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Dozens of Journalists Arrested at Republican National Convention in St. Paul

Questions Raised over Preparations and Policies Regarding Media

Dozens of journalists were among the more than 800 people arrested during the 2008 Republican National Convention (RNC) held in St. Paul and Minneapolis September 1 - 4, prompting questions about whether police and security organizers responded appropriately to allow the news media to do their job while controlling protests.

As Many as 50 Journalists Arrested

The journalists arrested and detained – the St. Paul *Pioneer Press* reported as many as 50 – included reporters, photographers, and videographers from Twin Cities television stations WCCO and KARE-11, the national MyFox television chain, the *Pioneer Press*, The Associated Press (AP), several local and national news Web sites and blogs, and student newspapers from the University of Minnesota, the University of Iowa, the University of Wisconsin-Madison, the University of Kentucky, and the University of Nevada, Las Vegas. A list of 47 journalists arrested or detained during the RNC, compiled by the Web site Minnesota Independent, is available at <http://minnesotaindependent.com/8190/cataloging-the-journalist-detainees-connected-to-rnc-protests>.

Many of those detained, arrested, or given citations were swept up in mass arrests on the first and last days of the convention, when the most active protests occurred around downtown St. Paul and the state capitol building. Several members of an online video law enforcement watchdog collective based in New York City were also detained on August 30 while police executed a search warrant for the St. Paul house in which they were staying.

One of the most high-profile arrests was that of Amy Goodman, host of the radio and television show *Democracy Now!*, who was arrested September 1 when she approached a line of riot police in downtown St. Paul to request the release of two of the show's producers who had already been arrested. A video of Goodman's arrest was YouTube's most watched video September 1 and 2, according to *Boston Phoenix* columnist Adam Reilly on October 2.

Several free press advocacy and human rights groups decried the arrests. The Reporters Committee for Freedom of the Press issued a press release on September 5 calling on officials to drop the charges against journalists. In a letter to Ramsey County Sheriff Bob Fletcher and St. Paul Police Chief John Harrington, Reporters Committee Executive Director Lucy A. Dalglish asked, "What conceivable purpose is achieved by citing [journalists] with criminal charges? Once you knew they were journalists, why did you have to engage [in] silly bureaucratic nonsense?" Amnesty International called for an inquiry into the "arbitrary" arrests of journalists in a September 5 press release that also expressed concern about "disproportionate" use of force by police against protesters.

Local advocates from the Twin Cities Media Alliance, along with national group Free Press, organized a letter writing campaign to demand that the charges against journalists be dropped. The groups gathered more than 50,000 signatures in two days, delivering the letters to the office of St. Paul Mayor Chris Coleman on September 5. Twin Cities Media Alliance spokesperson Nancy Doyle Brown, speaking at a September 5 press conference, said "The targeting and harassment of journalists that we've seen during the RNC sends the message that the Twin Cities don't value the essential role that journalists play in a democracy. From the pre-convention raids to the ongoing harassment and arrests of journalists, these have been dark days for press freedom in the United States."

On the other hand, KSTP-TV reported September 12 that a KSTP/SurveyUSA poll of 552 registered Minnesota voters found that 60 percent of the people asked how law enforcement handled the arrests of hundreds of protestors during the RNC responded, "just about right." Twenty-two percent said police were "too aggressive" and 15 percent said they were "not aggressive enough." KSTP, one of the few local media organizations to have no journalists arrested during the RNC, broadcast a "rare" editorial September 8, praising police who were "calm and professional and measured when faced with protesters."

St. Paul Drops Charges Against Journalists

On September 19, Coleman announced that the city would not prosecute journalists who were arrested and charged with misdemeanors for being present at an unlawful assembly during the RNC. Coleman said in a press release that the decision "reflects the values we have in Saint Paul to protect and promote our First Amendment

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rights to freedom of the press.” The press release also said “the city attorney’s office will use a broad definition and verification to identify journalists.”

St. Paul City Attorney John Choi told the *Bulletin* that as of November 12, his office had reviewed citations against 42 journalists and had declined to prosecute 34 who were charged only with misdemeanor presence at an unlawful assembly and whose status as journalists was confirmed. The city attorney’s office has worked with the Society of Professional Journalists and the Reporters Committee for Freedom of the Press to identify journalists whose charges could be dropped, and Choi has urged those who qualify to contact his office in order to expedite the handling of their cases.

According to Choi, Deputy City Attorney Therese Skarda was assigned to the cases of journalists whose RNC charges the city would consider dropping. Choi declined to give specific criteria Skarda used for a “broad” definition of “journalist,” saying that defining journalism was “a debate we don’t want to get into.” He said that the definition was “a matter of prosecutorial discretion,” and that Skarda used a “reasonable standard” to determine whether those purported journalists who asked the city to drop their charges qualify under the September 19 policy announcement. Choi said that among the eight cases still pending, some included individuals that his office had asked to provide more information that would demonstrate that they qualify as journalists under the policy. Choi said such information could include “anything that would be helpful” in making that determination, including “citations,” “references,” or information available on the Internet.

If the city agrees to drop the charges, the city attorney’s office sends a “decline of prosecution letter” to the arrested journalist and to the St. Paul Police Department, announcing that the charges have been dropped pursuant to the September 19 policy announcement, while clarifying that the decision not to prosecute the journalist in that particular instance “in no way means that the Saint Paul Police Department acted inappropriately or without probable cause.”

Although city officials’ decision to decline to prosecute members of the media arrested while covering the RNC protests was probably welcome news for many, questions remained about the plans police had in place before the convention, how journalists could have prevented their own arrest, and what led to inconsistent treatment of credentialed and non-credentialed journalists who were arrested.

Forum Addresses ‘What Went Wrong – What Went Right’ at the RNC

A September 22 forum titled “Your Credentials, Please: The Media and Law Enforcement at the RNC – What Went Wrong, What Went Right?” sought to address some of the lingering questions. The event was held at the University of Minnesota’s Coffman Union Memorial Theater and was sponsored by the Silha Center, the Minnesota Pro Chapter of the Society of Professional Journalists, the Minnesota Journalism Center, and the School of Journalism &

“Having watched hours of footage, I’d be hard-pressed to think we didn’t give great access.”

– Ann Mulholland
St. Paul Deputy
Mayor

Mass Communication. The night’s panel discussion was moderated by Al Tompkins of journalism think tank The Poynter Institute and featured St. Paul Deputy Mayor Ann Mulholland, KARE-11 photojournalist Jonathan Malat, St. Paul Assistant Police Chief Matt Bostrom, and Pioneer Press reporter Mara Gottfried. Organizers also invited members of the local media, members of the Society of Professional Journalists, and local media attorneys to serve as a pool of experts.

Before beginning the discussion, Tompkins showed video of some of the key protest events of the RNC, some of which was filmed by Malat before he was arrested in a mass arrest on September 4. Tompkins said the goal of the event was to engage in a productive dialogue rather than a “witch hunt.”

According to Tompkins, one issue central to the discussion was the need to have a “serious conversation” about the question “who is a journalist?” Little was offered, however, toward a clear definition. Local media lawyer Mark Anfinson agreed that the “who is a journalist” question “permeates” the problem of journalists being arrested or detained, and he observed that refusing to draw a line around who is and is not a journalist “open[s] a door with a dark alley behind it.” Anfinson declined, however, to suggest where that line should be drawn.

According to Bostrom, St. Paul police and the other law enforcement agencies involved in convention planning did not anticipate the sheer number of people on the scene who claimed to be media. He pointed out that St. Paul police do not issue formal media credentials, but that officers were trained that “the media has a story to tell and they have a right to tell it.”

Mulholland said the mayor’s office had been determined to assure that members of the media had “access and the information they need to tell a story,” adding, “Having watched hours of footage, I’d be hard-pressed to think we didn’t give great access.” However, when it came to whether law enforcement should treat all journalists – from reporters for mainstream media to independent bloggers – as equals at the scene of a protest, Mulholland said “I don’t know who the journalist is ... I think our approach was probably to treat everyone the same.”

According to Anfinson, when police issue a “lawful order” telling a crowd to disperse, such as was done during the September 1 and September 4 protests, journalists risk arrest if they do not obey the order, just like everyone else, regardless of whether they have media credentials of any kind. “It’s hard to see where the police violated rights as opposed to acting without a lot of tact or wisdom,” Anfinson said. Bostrom said that officers have “discretion” to decide whether members of the media are arrested. However, he observed that “If [officers] were to release someone who was a criminal hiding behind a media credential, they have to be accountable for that.”

Discussion also focused on the fact that treatment of journalists who were arrested and those who were

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not apparently varied considerably. According to AP Minnesota Bureau Chief David Pyle, four AP journalists were arrested or “roughed up” during various RNC protests, including photographers Matt Rourke and Evan Vucci. Pyle said Vucci was “picked up and slammed to the ground” by an officer while in the midst of a protest crowd on September 1, but when he showed his press credentials, which included those issued by the RNC, he was released on the spot. Rourke, who also had press credentials issued by the RNC, was rounded up in the same crowd, but was placed under arrest, had his equipment confiscated, and was held until 2:30 a.m. the following day before he was charged and released.

Minnesota Daily assistant photo editor Stephen Maturen, in an account he gave to the National Press Photographers Association Web site, said that on the evening of September 4 he was pepper sprayed in the face after asking an officer how to leave the scene of the protest, which had turned dangerous. Shortly thereafter, Maturen said, he was arrested, placed in riot handcuffs, and his equipment was confiscated. While he was sitting on a curb awaiting processing with other arrestees, Maturen said, a former colleague who was working with WCCO and who was not arrested recognized him and encouraged St. Paul Police Public Information Director Tom Walsh to have him released. “About a minute later my zip ties were cut and my [memory] cards and cameras were in hand,” Maturen said. His account is available at http://www.nppa.org/news_and_events/news/2008/09/maturen.html.

Malat said that when he was caught up in the mass arrest on the evening of September 4, Sheriff Fletcher arrived while people were being processed, directing that journalists with credentials issued by the RNC, such as Malat, be separated from other arrestees. Freelance reporter Brian Madigan said he was caught up in the same arrest but was not cited and released like other journalists, adding that while Malat was able to collect his equipment in time for the 10 p.m. KARE-11 news that night, it took several days for Madigan to have his materials returned. Madigan did not specify what materials were confiscated.

Another question raised at the forum was over a pre-convention arrangement between some media organizations and police to embed journalists with “mobile field forces.” According to a September 26 article by David Brauer at MinnPost.com, reporters from local media, including WCCO, the *Pioneer Press*, and the Minneapolis *Star Tribune*, proposed the idea of reporter ride-alongs to police organizers during the convention’s planning stages. Brauer reported that eventually the *Star Tribune*, the *Pioneer Press*, WCCO, KSTP-TV, Fox9, and Minnesota Public Radio (MPR) agreed to sign waivers in which police promised embedded reporters would not be subject to arrest following orders to disperse in exchange for a promise from media organizations that they would hold any reporting on “police strategy” until after the convention ended. According to Brauer, *Star Tribune* reporter David Chanen said police also told embedded reporters, “We’re not your babysitters; we’re not looking out for your welfare, you’re on your own.”

There was some disagreement at the forum over whether the embedding opportunity was extended fairly. Brown, of the Twin Cities Media Alliance, alleged that embedded journalists were selected by the police. “I imagine that [police] had their own criteria – maybe subjective, maybe not – of what journalists they felt would be appropriate, or acceptable,” Brown said, asking why the program was kept a secret. Gottfried, who was one of the embedded reporters, responded that she did not believe the program was kept secret.

According to Brauer’s story, Walsh said he sent an e-mail to an 800-person list directing any journalist who was interested in embedding with police to attend a pre-convention meeting. Reports from local journalists conflicted over whether the program was ever mentioned in a meeting or e-mail. Brauer wrote that the “bottom line” appeared to be that “major-media journalists who were smart enough to ask got in, but Walsh did some outreach among direct competitors. However, greener or less-connected media likely never knew a ‘stay out of jail free’ card was available.”

At the forum, KARE-11 News Director Tom Lindner said he turned down embedding a reporter because of the requirement to hold stories until after the convention, which he called “cockamamie.” Quoted in Brauer’s story, Lindner said, “If we had truly witnessed, God forbid, someone severely injured or killed Monday, we’re supposed to hold that until Friday? Our job is to release the news, not hold news.”

But Chanen said at the forum that under his embedding agreement he could opt out at any time after he informed the commanding officer that he was doing so. According to Brauer, Chanen said that if he had exercised that option “any behind-the-scenes tactical insight up to then would’ve been off limits ... [but] he could use everything he saw on the street.”

According to Brauer’s September 26 article, embedding reporters with police during the RNC raised practical and ethical questions for the news organizations that participated, such as whether it was a particularly effective way to cover the protests, and whether the news organizations were transparent enough with readers and viewers about the special arrangement.

WCCO News Director Scott Libin told Brauer that he was not concerned that embedding limited his station’s ability to cover the demonstrations and protests because he had several other teams covering them at the same time. If events had turned especially violent or included police misconduct, other reporters or videographers who were not under an embargo could have gone to the scene and reported. Libin also said he would have considered breaking the agreement to hold reporting in an extreme circumstance.

Officials from MPR and the *Pioneer Press* both said that because they embedded reporters with police only on Thursday, September 4, the last day of the convention, they were not particularly concerned about holding reporting from their embedded reporters until the next day, after the convention had concluded.

“If we had truly witnessed, God forbid, someone severely injured or killed Monday, we’re supposed to hold that until Friday? Our job is to release the news, not hold news.”

– Tom Lindner
News Director,
KARE-11

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Brauer said the media organizations that embedded reporters were not transparent enough about the arrangement, and that “disclosure was a problem for privileged organizations.” Chanen’s September 5 *Star Tribune* story noted that he and photographer Richard Sennott were “embedded” with the police, but it did not explain what the term meant. WCCO also used the term in a report without explaining the arrangement. Brauer cited a September 6 “roundup” story about police and protesters in the *Pioneer Press* that included some of Gottfried’s reporting but did not mention the embedding arrangement, and said a similar RNC “debrief” report that aired on MPR the day after the convention ended did not explicitly describe the arrangement.

Pre-Convention Raid Questioned

One forum questioner asked Bostrom to address the August 30 pre-convention raid on a St. Paul house where members of the Internet video activist group I-Witness Video was staying. Bostrom refused to comment, only saying that a judge had signed the search warrant that was executed.

According to the *Pioneer Press* on September 25, I-Witness Video monitors law enforcement during protests and helped exonerate 400 people charged in connection with protest activity at the 2004 RNC in New York. The group films protest activity and uses the footage to verify or disprove police claims about protesters’ conduct.

The *Pioneer Press* reported that St. Paul police surrounded the house at 951 Iglehart Avenue on the afternoon of August 30, eventually obtaining and executing a search warrant for the house that included “packages and their contents;” guns; ammunition; weapons; hazardous materials; cell phones, computers, pagers and other communication devices; and “the electronic data contained within (those) devices.” The owner of the house, Michael Whalen, and the I-Witness Video group were detained and handcuffed in the back yard for two hours but eventually freed without charges. No property was taken from the house, the *Pioneer Press* reported.

The *Star Tribune* reported September 29 that the search warrant affidavits imply that “Whalen supported international terrorism, had boxes of weapons delivered to his home, advocated violence during the [RNC] and fled police in a rented Chevy.” Whalen has denied all those allegations, pointing out that the boxes police searched during the August 30 raid contained literature on veganism and vegetarianism belonging to his housemate, and suggesting that the I-Witness Video group were the real targets of the raid. The *Star Tribune* reported Oct. 10 that Whalen has served the city of St. Paul with notice that he will file a \$250,000 lawsuit.

Several other police raids on August 29 and 30 led by the Ramsey County Sheriff’s office targeted three

Minneapolis houses where protesters were staying and a protester “convergence space” in St. Paul. Four people were arrested during the raids and charged with conspiracy to commit riot in furtherance of terrorism. According to the AP on August 30, Chuck Samuelson, executive director of the American Civil Liberties Union in Minnesota said arresting people on conspiracy charges to pre-empt disruptions is troubling because it stops people from exercising free-speech rights.

Officials Announce Investigations; Media Not a Central Focus

Officials in St. Paul and Minneapolis announced plans to investigate policing during the convention, but neither expects to focus exclusively on media issues. The St. Paul City Council approved an investigation led by former U.S. Attorney Tom Heffelfinger and former Assistant U.S. Attorney Andy Luger to study the “interaction” between the community and police from the Saturday before the convention, August 30, to its last day, September 4. The commission’s deadline is December 15 and its report will identify and analyze the public safety plan; examine how the plan was carried out, including the gathering of officers, training, and equipment; and evaluate how the plan was executed before and after the convention. But it will not investigate individual cases of alleged misconduct by police or citizens, the *Star Tribune* reported October 1. The commission held a public hearing on November 6.

On September 11, Minneapolis Mayor R.T. Rybak announced a plan for a series of reviews into the Minneapolis Police Department’s actions in Minneapolis during the RNC, the *Star Tribune* reported. Several departments will provide the mayor and city council with reports on police operations and training as well as the process used for citations and arrests and their financial impact on the courts. Rybak also suggested that officials develop a model policy for how to work with the media during large crowd events, the *Star Tribune* reported.

One Journalist Arrested at DNC; Charges Dropped

On October 17, the Reporters Committee for Freedom of the Press reported that charges would be dropped against an ABC News producer who was arrested and charged with trespassing at the Democratic National Convention (DNC) in Denver on August 27.

ABC reported that producer Asa Eslocker was standing on a public sidewalk and filming as senators and donors arrived at a Denver hotel for a meeting, part of a report on links between large donors and party officials, when he was arrested. His arrest was also caught on tape. This was the only widely reported incident of a journalist being arrested at the DNC.

– PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

Election 2008

Sen. Coleman Bans Alternative Media from Press Conference

Faced with a three-minute barrage of questions from reporters about whether U.S. Sen. Norm Coleman (R-Minn.) received gifts of clothing from businessman Nasser Kazeminy, a spokesman for his re-election campaign refused to explicitly deny the report, saying the campaign will not respond to bloggers. Later, on Oct. 10, 2008, the campaign refused admission to two reporters from alternative online media outlets in Minnesota at a scheduled news conference.

The original allegations about clothing gifts appeared on the "Washington Babylon" blog on *Harper's Magazine's* Web site on October 6. The blog is written by Ken Silverstein, an award winning reporter formerly of the *Los Angeles Times*.

"I've been told by two sources that Kazeminy has in the past covered the bills for Coleman's lavish clothing purchases at Neiman Marcus in Minneapolis," Silverstein wrote. "The sources were not certain of the dates of the purchases; if they were made before Coleman joined the Senate in 2003, he obviously would not be required to report it under Senate rules."

Two days later, on October 8, Coleman's spokesman, Cullen Sheehan, was asked repeatedly by reporters at a news conference about the allegations. Sheehan repeated the phrase "the Senator has reported every gift he has ever received" at least seven times, but refused to explicitly deny the allegations. Sheehan said the campaign will not "respond to unnamed sources on a blog," but refused to offer further explanation. Video of the press conference is available at <http://www.youtube.com/watch?v=VySnpLoaUrI>.

Sen. Coleman offered a somewhat more detailed explanation when he was asked about the alleged clothing gifts by a St. Paul *Pioneer Press* reporter on October 7. "The idea of responding to the things bloggers throw out is something I'm not going to get into. There are very awful things that are said about people on blogs. And the idea to make it a legitimate story is something ... I just don't respond to it," Coleman said, according to an October 9 MinnPost.com report.

Silverstein argued in a Washington Babylon post on October 8 that Coleman's stonewalling was an attempt to change the topic and deflect criticism surrounding the alleged gifts. He pointed out that Coleman had been given the opportunity to respond to the allegations before the story was published, and the senator had refused to explicitly confirm or deny the story.

While Coleman's refusal to specifically deny the alleged clothing gifts generated attention from both local and national media outlets, the campaign continued its new policy of denying access to the alternative media Oct. 10, 2008 when it refused to admit journalists from Web sites The UpTake and The Minnesota Independent at a scheduled news conference.

Video from The UpTake shows an unidentified Coleman staffer refusing to admit the two journalists,

along with the videographer from the DFL party who produced the Sheehan video, to the news conference. The Coleman staffer explains that the news conference is only open to "credentialed members of the press." When asked what it takes to be credentialed, he says it is only for "legitimate members of the press." The staffer refuses to explain further, telling the journalists they are "free to leave."

An October 10 story by David Brauer on MinnPost.com said The UpTake and The Minnesota Independent are "undeniably left-favoring" news organizations, but still provide valuable services to the public.

The UpTake would have provided the only live video feed of the news conference. It also provided the only live video feed of the first debate between Coleman and his challenger Al Franken.

Later, the Coleman campaign also barred The UpTake from a press conference on November 11 and a campaign event featuring former New York City Mayor Rudy Giuliani. The Minnesota Independent reported that bloggers from MinnPost.com and Minnesota Democrats Exposed were admitted to those events.

Newspapers Shut Down Partisan Coverage Ahead of Election

The *Star Tribune*, Minnesota's most widely read newspaper, announced October 25 that it had "asked" its local news columnists to refrain from partisan commentary until after the election. Editors said the decision was an effort to "separate news from opinion."

Editor Nancy Barnes announced the decision in a column about the newspaper's coverage of the economic downturn and the elections, published October 25. "The challenge as an editor is to separate partisanship and emotion from the truth," Barnes wrote in the column.

The decision was announced three days after columnist Katherine Kersten lambasted Democratic senatorial candidate Al Franken for his "penchant for the pornographic" and anti-Christian comedy in a column that generated more than 500 comments on the newspaper's Web site. On October 21, columnist Nick Coleman wrote about GOP congressional candidate Michele Bachmann, suggesting her "stupid" comments about her belief that Barack Obama may hold "anti-American views" could cost her the election.

Colorado Community Newspapers made an even more dramatic effort to avoid partisanship in the newspaper, halting all political coverage two weeks before the election. "Any news coverage, letters to the editor or any other content discussing the Nov. 4, elections will not be printed to allow readers an opportunity to develop their stance without media interference," an October 20 notice in the *Littleton* (Colo.) *Independent* said.

— MICHAEL SCHOEPP
SILHA FELLOW

"The idea of responding to the things bloggers throw out is something I'm not going to get into."

— Sen. Norm
Coleman (R-Minn.)

Election 2008

Minnesota News Organizations Granted Access for Exit Polling by Federal Judge

On Oct. 15, 2008 a federal judge issued a preliminary injunction blocking the enforcement of a Minnesota law requiring anyone not voting or registering to vote on election day to remain 100 feet away from the building where voting is being conducted.

Six news organizations: ABC, The Associated Press (AP), CBS, CNN, Fox News, and NBC, sued Minnesota Secretary of State Mark Ritchie and State Attorney General Lori Swanson on September 29, alleging that Minn. Stat. § 204C.06(1) violates their First Amendment right to conduct exit polls as long as they do not interfere with voters' ability to vote. Federal District Judge Michael Davis' October 15 order in *ABC, Inc. v. Ritchie*, No. 08-5285 (D. Minn. 2008) blocks enforcement of the statute only as it applies to exit pollsters and only until the court can resolve the underlying dispute about the statute's constitutionality. However, the court also found that the media organizations are likely to ultimately prevail.

Davis ruled that the state law failed to satisfy all three parts of the U.S. Supreme Court's "time, place, and manner" test for laws that restrict free expression. Under this test, the government must prove a law does not restrict expression based on its content, is "narrowly tailored to serve a significant government interest," and leaves open ample alternatives for communication.

Minn. Stat. § 204C.06(1) states, "an individual shall be allowed to go to and from the polling place for the purpose of voting without unlawful interference. No one except an election official or an individual who is waiting to register or to vote shall stand within 100 feet of the building in which the polling place is located."

Davis wrote that the statute is content-neutral on its face, "because it prohibits everyone who is not a voter or an election official from 'stand[ing] within 100 feet of the building in which a polling place is located,'" regardless of their purpose for standing there. However, he observed that in crafting the law, state lawmakers explained that its purpose was to allow election officials to remove people engaged in expressive activity, such as electioneering, protesting, or other disruptive behavior, from the polling place, rather than removing any person who happened to be standing nearby. Therefore, Davis wrote, the statute constitutes an "incidental" restriction of speech and is not content-neutral.

As to whether the statute is narrowly tailored, Davis wrote that although the government interest in preventing "disruption and overcrowding" at polling places was compelling, the government provided no evidence that exit polling has ever proven to be a disruption for voters or a problem for election officials. In fact, he said, citing a 2006 case involving election day exit polling, *American Broad. Co., Inc. v. Blackwell*, 479 F.Supp.2d 719 (S.D. Ohio 2006), "the presence of the press at polling places would likely

serve as a deterrent to fraud and intimidation" by campaigns or other disruptive groups. Davis added that the first sentence of the statute, which states, "an individual shall be allowed to go to and from the polling place for the purpose of voting without unlawful interference," should give election officials all the authority they need to prevent disturbances without banning exit polling.

Davis lastly found that forcing exit pollsters to stay 100 feet away from polling places significantly impedes their ability to conduct accurate polling without providing them with an adequate alternative. He concluded that the news media companies' First Amendment rights and their interest in providing to the public "accurate and valuable voter information during this historic election year" far outweighed the government's compelling but ultimately unproven concerns about complications and disruption at the polls. He ordered the Secretary of State to notify county auditors and election officials that the news organizations and their agents are allowed to conduct exit polling, provided their actions do not violate state or federal law and they do not unlawfully interfere with voters' ability to go to and from the polls.

According to the Minneapolis *Star Tribune* on October 16, Susan Buckley, attorney for the news organizations, called the ruling "just a wonderful opinion and a victory for the First Amendment in all respects." Buckley said this lawsuit was the 12th to be filed in 10 states over the past 20 years against exit polling prohibitions or other restrictions. In every case, courts have ruled that they violate the First Amendment, the *Star Tribune* said.

The October 15 ruling is the second time that a federal judge has enjoined a Minnesota law that restricts access to polling places by pollsters or reporters. In 1988's *CBS Inc. v. Grove*, 15 Med. L. Rep. 2275, (D. Minn 1988), U.S. District Judge David Doty issued an injunction against a state law that prohibited anyone within 100 feet of a polling place from asking people how they voted.

State legislators amended the law in 1989 to prohibit anyone from standing within 100 feet of a polling place, which was initially interpreted to be measured from the room where voting was taking place. Media organizations complained that some election officials interpreted the law to mean that pollsters were to remain 100 feet from the entrance to the building where voting was taking place, according to the October 15 opinion.

