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Obama Promises More Government Openness; Skeptics Demand Immediate Results

President Barack Obama took the oath of office on Jan. 20, 2009 and the next day renewed his promise of a new era of open government and public accountability. But despite several new executive orders and policy changes, the administration's continuation of some of Washington's traditional secretive practices has already drawn the criticism of open-government advocates.

Freedom of Information Act Memo

Obama released a memo on January 21 announcing changes to the way the executive branch would handle Freedom of Information Act (FOIA), 5 U.S.C. § 552, requests going forward, saying that under his administration there would be a "presumption of disclosure" for all FOIA requests.

"As Justice Louis Brandeis wrote, 'sunlight is said to be the best of disinfectants,'" Obama's memo said in its opening paragraph. "In our democracy, the [FOIA], which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government.

"In the face of doubt, openness prevails," the memo said. "In responding to requests under the FOIA, executive branch agencies … should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public."

The memo, published in the Federal Register at 74 Fed. Reg. 4683, was addressed to the heads of all executive departments and agencies. It represents a distinct departure from the Oct. 12, 2001 memo from then-Attorney General John Ashcroft that called for withholding any requested documents if there was a "sound legal basis" for doing so.

The Ashcroft memo told the department and agency heads that "you can be assured that the Department of Justice will defend your [FOIA] decisions unless they lack a sound legal basis." (See "Surveys on Access to Information Released" in the Summer 2003 Silha *Bulletin* for more on the Ashcroft memo and its affect on government access.)

In addition to acting on FOIA requests, the Obama memo said that individual departments should take "affirmative steps to make information public." Instead of waiting for requests, the memo instructed agencies to "use modern technology to inform citizens about what is known and done by their Government."

"For a long time now, there's been too much secrecy in this city," Obama said at a January 21 event welcoming senior staff and cabinet secretaries to the White House. "The old rules said that if there was a defensible argument for not disclosing something to the American people, then it should not be disclosed. That era is now over. Starting today, every agency and department should know that this administration stands on the side not of those who seek to withhold information but those who seek to make it known." The full transcript of the speech is available at http://spj.org/blog/blogs/foifyi/archive/2009/01/21/21864.aspx.

"The fact that Mr. Obama took these actions on his very first day in office signals a new era in government accountability," said Melanie Sloan, executive director of Citizens for Responsibility and Ethics in Washington (CREW) in a January 21 Associated Press (AP) story. "He is turning the page and moving away from the secrecy of the last administration."

CREW is a nonprofit advocacy group concerned with political accountability. It filed a lawsuit in May 2007 seeking White House e-mails under FOIA. See "Courts Continue to Deal with Bush Records Policies, E-mails" on page 12 of this issue and "Roundup: Government E-mails as Public Records" in the Fall 2008 Silha *Bulletin*.

The Society of Professional Journalists (SPJ) also praised the FOIA memo in a January 22 press release. "It's a good day for access to information," said Dave Cuillier, SPJ Freedom of Information Committee chairman in the statement. "The details are yet to be worked out, but now federal employees must err on the side of openness, and I'm hopeful that will result in shorter waits, fewer public records denials and better government accountability."

A story in the January 21 *Columbia Journalism Review* said that it was significant that the policy was expressed as an executive memo as opposed to a memo from a cabinet official. "An executive order is much stronger medicine. It is a directive from the president to government to do the following unless you're otherwise prohibited by law," said David Vladeck, a Georgetown University law professor, in the *Review* story.

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Obama Transparency, *continued from page 1*

Rolling back Obama's new executive directive on FOIA would be difficult, if only because would bring far greater attention. "This is something he wants the next president to have to rescind," Vladeck said. "He takes this very personally, and he wants his name on this, not [Attorney General] Eric Holder's."

Transparency and Open Government Memo

In addition to the FOIA memo, President Obama released a "Transparency and Open Government" memo on January 21, in which he stated he was "committed to creating an unprecedented level of openness in Government."

The memo, published in the Federal Register at 74 Fed. Reg. 4685, lists a series of characteristics the Obama administration said it is seeking to implement, specifically that government should be transparent, participatory, and collaborative.

The memo also directs the Chief Technology Officer, in coordination with the Director of the Office of Management and Budget and the Administrator of General Services, to "coordinate the development … within 120 days, of recommendations for an Open Government Directive … that instructs executive departments and agencies to take specific actions implementing the principles set forth in this memorandum."

One of the hurdles facing the implementation of this memo is that the office of Chief Technology Officer has not yet been created. The Web site Secrecy News observed in a February 2 post that "there are fundamental questions about the nature, role, authority, budget, and status of such a position that remain to be answered."

"The fact that Mr. Obama took these actions on his very first day in office signals a new era in government accountability."

Melanie Sloan — Executive Director, Citizens for Responsibility and Ethics in Washington (CREW)

Access to Presidential Documents

Obama also issued an executive order on January 21 that requires the incumbent president to consult with the attorney general and the White House general counsel whenever a request is made for information that a current or former president wishes to withhold.

"Information will not be withheld just because I say so," Obama said at the January 21 welcoming event at the White House. "It will be withheld because a separate authority believes my request is well-grounded in the Constitution."

Obama's new order, Executive Order 13489, 74 Fed. Reg. 4669, revoked President George W. Bush's Executive Order 13233, 66 Fed. Reg. 56025, which had been in place since November 2001. The order activates the new administration's policy regarding the Presidential Records Act of 1978 (PRA), 44 U.S.C. § 2201 *et seq*. The PRA makes presidential records the property of the public. Under § 2204 of the act, former presidents may restrict access to some of their records, subject to executive order, for up to 12 years after leaving office, at which point the records will become public and subject to the FOIA.

The old order, instituted by the Bush administration after the Sept. 11, 2001 terrorist attacks, allowed former presidents to assert executive privilege to keep some of their White House papers secret indefinitely. It allowed any past or present president to assert a privilege for any information pertaining to "military, diplomatic, or national security secrets; communications of the President or his advisors; legal advice or legal work; and the deliberative processes of the President or his advisors." Parts of the Bush order were ruled invalid by a federal judge in *American Historical Ass'n v. National Archives and Records Admin.*, 516 F. Supp. 2d 90 (D.D.C. 2007), which held that a portion of the order was "contrary to the terms of the PRA and lacks a valid constitutional basis."

