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Web Site Fights Off Federal Injunction

Following two weeks of intense scrutiny and widespread condemnation from media and free speech advocates, a federal judge on Feb. 29, 2008 reversed an order aimed at blocking all access to a Web site devoted to the unauthorized publishing of government and corporate documents.

On Feb. 15, 2008, Judge Jeffrey White of the Northern District of California approved a permanent injunction of Wikileaks, http://wikileaks.org/, a Web site which says it seeks to "reveal unethical behavior in … governments and corporations" through the unauthorized disclosure of documents. The injunction was part of an agreement struck by plaintiff Julius Baer & Co., a Swiss bank, and defendant Dynadot, the California company that registered Wikileaks' domain name. Julius Baer & Co. filed suit against Wikileaks and Dynadot on Feb. 6, 2008, claiming that the Web site had posted private banking information online.

The Web site TPM Muckraker wrote that Wikileaks has gained notoriety for making available a number of high-profile documents. Rules of engagement for U.S. troops were posted there in early February 2008, and in late 2007 copies of the 2003 and 2004 versions of operating manuals for the Guantanamo Bay prison were leaked to the site. According to an American Civil Liberties Union (ACLU) Feb. 27, 2008 press release, the government had resisted releasing the operating manuals in response to a 2003 Freedom of Information Act request. (The TPM Muckraker story is available at http://tpmmuckraker.talkingpointsmemo.com/2008/02/us_court_shuts_down_whistleblo.php.)

Wikileaks says it was "founded by Chinese dissidents, journalists, mathematicians and startup company technologists, from the US, Taiwan, Europe, Australia and South Africa" and calls itself "an uncensorable version of Wikipedia for untraceable mass document leaking and analysis." The site has a nine-member advisory board, but no formal ownership, and claims not to be responsible for its content. Although it is not affiliated with the popular editable encyclopedia site from which it takes its name, it functions in much the same way, using the same software. Users can anonymously post documents on the site for others to scrutinize and discuss.

The February 15 injunction required Dynadot to immediately lock and disable the "Wikileaks.org" domain name in order to block access to the site and prevent any changes being made to it. The stipulated permanent injunction was accompanied by a temporary restraining order White issued that forbade Wikileaks to display the specific documents at issue. White's February 29 order in *Bank Julius Baer & Co., Ltd. v. Wikileaks.org and Dynadot, LLC*, No. C 08-00824 JSW (N.D. Cal. 2008) dissolved both the injunction and the restraining order, and also denied another motion from Julius Baer & Co. for a preliminary injunction.

According to their complaint, Julius Baer & Co. claimed that a disgruntled ex-employee provided the stolen documents to Wikileaks, violating a confidentiality agreement along with international banking and consumer protection laws and California privacy laws. Wikileaks claimed "the documents allegedly reveal secret Julius Baer trust structures used for asset hiding, money laundering and tax evasion," according to *The New York Times* on February 19.

The *Times* reported that Internet users everywhere, including the United States, could still access Wikileaks after Dynadot placed restrictions on the site. Its Internet Protocol (IP) address was unaffected by the injunction, as were a number of "mirror sites" Wikileaks maintains, which are copies of the site set up in various countries used to insure against outages and to sidestep legal action. Wikileaks has registered mirror sites in Belgium, Germany, and the Christmas Islands, the *Times* reported.

The February 19 injunction raised strong criticism from media and civil rights groups.

In a February 25 editorial, the *Chicago Tribune* said the court "seem[ed] to have forgotten something important – the 1st Amendment to the Constitution," concluding, "Censorship is censorship, no matter the medium."

The New York Times' February 21 editorial said that the injunction against Wikileaks "stifle[d] important speech and violate[d] the First Amendment."

In the February 27 ACLU press release, Ann Brick, a staff attorney with the ACLU of Northern California, said, "Blocking access to the entire site in response to a few documents posted there completely disregards the public's right to know. It's unconstitutional and un-American."

Media and free speech advocates also took an active role in the February 29 proceedings before the District Court in San Francisco. Wikileaks did not have a representative in court on February 15, and both the injunction

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Subpoenas and Reporter Privilege News

Reporters Fight Federal Subpoenas

Locy Faces Fines, Risen Subpoenaed Over Sources for CIA Book

Former *USA Today* reporter Toni Locy faces fines escalating to $5,000 per day for refusing to divulge the identity of confidential sources. Locy, currently a journalism professor at West Virginia University, used confidential sources in reporting on the still-unsolved anthrax attacks in 2001 that left five people dead.

Judge Reggie B. Walton held Locy in contempt Feb. 20, 2008 for refusing to divulge who told her that former Army scientist Dr. Steven J. Hatfill was being investigated in connection with the attack, *The New York Times* reported. On March 8, Walton issued a second order dismissing Locy's motion to stay enforcement of the contempt order pending appeal and requiring that Locy pay the fines herself. On March 11, hours before the first fine was due to be assessed, the U.S. Court of Appeals for the D.C. Circuit granted emergency relief and stayed Walton's order, pending an appeal, an Associated Press report said.

The Appeals Court ruling means that Locy will have another chance to argue her case before an appellate court before any fines will be assessed.

The orders are the latest rulings in a 2003 suit filed under the Privacy Act, 5 U.S.C. § 552a (2006), by Hatfill against the government for damage to his reputation resulting from leaks about his potential involvement in the attacks. (See "Reporters Ordered to Testify and Reveal Government Sources in Hatfill Case" in the Fall 2007 Silha *Bulletin*.)

Walton's order said Locy must personally pay fines of $500 per day for the first seven days, $1,000 per day for the next seven days, and $5,000 per day for the final seven days. If she continues to refuse to divulge her sources, Walton could impose further sanctions, including jail time.

According to a March 10 report from the *Wall Street Journal's* Law Blog, requiring that Locy, rather than her former employer *USA Today*, pay the fines is an unusual step in a case involving a journalist.

"I think this is unprecedented in terms of it being applied to a journalist," George Washington University journalism professor Mark Feldstein said in the report. "It's mostly used in mob cases when the court doesn't want some larger organized crime structure to pay for a fine. It's deeply disturbing because we already had, with the Judy Miller case, the essential erosion of the *Branzburg* decision. This takes it one step further by putting journalists on the spot to be liable individually for their reporting."

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a divided U.S. Supreme Court held that the First Amendment does not protect a journalist who has witnessed criminal activity from testifying before a grand jury about that activity, even where the journalist has promised confidentiality to the actors. Since *Branzburg*, some federal appeals courts have recognized a limited constitutional privilege for reporters, especially in civil cases like Hatfill's, based on Justice Powell's brief concurring opinion.

Justice Powell voted with the five-justice majority to reject a constitutional privilege for Branzburg, but he added a concurrence to "emphasize … the limited nature of the Court's holding. The Court does not hold that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources."

Relying on Justice Powell's concurrence, the D.C. Circuit held in *Zerilli v. Smith*, 656 F.2d 705 (1981) that the First Amendment grants limited protection to reporters seeking to protect the identity of confidential sources in civil cases. The information sought must go "to the heart of the matter" and the party seeking disclosure must have exhausted all alternative sources of information.

In ordering Locy to divulge the identity of her confidential sources, Walton held that Hatfill met both prongs of the *Zerilli* test. But Feldstein said in the *Wall Street Journal* report that forcing Locy to pay the fines herself, which could total $45,500, further erodes press protections established by the *Branzburg* decision and its progeny.

Lucy Dalglish, executive director of the Reporters Committee for Freedom of the Press (RCFP), said in the February 20 *Times* report that the sanctions were among the "most disturbing" issued by a federal court to a reporter in several years. "Toni Locy is being punished for doing what reporters are supposed to do: making sure important information gets to the public about whether the government had the investigation into a major public health threat under control," she said.

Of the six journalists originally ordered by Walton to reveal their sources, only Locy and former CBS News journalist James Stewart remain under subpoena. According to the February 20 *Times* report, the subpoenas issued for the testimony of four other reporters have been dismissed for procedural reasons.

New York Times *Reporter Subpoenaed by Federal Grand Jury*

A *New York Times* reporter has received a subpoena from a federal grand jury in Virginia in connection with a 2006 book about the Central Intelligence Agency (CIA), *The Times* reported Feb. 1, 2008.

The subpoena relates to information in the book, "State of War," about the CIA's efforts to halt nuclear development in Iran, *The Times* report said. The book is by James Risen, a *Times* reporter who won a Pulitzer Prize in 2006 for his reporting on warrantless wiretapping.

According to a Feb. 18, 2008 article in *The Weekly Standard*, the book's claims about CIA activities in Iran are the subject of the subpoena. The book says that in 2004 a botched CIA effort to send encrypted messages to operatives in Iran exposed

Federal Subpoenas, *continued on page 5*

Former *USA Today* reporter Toni Locy faces fines of $500 per day for the first seven days, $1,000 per day for the next seven days, and $5,000 per day for the final seven days covered by the order.

Mankato *Free Press*, *continued from page 4*

prosecution of a crime. "Had the legislature intended to require that the information sought be 'clearly relevant' to a gross misdemeanor or felony that was 'actually prosecuted,' it could have provided such a requirement in the statute. But it did not," Judge Christopher J. Dietzen wrote for the panel. Thus, the legislature did not intend the statute to require a prosecution, the court concluded.

The panel also upheld the lower court ruling that as a consequence of Skjervold's death, the information could not be obtained from another source.

But on the final element of the statute, the court sided with the newspaper, holding that the Free Flow of Information Act requires that public officials prove a specific injustice that can only be averted through disclosure of the unpublished information.

County attorney Ross E. Arneson had argued that disclosure was necessary to understand the events that led to Skjervold's death and that the county had a compelling interest in understanding those events, the court's opinion said. But the court rejected the argument. The opinion said that an official seeking disclosure of protected notes must show that revealing the notes will help remedy a specific injustice, like preventing or solving a crime. It is not enough to allege that keeping the notes secret is an injustice in itself because it hides information from the public view that relates to the shooting of two police officers, the opinion said.

"Essentially, the county attorney argues that it needs to conduct discovery to find an injustice, but declines to connect the discovery to a particular injustice. We conclude that the statute requires that the particular injustice be identified," Dietzen wrote.

Despite urging from *amici curiae* – Minnesota Broadcasters, Minnesota Joint Media Committee, Minnesota Newspaper Association, Reporters Committee for Freedom of the Press, and the *Star Tribune* – the court declined to hold that an injustice must be proved before a judge could order *in camera* review of the information sought. "Because it is not necessary for us to reach the issue of whether an in-camera review by the district court is permissible under the statute, we decline to reach that issue," Dietzen wrote.

Mark Anfinson, the attorney for *The Free Press*, told the paper in a Dec. 27, 2007 story that the case was important because so few cases had been decided under the Free Flow of Information Act. Following the ruling in *Skjervold*, "[p]arties seeking to subpoena reporters really do have to clearly prove all three elements of the statute," Anfinson said. "They don't get to take short cuts."

Free Press Publisher Santori wrote in his Jan. 6, 2008 article that several readers criticized the newspaper's decision to protect the reporters' notes. But the critics should remember the important role the media plays as a watchdog for the public, Santori wrote. Shield laws, like the Free Flow of Information Act, are critical to maintain separation between the press and the government, he wrote. "These laws require investigators to make a legitimate case before they can have access to those notes or sources. Privilege to the press is lost if other sources of the information had been exhausted and the information was essential to solving a crime."

Santori argued that *The Free Press* frequently worked with police, publishing photos of suspects sought by police and refraining from publishing information that might hamper an investigation. But it was important in this case for the newspaper to maintain some separation from the government, he wrote.

"At a point when the press is considered an arm of government or an agent of the police, we lose our ability to serve as a watchdog for our communities," Santori wrote.

According to a Jan. 19, 2008 story in *The Free Press*, the Blue Earth County Attorney's Office has appealed the ruling to the Minnesota Supreme Court. As the *Bulletin* went to press, the Court had not decided whether to take the appeal.

– Michael Schoepf
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every American operative in the country to Iranian authorities and left the CIA unable to gain first-hand intelligence.

The book also alleges that a secret CIA operation called "Merlin" attempted to secretly supply the Iranians with a faulty design for a bomb trigger in an effort to spoil any nuclear test and embarrass the Iranians. According to the *Standard* article, Risen calls the operation "one of the most reckless operations in the modern history of the CIA."

The *Standard* article said the subpoena likely stems from Risen's exposure of the secret operation which foiled CIA plans and created increased risks to the public. But other commentators disagree. Daniel Schorr said in a Feb. 5, 2008 commentary on National Public Radio that the more likely scenario is that the subpoena results from embarrassed CIA officials scrambling to cover up the agency's apparent inability to keep secrets.

According to the *Times* article, Risen's attorneys said they would fight the subpoena, and Risen intends to stand by his commitment to the confidential sources.

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company's records instead, police were able to obtain information otherwise protected by the statute without technically violating it.

In addition to the protections enacted by Congress, a provision of the Privacy Act, 42 U.S.C. § 2000a-11, also requires that the U.S. Attorney General adopt rules governing the issuance of subpoenas to journalists and for journalists' phone records. Those rules, 28 C.F.R. § 50.10, would have prevented officials in the Department of Justice from seizing Lyden's phone records.

The rules require that federal officials first exhaust all other avenues to obtain the necessary information and then institute negotiations with the reporter in an effort to obtain the information before issuing a subpoena for a reporter's phone records. If negotiations prove unsuccessful, a subpoena for a reporter's phone records can only be issued with the approval of the Attorney General.

In a request for approval, federal law enforcement officials must state that there are "reasonable grounds" to believe that a crime has been committed which can only be solved through subpoenaing the reporter's phone records. Even then, the rules generally require that federal officials notify journalists before issuing the subpoena. Notice is always required within 45 days after the subpoena has been issued.

Lyden told Brian Lambert, an editor at *Minneapolis-St. Paul Magazine* who writes a blog about local media, that his problem with the police department's methods was their secret nature. "Go get a real subpoena, present it to my bosses and our lawyers, and let's see what happens. But do it out in public. This was all done behind closed doors. I wouldn't have known anything about it if I hadn't been tipped. I have a problem with that," he said.

According to a Dec. 14, 2007 report in the *Star Tribune*, Harrington, the St. Paul police chief who apparently gained access to Lyden's phone records in an attempt to unveil his source, said he regretted causing "concern or worry" but stopped short of an outright apology. Harrington said the point of the search was to determine who called whom, not to intimidate Lyden.

Harrington also acknowledged that the disputed arrest report was public and should have been released. The police department's failure to turn over a public record is a potential violation of the Minnesota Government Data Practices Act, Minn. Stat. § 13.01 *et seq.*, which makes all state government data presumptively open to the public.

The Data Practices Act creates civil remedies for violations of the statute and makes willful violation by a government official a misdemeanor. A police officer who knew the arrest report was public and still withheld it could be criminally prosecuted.

Harrington also said police had stopped investigating the alleged "leak" and that Lyden had never been a target of any investigation, a Dec. 14, 2007 AP report said.

But according to the *Star Tribune* report, Lyden did not buy Harrington's explanation. "I think they went after [the records] under false pretenses," he said. "It was an effort to dry up my sources."

The search warrant, unsealed following Harrington's comments on Dec. 14, 2007, showed that police had seized more than two month's worth of Lyden's phone records, the AP reported on December 18. But according to a St. Paul police spokesman, they had examined only a six-hour period.