Davis wrote that when the media requested clarification from the Secretary of State's office in early September, in order to prevent similar problems during the Nov. 4, 2008 general election, they were told the statute was amended effective June 1, 2008 to be measured as 100 feet from the building where voting was taking place, and that it would be enforced against exit pollsters.

— PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

Federal District Judge Michael Davis ruled that forcing exit pollsters to stay 100 feet away from polling places significantly impedes their ability to conduct accurate polling without providing them with an adequate alternative.

Election 2008

Bias or Reality? Media Critics Assess Positive Obama Coverage and Negative McCain Coverage

In the days before the presidential election on Nov. 4, 2008, some media critics suggested the press might be too eager to call the election in favor of Democratic candidate Sen. Barack Obama (D-Ill.), but others said that coverage reflected reality rather than partisan bias.

In a November 2 column, *New York Times* Public Editor Clark Hoyt observed that coverage in his newspaper's opinion and news sections, as well as in other media outlets, seemed increasingly confident of an Obama win. He quoted an October 18 *Times* op-ed column by Charles M. Blow that said, "I've studied the polls and the electoral map for months, and I no longer believe that John McCain can win," and cited cover stories in *Newsweek* and *New York* magazines that speculated about what an Obama presidency would look like. *Washington Post* media critic Howard Kurtz asserted in his October 28 column titled, "Journalists name 44th President," that articles like those in *Newsweek* and *New York* showed that "Many pundits and publications seem ... certain of a big Democratic win."

Political correspondent John Dickerson of online magazine Slate observed in a November 2 post that an Obama loss could be considered just as historic as an Obama win because "It would mark the biggest collective error in the history of the media and political establishment." Dickerson wrote, "an Obama loss would mean the majority of pundits, reporters, and analysts were wrong."

During the October 23 broadcast of "The Newshour with Jim Lehrer," reporter Jeffrey Brown asked *Los Angeles Times* political campaign reporter Robin Abcarian whether "some in the media have essentially started to treat this race like it's over," a concern Abcarian said he shared.

Many critics highlighted studies released in late October 2008 by the Project for Excellence in Journalism (PEJ) which reported that in television, print and online news coverage from September 8 to October 16, 57 percent of overall coverage of the McCain campaign had a "negative tone," while only 29 percent of Obama coverage was "negative." Meanwhile, 14 percent of McCain's coverage was considered "positive" in tone, while 36 percent of Obama coverage was "positive." The studies are available through the group's Web site, <http://journalism.org/>.

PEJ Associate Director Mark Jurkowitz told PBS' Brown that the data did not necessarily show media bias or a lack of balance. "If a candidate is perceived to be ... doing well in polls, if the strategic dynamic of the campaign is favoring him, then he tends to get better coverage," Jurkowitz said, adding, "the simple message of our report is that: winning begets winning coverage."

According to Kurtz, journalists say that it would be "a disservice to readers and viewers to ignore,

in the name of balance," polling data that indicated a strong lead for Obama or concerned comments from Republican pundits. Hoyt interviewed Richard Stevenson, *The New York Times* editor in charge of campaign coverage, for the November 2 column, who said, "There is a great degree of angst now among Republicans about their prospects for president and down the ballot. There is a great degree of optimism among Democrats. That all leads you to a conclusion right now, as a snapshot in time, that Obama is in a better position than McCain is in. That's the reality, and we're not going to put our finger on the scale to pretend otherwise."

John F. Harris and Jim VandeHei, editors of the Web site Politico, put it more bluntly in an October 30 post: "As it happens, McCain's campaign is going quite poorly and Obama's is going well. Imposing artificial balance on this reality would be a bias of its own."

Slate's Dickerson told Kurtz that, considering Obama's gathering strength in key battleground states during the final weeks of the campaign, "we're not crazy to think it's all going Obama's way." But, Dickerson said, "we've seen how this can go horribly wrong when you call the thing too early, and voters find it offensive when journalists skip over the event the voters are supposed to be taking part in."

Kurtz, along with Hoyt, also pointed out the fallibility of the media relying too much on polls to tell the story of the race. Kurtz said that "as recently as the middle of last December, Hillary Clinton led Obama by 30 points in a *Post* poll, while Rudy Giuliani was the GOP front-runner." Polls also led many to predict that Clinton would lose the Jan. 18, 2008 New Hampshire primary, including the *Washington Post*, which said in a story that day that a loss would leave her campaign "gasping for breath." Instead, Clinton won, breathing new life into her campaign.

According to Hoyt, *The New York Times* treated polls "with great and appropriate caution" in regards to the presidential election, citing the expectation that youth and minority voters – groups whose turnouts are notoriously unpredictable on Election Day – would probably play an important role in choosing the new President.

According to Kurtz, veteran pollster John Zogby said "The media still misunderstand and, to a great degree, still misrepresent polls. We don't predict, can't predict." Nevertheless, Kurtz said that on the eve of the 2004 election, Zogby predicted that John Kerry would beat President Bush, a move he now attributes to "hubris and naivete." After Bush won, Zogby said, "I wasn't in a fetal position, but I vowed I wouldn't do that again. And I haven't."

– PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

"As it happens, McCain's campaign is going quite poorly and Obama's is going well. Imposing artificial balance on this reality would be a bias of its own."

– John F. Harris and
Jim VandeHei
Editors, Politico.com

Journalists and Subpoenas

Judge Orders Michigan Reporter to Give Up Sources in Privacy Act Case

A U.S. District Court judge in Michigan ordered *Detroit Free Press* reporter David Ashenfelter to reveal the identity of confidential sources Aug. 28, 2008, holding there is no constitutional or common law testimonial privilege for journalists in the 6th Circuit. The lawsuit, in which neither the reporter nor the newspaper is a party, alleges that the Department of Justice violated the federal Privacy Act when unnamed officials leaked information to the *Free Press* concerning a botched 2003 terrorism trial.

The 6th U.S. Circuit Court of Appeals, which takes appeals from federal district courts in Michigan, Ohio, Kentucky, and Tennessee, is one of two federal circuit courts of appeals that have not recognized any form of constitutional privilege for reporters seeking to protect the identity of confidential sources. The appellate court has declined to recognize a privilege for reporters subpoenaed to testify before a grand jury, but has yet to consider the privilege question in a civil case.

The neighboring 7th Circuit, covering Illinois, Indiana, and Wisconsin, has also declined to recognize a testimonial privilege for reporters. (See “Silha *Bulletin* Guide to Journalist’s Privilege: Federal Privilege Question is Facing a Crossroads” in the Spring 2008 issue of the *Silha Bulletin*.)

The case, *Convertino v. U.S. Department of Justice*, 2008 WL 4104347, No. 07-CV-13842 (E.D. Mich. 2008), began with a civil lawsuit filed in 2004 by former Assistant U.S. Attorney Richard Convertino against the Department of Justice in federal district court in Washington D.C. The complaint alleges that the Justice Department violated the Privacy Act, 5 U.S.C. § 552a, by leaking records related to a confidential ethics investigation focused on Convertino’s conduct during a 2003 terrorism trial. (See “Gannett Co. Subpoenaed to Disclose DOJ Source” in the Fall 2006 issue of the *Silha Bulletin*.)

The Privacy Act makes it illegal for government agencies to disclose records maintained by the agencies without the consent of the named individual. The statute also contains several exceptions, including for disclosures authorized by other statutes, related to law enforcement activities, and to congressional committees and subcommittees.

The statute creates a private right of action for individuals to sue government agencies if the agency improperly discloses records pertaining to the individual. Plaintiffs in several recent civil suits filed under the statute have sought to compel discovery from third-party reporters in an effort to uncover the identity of confidential sources. (See “Reporters Refuse to Reveal Sources in Spy Case” in the Fall 2003 issue of the *Silha Bulletin* and “Reporters Ordered to Testify and Reveal Government Sources in Hatfill Case” in the Fall 2007 issue of the *Silha Bulletin*.)

During the 2003 terrorism trial, Convertino allegedly withheld evidence from the defendants that could have been helpful to their case. At the request of the Justice Department, the convictions obtained in the 2003 trial were overturned, and the Justice Department began an internal investigation and eventually filed criminal charges against Convertino. While the criminal trial took place in Michigan, Convertino’s civil suit was on hold. But on Oct. 31, 2007, a jury acquitted Convertino of all criminal charges and discovery in the Privacy Act suit resumed, an Associated Press (AP) report said.

The ruling stems from a motion to compel Ashenfelter and the *Detroit Free Press* to reveal the identity of the government sources quoted in the 2004 *Free Press* story about Convertino’s alleged misconduct. Convertino filed the motion in federal court in Michigan because Ashenfelter and the *Free Press* are located there. Ashenfelter sought to have the matter removed to the court in Washington D.C. where Convertino’s civil suit against the U.S. Government is pending, but the judge in Michigan denied the request, the *Free Press* reported November 8.

Ashenfelter and his employer opposed the motion, arguing the identity of the source was protected by a constitutional or common law reporter’s privilege and also outside the scope of discovery authorized by Rule 26 of the Federal Rules of Civil Procedure.

Beginning with the constitutional question, Judge Robert H. Cleland noted that 10 of 12 U.S. Circuit Courts of Appeals have recognized some form of constitutional privilege. But in *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987), the 6th Circuit declined to join the majority. Instead, in a broadly worded opinion, the court declined to recognize a constitutional privilege for a television reporter who had refused to testify before a criminal grand jury.

The 6th Circuit based its ruling on *Branzburg v. Hayes*, 408 U.S. 665 (1972), the landmark case in which a plurality of the U.S. Supreme Court held that reporters have no constitutional privilege to refuse to testify before a grand jury.

According to Cleland, the 6th Circuit’s decision in *Grand Jury Proceedings* forecloses the recognition of “any reporters’ privilege, qualified or absolute, in civil cases.” Even though the appellate court dealt with a criminal grand jury and not a civil case, Cleland ruled, the holding in *Grand Jury Proceedings* bars the recognition of a privilege in all circumstances.

If the *Convertino* case is appealed, it will present the 6th Circuit with its first opportunity to consider whether reporters have a constitutional privilege in civil cases.

The district court also rejected a reporters’ privilege on common law grounds. “[The 6th] Circuit’s disavowal of a First Amendment-based

“What sources often bring is information that the public has a right to know. If they fear their identities will be revealed and they could be exposed to retaliation, a lot fewer people with valuable information will want to come forward.”

– Paul Anger
Editor, *Detroit Free Press*

Journalists and Subpoenas

Pennsylvania High Court Upholds ‘Absolute’ Shield Law

Pennsylvania’s highest court refused to adopt a “crime-fraud exception” to the state’s statutory shield law Sept. 24, 2008, holding that the statute’s “unambiguous” text provides an absolute shield for reporters to protect the identity of confidential sources.

“Our Shield Law jurisprudence has consistently recognized the statute’s absolute protection of a source’s identity from compelled disclosure. For that reason alone, we cannot simply engraft upon the statute an exception which would not only contradict the well-established public policy underlying the Shield Law, but, as importantly, would contravene the statute’s unambiguous text,” Chief Justice Ronald D. Castille wrote for a majority of the court in *Castellani v. Scranton Times, L.P.*, 956 A.2d 937 (Pa. 2008).

The ruling upheld a mid-level appellate court’s reversal of a trial court order that would have forced a reporter for *The Scranton Times* and *The Tribune*, both based in Scranton, Pa., to reveal the identity of a confidential source. (See “Pennsylvania Court Rules Reporter Need Not Reveal Source” in the Winter 2007 issue of the *Silha Bulletin*.)

Both papers, which have since merged to become *The Times-Tribune*, published essentially identical front-page stories by Jennifer Henn about a grand jury investigation of alleged wrongdoing in Lackawanna County’s prison system on Jan. 12, 2004, Castille’s opinion said. The stories alleged that two county commissioners, Randall A. Castellani and Joseph J. Corcoran, were uncooperative when questioned by the grand jury about problems at the prison.

Grand jury proceedings are closed to reporters and are supposed to be confidential, but Henn cited “a source close to the investigation” in her reporting. Pennsylvania law, 42 Pa. Stat. Ann. § 4549, makes it illegal for participants in grand jury proceedings to disclose information about the proceedings with the single exception that witnesses may discuss their own testimony.

After the stories ran, the grand jury’s supervising judge, Isaac S. Garb, appointed a special prosecutor to investigate whether the source was a person connected to the state attorney general’s office, which was conducting the grand jury investigation. But the prosecutor concluded that the allegations in the story that the commissioners “stonewalled” the grand jury and irritated jurors to the extent that Castellani and Corcoran were nearly pulled from the witness stand were inaccurate and could not have come from actual participants in the proceedings.

Garb concurred in the prosecutor’s report, noting the inaccurate assertions in Henn’s story provide no evidence that someone in the attorney general’s office broke the law. “Obviously, the source of the reporter’s information was someone not privy to the Grand Jury proceedings and, therefore, not someone in the Office of the Attorney General,” Garb wrote.

Citing the special prosecutor’s report as evidence, Castellani and Corcoran filed a defamation suit

against Henn and the newspapers in the Lackawanna County Court of Common Pleas. The commissioners quickly moved to compel the defendants to disclose the identity of Henn’s confidential source.

In a June 3, 2005 order, Judge Robert A. Mazzone granted the plaintiffs’ motion. Although he acknowledged that the shield law, 42 Pa. Cons. Stat. Ann. § 5942, purported to provide absolute protection for reporters seeking to protect the identity of confidential sources in order to promote the free flow of information, he ruled those interests must yield to the state’s stronger interest in grand jury confidentiality.

Mazzone distinguished the case from other instances where Pennsylvania courts have upheld the absolute protections of the shield law based on the nature and foundation of the communication between Henn and her source. “This communication does not talk about a crime – it is the crime,” he wrote.

After issuing the order, Mazzone certified the question for immediate appeal to the Pennsylvania Superior Court before continuing with the defamation suit.

The mid-level court reversed Mazzone’s ruling and the Pennsylvania Supreme Court affirmed, holding, “the news media have a right to report news, regardless of how the information was received.” The high court recognized that Henn’s source may have committed a crime, but held that it was improper to punish the media for the wrongdoing of their source. “[T]he Shield Law protects a journalist’s source of information from disclosure, even if such protection would conceal or cover-up a crime,” Justice Castille wrote for the majority.

Castille contrasted the statute’s nearly absolute protection for the identity of a source with its more ambiguous description of what type of “source” is actually protected.

In *Hatchard v. Westinghouse Broadcasting Co.*, 532 A.2d 346 (Pa. 1987), the State Supreme court held in the context of a libel action that the shield law does not protect “unpublished documentary information” that does not reveal the identity of a confidential informant. That ruling recognized that “the Legislature did not intend to shield **all** information that an alleged defamer had prior to publication of a defamatory statement” but only the identity of the confidential informant, the majority opinion said (emphasis in original).

When the information sought will reveal the actual identity of the informant, however, the statute provides absolute protection for newspaper and magazine reporters to maintain confidentiality, Castille’s opinion said.

The statute contains a single textual exception. If television and radio stations fail to maintain and keep open for inspection tapes or transcripts of all their actual broadcasts for at least one year, they may be forced to reveal the identity of confidential sources.

“Our Shield Law jurisprudence has consistently recognized the statute’s absolute protection of a source’s identity from compelled disclosure.”

– Chief Justice
Ronald Castille
Pennsylvania
Supreme Court

Detroit Reporter, *continued from page 8*

reporters' privilege in *Grand Jury* makes it equally clear that the [6th] Circuit does not consider a reporter's privilege in civil cases justified "in the light of reason and experience," Cleland wrote, stating the test for common law testimonial privileges set forth in the Federal Rules of Evidence.

Michigan has a statutory shield law that protects reporters from divulging confidential sources before grand juries unless the grand jury is investigating an offense that is punishable by life in prison, and the reporter has important information that cannot be obtained elsewhere. Mich. Comp. Laws Ann. § 767.5a. But Cleland held that the shield law did not protect Ashenfelter because state evidentiary privileges are inapplicable to federal civil suits based on federal statutes.

Having dismissed Ashenfelter's privilege claim, Cleland held that the only remaining issue was whether discovery of the identity of the sources was authorized by the Federal Rules of Civil Procedure. Because the information was relevant to Convertino's claim, not easily obtainable elsewhere, and not unreasonably burdensome to produce, Ashenfelter must identify his sources, the court held.

Cleland acknowledged that the discovery request burdened Ashenfelter's First Amendment interests in news gathering. "The biggest factor counseling against disclosure is harm to Ashenfelter's First Amendment interests. Virtually every case in which a court compels a reporter to disclose a confidential source implicates at least some risk, direct or otherwise, that news gathering activities protected by the First Amendment may be hindered."

But the risk to protected interests is minimal in this case, Cleland continued, because of the strong possibility that Ashenfelter's sources violated the Privacy Act when they disclosed information about the Convertino investigation.

Cleland refused, however, to require that the *Free Press* comply with Convertino's discovery request. Convertino sought the same information from both the newspaper and the reporter – the identity of Ashenfelter's confidential sources. Because the *Free Press* is a corporation, it would be obliged to produce an employee or officer for the deposition, and Ashenfelter, the person with the most knowledge about the issues in question, would be the logical choice.

It would be unnecessarily duplicative, Cleland held, to force Ashenfelter to be deposed both as an individual and as a representative of the *Free Press*. Therefore, the court denied the motion to compel the *Free Press*, with the caveat that the court would revisit the issue if Ashenfelter continued to guard the identity of his sources.

In a September 11 article about the ruling, *Free Press* Editor Paul Anger said the newspaper would "vigorously" pursue all possible avenues to protect Ashenfelter's sources.

"What sources often bring is information that the public has a right to know," he said. "If they fear their identities will be revealed and they could be exposed to retaliation, a lot fewer people with valuable information will want to come forward."

But Convertino's attorney, Stephen Kohn, disagreed. "This has nothing to do with freedom of the press. It has everything to do with exposing misconduct by high-ranking government officials in the Department of Justice," he said, referring to his client's pending lawsuit in a November 8 *Free Press* story.

– MICHAEL SCHOEPF
SILHA FELLOW

Pennsylvania Absolute Shield, *continued from page 9*

A single justice dissented, arguing the majority opinion failed to give adequate weight to the right to reputation protected by the Pennsylvania Constitution, Art. I, § 1.

Justice Seamus McCaffery argued that the court should recognize an exception to the shield law where a public figure plaintiff makes a "colorable showing" that the unnamed source of the allegedly defamatory information does not exist at all. "Otherwise, the plaintiff is left without the ability to sustain his or her heavy burden to show that the alleged defamer acted with actual malice," he wrote.

According to McCaffery, the information reported in Henn's story was so inaccurate that the plaintiffs should have the opportunity to discover whether there was any source at all. It would be difficult to prove that Henn acted with reckless disregard for the truth if she is allowed to rely on the accusations of an unnamed informant who may not even exist, he argued.

The ruling means that the case will return to the Court of Common Pleas for a trial on the defamation claim. But the identity of Henn's source – and any documentary information that would reveal the identity of that source – is protected from discovery and will not have to be disclosed.

The Associated Press reported on Sept. 26, 2008 that Castellani and Corcoran would continue with their defamation case despite the adverse ruling. "The court was very clear in its decision, and we respect that," said their attorney, Geoff Johnson. "We're going to go forward and prosecute."

– MICHAEL SCHOEPF
SILHA FELLOW

Journalists and Subpoenas

FBI Apologizes to *Washington Post*, *New York Times* over Phone Records Breach

On Aug. 8, 2008, Federal Bureau of Investigation (FBI) Director Robert S. Mueller apologized to the executive editors of *The Washington Post* and *The New York Times* for obtaining the telephone records of some of the newspapers' reporters in 2004 without following special procedures required by the Department of Justice.

The FBI requested the reporters' toll phone records from telephone companies through "exigent circumstance" letters, which did not state the reasons for the FBI's request or the nature of any investigation, according to an August 9 *Washington Post* story. Telephone toll records indicate the phone calls made from a particular telephone number, but they do not provide information about the content of telephone conversations, *The New York Times* reported August 8.

The FBI obtained phone records for *Washington Post* staff writer Ellen Nakashima and researcher Natasha Tampubolon and *New York Times* reporters Raymond Bonner and Jane Perlez. All four were based in the Jakarta, Indonesia bureaus of their newspapers in 2004. *The Washington Post* reported in its August 9 story that its reporters were writing about Islamic terrorism in Southeast Asia at the time.

The New York Times reported that the FBI did not adhere to the Attorney General's guidelines in issuing its request to telephone companies for the reporters' records. Those guidelines, codified at 28 C.F.R. § 50.10, require Attorney General approval for all subpoenas for telephone toll records directed to members of the news media, and must be followed by all members of the Justice Department. When deciding whether to issue subpoenas for journalists' telephone toll records, the guidelines require the Attorney General to balance "the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice." The regulations require the department to make attempts to obtain information from alternative sources, and the department must conduct negotiations with the news organization whose telephone records are to be subpoenaed. If no notice is provided before the subpoena is issued, notification must be provided as soon as it is determined that the notice will not be a clear and substantial threat to an investigation.

Mueller's phone calls to Bill Keller, executive editor of *The New York Times*, and to Leonard Downie, Jr., executive editor of *The Washington Post*, were accompanied by a faxed letter from Valerie Caproni, general counsel for the FBI, the *New York Times* reported August 8. "The F.B.I. is committed to protecting the news media consistent with the First Amendment and Department of Justice policies, and we very much regret that this situation occurred," the letter said.

Keller said, "we'd still like to know more about how this happened and how the bureau is securing

against similar violations in the future," according to the August 9 *Washington Post* story.

Caproni said obtaining the reporters' phone records was a mistake caused by a miscommunication and not by "malevolence," *The Washington Times* reported August 26. She said that an FBI case agent had e-mailed an individual within the Communications Analysis Unit (CAU) of the FBI, which sent an exigent circumstances letter to phone companies, despite the fact that the case agent did not say there was an emergency requiring the letter, according to *The Washington Times*.

FBI spokesman Michael P. Kortan said that the phone records obtained from the four journalists were not used for investigative purposes, and they have been removed from the FBI's databases, *The Washington Post* reported August 9.

The Washington Post reported March 18, 2007 that exigent circumstance letters were created by the FBI's New York office following the terrorist attacks of Sept. 11, 2001. The letters were written by the CAU, an approximately 12-member division that analyzes communications for counterterrorism information. The CAU sent 739 exigent circumstance letters between 2003 and 2005 to obtain records in connection with 3,000 phone numbers. The letters were sent to telephone companies AT&T, Verizon, and MCI.

The letters stated that "Due to exigent circumstances, it is requested that records for the attached list of telephone numbers be provided." Several exigent circumstance letters were released by the FBI pursuant to a Freedom of Information Act request made by civil liberties group the Electronic Frontier Foundation (EFF) on June 15, 2007, and are available on the EFF's Web site at http://www.eff.org/files/filenode/07656JDB/070507_nsl03.pdf.

Justice Department Inspector General Glenn A. Fine exposed FBI misuse of exigent circumstance letters in a March 2007 report. Fine concluded that there were sometimes no pending national security investigations linked to the records requests made by FBI agents, and although the exigent circumstance letters stated that subpoenas had been submitted to the U.S. Attorney's office, often no subpoenas were requested before the letters were sent and agents did not file the requisite legal follow-up documents for each letter.

The FBI discontinued use of exigent circumstance letters after advocacy groups and internal watchdogs cited "hundreds of cases" in which agents did not file paperwork following issuance of the letters to explain the legal grounds for the request, *The Washington Post* reported August 9.

The FBI has developed a new process for agents seeking telephone toll records, according to *The Washington Times*. The agency now requires agents to write a memo detailing the grounds for the request, which must be approved by a supervisor. The memos

"[W]e'd still like to know more about how this happened and how the bureau is securing against similar violations in the future."

– Bill Keller
Executive Editor, *The New York Times*

Journalists and Subpoenas

State Trial Courts Hold Shield Laws Protect Anonymous Reader Comments on Web Sites

Illinois Paper Cites Shield Law, Refuses to Expose Anonymous Commenters

State trial courts in Montana and Oregon have held that their respective statutory shield laws protect the identities of anonymous online commenters who participate in discussions on newspaper Web sites. Meanwhile in Illinois, a third newspaper has invoked the Illinois shield law to fight a subpoena seeking the identity of five anonymous commenters.

Montana Decision

In Montana, Russ Doty, a 2004 candidate for Public Service Commission, sued his opponent, Brad Molnar, for libel and slander related to the campaign. Doty alleged in his suit that negative comments posted on the *Billings Gazette's* Web site by commenters "CutiePie" and "Always wondering" were actually submitted by Molnar using pseudonyms, the *Gazette* reported Sept. 3, 2008.

Molnar denied the accusations, but Doty nevertheless issued a subpoena in July 2008 to the newspaper, not a party to the suit, arguing that he had a right to "test whether or not Molnar is telling the truth," the *Gazette* report said. Alternatively, Doty argued that even if "CutiePie" and "Always wondering" did not turn out to be Molnar, they could still serve as important witnesses on the issue of reputation damage.

The newspaper moved to quash the subpoena, arguing that the state's Media Confidentiality Act, Mont. Code Ann. §§ 26-1-901-903, authorizes the newspaper to protect the identities of the commenters in the same way the statute protects confidential sources and reporters' work product from compelled disclosure, the *Gazette* reported.

The Media Confidentiality Act provides absolute protection for news organizations and people "connected with or employed" by news organizations to withhold "any information obtained or prepared" by the organization or person "if the information was gathered, received, or processed in the course of his employment or its business." The statute also protects anonymous sources of information from compelled disclosure.

Martha Sheehy, an attorney for the newspaper, argued at the September 3 hearing that unpublished information about the anonymous commenters was protected by the statute, the *Gazette* report said. Sheehy argued that it should not matter where or how the information is published for the purposes of the shield law.

Sheehy supported her argument with an affidavit from *Gazette* Editor Steve Prosinski. The affidavit said that online comments are a critical component of the service the newspaper provides to its readers and that they serve the public by "fostering democratic discourse through communities of users," the *Gazette* report said.

Prosinski also said that the newspaper did not know the identity of the commenters, only their e-mail and Internet Protocol (IP) addresses. The IP address, however, could be used to trace the posts to a specific computer or computers.

Doty argued that the commenters should not be protected by the statute because their comments are not "news," the *Gazette* report said. "The scope of the statute is to shield the news media from disclosing 'news' sources or any information obtained or prepared" during the news gathering process, Doty wrote in a brief. "Blogs and online comment simply are not 'news.' Therefore, the persons who comment are not protected by a statutory privilege."

District Court Judge G. Todd Baugh agreed with the *Gazette*, holding the Media Confidentiality Act authorizes the newspaper to protect information about the commenters from compelled disclosure. Baugh issued no written ruling. The civil libel suit is *Doty v. Molnar*, DV07-22 (Mont. 13th Jud. Dist. 2008).