No privilege may be exerted under the new order unless there is a "substantial question of executive privilege," defined in the statute as information that "might impair national security, law enforcement, or the deliberative processes of the executive branch."

In addition, under the new order, former presidents may ask to have certain documents kept secret, but they no longer may compel the National Archives to do so. Any request to keep the documents of a former president closed requires the consultation of "the Archivist, the Attorney General, the Counsel to the President, and such other executive agencies as the Archivist deems appropriate concerning the Archivist's determination as to whether to honor the former President's claim of privilege or instead to disclose the presidential records notwithstanding the former President's claim of privilege."

Gates Lifts Ban on Photographing Caskets

Obama's Secretary of Defense, Robert Gates, the lone holdover from Bush's presidential cabinet, announced on Feb. 26, 2009 that the Department of Defense was rescinding a long-standing prohibition against photographing caskets of returning war dead at Delaware's Dover Air Force Base after Obama asked him to review the policy.

"After receiving input from a number of sources, including all of the military services and organizations representing military families, I have decided that the decision regarding media coverage of the dignified transfer process at Dover should be made by those most directly affected, on an individual basis by the families of the fallen," Gates said at a news briefing from the Pentagon. "We ought not presume to make that decision in their place."

The new order calls for the creation of a "working group" to create a plan that allows families to decide whether news organizations may photograph the arrivals. The department's previous policy, in place since 1991 when it was implemented under President George H.W. Bush, was a blanket ban on all photographs of the caskets bearing the remains of military personnel.

Gates, who expressed his personal support for the new plan, was questioned at the briefing why the change was not initiated earlier. "I asked for a review of it a little over a year ago, and got a different answer than I got a few days ago," Gates responded. "And I was much happier with the answer I got this year."

Some military family groups opposed the new decision. "I'm very disappointed," said John Ellsworth in a February 26 *New York Times* story. Ellsworth's son was killed in Iraq in 2004. He is currently the president of Military Families United. "There was nothing wrong with the way things were.

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I believe that the administration basically caved to the special-interest groups, the antiwar groups, that are going to politicize our fallen," Ellsworth said. "What is the need to show these caskets, other than to try to inflame controversy?"

Richard Lacayo, the art and architecture critic at *Time* magazine, praised the decision in a February 27 story. "Pictures of the sacrifices necessary for a justifiable war won't make people turn their backs on it," Lacayo wrote. "They didn't do that during World War II. That's because pictures don't make up our minds for us. They don't tell us the answers and we don't expect them to. What they tell us is why the questions are important."

News organizations also praised the change in policy. "The public has a right to see and to know what their military is doing, and they have a right to see the cost of that military action," said Santiago Lyon, director of photography for the AP, in the February 26 *New York Times* story. "I think what we had before was a form of censorship."

Release of Controversial OLC Memos

On March 2, 2009, the Justice Department released nine memos produced by the Office of Legal Counsel (OLC) in the months after Sept. 11, 2001 that advocate a broad interpretation of executive power.

The OLC provides legal advice to the president and all the executive agencies through written opinions and oral advice, in addition to reviewing the president's executive orders and proclamations. According to its Web site, http://www.usdoj.gov/olc/, the OLC serves as "in effect, outside counsel for the other agencies of the Executive Branch [and] general counsel for the [Justice] Department itself."

According to a March 4, 2009 story in *The Washington Post*, Attorney General Eric Holder had promised during his confirmation hearing in the Senate to release the memos. Justice Department officials also said that after formal review, more of the now discredited memos would be released.

The memos offer legal justifications for expansive use of executive power to fight terrorism. For example, one memo, dated Oct. 23, 2001, argues that the President can order the military to perform searches and seizures within the United States without a warrant as part of its efforts to combat terrorism. Another memo, dated Jan. 15, 2009, five days before the Bush administration left office, repudiates many of the legal positions adopted in the earlier memos.

According to a March 3, 2009 article on Law.com, administration officials also acknowledged that 92 videos created by the Central Intelligence Agency (CIA) that depicted interrogations of terrorism suspects had been destroyed.

"Too often over the past decade, the fight against terrorism has been viewed as a zero-sum battle with our civil liberties," Holder said of the released memos, according to *The Washington Post*. "Not only is that school of thought misguided, I fear that in actuality it does more harm than good."

Promises of Openness in Economic Aid Programs

Obama has also indicated that under his leadership the government will be more transparent with federal programs designed to boost the ailing economy, such as the 2009 economic stimulus package and the remaining funds of a plan to bail out the nation's banks known as the Troubled Asset Relief Program (TARP), initially launched under the Bush administration.

The proposed openness regarding TARP funds is a marked departure from Bush administration policy. Senior Bush administration officials said they feared forcing banks to reveal what they did with government funds would deter participation in the program and cause adverse stock market reactions, *The New York Times* reported in a Feb. 10, 2009 story.

Obama administration officials have said they reject this approach. "The priority now has to be restoring trust, demonstrating that the financial system can be supported in ways that are accountable and transparent," said Lawrence H. Summers, director of the National Economic Council on the Feb. 9, 2009 edition of ABC's "This Week With George Stephanopoulos."

The Obama administration's plan mirrors the recommendation of a Government Accountability Office report released in December 2008. The report found that the U.S. Treasury had failed to address a number of critical issues regarding TARP funds and recommended that "monitoring aggregate information across the [TARP] participants would help ensure an appropriate level of transparency and accountability."

Obama administration officials have already made public hundreds of pages detailing bailout agreements with the nation's largest banks, and it promised to publish any new TARP contracts it entered into. However, Treasury Secretary Timothy Geithner has come under criticism for his lack of specificity in a Feb. 11, 2009 press conference intended to explain the details of the plan. Lynn Tilton, CEO of the equity firm Patriarch Partners, said "Everybody thought there was going to be an actual plan everyone could jump on, but then we didn't get details," according to a Feb. 11, 2009 AP story.