According to a Dec. 18, 2007 story in the *Pioneer Press*, Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, said the search warrant covered more records than necessary. "I don't see how you can avoid the interpretation that they want to short-circuit communication between [Lyden and his source] … . There's simply no reason to obtain records for this lengthy period of time," she said.

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the privilege would be available only to individuals who "complied with and met applicable standards of journalism ethics," but that provision was later dropped.

According to the AP on February 27, HB 2557's ethics provision was based on the code of ethics of the SPJ. However, the House Judiciary Committee amended the bill to exclude the provision after SPJ protested the use of its standard of conduct to define who qualifies for a privilege.

The version of HB 2557 that passed committee on February 27 applies to sources and unpublished information "obtained by [a] person in the course of gathering, receiving, or processing of information for communication to the public," and applies to "a journalist or newscaster presently or previously employed or otherwise associated with any newspaper, magazine, news agency, press association, wire service, or radio or television transmission station or network." Another provision states that the privilege also applies to "any individual who can credibly establish that [he or she] has, with respect to the source or information sought, participated in the gathering, preparation, collection, photographing, recording, writing, editing, reporting, or publishing of news or information of substantial public interest for the purpose of dissemination to the general public by means of any tangible or electronic medium."

The privilege under HB 2557 would not apply to any journalist or newscaster who "has committed, is committing, or is about to commit a crime, or … is a percipient witness to the commission of a crime," or if a source consents to disclosure.

In non-criminal matters, the party seeking disclosure must "show by clear and convincing evidence" that the source or information is "unavailable despite exhaustion of all reasonable alternative sources;" "noncumulative," meaning it would reveal more information than what is already known; and is "necessary and relevant to the claim or defense asserted."

Some support the move to protect Hawaiian journalists, especially if the law covers bloggers.

"Journalists could use the protection," said Larry Geller, who writes a Hawaii-based politics blog, Disappeared News, in a February 6 AP story. "News sources are increasingly on the Web and less and less from traditional sources."

In a hearing before the House Judicial Committee on February 5, Hunter Bishop, a representative of the Hawaii Newspaper Guild, former professional journalist and now blogger, testified that he still considers blogging to be journalism worthy of a shield.

"Although a blog provides a different format and requires different style for my work … I am providing news and commentary on a regular basis about matters of general interest to my community," Bishop testified.

According to the AP, at least one blogger is currently fighting a subpoena in Hawaii. James Pflueger, the owner of a dam that collapsed in March 2006, killing seven, has subpoenaed the notes and records of Malia Zimmerman, an investigative reporter for the Web site, Hawaii Reporter. According to a February 1 AP report, Pflueger is building his defense against lawsuits from the victims' families.

Other groups and individuals that testified February 5 in favor of passing a shield law included Geller; the Honolulu Community Media Council; Andy Parx, a former television journalist and publisher of Kauai-based blog Parx News Net; the local branches of the Screen Actors Guild and American Federation of Musicians; the Hawaii Chapter of the SPJ; journalist and blogger Joan Conrow; and Douglas White, a former house staff member and blogger for Poinography.

Many of those who support a shield, however, said they were concerned by the inclusion of the ethics provision and the fact that the then-current version of the bill did not explicitly shield non-professionals or those who publish online.

"The gainful employment in commercial dissemination methods of a reporter's product is of no factor whatsoever in determining if the person in question is gathering and disseminating information," Parx's testimony said.

The committee was apparently persuaded by the arguments, as the version of the bill passed out of committee February 27 eliminated that the ethics provision and was not limited to current or former professional reporters.

The proposed shield law still has its critics, however. Some Hawaii lawmakers expressed concern about a broad privilege and others argued it might be abused.

"I understand the need for the shield and protection for a free press … but by the same token, there are so many other people with lesser integrity running newspapers, magazines and et cetera that can ruin peoples' lives," said Rep. Joe Souki (D-Waihee-Wailuku) in the February 6 AP story.

State Attorney General Mark Bennett submitted testimony to the February 5 hearing, stating that although he "supports in general the concept of a reporter's privilege because it maximizes the public's access to important information," he had concerns about the "broad and virtually unlimited scope" of the bill and called for an exception "to ensure that law enforcement and public safety are not compromised."

The Honolulu Prosecuting Attorney's office, headed by Prosecutor Peter B. Carlisle testified more strongly against a shield.

"We oppose this bill since it fails to recognize a legitimate and significant public interest in the investigation and prosecution of crime," said the testimony.

Carlisle commented to the AP in a February 1 story, "If everybody was Walter Cronkite, it would be an easy sell for me. Unfortunately that's not the way the world works," adding, "I just don't think a law is entirely necessary."

The Hawaii Supreme Court Standing Committee on the Rules of Evidence, although not testifying in favor of or against a shield bill, requested February 5 that the matter be referred to it "for interim study" and deferred to the 2009 legislature.

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Access

President Signs, then Rewrites, OPEN Government Act

President George W. Bush signed the Openness Promotes Effectiveness in our National (OPEN) Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, on Dec. 31, 2007. The new law makes several procedural changes to the 40-year-old Freedom of Information Act (FOIA).

The final OPEN Government Act includes provisions that will impose new penalties on agencies that fail to comply with requests in a timely fashion, institute new provisions for congressional oversight, define "news media representative" to include many bloggers, create FOIA "public liaisons" for each agency, and establish a FOIA ombudsman within the National Archives and Records Administration. But less than a month after its passage, President Bush released a proposal for the fiscal year 2009 budget that would shift funding for the ombudsman out of the independent National Archives and into the Department of Justice, which is controlled by the executive branch.

A provision of the original House bill, H.R. 1309, that would have made government records presumptively open to the public, is absent from the final version.

The act's passage followed months of debate and procedural wrangling in Congress as legislators tried to balance concerns about national security with the need to keep the federal government open to the public. Portions of the OPEN Government Act took effect immediately, but it will not be fully implemented until Dec. 31, 2008. (See "Newspaper's FOIA Request Granted After Nearly Three Years; Congress Passes Bill to Prevent Similar Delays" in the Summer 2007 issue of the Silha *Bulletin*.)

Among the new penalties, the OPEN Government Act makes it easier for requesters to recover attorney fees if they prevail on claims against federal agencies. Although attorney fees have long been available under the FOIA when a requester "substantially prevail[s]" on its claims, the new statute defines "substantially prevail" in a way that makes clear that a judicial order is not required. Even if the agency makes a "voluntary" change in position and grants a request it previously denied, a court may award the requester reasonable attorney fees paid out of the agency's budget, instead of the treasury fund set up to pay for judgments against the government.

In addition to the attorney fee changes, the amended statute takes away an agency's ability to charge search and duplication fees if it misses the strict 20-day time limit for responses. The statute requires that agencies assign tracking numbers to requests that will take longer than 10 days to process and set up telephone or Internet-based programs where requesters can monitor the status of their requests. It also substantially increases reporting requirements so Congress can monitor compliance and processing speed.

The amended statute also adds a definition of "news media representative" absent from earlier versions of the FOIA. News media representative means "any person or entity that gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw materials into a distinct work, and distributes that work to an audience." The new definition ensures that many bloggers and other journalists not associated with major news organizations are exempt from search fees charged to most requesters but not news media representatives.

Finally, the OPEN Government Act establishes the Office of Government Information Services (OGIS) – often referred to as a FOIA ombudsman – within the National Archives and Records Administration and requires that each agency name chief FOIA officers and public liaisons.

The new OGIS and the FOIA chiefs are charged with reviewing agency compliance and procedures, monitoring the implementation of the new rules, and reporting to the U.S. Attorney General on each agency's progress. The OGIS also has authority to serve as a mediator between requesters and agencies if disputes arise. The public liaisons help requesters navigate the process and "assist in the resolution of any disputes between the requester and the agency."

Less that one month after the president signed the bill, Sen. Patrick Leahy (D-Vt.), one of the bill's sponsors, announced in a speech on the Senate floor that the White House had said it planned to shift funding for the OGIS from the National Archives to the Department of Justice. In the Jan. 23, 2008 speech, he said that the move would be contrary to both the letter and the purpose of the OPEN Government Act. Congress had deliberately placed the OGIS outside the Justice Department due to the Bush administration's "abysmal" record on FOIA requests, he said.

Leahy said that the OGIS was intended to be an independent check on the executive branch. Moving the office to the justice department would strip it of its independence, he said.

According to the blog The Secrecy File, available at the Web site of the *Austin* (Texas) *American Statesman*, www.statesman.com, the move is far from permanent because the fiscal year 2009 budget shift could easily be reversed before any money flows to the Justice Department. Sean Kevelighan, press secretary for the Office of Management and Budget, said that the final budget has not been released. "Until then, it would be premature to speculate as to what might be in the final product," he said.

In the Jan. 23, 2008 speech Leahy said that he would continue to push for reforms to make government more open to the public, including further changes to strengthen the FOIA and a new federal shield law to protect reporters. "Open government is not a Democratic value, nor a Republican value. It is an American value and an American virtue. ... I urge all members to join me in supporting an agenda of an open and transparent government on behalf of all Americans," Leahy said.

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Less than a month after signing the bill, President Bush released a proposal for the fiscal year 2009 budget that would shift funding for the FOIA ombudsman out of the independent National Archives and into the executive branch-controlled Department of Justice.

Access

Minnesota Advisory Committee Resists Cameras in Courts

What had seemed to be cautious support for rule changes that would allow increased electronic media access to Minnesota courtrooms faded quickly in the face of critical testimony from local prosecutors, defense attorneys, and victims' advocates at a January hearing before the Minnesota Supreme Court Advisory Committee on General Rules of Practice.

More than 20 attorneys, judges, and advocates spoke at the Jan. 11, 2008 meeting on whether Minnesota's camera access rules should be relaxed. Current Minnesota rules, Minnesota Code of Judicial Conduct canon 3(A)(11) and Minnesota General Rules of Practice rule 4, bar cameras from both civil and criminal trials unless all parties and the judge consent. The restrictive rule functions as a complete bar to filmed trials.

At the hearing, four speakers supported change. The rest, including representatives of the Minnesota County Attorneys Association and the Minnesota Association of Criminal Defense Lawyers, urged the committee to maintain the status quo, arguing that the 15-second sound-bite coverage likely to result from increased access would do nothing to educate the public or increase confidence in the judiciary. Instead, the opposition said, the presence of cameras would intimidate witnesses and prevent victims from coming forward.

The January 11 public comments were the last the committee will hear before making its recommendation to the Minnesota Supreme Court. In 2007, the committee heard from media representatives and trial court judges in Wisconsin and Iowa, where cameras are allowed. The hearings were organized in response to a proposal for increased camera access submitted by a group of media organizations in March 2007. (See "Minnesota Considers Cameras in Trial Courtrooms" in the Fall 2007 issue of the Silha *Bulletin*.)

At the January hearing, Dakota County Attorney James Backstrom, speaking on behalf of the County Attorneys Association, told the committee of judges and lawyers that "sensationalized" coverage of trials provided by cameras in courtrooms will "trivialize what we do." He said the public has a right to be present and observe trials in person, but no right to watch them on television.

State Public Defender John Stuart agreed that sensational coverage of criminal cases would harm the justice system. He called Minnesota a national leader in criminal justice policy and urged committee members to avoid rule changes advocated by members of the media that would threaten the state's position. "If the media in America could show me that they could keep Britney Spears off the news for one week, then they could participate in developing public policy," he said.

But Mark Biller, a former county attorney in Polk County Wisconsin, said that in his experience sensational and potentially detrimental coverage more often featured footage shot outside the courthouse than inside the courtroom. Cameras in courtrooms provide a way for judges to gain some control of the content of trial coverage, he said.

Biller said he had participated in 10 filmed trials in 14 years as a prosecutor; he was the only attorney to testify January 11 who had direct experience with courtroom cameras.

In addition to concerns about "sound-bite" coverage, several witnesses spoke on behalf of advocacy groups for victims and witnesses arguing cameras could discourage them from testifying.

Donna Dunn of the Minnesota Coalition Against Sexual Assault said that 80 percent of rapes go unreported. Cameras in courts will increase that number because televised trials will give complainants another reason to fear that their identity will be made public, she said.

Even if the rule prohibits cameras in sexual assault trials and allows complainants to request the cameras be turned off, their mere presence will chill assault reporting because after seeing coverage of other types of trials on television, they will believe, erroneously, that if they testify, that testimony will be filmed, Dunn said.

But Marna Anderson, executive director of WATCH, a group that has monitored the way courts handle cases involving violence against women and children since 1992, said that cameras mean accountability, and that is good for the public even if it makes it more difficult to get complainants to testify.

After hearing testimony, several committee members expressed skepticism about the need for a rule change. "Is there something broke here that we need to fix? Or are we just doing this because the electronic media has a 24-hour news cycle?" asked Hennepin County Judge Mel I. Dickstein.

Several members said the media group seeking increased access had not shown that anything would be gained by allowing cameras in courtrooms. Any benefit, they said, would be outweighed by the potential costs.

A video of the Jan. 11, 2008 hearing can be downloaded at http://www.mncourts.gov/ under the "read more news items" link.

The committee met again Feb. 27, 2008 to discuss a draft proposal submitted by committee reporter David F. Herr, an attorney in Minneapolis. The committee approved an administrative change – removing the duplicative rule from the Code of Judicial Conduct and altering the technical language in the General Rules of Practice – but the sole substantive provision was overwhelmingly rejected by a voice vote.

The draft report had suggested a limited exception that would allow the chief judge in each judicial district to approve the use of cameras in exceptional circumstances over the objection of one or both of the parties. But the committee quickly voted to delete

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>
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> Minnesota State Public Defender

Access

Media Reports Raise Questions over Court Records Access

News reports on sealed case files and court records have shed light on how many documents are kept from public view, and led officials in some jurisdictions to reconsider when and how such information is sealed.

The Minneapolis *Star Tribune* reported Feb. 14, 2008 that 83 of 3,000 federal criminal cases filed in Minnesota from January 1998 through 2007 remained sealed. The *Star Tribune* said terrorism, increased Internet access to court records, and a Web site that publishes the names of government informants have caused authorities to be more cautious about access to sensitive criminal case files.

When a case is under seal, only its case number is public. Names, charges, and any other details are kept secret. According to the *Star Tribune*, federal appeals courts in the 2nd, 9th, and 11th circuits – none of which include Minnesota – have found that secret court dockets may violate either the constitutional protections of the press, the right to a public trial, or both. According to the Reporters Committee for Freedom of the Press, "secret dockets threaten the First Amendment rights of the public and press to monitor the judiciary and follow cases in courtrooms across the country." A complete report, published in 2003, is available at http://www.rcfp.org/secretjustice/secretdockets/index.html.

According to the *Star Tribune*, Chief U.S. District Court Judge James Rosenbaum, said judges in the Minnesota district are "committed to full public access," but in some cases, such as those dealing with juvenile records, fugitives, or informants, they are required to seal the case file.

The *Star Tribune* reported that it asked Assistant U.S. Attorney Jeffrey Paulsen, head of the criminal division in Minnesota, to review 64 case files sealed since Sept. 11, 2001, which remained under seal in mid-December 2007. Although Paulsen would not comment on whether any of the cases he reviewed involved terrorism, he said about one third of the cases involved juveniles, and eight of them involved fugitives, cases which are generally not unsealed until the fugitive is caught. The *Star Tribune* reported February 14 that six of the 64 cases Paulsen reviewed had been unsealed after he was interviewed because fugitives had been captured.