Sheehy told the Reporters Committee for Freedom of the Press (RCFP) in a September 4 story that she was pleased with the result. "There are similarities between old and new technology," she said. "If a person's speech is anonymous in the printed newspaper, the statute protects it. This is anonymous speech in a different form."

But a commenter purporting to be "Russ Doty" called the ruling a blow to the type of thoughtful and credible commentary that should be protected by the shield law, in a post attached to a Sept. 4, 2008 *Gazette* story about the case. "I am ... deeply troubled by the outcome because of the absoluteness it conveys and because while it may not chill the speech of folks who libel with abandon, it chills the speech of persons who would post openly under their own name."

Doty argued the ruling would encourage people to post anonymously rather than in their own names, and consequently reduce the credibility of online discussion forums.

Oregon Decision

A state trial court judge in Oregon ruled Sept. 30, 2008 that two Oregon newspapers do not have to turn over information about an anonymous reader who commented on similar stories published separately on the *Portland Mercury* and *Willamette Week* Web sites.

The original story in the *Portland Mercury* was posted on Jan. 31, 2008 and discussed mayoral candidate Sho Dozono's bid for public financing for his campaign. In the comments section, a reader named "Ronald" announced his support for Dozono, but only because the candidate had severed ties with businessman Terry Beard. "Ronald" called Beard a "cantakerous [sic] obnoxious dishonest new money

Anonymous Commenters, continued on page 13

"If a person's speech is anonymous in the printed newspaper, the statute protects it. This is anonymous speech in a different form."

– Martha Sheehy
Attorney, *Billings*
(Mont.) *Gazette*

pig” who mistreated his employees.

Beard, upset about the comments, filed suit against “Ronald” and subpoenaed the two newspapers seeking information about the anonymous commenter, the *Portland Mercury* reported October 1. But Judge James E. Redman ruled that the state’s shield law, Or. Rev. Stat. §§ 44.510–540, protected the identity of the commenters from compelled disclosure.

Oregon’s shield law provides that “No person connected with, employed by or engaged in any medium of communication to the public ... shall be required ... to disclose” the identity of a confidential source or unpublished information “obtained or prepared by the person in the course of gathering, receiving or processing information for any medium of communication to the public.”

Beard had argued that the shield law was inapplicable. Although it protects unpublished information, he contended that it was only designed to protect such information if it was produced as part of the news gathering process. But Redman disagreed.

“It would seem clear that Oregon’s Media Shield Law is intended to have a wider scope than ‘news gathering,’” he wrote in his ruling, issued to the parties’ attorneys in a September 30 letter. “Ronald”’s post was related to the story and therefore “the argument could be made that the *Portland Mercury* [received it] in the ‘course of gathering, receiving, or processing information for any medium of communication to the public.’” The ruling is available online at <http://www.citmedialaw.org/threats/beard-v-portland-mercury#description>. Beard’s libel suit is *Doe v. TS et al*, CV 0803693, (Clackamas, County Ct., Or. 2008).

Redman’s ruling left open the possibility that a comment completely unrelated to the posted story could fall outside the scope of the statute and would therefore be unprotected.

“Long story short: We won. And therefore, so did you, dear anonymous Blogtown commenters,” Editor Amy J. Ruiz wrote in an October 1 post about the ruling. But Ruiz warned readers to follow the newspaper’s comment policy and keep their posts on topic to ensure their identities remain protected. “We’re all for going to court to protect anonymous free speech, but keep our comments policy in mind,” she wrote.

Illinois Case

The *Alton Telegraph* refused to turn over information about five anonymous commenters to state prosecutors October 2, arguing that the Illinois shield law provides protection for anonymous informers whether they pick up the phone, send a message in the mail, or comment on a blog.

According to an Oct. 17, 2008 story in the *Belleville News-Democrat*, the *Telegraph* received a subpoena seeking information about the commenters from a grand jury conducting a murder investigation. The subpoena gave the *Telegraph* until October 2 to respond, but the newspaper declined to do so and instead moved to quash the subpoena citing the state’s shield law, 735 Ill. Comp. Stat. 5/8-901–909.

The Illinois Privilege Statute provides “No court may compel any person to disclose the source of any information obtained by a reporter” The statute allows judges to override the privilege if the party seeking the identity of the confidential source provides a written application setting forth “a specific public interest that would be adversely affected” if the information were not disclosed. The statute also provides several factors for judges to consider including “the nature of the proceedings, the merits of the claim or defense, the adequacy of the remedy otherwise available, if any, the relevancy of the source, and the possibility of establishing by other means that which it is alleged the source requested will tend to prove.”

In order to override the privilege, the court must find that all other sources of information have been exhausted and disclosure of the information is essential to the public interest.

According to the *News-Democrat* report, Don Craven, an attorney for the Illinois Press Association, said the case would be an “interesting mess,” but the court should hold that the identities of the anonymous commenters are protected by the shield law. “The newspaper is entitled under the Reporters’ Privilege Statute to maintain the confidentiality of source information,” he said. “Even though they may disclose the information itself in an article, they are nonetheless entitled to maintain the confidentiality of that source.”

But Prosecutor Bill Mudge said in the *News-Democrat* story that the commenters have information that could aid the murder investigation. Mudge declined to comment specifically about the information the commenter might have, but the *Telegraph* wrote in its motion to quash the subpoena that some comments referred to crimes allegedly committed by the murder suspect in the past.

– MICHAEL SCHOEPF
SILHA FELLOW

Journalists and Subpoenas

Court Throws Out Locy Contempt Order

The United States Court of Appeals for the D.C. Circuit threw out a contempt order against former *USA Today* reporter Toni Locy on November 17, several months after the lawsuit in which she was called to testify was settled out of court.

“Because the underlying case has been settled . . . there is no longer a pending trial in which the appellee’s request for disclosure can be used,” the two-page *per curiam*, or unsigned, opinion in *Hatfill v. Mukasey*, No. 08-5049 (D.C. Cir. 2008), said. Although the court acknowledged that the appeal raised “close questions” under the First Amendment, it did not address whether Locy’s sources were privileged.

Former Army Scientist Steven Hatfill subpoenaed Locy’s sources in a suit against the federal government, alleging that government officials illegally disclosed disparaging details about him in “a coordinated smear campaign” while investigating the deadly anthrax mailings of 2001.

Locy, who covered the investigation for *USA Today*, refused to reveal her sources, and was held in contempt and ordered to pay escalating fines of up to \$5,000 per day. (See “Reporters Ordered to Testify and Reveal Government Sources in Hatfill Case,” in the Fall 2007 issue of the *Silha Bulletin* and “Reporters Fight Federal Subpoenas” in the Winter 2008 issue of the *Silha Bulletin*.)

Locy appealed the order and contempt charges to the D.C. Circuit, and the court heard oral arguments, but the suit between Hatfill and the government was settled in June for about \$5.8 million, and it was uncertain what would happen regarding the charges against Locy. (See “Hatfill Suit Settled, Reporter Locy’s Fate Still Unclear” in the Summer 2008 *Silha Bulletin*.)

According to an October 1 Associated Press (AP) story, Locy said she had been forced to continue her legal fight because Hatfill said he wanted to collect attorneys’ fees, which could have been hundreds of thousands of dollars, for the time spent litigating the case while Locy refused to disclose her sources.

Hatfill filed a motion to dismiss Locy’s appeal on September 11, arguing that the settlement rendered the appeal moot. The motion said that if the appeal was dismissed, Hatfill would seek fees from Locy in lower court, noting that U.S. District Judge Reggie Walton had said that attorneys’ fees would be appropriate.

Locy filed a response on September 18 arguing that she “deserves the opportunity to have [the] court clear her name,” and that the court should still issue a ruling on the appeal. Locy’s response argued that even if the appeal was dismissed, the court should vacate the lower court’s contempt ruling and fine.

Gregg Leslie, legal defense director at the Reporters Committee for Freedom of the Press, said in a November 17 AP story that the dismissal probably means Locy will not be liable for any attorney fees. “To go after someone for attorney fees you have to have substantially prevailed in litigation, and there’s no order finding [Hatfill] prevailed,” Leslie said, although the decision could still be appealed.

“If every time reporters stood up for constitutional rights they’re hit with huge attorneys’ fees, that would be a huge chilling effect,” Leslie said in the October 1 AP story. “It would be a novel way of harassing reporters.”

In an unrelated holding also published on November 17, U.S. District Court Chief Judge Royce Lamberth ruled in favor of *The New York Times* and the *Los Angeles Times* in a Freedom of Information Act suit to unseal FBI records relating to the investigation and the arrest of Hatfill. Lamberth wrote that the public has “a legitimate interest in observing and understanding how and why the investigation progressed in the way that it did,” *The Washington Post* reported November 18.

— JACOB PARSELEY

SILHA RESEARCH ASSISTANT

FBI Apology, *continued from page 11*

provide more details regarding the request for phone companies, Caproni told the *Washington Times*, and allow the companies to determine whether the emergency warrants immediate turnover of the records before receipt of a subpoena. The new procedure for obtaining telephone toll records is not subject to judicial review.

Following press accounts of Mueller’s apology to *The Washington Post* and *The New York Times*, Senate Judiciary Committee Chairman Patrick Leahy (D-Vt.) and Ranking Member Arlen Specter (R-Pa.) called for a probe into the FBI’s policies with respect to exigent circumstance letters.

In an August 11 letter to Mueller, the Senators stated that the FBI should explain why it obtained the reporters’ phone records. “[W]e expect to receive a more complete accounting of this violation of the Justice Department’s guidelines intended to protect privacy and journalists’ First Amendment rights,” the letter said.

Leahy and Specter also said that the revelations about the FBI’s misuse of the letters suggest a need for passage of the federal journalists’ shield law bill, S. 2035, the “Free Flow of Information Act of 2008.” (See “Silha Bulletin Guide to Journalist’s Privilege” in the Spring 2008 issue of the *Silha Bulletin*.) The senators said the bill includes a provision that would limit the ability of the government to get reporters’ telephone records.

The FBI continues to use national security letters (NSLs), which allow the FBI to demand financial records and documents without prior judicial review, as an investigative tool. Caproni told the *Washington Times* that in 2007, the FBI increased training about NSLs for its employees, and it has created procedures that ensure a supervisor and an FBI lawyer reviews each letter that is sent.

— AMBA DATTA

SILHA RESEARCH ASSISTANT

“If every time reporters stood up for constitutional rights they’re hit with huge attorneys’ fees, that would be a huge chilling effect.”

— Gregg Leslie
Legal Defense Director,
Reporters Committee for
Freedom of the Press

Journalists and Subpoenas

New Jersey Shield Law Protects Author of Trump Biography

A New Jersey appellate court ruled on Oct. 24, 2008 that a former *New York Times* reporter who wrote a book about Donald Trump does not have to reveal the identity of his confidential sources. The decision reversed a lower court's ruling on a discovery request by Trump in his ongoing defamation suit against Timothy O'Brien.

O'Brien wrote *TrumpNation: The Art of Being the Donald*, a 2005 biography about Trump in which he stated that "three people with direct knowledge of Donald's finances, people who had worked closely with him for years, told me that they thought his net worth was somewhere between \$150 million and \$250 million," and that "by anyone's standards this still qualified Donald as comfortably wealthy, but none of these people thought he was remotely close to being a billionaire."

O'Brien had also written about Trump in *The New York Times*, including a story on Sept. 4, 2004, which said that "Mr. Trump's wealth, presuming that it is not encumbered by heavy debt, may amount to about \$200 million to \$300 million. That is an enviably large sum of money by most people's standards but far short of the billionaire's club."

O'Brien said he could not reveal the identity of his sources, who had "direct knowledge of Donald's finances," because the sources feared retribution from Trump.

In response to the book, Trump filed a defamation suit in New Jersey state district court against O'Brien and his publisher, Warner Books, in which he claimed multi-billionaire status. In his suit, Trump claims that O'Brien's "low estimates of his wealth injured his credit and otherwise harmed his business interests." Trump is seeking \$5 billion in damages.

As part of his suit, Trump made discovery requests seeking, among other things, the identities of the sources of O'Brien's information regarding Trump's net worth and his notes of interviews with those sources. O'Brien declined Trump's request, citing state shield laws, both in New Jersey, N.J.R. Evid. 508, N.J. Stat. Ann. § 2A:84A-21, and New York, N.Y. Civ. Rights Law § 79-h.

Although Trump sued in New Jersey, the district court judge found New York's shield law to be applicable, and interpreted it narrowly, requiring O'Brien to produce the materials requested because he found them to be "entertainment" and not news. He also ruled that a book author was not covered under the definition of a "professional journalist" found in the New York statute.

In *Trump v. O'Brien*, No. A-3905-06T2, 2008 N.J. Super. LEXIS 217 (N.J. Super. CT. App. Div. Oct.

24, 2008), a unanimous three-judge panel of the New Jersey Superior Court, Appellate Division reversed. Judge Edith K. Payne, writing for the court, held that New York's shield law protects books even though books are not specifically mentioned in the law. The court noted that the lower court's interpretation would protect O'Brien's writing for *The Times*, but not for his book. "We decline to torture the language of the Shield Law so as to achieve so indefensible a result," Payne wrote.

The appellate court also disagreed with the lower court that the materials requested by Trump were not news and thus did not fall under the protections of the New York shield law. The court noted that, although the book was "written in a breezy, irreverent style," it was still sufficiently newsworthy to qualify for protection under the shield law.

The court relied on previous New York case law and determined that "the scope of the subject matter which may be considered of 'public interest' or 'newsworthy' has been defined in the most liberal and far-reaching terms ... Without doubt, details of the life of Trump, whether entertainingly reported or not, constitute matters of public interest and thus 'news' protected by the Shield Law."

Payne also rejected the lower court's conclusion that O'Brien could not invoke the "absolute protection for confidential news" found in the New York shield law because his sources were not specifically designated as confidential within the text of his book. Instead, the appellate court viewed "the totality of the evidence offered by O'Brien as sufficient to demonstrate the confidentiality of his sources," including his statements made in court filings.

Nineteen different media groups filed *amicus* briefs in support of O'Brien.

"The ruling is not surprising given New Jersey's long history of providing broad protection to all reporters, even those with dubious factual support for outlandish contentions," said William Tambussi, Trump's attorney, in an October 25 story in *The Philadelphia Inquirer*.

According to an October 24 entry on *The Wall Street Journal's* Law Blog, Trump said that he was happy with the judges' ruling. "They ruled it's news, which is good for us. As for sources, if he has sources then his case was helped, but we're saying he doesn't have any sources," Trump said. He also said that he would continue to pursue the matter, telling the blog that "I want to have a trial on it."

— JACOB PARSLY
SILHA RESEARCH ASSISTANT

"Without doubt, details of the life of Trump, whether entertainingly reported or not, constitute matters of public interest and thus 'news' protected by the Shield Law."

— Judge Edith K.
Payne
New Jersey Superior
Court

FOIA and Access

Detainee Abuse Photos Ordered Released

The 2nd Circuit U.S. Court of Appeals ruled Sept. 22, 2008 that the Department of Defense cannot withhold 21 photographs depicting abusive treatment of detainees in Iraq and Afghanistan under the Federal Freedom of Information Act (FOIA), 5 U.S.C. § 552.

The decision in *American Civil Liberties Union v. Department of Defense*, 543 F.3d 59 (2nd Cir. 2008), affirmed a lower court's rejection of the government's arguments that the photographs fall under FOIA exemptions meant to protect personal privacy and safety. The unanimous ruling by the three-judge panel found that the federal district court's order to redact personally identifying elements of the photographs were sufficient to protect the privacy of those pictured, and that the government failed to meet the law's requirement to identify specifically whose life or physical safety the photos' release would endanger.

According to the 2nd Circuit opinion, the American Civil Liberties Union (ACLU) and several other groups first filed a FOIA request in October 2003 with the Defense Department and other federal agencies for the release of records related to the treatment and death of prisoners held in U.S. custody abroad following Sept. 11, 2001 and related to the so-called "rendering" of some prisoners to countries known to use torture. The ACLU received no records in response to its request and filed suit against the agencies in federal district court in June 2004.

The ACLU lawsuit focused on photographs and videos depicting U.S. soldiers at detention facilities in Afghanistan and Iraq, including Abu Ghraib prison, abusing detainees, often by forcing them to strip naked and pose in what the 2nd Circuit opinion described as "dehumanizing, sexually suggestive ways."

On Sept. 29, 2005, Judge Alvin K. Hellerstein of the Southern District of New York ordered the release of 74 photographs and three videos, rejecting the government's argument that the records could be withheld according to FOIA exemptions 6, 7(C), and 7(F). Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;" 7(C) applies to "records or information compiled for law enforcement purposes ... [whose release] could reasonably be expected to constitute an unwarranted invasion of personal privacy;" and 7(F) applies to "records or information compiled for law enforcement purposes ... [whose release] could reasonably be expected to endanger the life or physical safety of any individual." In addition to the personal privacy argument, the government argued that the release and dissemination of the photographs could reasonably be expected to incite violence against U.S. or coalition troops or civilians in Iraq and Afghanistan.

In his September 2005 ruling, Hellerstein said that appropriate redactions could protect individuals' privacy, and that the public interest in the records' disclosure outweighed the remaining privacy concerns. In regards to the government's assertion that exemption 7(F) barred the records' disclosure,

"[I]n order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual."

– Judge John Gleeson
2nd Circuit U.S.
Court of Appeals
(by designation)

an argument the Defense Department added two months after the oral arguments in the case were heard, Hellerstein did not directly address the language of the statute, stating that "the core values that exemption 7(F) was designed to protect are not implicated by the release of the photographs." (For more on the ruling, see "ACLU v. Department of Defense" in the Fall 2005 *Silha Bulletin*.)

According to the 2nd Circuit opinion, when the government's appeal of the district court ruling was pending in March 2006, many of the Abu Ghraib photos were published on the Internet by a third party. The government then withdrew its appeal but withheld 29 other photographs which were taken at other locations in Iraq and Afghanistan which did not depict detainees nude or in forced poses, but which had nonetheless led to disciplinary action for the soldiers involved. The government again cited FOIA exemptions 6, 7(C), and 7(F) in withholding the photographs.

In June 2006 Judge Hellerstein relied on his reasoning in the earlier case to order that 21 of the additional 29 photographs be released, and the Department of Defense again appealed. (See "Federal Court Orders Additional Detainee Photos Released" in the Fall 2005 *Silha Bulletin*.)

The Sept 22, 2008 2nd Circuit decision was written by District Judge John Gleeson, who was sitting by designation, and was joined by circuit judges Joseph McLaughlin and Peter Hall. The decision echoed Judge Hellerstein's reasoning on exemptions 6 and 7(C), but more directly addressed the language of exemption 7(F), which was the government's lead argument on the appeal.

According to the opinion, the government argued that it need not specifically identify the individuals whose safety or lives were endangered by the photos' release, because the term "any individual" in exemption 7(F) did not require it. The court disagreed, saying the term "may be flexible, but is not vacuous."

The court opinion includes a lengthy discussion of the U.S. Supreme Court's interpretation of the term "any" in various statutes, as well as an examination of the language of other FOIA exemptions and the legislative history of exemption 7(F). The 2nd Circuit said "While all harms in the end are suffered by individuals, there is a crucial difference between a showing that disclosure 'could reasonably be expected to endanger life or physical safety'" which was essentially what the government argued, "and exemption 7(F)'s requirement that disclosure endanger the life or physical safety of any individual."

Thus, the court held that "in order to justify withholding documents under exemption 7(F), an agency must identify at least one individual with reasonable specificity and establish that disclosure of the documents could reasonably be expected to endanger that individual." The court said that although the government need not name each and every individual who might be harmed if the photographs

Detainee Abuse Photos, continued on page 21

FOIA and Access

Roundup: Government E-mails as Public Records

Several state and federal cases in the summer and fall of 2008 underscored the need to define the parameters of public access policies and retention procedures regarding government employee e-mails. (For more on the role of new technology in public records, see “Detroit Newspapers Sue for Release of Text Messages in Mayoral Sex Scandal” on page 20 of this issue of the *Silha Bulletin*.)

Gov. Sarah Palin’s E-mails

An Alaska state judge ruled Oct. 10, 2008 that government-related e-mails sent by Alaska Governor and former Republican vice presidential candidate Sarah Palin and her staff from private e-mail accounts had to be retained and preserved, according to The Associated Press (AP).

Alaska Superior Court Judge Craig Stowers ordered that e-mails sent between Dec. 4, 2006 and the date the litigation concludes that relate to “the conduct of official business of the state of Alaska” must be preserved. Stowers made the ruling in a lawsuit brought by Anchorage resident Andree McLeod, according to an October 11 *Anchorage Daily News* story. McLeod sued to have the e-mails preserved so that she can file open records requests to review the e-mails under Alaska’s open records law, Alaska Stat. §§ 40.25.100–125, the AP reported.

E-mails sent from Sarah Palin’s official government e-mail address are subject to Alaska’s open records law. However, according to an October 4 AP story, Palin and her staff frequently used private Yahoo accounts instead of government e-mail addresses to conduct official state business. Stowers’ order also asked for further argument from attorneys on whether it was appropriate for Palin and her staff to use personal e-mail addresses for state business, according to the AP.

McLeod originally filed a public records request on June 17, 2008 seeking release of e-mails sent and received by two top aides to Sarah Palin from February through April of 2008, according to a September 7 *Mother Jones* blog post available at http://www.motherjones.com/mojoblog/archives/2008/09/9620_sarah_palin_secret_email.html.

Palin’s office released to McLeod four boxes containing copies of e-mails, but claimed executive privilege with respect to others, according to a September 10 *Washington Post* story. Palin said the privilege protects communications between the governor and her aides on policy matters, *Mother Jones* reported. Palin also said that e-mail communications copied to her husband, who is not a state employee but advises the governor on a union for public safety workers and Alaska State Trooper issues, were protected by executive privilege from disclosure, according to *The Washington Post*.

Palin’s office withheld 1,100 e-mails. A list cataloguing the e-mails Palin’s office refused to release was included with the four boxes of redacted e-mails, *Mother Jones* reported.

The *Anchorage Daily News* reported October 11 that McLeod filed another public records request on

October 1, the same day she filed her lawsuit seeking preservation of the e-mails. McLeod specifically requested copies of all e-mails sent and received from Palin’s private e-mail accounts and her husband Todd Palin’s e-mail account.

McLeod is seeking to investigate Palin’s use of non-government e-mail accounts for state business, according to the AP. The Reporters Committee for Freedom of the Press reported September 18 that McLeod was also concerned that Palin was conducting political party activities on state time, in violation of state law.

Palin’s e-mail account with Yahoo has been closed, the AP reported, because the address was compromised in September 2008. Hackers broke into the account and circulated on the Internet a number of personal messages Palin had received at her Yahoo address after she had been selected as John McCain’s running mate.

Alaska-based media organizations have been deterred from making public records requests from the governor’s office for copies of e-mails because of the costliness of the requests. Palin’s office has quoted a price of \$15 million to news organizations and private citizens for copies of state e-mail, according to an October 17 MSNBC.com story.

MSNBC.com reported that in response to an AP request for copies of all state e-mails sent to Todd Palin, Palin’s office said it would take about 13 hours to reconstruct e-mails sent from one state employee to Todd Palin. At \$73.87 per hour, the cost for one e-mail account would be \$960.31. With 16,000 employees on the state payroll, the cost of retrieving all the state e-mails sent to Todd Palin would exceed \$15 million.

According to Alaska public records law, Alaska Stat. §§ 40.25.110, the state is not required to charge fees for processing records requests, but the law provides that fees are allowed if processing would take more than five hours.

Small newspapers in Alaska have cancelled their public records requests for electronic communications after learning that the process would be costly, MSNBC reported. A weekly paper, the *Anchorage Press*, withdrew its request after learning that it would have to pay \$6,500 for e-mails from Palin and three aides regarding the lieutenant governor.

Missouri and Ohio

In Missouri, Gov. Matt Blunt agreed as part of an October 2008 legal settlement to disclose e-mails at no cost to news media outlets that had sued his administration after Blunt’s staff members ignited controversy when they said in 2007 they frequently deleted e-mails.

Blunt told the AP for a Sept. 25, 2007 story that he was in compliance with Missouri’s open records law and stated “I probably have four or five different e-mail accounts, like lots of people. Some e-mails I might keep a long time. Some e-mails I delete as soon as I receive, and will continue to do so.”

Government E-mail Roundup, continued on page 18

“I probably have four or five different e-mail accounts, like lots of people. Some e-mails I might keep a long time. Some e-mails I delete as soon as I receive, and will continue to do so.”

– Gov. Matt Blunt
(R-Mo.)
Sept. 25, 2007

Government E-mail Roundup, continued from page 17

Missouri's open records law, Mo. Ann. Stat. § 610.010, includes e-mail communications in its definition of a public record. The state's retention policies vary with respect to the nature of the communications, but correspondence related to the development or implementation of government policies must be retained permanently.

On Oct. 31, 2007, the AP filed a public records request seeking e-mail records for several top Blunt staff members. Blunt's office told the AP it would cost \$23,625 to comply with the AP's request.

Two court-appointed special assistant attorneys general investigating whether the governor complied with open records requests and e-mail retention standards filed a lawsuit against Blunt. Several news organizations, including the AP, *St. Louis Post-Dispatch*, and *The Kansas City Star*, which had also filed public records requests for the governor's e-mails, intervened in the lawsuit.

As part of the settlement announced Oct. 15, 2008, Blunt agreed to give the news organizations thousands of e-mails for free. Blunt's lawyer told the AP that the governor wanted to resolve the legal battle before his term ends in early January 2009. He is not seeking re-election, according to the AP.

In Ohio, the State Supreme Court heard arguments on Sept. 16, 2008 on the issue of whether deleted e-mail constitutes a public record that can be subject to open records requests.

The (Toledo, Ohio) Blade is seeking access to a number of e-mails deleted by Seneca County, Ohio commissioners from their computer hard drives. The newspaper alleges the e-mails might contain illegal communications related to the proposed razing of the county's courthouse before a public vote was conducted on the matter. It brought a lawsuit against the county because it wanted it to pay for a forensic expert to recover e-mails deleted from government computers during an 18-month period beginning Jan. 1, 2006, according to a Sept. 17, 2008 *Blade* story.

The Blade filed a public records request pursuant to Ohio's open records law, Ohio Rev. Code Ann. § 149.43, and the commissioners provided some e-mails in response to the request. After the newspaper filed a lawsuit, the commissioners turned over another 700 pages of e-mails. *The Blade* reported the commissioners said many e-mails had been deleted.