Geithner said in a Feb. 12, 2009 *New York Times* story that he wanted to finalize TARP's details before going public with the particulars of the plan. "I do not want to compound the mistakes of the last 12 months, when things were rushed out before they were ready, and strategy had to be adapted because of that," Geithner said. "If that means that there is going to be disappointment with the level of details until we get it right, I will live with that disappointment because it is better than the alternative."

Obama said that he also plans to keep expenditures in the $787 billion stimulus package signed on Feb. 17, 2009 open to public scrutiny.

At a Feb. 9, 2009 press conference held just before Congress passed the bill, Obama said the stimulus package "contains an unprecedented level of transparency and accountability so that every American will be able to go online and see where and how we're spending every dime."

Openness Policy Has Early Skeptics

Despite the early promises of openness, critics said the initial days of the Obama administration failed to produce the real change the candidate promised.

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"[L]ongtime civil servants[] figure they know how to run their offices better than a short-term presidential administration. Those who had been open continued to be so; those of a more secretive bent continued to be so. Policies don't always transfer into practice."

– Herb Strentz
Professor Emeritus,
Drake University

Obama Transparency, *continued from page 3*

Shortly after Obama took office, major news agencies refused to distribute White House-provided photos of Obama in the Oval Office on his first day and of Obama retaking the oath of office, arguing that access should have been provided to news photographers.

In a January 27 interview on the National Public Radio (NPR) show "All Things Considered," CBS White House reporter Bill Plante said news outlets needed to draw the line. "Do you originate the material, or do you function as a transmission belt for handouts from the government?" Plante said. "The whole idea of an independent press as guaranteed by the First Amendment is that it would serve as a watchdog and check on the power of government."

The AP, Reuters, and Agence France-Presse (AFP) said the White House was breaking with long-standing tradition in not allowing news photographers to capture the president at work in the Oval Office on his first day, the January 21 AP story said. "We are not distributing what are, in effect, visual press releases," said Michael Oreskes, managing editor for United States news at the AP.

The AP story said that news agencies have used White House-provided images in the past only for areas in the White House where media access is generally not permitted, such as the Situation Room or the private residence. But they contend that the Oval Office is the public office of the president and photographers should have access rather than be forced to rely on a government handout.

Vincent Amaluy, director of photography for North and South America for AFP, said in the AP story that he suspected the exclusion was the result of first-day confusion, not an attempt to clamp down on access.

In addition to the complaints about access for photographers, Lawrence Wright, a staff writer for *The New Yorker* magazine, said in a February 6 interview on NPR's "On the Media" that he had not noticed any changes in FOIA implementation, despite the new administration's promises. "I just don't think that the government is moving in the direction that the president has indicated," Wright said.

Washington Post media columnist Howard Kurtz also questioned Obama's media management tactics in a February 9 column. Kurtz said Obama demonstrated strategic media tactics when he signed an order allowing federal funds to be used for international groups that promote abortion. Reporters and cameras were not allowed at the signing, presumably in order to downplay the divisive issue, Kurtz wrote.

Kurtz referenced several other incidents where Obama was reluctant to talk with reporters. The column also said some journalists are bothered by Obama's practice of deciding the day before news conferences which reporters he is going to call on and notifying them in advance. Salon.com columnist Glenn Greenwald observed in a February 12 post that former President Bush was also known to use a pre-arranged list of reporters to call on for questions.

Kurtz reported that in his first week in office Obama toured the White House pressroom, but balked when a reporter asked a question about a Pentagon nominee. "Ah, see, I came down here to visit," Obama said. "See, this is what happens. I can't end up visiting with you guys and shaking hands if I'm going to get grilled every time I come down here."

A January 26 post on *The New York Times* politics blog The Caucus criticized the Obama administration's use of traditional "background briefing" sessions, in which no cameras are allowed and comments could be attributed only to "senior administration officials."

"Does an administration that has pledged to be the most open and transparent one ever really need to have routine briefings be on background, by an official who can't be named?" *Times* reporter Jeff Zeleny asked.

Obama Administration Claims 'State Secrets' Privilege

The continued use of the "state secrets" doctrine also elicited criticism in the early days of the Obama administration.

Despite promises of a thorough review of all state secrets claims, which the Bush administration often used to shield controversial anti-terrorism programs from lawsuits, government lawyers continued to invoke the state secrets privilege in a case before the 9th U.S. Circuit Court of Appeals in San Francisco, according to a February 10 AP story.

The state secrets privilege is an evidentiary rule that allows the Justice Department to avoid litigating a claim based solely on an affidavit swearing that continued litigation could expose state secrets and endanger national security.

The 9th Circuit case involves a lawsuit over the CIA's extraordinary rendition program, in which some former prisoners contend they were tortured. Proving the torture claims in court has been difficult, since evidence to corroborate the prisoners' claims has been protected by the president's state secrets privilege.

American Civil Liberties Union (ACLU) Executive Director Anthony Romero criticized the new administration's use of the legal doctrine in the San Francisco case in a February 10 AP story. "Candidate Obama ran on a platform that would reform the abuse of state secrets, but President Obama's Justice Department has disappointingly reneged on that important civil liberties issue," Romero said in a statement.

On the Nieman Watchdog blog, a site run by the Nieman Foundation for Journalism at Harvard University, Drake University Journalism Professor Emeritus Herb Strentz cautioned that similar promises of openness have been made by past administrations. "We've been here before. When the Clinton administration came in, his attorney general, Janet Reno, issued the same kind of marching orders in 1993 that the Obama administration issued today, reversing the 'don't disclose' polices of the George H.W. Bush and Ronald Reagan administrations," Strentz wrote.

"The intentions were laudable, as they are today. But not much changed. That's because the people in the trenches, including longtime civil servants, figure they know how to run their offices better than a short-term presidential administration. Those who had been open continued to be so; those of a more secretive bent continued to be so. Policies don't always transfer into practice."