The *Star Tribune* also reported that shortly after its investigation, "prosecutors moved quietly to unseal several cases," which the newspaper said "rais[ed] questions of whether some had remained secret by default."

The newspaper cited two cases, both drug-related, in which the defendants had been convicted and sentenced to prison but whose case files had remained sealed. One woman had been sentenced to more than five years in prison on Nov. 28, 2006, but the case remained secret until Dec. 26, 2007, which the *Star Tribune* said was one week after it gave the U.S. district attorney's office its list of sealed cases. Another man was sentenced on June 3, 2003 to 21 months in prison and five years of supervised release, but his case had remained sealed until Feb. 13, 2008, one day before the *Star Tribune* published its story.

The *Star Tribune* also reported that Paulsen said the safety of informants can play a role in keeping a case file secret, sometimes even after a defendant is sentenced. "What we're talking about mainly is people who are out on the street cooperating," he said. "In some cases, the risk to someone might never go away."

The *Star Tribune* said Paulsen cited initiatives to publish dockets and court records online as heightening security concerns because of organized efforts to expose informants. For example, Who's a Rat, found at http://www.whosarat.com/, is a Web site whose paying members can log in to post and view profiles of informants and government agents.

Sean Bucci, a Boston disc jockey, created Who's a Rat in 2004 while awaiting trial in a marijuana conspiracy case, the *Star Tribune* reported. The Web site says it has profiles of more than 4,500 informants and 437 government agents.

The *Star Tribune* said Paulsen considered such resources a concern. "None of us wants to see a defendant get hurt or killed," Paulsen said.

But Paulsen told the newspaper that his office would consider whether changes are needed to ensure periodic reviews of sealed cases.

If the U.S. District Attorney for the District of Minnesota were to consider a rule change or clarification based on the *Star Tribune*'s report, it would not be the first time such a report helped lead officials to make such a change. Last year, during a year-long investigative series by *The Seattle Times* on the vast number of civil, guardianship, and divorce case files under seal in Western Washington, state and local federal courts adopted rule changes. The newspaper reported in March 2006 that Seattle's King County Superior Court had approved sealing entire files on nearly 2,000 such cases since 1990.

The Washington Supreme Court amended its rules in fall 2006 to say that parties' desires for files to be sealed do not, by themselves, constitute a compelling reason for a court to seal a file. The U.S. District Court for the Western District of Washington changed its rules to require a judge's permission before a lawyer can file a pleading under seal.

Additionally, *The Seattle Times* reported that King County judges and commissioners now receive extensive training on sealing restrictions. Old, outdated and inaccurate forms had also been discovered and updated, and the power to seal records was taken away from substitute court commissioners. (For the complete story, see "Washington State Courts Reopen Sealed Records" in the Winter 2007 issue of the Silha *Bulletin*.)

Investigative reporting by a newspaper in Las Vegas helped encourage the Nevada state Supreme Court to consider and eventually pass new rules on sealing civil court records that took effect Jan. 1, 2008, the *Las Vegas Review-Journal* reported.

Court Records Access, *continued on page 21*

Chief U.S. District Court Judge James Rosenbaum said judges in the Minnesota district are "committed to full public access."

Photography Rules, *continued from page 16*

continued to stand behind the proposed rules following the hearing. "There is no intention in these proposed regulations for censorship by the agencies based on content," said Mitchell Butler, deputy assistant secretary of the interior for fish, wildlife and parks. "In fact, we believe that telling the story of our resources benefits not only our public lands but the visiting public as well."

The Interior Department also received more than 60 written comments on the proposal from journalism groups, private photographers, and individuals on both sides of the issue. The proposed rule, along with those comments, can be viewed at www.regulations.gov by searching for "DOI-2007-0035."

The Interior Department had not taken further action on the rule at press time.

New York City Backs Off Plan to Restrict Filmmakers and Photographers

Press groups, filmmakers, and the New York Civil Liberties Union (NYCLU) reacted with heated criticism to new rules proposed in the summer of 2007 by the Mayor's Office of Film, Theatre, and Broadcasting (MOFTB) in New York City.

The proposal could have required even casual photographers with handheld cameras and tripods filming anywhere on city property, including streets, sidewalks, and parks, to obtain permits and $1 million in liability insurance. In response to the criticism, the MOFTB issued a revised set of rules Oct. 29, 2007 that ease restrictions for amateurs, students, and smaller projects that do not obstruct traffic on the city's streets and sidewalks.

The original proposal would have required any group of two or more people filming for more than 30 minutes, or using a tripod for more than 10 minutes, to obtain a permit. The rule's definition of "filming" included still photography with handheld cameras. To obtain a permit the rules required proof of $1 million in liability insurance. Critics said the proposed rules would restrict the First Amendment rights of freelance photographers and photojournalists because they required a permit with an insurance requirement that would be prohibitively expensive for most independent producers.

The revised draft of the rules allows for unlimited use of handheld cameras and tripods without a permit as long as the filmmakers do not obstruct the city's streets or sidewalks. The rule says a sidewalk is not obstructed if the greater of eight feet or half the sidewalk's width remains open for pedestrians to pass.

For example, on a 12-foot wide sidewalk, a photographer could set up a tripod obstructing a four-foot portion without a permit, but a five-foot obstruction would require a permit. On sidewalks eight feet wide or narrower, any obstruction would require a permit under the new proposal.

Press photographers with credentials issued by the New York City Police Department are exempt from the permitting requirements. The rules also exempt photographers covering parades and protests.

The new proposal still requires that filmmakers or photographers using "vehicles or equipment" obtain permits. The proposed rules define "equipment" as cameras other than handheld cameras, props, sets, lights, and other production equipment.

The new rules state that the free permits shall be issued unless the proposed project poses a danger to the general public or seeks to shoot in an inappropriate location. Locations may be deemed inappropriate if the project cannot be accommodated, a different organization has already obtained a permit to shoot in the area at the same time, or shooting would interfere with city operations. The MOFTB may also deny permits to groups that have violated filming rules in the past.

According to an MOFTB explanation accompanying the rules, they are "designed to codify procedures that have existed in practice since the office was established in 1966. ..." The explanatory document says that the rules are not designed to deter photographers, journalists, or filmmakers, but to ensure sidewalks and streets remain free for public use.

The explanation also points out that student filmmakers seeking permits will meet the insurance requirements through their school's coverage.

In a news release, Mickey H. Osterreicher, general counsel to the National Press Photographers Association, praised the changes. "It is nice to see common sense prevail in the face of constructive criticism," he said. "The fact that the film commission has been able to distinguish amateur and professional photographers from large commercial productions goes a long way in helping all concerned. … I believe that retaining the press exception to the permit requirement, as well as articulating an exception for covering parades, rallies, and protests or demonstrations, is a sound decision. The real key will be how well a job the commission does in educating both the public and the police once these new rules are adopted," he said.

According to a Dec. 26, 2007 story posted on the Web site Photo District News, the NYCLU and individual photographers voiced concern that selective enforcement of the "vague" new rules could lead to censorship problems. "Do you think cops will measure the sidewalk to mark how eight feet must be clear?" video artist Juliana Luecking asked at a Dec. 13, 2007 hearing concerning the new version of the rules. "Will they wear [measuring tapes] on their gun belt? Like the first proposal, these regulations give law-enforcement officials the power to prohibit my right to use a camera in public – and shield [police] from lawsuits."

As the Silha *Bulletin* went to press, no further action had been taken on the proposed rules.

– Michael Schoepf
Silha Research Assistant

Cross-Ownership Rules, *continued from page 18*
opportunity for comment on the actual rules and study the related issues, we will immediately move legislation that will revoke and nullify the proposed rule," the letter read, according to a December 18 *Washington Post* story.

On Dec. 4, 2007, the Senate Commerce Committee approved the Media Ownership Act of 2007 (S.B. 2332), which would delay FCC adoption of new media ownership rules for at least 180 days. The bill would also require the establishment of an independent panel to make recommendations on methods of increasing women and minorities in broadcast media ownership.

A similar bill, H.R. 4835, was introduced in the House on Dec. 18, 2007 to promote transparency in the adoption of new media ownership rules by the FCC. The bill was referred to the Subcommittee on Telecommunications and the Internet.

Civil rights community leaders also opposed the new media ownership rules. On Nov. 5, 2007, 21 groups, including the National Hispanic Media Coalition and the National Association of Hispanic Journalists, sent a letter to Martin, calling on him to establish an independent task force to study the impact of market concentration on female and minority ownership in the broadcast media industry. The letter stated that the commission's rules appear to "severely undercut" minority ownership of broadcast stations. The letter is available on the Web site of Free Press, an organization promoting media reform, at http://www.freepress.net/news/27822.

Democratic presidential candidate Senator Barack Obama (D-Ill.) also supported the proposal to create a panel to study diversity in media ownership, according to a letter to Martin dated Oct. 21, 2007, which is posted on the Free Press Web site at http://www.freepress.net/news/27246. In his letter, Obama berated Martin for his method of vetting his cross-ownership proposals through an op-ed published in *The New York Times*, stating that the commission has the responsibility to defend new proposals in public discourse and debate.

The FCC's order was published in the *Federal Register* on Feb. 21, 2008, triggering a 60-day period for lawsuits challenging the rules and a 30-day period for filing petitions of reconsideration at the FCC, according to a Feb. 21, 2008 *Broadcasting & Cable* story.

Andrew J. Schwarzman, president of Media Access Project (MAP), an advocacy organization dedicated to promoting public access to open and diverse media, said that the non-profit organization will challenge the new rules, according to a Feb. 4, 2008 Broadcasting & Cable story. Parties "whose interests are adversely affected" by an FCC order may challenge the commission's decision either in a lawsuit in federal court under 47 U.S.C. 402, or through a petition for consideration filed with the FCC pursuant to 47 U.S.C. 405. Although parties may initially file a lawsuit under 47 U.S.C. 405 in a U.S. Court of Appeals in order to challenge an FCC order, they may also file a petition for reconsideration and, if that petition is denied, appeal that denial to federal court.

The FCC last approved new rules to relax media ownership regulations in 2003 under Chairman Michael K. Powell. However, on Sept. 3, 2003, the 3rd Circuit U.S. Court of Appeals in Philadelphia issued an order in *Prometheus Radio Project v. FCC* (FCC No. 03-127) staying the effective date of the FCC's new rules pending judicial review. (See "FCC's New Regulations Blocked by Appeals Court" in the Summer 2003 issue of the Silha *Bulletin*.)

The commission ultimately lost the major court challenge. On June 24, 2004, the 3rd Circuit remanded the case, stating that the commission had not adequately justified its decision to modify the media ownership rules.

According to a Feb. 4, 2008 *Broadcasting & Cable* story, the new rules concerning newspaper-broadcast cross-ownership represented a compromise on deregulation that did not extend as far as the 2003 proposed changes to the media ownership rules.

Commissioner Copps told the *New York Times* for an Oct. 17, 2007 story, "We shouldn't be doing anything without having a credible process and nothing should be done to get in the way of Congressional oversight and more importantly, public oversight," he said. "We've got to have that public scrutiny. That was one of the big mistakes that Mr. Powell made, and he was taken to the woodshed by the 3rd Circuit. I fear it is déjà vu all over again."

– Amba Datta
Silha Research Assistant

Cable Regulation, *continued from page 20*

top economic adviser at the White House; and Joel D. Kaplan, the deputy chief of staff and a longtime friend of Martin's.

Although the commission's decision to allow cable companies time to provide their own data on subscription rates blocked Martin's proposal to increase FCC regulation powers under the "70-70 rule," the commission compromised on other issues supported by Martin and consumer groups in their November 27 meeting, according to *The New York Times*.

One of the rules the commission adopted would make it less expensive for independent programmers to lease channels from cable companies. *The New York Times* said Martin and some consumer groups said this decision could help to make programming more diverse and ultimately reduce cable costs.

– Patrick File
Silha Fellow and *Bulletin* Editor

Court Records Access, *continued from page 15*

A Feb. 11, 2007 report by the *Journal-Review* revealed that at least 115 civil cases had been completely sealed since the year 2000 in district courts in Las Vegas' Clark County, and said that anecdotally, Las Vegas attorneys said the practice had become more common in recent years.

The report led to an inquiry by the state legislature later in 2007, the *Journal-Review* reported on Jan. 1, 2008, and in April 2007, the state Supreme Court appointed a "Commission on Access, Preservation and Sealing of Court Records" comprised of judges, attorneys, media representatives, and other interested parties that reviewed other state's policies on sealing civil case files and held hearings.

On Dec. 31, 2007, all seven members of the state Supreme Court voted in favor of changes to the rules that had been recommended by the commission, the *Journal-Review* reported, ruling that the changes would take effect the next day.

Under the new Nevada rules, judges must identify in writing "compelling privacy or safety interests that outweigh the public interest in access to the court record," the *Journal-Review* reported. Records can be sealed if permitted by state or federal law or to protect such information as trade secrets, personal identifiers such as Social Security numbers, medical or mental health records, or tax and financial records, the *Journal-Review* reported.

One change the Supreme Court justices made to the recommendations, the *Journal-Review* reported, was to set a time limit for individuals to ask the courts to unseal documents or files. The new rules state that any person, a litigant or nonlitigant, can challenge an order sealing documents and ask that the documents be unsealed, but those motions or petitions must be filed within five years of a case being closed or resolved, the *Journal-Review* reported.

The rules also state that when a court record is sealed, some identifying information about the case must be maintained on court indexes for public review, the *Journal-Review* report said, "including a case number, docket code or number; the date of the initial filing; the names of parties, counsel of record and assigned judge; the notation 'case sealed;' the case type and cause of action which may be obtained from the civil cover sheet; the order to seal and written findings supporting the order to seal; and the identity of the party who filed the motion to seal."

Barry Smith, executive director of the Nevada Press Association and a member of the commission, told the *Journal-Review* that the new rules are "a significant statement for open government in Nevada."

"[They] still allow judges to seal files, but they have to do so for the right reasons, and they have to make a public record of their decision," Smith said. "That's what open government is about: accountability."

One member of the commission, *Review-Journal* Special Projects Editor A.D. Hopkins said he questioned the wisdom of the five-year limit on motions to unseal, "but at least remedies are provided."

According to the February 2008 issue of the American Bar Association (ABA) publication *Litigation News*, an increasing number of jurisdictions have sought to reverse a trend toward sealing civil case files.

Litigation News said that in addition to Washington state's 2006 rule change, in April 2007 the Supreme Court of Florida issued emergency rules that require judges to specify in writing their reason for the sealing order and to specifically explain why the order is no broader than necessary. The rules also stipulate that judges may not conceal the docket number of the action, and clerks must post all sealing orders at the courthouse and on the court Web site. Non-parties may move to vacate a sealing order, and, if the motion is contested, the court must hold a public hearing on the motion, *Litigation News* reported.

Litigation News said the change in Florida rules was a response to the discovery that one county had sealed files in more than 400 civil cases, some of which concerned divorce and domestic violence by judges, politicians, lawyers, police officers, or television personalities.

Erica L. Calderas, co-chair of the ABA Section of Litigation's Pretrial Practice and Discovery Committee, told *Litigation News* that she acknowledges the importance of balancing individual privacy concerns with the public right of access to court information, but she strongly objects to sealed dockets. "The existence of secret dockets can cause the public to lose faith in the court system," Calderas said, "as it implies that there is a double standard of justice – one for the haves and one for the have-nots."