The cost of hiring a forensics expert would be between \$1,000 to \$2,500 per computer, according to *The Blade*. But Seneca County said that it would cost tens of thousands of dollars to hire an expert. "If the court doesn't rule fully in our favor, then it will mean that any official will be able to legally cover his tracks and misdeeds by a simple click on the computer's delete button," *The Blade's* Co-publisher and Editor-in-Chief John Robinson Block said, according to the September 17 *Blade* story. The court has not rendered a decision.

Federal Office of Administration

In two separate rulings, the U.S. District Court for the District of Columbia addressed the White House's failure to retain and preserve e-mail communications

sent and received by White House personnel from 2003 to 2005. The court found that although the federal Freedom of Information Act (FOIA) does not require the Office of Administration to provide access to records concerning the loss of its e-mails, watchdog groups may challenge the Executive Office of the President's e-mail retention policies under the Federal Records Act.

In the first of two rulings, Judge Colleen Kollar-Kotelly of the U.S. District Court for the District of Columbia ruled June 17, 2008 that the Office of Administration (OA) does not have to provide public access to records regarding millions of possibly missing White House e-mails under FOIA, according to the AP.

The case was triggered by an investigation conducted by a watchdog group, Citizens for Responsibility and Ethics in Washington (CREW), into the loss of e-mails sent or received by White House personnel. In a report issued April 13, 2007, CREW concluded that the White House had lost approximately five million e-mails from 2003 to 2005, a crucial period in the Bush Administration. The United States launched its invasion of Iraq on March 20, 2003, and the White House leaked former CIA officer Valerie Plame's name in July 2003, instigating a Department of Justice investigation. CREW filed a lawsuit in May 2007 against the OA under FOIA seeking internal records regarding the White House's loss of the e-mails.

According to a Jan. 17, 2008 *Washington Post* story, the White House might have lost the e-mails because it recorded e-mail messages sent and received by White House personnel on recycled tapes. The White House used the same backup tape each day to copy new and old e-mails.

The Presidential Records Act (PRA), 44 U.S.C. §§ 2201–2207, requires the White House to preserve documents and records, including electronic communications, while the President is in office. Upon the conclusion of a President's last term, the Archivist of the United States assumes responsibility for custody and preservation of the records. Documents subject to the PRA can only be released to the public five years after the President's last term. Presidential records are not subject to public access during the President's term in office.

The Federal Records Act (FRA), 44 U.S.C. § 3301, requires heads of federal agencies to develop standards for preserving and maintaining records, including e-mail communications. Agencies subject to the FRA must comply with FOIA, which governs public requests for electronic records to federal agencies, departments, and executive branch offices.

The issue in *CREW v. Office of Administration*, 565 F.Supp.2d 23 (D. D.C. 2008), was whether the OA constitutes an "agency" under the FRA that is required to provide access to internal documents to CREW under FOIA. Kollar-Kotelly determined that the OA does not exercise sufficient "substantial independent authority" in conducting its activities to constitute an agency subject to FOIA. The OA does not have authority over others in the executive branch

Government E-mail Roundup, continued on page 19

Government E-mail Roundup, *continued from page 18* and only provides services to the Executive Office of the President. Therefore, it is not required to provide access to internal paperwork regarding the loss of the White House e-mails under FOIA.

The OA has responded to information requests since 1978 and responded to 65 FOIA requests in 2006, according to an Aug. 23, 2007 *Washington Post* story. However, the OA reversed its practices after CREW's lawsuit was filed in 2007 and stopped submitting to FOIA requests, according to the AP. CREW plans to appeal the decision, the AP reported, even though the Bush Administration's term in office will conclude in January.

In the second case before the District of Columbia federal district court, Judge Henry H. Kennedy, Jr. ruled Nov. 10, 2008 in favor of the plaintiffs, CREW and the National Security Archive (NSA), who brought a lawsuit against the Executive Office of the President, challenging the agency's failure to retain and preserve e-mail communications under the FRA and Administrative Procedure Act (APA), 5 U.S.C. § 706.

In the consolidated actions *CREW v. EOP*, No. 07-01707, and *NSA v. EOP*, No. 07-01577, CREW and NSA, a non-profit research library that publishes government documents on national security, allege that the EOP has violated the FRA by failing to implement an adequate system to ensure the preservation of e-mail records. The groups are seeking a court order requiring the Archivist of the United States to request action from the Attorney General to restore the deleted e-mails, according to the court's opinion.

Under the FRA, 44 U.S.C. § 2905, if a head of an agency does not initiate action for recovery after being notified by the Archivist of the destruction of records in the custody of the agency, the Archivist can request the Attorney General to initiate an action for recovery. CREW and the NSA claim the Archivist has been notified of the loss of five million White House e-mail records, but has not requested any recovery action to date. Therefore, the Archivist is violating his statutory duty under the FRA, according to plaintiffs' complaint filed Sept. 5, 2007.

The government argued that the plaintiffs' claims should be dismissed because they seek compliance with the PRA, which does not allow judicial review. But Judge Kennedy concluded the PRA does not bar the lawsuit, according to the court's opinion. Rather, there is limited judicial review under the PRA to ensure that nonpresidential records are not classified as Presidential records and are maintained separately, Kennedy said.

Kennedy also rejected the government's motion to dismiss the lawsuit because the FRA allows judicial review of compliance with agency guidelines. Therefore, the court may hear claims that the Archivist has not fulfilled his statutory duty. Furthermore, the APA authorizes review of the adequacy of an agency's recordkeeping guidelines and directives, Kennedy ruled. The court's ruling allows CREW and the NSA to proceed with their case against the government.

Sheila Shadmand, an attorney from the law firm Jones Day, which is representing NSA, said the ruling will protect the e-mail records "before they get carted off or destroyed as the current administration packs its bags to leave," according to the AP.

Federal Bill Aims to Preserve Executive E-mails

Representative Henry Waxman (D-Calif.) introduced a bill in the House in April 2008 that would provide new standards for the capture, management, and preservation of White House e-mails and federal agency communications, potentially avoiding the problem of lost or deleted White House e-mails like those at issue in the *CREW* case. The Electronic Communications Preservation Act, H.R. 5811, was referred to the Committee on Homeland Security and Governmental Affairs on July 10, 2008.

The bill seeks to implement new oversight procedures to ensure that government agencies institute standards for e-mail retention, instead of allowing their employees to delete e-mails. Under FOIA, e-mails constitute public records, but that access is meaningless if government employees fail to retain their e-mails in an adequate recordkeeping format.

A July 8, 2008 General Accounting Office (GAO) report found that four federal agencies do not comply with requirements to preserve e-mail records. In a survey of the Department of Homeland Security, the Department of Housing and Urban Development, the Environmental Protection Agency, and the Federal Trade Commission, the GAO found the agencies were relying on outdated recordkeeping systems to store their e-mail records.

"If recordkeeping requirements are not followed, agencies cannot be assured that records, including information that is essential to protecting the rights of individuals and the federal government, is [sic] being adequately identified and preserved," Linda Koontz, the GAO's director of information management issues, wrote in the report.

The National Archives and Records Administration (NARA) is responsible for overseeing federal agency e-mail policies pursuant to the FRA. But the GAO report stated that NARA had conducted only limited oversight of agency e-mail preservation policies.

Codified at 2 C.F.R. § 1234, the NARA regulations dictate that government agencies must implement an agency-wide program for managing and retaining electronic records, including e-mail communications. E-mail records may only be destroyed with the approval of the Archivist of the United States. Government agencies with e-mail programs that do not have recordkeeping functions must print their e-mails out and file them.

With respect to nonpresidential federal records, the NARA can demand an explanation from any federal agency that it thinks is mishandling records. It can also seek a Department of Justice probe, according to a Jan. 22, 2008 *Washington Post* story.

— AMBA DATTA
SILHA RESEARCH ASSISTANT

FOIA and Access

Detroit Newspapers Sue for Release of Text Messages in Mayoral Sex Scandal

Former Detroit Mayor Kwame Kilpatrick resigned on Sept. 4, 2008 and began a 4-month jail sentence on October 29 after the release of text messages exchanged between himself and a staffer led Kilpatrick to plead guilty to perjury and obstruction of justice charges.

Kilpatrick and his former chief of staff Christine Beatty testified they were not involved in a sexual relationship at a whistle-blower trial last year concerning the termination of seven Detroit law enforcement officers. Subsequently released text messages sent by the pair on city-issued pagers indicated otherwise.

An ongoing lawsuit brought by the *Detroit Free Press* and *The Detroit News* demands the release of all records related to the city's \$8.4 million settlement of the 2007 whistle-blower lawsuits, including additional text messages exchanged by Kilpatrick and Beatty.

Wayne County Circuit Judge Robert J. Colombo Jr. has set a November 21 settlement conference date in the case, according to an October 10 story in *The Detroit News*.

According to the story, Colombo said he did not believe there was significant new information to be gleaned as a result of the lawsuit. Colombo said his earlier rulings in the public records case limit further disclosures to text messages relating to an affair between Kilpatrick and Beatty and to the termination of former Deputy Police Chief Gary Brown.

"Most of that stuff has already come out," Colombo said, according to the October 10 *Detroit News* story. "This lawsuit needs to be brought to an end. There is no public interest that is now being served, in my judgment."

Colombo said he is concerned about a city with a projected \$100 million deficit ringing up legal fees it cannot afford to pay.

Despite repeated efforts by Kilpatrick and other city officials to keep the text messages private, many were released, first to reporters for the *Detroit Free Press* from undisclosed sources in January and later to the public by the Wayne County Circuit Court on October 23.

Documents released in February by Wayne County Circuit Judge Robert Colombo show Kilpatrick and Beatty signed a secret deal to keep the text messages private as part of the city's \$8.4 million settlement of the whistle-blower lawsuits. The original order released to the public included only the amount of the settlement and did not mention the confidentiality agreement.

An interactive timeline of the entire Kilpatrick saga with court documents and video footage is available on *The Detroit News*' Web site at <http://tinyurl.com/2ygfwd>.

The Detroit City Council did not support Kilpatrick's fight to keep the messages secret and voted 8-1 to authorize the release of all the Kilpatrick and Beatty text messages sought, according to a March 28 story in *The Detroit News*.

"At the end of the day, it's our citizens who are paying for this," former Council President and current Detroit mayor Kenneth Cockrel Jr. said of the city-issued pagers used to send the text messages, according to the story.

Kilpatrick has argued that the messages were "personal and private" and should not be made available to the public.

Wayne State University law professor Peter Henning, a former Justice Department lawyer, questioned Kilpatrick's logic. "It's hard to see how they can make this argument with a straight face," Henning said. "This was a lawsuit against the city. The city paid the judgment. The benefit of the [confidentiality] agreement went to Kilpatrick personally. He got his documentation back. Christine Beatty got her documents back so they could keep it secret. I don't see how the city got any benefit from the confidentiality agreement," said Henning in a February 10 *Free Press* story.

Some of the text messages were released as part of the ongoing felony case against Beatty by order of Wayne County Circuit Judge Timothy Kenny on October 23, with additional messages released on October 30. According to an October 23 story in *The Detroit News*, there are hundreds of thousands of additional messages that have not yet been released by the court.

Some of the information in the text message transcripts was blacked out by court officials, who cited potential attorney-client privilege, spousal privilege, or deliberative process privilege, which allows officials to discuss negotiation details without undermining the deal. Kenny will rule in December whether those privileges will apply to the additional messages, according to an October 21 *Free Press* story.

The *Free Press* and *The Detroit News* also blacked out any information they deemed too sexually explicit when they posted the full transcripts to their respective Web sites on October 23. The messages can be viewed at <http://www.freep.com/article/20081023/NEWS01/81023053>.

The *Free Press* published a story on October 27 in which investigative reporters Jim Schaefer and M.L. Elrick talked about the investigation. "Because we are a newspaper that seeks to inform rather than offend, some of the saltier language has been blacked out," Elrick said of the posted messages.

The October 27 story also said that the *Free Press* would continue to seek the additional release of information on potential corruption. "We believe they are public records you are entitled to see. We will write stories about the messages as they become available," Elrick said.

The *Free Press* initially requested the settlement documents in December 2007, and the city denied a settlement existed, but eventually produced nine pages involving the two suits, according to a Feb. 5, 2008 *Free Press* story. Suspecting that the city was holding back other settlement records, the *Free Press* filed a

"If I want things to be private, I buy it myself."

– Sheila Cockrel
Detroit City
Councilwoman

Detroit Mayor, continued on page 21

Detroit Mayor, *continued from page 20*

lawsuit under Michigan's Freedom of Information Act, Mich. Comp. Laws Ann. 15.231 et seq. *The Detroit News* was joined as a party in the lawsuit in January.

Colombo ordered the release of all the secret documents after a hearing on February 5. He also said the city had essentially created the confidential side agreement and then tried to hide it by claiming it was not a public record and therefore exempt from Michigan's Freedom of Information Act, according to the February 5 *Free Press* story.

Kilpatrick and other officials have continuously fought the release of the text messages. In February, Kilpatrick appealed to the Michigan Supreme Court in an attempt to seal the records, according to a February 15 Associated Press (AP) story.

After the Court unanimously rejected the appeal, Kilpatrick attempted to depose reporters from both papers to find out who leaked the initial batch of text messages this past January. His attempts were rejected by Colombo in July.

"Everyone would like to know how the *Free Press* got the text messages, but it's not relevant to this case," Wayne County Circuit Judge Robert Colombo Jr. said in his denial of Kilpatrick's request to depose Schaefer and Elrick, according to a July 18 *Free Press* story.

In May, Kilpatrick implemented a new city policy to exempt the use of certain communication devices from FOIA requests. The policy states that the communications of city employees authorized to use the system could be subject to public disclosure, but that "[t]his policy does not include telephones, text messaging devices and pagers, which are given to

employees for their personal and business use. State and federal laws protect communications made over telephone lines and through the use of messaging devices."

According to a May 16 story in the *Free Press*, the policy drew an incredulous reaction from some city council members. They said any message sent on a city-funded device is city property and subject to disclosure. "If I want things to be private, I buy it myself," Councilwoman Sheila Cockrel said.

Although Kilpatrick is currently in jail, there are still several ongoing court actions, including possible additional charges. Wayne County Prosecutor Kym Worthy said she is not done with thousands of text messages obtained by her office. "We have an ongoing investigation," she told reporters, according to an October 28 AP story.

The AP also reported that there is a federal probe of corruption in city government during the Kilpatrick years and a civil lawsuit against Kilpatrick and Detroit police by the family of a stripper slain in 2003, in which the family believes Kilpatrick may have been involved. A federal magistrate approved a request to produce text messages from the pagers of 39 city employees as part of the suit filed by the family of the stripper, according to the October 28 AP story.

Kilpatrick could also be a witness in Beatty's upcoming trial on charges of perjury and obstruction of justice. Beatty has rejected all plea bargains offered by the prosecutor and will go to trial in January. Her attorneys suggest that the text messages might not be authentic, according to an October 26 *Free Press* story.

— JACOB PARSLEY

SILHA RESEARCH ASSISTANT

Detainee Abuse Photos, *continued from page 16*

are released, "saying that the government does not need to identify an individual by name does not imply that the government does not need to identify an individual *at all*, or that the government may identify an individual only as being a member of a vast population."

The court also observed that although the government argued that the records should be exempt under 7(F) in order to safeguard national security, it had not argued that the records were exempt from FOIA under section I(A), the national security exemption, covering records that are "specifically authorized under criteria established by an Executive order to be kept secret in the interest of national defense or foreign policy."

The court said "The existence of separate standards for information threatening harm to national security undercuts the defendants' asserted construction of exemption 7(F). It would be anomalous if an agency that could not meet the requirements for classification of national security material could, by characterizing the material as having been compiled for law enforcement purposes, evade the strictures and safeguards of classification and find shelter in exemption 7(F) simply by asserting that disclosure could reasonably be expected to endanger someone unidentified somewhere in the world."

In addition to the exemptions, the government argued that FOIA should be read to be consistent with the Third and Fourth Geneva Conventions,

which provide that prisoners of war must be protected against acts of violence, intimidation, threats, insults, and public curiosity, and release of the photographs would violate these conventions. But the court observed that the government has not been historically consistent in its treatment of prisoner photographs, pointing out that at the end of World War II, the United States government widely disseminated photographs of prisoners in Japanese and German prison and concentration camps, which "depicted detainees in states of powerlessness and subjugation similar to those endured by the detainees depicted in the photographs at issue here. Yet the United States championed the use and dissemination of such photographs to hold perpetrators accountable."

ACLU attorney Amrit Singh called the decision "a resounding victory for the public's right to hold the government accountable," according to *The New York Sun* on September 23. Singh continued, "The Bush administration has consistently maintained that what happened at Abu Ghraib was the work of a few rogue soldiers. Well, that's not true, because it was happening elsewhere." According to The Associated Press (AP), Singh said the government has indicated it has more photographs that were not part of the litigation.

The AP reported November 9 that the government has asked all 12 2nd Circuit judges to review the case *en banc*, saying it is of "exceptional importance."

— PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

FOIA and Access

City Officials Refuse to Release Address-Specific Flood Damage Data

City officials in Cedar Rapids, Iowa, have refused to release information about federal payments made to homeowners whose dwellings were damaged by floods during the summer of 2008, according to a story in the Aug. 31, 2008 Cedar Rapids *Gazette*.

The Gazette asked Cedar Rapids City Hall to provide address-by-address information about damage assessments of the 850 homes in the city's flood plain because "a finding of substantial damage — at least 50 percent of a home's value — can qualify some homeowners for more insurance money and may help others without insurance make a better case to the city for a buyout."

Parts of Cedar Rapids were heavily damaged in the floods, and the state of Iowa is set to receive approximately \$85 million in federal disaster aid, according to a September 11 story in *The Gazette*.

According to the August 31 *Gazette* story, city officials said that the data was the property of the Federal Emergency Management Agency (FEMA) and not the city, even though it was mailed to homeowners by the city's Code Enforcement Division. All subsequent modifications to FEMA's findings were also handled by the city.

Assistant City Attorney Elizabeth Jacobi denied the newspaper's request under the federal Freedom of Information Act (FOIA), 5 U.S.C. § 552, for release of address-by-address damage assessments, citing the Federal Privacy Act of 1974.

The Privacy Act, 5 U.S.C. § 552a, states in part that its purpose is "to provide certain safeguards for an individual against an invasion of personal privacy by requiring Federal agencies, except as otherwise provided by law, to ... collect, maintain, use, or disseminate any record of identifiable personal information in a manner that assures that such action is for a necessary and lawful purpose, that the information is current and accurate for its intended use, and that adequate safeguards are provided to prevent misuse of such information."

In its FOIA request, *The Gazette* cited *News-Press v. U.S. Department of Homeland Security*, 489 F.3d 1173 (11th Cir. 2007), a case in which FEMA was ordered to release address-by-address information about federal relief provided to homeowners after several hurricanes caused widespread damage in Florida in 2004. (See "Appeals Court Sides with Newspapers in FEMA Aid FOIA Case" in the Summer 2007 issue of the *Silva Bulletin*.)

The 11th Circuit ruling held that FEMA had failed to meet its "heavy burden" of proving that the release of address-by-address relief information was a "clearly unwarranted invasion of personal privacy." The opinion cited several of FEMA's purported failures during the 2004 hurricane season as one of the reasons for keeping the records open.

"In light of FEMA's awesome statutory responsibility to prepare the nation for, and respond

to, all national incidents, including natural disasters and terrorist attacks, there is a powerful public interest in learning whether, and how well, it has met this responsibility," Judge Stanley Marcus wrote.

"Plainly, disclosure of addresses will help the public answer this question by shedding light on whether FEMA has been a good steward of billions of taxpayer dollars," Marcus continued. "[W]e cannot find any privacy interests here that even begin to outweigh this public interest."

The court did allow the agency to withhold individual names of FEMA relief recipients, saying it would add only nominal public benefit and citing exemption 6 to the FOIA, which prohibits the release of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy."

The opinion acknowledged that releasing information by address would make individual homeowners accessible to the media. But Marcus noted that "individuals are under no obligation to speak to reporters, and on balance, the modest annoyance of a 'no comment' is simply the price we pay for living in a society marked by freedom of information laws, freedom of the press, and publicly-funded disaster assistance."

FEMA made clear immediately after the Florida case that the court's ruling would not change its policies. FEMA officials told the Florida newspapers that brought the lawsuit that they would only release address-by-address information for aid paid between 1998 and 2004. Information about aid paid after 2004 would require another court order.

Attorneys involved in the 2007 case said that FEMA's refusal to change its policy ignored the basis of the court's ruling. "The public interest in making sure that FEMA is effectively protecting us doesn't change from disaster to disaster, year to year, or region to region," said Charles Tobin, a lawyer for the Florida newspapers in a June 22, 2007 Fort Myers, Fla. *News-Press* story. "If FEMA really thinks the court didn't mean for its decision to apply to other disasters, the agency has learned nothing from this exercise, and that's very unfortunate for the public because it may mean more wasteful litigation in the future, at taxpayer expense."

If *The Gazette* files suit to force the city of Cedar Rapids and FEMA to turn over address specific information, federal courts in Iowa could ignore the 11th Circuit precedent because Iowa is in the 8th Circuit. Circuit level opinions are only binding on federal courts in that circuit.

A September 3 editorial in *The Gazette* argued, "Yes, some things about a person's life should be private. But when taxpayer money is involved, it comes with strings attached. One of those conditions ... is the public's right to know how its money is disbursed."

Flood Damage Data, continued on page 23

"The public interest in making sure that FEMA is effectively protecting us doesn't change from disaster to disaster, year to year, or region to region."

— Charles Tobin
Attorney, 2007
Florida newspaper FOIA
case

FOIA and Access

Gag Order Lifted on California Paper Seeking to Cover its Own Trial

A gag order meant to halt a California newspaper from reporting on its own trial lasted 10 days before a state appeals court ordered it vacated, saying the trial court “cannot possibly justify the censorship imposed.”

The Orange County Register’s parent company, Freedom Communications, Inc., is being sued by 6,000 newspaper carriers who filed a \$100 million class action lawsuit claiming the company has unfairly classified them as independent contractors rather than employees, denying them overtime pay and other benefits. The Associated Press (AP) reported Sept. 30, 2008.

On September 19, trial court Judge David C. Velasquez issued an order that excluded all non-expert witnesses from the courtroom while other non-expert witnesses were giving testimony, and prohibited all witnesses, including the parties, from discussing or disclosing the testimony of any witness while the trial is pending. The last paragraph of Velasquez’s September 19 order said that the prohibitions on discussing or disclosing witness testimony given in open court “pertains to all means and manner of communication whether in person, electronic, through audio or video recording, or print medium.” The order effectively gagged *The Orange County Register* from publishing or discussing any witness testimony in its pages or on its Web site.

The Orange County Register filed an emergency stay of the order and was joined shortly thereafter in an *amicus* brief filed by over two dozen media and First Amendment advocacy organizations, including the AP, the *Los Angeles Times*, *The New York Times*, Reuters, CNN, the E.W. Scripps Company, Bloomberg News, the American Society of Newspaper Editors, California Newspaper Publishers Association, and the Reporters Committee for Freedom of the Press.

In *Freedom Communications, Inc. v. Superior Court*, 167 Cal.App.4th 150 (Cal. 2008), a three-judge panel of the California Court of Appeals Fourth Appellate District issued a *per curiam*, or unsigned, opinion on September 29 ordering that the gag order be immediately vacated because it “plainly violates the press freedoms guaranteed by the United States and California Constitutions.”

Citing well-known federal cases involving court-ordered prior restraints on media such as *Nebraska Press Ass’n v. Stuart* 427 U.S. 539 (1976)

and *CBS, Inc. v. Davis* 510 U.S. 1315 (1994), the court explained that a prior restraint such as a gag order is “presumptively invalid” because it is “the most serious and the least tolerable infringement on First Amendment rights.” The few instances when the U.S. Supreme Court has suggested such an infringement might be justified, the court said, include preventing the dissemination of information about troop movements during wartime and avoiding a nuclear holocaust.

“This case law makes clear that the danger the trial court sought to avert by its prior restraint here – the risk that witnesses in a civil trial might be influenced by reading news reports of the testimony of other witnesses – cannot possibly justify the censorship imposed,” the court said.

Moreover, the court pointed out that less restrictive alternatives were available to Velasquez, including admonishing witnesses not to read press accounts of the trial. In *CBS, Inc. v. Davis*, Justice Blackmun ruled that when “less intrusive measures” are available, other than a prior restraint, the prior restraint is rendered unconstitutional. Admonishing the witnesses might even be more effective, the California Court said, because although the September 19 order might have prohibited *The Orange County Register* from reporting on the trial, it did not preclude other newspapers from reporting it.

According to the AP on September 30, Daniel Callahan, lead attorney for the newspaper carriers, was critical of *The Orange County Register’s* coverage of the trial. “The Register has a practice of running articles in its paper that are self-serving,” he said. “It is writing to the subscribers, which are members of our jury pool, and saying that this lawsuit lacks merit.” The AP reported that jury selection began on September 29.

In a separate order on September 23, Velasquez fined Freedom Communications over \$23,000 for “willfully and intentionally” suppressing evidence in the case by destroying its e-mails from December 2003 to January 2008.

According to the AP, the company said in a statement that the newspaper had turned over more than 10 million documents and 130,000 e-mails and did not know the e-mails in question were relevant before its computers automatically deleted them.

– PATRICK FILE
SILHA FELLOW AND BULLETIN EDITOR

“[T]he danger the trial court sought to avert by its prior restraint here – the risk that witnesses in a civil trial might be influenced by reading news reports of the testimony of other witnesses – cannot possibly justify the censorship imposed.”

– California Court of Appeals, Fourth Appellate District

Flood Damage Data, *continued from page 22*

“It would be a flagrant waste of taxpayer money for the government to wage more legal battles against such Freedom of Information requests – money that would be better used to assist individuals struggling mightily to rebuild their homes and lives,” the editorial said.

The Gazette reported that officials with the city attorney’s office referred questions to City Manager Jim Prosser, who said he wanted to review the matter before commenting.

– JACOB PARSLEY
SILHA RESEARCH ASSISTANT

FCC News

Comcast to Appeal FCC's Decision on Internet Network Blocking

Internet service provider Comcast Corporation filed an appeal on Sept. 4, 2008 with the U.S. Court of Appeals for the District of Columbia Circuit seeking the reversal of an order from the Federal Communications Commission (FCC) requiring Comcast to stop secretly blocking peer-to-peer applications over its broadband networks.