– Jacob Parsley
Silha Research Assistant

Journalist Subpoenas and Shield Laws

Ashenfelter Pleads the Fifth in Ongoing Effort to Protect Confidential Sources

The battle over confidential sources between former Assistant U.S. Attorney Richard Convertino and *Detroit Free Press* reporter David Ashenfelter shifted from First Amendment freedoms to Fifth Amendment protections after Ashenfelter refused to answer questions at a Dec. 31, 2008 deposition, citing the right against compelled self-incrimination.

The Michigan judge overseeing discovery issues in the case ordered Ashenfelter to attend another deposition Feb. 26, 2009 or explain under oath why the Fifth Amendment privilege should apply. The order, *Convertino v. U.S. Department of Justice*, No. 07-CV-13842, 2009 WL 497400 (E.D. Mich. Feb. 26, 2009), directed the parties to hold the new deposition at the courthouse where U.S. District Court Judge Robert Cleland would be available to quickly dispose of subsequent issues.

On March 4, 2009, Ashenfelter filed an emergency motion asking Cleland for permission to explain his assertion of the Fifth Amendment *in camera*, meaning Cleland could privately review factual information submitted by Ashenfelter and might not share those facts with Convertino or his lawyers.

The December deposition was scheduled in response to an Aug. 28, 2008 order compelling Ashenfelter to answer questions about a story he wrote for the *Free Press* in 2004. The story detailed misconduct by the Justice Department in a terrorism trial led by Convertino.

Ashenfelter had previously refused to answer Convertino's questions about the story, citing a constitutional or common law reporter's privilege. But in the August order, *Convertino v. U.S. Department of Justice*, 2008 WL 4104347, No. 07-CV-13842 (E.D. Mich. Aug. 28, 2008), Cleland held there is no such privilege for reporters in the 6th Circuit and ordered Ashenfelter to answer questions about his sources. (See "Judge Orders Michigan Reporter to Give Up Sources in Privacy Act Case" in the Fall 2008 Silha *Bulletin*.)

Cleland later affirmed his decision in two November rulings refusing to reconsider whether Ashenfelter was entitled to a reporter's privilege. Those decisions are *Convertino v. U.S. Department of Justice*, 2008 WL 4998369, No. 07-CV-13842 (E.D. Mich. Nov. 21, 2008), and *Convertino v. U.S. Department of Justice*, 2008 WL 4852936, No. 07-CV-13842 (E.D. Mich. Nov. 7, 2008).

The dispute stems from a suit under the Privacy Act, 5 U.S.C. § 552a, filed by Convertino against the Justice Department in 2004, alleging officials in the department violated the statute when they leaked information about his conduct in the terrorism trial to reporters. Ashenfelter is not a party to the suit. (See "Gannett Co. Subpoenaed to Disclose DOJ Source" in the Fall 2006 Silha *Bulletin*.)

The Privacy Act makes it illegal for federal government agencies to disclose certain records that the agencies maintain about individuals without the consent of the named individuals. It also creates a private right of action for individuals to sue the government agency if those records are improperly disclosed.

Ashenfelter's latest attempt to protect the identity of his sources relies on the criminal provisions of the Privacy Act. The same statute that creates a civil cause of action for Convertino to sue the Justice Department could give rise to federal criminal sanctions for the Justice Department officials who allegedly leaked information to Ashenfelter. Because Ashenfelter allegedly participated in those crimes, he could be charged as a "co-conspirator and participant in, and accessory to" those crimes, his brief argues.

In addition to the Privacy Act, the Ashenfelter brief cites several additional federal statutes under which criminal charges for publishing confidential government information potentially could be brought including, among several others, statutes that criminalize disclosure of classified information, 18 U.S.C. §§ 798, 1905, and 1924; theft of government property, 18 U.S.C. § 641; and espionage, 18 U.S.C. § 793.

Therefore, a brief filed with the court on Jan. 21, 2009 argued, the court cannot compel him to divulge his sources of information on the 2004 terrorism trial under the Fifth Amendment because that testimony could later be used against him in a criminal proceeding.

The text of the Fifth Amendment guarantees that "No person … shall be compelled in any criminal case to be a witness against himself … ." According to Ashenfelter's brief, courts have interpreted the provision liberally and applied it in a variety of proceedings including depositions. The brief goes on to state that courts must uphold the Fifth Amendment privilege claim if there is sufficient evidence "to imagine the possibility" that Ashenfelter's testimony could "supply a link in the chain of evidence needed to prove a crime."

Ashenfelter has argued that courts must uphold the Fifth Amendment privilege claim if there is sufficient evidence "to imagine the possibility" that his testimony could "supply a link in the chain of evidence needed to prove a crime."

In a reply brief filed Jan. 28, 2009, Convertino argues that the Fifth Amendment claim is nothing but a tactic to delay a contempt order. The brief states that the statute of limitations has run out on most of the crimes Ashenfelter listed in his brief and that the Justice Department's investigation into the leak was closed more than four years ago.

"Accordingly, even were prosecution for most of the crimes Mr. Ashenfelter cites not barred by the statute of limitations, any fear of prosecuted [sic] he had was completely unreasonable and purely speculative – certainly insufficient to support an assertion of the Fifth Amendment," the Convertino brief states.

At a Feb. 11, 2009 hearing on the Fifth Amendment claim, Cleland initially seemed receptive to Convertino's argument that Ashenfelter's main purpose was delay, The Associated Press (AP)

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Journalist Subpoenas and Shield Laws

Nevada Shield Law Upheld; Reporter Does Not Have to Testify

A federal magistrate judge in Nevada held that "the plain language" of the state's reporter shield law confers an "absolute privilege," protecting a reporter from disclosing sources and other newsgathering information in a Jan. 30, 2009 ruling.

U.S. Magistrate Judge Peggy Leen issued the order in a defamation case filed by billionaire casino mogul Sheldon Adelson against a former employee, Moshe Hananel, The Associated Press (AP) reported Feb. 3, 2009. The decision means *Las Vegas Sun* reporter Rick Velotta will not have to testify at a deposition related to the suit.