– Patrick File
Silha Fellow and *Bulletin* Editor

Election 2008 Issues

Washington Law on Lies by Politicians Found Unconstitutional

The Washington Supreme Court ruled Oct. 4, 2007 that the state cannot punish political candidates for making false statements about their opponents unless the false statements are also defamatory.

In a split 4 to 1 to 4 decision, the state's highest court upheld a facial challenge to a statute, Wash. Rev. Code § 42.27.530(1)(a), which prohibited false advertising or electioneering communication concerning a political candidate made with "actual malice." "Actual malice" means knowledge of falsity or reckless disregard for the truth. According to the Washington court, 14 states, including Minnesota, have similar laws.

The case arose out of a 2002 election for a seat in the state senate, the majority opinion by Justice James M. Johnson said. In the election, incumbent Senator Tim Sheldon, a Democrat with 79 percent of the vote, prevailed over Green Party challenger Marilou Rickert. After the election, Sheldon filed a complaint with the state Public Disclosure Commission, alleging Rickert made false statements with actual malice when she sent out a brochure claiming he had voted to close a camp for developmentally disabled youth.

The Public Disclosure Commission found that the camp was for juvenile delinquents, not developmentally disabled children, and that Sheldon had not voted to close the facility. The Commission fined Rickert $1,000, and a trial court affirmed. The Washington Supreme Court reversed in *Rickert v. Public Disclosure Commission*, 168 P.3d 826 (Wash. 2007), holding that the state cannot punish political speech that is false and made with actual malice absent proof that the speech is defamatory.

The four-justice plurality ruled that content-based restrictions on speech, especially political speech, cannot withstand First Amendment scrutiny unless they are "narrowly tailored" to serve a "compelling interest." Calling the statute a "government-enforced censorship scheme," the plurality argued that the state's purported interests in protecting political candidates and the integrity of elections were not compelling.

Johnson's plurality opinion said that the voters, and not the government, should evaluate the honesty and value of political speech. "[The statute] naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech. Yet, political speech is usually as much opinion as fact."

One justice, in a brief concurrence, characterized the majority opinion as going "too far in concluding that any government censorship of political speech would run afoul of the First Amendment." Chief Justice Gerry L. Alexander pointed to defamatory speech as an example of political speech that can be regulated. Alexander declined to join the plurality opinion, but agreed with the result, and provided the deciding vote to strike down the statute as unconstitutional on its face.

Four justices dissented, arguing "the majority's decision is an invitation to lie with impunity. ... [T]he use of calculated falsehood is not constitutionally protected." Although "there is no such thing as a *false idea*," false statements of fact made with actual malice can be constitutionally punished, the dissenting opinion by Justice Barbara Madsen said.

In Madsen's view, the majority failed to distinguish between statements of fact and statements of opinion and misinterpreted U.S. Supreme Court precedent. The dissenters argued that because false statements of fact made with actual malice are not constitutionally protected speech, a lesser degree of scrutiny should have been applied.

Other cases regarding similar laws have reached conflicting conclusions. The Washington Supreme Court had previously struck down a similar law that prohibited any political speech containing a false statement of material fact. After that case, *State ex. rel. Public Disclosure Commission v. 119 Vote No! Committee*, 957 P.2d 691 (Wash. 1998), the legislature amended the statute to require that the false speech be about a political candidate. In *Rickert*, the court struck down the new law.

Similarly, in 1996 the Minnesota Court of Appeals struck down a law that made it a misdemeanor to communicate political information "with reason to believe" it was false. In *State v. Jude*, 554 N.W.2d 750 (Minn. App. 1996), the court held that the Minnesota law was unconstitutionally overbroad because it did not require that the false statements were made with actual malice.

In 1998 Minnesota passed a new law, Minn. Stat. § 211B.06, incorporating the actual malice standard. That law, still in force in Minnesota, is very similar to the law struck down in *Rickert* and was cited by the *Rickert* dissent in support of the proposition that false political speech made with actual malice can be punished.

The 6th Circuit U.S. Court of Appeals has also partially upheld an Ohio law, Ohio Rev. Code Ann. § 3517.21, that prohibits "knowingly" making false statements about political candidates. In that case, *Pestrak v. Ohio Elections Commission*, 926 F.2d 573 (6th Cir. 1991), a three-judge panel held that the elections commission could not levy fines against candidates who knowingly made false statements about their opponents, but it could initiate investigations and recommend that local authorities prosecute violations.

The majority of the Washington Supreme Court dismissed the unfavorable cases in different jurisdictions, stating "such holdings should be neither admired nor emulated. The notion that the government, rather than the people, may be the final arbiter of truth in political debate is fundamentally at odds with the First Amendment."

– Michael Schoepf
Silha Research Assistant

"[The statute] naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech. Yet, political speech is usually as much opinion as fact."

– Justice James M. Johnson, Washington Supreme Court plurality opinion, *Rickert v. Public Disclosure Commission*

Election 2008 Issues

Kucinich Loses Battles to be Included in Debates

One hour before a Jan. 15, 2008 Las Vegas debate featuring presidential candidates from the Democratic Party, the Nevada Supreme Court ruled that MSNBC is free to bar Ohio Congressman and presidential candidate Dennis Kucinich (D-Ohio) from participating. The ruling vacated a temporary restraining order issued earlier that day by a Clark County District Court that said MSNBC must either cancel the broadcast or allow Kucinich to participate.

The controversy arose from a January 14 lawsuit filed by Kucinich's lawyers in Las Vegas after MSNBC initially invited him to participate and then rescinded the offer two days later. The district court held that barring the congressman from participating in the debate would breach a contract between MSNBC and Kucinich and violate the so-called "equal time" requirements of the Communications Act of 1934, 47 U.S.C. § 315 (2006). The "equal time" requirements mean that licensed television and radio stations must, in some circumstances, provide equal opportunity for political candidates to appear on their station's programs.

Nevada Supreme Court order No. 50889 overturned the lower court ruling on both claims. Even though MSNBC invited Kucinich to participate in the debate in a Jan. 9, 2008 e-mail message, the television network remained free to withdraw its offer, which it did on Jan. 11, 2008, because the alleged contract lacked "consideration," the Nevada Supreme Court ruled. "Consideration" means a return promise – often of money or some other tangible or intangible asset – offered by the party seeking to enforce the contract. Here, MSNBC offered Kucinich the chance to participate in the debate, but he did not promise any consideration in return. Contracts that lack consideration are invalid, the opinion said.

The high court also reversed the lower court's ruling under the Communications Act of 1934, finding the district court lacked jurisdiction to hear the case. The federal statute, as amended, states that any "broadcasting station" that allows a candidate for federal office to "use" its services "shall afford equal opportunities to all other such candidates for that office."

The Nevada Supreme Court ruled that under the Communications Act of 1934, the only role of the courts is to review the rulings of the Federal Communications Commission (FCC). Since Kucinich failed to allege in his lawsuit that he sought review from the FCC first, the Nevada courts lacked jurisdiction to hear his case. The state's high court did not address MSNBC's argument that the "equal time" restrictions should apply only to broadcast stations, not cable networks.

Following the ruling, the debate proceeded between the remaining Democratic candidates – Hillary Clinton, John Edwards, and Barack Obama – in the Cashman Center in Las Vegas. Outside the building, Kucinich and his supporters held an impromptu rally, according to a Jan. 16, 2008 report on lasvegasnow.com, a Web site run by a local CBS affiliate.

The report said Kucinich spoke to reporters and supporters at the rally. "Who died and left NBC god? I mean, the TV networks are here to serve the public interest," Kucinich said. "NBC has some idea that they can determine what the public's interest is."

According to a Jan. 16, 2008 *New York Times* story, MSNBC did not comment on the ruling.

The Nevada controversy was not the only time Kucinich tried to participate in a presidential debate from which he was excluded. On Jan. 4, 2008, he filed a complaint with the FCC after ABC News announced he would be excluded from a debate the next day. The debate proceeded without him as the FCC and ABC News apparently ignored his complaint. But Kucinich tried again on Jan. 18, 2008, when CNN announced he would be excluded from a January 21 debate on the cable network.

In the January 18 complaint, Kucinich repeated the argument that the equal time provisions of 47 U.S.C. § 315 mean television networks cannot bar "serious" presidential candidates from participating in televised debates. Kucinich argued that excluding him from the debate "undermines the purpose" of the statute because it hides "strong anti-war and national health care messages" from the public view. He also pointed out he was the only democratic candidate that had qualified for federal campaign funding to be excluded.

This time, the FCC quickly rejected his complaint in a written opinion, DA 08-136, released the same day. The opinion said the agency lacks authority to force CNN to include Kucinich in the debates. The agency's authority is limited to forcing the network to offer the congressman equal time, but it declined to do so in this case because the debate was a "bona fide news event."

Section 315 requires that any FCC licensed television or radio station that allows a "legally qualified candidate" for public office to "use" the station to also "afford equal opportunities to other such candidates." A "use" is any appearance on television or radio by a candidate whose voice or picture is readily identifiable whether the appearance is political in nature or not. The statute exempts four types of "bona fide" news from the restrictions, including newscasts, interviews, documentaries where the candidate is not the subject of the program, and "on-the-spot coverage" of events like political conventions.

The FCC ruled that the debate consisted of "on-the-spot coverage of a bona fide news event," so the equal time restrictions did not apply. "A station is free to choose its participants, provided that its intent is not to further the candidacy of any particular individual," the ruling said.

In a footnote, the FCC acknowledged a potential distinction between cable networks, like CNN, and broadcast networks. But the agency declined to consider whether the equal time provisions should apply to cable networks at all in light of its ruling that the debate qualified as a bona fide news event.

– Michael Schoepf
Silha Research Assistant

"Who died and left NBC god? I mean, the TV networks are here to serve the public interest."

– Dennis Kucinich
(D-Ohio)
Former Democratic
Presidential Candidate

Media and the Iraq War

U.S. Brings Terrorism Case against AP Photographer in Iraq

Associated Press (AP) photographer Bilal Hussein, held without charges by the U.S. military for over 20 months, received his first criminal hearing before an Iraqi investigative magistrate on Dec. 9, 2007 in Baghdad.

The hearing before Iraqi magistrate Dhia al-Kinani was to determine whether there were grounds under Iraqi law to try Hussein before a three-judge panel, according to an AP report on December 9. Al-Kinani issued an order stating that details of the nearly seven-hour, closed proceedings were to remain secret.

The U.S. military has refused to disclose to the media specific evidence or allegations concerning the grounds for Hussein's detention. According to a Nov. 19, 2007 AP story, Pentagon press secretary Geoff Morrell stated that Hussein, a native of Fallujah, was an operative who infiltrated the AP and was linked to terrorist groups in Iraq. Morrell said the military had "convincing and irrefutable evidence" that Hussein is linked to insurgent activity.

Hussein's defense attorney, Paul Gardephe, confirmed to the AP in a story on the day of the hearing that no formal charges had been brought against the photographer, a member of the 2005 Pulitzer Prize-winning AP photography team. Gardephe said that he was allowed to view some material during the proceedings, but not to make copies of any evidence.

The AP asserts that the U.S. military's allegations against Hussein are false. In a statement dated December 9 posted on the AP Web site, http://www.ap.org, AP Director of Media Relations Paul Colford said "The Associated Press continues to believe that Bilal Hussein was a photojournalist working in a war zone and that claims that he is involved with insurgent activities are false."

Hussein was seized on April 12, 2006 in the western Iraqi city of Ramadi, according to the AP's November 19 story. Shortly after the photographer was detained, the AP appealed to the U.S. military to release him or bring him to trial. The AP also noted November 19 that there were a number of unofficial accusations that were "floated" against Hussein, which were then withdrawn with little explanation. (See "CPJ Urges Defense Department to Release or Charge AP Photographer Detained in Prison Camp" in the Winter 2007 issue of the Silha *Bulletin*.)

AP President and CEO Tom Curley said in the November 19 AP article, "While we are hopeful that there could be some resolution to Bilal Hussein's long detention, we have grave concerns that his rights under the law continue to be ignored and even abused."

An unnamed U.S. military spokesman told *The New York Times* in an article published Dec. 17, 2007 that Hussein has been "treated fairly, humanely and in accordance with all applicable law."

An investigation initiated by the AP after Hussein's arrest, described in the November 19 AP story, contended that on the day he was taken into custody, Hussein was in the streets of Ramadi buying bread. Hearing a blast in a nearby street, he invited several strangers to seek shelter in his apartment with him, as is customary during such instances of unrest in the streets.

U.S. marines arrived at Hussein's apartment and asked to use it as an observation post. The marines later took Hussein into custody and confiscated his laptop and satellite phone. The AP reported in its November 19 story that two of the guests Hussein invited back to his apartment after the explosion in Ramadi were suspected insurgents, and one of them was later convicted for having fake identification.

CNN reported on Nov. 19, 2007 that bomb parts and insurgent propaganda were found in Hussein's apartment. CNN also reported that according to Pentagon press secretary Morrell, Hussein had already aroused the U.S. military's suspicions because he arrived at terrorist attack sites so quickly. The military suspected that he had advance knowledge of attacks.

The New York Times reported on December 17 that a military spokesperson had informed the newspaper in an e-mail message that Hussein had been named by sources as having knowledge of an improvised explosive device attack on American and Iraqi forces. According to the sources, Hussein was standing by the triggerman at the time of the attack and took photographs of the triggerman as he initiated the explosion and attack on the troops.

According to *The New York Times*, Hussein took a photograph in Fallujah on Nov. 8, 2004 of Iraqi insurgents firing a mortar and small arms. The photograph was among the 20 photographs that won the Pulitzer Prize for news photography for the AP in 2005. The military spokesperson did not indicate in his e-mail whether this was the photograph implicated by the sources that named Hussein as being involved in explosive attacks on American and Iraqi forces.

The e-mail to the *Times* also indicated that Hussein had knowingly and willingly offered to provide a false Iraqi national identification card to an alleged sniper in order to help him avoid capture by the U.S. military.

Over the past three years, the U.S. military has held eight other Iraqi journalists for weeks or months without charges and later released them, according to the nonprofit advocacy organization Committee to Protect Journalists (CPJ).

Hussein had been working for the AP for two years before his arrest in April 2006. John Daniszewski, the AP's international editor, told *The New York Times* in December 2007 that Hussein initially began working for the AP as a driver and helper in April 2004 when soldiers first came to Fallujah. Photography was his hobby, however, and the AP eventually provided him with the necessary equipment to become a photographer.

"He said he always wanted to be a professional photographer," Daniszewski said. "And we had a need there. We gave him training, equipment and he just did good work."

Photographer, *continued on page 28*

"The Associated Press continues to believe that Bilal Hussein was a photojournalist working in a war zone and that claims that he is involved with insurgent activities are false."

– Paul Colford
AP Director of Media Relations

Endangered Journalists

In Midst of Crisis, Musharraf Cracks Down on the Press

Pakistani President Pervez Musharraf's crackdown on domestic and foreign journalists following the imposition of a state of emergency in Pakistan in fall 2007 has showed no signs of abating even during the Feb. 18, 2008 parliamentary elections that resulted in a resounding defeat for Musharraf's party at the polls.