The Aug. 1, 2008 FCC order (FCC 08-183) reflects the Commission's support of "network neutrality," the principle that broadband networks should not discriminate among Internet content, services, and applications in managing their networks. The Commission rejected Comcast's position that it must delay file-sharing applications like BitTorrent, which allow users to download files directly from other users' computers, in order to manage its network effectively.

"[W]e conclude that the company's discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management," the order said. It was adopted by a 3 to 2 vote by the five-member commission.

The FCC also observed that peer-to-peer applications, which facilitate the transmission of large files such as videos, represent a direct competitive threat to cable operators, of which Comcast is the nation's biggest. "Internet users have the opportunity to view high-quality video with BitTorrent that they might otherwise watch (and pay for) on cable television," the order said.

The FCC ordered Comcast to disclose specific details regarding its network management policies to its subscribers and the FCC within 30 days. Comcast must also submit a compliance plan detailing how the company plans to stop its discriminatory practices by the end of 2008.

While the appeal is pending, Comcast Executive Vice President David Cohen said the company would comply with the order, according to a Sept. 4, 2008 cnet news story. On September 22, Comcast gave the FCC its plan for altering its Internet traffic management policies by the end of December 2008, according to a September 23 Reuters story. Comcast plans to use software to identify subscribers who use the most bandwidth when the network is congested. It will then give those subscribers lower priority status during times of peak network congestion.

The FCC began its investigation into Comcast in January 2008 after Free Press, an organization promoting media reform, filed a complaint on Nov. 1, 2007. The complaint said that Comcast subscribers were experiencing delays using file-sharing networks for large file downloads. The Associated Press (AP) conducted tests in October 2007 that determined Comcast was terminating file-sharing transmissions without notifying its customers, according to a Sept. 4, 2008 AP story.

At a public hearing held by the FCC in Cambridge, Mass. on Feb. 25, 2008, Cohen stated that Comcast was regulating network traffic and blocking file

transmissions only during times of peak network congestion, according to a Feb. 25, 2008 cnet news story. However, the FCC's August 1 order said that tests indicated that Comcast interfered with peer-to-peer applications at many times of the day and not only during periods of heavy network traffic.

The FCC has never formally adopted network neutrality rules for broadband operators through the agency's rulemaking process defined in the Administrative Procedure Act (APA), 5 U.S.C. § 563. However, in August 2005, the FCC released an "Internet Policy Statement" (20 FCC Rcd 14986) stating that consumers were "entitled to run applications and use services of their choice" on the Internet subject to "reasonable network management" practices. The FCC did not define "reasonable network management."

According to a Sept. 4, 2008 statement issued by Cohen, Comcast believes the FCC cannot enforce a policy of non-discriminatory network management in the absence of formal rules.

"We filed this appeal in order to protect our legal rights and to challenge the basis on which the commission found that Comcast violated federal policy in the absence of pre-existing legally enforceable standards or rules," the statement said.

In its August 1 order, the FCC said that it had chosen to resolve disputes regarding Internet policy on a case-by-case basis instead of promulgating rules. First, it stated that because the Internet is a new medium, regulation under the agency's power to adjudicate disputes would be a better means for addressing novel issues presented by the Internet. Second, network management practices are so specialized that a broad rule could not effectively address the varied policies of different broadband providers. Third, the order said a case-by-case approach better implements the commission's policy of restraint in the area of Internet regulation.

The FCC's order also asserted its authority over Internet broadband access providers like Comcast. In *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), the U.S. Supreme Court said the FCC could impose "special regulatory duties" on Internet service providers under Title I of the 1934 Communications Act, 47 U.S.C. §§ 151-161, which conferred to the FCC the authority to regulate communications by wire and radio that take place between states. It also confers the power to regulate radio and wire transmissions between the United States and foreign countries that originate in the United States or are received within the United States.

The FCC claims in its August 1 order that it can regulate Internet service providers like Comcast because broadband Internet access services are a form of communication by wire. Therefore, the FCC also claims that it can enforce national Internet policy over broadband access providers under § 230(b) of the Communications Act of 1934, 47 U.S.C. §

Comcast Appeals FCC Order, *continued on page 27*

"[W]e conclude that the company's discriminatory and arbitrary practice unduly squelches the dynamic benefits of an open and accessible Internet and does not constitute reasonable network management."

– FCC order 08-183
Aug. 1, 2008

International

Malaysian Government Faces Criticism over Jailed Blogger

The Malaysian government released the editor of a news Web site who was detained under a national security law for criticizing Islam after a court ruled his detention was illegal.

High Court Justice Syed Ahmad Helmy Syed Ahmad ruled Nov. 7, 2008 that Malaysia's home minister exceeded his authority in detaining blogger Raja Petra Raja Kamarudin, editor of the Web site Malaysia Today, under Section 8 of Malaysia's Internal Security Act (ISA), according to The Associated Press (AP). *The New York Times* reported November 7 that the court concluded that the government's justification for Raja Petra's detention was insufficient.

Raja Petra had been detained since Sept. 12, 2008 when he was arrested as part of a larger government crackdown on anti-government critics. The blogger's arrest under the ISA drew protesters to the streets of Kuala Lumpur, Malaysia's capital, and drew criticism from international free expression advocates and the U.S. State Department.

The government can appeal the ruling, but the judge ordered Raja Petra released the same day, according to *The Times*. Raja Petra told the AP, "I'm really glad it's over. I'm really tired. The judge's decision proves there is no justification for my detention."

The ISA gives the home minister broad powers to detain individuals acting in a manner considered harmful to national security without trial for up to two years. According to a Sept. 30, 2008 story on the Web site c|net news, the law's expansive powers are a vestige of British colonial rule in Malaysia, and it was originally enacted to address the threat of communist terrorists.

Malaysian Information Minister Datuk Ahmad Shabery Cheek said Raja Petra was detained for national security reasons because he ridiculed Muslims in his blog posts on Malaysia Today's Web site, according to a September 12 report issued by the Malaysian official news agency Bernama. Raja Petra wrote an August 8 post entitled "I Promise to Be a Good, Non-Hypocritical Muslim," that stated "Muslims do everything Islam is against" and "Muslims are hypocrites. That is what ails Malaysia." The column is available at <http://mt.m2day.org/2008/content/view/11025/84/>. Cheek also cited another August 24 column authored by Raja Petra, "Not all Arabs are Descended from the Prophet."

According to Bernama, Cheek said Raja Petra's statements might antagonize Muslims worldwide. He compared Raja Petra's blog to controversial political cartoons depicting the prophet Mohammed published in September 2005 by the Danish newspaper *Jyllands-Posten*. (See "Controversial Cartoons Lead to Worldwide Concern for Speech, Press Freedom, and Religious Values" in the Winter 2006 *Silha Bulletin*.)

Raja Petra was detained at the Kamunting Detention Center in Taiping, according to the AP. Under the terms of the ISA, an advisory board was required to review the grounds for Raja Petra's

detention every six months. The home minister is authorized to extend an individual's detention for two years beyond the initial two-year detention period.

Raja Petra was also arrested earlier this year, on May 6, 2008, for sedition, according to the AP. In an April 25 post on the Malaysia Today Web site, he implicated Malaysian Deputy Prime Minister Najib Razak and his wife in the 2006 killing of a Mongolian model, Altantuya Shaariibuu, according to a May 6, 2008 Reuters story. The post, entitled "Let's Send the Altantuya Murderers to Hell," stated that before her death, the model allegedly had an affair with the Deputy Prime Minister and tried to blackmail him for money.

Raja Petra was released on bail on May 9, *The New Straits Times* reported. His trial on sedition charges began in Kuala Lumpur on Oct. 6, 2008, after he had been detained for violating the ISA, according to *The Guardian* of London. *The New York Times* reported November 7 that the charge of sedition was still pending against Raja Petra. "This is becoming a test case," Raja Petra's lawyer told Reuters. "This is the first time a blogger has been charged with sedition."

In August 2008, the Malaysian government attempted to block the Malaysia Today Web site, citing concerns about defamatory content. On Aug. 27, 2008, the Malaysian Communications and Multimedia Commission (MCMC) ordered Internet service providers (ISPs) in Malaysia to cut off access to the Web site, according to an August 29 AP story.

"Everyone is subject to the law, even websites and blogs," Home Minister Datuk Seri Syed Hamid Albar said, according to an August 29 *New Straits Times* story. Although he asserted that the government did not intend to restrain freedom of expression, he added, "when you publish defamatory contents [sic], it is only natural for action to be taken."

The New Straits Times reported that the MCMC's efforts to block access to the Web site were ultimately stymied. Raja Petra created a mirror site of Malaysia Today, an exact copy of a Web site on a different server, that allowed users to access the Web site's content in spite of the ISP block.

Raja Petra told the AP for an August 28 story, "Blocking my site is a move by a desperate government that is trying to silence me, but it's not going to stop me. It only reveals that the government does not know how to handle the Internet."

The government has also detained other individuals under the ISA. The Malaysian opposition claims the ruling coalition is trying to quash dissent following a loss of support in the March 2008 general election, according to a September 23 BBC News story.

Raja Petra's arrest on September 12 occurred on the same day opposition lawmaker Teresa Kok and reporter Tan Hoon Cheng from Chinese language newspaper *Sin Chew* were also detained pursuant to the ISA, according to a September 13 AP story. Kok was arrested for allegedly complaining about

Malaysian Blogger Jailed, *continued on page 27*

"Blocking my site is a move by a desperate government that is trying to silence me, but it's not going to stop me. It only reveals that the government does not know how to handle the Internet."

– Raja Petra Raja
Kamarudin
Editor, Malaysia
Today Web site

International

In State of Emergency, Thai Government Blocks Web Sites but Not Mainstream Media

Anti-government protests in Thailand in September 2008 resulted in a declaration of a state of emergency by Thailand's prime minister on Sept. 2, 2008. Although the declaration placed restrictions on media content, the refusal by army commander Anupong Paochinda to enforce the state of emergency made the restrictions on the mainstream media largely theoretical.

Immediately following the declaration of the state of emergency, however, online commentary in Thailand was quashed by a September 3 court order shutting down 400 Web sites in Thailand, some of which were allegedly insulting to the Thai royal family, according to a September 2 *Bangkok Post* story.

The product of tensions between two rival political parties, the People's Alliance for Democracy (PAD) and the ruling People's Power Party (PPP), civil unrest in Thailand began with the takeover of government buildings in late August 2008. The Associated Press (AP) reported August 26 that several thousand PAD members occupied the state-run National Broadcasting Services of Thailand (NBT) television news station, suspending broadcasts for several hours. The NBT later resumed broadcasting from another location, according to the AP.

The *Asia Times* reported September 6 that protestors also occupied the prime minister's office the same day. The PAD called for the resignation of the prime minister and his government, stating that the PPP is aligned with ousted Prime Minister Thaksin Shinawatra, who fled to London in early August 2008 to escape corruption charges in Thailand, according to a September 2 BBC News story.

The Guardian of London reported September 2 that the death of one protestor in a clash between the PAD and 400 army troops near the headquarters of the United Nations in Bangkok prompted Prime Minister Samak Sundaravej to declare a state of emergency in Thailand. On September 2, Sundaravej suspended the constitution and declared that army chief Anupong Paojinda would enforce order in Bangkok, according to a September 2 BBC News story. The state of emergency limits freedom of assembly and prohibits the media from publishing or broadcasting images that would incite the public, CNN reported September 2.

Several Thai media organizations, including the Press Council of Thailand and the Thai Journalists Association, released a statement on September 2 condemning the state of emergency. Specifically, the statement challenged restrictions on the media contained in Article 9 of the 2005 Emergency Decree on Public Administration in Emergency Situation, which authorizes the prime minister to declare a state of emergency. Article 9 states that restrictions may be placed on reporting that could threaten "national security, or law and order, and/or the good morale of the people." The media organizations said this provision violates Section 45 of the Thai Constitution,

which protects freedom of expression and states that newspapers shall not be prevented from printing news or expressing opinions.

Section 45, however, also contains an exception allowing the government to restrict the liberty guaranteed by the Section through laws enacted for the purpose of "maintaining the security of the State ... [and] maintaining public order or good morals."

Although the protests took place on a large-scale, drawing thousands of people to the streets of Bangkok, according to a September 2 story on National Public Radio's "All Things Considered," the demonstrators were largely peaceful. *The New York Times* reported September 14 that the protests had resulted in one fatality over three weeks, and "life in Bangkok has continued as usual."

Reuters reported September 14 that Army Chief Anupong Paojinda refused to enforce the state of emergency and said he would not use force against protestors. He told the *Bangkok Post* for a September 13 story that he had urged the acting prime minister to cancel the state of emergency. Mediabistro.com blog Fishbowl NY, which covers New York media, said in a September 2 post that the restrictions against the media were not being enforced. "It's amazing that the military has taken a stand and said they won't enforce this censorship," said Kavi Chongkittavom, senior editor with *The Nation* (Bangkok), according to a September 2 *Hollywood Reporter* story.

Although the army may not have enforced restrictions against the mainstream media, the government moved to cut off access to hundreds of Web sites. The *Bangkok Post* reported September 2 that Thailand's Information and Communications Technology (ICT) Ministry had detected 1,200 Web sites that were detrimental to national security or harmful to social order and good morals. The ICT Ministry said it had advised Internet service providers to immediately block access to these Web sites and sought court orders to shut them down, according to the *Bangkok Post*.

Enacted in 2007, Section 20 of Thailand's Computer Crime Act empowers courts to block Web sites that are harmful to national security or social order. Government officials must file a petition with a court stating the grounds for the request to block access to a Web site and evidence regarding the allegations. The Act also authorizes imprisonment for those who possess pornographic computer files and allows the police to seize computer equipment if it is implicated in illegal activity under the Act.

Of the Web sites that were shut down, 344 were deemed insulting to the royal family of Thailand. Two of the blocked Web sites included religious material, one contained a video sex game, and five had content deemed to be obscene, according to a September 3 story in *The Guardian* of London.

A week after the declaration of the state of emergency on September 2, a media appearance

Thai Web Sites Blocked, *continued on page 27*

"It's amazing that the military has taken a stand and said they won't enforce this censorship."

– Kavi Chongkittavom
Senior editor, *The Nation* (Bangkok)

Comcast Appeals FCC Order, *continued from page 24*

230(b), a federal law that encourages the promotion of “the open and interconnected nature of the public Internet.” In its 2005 policy statement, the commission interpreted these words to support network neutrality principles. The policy statement instructs broadband Internet access services that consumers are entitled to “access the lawful Internet content of their choice.”

On March 28, 2008, Comcast voluntarily agreed to collaborate with file-sharing network BitTorrent and stated it would stop delaying transfers. Comcast said it would reconfigure its network to manage data in a “protocol agnostic” way by delaying response times for customers who exceed a specified bandwidth threshold, according to a June 3, 2008 *Broadcasting & Cable* story. This type of network management does not measure the content being used by subscribers. Rather, it measures aggregate bandwidth consumption.

In August 2008, Comcast also announced that effective Oct. 1, 2008 it would cap residential users’ monthly data usage at 250 gigabytes per month, the data equivalent of sending 50 million e-mails or downloading 62,500 songs at 4MB per song, according to an August 28 cnet news story. Comcast said it would notify users who exceeded the data cap with a telephone call. Subsequent violation of the policy would result in immediate suspension of service for a year.

According to an August 29 *New York Times* story, Comcast stated there was no link between the 250 gigabyte cap and the FCC’s August 1 decision requiring Comcast to alter its network management practices.

FCC Chairman Kevin Martin, who voted to adopt the commission’s order, stated that he was disappointed by Comcast’s decision to appeal, according to a Sept. 4, 2008 AP story. In his statement accompanying the August 1 order, Martin said the commission would enforce the network neutrality principles in the 2005 Internet policy statement. “[T]he commission will remain vigilant in protecting consumers’ access to content on the Internet,” he said.

Dissenting commissioner Robert McDowell questioned the commission’s authority to mandate network management principles based on the FCC’s 2005 Internet policy statement. “In short, we have no rules to enforce,” said McDowell in his statement. “This matter would have had a better chance on appeal if we had put the cart before the horse, and conducted a rulemaking, issued rules and *then* enforced them.”

— AMBA DATTA
SILHA RESEARCH ASSISTANT

Malaysian Blogger Jailed, *continued from page 25*

the noise created by morning prayers at the mosque in her district. Tan was detained after reporting that a Malay Muslim party politician made derogatory comments about the Chinese minority in Malaysia. Both Kok and Tan have since been freed. The simultaneous arrests, however, instigated a wave of criticism against the Malaysian government and inspired calls for the abolition of the ISA.

The Malaysian Bar Association adopted a resolution calling for the repeal of the ISA on September 20 and the release of individuals detained under the law, according to a September 21 story in *The New Straits Times*.

On September 27, more than 2,000 Malaysians marched in protest in the streets of Kuala Lumpur to show their support for repeal of the ISA, according to the *Straits Times* of Singapore on September 29.

U.S. State Department Spokesman Sean McCormack said in a statement issued September 18, “The United States firmly believes that national security laws, such as the ISA, must not be used to curtail or inhibit the exercise of universal democratic liberties or the peaceful expression of political views.”

— AMBA DATTA
SILHA RESEARCH ASSISTANT

Thai Web Sites Blocked, *continued from page 26*

by Thailand’s prime minister resulted in his departure from office. Sundaravej, a former celebrity chef for seven years before he became prime minister, made several appearances on the popular Thai cooking show “Tasting and Complaining” after he took office, according to an AP story. On September 9, Sundaravej was forced out of office by a Constitutional Court ruling that Sundaravej violated the restriction against private employment contained in Article 267 of Thailand’s constitution.

Sundaravej stated in court that he had not earned a salary for his appearances on the cooking show. Rather, he said, “I did it because I liked doing it,” *The New York Times* reported in a September 9 story. But testimony from the managing director of the company that produced the show said that Sundaravej was paid \$2,350 for four shows, according to *The Times*.

The ruling People’s Power Party stated that it would try to reinstall Sundaravej as prime minister through a parliamentary vote, but Sundaravej stated that he would resign from his position as party leader and would not accept the prime ministership in any event, according to a September 12 AP story.

Acting Prime minister Somchai Wongsawat lifted the state of emergency on September 13, citing fears that Thailand’s tourism industry was suffering, according to a September 14 *New York Times* story. On September 16, the PPP voted Wongsawat in as Thailand’s prime minister.

— AMBA DATTA
SILHA RESEARCH ASSISTANT

New Media

Judge Lifts Restraining Order; Students May Discuss Transit Security Research

A federal judge in Boston ruled Aug. 19, 2008 that three Massachusetts Institute of Technology (MIT) students can publicly discuss the findings of a research project that explains how to manipulate the state's electronic payment system for transit fares. The ruling lifted a temporary restraining order, granted ten days earlier, that prevented the students from presenting their project at the DEFCON 16 computer security and hacker conference in Las Vegas on August 10.

Zack Anderson, Russell Ryan, and Alessandro Chiesa earned an "A" for the research project as part of an undergraduate computer security course at MIT. Their research explains how to hack the Massachusetts Bay Transportation Authority's (MBTA) electronic payment system to obtain free rides on Boston's T subway.

The T's payment system, which replaced cash and tokens with magnetically coded tickets called CharlieCards or CharlieTickets, was installed in 2006 at a cost of more than \$180 million. Systems employing the same software are used by transit agencies in many other cities around the world, including London and Minneapolis, according to Power Point slides the students prepared for their presentation that are available at http://tech.mit.edu/V128/N30/subway/Defcon_Presentation.pdf.

The slides were distributed to people planning to attend the DEFCON conference before the restraining order was issued. Later, after the court proceedings generated publicity, they were widely disseminated over the Internet via Web sites like Wikileaks and MIT's student newspaper, *The Tech*. The slides contain technical information about the students' research, but according to court documents filed by the students, they leave out key details that would be required to hack the payment system.

The slides also acknowledge that manipulating the payment system would be a crime. The fifth slide features plain black type on a white background reading: "AND THIS IS VERY ILLEGAL!" Below the warning, in smaller print, the slide cautions: "So the following material is for educational use only."

On August 9, the day before the students were scheduled to present their research at the DEFCON conference, Judge Douglas Woodlock granted a 10-day restraining order to the MBTA barring the students from disclosing programming information or software code that could aid in circumventing the payment system. The order was based on the Computer Fraud and Abuse Act, 18 U.S.C. § 1030, which makes it illegal to "knowingly cause[] the transmission of a program, information, code, or command ... [that] intentionally causes damage without authorization, to a protected computer" if the aggregate harm would result in more than \$5,000 damage or cause public health or national security concerns. Woodlock's order in *MBTA v. Anderson*, No. 08-11364-GAO (D. Mass. 2008) is available

online at http://www.eff.org/files/filenode/MBTA_v_Anderson/mbta-temp-restraining-order.pdf

According to court documents filed by the MBTA, the agency argued that the students' presentation would show hackers how to create and market fake CharlieTickets to the public. The fake tickets would allow transit riders to board trains without paying the fare. The MBTA's complaint alleged that the aggregate harm would result in more than \$5,000 damage and create national security concerns.

In order to fit the students' conduct within the prohibitions of the computer fraud statute, the MBTA also argued that an oral presentation at the DEFCON conference constituted a "transmission" and each CharlieTicket was a "protected computer."

The statute does not define "transmission," but the attorneys for the students argued in court documents that the intention of the statute was to prohibit electronic distribution over the Internet, not oral presentations. The statute defines computer as "an electronic, magnetic, optical, electrochemical, or other high speed data processing device performing ... storage functions, and includes any data storage facility or communications facility directly related to or operating in conjunction with such device" To be "protected," the computer must be used in interstate commerce or by a federal agency.

At an August 19 hearing to determine whether to convert the restraining order into a 5-month injunction to allow the MBTA time to fix its security flaws, a second U.S. District Court Judge, George O'Toole Jr., ruled that an oral presentation did not qualify as a "transmission" within the meaning of the computer fraud statute. He also ruled that the MBTA had failed to prove that the students' research was likely to cause \$5,000 damage, *The Boston Globe* reported on August 20. The ruling cleared the way for the students to discuss their findings, but came too late to save their scheduled presentation at DEFCON 16.

Although O'Toole did not focus on the issue, attorneys for the students and other First Amendment lawyers argued that the restraining order was also an unconstitutional prior restraint.

Cindy Cohn, an Electronic Frontier Foundation (EFF) attorney who represented the students at the August 19 hearing, argued that the students did not create the CharlieTicket problems, they simply exposed them to the public, the *Globe* reported. "This is a public debate on a matter of public importance, and they want to participate," she said at the hearing.

Marc Randazza, a First Amendment attorney not affiliated with the case, was critical of the MBTA's decision to sue the students in comments to the Legal Talk Network on August 28. "It seems to me that this is a case of getting caught with your pants down, and they wanted the government to put a sheet over them while they pulled their pants up," he said.

"It seems to me that this is a case of getting caught with your pants down, and [the Massachusetts Bay Transportation Authority] wanted the government to put a sheet over them while they pulled their pants up"

– Marc Randazza
First Amendment
attorney

New Media

YouTube Bans Videos that ‘Incite Violence’

Popular video sharing Web site YouTube adopted a policy banning videos “intended to incite violence or encourage dangerous, illegal activities” on Sept. 11, 2008, several months after Sen. Joe Lieberman (I-Conn.) pressured the site and its owner, Google, to remove content he said was “designed to incite violence against America and Americans or that show graphic violence against American troops and others.”

In a May 19, 2008 letter to Google Chairman and CEO Eric Schmidt, Lieberman, Chairman of the Senate Homeland Security and Governmental Affairs Committee, said that, according to a staff report by the committee, “Islamist terrorist organizations use YouTube to disseminate their propaganda, enlist followers, and provide weapons training.” Lieberman wrote that YouTube searches turned up “dozens” of videos bearing the logos of designated terrorist organizations documenting attacks on American troops in Iraq or Afghanistan, providing weapons training, featuring speeches by al-Qaida leadership, and “general material intended to radicalize potential recruits.”

Lieberman’s letter called on the Web site “to immediately remove content produced by Islamist terrorist organizations” and to “explain what changes Google plans to make to the YouTube community guidelines to address violent extremist material.” The letter is available on Lieberman’s Web site at <http://tinyurl.com/Liebermanletter>.

Because more videos are uploaded to YouTube than could possibly be individually monitored by the Web site, it relies on a set of “community guidelines” which encourage users to “flag” inappropriate content, which is then reviewed by the Web site and considered for removal.

According to a May 25 *New York Times* editorial, YouTube initially removed 80 videos at Lieberman’s request, but refused to take down more videos because they did not violate the site’s guidelines against graphic violence or hate speech. A May 19 post on the Google Public Policy blog said, “While we respect and understand [Lieberman’s] views, YouTube encourages free speech and defends everyone’s right to express unpopular points of view.” The blog post is available at <http://googlepublicpolicy.blogspot.com/2008/05/dialogue-with-sen-lieberman-on.html>.

Some criticized Lieberman’s demands that YouTube more closely police the site. The May 25 *New York Times* editorial said “it is profoundly disturbing that an influential senator would even consider telling a media company to shut down constitutionally protected speech.”

In a June 6 commentary, non-profit advocacy group the California First Amendment Coalition (CFAC) said Lieberman’s letter demonstrated “a failure to understand how free speech works in this medium.”

However, the new community guidelines appear to back down from Google’s initial position.

The relevant YouTube community guidelines state, “we draw the line at content that’s intended to incite violence or encourage dangerous, illegal activities that have an inherent risk of serious physical harm or death.” The guidelines specifically cite “instructional bomb making, sniper attacks,” and “videos that train terrorists,” as examples of those that should be removed, and say “[a]ny depictions like these should be educational or documentary and shouldn’t be designed to help or encourage others to imitate them.” The guidelines are available online at http://www.youtube.com/t/community_guidelines.

YouTube spokesman Ricardo Reyes told *The Washington Post* for a September 12 story that “YouTube reviews its content guidelines a few times a year, and we take the community’s input seriously,” adding, “The senator made some good points.”

According to The Associated Press (AP) on September 13, YouTube did not identify specific videos that led to the new guidelines, nor did it say exactly how it would choose those that are purged.

In a September 11 press release, Lieberman praised the new guidelines, which the press release called “a move taken in direct response to the Senator’s complaints.”

– PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

“[W]e draw the line at content that’s intended to incite violence or encourage dangerous, illegal activities that have an inherent risk of serious physical harm or death.”

– YouTube community guidelines

MIT Restraining Order, continued from page 28

Randazza said the restraining order should never have been issued in the first place. “When we are looking at suppressing speech, we’re looking at a prior restraint, a court coming and saying [that] what you are about to say in public is so god awful dangerous, that we’re going to gag you from speaking about it. The harm that should come from that should be either an imminent riot [or] a nuclear weapon detonating, not the MBTA getting caught that it, perhaps, did not have the best security system for its fare cards,” he said.