In 2004 Velotta wrote about a disagreement in Israel between Adelson and Hananel about money the casino operator allegedly owed his employee for help with gambling operations in Macau, the *Sun* reported February 3. Adelson later filed the defamation suit against Hananel in Las Vegas, calling the Macau claim "preposterous on its face" and accusing Hananel of making false statements about their relationship in interviews with Velotta and other Las Vegas media members.

The *Sun* reported that Adelson's attorney filed court papers in December saying that he wanted to question Velotta about matters the attorney contended were not covered under the shield law, such as the reporter's education, experience, and news gathering practices, as well as the news gathering practices of the *Sun*.

But Leen rejected Adelson's request, stating that this was "merely an attempt to obtain indirectly what Adelson may not obtain directly under" the shield law. At the request of *Sun* attorney Mitchell Langberg, Leen quashed the subpoena requiring Velotta to give the deposition.

Nevada's shield law, Nev. Rev. Stat. § 49.275, states in part that "No reporter, former reporter or editorial employee of any newspaper, periodical or press association or employee of any radio or television station may be required to disclose any published or unpublished information obtained or prepared by such person in such person's professional capacity in gathering, receiving or processing information for communication to the public, or the source of any information procured or obtained by such person, in any legal proceedings, trial or investigation … before any court, grand jury, coroner's inquest, jury or any officer thereof … ."

According to a February 3 AP story, Leen's order cited Nevada Supreme Court rulings and "the plain language" of the state's reporter shield law, which she said confers an "absolute privilege from disclosure" of sources and information.

In 2000, Nevada's Supreme Court overruled previous precedent and interpreted the state's shield statute broadly in *Diaz v. Eighth Judicial Dist. Court ex rel. County of Clark*, 993 P.2d 50 (Nev. 2000), stating that "the news shield statute provides an absolute privilege to reporters engaged in the newsgathering process."

The *Diaz* court stated that the rationale behind the statute was "to enhance the newsgathering process and to foster the free flow of information encouraged by the First Amendment to the U.S. Constitution," and that it "serves an important public interest and provides absolute protection against compelled disclosure to ensure that through the press, the public is able to make informed political, social and economic decisions."

A federal district court in Nevada also previously held the state's shield law provides broad protection for reporters in the 1985 case *Newton v. National Broadcasting Co.*, 109 F.R.D. 522 (D. Nev. 1985). The court held that television reporters did not have to reveal the names of confidential sources in a libel suit against NBC television. The court determined that the Nevada legislature had "made a decision to favor the public's interest in access to information over an individual's interest in vindicating his reputation in a defamation action."

Sun Managing Editor Michael Kelley said the magistrate judge "made the right ruling in this case."

"The *Sun* will always battle to uphold the free press principles embodied in the Nevada reporters' shield law," Kelley said in the February 3 *Sun* story. "Any efforts to misuse our reporters will be vigorously opposed."

Langberg said he was "not surprised" by the decision and that "it was right, given the iron-clad nature of the Nevada shield law," according to a February 6 story by the Reporters Committee for Freedom of the Press.

The *Sun* reported that Adelson's attorney did not return calls regarding whether he will file a challenge to Leen's order with Senior U.S. District Judge Edward Reed Jr., who is presiding over the defamation suit.

– Jacob Parsley
Silha Research Assistant

"The *Sun* will always battle to uphold the free press principles embodied in the Nevada reporters' shield law. Any efforts to misuse our reporters will be vigorously opposed."

— Michael Kelley
Managing Editor,
Las Vegas Sun

Journalist Subpoenas and Shield Laws

Shield Law Bills Introduced Again in U.S. House and Senate

Federal shield bills have been introduced in the U.S. House and Senate that would limit the federal government's power to subpoena journalists. News organizations and press freedom advocates are optimistic about the chances that a shield bill creating a privilege will become law.

The House bill, H.R. 985, was introduced Feb. 11, 2009, and the Senate bill, S. 448, was introduced Feb. 17, 2009. Both are titled the Free Flow of Information Act of 2009 and are identical to the shield laws put before Congress in its 2007 session. In October 2007, the House passed a bill identical to H.R. 985 by a vote of 398 to 21. That was the first time that the full U.S. House of Representatives voted on and passed a journalist's shield bill. (See "House Passes Federal Reporter Shield Law" in the Fall 2007 Silha *Bulletin*.) The Senate version of the 2007 bill was approved by the Senate Judiciary Committee, but did not come to a vote before the Senate.

Both bills generally limit the federal government's power to compel journalists to testify or disclose their confidential sources or information in civil or criminal proceedings, but they contain numerous exceptions and qualifications.

The privilege offered in S. 448 can be overcome in non-criminal proceedings if a federal court determines that the party seeking to compel the journalist's testimony or disclosure "has exhausted all reasonable alternative sources;" if it is "essential to the resolution of the matter;" and "if the public interest in compelling disclosure of the information … outweighs the public interest in gathering or disseminating news or information." Meanwhile, in a criminal investigation, the privilege offered by S. 448 can be overcome if reasonable alternative sources have been exhausted, compelling disclosure outweighs nondisclosure, and, additionally, (i) "there are reasonable grounds to believe that a crime has occurred," (ii) the journalist's testimony or disclosure is "essential" to the investigation or prosecution, and (iii) when, in an investigation of an "unauthorized disclosure of properly classified information," the disclosure "has caused or will cause significant and articulable harm to the national security." H.R. 985 contains almost identical exemptions, but uses the word "critical" instead of "essential."

Both bills also include exceptions if a federal judge considers a journalist's testimony or disclosure necessary to prevent specific or imminent death, kidnapping, or substantial or significant bodily harm; to prevent "an act of terrorism" or other significant and specified or articulable harm to national security; or when the information sought was obtained as a result of witnessing or committing a crime, unless the crime alleged was the communication of the information sought. This last provision could be interpreted as being meant to protect whistleblowers who provide classified or secret information to a journalist, even if sharing the information could be considered committing a crime.

H.R. 985 includes additional exceptions for situations when a journalist's testimony or disclosure would identify a person who has disclosed a trade secret, "individually identifiable health information," or "nonpublic personal information." The House bill also states that it does not apply to "civil defamation, slander, or libel claims or defenses under State law, regardless of whether or not such claims or defenses … are raised in a State or Federal court."