On Nov. 3, 2007, Musharraf suspended Pakistan's constitution and imposed martial law shortly before an anticipated Supreme Court ruling determining whether his reelection to Pakistan's presidency was legal, according to a Nov. 5, 2007 Associated Press (AP) story. Musharraf simultaneously instituted several restrictions on press freedom in Pakistan, including blacking out TV networks and threatening to jail journalists. Broadcasts by international television networks like the BBC and CNN went off the air. The state of emergency was lifted December 15, but journalists still face formal restrictions and intimidation from the government, according to reports.

On Nov. 3, 2007, Musharraf promulgated amendments to Pakistan's ordinances on the print and broadcast media which allow the government to sentence a journalist to three years in prison for defaming the head of state, members of the armed forces, and members of the executive, legislative, or judicial organs of the state, according to a Nov. 4, 2007 *Hindustan Times* (India) story.

The amendments to the Registration of Printing and Publication Ordinance, RPPO-2002, and the Pakistan Electronic Media Regulatory Authority, PEMRA-2002, also provide for punishments which can lead to the suspension of a newspaper's publication for up to 30 days and fines of up to 10 million rupees, or approximately $163,343, according to the *Hindustan Times*.

Musharraf's power to promulgate ordinances stems from Article 89 of Pakistan's constitution, which allows the president to promulgate ordinances that have the same force and effect as an act of parliament. Any ordinance promulgated by the president expires at the end of four months, or earlier, if the National Assembly, the lower house of the bicameral legislature, or both houses of Parliament (depending on the content of the ordinance), pass a resolution repealing it, according to Article 89. However, Musharraf's Provisional Constitution Order No. 1 of 2007 issued on November 3, following the Proclamation of Emergency which imposed martial law, contains a provision that allows the president to extend the life of ordinances indefinitely. Section 5(1) of the Constitution Order states that "An Ordinance promulgated by the President ... shall not be subject to any limitations as to duration prescribed in the Constitution." This provision means that Musharraf's amendments to the press ordinances will not expire at the end of four months.

The Brussels-based International Federation of Journalists (IFJ) said in a Dec. 18, 2007 story that although Musharraf's decision to lift the state of emergency on Dec. 15, 2007, restored the Pakistani constitution's Article 19, which protects freedom of expression, broadcast media organizations were still required to sign a code of conduct promulgated by the Pakistan Electronic Media Regulatory Authority. The IFJ story is available on the group's Web site at http://www.ifj.org/default.asp?index=5624&Language=EN. The code of conduct formalized many of the curbs on press freedom contained in Musharraf's amendments to the media ordinances after November 3, according to Human Rights Watch on Feb. 16, 2008.

Pakistani television network Aaj TV was taken off the air by the government a few days after the imposition of the state of emergency, according to a Jan. 24, 2008 "Frontline" story available at PBS' Web site at http://www.pbs.org/frontlineworld/blog/2008/01/pakistan_blacko.html. Aaj TV News Director Talat Hussain's political talk show, "Live With Talat" was among the shows that went off air on November 5. Hussain told PBS that the policemen who confiscated Aaj TV's satellite equipment told him that broadcasters were inciting riots by showing footage of protests against the state of emergency, according to "Frontline."

"We were exceedingly critical of the many fallibilities of this government, run by President Musharraf" Hussain said. "And we were raising issues, which of course didn't sit well with Musharraf. These were issues of the rule of law and the constitution – words that Musharraf is not particularly fond of."

Hussain's show resumed broadcasting in mid-January after negotiations with the government, "Frontline" reported. However Hussain said that the show now cannot criticize the government or Musharraf directly.

Geo TV, Pakistan's largest private television network, was also forced off the air for 77 days by the government following the imposition of the state of emergency, according to a Feb. 16, 2008 Human Rights Watch report available on its Web site at http://hrw.org/english/docs/2008/02/16/pakist18088.htm.

Mir Shakil-ur-Rahman, owner of Geo TV, told Human Rights Watch that he had received a threatening phone call in the middle of the night from an operative of Inter-Services Intelligence (ISI), Pakistan's military intelligence agency. He was taken to an ISI safe house and told to comply with Pakistan's new laws legalizing restrictions on press freedom, Human Rights Watch reported.

The Paris-based free-press advocacy group Reporters sans Frontieres (Reporters Without Borders or RSF) found that journalists have also faced physical intimidation by the police, even after the state of emergency was lifted on December 15, according to a Jan. 9, 2008 story available on RSF's Web site at http://www.rsf.org/article.php3?id_article=24976.

Musharraf, *continued on page 30*

"We are being told to report what the government wants us to report. We have never experienced such harsh restrictions."

– Mazhar Abbas
Secretary, Pakistan Federal Union of Journalists

Endangered Journalists

Journalists in Afghanistan, Niger Iran face Death Sentences

Afghan Journalism Student Faces Death Sentence for Downloading Document

A 23-year-old Afghan journalism student was sentenced to death Jan. 22, 2008 for downloading a document from an Iranian Web site that questions the role of women in Islam.

According to reports from Jurist, a legal news Web site run by the University of Pittsburgh, Sayad Parwez Kambaksh received the sentence for bringing papers to class that advocated increased women's rights in Islamic societies. Other students reported his actions to authorities and claimed he wrote the documents. Kambaksh has denied he was the author.

According to the reports, the court held that the papers were "blasphemy" against Islam, for which death is the appropriate sentence under Article 130 of the Afghan Constitution. Article 130 gives judges discretion to rule in accordance with "Hanafi" jurisprudence when there is no other laws governing the issue.

Hanafi is the oldest and most liberal of four schools of legal thought practiced by Sunni Muslims, a report on the Web site globalsecurity.org said.

According to a Feb. 25, 2008 report in *The Independent* of London, Kambaksh was arrested on Oct. 27, 2007 at *Jahan-e-Naw*, a newspaper where he worked as a reporter. Kambaksh told *The Independent* that the court convicted him after a four-minute hearing. The hearing was closed, and Kambaksh was not given an opportunity to explain his actions.

"The judges had made up their mind about the case without me. The way they talked to me, looked at me, was the way they look at a condemned man. I wanted to say 'this is wrong, please listen to me,' but I was given no chance to explain," Kambasksh told *The Independent* from his jail cell in Mazar-I-Sharif, Afghanistan.

According to *The Independent*, Afghan President Hamid Karzai has faced international pressure to pardon Kambaksh, but he has said he will not act on the controversy, at least until the appeals process is complete.

Afghan authorities have promised Kambaksh the chance to appeal the ruling in open court with the aid of an attorney, a Feb. 19, 2008 story in *The Independent* said.

French Journalists Released from Prison in Niger

Two French journalists were released from prison in Niger on Jan. 18, 2008 after being held for more than a month on suspicion of threatening state security, an offense punishable by death. Formal charges were not filed until the day before their release on 15,000 euros bail each.

Cameraman Thomas Dandois and reporter Pierre Creisson were first detained in northern Niger Dec. 17, 2007 for trying to report on Tuareg rebels, a Jan. 17, 2008 Associated Press (AP) report said. The two men had permission from Nigerien officials to travel in southern and central portions of the country to report on bird flu, but northern Niger was closed to foreigners in 2007 due to the ongoing rebellion. The reporters were arrested while traveling in the closed area on assignment for the television station Arte.

A representative from Paris-based press freedom group Reporters Sans Frontieres (RSF or Reporters without Borders) traveled to Niamey, Niger with a brother of each detained journalist to negotiate their release, a January 17 report on RSF's Web site said. The group returned to Paris January 17 and reported that Dandois and Creisson were being "treated well by local standards" and that they were optimistic that the journalists would be released soon.

On January 18, RSF posted a news release on its Web site announcing the journalists had been freed. Dandois and Creisson arrived in Paris the next day. "We are happy and relieved for them, their families and their friends. We thank all the journalists, diplomats and politicians in Niamey, Paris and elsewhere who rallied to their [defense]," RSF said in the news release.

Al-Hassane Abdourahman, the journalists' driver, was released without paying bail on Jan. 22, 2008. He had been charged with "complicity" in helping Dandois and Creisson threaten state security, an RSF report said.

According to RSF, Nigerien journalists Moussa Kaka and Ibrahim Manzo Diallo remain in prison for similar offenses related to the Tuareg rebellion. Kaka is a correspondent for Radio France Internationale and Diallo is an editor for Aïr Info.

Iranian Journalist Accused of Terrorism Faces Death Penalty

The Iranian Judiciary sentenced journalist Yaghoob Mirnehad to death in February 2008, accusing him of membership in the terrorist group Jundallah, *The New York Times* reported.

According to a Feb. 21, 2008 *Times* report, Mirnehad was arrested with five other men in southeastern Iran in May 2007 . The rest of the men have since been released.

Mirnehad is a reporter for the Tehran-based newspaper *Mardomsalari*. He also runs a charity that supports childhood education, New York's *Newsday* reported Feb. 20, 2008.

Jundallah, which means "God's brigade," is a Sunni group based in the Iranian province Sistan va Baluchistan that has been associated with terrorist attacks in Iran, including one that killed 11 Revolutionary Guards in 2007, *The Times*' report said. Mirnehad is an ethnic Baluchi, but his alleged involvement with Jundallah was not explained.

According to a Feb. 20, 2008 AP report, the sentence can be appealed to Iran's Supreme Court.

– Michael Schoepf
Silha Research Assistant

> "The judges had made up their mind about the case without me. The way they talked to me, looked at me, was the way they look at a condemned man. I wanted to say 'this is wrong, please listen to me,' but I was given no chance to explain."
>
> – Sayad Parwez Kambaksh
> Condemned
> Journalism Student

Student Media

Internal, External Challenges at Colorado State, Loyola

The Colorado State University (CSU) student newspaper, *The Rocky Mountain Collegian*, faced challenges in September 2007 for a controversial editorial and in January 2008 for a proposed buyout by Gannett.

A front-page story in the Sept. 21, 2007 issue of the *Collegian* discussed a notorious September 18 incident at a University of Florida forum featuring Senator John Kerry, at which a student who repeatedly asked questions was handcuffed and shocked with an electric Taser. The editorial inside the newspaper said, "Taser this: F--- Bush" in large typeface, followed by the words, "This is the view of the *Collegian* editorial board."

A firestorm of controversy followed the publication of the editorial. Many student newspapers across the country carried their own editorials supporting or criticizing the editorial, and other mainstream news organizations picked up the story.

On October 1, *The New York Times* reported that CSU College Republicans responded by calling for editor-in-chief J. David McSwane's resignation. McSwane refused and defended the decision to publish the expletive.

The Associated Press (AP) reported October 5 that CSU's Board of Student Communications, which oversees the *Collegian*, admonished McSwane for violating the newspaper's code of ethics in a closed October 4 meeting, but ultimately it allowed him to keep his job.

In January 2008, the *Collegian* found itself on the other side of controversy, following reports that a media company was interested in acquiring the independent CSU student newspaper.

On Jan. 24, 2008, *The Tribune* of Greeley, Colo. reported that executives from the Gannett-owned *Coloradoan* of Fort Collins met with Colorado State University officials about a strategic partnership with the *Collegian*.

According to its Web site, Gannett Co., Inc. publishes 85 daily newspapers, including *USA Today*, and owns 23 television broadcast stations. The *Collegian* describes itself as "an independent, non-profit newspaper operating under the CSU Board of Governors."

The Tribune reported that an e-mail from University President Larry Penley said executives from the *The Coloradoan* first contacted the president's office about the offer in 2007. On Jan. 22, 2008, Penley, *Coloradoan* Publisher Christine Chin, *Coloradoan* Executive Editor Bob Moore, and the president of the CSU student government met to discuss the possibility of a partnership.

In July 2006, a Gannett newspaper in Tallahassee, Fla. purchased Florida State University's *FSView & Florida Flambeau*, the first acquisition of an independent student newspaper by a major newspaper chain. (See "Scholastic Journalism Roundup" in the Fall 2006 Silha *Bulletin*.) In February 2007, Gannett acquired the *Central Florida Future* student newspaper of the University of Central Florida.

The Tribune reported that Penley's e-mail said that in the meeting he asked *The Coloradoan* to submit a detailed formal proposal. Penley said the university Board of Governors "want[s] to seek opportunities to improve the student experience – including educational and career opportunities at Colorado State University."

CSU students, *Collegian* staff, and members of CSU student government spoke out against the proposed deal.

A January 24 *Collegian* opinion piece by Jennifer Walton, Leah Mori, Adam Gibbs, Anne Waite, Brooke Schledewitz, Jeri Humphries, and Bridget Cass, who are graduate students and recent graduates of CSU's journalism school, was titled "We will not accept corporate ownership."

A partnership would "not serve the interest of the student body or our community," the piece said. It also criticized Gannett ownership of the *Coloradoan*, saying the newspaper's quality of local coverage had suffered.

According to a January 29 story in the *Collegian*, staffers at the two Gannett-owned student newspapers in Florida had "mixed opinions" about corporate ownership. Editors who had worked at the *FSView & Florida Flambeau* and the *Central Florida Future* both before and after the Gannett purchases said corporate ownership has not changed their papers' content or operations.

However, Rob Davis, former photo editor for the *FSView & Florida Flambeau* said the positive influence from professional journalists was limited. "There was some talk of getting reporters from the Tallahassee *Democrat* to come over and do some things for the writers for the *FSView*, but that never really happened," Davis said.

According to *The Denver Post* on January 23, McSwane called the proposed partnership "a takeover," warning, "the next thing you know, we are volunteering for big media."

McSwane raised his concerns about the plan in a student government meeting on January 23, according to the *Collegian*. In that meeting, a number of student senators spoke out against the partnership plan, and a resolution condemning it, titled "Endorsement of Independent Student Media," was proposed but not voted on.

On March 7, 2008, the *Collegian* reported that Gannett spokeswoman Tara Connell said that the company was focused only on purchasing the student paper, and that it had not considered any partnership after it was told in the January 22 meeting that the *Collegian* was "not for sale."

However, after the January meeting, the Greeley *Tribune* reported that Chin had said that the *Coloradoan* was likely to continue to pursue a partnership.

The Student Press Law Center (SPLC) reported March 10 that Penley had formed an "advisory committee" in February, which included student

Student Media Roundup, *continued on page 34*

Graduate students and recent graduates of CSU's journalism school said a partnership between the student newspaper and Gannett Co. would "not serve the interest of the student body or our community."

Student Media

Appeals Court Upholds Dismissal of Former Dean's Libel Suit Against St. Cloud State Student Paper

On Jan. 25, 2008, a Minnesota Court of Appeals affirmed a lower court's grant of summary judgment in a libel suit filed by a professor and former dean at St. Cloud State University, finding in favor of the university's student newspaper, the *University Chronicle*.

According to the Student Press Law Center (SPLC), the suit, *Lewis v. University Chronicle*, 2008 Minn. App. Unpub. LEXIS 210 (Minn. Ct. App. Jan. 25, 2008) stemmed from an October 2003 *Chronicle* story in which a former student claimed to have been treated unfairly by then-dean Richard D. Lewis. In the story, former student Robbi Hoy, who had been involved in a dispute with Lewis, claimed she overheard Lewis making anti-Semitic remarks and racial slurs. After publication, Hoy told a *Chronicle* reporter that the remarks she heard came from another professor, not Lewis. The *Chronicle* printed a partial retraction of the story in November 2003, apologizing to Lewis.

Lewis originally filed a libel suit against St. Cloud State and the Minnesota State Colleges and University system in Ramsey County District Court, arguing the defendants were "vicariously liable" for the defamatory statements printed in the *Chronicle* because, Lewis claimed, they exercise control over the student newspaper's operations. The district court dismissed the case, and the Minnesota Court of Appeals upheld the district court's dismissal in June 2004.