MBTA General Manager Daniel Grabauskas said the court proceedings helped the agency understand the CharlieTicket’s security risks, according to an August 19 c|net report. “The 10-day process yielded a lot more information than we had at the start, and that was a key objective all along,” he said. “Now that the court proceedings are behind us, I renew my invitation to the students to sit down with us and discuss their findings. A great opportunity now presents itself.”

Zack Anderson, one of the students, said they would be willing to speak with the MBTA about the problems, the *Globe* reported August 20. “We’ve always wanted to settle this amicably,” he said. “My God, we never wanted any of this.”

– MICHAEL SCHOEPF

SILHA FELLOW

Copyright

Federal Judge Says Copyright Owners Must Consider Fair Use Before Sending Takedown Notices

The U.S. District Court for the Northern District of California ruled Aug. 20, 2008 that copyright owners must determine whether online content makes fair use of a copyright before demanding a host Web site remove the content.

The court held in *Lenz v. Universal Music Corporation*, 572 F. Supp. 2d 1150 (N.D. Cal. 2008), that Universal Music Corporation must determine whether the “fair use” doctrine applies to a copyrighted song used in a video posted on popular Internet video hosting site YouTube before issuing a notice to YouTube to remove the video from its site.

“Fair use” is a principle that allows the use of copyrighted material for certain purposes, depending on the nature of the use, the nature of the copyrighted work, the amount of the work used, and the economic impact of the use. Fair use of a copyrighted work does not constitute an infringement of copyright, according to the Copyright Act of 1976, 17 U.S.C. § 107.

In February 2007, plaintiff Stephanie Lenz posted to YouTube a 29-second video of her toddler dancing in her kitchen. In the video, Lenz’s toddler danced to 20 seconds of the song “Let’s Go Crazy” by the artist professionally known as Prince. Universal holds the copyright to “Let’s Go Crazy.”

On June 4, 2007, Universal demanded that YouTube remove the content uploaded to the Web site by Lenz. It sent YouTube a “takedown notice,” a request that an online content provider remove copyrighted material from a Web site because of a copyright violation. Takedown notices are issued pursuant to provisions of the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512, which provides online service providers with a “safe harbor” from copyright infringement lawsuits as long as they comply with requests from copyright holders to remove unauthorized material.

YouTube sent Lenz an e-mail telling her it was removing her video from its Web site in response to Universal’s allegations of copyright infringement, according to the court’s opinion, written by Judge Jeremy Fogel. On June 5, 2007, YouTube removed Lenz’s video.

Lenz sought advice from the Electronic Frontier Foundation (EFF), a non-profit cyber rights legal organization, according to the court opinion, and she informed YouTube on June 27, 2007 in a “counter-notification” that her use of Prince’s song as background music for her home video was a fair use of the copyright. Therefore, she claimed, she had not infringed on Universal’s copyright for the song. Lenz demanded YouTube post her video again. YouTube posted the video on its Web site again six weeks after receipt of the counter-notification.

Reuters reported in a Sept. 13, 2007 story that Prince released a statement saying he was planning

to sue YouTube and other Web sites for unauthorized use of his music on their sites. “Prince strongly believes artists as the creators and owners of their music need to reclaim their art,” the statement said. Prince plans to file lawsuits in the United States and the United Kingdom, according to a Sept. 13, 2007 story on the Web site c|net news.

Lenz asserts that Prince’s demand that Universal send a takedown request was not based on an evaluation of the particular characteristics of her home video but rather was based on his belief that “as a matter of principle” the video should be removed because it included his music, Fogel’s opinion said.

Section 512(f) of the DMCA says that copyright owners who file DMCA takedown notices without a good faith belief that the use of the material infringes a copyright can be liable for misrepresentation. Lenz argued that copyright owners who do not evaluate whether the use of their copyrighted material is fair use cannot represent that they have a good faith belief that the material infringes a copyright.

Lenz filed a civil suit on July 24, 2007, alleging that Universal was liable for misrepresentation under § 512(f) of the DMCA because it had not considered whether fair use applied to authorize Lenz’s use of Prince’s song in her home video before sending a takedown notice to YouTube. She asked for unspecified monetary damages, including attorneys’ fees.

Universal argued that the DMCA does not reference the fair use doctrine, according to the court’s opinion. Therefore, the law does not require a copyright owner to determine whether fair use applies before demanding a Web site remove copyrighted content. Universal also stated that, as a matter of policy, copyright owners would be unable to respond to copyright infringements in a timely manner if they were expected to consider the fair use doctrine before issuing takedown notices. An evaluation of fair use could be complex, Universal argued.

Fogel rejected Universal’s argument, holding that consideration of the fair use doctrine is part of the review required by the DMCA. “[I]n the majority of cases,” wrote Fogel, “a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner’s ability to respond rapidly to potential infringements.”

However, Fogel ruled that a full investigation by a copyright owner to verify whether a claim of infringement is accurate is not required. In order to prevail on a claim for misrepresentation under the DMCA, the plaintiff must show subjective bad faith on the part of the copyright owner in its determination that use of copyrighted material does not constitute fair use. The district court ruled in Lenz’s favor and denied Universal’s motion to dismiss.

“[I]n the majority of cases a consideration of fair use prior to issuing a takedown notice will not be so complicated as to jeopardize a copyright owner’s ability to respond rapidly to potential infringements.”

– Judge Jeremy Fogel
Northern District of California

Copyright

Blogger Arrested for Posting Unreleased Guns N' Roses Songs

Federal police arrested a blogger on Aug. 27, 2008 for streaming nine songs from "Chinese Democracy," an as-yet unreleased album from the band Guns N' Roses, on the Internet. He has plead not guilty to the charges.

The blogger, Kevin Cogill, who posts on the site www.antiquiet.com under the alias "Skwerl," was charged with copyright infringement under 17 U.S.C. § 506(a)(1)(C), according to an affidavit available at <http://www.thesmokinggun.com/archive/years/2008/0827082gnr1.html>. The *American Bar Association Journal* said in an August 29 story that the provision, added to the law by the Family Entertainment and Copyright Act of 2005, has generally been used to prosecute commercial piracy rings.

The law states, in part, that "Any person who willfully infringes a copyright shall be punished ... if the infringement was committed ... by the distribution of a work being prepared for commercial distribution, by making it available on a computer network accessible to members of the public, if such person knew or should have known that the work was intended for commercial distribution." The law provides for penalties of up to 3 years in prison, with two additional years if financial gain can be shown.

Cogill posted the songs on Antiquiet on June 18. The songs were originally streamed, meaning users could listen to but not download the songs, although recordings of the songs were converted into downloadable mp3s and are currently widely available on various file sharing sites.

A self-proclaimed fan, Cogill had chastised the band and Geffen, its record company, for delaying the release of the new album. He stated in a June 6 Antiquiet posting that "the more you dick around with the details, the more likely the album is to leak on the [I]nternet, spoiling whatever big plans you're cooking up anyway."

The album has been a work-in-progress since 1994, and has racked up at least \$13 million in production costs, according to a March 6, 2005 story in *The New York Times*. A September 13 story on the ABC News Web site stated the album has a tentative November 25 release date, and the lead single, "Shackler's Revenge," was released on the "Rock Band II" video game in September 2008.

According to a June 24 story on *Rolling Stone's* Web site, Cogill used to work in the distribution department of Universal Records and is currently a Web designer. He said he received the tracks from "an anonymous online source."

The *Rolling Stone* story said that massive traffic in the wake of posting the "Chinese Democracy" tracks caused the Antiquiet site to crash. Cogill also said in the story that he received a phone call from "the Gn'R camp" requesting that the songs be removed, and that he complied.

A cease-and-desist letter soon followed threatening possible legal action. Cogill was arrested on August 27. He posted a \$10,000 signature bond and was

released pending a preliminary hearing on October 20, where he plead not guilty, according to an October 21 Reuters report.

After Cogill's arrest, Assistant U.S. Attorney Craig Missakian said the Recording Industry Artists Association had alerted the Department of Justice to the case, and he planned to prosecute similar cases as they arose in what could signal a more aggressive stance in the fight against online music piracy. "We take this type of crime very seriously," he said, according to a story in the August 28 *Wall Street Journal*.

"In the past, these may have been viewed as victimless crimes," said Craig Missakian, an assistant U.S. attorney in Los Angeles who built the case with the FBI and recording-industry investigators, in an August 29 story in the *Los Angeles Times*. "But in reality, there's significant damage. This law allows us to prosecute these cases."

The industry is particularly sensitive about pre-release leakage, which "pops the balloon," Eric German, an attorney with Mitchell, Silberberg & Knupp who has represented the recording industry in piracy cases, told *Los Angeles Times*. "It rips up the lottery ticket. It takes the wind out of everything," German said.

Corynne McSherry, staff attorney with the Electronic Frontier Foundation, said in the August 29 *Los Angeles Times* story that the arrest of Cogill was troubling because it raised the prospect of eager fans going to jail for posting a handful of songs.

"Bringing that hammer down on an individual music fan strikes me as entirely inappropriate," she said. "Taxpayers should be concerned that they are picking up Hollywood and the music industry's legal costs, particularly when you are going after an individual like this."

An August 27 story from the Web site for technology magazine *Wired* stated that Cogill could also face a civil copyright infringement suit from Guns N' Roses. Statutory damages in a civil case for releasing the material with intent or malice are up to \$150,000 per song, for a total that could exceed \$1.3 million.

"The band is in the position now where they can start a civil action, and they would be successful," said Howard Rubin, an entertainment lawyer at the New York law firm of Goetz and Fitzpatrick, in the *Wired* story, "But how are their fans feeling about this? They'll have their own public relations issues as to whether they're going to start an action here."

In a July 6 response to his original posting of the songs, Cogill wrote that "sooner or later, everyone will realize that downloading music and supporting an artist are far from mutually exclusive ... all the positive hype surrounding these leaks will do more for ["C]hinese [D]emocracy["] sales than any billboard or corporate media review ... [I] for one, will buy the album when it comes out ... and [I] will also surely pay to see the band do these great new songs live."

Blogger Arrested, continued on page 34

"I hope he rots in jail. ... It's going to affect the sales of the record. ... I think if someone goes and steals something, it's theft."

– Slash
Former guitarist,
Guns N' Roses

Student Media and Speech

8th Circuit Rules Students May Wear Black Armbands to Protest School Policy

The U.S. Court of Appeals for the 8th Circuit ruled Sept. 2, 2008 that students have a right to protest by wearing black armbands to school, calling a 40-year-old landmark U.S. Supreme Court decision on the same issue “dispositive.”

In *Lowry v. Watson Chapel School District*, 540 F.3d 752 (8th Cir. 2008) a three-judge panel ruled unanimously that students in the Watson Chapel School District in Central Arkansas may wear black armbands to protest a school uniform policy. The opinion by Judge Lavenski R. Smith upheld the Oct. 31, 2007 decision of a federal district court to permanently enjoin the school district from disciplining any student for wearing a similar armband.

Citing *Tinker v. Des Moines Community School District*, 393 U.S. 503 (1969), the 8th Circuit found that the students’ conduct in wearing an armband in protest was a symbolic act protected by the free speech clause of the First Amendment. “We hold that *Tinker* is so similar in all constitutionally relevant facts that its holding is dispositive,” the 8th Circuit opinion said.

The plaintiffs in *Lowry* were three junior high and high school students who wore black armbands on Oct. 6, 2006 to protest the school’s adoption and enforcement of a mandatory school uniform policy. The school’s policy stipulated that students were required to wear their uniform in school, on school buses, and at designated school bus stops in order to “promote equal educational opportunity through economical access to appropriate school clothing and orderly, uniform apparel standards for students,” according to the 8th Circuit’s opinion. The school uniform policy states that students may wear jewelry and wristbands, but they cannot cover the school uniform. The three students wore the armbands to school on their wrists, forearms, or biceps, not over the uniforms, but they were suspended for one day for wearing them.

On Oct. 10, 2006, the students and their parents filed a complaint in the U.S. District Court for the Eastern District of Arkansas, alleging that the school district’s discipline had violated their First Amendment rights. The school district stipulated at trial on Sept. 11, 2007 that the wearing of the black armbands did not cause material disruption or interference with school.

In *Tinker*, the Supreme Court held that a school’s decision to suspend students who refused to remove black armbands they wore as an act of protest against the Vietnam War was unconstitutional because it violated the students’ right to free expression. That case also arose in the 8th Circuit, but there the district court had held that school officials acted within their authority if they punished the students in order to maintain school discipline. A divided appeals court had affirmed.

Defendants in *Lowry* argued that *Tinker* did not apply because the students in *Tinker* wore armbands to school to protest the federal government’s Vietnam War policy, while the students in *Lowry* wore armbands to protest a school dress code. However, the 8th Circuit said the distinction was immaterial. “Whether student speech protests national foreign policy or local school board policy is not constitutionally significant,” the opinion said.

Although the court noted that *Tinker* does not protect certain types of student speech, including speech that promotes illegal drug use or speech that is sexually explicit, it classified the type of speech at issue in *Lowry* as “non-disruptive student protest that violated no school policy based upon student viewpoint.” Therefore, it found *Tinker* controlling. The 8th Circuit also affirmed the district court’s award of nominal damages to the plaintiffs and its award of \$37,500 for attorneys’ fees to the plaintiffs.

Ivy Lincoln, an assistant superintendent with the school district, said that the district expected to appeal the decision to the U.S. Supreme Court, according to a September 8 story by the Student Press Law Center.

Holly Dickson, a staff attorney with the American Civil Liberties Union (ACLU), which represented the students in *Lowry*, said that the school district’s decision to appeal the case was unsurprising. “They are so deeply offended that students dared to question their actions, they’ll stop at nothing in order to not hear commentary,” she told the Student Press Law Center.

Lincoln contends *Tinker* is not on point. He distinguished the situation of student protests of a school dress code policy from the circumstances at issue in *Tinker*, which concerned student protests of the Vietnam War – a national controversy.

“If a second-grader wants to protest the War in Iraq tomorrow, then that kid won’t get in trouble here,” he told the Student Press Law Center.

But Rita Sklar, executive director of ACLU of Arkansas, said “The 8th Circuit was clearly rebuking the school district for claiming that punishing students for protesting an apparel policy was not as serious as punishing students for protesting national policy,” according to a September 2 ACLU press release.

“Whether student speech protests national foreign policy or local school board policy is not constitutionally significant.”

– Judge Lavenski R. Smith
8th Circuit U.S. Court of Appeals

– AMBA DATTA
SILHA RESEARCH ASSISTANT

Student Media and Speech

Facing Censorship, College Students Quit School Paper and Launch Independent Web Site

In the fallout from a conflict between Quinnipiac University officials and student journalists over posting breaking news stories on the Internet, members of *The Quinnipiac Chronicle* staff left to form the Quad News, an independent online publication.

According to a Dec. 2, 2007 story in *The New York Times*, the dispute between the school's administration and *The Chronicle* dates back to 2006, when the school prohibited *The Chronicle* from posting stories on its Web site before they were published in the weekly print version of the paper. The policy was instituted after *The Chronicle* posted a story online about players on the men's basketball team. Administrators had not seen the story before they were contacted by local reporters asking about the incident.

According to an Oct. 24, 2007 story in *The Chronicle*, editorial staff members approached the administration in August 2007 about posting an story relating to a racial incident that occurred on campus in the first week of the semester. Because *The Chronicle*'s first issue was not set to be distributed until Sept. 12, 2007, the post would have violated the agreement between the Quinnipiac administration and the student newspaper.

"My reaction was absolutely no," Quinnipiac President John Lahey said, according to the story. "The student newspaper is for students. It should come out when it normally comes out."

The Oct. 24, 2007 story was written following a university meeting for student groups on campus. "I guess the challenge for us now is how in today's world we can really have a good discussion with the students about important topics, but not have it be a press conference to the world, where I have absolutely no control," Lahey said, according to the story.

Chronicle Editor in Chief Jason Braff was openly critical of the school's policy, and repeatedly protested the rule, including in a Sept. 19, 2007 editorial in *The Chronicle* and in an interview with *The Waterbury* (Conn.) *Republican-American*.

According to *The New York Times* story, Braff said that, although the paper had adhered to the online policy, doing so prevented the paper from reporting breaking news. He also said that the administration had threatened to fire him for speaking out against the policy.

Lynn Bushnell, the school's vice president for public affairs, denied that such a threat had been made. "We do not discipline students who criticize the university or its policies," she said in a statement. "We do discipline students who fail to follow clearly established policies. However, student leaders, especially those in paid positions, are expected to generally be supportive of university policies."

In May 2008, Braff and most of the rest of *The Chronicle*'s staff decided to leave the paper with the goal of launching an independent, student-run news

Web site, according to a story in the May 3, 2008 *New Haven* (Conn.) *Register*.

The walkout came in response to the administration's plan to appoint the paper's editorial staff, the story said. "We kind of decided to move on, so we are done with *The Chronicle* and the school can have it," Braff said, according to the story. "We don't want to be part of what they're doing right now."

Lahey had appointed a three-member task force that recommended *The Chronicle* "become totally independent of the university, functioning entirely on its own and generating all of its own revenues to cover all of its expenses," according to an April 9, 2008 story in the *Register*, partly because of concerns that the university would be legally liable for anything it printed. Although the university senate unanimously voted to reject the task force's recommendation and maintain the paper's current status, Lahey approved the plan, which included administrative approval of *The Chronicle*'s editor and publisher for the 2008-2009 school year, spurring the staff walkout.

The Quad News Web site was launched on Aug. 27, 2008 and Braff published a story in the opinion section of the paper welcoming new readers to "the independent voice of Quinnipiac."

"The structure of the website will include constantly updated and live breaking news stories and Quinnipiac Bobcats' game updates, and story topics similar to those that have previously appeared in *The Chronicle* once a week," Braff wrote.

The Quad News staff was greeted with a "cold shoulder" by the University, according to a Sept. 13, 2008 story in the *Register*. Quinnipiac athletes and coaches were prohibited from talking to Quad News reporters, and the campus chapter of the Society of Professional Journalists (SPJ) was threatened with loss of their official student group status for cooperating with the Quad News.

Lynn Bushnell, vice president of public affairs at Quinnipiac, said in the story that the SPJ and the Quad News had used "subterfuge to attempt to gain access to university space and resources." According to the story, the Quad News staff had written stories about overcrowded campus housing and Quinnipiac's top ranking by U.S. News. The university would not comment for either story.

Gemma McFarland, Quad News lifestyles editor, said, "As an editor, this situation is frustrating ... I have two writers working on a story about the meal plan, and the administration won't even comment on that."

An Oct. 26, 2008 editorial in *The New York Times* said that the gag order has since been lifted, and on November 10 the *Yale Daily News* reported that the Quinnipiac administration had officially retracted its threat to ban the SPJ chapter from campus.

The *Daily News* story called the retraction "an attempt by the Quinnipiac administration to finally

"I guess the challenge for us now is how in today's world we can really have a good discussion with the students about important topics, but not have it be a press conference to the world, where I have absolutely no control."

– John Lahey
President, Quinnipiac
University

Quinnipiac Chronicle, continued from page 33

quiet a small national scandal” over the events, and speculated that the removal of the SPJ threat and gag order could indicate the end of the ordeal. “It’s difficult to understand some decisions that were made,” Braff said. “But things have been getting better with us.”

Meanwhile, an all-new staff of *The Chronicle* published its first edition on Sept. 17, 2008. Quinnipiac hired Michael Riecke, a former Syracuse, N.Y., news anchor, as manager of student media organizations, including *The Chronicle*.

“We were starting fresh,” said Riecke. “Ordinarily at the end of a semester there would be some sort of staff in place, at least an editorial board in place.” In the 2008-2009 school year, the editor and publisher were appointed by the administration, and most of the rest of the staff were freshmen.

The first issue of *The Chronicle* contained an op-ed from Stacy Kinnier, the editor-in-chief, saying that, “while some may feel that *The Chronicle* has been taken into the hands of administration and that our content will be closely watched and controlled, I can assure you that this is not the case. We are still a student-run newspaper that covers, and will continue to cover, hard news. As journalists, we have a responsibility to inform our readers of what is happening on this campus.”

Although Quinnipiac is a private university and the situation does not directly implicate the First Amendment, Margarita Diaz, chair of the journalism department at Quinnipiac, said that the incident is “about curtailing access to information and preventing members of the press from doing their job,” according to a Sept. 19, 2008 column in the *Hartford Courant*. “If that’s not an attack on the First Amendment, I don’t know what is.”

The October 26 *New York Times* editorial had criticized the school’s policy and called on the paper to withdraw its threat against the SPJ. “Such intimidation does not speak well of Quinnipiac’s commitment to freedom of speech, open-mindedness or academic inquiry,” the editorial said. “Instead of encouraging the students for their remarkable initiative, the school tried to retaliate against them for resisting its control and not toeing the line.”

– JACOB PARSLEY
SILHA RESEARCH ASSISTANT

Copyright, Fair Use, continued from page 30

The Citizen Media Law Project, a research organization dedicated to the study of cyberspace and media law, said in an Aug. 22, 2008 story that plaintiffs might have difficulty meeting the standard for misrepresentation claims articulated in *Lenz*. Specifically, a plaintiff might have to show that a copyright owner knew a copyright had not been infringed and yet issued a takedown notice despite this knowledge. This type of showing would require a plaintiff to produce “smoking gun” e-mails or memos demonstrating the copyright holder’s subjective belief that use of the copyrighted material was fair use.

Universal spokesman Peter Lofrumento stated that Universal remains confident it will prevail in the case, according to an Aug. 20, 2008 story posted on the *Wired* magazine blog “Threat Level.” On August 29, Universal filed a motion for an interlocutory appeal, a request to an appellate court to review a district court’s ruling before the trial phase of a case has concluded. Universal seeks to have the district court’s ruling that it must consider fair use before issuing a takedown notice reviewed by the 9th Circuit.

– AMBA DATTA
SILHA RESEARCH ASSISTANT

Blogger Arrested, continued from page 31

Although the band has not commented officially on the Cogill case, Slash, the former Guns N’ Roses lead guitarist, did not have kind words for the blogger. “I hope he rots in jail,” said Slash in the August 29 *Los Angeles Times* story. “It’s going to affect the sales of the record, and it’s not fair. The Internet is what it is, and you have to deal with it accordingly, but I think if someone goes and steals something, it’s theft.”

– JACOB PARSLEY
SILHA RESEARCH ASSISTANT

Libel

State Courts Issue Libel Verdicts against Local Media Outlets

Pennsylvania Superior Court Upholds \$3.5 Million Libel Verdict

A mid-level Pennsylvania appeals court upheld a \$3.5 million libel verdict against a Pennsylvania newspaper Sept. 18, 2008, ruling that it negligently defamed a businessman and one of his companies.

The case, *Joseph v. Scranton Times L.P.*, 2008 PA Super. 217, (Pa. Super. Ct. 2008) began in 2002 when Thomas Joseph sued the Wilkes-Barre *Citizens' Voice*, its parent company, *The Scranton Times*, and former *Voice* reporter Edward Lewis over a series of stories published in 2001. The stories discussed several raids by state police and IRS agents at Joseph's home and business relating to his potential connections to an organized crime family.

Joseph, who was never charged as a result of the investigation, claimed the paper defamed him by citing anonymous sources who linked him to suspected illegal activity. In November 2006, Luzerne County Judge Mark Ciavarella awarded \$2 million to Joseph and \$1.5 million to one of his companies, Acumark Inc., a direct-mail marketing firm, for "either directly or implicitly indicating that [Joseph and his company] were engaged in a broad range of criminal enterprises uncovered by an investigation when in fact the investigation targeted other individuals and businesses."

The trial court found that Joseph had proven that the stories were false, and that the *Voice* had published them with "want of reasonable care and diligence to ascertain the truth."

The trial court testimony included that of Christopher Harper, a journalism professor at Temple University. Harper said that confidential and anonymous sources should be used only in very extreme cases, and that Lewis had violated the "journalistic code" of the *Citizens' Voice* as well as generally accepted newsroom standards.

In addition, the lower court found that Joseph and his company were not limited-purpose public figures because the paper could not prove that they had "voluntarily thrust themselves into the vortex of the public controversy," and therefore Joseph did not have to prove that the paper acted with "actual malice."

The *Voice* appealed, arguing Joseph and his company failed to prove the articles were false and that an actual injury resulted from the allegedly defamatory statements.

Judge Zoran Popovich, writing for a three-judge panel of the appellate court, upheld the lower court ruling and held that "the 'gist' of the defamatory articles was not a fair and accurate summary of the federal investigation" and the articles "resulted in a falsehood" against Joseph and Acumark. The court also agreed that "the paper acted negligently in publishing the Defamatory Articles by failing to abide by their own journalistic code when using unnamed sources."

Voice Publisher Scott Lynett said that the paper is "obviously very disappointed in the Superior Court's ruling. We disagree with their findings and

our attorneys are currently reviewing the opinion to decide on any appeal strategy," according to a September 19 Associated Press (AP) story.

Montana Jury Issues \$3.8 Million Judgment against Local Radio Host

A jury in Flathead County District Court in Kalispell, Mont. awarded \$3.8 million to a father and son in a defamation action against local radio show host John Stokes. Stokes hosts a radio show on KGEZ, a radio station located south of Kalispell that he also owns, according to a September 18 AP story.

The jury awarded \$900,000 to each of the plaintiffs for emotional and monetary damages and \$2 million in punitive damages because the jury determined that Stokes acted with malicious intent. Montana state law defines slander as any false publication other than libel which "charges any person with crime or with having been indicted, convicted, or punished for crime" or "tends directly to injure him in respect to his office, profession, trade, or business," Mont. Code Ann. § 27-1-803.

The plaintiffs, Davar and Todd Gardner, claimed Stokes made false statements about them on the air after they filed a separate lawsuit against him in 2001 regarding a disputed easement for radio towers owned by Stokes on the Gardners' property, the story said.

The previous case was ultimately concluded by a ruling by the Montana Supreme Court in July 2007, in *Anderson v. Stokes*, 163 P.3d 1273 (Mont. 2007). The decision affirmed the lower court's restriction of the extent of the easement, and required Stokes to take various steps to keep his broadcast equipment from interfering with the agricultural activities of the Andersons.

In the aftermath of the suit, Stokes suggested on his radio show that the Gardners had lied under oath during the litigation, had submitted a false affidavit, and committed bank fraud by obtaining a loan under false conditions, according to the AP. Stokes later admitted all three claims were false.

The Gardners filed their defamation suit in November 2007 after their requests for a retraction were ignored, according to a September 17 story in the Flathead *Beacon*, a local newspaper.