Both bills require that the testimony or information sought be "limited to the purpose of verifying published information" and be "narrowly tailored in subject matter and period of time covered."

The privilege is granted to those defined as a "covered person." Both bills define "covered person" as a person engaged in "the regular gathering, preparing, collecting, photographing, recording, writing, editing, reporting, or publishing of news or information that concerns local, national, or international events or other matters of public interest for dissemination to the public," and they both explicitly exclude from that definition any foreign power, terrorist, or terrorist organization, as those terms are defined by federal law. Both laws include a covered person's "supervisor, employer, parent company, subsidiary, or affiliate." Neither bill provides a definition for what constitutes "local, national, or international events or other matters of public interest."

Significantly, H.R. 985 additionally requires that a covered person be engaged in the listed activities "for a substantial portion of the person's livelihood or for substantial financial gain."

Both H.R. 985 and S. 448 also grant the same privilege and exceptions to communications service providers such as phone companies, Internet service providers, or online information content providers. If a subpoena is issued to a communications service provider for a third party's records or information, such as a phone record or Internet protocol (IP) address, however, the third party must be given notice of the subpoena and given an opportunity to challenge it, unless the court determines that doing so would "pose a substantial threat to the integrity of a criminal investigation." S. 448 limits the delay of notification to 45 days, but H.R. 985 has no limit. (For more on subpoenas to communications service providers, see "Subpoenas Seek to Identify Anonymous Web Site Commenters and Viewers" on page 21 of this issue of the Silha *Bulletin*.)

A coalition of press freedom advocates and media organizations supporting the federal shield law have expressed optimism about the bill's chances with a new administration in Washington. In a Feb. 11, 2009 press release, the Society of Professional Journalists (SPJ) said it was "encouraged that President Obama has indicated his support for a federal shield law." SPJ is among a number of organizations lobbying on behalf of a federal shield law, including the Newspaper Association of America, Reporters

Federal Shield, *continued on page 8*

The House version of the bill requires that a covered person be engaged in journalism "for a substantial portion of the person's livelihood or for substantial financial gain."

Ashenfelter, *continued from page 5*

reported Feb. 12, 2009. "Looks like someone is playing games, sandbagging," Cleland said. "That poses a very problematic situation."

But later in the hearing, the judge heard testimony from a Justice Department lawyer who said she could not say whether Ashenfelter or his sources would be criminally prosecuted for the 2004 leaks, the AP report said. "There could be circumstances where there could be an ongoing conspiracy," attorney Elizabeth Shapiro said. "It's not helpful to respond with maybes, but I'm not able to give you anything concrete."

Cleland held that there are three scenarios where the Fifth Amendment privilege might apply. The first two – questions that call directly for an incriminating answer and questions that appear to call for innocent answers but "are dangerous in light of other facts already developed" – did not apply because Ashenfelter refused to answer all but four questions and the factual record contained very little information from which inferences about future prosecutions could be drawn, Cleland wrote.

But the third – questions that appear innocent but are met with "sufficient evidence such that the 'court can, by the use of reasonable inference or judicial imagination, conceive a sound basis for a reasonable fear of prosecution'" – may apply if Ashenfelter testifies or swears to facts that show there is a possibility he will be prosecuted. It is not enough, Cleland wrote, for Ashenfelter's attorneys simply to argue that he may be prosecuted for a crime.

William Gertz, a *Washington Times* reporter, had some success with a similar Fifth Amendment argument in front of a federal judge in California in July 2008, *The Sun* (New York) reported July 25, 2008. When asked to reveal the identity of a source who supplied information about a confidential grand jury hearing, Gertz declined, citing the Fifth Amendment privilege. But according to *The Sun*'s story, the judge later ruled Gertz did not have to testify based on First Amendment news gathering protections rather than compelled self-incrimination concerns.

– Michael Schoepf
Silha Fellow

Federal Shield, *continued from page 7*

Committee for Freedom of the Press, Radio and Television News Directors Association, and Investigative Reporters and Editors. The National Press Photographers Association has a list of 71 organizations and media corporations that expressed support for the Free Flow of Information Act as of February 11, available at http://nppa.org/news_and_events/news/2009/02/coalition.html.

Then-Senator Barack Obama was a co-sponsor of the 2007 Senate shield bill, and he expressed support for a shield law in April 2008 while campaigning for president.

Attorney General Eric Holder said in his confirmation hearing before the Senate Judiciary Committee that he supports the idea of a federal shield law, the *San Francisco Chronicle* reported Jan. 16, 2009. In response to questions from Committee Chairman Sen. Patrick Leahy (D-Vt.), Holder said he would favor "a carefully crafted law to shield the press" that would leave the Justice Department with "the capacity to protect national security and to prosecute any leaks in intelligence that may occur," the *Chronicle* reported. By contrast, then-Attorney General Michael Mukasey and other Bush administration officials had encouraged the former president to veto any federal shield law Congress passed.

According to a February 17 press release, Sen. Arlen Specter (R-Pa.), one of the Senate bill's sponsors, called the shield law "necessary because we have seen in recent times a flurry of subpoenas being issued to reporters to disclose their confidential sources, and a reporter's source of information really depends upon their being able to fulfill a commitment of confidentiality."

Journalists who have fought federal subpoenas recently include *Detroit Free Press* reporter David Ashenfelter, who faces contempt and fines for refusing to disclose confidential sources related to his reporting on a high-profile terrorism trial, and former *USA Today* reporter Toni Locy, who was ordered to pay escalating fines of up to $5,000 per day before the D.C. Circuit threw out her contempt order in November 2008. (See "Ashenfelter Pleads the Fifth in Ongoing Effort to Protect Confidential Sources" on page 5 of this issue of the Silha *Bulletin*, along with "Judge Orders Michigan Reporter to Give Up Sources in Privacy Act Case" and "Court Throws Out Locy Contempt Order" in the Fall 2008 issue.)