The court of appeals found in *Lewis v. St. Cloud State University*, 693 N.W. 2d 466 (Minn. Ct. App. 2005) that the university and the state system could not be held liable for what an autonomous student newspaper prints. A spokeswoman for the Minnesota state university system told the SPLC in 2005 that the policy in place at the school specifies that the student newspaper is editorially independent from the university and the university and its officials cannot control what the newspaper prints.

According to the appeals court's 2004 ruling, "[The school's] relationship with the Chronicle, is, by virtue of [the university system's] policy and First Amendment constraints, significantly different from a private publisher's relationship with its newspaper," the court said. "Respondents, unlike a private publisher, have no control over the content of the Chronicle."

After the Minnesota State Supreme Court declined to hear Lewis' appeal in his suit against the university and the state university system, he filed a libel suit against the *Chronicle* in Stearns County District Court.

The Stearns County District Court granted summary judgment to the *Chronicle* in March 2005, ruling that Lewis could not meet the burden of proof as a "limited-purpose public figure." In order to succeed on a libel claim, a public figure must prove that the alleged defamatory statements were made with "actual malice": knowledge of the statements' falsity or a reckless disregard for whether they are true or not. The January 25 court of appeals decision affirmed this ruling.

– Patrick File
Silha Fellow and *Bulletin* Editor

The suit stemmed from an October 2003 *Chronicle* story in which a former student claimed to have overheard Lewis making anti-Semitic remarks and racial slurs. The paper later printed a partial retraction.

Chinese Journalists, *continued from page 32*

Rather than challenging American companies working in China, one nonprofit free speech advocacy group is trying to take on the government of China itself. The California First Amendment Coalition (CFAC) reported Jan. 4, 2008 that it initiated a proceeding to ask the Office of the U.S. Trade Representative to file a complaint with the World Trade Organization (WTO) over Chinese censorship of the Internet. China became a member of the WTO in 2001.

CFAC said its complaint is based on the theory "that China's censorship of the Internet, the most pervasive and systematic system of censorship in the world, violates China's obligations under treaties it signed" upon joining the WTO, namely the General Agreement on Tariffs and Trade (GATT) and the General Agreement on Trade in Services (GATS).

In order for the complaint to be successful, the Office of the U.S. Trade Representative must agree with CFAC's position and agree to file a complaint with the WTO, and then the WTO must decide to rule against China. Although the matter is only in the beginning stages, CFAC reported that a ruling against China could result in all of China's 1.2 billion citizens having unfettered access to the Internet for the first time ever.

CFAC reported that it is represented by the national law firm King & Spalding in Washington D.C. The initiative is supported by a consortium of organizations, including the UC Berkeley Graduate School of Journalism, the Center for Internet and Society at Stanford Law School, the National Freedom of Information Coalition, and the China Internet Project at UC Berkeley, among others. The CFAC press release is available at http://www.cfac.org/content/index.php/cfac-news/report/.

– Patrick File
Silha Fellow and *Bulletin* Editor

Copyright / Publicity

New State Legislation Protects Dead Celebrities' Rights

On Oct. 10, 2007, California Governor Arnold Schwarzenegger signed into law 2007 Cal. Stat. ch 439, otherwise known as the "Dead Celebrities Bill." The new law broadens California's existing protections for the right to publicity, a legal principle that allows a person whose identity has commercial value to control the manner in which the person's name or image is marketed.

The use of licensed images of deceased celebrities as a marketing ploy to pitch products has helped to create a multi-million dollar dead celebrity merchandising industry, according to an Oct. 29, 2007 *Forbes Magazine* story listing the "Top-Earning Dead Celebrities of 2007." But the question of who gets to collect the royalties from marketing dead celebrity images is far from clear-cut.

The bill's sponsor, California State Senator Sheila Kuehl (D-Los Angeles), told the *Los Angeles Times* for a July 23, 2007 story, "This bill is a recognition of the right to publicize and use an image as a kind of property right that extends beyond death and can be willed as a kind of personal property. The image of a celebrity is not something the public can use generally ... no matter how popular the celebrity is."

2007 Cal. Stat. ch 439 amends California Civil Code Section 3344.1 to retroactively bestow posthumous protection for rights of celebrities who died before 1985.

In 1984, California passed Civil Code Section 3344.1, dubbed the "Astaire Celebrity Image Protection Act," which created a posthumous right of publicity for celebrities that extended for 70 years after the celebrity's death. The law became effective on Jan. 1, 1985, according to a California Assembly Committee on the Judiciary analysis of the new bill signed into law in October 2007. The committee's analysis is available on the California Senate Web site at http://info.sen.ca.gov/pub/07-08/bill/sen/sb_0751-0800/sb_771_cfa_20070709_103425_asm_comm.html.

Although California Civil Code Section 3344.1 defined a "deceased personality" for purposes of the law as a natural person who had died within 70 years prior to Jan. 1, 1985, two federal district court decisions in May 2007 interpreted the California law to stand for the proposition that celebrities who died before the bill's effective date on Jan. 1, 1985 were not granted a posthumous right of publicity.

Both federal district court cases concerned disputes over the likeness of actress Marilyn Monroe between the heirs of Monroe's estate and the heirs of photographers who held copyrights to images of the actress. The photographers' heirs independently licensed Marilyn Monroe's image without consulting her estate, and the estate's heirs contested the photographers' heirs' ability to do so.

In *Shaw Family Archives Ltd., v. CMG Worldwide, Inc.*, 486 F. Supp. 2d 309 (S.D.N.Y. 2007), the U.S. District Court for the Southern District of New York ruled on cross-motions for summary judgment that Marilyn Monroe could not have bequeathed a post-mortem right to publicity to her heirs. The court initially determined that the relevant state laws from New York (no common law or statutory right of publicity for dead persons), California (see Cal. Code 3344.1), and Indiana (see 32 Ind. Code., Art. 35, Chap. 1, §§ 1-20) had not, at the time of Monroe's death in 1962, bestowed a postmortem right of publicity. Since Monroe could only have bequeathed property that she owned at her death to her heirs, and since she herself had not been granted a postmortem right of publicity at the time of her death by state law, she could not pass such a right on to her heirs in her will, the court ruled. As a result, any right of publicity that Monroe enjoyed her lifetime was extinguished at her death.

On May 14, 2007, in *Milton H. Greene Archives, Inc. v. CMG Worldwide, Inc.*, No. CV 05-2200 (MMM) (C.D. Cal.), the U.S. District Court for the Central District of California issued a similar ruling. It held that under California Code Section 3344.1, beneficiaries of a person who died before 1985 had no right to exploit the deceased celebrity's name, image, and likeness. Only persons who died after January 1, 1985, according to the court, could transfer their publicity rights to their own designated beneficiaries.

According to the California Assembly Committee on the Judiciary analysis, the purpose of the new bill was to abrogate the two federal district court decisions from May 2007 and clarify that a deceased celebrity's publicity rights apply to individuals who died before Jan. 1, 1985.

Similar bills to protect the publicity rights of dead celebrities have been introduced in New York and New Jersey.

In 2007, a bill that would recognize a postmortem right of publicity in perpetuity for any person deceased after January 1, 1938 was introduced as Senate Bill 6005 and Assembly Bill 8836 in the New York State Legislature. According to the summary of the bill on the New York State Legislature's Web site, http://assembly.state.ny.us/leg/?bn=A08836, it would prohibit use for advertising purposes of the name, portrait, voice, signature, or picture of a deceased person without the written permission of the individual's estate. The bill's purpose is to grant a pos-mortem right of publicity in New York so that "quick buck artists and unprincipled merchandisers who care nothing about the individuals concerned" cannot profit from use of a celebrity's likeness. The state legislature Web site indicates that the bill was amended after a third reading on June 14, 2007 and was then referred to the judiciary committee on Jan. 9, 2008.

In November 2007, the "Celebrity Image Protection Act" was introduced in the New Jersey State Legislature as Bill No. A4476 to recognize a postmortem right of publicity for a "deceased personality," defined as any person dying within 70

Dead Celebrities, *continued on page 38*

> "The image of a celebrity is not something the public can use generally ... no matter how popular the celebrity is."
>
> – Sheila Kuehl (D-Los Angeles) California State Senate

Free Speech

St. Paul Police Create New Guidelines for Investigating Protest Groups

Police Say New Rules Not Related to Convention; Critics Disagree

The St. Paul, Minn. Police Department has adopted new guidelines for investigating and gathering information on protest groups.

Critics have said the rules show that law enforcement officials intend to closely monitor and even infiltrate groups planning to protest the Republican National Convention (RNC) in St. Paul Sept. 1-4, 2008, but police officials have said the adoption of the policy has nothing to do with the upcoming event.

Police spokesman Tom Walsh told the Minneapolis *Star Tribune* for a Feb. 25, 2008 story that the document, the "Policy and Guidelines for Investigations and Information Gathering Operations Involving First Amendment Activity," was adopted as part of a broader revision of department policies and guidelines.

"We have completely redone our manual. We do that periodically. This is not tied to the RNC," Walsh said.

However, critics disagree.

The Associated Press (AP) reported February 25 that Bruce Nestor, an attorney for anti-war groups organizing protests at the RNC, said the timing "clearly indicates" a connection.

"I'm not surprised by the policy, but I think it represents the preparations of St. Paul police to be engaged in surveillance and infiltration of groups that engage in First Amendment activity," Nestor said.

The *Star Tribune* first reported on the policy, which was adopted by Police Chief John Harrington on Jan. 16, 2008, after requesting a copy from the department. The policy is available on the *Star Tribune* Web site at http://stmedia.startribune.com/documents/1stpaulpolicy.pdf.

The policy states that the St. Paul Police Department "must be proactive with developing sources of information to identify threats and illegal activities" in order to prevent "the commission of unlawful activities or terrorist acts … affecting the public safety." The policy says police will not investigate a group or individual when the investigation is "based solely on the lawful exercise of [the group's or individual's] constitutional rights;" rather, any investigation "shall be based on an existing criminal predicate or the reasonable suspicion that unlawful acts have occurred or may occur."

Although the policy calls for the "least intrusive techniques" to be used in gathering information while investigating, police may initiate a full investigation, which can include the use of confidential informants or undercover officers, when "reasonable suspicion" dictates.

According to the policy, the commander of the Police Department's Special Investigations Unit (SIU), David Korus, may authorize a full investigation after notifying Chief John Harrington or his designee. Korus is also required to seek permission for continued use of undercover investigations in writing every 120 days and to update the chief on the status of any ongoing investigation every 180 days.

According to the AP, Chuck Samuelson, executive director of the American Civil Liberties Union (ACLU) of Minnesota, said he was concerned because although the policy puts authority for investigation in the hands of Korus and Harrington, there is no requirement for outside review.

In the *Star Tribune* story, Alex Vitale, assistant professor at Brooklyn College who wrote a report for the New York ACLU on the 2004 RNC in New York City, expressed similar concerns about oversight.

"My big problem with [the policy] is the lack of independent oversight or accountability," Vitale said. "Basically you have police keeping a paper trail on their own decision-making, but how does anyone else know that they are adhering to those requirements?"

The policy also has a special provision for investigating members of the media. "If SIU is going to conduct an authorized investigation into a person who happens to be of the Mainstream media (such as a reporter) investigators will consult with a prosecuting attorney for guidance regarding obtaining data, records or information that may include portions of their work product for such media outlet. The investigator and Supervisor shall be aware of the legal restrictions to such data collection as it applies to both State and Federal law."

The Privacy Protection Act, 42 U.S.C. § 2000aa (1980), generally protects reporters from state or federal searches or seizures of their work product or documentary materials, including photos, film, video, and notes, as well as mental impressions or conclusions. Exceptions include when the reporter is the focus of the investigation, when seizure is necessary to prevent death or serious injury, or the material is in danger of being destroyed.

Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota, told the AP that the policy may single out members of the vaguely-defined "mainstream media" for deferential treatment, but leave behind new media such as political bloggers, or even the ethnic press.

"The First Amendment applies to anybody who's engaged in expressive activity," Kirtley said.

The policy also forbids undercover officers from instigating or encouraging illegal activity within a group under investigation, from "sowing seeds of distrust" among the members of the group, and from assuming any formal or informal position of leadership.

Police Policy, *continued on page 41*

"I'm not surprised by the policy, but I think it represents the preparations of St. Paul police to be engaged in surveillance and infiltration of groups that engage in First Amendment activity."

– Bruce Nestor
Minneapolis Attorney

Funeral Protesters, *continued from page 40*

Bennett reduced the $10.9 million award granted in October 2007 to $5 million by affirming the compensatory damage award of $2.9 million and reducing the punitive damages award to $2.1 million, citing "constitutional concerns of appropriateness" in his decision, according to a Feb. 5, 2008 AP story.

A Congressional Research Service (CRS) report entitled "Constitutional Limits on Punitive Damages Awards" published in updated form on July 17, 2007, states that the U.S. Supreme Court has struck down large punitive damages awards for violating the Fourteenth Amendment's Due Process Clause. Bennett indicated in his decision that he had to weigh the nature of the harm suffered by Snyder against the financial resources of the Westboro church.

Church members have stated that they will appeal the verdict, according to McClatchy Newspapers on Nov. 1, 2007, and said they believe that an appellate court will reverse the federal district court's ruling on First Amendment grounds. Church founder Reverend Fred Phelps told Reuters, "It will take the 4th Circuit Court of Appeals a few minutes to reverse this silly thing."

Snyder's attorney, Sean Summers, told McClatchy Newspapers that the First Amendment does not protect all speech. "The reality is that the First Amendment has survived 200 years without anyone protesting funerals, and I think it's safe to say that if this group is shut down and cannot protest funerals, the First Amendment will survive another 200 years," Snyder said.

At the appellate level, a recent 8th Circuit U.S. Court of Appeals decision arguably supports the Westboro church's First Amendment challenges to state statutes restricting protest at funerals.

In *Phelps-Roper v. Nixon*, 509 F.3d 480 (8th Cir. 2007), the 8th Circuit Court of Appeals ruled on Dec. 7, 2007 that Westboro church member Shirley Phelps-Roper was entitled to a preliminary injunction enjoining enforcement of a Missouri state statute, Mo. Rev. Stat. § 578.501, making it a misdemeanor offense to picket at a funeral one hour before or after the ceremony. Judge Kermit Bye, writing for the three-judge panel, stated that the 8th Circuit would not determine the constitutionality of the Missouri statute at issue. However, he added that "Phelps-Roper presents a viable argument that those who protest or picket at or near a military funeral wish to reach an audience which can only be addressed at such occasion and to convey to and through such an audience a particular message."

– Amba Datta
Silha Research Assistant

Police Policy, *continued from page 39*

According to the AP, Nestor said this aspect of the guidelines "appears to recognize some of the most outrageous abuses of the past" citing the case of New York City police who were criticized over their investigations preceding the 2004 RNC. The New York City police department was also criticized for sending officers around the United States and to Canada and Europe to monitor groups planning to protest the 2004 convention.

Walsh told the AP, "We've been saying from the very beginning that we are not following the New York model."

However, the AP said Walsh did not rule out the possibility that St. Paul police might travel outside the city to conduct an investigation permitted under the policy.