Stokes admitted that he had made the statements about the Gardners on air and that all three statements were false, but contended he took the appropriate steps to verify their accuracy and was exercising his right to free speech, according to the September 17 *Beacon* story.

"Out of 4,600 hours of being on the air, I screwed up for three minutes," Stokes said on his radio show after the verdict, according to a September 25 story in the Flathead *Beacon*. "So what I learned yesterday, and so many of us will, is that what previously was believed to be First Amendment protected rights, rights of the press to report things as they see it, now costs \$3.8 million."

State Libel Verdicts, continued on page 37

"Out of 4,600 hours of being on the air, I screwed up for three minutes. ... [W]hat previously was believed to be First Amendment protected rights, rights of the press to report things as they see it, now costs \$3.8 million."

– John Stokes
Kalispell, Mont. radio host

Libel

House Passes Libel Tourism Bill; Illinois Enacts Its Own Law

The U.S. House of Representatives passed a bill on September 27 that would change federal law to prohibit U.S. enforcement of certain foreign defamation judgments. The legislation moved on to the Senate on September 29. The bill is designed to protect Americans from “libel tourism,” a type of forum shopping in which plaintiffs choose to file libel suits in foreign jurisdictions that are more likely to produce a favorable result for them.

H.R. 6146, authored by Rep. Steve Cohen (D-Tenn.), states that “The purpose of this Act is to protect the right to freedom of speech under the First Amendment to the Constitution of the United States from the potentially weakening effects of foreign judgments concerning defamation.” It passed in the House by a unanimous voice vote.

The proposed legislation would add a new section to Title 28 of the United States Code, which governs the judiciary and judicial procedure. “Notwithstanding any other provision of Federal or State law, a domestic court shall not recognize or enforce a foreign judgment concerning defamation unless the domestic court determines that the foreign judgment is consistent with the [F]irst [A]mendment to the Constitution of the United States,” the bill states.

“While our Nation’s courts will generally enforce foreign judgments as a matter of comity, comity does not require that courts enforce foreign judgments that are repugnant to our Nation’s fundamental constitutional values, in particular its strong protection of the right to freedom of speech,” the preamble to the bill continues.

“Our legislation will codify the principle that, while U.S. courts will normally enforce the judgments of foreign courts, they should not do so when foreign judgments undermine our Constitution,” Cohen said while introducing the bill on the floor of the House of Representatives on May 22, according to the Congressional Record. “This is a straightforward solution that is designed to discourage foreign defamation plaintiffs from filing suit against American authors and publishers in foreign courts and instead encourage them to file [sic] suit in the United States.”

The bill is similar to a law enacted by the state of New York in April 2008. (See “New York Law Protects Authors from Libel Tourists” in the Summer 2008 *Silha Bulletin*.) When New York governor David Patterson signed that bill, he noted that ultimately Congress would need to address the issue on a national level.

According to a September 27 press release from Cohen’s office, libel tourism was brought to Cohen’s attention as a result of the New York law and the case *Ehrenfeld v. bin Mahfouz*, 518 F.3d 102 (2d Cir. 2008), in which a federal court refused to enter a declaratory judgment holding that a libel verdict entered in the United Kingdom against U.S. author Rachel Ehrenfeld was unenforceable in the United States. (See “New York High Court Rules in Libel

Tourism Case” in the Winter 2008 *Silha Bulletin*.)

“As our world becomes more and more interconnected, we need new laws to ensure that Americans’ First Amendment rights won’t be hindered by more restrictive, foreign mandates,” Cohen said in the September 27 press release. “I am proud that we were able to pass this common sense legislation to protect Americans from foreign courts impeding on their rights to free speech and freedom of the press this year, and I hope that the Senate realizes the urgency with which we must enact this law.”

In a September 29 press release, Association of American Publishers President Pat Schroeder thanked members of the House for focusing on libel tourism. “Libel tourism is an insidious threat,” Schroeder said. “It seeks to intimidate and silence American authors and deprive us of vital information on issues of public concern.”

The bill was the narrower of two bills in the House designed to protect Americans from defamation judgments entered in other countries. The other, H.R. 5814, officially titled the Free Speech Protection Act of 2008, would have allowed a party to collect civil damages if it could prove that an opposing group brought a foreign defamation lawsuit with the intentional goal of suppressing First Amendment rights.

“[Cohen’s bill] is a benchmark,” James Park, legislative counsel for Cohen, said in a September 30 story posted on the Web site for the Reporters Committee for Freedom of the Press. “We can add to it over time.”

An October 6 post on the Web site The Terror Finance Blog criticized the passage of the less protective bill. “Under this bill, academics and researchers would still have to endure a farcical trial in a foreign court before they could bring an action here to block recognition or enforcement of the foreign judgment,” the post’s author Aaron Meyer wrote.

Peter King (R-N.Y.), the author of H.R. 5814, stated in the Congressional Record for September 27 that, although H.R. 6146 was a “first step in the right direction,” because the bill does not provide for civil damages, “it doesn’t put an end to the problem and doesn’t provide any deterrence from these suits being filed in the first place.” King also said that he hoped during the next session members of Congress “can sit down together and craft a bill that we can all agree on and that will solve this problem once and for all.”

The New York Times published an editorial on September 29 praising the passage of the bill by the House and calling for swift action by the Senate. The article said that although the protections offered by the bill could have been broader the most important thing was to “prevent foreign libel judgments from eroding free-speech protection in the United States.”

“Libel tourism is an insidious threat. It seeks to intimidate and silence American authors and deprive us of vital information on issues of public concern.”

– Pat Schroeder
President,
Association of American
Publishers

Libel Tourism, continued on page 37

Libel Tourism, *continued from page 36*

“Now, the Senate needs to act,” the editorial said. “Senators Charles Schumer, Democrat of New York; Arlen Specter, Republican of Pennsylvania; and Joseph Lieberman, independent of Connecticut, should work to get Mr. Cohen’s bill through their chamber before Congress leaves town.”

While Congress pondered the matter on a federal level, Illinois Gov. Rod Blagojevich signed a bill into law on August 18 declaring, in part, that a “foreign judgment need not be recognized if ... the cause of action resulted in a defamation judgment obtained in a jurisdiction outside the United States, unless a court sitting in this State first determines that the defamation law applied in the foreign jurisdiction provides at least as much protection for freedom of speech and the press as provided for by both the United States and Illinois Constitutions.”

The law, which modifies 735 Ill. Comp. Stat. 5/2-209 and 5/12-621, was introduced on February 15 by state Sen. Emil Jones Jr. It passed both the Illinois Senate and House unanimously in April and May, respectively, and became effective upon the governor’s signing.

New Fee Arrangements Make British Libel Suits More Difficult to Defend

Meanwhile, *The Guardian* of London reported in an October 9 story that media companies embroiled in libel battles in England are becoming less willing to fight defamation court cases all the way to a verdict and instead are increasingly attempting to settle the cases.

The article cited research by the Reuters-owned Sweet & Maxwell indicating that out of more than 250,000 online law reports and transcripts, 61 percent of reported defamation cases over the 12 months until May 2008 resulted in a settlement, up from 21 percent of cases in the same period two years ago.

The story also discussed the increasing use of Conditional Fee Agreements (CFAs) by litigants in defamation cases, which enables lawyers to take libel cases against newspapers on a no-win, no-fee basis, and if victorious they can charge the losing side up to twice their normal fee at a rate of up to 800 British pounds per hour.

“There is no doubt that the use of CFAs is having a chilling effect on the media, and the whole system needs a thorough review,” said Caroline Kean, a litigator for the British law firm Wiggin, according to *The Guardian*. “Defendants are choosing the ground upon which they will fight a case to trial much more carefully.”

— JACOB PARSLEY
SILHA RESEARCH ASSISTANT

State Libel Verdicts, *continued from page 35*

“We are ecstatic about it,” Todd Gardner said of the verdict in the September 17 Flathead *Beacon*. “We know we’ll probably never see a dollar, but the more important thing is the message it sends to the valley about what’s right and wrong. Just because you have a microphone doesn’t mean you can attack someone.”

Stokes initially said he planned to file an appeal, but said later on his show that he might seek a settlement instead, the *Beacon* reported. “What we’d rather do is sit down and settle this thing with all parties involved,” Stokes said on the show, according to a September 25 story in the Flathead *Beacon*. “We’re not going out of business. The towers are still standing.”

— JACOB PARSLEY
SILHA RESEARCH ASSISTANT

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Libel

International Libel Roundup

Senegalese Court Imprisons Publisher for Libel

A Senegalese court sentenced a newspaper publisher to three years in prison for including “false reports” in an article claiming the president and his son had stolen government funds.

El Malick Seck was sentenced on September 12 after being found guilty of “acts likely to disturb the public order and cause serious political disorder, of diffusion of false reports, of public insult and of concealment of administrative documents,” according to a September 13 Associated Press (AP) story. Prosecutors had asked for a 5-year sentence.

The paper was also suspended from publishing for three months, according to Seck’s lawyer, Demba Cire Bathily, in the September 13 AP story.

The court acquitted Seck on an additional charge of insulting the president, according to a September 12 story from Panapress, an African news service.

According to Panapress, Seck was arrested August 28 after his Dakar-based daily paper, *24 Heures Chrono*, printed an article charging that Senegalese President Abdoulaye Wade and his son were involved in laundering money stolen from an Ivory Coast bank.

The judge said Seck did not provide sufficient proof to back up his allegations, according to the AP. Seck maintained in the trial that the information came from reports that were publicly available.

Sambou Biagui, editor of *24 Heures Chrono*, said in a September 12 BBC News story that Seck had been sentenced “simply because our paper put in the open the wrongdoings of those who are running this country.”

“This is a political sentence, El Malick Seck is a political detainee,” Biagui said in a September 13 story in the *Kenyan Nation*.

The September 13 AP story said that journalists have held demonstrations in recent months charging the government with trying to intimidate reporters and squash negative coverage. The September 12 BBC story reported that last month, the offices of *24 Heures Chrono* and another paper were ransacked, and some have implicated the government in the incidents.

According to an English translation of the Senegalese constitution by the University of Pretoria, Article 8 includes “freedom of expression” and “freedom of the press” in a list of “individual fundamental freedoms.” Article 11 states that “The creation of a press body for information on politics, the economy, culture, sports, recreation or science shall be free and shall not be subject to prior authorization of any kind. Press regulations shall be set by the law.”

In an open letter to President Wade, members of the PEN American Center, a human rights organization that opposes censorship and defends writers, wrote that they were “seriously concerned that the criminal conviction of El Malick Seck [was a] violation of his right to freedom of expression as guaranteed by the Senegalese constitution, as

well as by the African Union’s African Charter on Human and Peoples’ Rights and the UN International Covenant on Civil and Political Rights, to which Senegal is a signatory.”

A press release from Reporters Sans Frontieres (RSF or Reporters Without Borders) stated that “This sentence reflects all the unfairness and absurdity of Senegal’s law on press offenses,” and that “the alleged libel is in no way redressed by imposing a very severe sentence and now the government has a political prisoner on its hands.”

The report also called on President Wade to “quickly embark on a thorough overhaul of Senegal’s press legislation.”

Seck was also arrested in 2007 on charges of “offending the head of state and publishing misinformation,” but was later released, according to a Nov. 8, 2007 Reuters story.

Italian Court Rejects Prime Minister’s Suit against The Economist

A judge in Milan, Italy has rejected defamation claims by Italian Prime Minister Silvio Berlusconi against British publication *The Economist*, and required him to pay the magazine’s legal costs.

Berlusconi, currently serving his third term as Italy’s prime minister, filed the lawsuit in July 2001 during his second period in office. His suit claimed that *The Economist* defamed him in an article entitled “An Italian Story” in the April 26, 2001 issue. The cover of the magazine included the headline “Why Silvio Berlusconi is unfit to lead Italy.”

In the 2001 story, which did not name an author, *The Economist* suggested that Berlusconi was involved in bribery of judges, political corruption, questionable business practices, and connections to the Mafia.

“Mr. Berlusconi has needed a lot of help from insalubrious quarters,” the article said. “Though he says he wants to replace the old corrupt system, his own business empire is largely a product of it. His election as prime minister would similarly perpetuate, not change, Italy’s bad old ways.”

Berlusconi’s suit claimed that article contained “a series of old accusations” which were an “insult to truth and intelligence,” according to a September 5 story in the UK-based *Press Gazette*.

Berlusconi was also ordered to pay the magazine’s legal costs of 25,000 euros (\$35,760), according to a September 5 story in the Dubai-based *Gulf News*.

Berlusconi’s attorney said he would lodge an immediate appeal in a September 7 Reuters story.

“The Milan court is, in fact, mistaken in ruling lawful an article which in reality should have been considered offensive to ... Berlusconi and was peppered with unfounded assertions,” Fabio Lepri said in a statement, according to Reuters. “It is not by chance that the words of *The Economist* periodical, published shortly before the 2001 elections, have been disproved many times by the votes of the Italian people.”

International Libel Roundup, continued on page 39

“This is a political sentence, El Malick Seck is a political detainee.”

Sambou Biagui
Editor, *24 Heures Chrono*

International Libel Roundup, continued from page 38

The Economist issued a statement on September 6 that said “We are pleased to announce that the Court in Milan has issued a judgment rejecting all Mr. Berlusconi’s claims and requiring him to make a payment for costs to *The Economist* ... [T]he *Economist* will not be making any further comment.”

“They [*The Economist*’s arguments] fully fall within the right to criticize, which is guaranteed by Article 21 of the [Italian] constitution,” Judge Angelo Ricciardi wrote, according to the September 5 *Gulf News* story.

According to *The New York Times* on September 5, the ruling is unlikely to diminish the prime minister’s frequent criticism of the news media and Italian judges, who he claims have unfairly singled him out for attack since he entered politics nearly 20 years ago.

The Times story reported that *The Economist* has “repeatedly launched broadsides against Mr. Berlusconi, whose business empire spans television, publishing, film and the soccer team A.C. Milan.”

According to *The Times*, the Berlusconi feud has been ongoing. The magazine published a cover story in 2006 headlined “Basta, Berlusconi” (“Enough, Berlusconi”), and in July 2008 *The Economist* accused Berlusconi of using his office to pursue his “personal and corporate interests,” in an article that bore the headline “Berlusconi fiddles, Italy burns.”

American Wine Critic Faces Libel Charge in France

A Paris investigating judge filed preliminary charges against American wine critic Robert M. Parker on September 5 for allegedly defaming his former assistant, judicial officials said in a September 10 AP story.

The AP reported that the judge is looking into a lawsuit brought by Parker’s former assistant Hanna Agostini. Agostini co-authored a French book criticizing Parker. The book’s translated title is *Robert Parker: Anatomy of a Myth*.

Agostini, who brought the case last year, faces preliminary charges of her own in Bordeaux involving alleged forgery in a wine-trafficking affair centering on Belgian wine trader Geens, the AP reported. Agostini denies the allegations.

According to wine Web site Decanter.com, Parker had said on his bulletin board that Agostini was facing a jail term of five years and a possible fine of 1 million euros (\$1.5 million) for fraud and misrepresentation, and that the charges against her were “overwhelming.”

The civil case against Parker, heard in March, found that Parker’s Web site post had violated Agostini’s ‘presumption of innocence’ and awarded her 2,000 euros (\$2,820) in damages, which Parker appealed. The September 5 charges marked the beginning of the formal criminal defamation claims, according to Decanter.com.

Parker’s lawyer said the critic declined comment about the case, the September 10 AP story reported.

Agostini’s lawyer, Fabrice de la Voye, said that the U.S. critic made no legal challenge to his client’s book but had “launched a diatribe on his website about her personally,” according to the September 11 Decanter.com story.

“Ms Agostini spent many years working with Mr Parker,” de la Voye said, according to the Web site. “He completely abandoned her when she faced difficulties, and he has now attacked her character and integrity.”

According to a September 10 post on wine blog The Quaffer, Parker, a former lawyer who has his nose insured for a million dollars and is known as the “Emperor of Wine,” fired Agostini in 2003 amid allegations of false accounting. In 2007, Agostini released her critical biography of Parker in which she accused the wine guru of several indiscretions, including discrepancies in his ratings, recycled wine reviews, and cozying up to Bordeaux producers. The post is available online at <http://quaffwine.blogspot.com/2008/09/wine-critic-robert-parker-faces.html>.

According to the September 10 AP story, *Parker’s Wine Buyer’s Guide* is a well-known reference book, and his recommendations can make or break winemakers. His bimonthly publication, *The Wine Advocate*, assigns scores of up to 100 points to the wines it samples. He has been called the most powerful critic in the world.

— JACOB PARSLEY
SILHA RESEARCH ASSISTANT

Privacy

Florida Supreme Court Unanimously Rejects False Light Invasion of Privacy

The Florida Supreme Court declined to recognize the tort of false light invasion of privacy on Oct. 23, 2008 in a unanimous opinion that held the tort's chilling effect on protected speech outweighed its potential to create a new remedy for a narrow class of wrongs.

The high court's opinion in *Jews for Jesus, Inc. v. Rapp*, 33 Fla. L. Weekly S849 (Fla. 2008), also ended a second false light case, *Anderson v. Gannett Co.*, 33 Fla. L. Weekly S856 (Fla. 2008), in which a Florida jury had awarded the plaintiff more than \$18 million in damages on his false light claim.

Although many states recognize false light invasion of privacy claims, several state high courts, including Minnesota, Colorado, and now Florida, have explicitly declined to recognize the cause of action. (See "Ohio Supreme Court Recognizes False Light Claim" in the Fall 2007 issue of the *Silha Bulletin* and "Colorado Rejects False Light Invasion Of Privacy Tort" in the Fall 2002 *Bulletin*.)

In *Rapp*, Edith Rapp sued Jews for Jesus after her stepson, Bruce Rapp, published an account of an alleged exchange he had with his stepmother in the organization's newsletter and on the Internet. In the account, Bruce Rapp, who was also an employee of Jews for Jesus, relates that he asked his stepmother, who is Jewish, "if she would like to ask [God] for forgiveness for her sins and receive [Jesus]" and she responded "yes!" the court's opinion said.

Edith Rapp's suit alleged claims for defamation, intentional infliction of emotional distress, and false light invasion of privacy. According to her complaint, her stepson's account falsely implied Rapp had joined Jews for Jesus and believed in its tenets. The trial court dismissed Rapp's complaint for failure to state a claim, and the mid-level appellate court affirmed as to the first two claims, but certified a question to the state's high court to decide whether to recognize the false light tort.

The court began with a review of the history of false light invasion of privacy, focusing on "two primary concerns" expressed by other courts and academics. First, false light largely duplicates the existing and well-established cause of action for defamation. Second, it lacks the procedural and substantive safeguards present in defamation law and designed to protect First Amendment concerns and therefore has the potential to chill protected expression.

Writing for the unanimous court, Justice Barbara J. Pariente analyzed two potential differences between false light and defamation. In some jurisdictions, false light addresses statements that are "literally true" but create a "false impression." But Pariente dismissed that distinction because Florida has recognized claims for defamation by implication in those situations.

Defamation by implication covers cases where the story or article is not defamatory because of what it says, but because of what it implies, Pariente

explained. Although the state Supreme Court acknowledged that it had never explicitly endorsed the concept, the opinion makes clear that defamation by implication is a valid cause of action in Florida.

Additionally, false light makes actionable false statements that are "highly offensive to a reasonable person" even if they are not objectively defamatory. The distinction is the interest each cause of action seeks to protect. "[I]n defamation cases the interest sought to be protected is the *objective* one of reputation, either economic, political, or personal, in the outside world. In privacy cases the interest affected is the *subjective* one of injury to [the] inner person," Pariente wrote, quoting *Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007).

But Pariente dismissed the "theoretical" distinction, noting that in actual practice most statements that cause objective harm to reputation will also be subjectively offensive and most subjectively offensive statements will also be objectively harmful to reputation.

More importantly, Pariente argued, adopting the subjective test would make actionable statements that are more difficult for authors and publishers to identify. "[T]he 'highly offensive to a reasonable person' standard runs the risk of chilling free speech because the type of conduct prohibited is not entirely clear . . ."

Next, the Court considered procedural and substantive safeguards in defamation law designed to protect First Amendment interests in free expression. In Florida, those safeguards include statutory notice requirements and limits on damages if the actionable statements were published in good faith. Case law in other jurisdictions does not adequately address whether such protections also apply in false light cases, Pariente wrote.

The court acknowledged that it could address the problem by extending the First Amendment protections that are part of defamation law to false light actions, but held that such a course of action would be better suited to the legislative branch. The Florida Legislature has studied the possibility of adopting a statutory false light cause of action, but has not taken any action on the issue.

In conclusion, the court held that the advantages of adopting the new tort were overshadowed by its potential chilling effect on speech. "[B]ecause the benefit of recognizing the tort, which only offers a distinct remedy in relatively few unique situations, is outweighed by the danger of unreasonably impeding constitutionally protected speech, we decline to recognize a cause of action for false light invasion of privacy," Pariente wrote.

The court did, however, expand Florida defamation law to cover statements that could be considered objectively defamatory by a "substantial and respectable minority" of the community, even if the public as a whole would not view the statements as

Florida False Light, continued on page 41

"[B]ecause the benefit of recognizing the tort, which only offers a distinct remedy in relatively few unique situations, is outweighed by the danger of unreasonably impeding constitutionally protected speech, we decline to recognize a cause of action for false light invasion of privacy."

– Justice Barbara J. Pariente
Florida Supreme Court

Florida False Light, *continued from page 40*

harmful to the plaintiff's reputation. Therefore, in Rapp's case, even if the whole community would find nothing objectionable about her "receiving" Jesus, such a statement still presents an actionable defamation claim if it diminishes her reputation among a "substantial and respectable" minority of the community.

Although all the justices participating in the case agreed that the court should decline to adopt the false light invasion of privacy tort, a single justice dissented on the applicable community standard in defamation law.

According to Justice Charles Talley Wells, the new standard was too vague to be fairly applied. "There is no way to know how many it takes to constitute a 'substantial' number or what constitutes a 'respectable minority,'" he wrote.

The court's decision to decline to adopt false light invasion of privacy as a new tort also ended proceedings in *Anderson v. Gannett Co.*, which had reached the Court on a statute of limitations question. (See "Florida Court Extends Defamation Statute of Limitations to False Light Suits" in the Fall 2006 issue of the *Silha Bulletin*.)

Privacy torts have a four-year limitations period and defamation actions have a two-year limitations period. Therefore, had Joe Anderson Jr., the plaintiff, brought his claim as a defamation action it would have been time-barred. The mid-level appellate court reversed a jury award of more than \$18 million, holding the defamation statute of limitations applies to false light cases.

In an opinion issued the same day as *Rapp*, the Florida Supreme Court held that the issue of which statute of limitations applies to a false light action was moot because false light never existed as a valid cause of action in Florida. The Court affirmed reversal of the jury verdict on those grounds.

Anderson arose when the *Pensacola News Journal* ran a story about a construction business owner, Anderson, who accidentally killed his wife. Anderson claimed in his lawsuit that the *News Journal* story, although literally true, implied the accident was actually a murder.

In an October 24 Associated Press (AP) story, *News Journal* Publisher Kevin Doyle said the "landmark" decision was a "great victory" for the news media and the state of Florida.

But Anderson said the decision would disqualify plaintiffs like him who have been harmed by published statements that are literally true, but misleading.

"The [C]ourt shut the courthouse door to every Floridian who is falsely accused by a newspaper when they publish words that are literally true but carefully crafted to included [sic] thinly veiled accusations of wrongful conduct," the AP reported that Anderson said in a statement.

A claim like Anderson's could still be brought in Florida as a defamation by implication action. However, when Anderson filed his suit in 2001, it would have been time-barred by the two-year statute of limitations.

– MICHAEL SCHOEPF
SILHA FELLOW

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Media Ethics

False Online News Reports Drive Plunges in United Airlines and Apple Stock

It began early Sunday morning, Sept. 7, 2008, when somebody searched the archives of the *South Florida Sun Sentinel* (Fort Lauderdale, Fla.) and clicked on an old article from the *Chicago Tribune* about a company called UAL's 2002 bankruptcy filing. Within 36 hours, the archived story about United Airlines' parent company had been aggregated by Google News, picked up by a private financial news company in Florida, and distributed to stock traders on Wall Street by Bloomberg, sending the embattled airline company's stock into a free fall.

Nasdaq quickly stepped in to stop trading and Bloomberg pulled the old story and ran a correction, but not before nervous investors dumped millions of shares of UAL stock and caused the company to shed more than \$1 billion in value in less than 15 minutes, *Forbes.com* reported Sept. 8, 2008. The "debacle," as *Forbes* called it, left angry investors and UAL executives calling for a Securities and Exchange Commission (SEC) investigation and embarrassed news organizations pointing fingers at each other in an effort to redirect blame.

The problem started when the Google News "crawler," an automated program that searches 7,500 Web sites every 15 minutes for stories, discovered a link to the 2002 story on the *Sun Sentinel's* "Most Viewed" list on its home page, *The New York Times* reported September 14. The *Sun Sentinel* explained that the story, which was not dated, could have made it on the list after a single click because of low traffic volumes on early Sunday mornings.

The Google crawler appended the current date to the story, which was Sept. 6, 2008 in California where it was still late Saturday night, and posted a link on the Google News site.

On Monday morning, a researcher for Investment Securities Newsletter, a Florida-based investment news company that provides content for Bloomberg, ran a standard search for "bankruptcy 2008," the *Los Angeles Times* reported September 9. The search revealed the 2002 story with Google's modern date.

The researcher wrote a new headline and published the article to Bloomberg's investment news service at 10:53 a.m. Eastern Time Monday, the *Forbes.com* report said. By 11:06 a.m. UAL's stock had dropped 70 percent of its value and Nasdaq suspended trading.

"This is what happens when everything goes on autopilot and there are no human controls in place or those controls fail," Yahoo!'s then-head of media, Scott Moore, told *The New York Times*. Yahoo! runs the most popular news site on the Web and is Google's main competitor.

Officials from the Tribune Company, which owns the *Sun Sentinel* and the *Chicago Tribune*, also blamed Google's automated news crawler for the problem, *The New York Times* report said. The officials said they had discovered the potential problems with

Google's news searches "months ago" and asked them to fix the problem.

But Google argued that the real problems were the failure of the Tribune Company's newspapers to properly date the article and the appearance of the article on the "Most Viewed" list after a single click, *The New York Times* reported. The article's appearance on the list made it appear to the crawler to be news. "[I]t was a new item that said, 'Hey, look here,'" Google spokesman Gabriel Stricker said in the *Los Angeles Times* story.