For much more on the ongoing federal shield law issue, see the "Silha *Bulletin* Guide to Journalist's Privilege," a comprehensive guide to the legal history, rationale, and challenges for the privilege, published in the Spring 2008 Silha *Bulletin*. The *Bulletin* has extensively covered recent efforts to pass a shield law as well as numerous federal subpoenas to journalists. Please check the *Bulletin* archive online at http://www.silha.umn.edu/Bulletin/bulletinarchive.htm.

– Patrick File
Silha Fellow and *Bulletin* Editor

FOIA and Access

2nd Circuit: Detainee Identities Can Be Kept Secret under FOIA

The 2nd Circuit U.S. Court of Appeals ruled Jan. 5, 2009 that the privacy interests of Guantanamo Bay detainees and their families who were the subject of investigations of prisoner abuse outweigh the public interest in their personal information being released to The Associated Press (AP).

The unanimous decision by a three-judge panel in *Associated Press v. Department of Defense*, 554 F.3d 274 (2d Cir. 2009), held that The Freedom of Information Act (FOIA), 5 U.S.C. § 552, does not compel the Defense Department to release identifying information about detainees who were allegedly abused by military personnel, identifying information about detainees who were allegedly involved in detainee-against-detainee abuse, or identifying information about family members who had sent letters to detainees. The Defense Department had redacted the personal information from about 1,400 pages released following two FOIA requests made by the AP in 2004 and 2005.

Judge Peter W. Hall cited a series of U.S. Supreme Court rulings on FOIA privacy exemptions in ruling that the AP failed to show how the information, if released, would serve the public interest in a way that would outweigh the detainees' and families' privacy interests.

The Defense Department cited FOIA privacy exemptions 6 and 7(c) in redacting the information. Exemption 6 applies to "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," and exemption 7(c) applies to law enforcement records, the release of which "could reasonably be expected to constitute an unwarranted invasion of personal privacy."

Hall quoted *Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), a case in which the U.S. Supreme Court found that FBI-compiled arrest records, or "rap sheets," could be withheld under FOIA's privacy exemptions, in writing that under exemption 7(c), there is a recognized "privacy interest in keeping personal facts away from the public eye." Hall said that such "personal facts" include the redacted detainees' names, addresses, and other personal information.

Hall also cited *Department of State v. Ray*, 502 U.S. 164 (1991), which held that "an individual's privacy interest is particularly pronounced where disclosure could lead to embarrassment or retaliation." Hall wrote that the disclosure of the names of detainees who allegedly have been abused by military personnel or other detainees, as well as those who abused other detainees, "could certainly subject them to embarrassment and humiliation."

Hall wrote that under *Reporters Committee*, the only relevant interest counter to the privacy interest is "to open agency action to the light of public scrutiny." According to *National Archives and Records Admin. v. Favish*, 541 U.S. 157 (2004), Hall wrote, the AP must show a "significant" public interest more specific than having the information for its own sake, and that the information is likely to advance that interest. Moreover, allegations of misconduct may not rest on a "bare suspicion," but require evidence warranting a reasonable person's belief that misconduct may have occurred.

The AP argued that the disclosure of the detainees' names would add context to the abuse allegations based on knowledge of their religion or nationality, would allow the public to evaluate the Defense Department's transfer and release decisions, and would help the public to seek out the detainees' side of the story.

Hall wrote that the AP's first argument, which "implies that [the Defense Department] may have responded differently to allegations of abuse depending on the nationalities or religions of the abused detainees" did not rise above a "bare suspicion" of misconduct, which was an inadequate justification for disclosure under *Favish*. The AP's second argument, that the release of detainees' names would allow public tracking to see how they were transferred and treated in other contexts, was stronger, Hall wrote, but its "speculative nature" rendered it insufficient as well. Lastly, Hall said the AP's argument that disclosure would allow the public to seek out the detainees' side of the story was a "derivative use theory" and the "minimal public interest" that it might serve was not enough to outweigh the detainees' privacy interests.

Hall wrote that the detainees' family members' names qualified as "similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy" under exemption 6, and that the information is of a type "that a person would ordinarily not wish to make known about himself or herself." The AP failed to show how disclosing their names would inform citizens about "what their government is up to," Hall wrote, again quoting the *Reporters Committee* decision.

The 2nd Circuit decision reversed a ruling by Judge Jed Rakoff of the Southern District of New York granting summary judgment to the AP, which said that the information should be released because detainees, like prisoners, have minimal privacy rights, and in fact they would want their allegations of abuse to be publicized. Meanwhile, Rakoff said there was "considerable public interest" in the subject of detainee abuse and in "the context in which the [Defense Department] was called upon to evaluate the allegations." Attorney David A. Schulz said the AP did not seek a rehearing in *Associated Press v. Department of Defense*, and a decision on whether it would file for *certiorari* with the U.S. Supreme Court was pending.

The January 5 decision in *Associated Press v. Department of Defense* was the second ruling handed down by the 2nd Circuit in just over a month turning back an AP FOIA request related to the detention and prosecution of alleged terrorists.

AP FOIA, *continued on page 11*

The AP argued that the disclosure of the detainees' names would help the public to seek out the detainees' side of the story.

FOIA and Access

Minnesota High Court Approves Cameras-in-Court Pilot Program

Cameras Also Allowed in Court for Coleman-Franken Trial

After nearly two years of debate and competing reports from an advisory committee, the Minnesota Supreme Court ordered Feb. 12, 2009 that current procedures governing electronic media coverage in the state's courtrooms should be retained until a pilot project and concurrent study can be completed.

Meanwhile, down the hall in the state high court's own courtroom at the Minnesota Judicial Center in St. Paul, a coalition of media groups streamed live coverage of the U.S. Senate recount trial over the Internet. The electronic coverage of Sen. Norm Coleman's (R-Minn.) challenge to Democrat Al Franken's 225-vote lead in the Senate race is one of the only examples of courtroom footage in the nearly 30 years since cameras were effectively banned at Minnesota trials.

Based on the language of the new rule alone, a judge could allow electronic coverage of a trial over the objection of one or both of the parties. Nevertheless, it remains unclear what effect the omission of the party consent requirement will have.