According to the *Star Tribune*, Nestor, along with the ACLU of Minnesota expressed concerns that "unlawful activity" is too low a standard, allowing the police to launch investigations for minor violations like marching without a permit or performing peaceful civil-disobedience protests. Nestor told the *Star Tribune* his greatest concern is that there is no requirement that police must show any element of violence or level of seriousness about committing a crime in order to trigger an investigation.

Walsh told the AP for its February 25 story that the policy does not say that St. Paul police are infiltrating or investigating groups.

"What we have said from the beginning is people who come to St. Paul to exercise their First Amendment rights are welcome to do so. People who come here to commit illegal acts will be arrested," Walsh said.

Denver will host the Democratic National Convention Aug. 25-28. The AP reported that the Denver Police Department's operations manual does not currently have a policy similar to the one adopted in St. Paul. A spokesperson for the Denver police said "information is unavailable at this time" on whether a policy is in planning, and a city council member said that, as far as he knows, no such policy is in the works, according to the AP.

– Patrick File
Silha Fellow and *Bulletin* Editor

Libel Tourist, *continued from page 42*
switching the burden of proof from the plaintiff to the defendant in a libel case violated the public policy contained in the First Amendment to the U.S. Constitution.

"The protection to free speech and the press embodied in [the First Amendment] would be seriously jeopardized by the entry of foreign libel judgments granted pursuant to standards deemed appropriate in England but considered antithetical to the protections afforded the press by the US Constitution," the *Bachchan* court held.

More recently, a three-judge panel of the 2nd Circuit U.S. Court of Appeals reached a similar conclusion based on New York law in *Sarl Louis Feraud International v. Viewfinder, Inc.*, 489 F.3d 474 (2d Cir. 2007). In a case based on French intellectual property law, Judge Rosemary S. Pooler wrote approvingly of the *Bachchan* decision.

In *Viewfinder*, French fashion design companies sought to enforce two French judgments holding Viewfinder liable under French copyright laws for posting pictures of the designers' clothing lines on the Internet. The pictures were taken at fashion shows.

Citing section 5304 and *Bachchan*, Pooler wrote that foreign judgments based on laws repugnant to the First Amendment will not be enforced in New York.

The 2nd Circuit panel sent the case back to the same New York District Court where Ehrenfeld filed her original lawsuit. Noting that First Amendment protections are not absolute, the Appeals Court directed the trial court to provide further consideration of whether Viewfinder's actions complied with the "fair use" doctrine and the First Amendment.

"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.

In January, less than a month after Ehrenfeld's loss in the New York high court, state legislators introduced bills in both houses that would provide for personal jurisdiction over libel tourists like bin Mahfouz and explicitly amend section 5304 to ensure that New York state courts would not recognize British libel judgments.

The Libel Terrorism Protection Act, S.6687 and A.9652, would extend New York's long-arm statute to cover plaintiffs in foreign libel suits who obtain judgments against New York residents. The bill requires that the publication at issue be published in New York and that the defendant in the foreign suit have assets in New York that may be used to pay the judgment or that the defendant in the foreign suit would be required to take actions in New York related to the foreign judgment. The bill grants personal jurisdiction for the limited purpose of determining whether New York courts should recognize the foreign judgment.

Under the proposed bill, a court sitting in New York could exercise personal jurisdiction over bin Mahfouz in the *Ehrenfeld* case for the limited purpose of determining whether a New York court should recognize the British libel judgment because bin Mahfouz was the plaintiff in a foreign libel suit related to a book published in New York, *Alms for Jihad*, and the defendant in the foreign suit, Ehrenfeld, is a New York resident with assets in the state that might be used to pay the foreign judgment.

The bill passed in the state senate on Feb. 27, 2008, but as of press time, the New York Assembly had yet to vote on it. According to a Feb. 29, 2008 report in the *New York Law Journal*, the senate vote was unanimous.

The bill, which is also frequently referred to as the Libel Terrorism Reform Act or the Libel Terrorism Prevention Act in the popular press, also amends section 5304 to ensure that libel judgments in foreign jurisdictions with less stringent press and speech protections will not be recognized in New York state courts. The proposed amendment states that foreign libel judgments cannot be recognized by New York courts unless the "foreign jurisdiction provides at least as much protection for freedom of speech and press as provided for by both the [U.S.] and New York Constitutions."

In addition to granting personal jurisdiction in New York courts over libel tourists like bin Mahfouz, the bill would codify the rule in *Bachchan* and ensure that British libel judgments will not be enforced in New York state courts.

If New York legislators pass the bill, Ehrenfeld would have to file a new complaint in federal court and convince that court that the exercise of personal jurisdiction over bin Mahfouz, as provided in the bill, does not violate due process protections contained within the Fifth and Fourteenth Amendments to the U.S. Constitution.

In *Yahoo!, Inc. v. La Ligue Contre Le Racisme Et L'Antisemitisme*, 433 F.3d 1199 (9th Cir. 2006), the 9th Circuit U.S. Court of Appeals exercised personal jurisdiction over two French civil rights groups in a case based on similar facts. *Yahoo!* began when the French civil rights groups obtained orders in French courts requiring Yahoo! to block users of its French Web site from accessing Web pages associated with Nazism. (See "Recent Developments in Internet Law: Court Clears Yahoo!" in the Winter 2003 Silha *Bulletin* and "Yahoo! Bans Sales of Nazi Memorabilia After French Ruling" in the Spring 2001 *Bulletin*.)

Yahoo! then sued in federal district court in California seeking a declaratory judgment to enjoin enforcement of the French order arguing, in part, that it violated the First Amendment. The District Court exercised personal jurisdiction over the French groups, and eight of 11 Circuit Court judges, sitting *en banc*, agreed.

The only substantial difference between *Yahoo!* and *Ehrenfeld* is the state in which the action was brought. California's long-arm statute, unlike New York's, extends personal jurisdiction to the limits imposed by constitutional due process requirements. However, under the 9th Circuit ruling, which is not binding on federal courts in the 2nd Circuit, if the

Libel Tourist, *continued on page 46*

Faculty Ethics, *continued from page 44*
post, entitled "The Plagiarism Trap: Is it Ethical to Shoot a Fly With a Bazooka?" stated that Merrill's actions did not constitute plagiarism. Plagiarism, which Clark dubbed the "scarlet letter of the literary world," should be reserved for the most serious cases of malpractice. Merrill's punishment was far out of proportion to his violation, Clark said.

"What we are left with instead," Clark concluded, "is a stain on a scholar whose work over decades has been judged original, and a good editor who looks more than a little like those Puritans who pinned a scarlet 'A' on ladies suspected of adultery."

Gene Foreman, former managing editor of the *Philadelphia Inquirer* and a professor of journalism at Pennsylvania State University, said that lifting quotations from another story is a "lesser transgression" than plagiarism, according to a *Missourian* story published Dec. 8, 2007. Stating that the column evidenced no "malicious intent" to plagiarize, Foreman concluded that Merrill was simply giving the reader background on the new department at the university.

On Dec. 8, 2007, the *Missourian* also published a commentary authored by four faculty members from the Missouri School of Journalism: Daryl Moen, George Kennedy, Jacqui Banaszynski, and Charles Davis, who stated that Merrill's punishment was too harsh. His lack of intent to defraud in this context, argued the authors, should have been a mitigating factor in determining his punishment.

However, the professors asserted that the allegation of plagiarism, if not the punishment, was accurate. "[B]y any reasonable definition," they asserted, "the use of material gathered by another writer, without crediting that writer, is plagiarism."

Other scholars contend that the *Missourian*'s editors share the blame for Merrill's misappropriation of the student reporter's material. Professor Linda Steiner of the Philip Merrill College of Journalism at the University of Maryland, and Deborah Kornmiller, reader advocate of the *Arizona Daily Star*, stated that Merrill was careless in his failure to credit the student reporter, but added that the *Missourian*'s editors should have been more careful as well, according to the December 8 *Missourian* story.

"Merrill's editors and those around him could and should have saved him. Surely they read the original piece. When a columnist writes something that is sure to rile what might be considered a sacred cow, I would expect there to be a conversation with the writer," Kornmiller said.

Some of the reader comments posted on the *Missourian*'s Web site at the conclusion of a Dec. 8, 2007 story reviewing the debate about the column's cancellation demonstrate that some readers thought Merrill had committed plagiarism and supported the paper's decision to cancel Merrill's column. The reader comments are available at the newspaper's Web site, http://www.columbiamissourian.com.

One commenter, identifying himself as J. Todd Foster, managing editor of the Bristol (Va.) *Herald Courier*, posted a comment on Dec. 11, 2007, stating that he would probably have fired Merrill for plagiarism, concluding, "I don't know too many editors in these lean, do-more-with-less times who would have time on deadline to question the sourcing of a distinguished 80-year-old professor, let alone assume he had taken someone else's quotes without attribution. Some journalists are expected to be self-policemen."

Northwestern University Journalism Student Alleges Dean Fabricated Quotations in Column

A Northwestern University student newspaper columnist set off a controversy when he alleged that the dean of the high-profile Medill School of Journalism fabricated quotes in an alumni magazine. An investigation of the incident by the university provost's office concluded that the dean did not make up the quotes, but some students and faculty continued to question the dean's commitment to ethical reporting principles.

In his Feb. 11, 2008 column, *Daily Northwestern* columnist David Spett, a Northwestern senior, alleged Dean John Lavine fabricated three anonymous quotations from students in columns titled "Letter from the Dean" that he wrote for two issues of the school's alumni magazine in 2007. Spett wrote that he became especially suspicious about the phrasing of an anonymous student quotation that appeared in Lavine's column in the spring 2007 issue of *Medill* magazine, praising an undergraduate advertising class.

Spett wrote that he had contacted all of the 29 students in the class and asked them whether they had made the following statement, which Lavine attributed to an unnamed Medill junior: "I came to Medill because I want to inform people and make things better. Journalism is the best way for me to do that, but I sure felt good about this class. It is one of the best I've taken, and I learned many things in it that apply as much to truth-telling in journalism as to this campaign to save teenage drivers." Spett said all of the students denied making the statement, even when he promised not to print their names.

Another quote in Lavine's column, attributed to a sophomore, concludes, "This is the most exciting my education has ever been. ..." The spring 2007 issue of *Medill* magazine is available online at http://www.medill.northwestern.edu/alumni/medillmagazine.aspx?id=64439.

According to a Feb. 12, 2008 post on the blog "news bites," which is available on the *Chicago Reader*'s Web site, http://blogs.chicagoreader.com/news-bites/2008/02/12/did-medills-dean-lavine-make-quote, Lavine has aroused the ire of some Medill faculty and alumni with his attempts to closely integrate Medill's journalism and marketing programs. The anonymous student quotations praise the class' multi-disciplinary approach, the blog reported.

Spett confronted the dean about the anonymous quotations during a tape-recorded interview, according to the February 11 column. Lavine told Spett that the "I sure felt good" quotation had come from a student e-mail, but he could not identify the student's name. "I wouldn't have quoted it if I didn't have it," he said.

Faculty Ethics, *continued on page 46*

Media Ethics

Cartoonist, Romance Novelist, Sex Columnist Caught Plagiarizing

Plagiarism problems plagued a variety of media in the fall and winter of 2007 and 2008, raising similar ethical dilemmas for cartoonists, romance novelists, and sex columnists and their editors.

Cartoonist Resigns after Copying 45-Year-Old* Mad Magazine *Cartoon

John Kilbourn, an award-winning cartoonist for the Park City, Utah *Park Record*, resigned in November 2007 after a local radio station reporter pointed out similarities between a Kilbourn cartoon and a *Mad Magazine* cartoon from 1962.

Rich Brough, a reporter at public radio station KPCW-FM, identified the similarities between Kilbourn's cartoon, which ran in the *Park Record* on Nov. 14, 2007, and one of cartoonist Mort Drucker's 1962 drawings for *Mad Magazine*, according to the *Salt Lake Tribune* on November 30.

Kilbourn's cartoon featured a parody of the Ben Cartwright family in the TV western "Bonanza" making fun of Park City officials for ignoring traffic problems on Bonanza Drive. Drucker had drawn the same image for a 1962 issue of *Mad*, although Drucker's cartoon was accompanied by a different caption, according to the *Salt Lake Tribune*.

A Nov. 30, 2007 *Deseret Morning News* story reported that Kilbourn told his editor that he felt he had made enough changes in the cartoon to make it his own and added that perhaps the newspaper should have put a tag line on the cartoon giving credit to Drucker.

Kilbourn told the *Salt Lake Tribune*, "[The cartoon] was pretty close to the original. What I should have done is put in an apology to Mort Drucker," he said. "To be honest with you, it was really late at night. I kind of do these as a side job and didn't think of putting it in there."

The *Salt Lake Tribune* reported November 30 that Kilbourn, *Park Record* editor Nan Chalat-Noaker, and publisher Andy Bernhard agreed that Kilbourn should resign.

Chalat-Noaker told the *Tribune* that after she saw a copy of the *Mad Magazine* cartoon Kilbourn had copied, "I was heartbroken and went to the publisher, and we took just one look at it and realized [Kilbourn's cartoon] should never have run. We called John and it was a mutual decision for him to resign," she said.

Romance Novelist Plagiarizes in Historical Romance Novels

Romance novelist Cassie Edwards, who specializes in historical romances about Native American Indians, admitted in a Jan. 10, 2008 Associated Press (AP) story that she had plagiarized from numerous sources, after bloggers who review romance novels uncovered material in some of Edwards' work that had appeared elsewhere.

The hosts of a romance novel blog Smart Bitches Who Love Trashy Books, http://www.smartbitchestrashybooks.com, said the didactic tone of specific passages from Edwards' works made the blog's author and a friend suspicious. They began tracking the similarities between passages in Edwards' novels and excerpts from other published works, including books about the traditions of Native American Indian tribes, that Edwards used without attribution in her historical romances. To do so, they entered excerpts from Edwards' books into the Internet search engine Google, according to a post on the blog last updated on Jan. 21, 2008 titled "Cassie Edwards Novels: Tracking Their Similarities to Passages Found In Other Books". The blog hosts tracked over 20 of Edwards' novels, finding that the best-selling romance novelist used passages from a wide variety of sources in her novels without attribution.

In a blog post dated Jan. 7, 2008, one of the blog's authors described the investigation into Edwards' works that she and a friend began after their suspicions were aroused by passages from Edwards' novel, "Shadow Bear," a novel set in South Dakota in the 1850s. In "Shadow Bear," Edwards used material from an article by freelance journalist Paul Tolme about the endangered black-footed ferret, which was published in the Summer 2005 issue of *Defenders*, a wildlife preservation magazine.

According to an article Tolme wrote for the Jan. 15, 2008 issue of *Newsweek*, a conversation in "Shadow Bear" between Edwards' hero, a Lakota chieftain, and pioneer heroine Shiona Bramlett about the origins of the ferret in North America and its breeding and feeding habits identically matched passages from Tolme's article in *Defenders*.

On Jan. 9, 2008, the AP reported that Edwards' publisher Signet Books asserted in a public statement that "Ms. Edwards has done nothing wrong." Signet said "[t]he copyright fair-use doctrine permits reasonable borrowing and paraphrasing of another author's words, especially for the purpose of creating something new and original."

The "fair use" doctrine stems from the Copyright Act of 1976, 17 U.S.C. § 107. In order to determine whether a use of a copyrighted work is fair use, four factors must be considered, including the purpose and character of the use; the nature of the copyrighted work; the substantiality of the portion used from the work in relation to the copyrighted work as a whole; and the effect of the use upon the potential market for the copyrighted work.

