

South Dakota State University’s Collegian obtained a court order in September preventing university regents from keeping student journalists out of interviews with university presidential candidates.

According to the (Sioux Falls) Argus Leader, the ruling by Circuit Court Judge Rodney Steele reversed a 35 year old regents’ policy at the university. The policy was ostensibly in place to protect candidates from media scrutiny during the interview process, but Steele’s temporary restraining order, issued September 13, stated that there “appears to be no compelling right or reason to exclude applicants as student-journalists from these forums…”

The regents complied with the order, allowing not only student journalists but all media to view the on-campus interviews with four finalists for university president.

The Collegian dropped its suit shortly after the completion of the interviews. John Arneson, lawyer for the Collegian told the Student Press Law Center that seeking a permanent injunction would be a waste of both parties’ time and money.

“But basically, the board gave [an] unconditional surrender and they’ve not threatened to do it anymore,” Arneson said.

David Chicoine, SDSU alum and former vice president of technology and economic development at the University of Illinois, was picked for the position in late September.

In July 2004, the Minnesota Supreme Court ruled in favor of five media outlets, including the Minnesota Daily, who had sued the University of Minnesota board of regents for suspending adherence to the state’s Open Meetings Law and Data Practices Act in a presidential search. (See “University of Minnesota Must Release Finalists’ Names” in the Summer 2004 issue of the Silha Bulletin.)

California law guarantees student press rights in response to Hosty v. Carter

California lawmakers have passed a law meant to guarantee the free press rights of college journalists at public universities.

The bill, AB 2581, was proposed in response to the U.S. Seventh Circuit Court of Appeals’ 2005 ruling in Hosty v. Carter, which allows university administrators in Illinois, Wisconsin and Indiana to review articles in universitiesponsored student newspapers. (See “Supreme Court Will Not Hear Hosty Case” in the Spring 2006 issue of the Silha Bulletin and “Hosty Ruling Could Result in Fewer Freedoms for University Newspapers, Students” in the Summer 2005 issue of the Silha Bulletin for an in-depth account of the Seventh Circuit’s ruling.)

The California law is meant to bring censorship protections for university publications in line with those already in place for high school and professional journalists under California law.

Kyle Smith, editor of Saddleback Community College’s Lariat, told the Student Press Law Center on September 15, “I’m proud of our state for taking steps so quickly to protect student free press and being on the forefront of this law.”

California Governor Arnold Schwarzenegger signed AB 2581 into law on August 28. He also signed a law criminalizing newspaper theft in early September. AB 2612 makes the theft of 25 or more newspapers a criminal offense, punishable by maximum fine of $500 and jail time for repeat offenders.

Student editors often cite newspaper theft as a more prevalent problem than administrative censorship.

Australian student newspapers face funding cuts

The Australian reported on August 9 that student newspapers across the country are “feeling the squeeze” from funding, production and staff cuts and competition from student unions and the Internet.
control the republication of their works after they have first been published in the newspapers.” The full text of the Canadian Press article is available online at http://www.cbc.ca/cp/media/061012/X101216U.html, and the Writer’s Union press release is available online at http://www.writersunion.ca/press/1306.htm.

Robertson also told the Canadian Press she has not yet decided whether to litigate the issue of an implied contract following the Supreme Court’s remanding that issue to the trial court.

— SCOTT SCHRAUT
SILHA RESEARCH ASSISTANT

Student Newspaper Roundup, continued from page 43

While a student campaign for more funding at La Trobe University saved its student newspaper, *Rabelais*, other universities across the country have cut funding, scaled back production, partnered publications with specific programs, or dumped their papers altogether.

Student leaders have expressed concerns about students having a voice, especially as newspapers are increasingly tied to specific funding from their institutions.

“It’s going to be a real push and pull between student editors’ independence and the universities’ temptation to say, ‘We’re funding this, I don’t like how they’ve got a double-page spread about how the faculty of economics is doubling class sizes,’” said National Union of Students president Rose Jackson.

In December 1998, the High Court of Australia affirmed a lower court ruling against editors of the *Rabelais* over a story advocating shoplifting. The former editors each faced jail terms of up to six years and/or fines to a maximum of AUD$72,000. Prosecutors dropped the charges in March 1999 without explanation.

New Jersey newspaper adviser reinstated

A college student newspaper adviser was reinstated for the fall semester by trustees after a federal judge issued a preliminary injunction against her removal. Karen Bosley, a 35 year veteran adviser, was removed from her position overseeing the *Viking News* of Ocean County College in Toms River, New Jersey at the end of the spring term. Bosley’s ongoing lawsuit alleges that the removal was in retaliation to the *Viking News*’ criticism of college administrators. Three editors filed a separate lawsuit in May, 2006 opposing Bosley’s removal and claiming unconstitutional censorship.

Judge Stanley R. Chesler of United States District Court in Trenton ruled in July’s injunction that the removal violated the students’ First Amendment rights and would have a “chilling effect” on future reporting. Trustees voted unanimously to reinstate Bosley on Aug. 28, 2006.

NYU’s J-School requiring ethics pledge

New York University’s Department of Journalism is requiring all its undergraduate and graduate students to sign an ethics pledge. According to NYU’s *Washington Square News*, the pledge is the first step in a larger plan to promote better ethics among its students, future professional journalists.

The Department of Journalism created a journalism ethics committee last fall, chaired by journalism professor Adam Penenberg, and has received a grant from the university to create an ethics curriculum and draft a code of ethics for the department.

“We hope the ethics code will create a culture of honesty, a culture where cheating is frowned upon,” said journalism professor Carol Sternhell.

— PATRICK FILE
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