Frank Ahrens, a business reporter for *The Washington Post*, said in a September 9 interview on PBS that some of the blame should also lie with the Florida researcher who published the story on Bloomberg's news service. Ahrens pointed out that UAL's 2002 bankruptcy and its emergence from Chapter 11 four years later were both widely discussed in the business press.

"So, it would be not unusual to think, wait a minute, haven't I heard about this before?" Ahrens said.

Ahrens also said that the "knee-jerk" reaction from Wall Street was worrisome and the whole incident could serve as a blueprint for short sellers looking to turn a quick profit.

Short selling describes a process whereby investors who think the price of a certain stock is too high sell shares they do not actually own intending to buy shares when the price drops to cover their earlier sales. If the price drops substantially, investors who are short stand to make large profits.

Following the UAL model, a person could short a stock and then publish false information about that company and wait for the price to drop. Such actions are prohibited by SEC regulations.

Ahrens said it appeared the UAL story was the result of an honest mistake, but *The New York Times* reported September 14 that the SEC had nevertheless begun an investigation into the incident.

Two similar incidents involving false reports of Apple CEO Steve Jobs' death occurred six weeks apart in late August and early October 2008. The August incident occurred when Bloomberg accidentally published its file obituary on Jobs while the organization was in the process of updating it. In October, a poster to iReport.com, a CNN-owned citizen journalism Web site, falsely reported Jobs was dead, briefly sending Apple's stock price into a nosedive.

According to an Oct. 3, 2008 report on the *Wired* Blog Network, experts suspected the iReport.com incident was the work of a short seller engaged in securities fraud.

"It's unlikely that anybody does this for kicks," said Scott Vernick, a partner at the law firm Fox Rothschild in Philadelphia in the *Wired* report. "People generally do this kind of thing because they have a position in the stock and they want to see it go one way or the other."

"This is what happens when everything goes on autopilot and there are no human controls in place or those controls fail."

– Scott Moore
Former head of
Yahoo! Media Group

– MICHAEL SCHOEPF
SILHA FELLOW

Media Ethics

Texas Weekly Folds after Plagiarism Accusation

A small Texas weekly newspaper shut down in August 2008 after plagiarizing dozens of stories from publications such as online magazine Slate and *USA Today*.

Slate music critic Jody Rosen catalogued numerous instances of plagiarism by the Montgomery County (Texas) *Bulletin* in his Aug. 6, 2008 column after a reader notified him that the *Bulletin* had printed more than 10 paragraphs of his Jan. 9, 2007 profile of musician Jimmy Buffett without attribution.

Using the Internet search engine Google, Rosen identified other plagiarized material in the *Bulletin* from publications like the Minneapolis *Star Tribune*, *The Washington Post*, and *Rolling Stone*, which ran under the byline of the *Bulletin*'s only reporter, Mark Williams.

Rosen concluded that Williams' methods of plagiarism varied: in some cases pulling stories from other sources verbatim, in others using material from other publications interspersed with original writing, and sometimes using material from other sources after slightly reworking the language or changing punctuation.

Rosen reported that the plagiarism was so widespread that he asked in his column whether, "In purely statistical terms," the plagiarized articles in the *Bulletin* amounted to "the greatest plagiarism scandal in the annals of American journalism[.]"

Rosen said he contacted the *Bulletin* several times before publishing his August 6 story on Slate. After verifying that the *Bulletin* had printed large segments of his Buffett profile without attribution, Rosen called *Bulletin* Publisher Mike Ladyman, who said he would investigate and speak to Williams.

After making his initial call to Ladyman, Rosen said he conducted further research online and confirmed that the *Bulletin* frequently used material without attribution from a number of sources. Realizing that "I might not have been Williams' only plagiarism victim," Rosen said he called the *Bulletin*'s publisher again. Ladyman asked Rosen to send him the articles and the results of his research and promised he would look into it. After the second phone call, Rosen said Ladyman never contacted him, and the *Bulletin* publisher did not return subsequent phone calls.

According to an August 8 post on the *Houston Press*' online news blog, Ladyman said he received between 30 and 50 e-mails daily after Rosen's story was published on Slate, telling him he was a "scum bag" and he "should go to hell." Following what Ladyman called a "witch hunt," he said he no longer had the heart to run the *Bulletin*, according to an August 22 *Houston Chronicle* story. "It's dead right now. I'm not bringing out another issue. I'll just close it up," Ladyman told the *Houston Press*.

According to the *Houston Chronicle*, Ladyman bought the *Bulletin* in 1998, when it was a weekly advertising supplement. Under his leadership, the paper covered local controversies from a liberal perspective and featured editorials, music reviews, and listings of local events. According to the *Houston*

Chronicle, the weekly paper had a circulation of 20,000.

Rosen said that he was not the first to publish allegations about the *Bulletin*'s plagiarism. In May 2007, a post on the Houston-area blog Nation of Mice said that a story in the *Bulletin* had been originally published on online magazine Salon.com, according to Rosen's Slate story.

Ladyman contended that Rosen acted unprofessionally with respect to the *Bulletin*, saying that Rosen did not tell him about the numerous examples of plagiarism that he documented in his August 6 article, apart from three stories that he referenced on the phone, according to the *Houston Press*. Ladyman said he told Williams about Rosen's allegations, and Williams said he had used material in his stories from press releases that had been sent to the *Bulletin*.

Ladyman acknowledged that "[writers] do tend to maybe use too much of the PR that's fed them," but he said he thought he was paying for original content from Williams, who was employed as a stringer and independent contractor, and had worked for the *Bulletin* for six years, the *Houston Press* reported.

Williams commented on Rosen's Slate story in a statement entitled an "Open Letter to Jody Rosen" published on the *Houston Press*' August 8 post. Although he apologized to Rosen, Williams mocked his "seasoned investigative know-how" and invited him to enjoy the spotlight with his "manufactured scandal." Williams said he used material from press releases, including Rosen's Buffett profile, thinking that it was "cleared for such use," according to his "open letter."

Williams' letter concluded, "It is easy to make fun of our little rag ... but, despite your grievances with our publication, I feel that we have done some good in our corner of the world." Williams cited stories in the *Bulletin* regarding a local library controversy and a story about illegal aliens in the Montgomery County area as examples of injustices exposed by the *Bulletin*.

Rosen's August 6 story initiated debate in a variety of media over the ethical implications of the *Bulletin*'s conduct, including the *New York Observer*, Web site Pop & Politics, and National Public Radio.

Rosen queried in his story whether the *Bulletin* was ahead of its time as news aggregation – the practice of providing links to stories from news outlets with no original content – gains popularity. "Mike Ladyman and company may simply be bringing guerilla-style 21st-century content aggregation to 20th-century print media: publishing the Napster of newspapers," Rosen wrote in his August 6 Slate story.

Although Rosen admitted in an August 8 segment on National Public Radio show "On the Media" that he "was being a little cheeky" when he compared the *Bulletin*'s plagiarism to other content aggregation practices, other journalists drew a clear distinction between news aggregation and the *Bulletin*.

Texas Plagiarism, continued on page 45

Slate music critic Jody Rosen asked in his column whether, "In purely statistical terms," the plagiarized articles amounted to "the greatest plagiarism scandal in the annals of American journalism[.]"

Media Ethics

DVD About Radical Islam Delivered to Swing State Homes via Newspaper Inserts

A documentary film about radical Islam that was distributed to approximately 28 million homes as a DVD insert in about 70 newspapers and through direct mail sparked controversy over the film's content as well as the political motives behind its targeted distribution.

The *St. Petersburg (Fla.) Times* reported on Sept. 26, 2008, that DVDs of the 60-minute film, "Obsession: Radical Islam's War Against the West" were distributed in 14 states, including key presidential election battlegrounds Florida, Michigan, Ohio, and Pennsylvania, by mail and as an advertising supplement in 58 Sunday newspapers. The *Los Angeles Times* and Associated Press (AP) reported that more than 70 total newspapers carried the advertising insert in September and early October.

The film includes scenes of carnage of the attacks of Sept. 11, 2001, Muslim children being urged to become suicide bombers, and Islamic radicals chanting "death to America." It also draws parallels between radical Islam and Nazism. The film begins with a disclaimer stating that "most Muslims are peaceful and do not support terrorism." According to the *Los Angeles Times* on September 28, the film was first released in 2006 and was shown primarily on college campuses. Its supporters called it "eye-opening," while opponents called it "inflammatory" and "unfair."

At least two newspapers, the Greensboro, N.C. *News & Record* and *St. Louis Post-Dispatch*, declined to distribute the DVD and advertising insert. *News & Record* Editor John Robinson explained in a September 14 column that Publisher Robin Saul said the film was "divisive and plays on people's fears and served no educational purpose." *St. Louis Post-Dispatch* religion columnist Tim Townsend reported on September 22 that Vice President of Advertising Jen Wood said the film's distributor provided the newspaper only with a trailer of the film, and when she asked to see a copy of the entire film, refused. "I didn't have enough information to make a decision, so I said 'no thank you,'" Wood said. "It wasn't clear what exact message they were trying to send."

According to the *Los Angeles Times*, newspaper readers in Colorado complained about the "Obsession" insert. In a September 22 letter to the editor of *The Denver Post*, Laurel Thompson said the film "tries to stir up deep anti-Muslim feelings that could hurt innocent people," adding, "If I paid you to distribute an anti-Semitic DVD, would you be so obliging? Or how about a DVD celebrating the courage of [Columbine High School killers] Harris and Klebold?" The *Los Angeles Times* reported that *The Denver Post* distributed more than 553,000 copies of the DVD in its Sept. 14 edition.

Jim Nolan, spokesman for The Denver Newspaper Agency, which publishes *The Denver Post* and *Rocky Mountain News*, said the company seeks to

"keep access as wide as possible" on issues-driven advertising, according to the *Los Angeles Times*. "Our business is to come down on the side of letting opinions be expressed," Nolan said.

Editor & Publisher magazine reported September 28 that the Portland (Ore.) *Oregonian* distributed the insert despite complaints by the city's mayor. According to *Editor & Publisher*, Portland Mayor Tom Potter wrote to *Oregonian* publisher Fred Stickel asking him not to distribute it. A statement from the mayor's office said Potter "felt that the tenor of the video contributes towards a climate of distrust towards Muslims that holds the entire Muslim community accountable for the actions of a dangerously misguided few. Distributing [it] with the *Oregonian* lends the video an impression of objectivity and legitimacy it does not deserve."

Stickel told *Editor & Publisher* that "I've always felt we have an obligation to keep our advertising columns as open as possible. Our acceptance of anything – our acceptance or rejection – does not depend on whether or not we agree with the content. ... There is a principle of freedom of speech involved here."

Jack Lessenberry, ombudsman of the Toledo (Ohio) *Blade*, wrote in a September 28 column that reaction he had received from readers about the "Obsession" insert was "all harshly negative." Although he pointed out that the management of *The Blade* said the DVD insert "is not a news product and its content is not a reflection of the views or opinion of The Blade, its owners, or its employees," Lessenberry said, "I wish The Blade had rejected this advertisement."

On September 23, advocacy group the Council for American-Islamic Relations (CAIR) asked the Federal Elections Commission (FEC) and Internal Revenue Service (IRS) to investigate the Clarion Fund, the 501(c)3 nonprofit group incorporated in November 2006 that is responsible for the distribution of "Obsession." The AP reported on September 24 that CAIR alleged that the Clarion Fund is a "front" for an Israel-based group with a stealth goal of helping Republican presidential candidate John McCain by targeted distribution of the film in so-called swing states.

Under the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.*, and the federal tax code at 26 U.S.C. § 527, nonprofit groups are restricted from contributing to or supporting specific political candidates, and foreign nationals may not contribute to American campaigns.

According to the *St. Petersburg Times* on September 26, the Clarion Fund refused to reveal the source of its funding, but "numerous ties connect it to a well-known Jewish education group," Aish HaTorah, an Israeli charity founded in the 1970s, "that vehemently denies any involvement with the film."

Islam DVD, continued on page 46

"Our acceptance of [any advertising] – our acceptance or rejection – does not depend on whether or not we agree with the content. ... There is a principle of freedom of speech involved here."

– Fred Stickel
Publisher, Portland,
Ore. *Oregonian*

Media Ethics

Record Fine for BBC over Phone-in Scams

On July 30, 2008, the British Office of Communications (Ofcom) announced that a record 400,000 British pounds in fines had been levied against the British Broadcasting Corporation (BBC) in connection with phone-in competition violations that occurred on various programs on the network from 2005 to 2007.

The amount is a record for the BBC, which also paid a fine of 50,000 pounds in 2007 for faking a competition winner on the children's program "Blue Peter." According to BBC News, Ofcom has not yet ruled on a second violation, where the results of a contest to name a cat were ignored and a different name was chosen for the cat by editorial staff.

On some BBC programs, viewers using "premium rate" phone lines operated by third-party providers such as PhonePayPlus, were allowed to call in to competitions on BBC programs despite the fact that competitions were already closed or they had no chance of winning. (See "U.K. Television Network Fined Big for Fake Phone-in Contests" in the Winter 2008 issue of the *Silha Bulletin*.) On other programs, competition results were ignored or prizes were awarded to staff members. The shows "Comic Relief," "Sports Relief," "Children in Need," "TMI," "The Liz Kershaw Show," "The Jo Whitley Show," "Russell Brand," and "The Clare McDonnell Show" were all implicated in the phone-in scams and were fined varying amounts that totaled 400,000 pounds.

The fines are part of a series of penalties levied by Ofcom against the BBC and other British television networks including ITV, Channel 4, GMTV, and Five, for similar phone-in contest related infractions from 2005 to 2007.

According to the (London) *Daily Mail*, the BBC's status as a public entity, as well as the fact that no money was made by the BBC through the scams, protected the corporation from even higher fines, such as those levied against ITV, which faces up to 4 million pounds in fines for a series of breaches of Ofcom's codes of conduct from 2006 to 2007. A complete list of ITV's violations is available online at http://www.ofcom.org.uk/media/news/2008/05/nr_20080508.

In a press release issued on July 30, 2008, the BBC said it accepted Ofcom's findings, noting that "Ofcom has recognised that neither the BBC nor any member of staff made any money from these serious editorial lapses."

In its own statement on July 30, the BBC Trust stated "The Trust regrets that these serious breaches by the BBC have led to a financial penalty being applied by Ofcom and the loss of licence fee payers' money as a result," and that "the penalty in these cases reflects that the breaches were serious, deliberate and in some cases repeated."

Since news of the scams first broke, the BBC has been working to rebuild its reputation as a network. The BBC wrote in its press release on July 30, "Whilst we must never be complacent and must remain constantly vigilant, audience research suggests the comprehensive action we have taken is rebuilding the trust of viewers and listeners."

– SARA CANNON
SILHA CENTER STAFF

"[T]he penalty in these cases reflects that the breaches were serious, deliberate and in some cases repeated."

– BBC Trust
press release

Texas Plagiarism, *continued from page 43*

Bill Boyarsky, former City Editor for the *Los Angeles Times* and columnist for Truth Dig, an online news and opinion magazine, said "What [Rosen] wrote about is out and out plagiarism," according to an August 12 Pop & Politics blog post. Boyarsky says that news aggregation is not plagiarism because of the operation of the "fair use" doctrine.

"Fair use" refers to the rule that copyrighted materials can be used for certain purposes, depending on the nature of the use, the amount of the work used, and the economic impact of the use. Limited use of copyrighted works by academics and journalists, for example, is fair use.

Choire Sicha, a *New York Observer* columnist, told Pop & Politics for its August 12 story that "There's a huge, and obvious, difference between fair use – blockquoting some text and giving a link and a name credit – and unethical reprinting."

– AMBA DATTA
SILHA RESEARCH ASSISTANT

The *St. Petersburg Times* reported that the Clarion Fund shares a Manhattan address with Aish HaTorah International, a fund raising arm of Aish HaTorah. HonestReporting, the group that produced “Obsession,” uses the same address, according to a 2006 tax return, the *St. Petersburg Times* reported.

According to the AP, the Canadian producer of the film, Raphael Shore, is a full-time employee of Aish HaTorah International, and *The Washington Post* reported that Shore and two other Clarion Fund officers, Rabbi Henry Harris and Rebecca Kabat, are also employees of Aish HaTorah International. Ronn Torossian, a New York-based spokesman for Aish HaTorah, told the AP that Shore’s work on the DVD project was not done under the banner of Aish HaTorah, calling it an “independent activit[y].”

The *St. Petersburg Times* reported that Clarion spokesperson Gregory Ross is a former employee of Aish HaTorah, and that Elke Bronstein, the name written on the permit for the bulk mailing of “Obsession,” is an employee of Aish Discovery, which produces high-tech programs and films for Aish HaTorah. The *St. Petersburg Times* reported that Bronstein said she worked for Clarion, but would not provide more information.

The *St. Petersburg Times* also reported that two of the three Clarion Fund directors at the time of its incorporation in November 2006 appeared as Aish employees on Aish Web sites at the same time. The third appeared on the Aish executive committee. According to the *St. Petersburg Times*, Torossian dismissed the connections.

The AP, *St. Petersburg Times*, *Los Angeles Times*, and *Washington Post* observed that one of the Clarion Fund’s Web sites, RadicalIslam.org, included an article in early October that expressed support for the McCain campaign. The article has been removed, and Ross said its inclusion on the site was a mistake.

Ross also denied that targeting the distribution of the DVDs at swing states was meant to sway voters there. He told *The Washington Post* on October 26 that its release was scheduled to coincide with the anniversary of the Sept. 11, 2001 terrorist attacks, not the elections.

Nevertheless, CAIR spokesman Ibrahim Hooper told *The Washington Post* that the DVD distribution campaign is inappropriate for a non-profit like Clarion. “When you send material like this almost exclusively to presidential swing states that sends a message that you are trying to influence the election,” Hooper said.

Nihad Awad, executive director of CAIR, said in a statement accompanying the FEC request, “American voters deserve to know whether they are the targets of a multimillion-dollar campaign funded and directed by a foreign group seeking to whip up anti-Muslim hysteria as a way to influence the outcome of our presidential election.”

– PATRICK FILE

SILHA FELLOW AND *BULLETIN* EDITOR

SILHA CENTER STAFF

JANE E. KIRTLEY

SILHA CENTER DIRECTOR AND SILHA PROFESSOR

PATRICK C. FILE

BULLETIN EDITOR AND SILHA FELLOW

MICHAEL SCHOEPF

SILHA FELLOW

AMBA DATTA

SILHA RESEARCH ASSISTANT

JACOB PARSLEY

SILHA RESEARCH ASSISTANT

SARA CANNON

SILHA CENTER STAFF

Silha Center Events

2008 Silha Lecturer Says Media Organizations Need Ombuds

Silha Lecturer Siobhain Butterworth was introduced as “a member of an endangered species.” As readers’ editor, or internal ombudsman, for *The Guardian* newspaper in London, Butterworth is among a shrinking group of editors whose primary responsibility is to address reader complaints, clarifications, and corrections in the daily newspaper and online.

In introducing Butterworth’s Oct. 6, 2008 lecture, entitled “Raise Your Hand if You’re a Journalist: Does Responsible Reporting Need a Legal Defense?” Silha Center director and professor of media ethics and law at the University of Minnesota Jane Kirtley pointed out a recent *Editor & Publisher* magazine report that between September 2007 and September 2008, 10 U.S. newspapers, including the Sacramento *Bee*, *The Sun* of Baltimore, the Fort Worth (Texas) *Star-Telegram*, The Hartford (Conn.) *Courant*, and the Minneapolis *Star Tribune*, dropped their ombudsmen as part of wider financial cuts, suggesting that newspapers increasingly consider the position expendable.

Butterworth contends that, to the contrary, in a digital age that is raising fundamental questions about who is a journalist and demanding greater transparency from news organizations about reporting and news gathering, having someone who answers directly to readers, users, and the audience may be more important now than ever before. Butterworth said that she considers herself to be under a legal as well as moral obligation to balance freedom of expression with rights to reputation or privacy asserted by complainants who call, write, and e-mail her. “Journalism doesn’t operate in a vacuum, and neither does media law,” Butterworth said. “Legal cases inform journalistic behavior and vice versa.”

During a wide-ranging lecture, Butterworth explored questions of what constitutes responsible journalism, who is a journalist in the digital age, whether journalists should be prepared to “own up to their own mistakes,” whether journalists who act responsibly need legal defenses, what legal responses are available for responsible reporting, and what is the role of a readers’ editor, or ombudsman, in approaching the problems raised by these questions.

Butterworth said that to a certain extent, the legal definition of responsible reporting “depends on what side of the Atlantic you are on.” An American standard of responsible reporting in the context of defamation of public figures, “actual malice,” was explained in the 1964 U.S. Supreme Court case *New York Times v. Sullivan*, 376 U.S. 254 (1964), as knowledge of a report’s falsity or a reckless disregard for whether it was true or not. Butterworth explained that Britain’s landmark high court case in reporter responsibility was 2001’s *Reynolds v. Times Newspapers*, [2001] 2 AC 127, in which Lord Donald Nicholls set out the 10 “Nicholls factors” for courts to consider in judging whether a report was published responsibly, including: the seriousness of the allegations; the nature of the information, such as its level of public interest; the source of the information; the steps taken to verify the report; the urgency of the report; and whether

comment was sought from the subject of the report.

Butterworth described how, although the high court specified in *Reynolds* that all 10 factors did not necessarily need to be satisfied or proven for a news organization to prevail in a lawsuit, many lower courts took the test literally until the 2006 case *Jameel v. Wall Street Journal*, [2006] UKHL 44, when the high court clarified its position on the “Nicholls factors.” There the court ruled that significant weight should be given to a report’s level of public interest and the professional judgment of an editor or journalist, and that anonymous sources can be an important and credible part of the journalistic process, Butterworth said.

Butterworth said that standards of responsible reporting also come from journalists and scholars, such as Americans Bill Kovach and Tom Rosenstiel and their 10 “Elements of Journalism,” or *Guardian* patriarch C.P. Scott, who served as editor of the *Manchester Guardian*, as it was previously known, for 50 years. Parts of Scott’s essay celebrating the newspaper’s 1921 centennial are central principles of the modern day liberal ideology of *The Guardian* newspaper and Web site, such as “comment is free, but facts are sacred,” and “the voice of opponents no less than that of friends has a right to be heard; it is well to be frank; it is even better to be fair.”

In what she called “an era of mass self-publication,” Butterworth said that journalism and responsible journalism have become harder to define, which she said is both an ethical and a legal problem. Even in the context of an established news organization like *The Guardian*, the different formats and standards of print and online publication have raised new questions, such as “should all content on a newspaper’s Web site be treated as journalistic content? And if so, do the same journalistic standards apply across the board?”

Throughout the lecture, and during the question and answer portion of the event, Butterworth gave examples of the increasingly complicated choices journalists and news organizations must make in deciding what to print or post online, and what to retract, take down, or correct. The news is no longer “tomorrow’s fish and chips wrapping,” Butterworth said. “Now it’s a lot more like a very permanent tattoo.”

In closing, Butterworth observed that changes in the economic model of the traditional news organization may eventually make the readers’ editor, internal ombudsman, or readers’ representative obsolete, or at least economically impractical, but readers and audiences will continue to demand standards of responsibility and transparency from journalists, who should be willing to raise their hands when they make mistakes or act irresponsibly.

The lecture was held before an overflow crowd at the Cowles Auditorium on the University of Minnesota’s West Bank campus. The annual Silha Lecture and other Silha Center activities are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

— PATRICK FILE

SILHA FELLOW AND BULLETIN EDITOR

“Journalism doesn’t operate in a vacuum, and neither does media law. Legal cases inform journalistic behavior and vice versa.”

— Siobhain Butterworth
2008 Silha Lecturer

Silha Center Events

FCC Legal Adviser Defends Ownership Rules at Silha Fall Forum

Despite intense opposition based on “as much passion and emotion as reason,” a lawyer for the Federal Communications Commission (FCC) argued that the recent decision to relax the 32-year-old ban on joint ownership of media outlets would improve news coverage through the combination of resources at the Silha Fall Forum Oct. 23, 2008.

Rosemary Harold, legal adviser to FCC Commissioner Robert McDowell, defended the Commission’s controversial move in front of a skeptical audience of professors and students attending the forum at the University of Minnesota’s Murphy Hall Conference Center.

Harold said the advent of the Internet and increasingly harsh economic conditions for newspapers have combined to render the FCC’s ban on joint ownership of newspapers and broadcast stations in the same market impractical in light of the original goal of preserving independent news judgment. “When the justification for the ban is the gone, the ban should also be gone,” Harold said.

The new rules allow joint ownership of newspapers and broadcast stations in the 20 largest markets as long as the broadcast station is not one of the top four stations in the market.

Harold said the high-profile decision generated more than 166,000 comments from individuals and groups. The FCC held multiple congressional and public hearings before changing the rules. (See “FCC Changes Cross-Ownership Rules amid Intense Criticism” in the Winter 2008 issue of the *Silha Bulletin*.)

“People care passionately about the media,” Harold said. “Everybody consumes it, so everybody has an opinion about how it’s working.”

She said that, although the attention shows that people care about the future of quality news media, “research data supports the idea that news programming can benefit from larger corporations.”

Harold, a former reporter and attorney who was previously Deputy Chief of the FCC’s Media Bureau, provided an extensive history of the rules regarding media consolidation to contextualize the recent changes. She cited three policy goals behind the Commission’s ownership limits: localism, diversity, and competition. She said the Commission had thoroughly researched the implications of the new rule, and that the change provided adequate protection for these policies.

Although she agreed that the public tends to benefit from having multiple independent sources of news, Harold said the rule change allowing larger media companies to combine their assets will help preserve quality journalism. She said the growing economic difficulties facing mainstream media, especially newspapers, were critical to the Commission’s final decision.

“Good journalism doesn’t usually just happen. Someone gets paid,” Harold said. “I want those opportunities to be there for folks who are in school now, and I want those jobs to be there for those working in the field, wondering if they can hang on.”

Harold also noted that the new regulations are currently being tested in the courts, and could potentially wind up before the Supreme Court of the United States. “It will be interesting to see if the Commission can justify its action,” Harold said.

The Silha Center is based at the School of Journalism and Mass Communication at the University of Minnesota. Silha Center activities are made possible by a generous endowment from the late Otto Silha and his wife, Helen.

– JACOB PARSLEY
SILHA RESEARCH ASSISTANT

“Good journalism doesn’t usually just happen. Someone gets paid. I want those opportunities to be there for folks who are in school now, and I want those jobs to be there for those working in the field, wondering if they can hang on.”

– Rosemary Harold
Legal Adviser to FCC
Commissioner Robert
McDowell

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