Two days after issuing its initial statement, Signet retracted its defense of Edwards and stated that it had reached a premature conclusion, according to a Jan. 11, 2008 AP story.

"We believe the situation deserves further review," Signet's new statement said. "Therefore we will be examining all of Ms. Edwards' books that we publish, and based on the outcome of that review we will take action to handle the matter accordingly. We want to make it known that Signet takes any and all allegations of plagiarism very seriously."

Edwards told the AP for its Jan. 10, 2008 story that she did not know that she had to credit her

Plagiarism, *continued on page 49*

> "To be able to tell the story of endangered ferrets to this romance novel reader audience, which is a passionate and frisky bunch, has been quite an experience and maybe a way for me to share a story with an audience that I might not have otherwise been able to reach."
>
> – Paul Tolme
> Freelance journalist
> plagiarized by author
> Cassie Edwards

McCain Story, *continued from page 48*

alleged romance] wasn't the sole aspect [of the *Times*' story] and it isn't the only aspect that ought to be of interest to the voting public. In a way, inserting the sexual angle has sort of deflected public attention from what I personally regard as the more important question: which is, 'is [McCain] acting as an independent legislator, or is he in somebody's pocket?'"

Alex Jones, director of Harvard's Shorenstein Center on the Press, Politics & Public Policy, told the *Washington Post* that the story was "absolutely appropriate. When you run for president, you should have your record scrutinized closely in every respect." Jones, a former *Times* reporter, said the paper demonstrated that McCain and Iseman had "a very close relationship. ... The only thing that seems to be in dispute is whether it was a romantic relationship, and that, frankly, is the least important part of it."

Jack Shafer, editor at large for the Web site Slate, said many of the story's critics missed the point. "The *Times* doesn't have to produce photographic evidence of the hot dog meeting the bun to cast suspicion upon the McCain-Iseman intimacies," Shafer wrote in his February 21 Pressbox column, available at http://www.slate.com/id/2184893. "If McCain were as close to a male lobbyist as he is Iseman, I'd want the *Times* to report it."

Hoyt lamented the distraction the romantic allegations created, writing, "The pity of it is that, without the sex, The Times was on to a good story."

– Sara Cannon
Silha Center Staff

Plagiarism, *continued from page 47*

sources when she used passages from other authors' works. "When you write historical romances, you're not asked to do that," she said.

In the Jan. 15, 2008 *Newsweek* story, Tolme wrote that he was initially angered when the bloggers contacted him and told him that Edwards had used his material without crediting him. Tolme noted that the Internet age presents challenges for freelance writers, many of whom fear that their work will be used without attribution or compensation.

However, Tolme told National Public Radio's "Talk of the Nation" host Neal Conan on Jan. 21, 2008, "[T]o be able to tell the story of endangered ferrets to this romance novel reader audience, which is a passionate and frisky bunch, has been quite an experience and maybe a way for me to share a story with an audience that I might not have otherwise been able to reach."

New York Press *Sex Columnist Resigns After One Column*

New York Press sex columnist Claudia Lonow resigned one day after her first column was printed after readers of the Jezebel blog suggested she had taken questions from an earlier column written by nationally-syndicated Savage Love columnist Dan Savage. The Jezebel post is available at http://jezebel.com/search/sex%20columnist/.

One of the questions featured in Lonow's column, Lip Service, which debuted on Jan. 23, 2008, concerned incest. According to a Jan. 23, 2008 post on Jezebel, a blog covering celebrities, sex, and fashion, the blog's features editor Moe Tkacik e-mailed *New York Press* editor David Blum to ask him how a reader could have submitted the question in advance of Lonow's first column. Blum replied, "since it was her first column, she solicited questions from friends ... that's how these columns tend to start, since it's hard to get questions from readers in advance. in future [sic] they'll come from readers." Blum's e-mail was excerpted in the January 23 Jezebel posting.

Blum described the process that led to his discovery that Lonow had used questions from Savage's column in a Jan. 24, 2008 *New York Observer* Media Blog post, found at http://www.observer.com/2008/blum-loses-another-sex-columnist-after-breach-journalism-ethics.

Blum said he was reading the comments to the Jan. 23, 2008 Jezebel post when he noticed a reader comment noting that the incest question was familiar and suggesting that it might have originated in a Savage Love column. The next morning, Blum identified the column Lonow had excerpted without attribution.

In a statement posted on the *New York Press* Web site on Jan. 24, 2008, the editors announced Lonow's resignation and stated that some of the questions in Lonow's first column were taken from a Savage Love column written by Savage in 2006. According to the statement, Lonow was "unaware that using questions from Savage's column was a breach of journalism ethics."

– Amba Datta
Silha Research Assistant

Monetizing, *continued from page 50*

Appeal's plan at his blog, McGuire on Media. McGuire said that the plan failed an ethics test because it did not maintain the newspaper's independence, either in fact or in appearance.

"Even if we convince ourselves the payment we received for that story does not compromise our independence because we are high-minded, pure as the driven snow and impervious to any sort of corruption, our readers still have to be convinced," McGuire wrote. "Will [*Commercial Appeal*] readers believe that a story about [FedEx's] interaction with China which they PAID for is a straight, honest account? No way."

Questions over Links to Ads in Online Text

In early November McGuire also reported in his blog on a local Arizona news organization's use of links in the text of news stories on its Web site to advertising.

According to a Nov. 2, 2007 blog post by McGuire, the (Phoenix) *Arizona Republic*'s AZ Central.com now links certain words in stories in the Sports, Business, Entertainment, Travel, and Home sections to ads. When the cursor hovers over the double-underlined words in a story, pop-up advertisements appear featuring links to companies. For example, in a Jan. 20, 2008 Associated Press story on AZ Central.com about a proposed federal tax rebate, the words "credit-card debt" linked to an ad for Countrywide home loans, and the word "tax" linked to an ad for H&R Block tax services.

According to McGuire, *The Atlanta Journal-Constitution*, *Reno* (Nev.) *Gazette-Journal*, and *Indianapolis Star* newspapers also use an in-text advertising tool on their Web sites. A Nov. 27, 2006 *Wall Street Journal* story cited by McGuire reported that mainstream news Web sites for Fox News and *Popular Mechanics* magazine were also using the service.

According to *The Wall Street Journal*, there are several online-ad brokers, including Vibrant Media Inc., Kontera Technologies Inc., and MIVA Inc. Advertisers pay either a fixed price to have their ads linked to specific keywords or bid against other advertisers in an auction. The ads generally run on a variety of sites, and advertisers pay only when users click on the ads.

According to McGuire's Nov. 2, 2007 blog post, Michael Coleman, Vice-President of Digital Media for AZ Central.com, said the contract between AZ Central.com and Vibrant Media provides that AZ Central.com cannot sell advertising for the Web site. The process is entirely automated; Vibrant Media's computer constantly scans the text and conceptually matches words. No more than three words per story can be linked to ads.

According to McGuire's blog and *The Wall Street Journal*, spokespeople for AZ Central.com, *Popular Mechanics*, and *The Atlanta Journal-Constitution* say they have received no negative feedback about the ads from visitors to their Web sites. AZ Central.com's Coleman, and Hyde Post, vice president for the Internet at *The Atlanta Journal-Constitution* said the Web sites restrict the ads to "soft" news sections like sports and entertainment.

"We want to test the waters on other stories before we do anything to embarrass ourselves or cause integrity problems," Coleman said.

The Wall Street Journal reported Nov. 27, 2006 that some odd juxtapositions between ads and stories have raised eyebrows. In September 2006, an ad for Target appeared in an Associated Press story on *The Atlanta Journal-Constitution*'s Web site about the death of celebrity Anna Nicole Smith's 20-year-old son. When the cursor was placed over the double-underlined name "Anna Nicole Smith," an ad with the words "Shop for Smiths. Save 10% to 20% online at Target.com" appeared. According to *The Wall Street Journal*, the ad was removed after about three hours. A screen capture of the ad can be viewed at http://www.adrants.com/images/smiths_for_sale.jpg. In part because of the mishap, *The Wall Street Journal* said Target stopped buying in-text ads.

According to *The Wall Street Journal*, some news organizations were uncomfortable with the idea of ads being linked to the text of editorial content. Forbes.com decided not to use the in-text ads after experimenting with them in the summer and fall of 2004, in part because reporters complained. For the Nov. 27, 2006 story, a spokeswoman for *The Wall Street Journal* said in-text ads will not appear on that newspaper's Web site because the ads "blur the line between advertising and editorial and 'interrupt the reader's experience.'"

Poynter's Bob Steele told *The Wall Street Journal* that the in-text advertising trend is "ethically problematic at the least and potentially quite corrosive of journalistic quality and credibility."

In a Nov. 7, 2007 blog post, McGuire said that although he understands that the newspaper business is facing profound challenges as a money-making venture in the digital age, in-text advertising is "a terrible mistake."

McGuire said the separation between advertising and reporting remains key to the credibility of news organizations. "[In-text advertising] will weaken and cheapen newspapers' effort to serve advertisers, and it will break any bonds of trust between newspaper and reader that might still exist," McGuire said.

Eau Claire, Wis. TV News Director Quits over Exclusive Source Deal

An ethics disagreement over a proposed exclusivity deal with a local hospital led to the resignation of the news director of WEAU TV-13 in Eau Claire, Wis.

The Eau Claire *Leader-Telegram* reported Jan. 15, 2008 that according to WEAU news director Glen Mabie and other sources, station management had attempted to negotiate a deal with local Sacred Heart Hospital in which WEAU would run medical stories featuring personnel from that hospital and its affiliates, but not employees of other area hospitals or clinics. According to the *Leader-Telegram*, Mabie said he was unsure whether the hospital would pay WEAU as part of the agreement.

Mabie, whose last day was January 11, said "my problem with this is it was going to dictate newsroom content. I told myself that I could not with a clear

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Monetizing, *continued from page 51*

conscience go into that newsroom and tell the staff that this was a good thing."

The *Leader-Telegram* reported that "several sources said the company decided not to proceed with the agreement," but WEAU Vice President and General Manager Terry McHugh declined to comment on any proposed agreement with the hospital, and Sacred Heart Hospital Regional Director for Marketing and Communications Becky Swanson said she was not aware of an exclusivity agreement with WEAU.

According to Gary Schwitzer, a professor of mass media ethics at the University of Minnesota and publisher of "Health News Review," a Web site which reviews the quality of health news in mainstream media, exclusivity agreements between news organizations and health care providers are "disturbingly" common.

"It is faux news – paid-for news with no disclosure to an unwitting audience," Schwitzer said. "Most people just don't understand how conflicted most of the health care news and information they receive really is."

David Gordon, professor emeritus of journalism at the University of Wisconsin-Eau Claire, told the *Leader-Telegram* for a January 16 editorial column by editor Tom Giffey that the appearance of undue influence on news judgment "just destroys the credibility of the newsroom."

"It's a question of who calls the shots, and if you have an agreement that you can't report on other hospitals in the area … [then health coverage is] not news; that's advertising being passed off as news," Gordon said.

– Patrick File
Silha Fellow and *Bulletin* Editor

***Times* Withholds Story**, *continued from page 52*

According to *CJR*, *New Yorker* reporter Coll said administration officials worried that if the U.S.-Pakistani talks were considered a violation of the NPT, it would limit U.S. diplomatic leverage with Iran. "It's not a trivial point, violating the NPT," Coll said.

According to *CJR*, "if the Times knew that PALs information had been exchanged with Pakistan, as seems likely, that means the paper deprived its readers of a chance to learn about a potential violation … by the Bush administration of U.S. laws and international nuclear non-proliferation obligations."

According to Politico, however, Baquet said that if the administration had again raised concerns about publishing the November 18 story, "we would have just pushed them aside," adding, "I think the news value was just so powerful."

– Patrick File
Silha Fellow and *Bulletin* Editor

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Media Ethics

Forum Addresses Ethics Questions for Online Journalism

Standards of ethics in the emerging realm of online journalism was the topic of a forum held at Minnesota Public Radio's (MPR) UBS Forum in downtown St. Paul on Feb. 25, 2008.

The forum was presented by the Minnesota Professional chapter of the Society of Professional Journalists (SPJ) and brought together representatives of the Twin Cities' professional print and broadcast media, the local online journalism community, journalism and mass communication scholars, and members of the public to discuss the role of traditional values of journalism ethics in blogging and online journalism.

Dan Gillmor was the evening's lead panelist. Gillmor is founding director of the Knight Center for Digital Media Entrepreneurship at Arizona State University's Walter Cronkite School for Journalism and Mass Communication. His book, "We the Media: Grassroots Journalism By the People, For the People" was published in 2004. MPR Managing Editor of Online News Bob Collins moderated the discussion.

The two-hour event featured a wide-ranging discussion. However, questions and comments from panelists and members of the audience returned to the central question of how standards for online journalists and those in more traditional media might be evolving in the Internet age.

According to Gillmor, asking the question "are bloggers journalists?" is the same as asking, "are people who write on paper journalists?" He said blogging is no more than a tool.

Gillmor said "what is journalism?" is a more important question to ask than "who are journalists?" for the purposes of determining standards and principles for online journalism, as well as for addressing legal issues like special access for journalists to courts and meetings, and special privileges like reporter shield laws.

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When asked whether he believed a blogger "code of ethics" or other general set of ethical guidelines would be useful, Gillmor said that responsible journalists, whether online or publishing in more traditional media, should adhere to basic principles. Reading from a small notebook, Gillmor cited "thoroughness, accountability, fairness, independence, and transparency" as important principles on which reporters and bloggers should base their ethical standards.

Gillmor also said that not only do journalists have the responsibility to work within ethical standards to report accurate information, but increasingly, the reading audience is also responsible for being more "literate" about media: knowing what information from which sources deserves its trust, and which do not meet its standards.

The audience-driven discussion returned several times to the February 22 *New York Times* story which alleged an inappropriate relationship between Republican presidential candidate Sen. John McCain (R-Ariz.) and a lobbyist, a story which many have criticized for its questionable sources and veracity. (See "*New York Times*' McCain Story Draws Much Criticism, Little Support" on page 48 of this issue of the Silha *Bulletin*.)

Collins asked whether the *Times'* poor judgment represented deteriorating standards in traditional media brought on by a lower online ethical standard creeping in.

Gillmor responded flatly, "no," adding that the story might be more indicative of "a *National Enquirer* standard moving up."

Contributing panel experts in attendance were Chuck Olsen of Web sites MNstories.com and The Uptake; Michael Caputo of MPR's "Public Insight Journalism" project; Jane Kirtley, director of the Silha Center and professor of media ethics and law at the University of Minnesota; Steve Perry of political Web site Minnesota Monitor; Dave Pyle, Associated Press Minnesota and Wisconsin bureau chief; Terry Sauer, managing editor of StarTribune.com; Wendy Wyatt, professor of media ethics at the University of St. Thomas; and Scott Libin, news director at WCCO-TV.

The forum was also available via streaming live video and audio at Metroblogging Minneapolis, http://minneapolis.metblogs.com/, and The Uptake, http://theuptake.org. Several bloggers also "liveblogged" the event, posting in real time during the discussion.

Event co-sponsors included the Silha Center for the Study of Media Ethics and Law, The Minnesota Journalism Center, The University of St. Thomas, The Associated Press, The Minnesota News Council, and the Minnesota Newspaper Association.

– Patrick File
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