Minnesota Supreme Court Orders No Change to Camera Rules; Calls for Pilot Program to Study Cameras

Current Minnesota judicial procedures bar still cameras, video cameras, and audio recorders from both trial and appellate court proceedings unless both parties and the judge agree to let them in. The February 12 state Supreme Court order retains those same procedures while making a series of non-substantive changes to improve clarity and calling for further study of the issue.

The order follows nearly two years of debate by the Supreme Court Advisory Committee for General Rules of Practice. The committee ultimately concluded by a 16-3 majority that the current rules should be retained. But the three minority members submitted their own report, arguing the requirement of party consent should be abandoned, and that instead the judge should have discretion to allow cameras over the objection of one or both parties. (See "Minnesota Considers Cameras in Trial Courtrooms" in the Fall 2007 Silha *Bulletin*, "Minnesota Advisory Committee Resists Cameras in Courts" in the Winter 2008 Silha *Bulletin*, and "Minnesota Supreme Court Holds Hearing on Cameras in Courts" in the Summer 2008 Silha *Bulletin*.)

The Supreme Court's order deletes rules governing cameras from Canon 3A(11) of the Minnesota Code of Judicial Conduct and adds nearly identical provisions to Rule 4 of the General Rules of Practice. According to the advisory committee comments, the change was meant to add clarity to the rules and make them easier to find without making substantive changes. A concurring opinion by Justice Christopher Dietzen also states the order was not intended to make substantive changes to procedures governing media coverage of trials.

The original order, issued Feb. 12, 2009, inadvertently omitted the party consent requirement, but a corrective order issued on March 12 fixed the mistake. A pilot program to study cameras will be based on the recommendations from the minority report that the party consent requirement be scrapped.

The rule also retains other restrictions and technical requirements intended to limit the disruption electronic coverage may cause. For example, cameras are barred from certain types of trials, such as juvenile proceedings. Further, in trials where electronic coverage is permitted, only one still camera and one video camera are allowed, with the images to be pooled and shared by participating media organizations.

The order also calls for the advisory committee that studied electronic coverage of courts to prepare a pilot program by Jan. 15, 2010 for further study of "the impact of cameras on proceedings and on participants … ." The order requires the committee to prepare a proposal for funding the pilot project and the study associated with it, stating that funding should come from outside the Minnesota judiciary's regular budget.

"Most states allow cameras in the courtroom, and the evidence seems clear that cameras themselves do not impact the actual in-court proceedings. But this court remains concerned by the fact that there is no empirical evidence addressing whether the prospect of televised proceedings has a chilling impact on victims and witnesses," the court stated in its order calling for a pilot project and a study.

The pilot program will study how cameras affect trial participants and witnesses. During the pilot project, each trial court judge will have discretion to allow cameras without the party consent requirement that has effectively barred cameras from nearly every courtroom since the rule was adopted in 1983.

Justice Alan Page dissented from the court's opinion. Citing scholarly research, Page argued that the media often portrays people of color, especially African Americans, in an unfavorable light. He wrote that electronic coverage of criminal trials could further distort public perceptions of African Americans.

"[G]iven the media's documented treatment of African Americans and other people of color accused of crime, I can only conclude that expanding the use of cameras will not assist in the court's obligation to prevent 'unjustified and mistaken deprivations,'" Page wrote, referring to the U.S. Supreme Court procedural due process case *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

Rick Kupchella, a television reporter and past-president of the Minnesota Society of Professional Journalists, said the order was a victory for proponents of electronic coverage of trials in a Feb. 12, 2009 Associated Press story. "The message is

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Cameras in Courts, *continued from page 10*

very clear, in reading that opinion, that cameras are coming into Minnesota courtrooms. … We hope that by beginning to get our feet in the door here, we can establish that the existence of cameras is not an inherent jeopardy to people in their right to a fair trial," he said.

A copy of the February 12 order, which took effect March 1, 2009, can be found at http://tinyurl.com/bg4bbd.

Electronic Media Allowed in Coleman-Franken Recount Trial

As debate continued over electronic coverage rules, Minnesotans had a rare chance to watch live and recorded video coverage of a trial as attorneys for Al Franken and Norm Coleman argued about which candidate won the November 2008 Senate election.

The three-judge panel specially appointed to oversee the election contest ruled Jan. 21, 2009 that one still camera, one video camera, and one recording device could be used by a pool of media organizations covering the trial. The ruling followed a request from a group of media organizations, led by The Associated Press (AP), interested in electronic coverage of the trial.

The ruling contained several restrictions aimed at limiting distractions associated with media coverage of the trial. For example, laptop computers for taking notes were prohibited, and seating was on a first come, first serve basis with no preference for journalists.

In addition to petitioning the court, the AP group sent letters to Coleman and Franken asking them to agree to electronic coverage, as required by then-controlling Canon 3A(11).

"This case is not only of great interest to nearly all Minnesotans but inevitably the object of partisan rancor and suspicion. Live electronic coverage presents a perfect opportunity to serve the public's legitimate interest in the evidence, while at the same time demonstrating the fairness of the proceedings," the Jan. 14, 2009 letters to the judges, Coleman, and Franken said.

National media interest in the trial waned as it continued for more than a month, but pictures of the proceedings continue to appear in local newspapers and short segments of video emerge regularly on local television. Additionally, The Uptake, a local online only media outlet, has webcast the entire trial live on its Web site.

The Silha Center is preparing a report on electronic coverage of the Minnesota Senate trial that will be published after the trial concludes.

– Michael Schoepf
Silha Fellow

AP FOIA, *continued from page 9*

On Dec. 1, 2008, another three-judge panel of the 2nd Circuit affirmed a district court ruling that the privacy interests of so-called "American Taliban" John Walker Lindh, who pled guilty in 2002 to terrorism-related charges, outweighed the public interest in the Justice Department releasing Lindh's 2006 petition for commutation of sentence.

The *per curiam* opinion in *Associated Press v. Department of Justice*, 549 F.3d 62 (2d Cir. 2008), held that the Justice Department properly withheld Lindh's petition under FOIA exemptions 6 and 7(c). The court said disclosing the petition would qualify both as an "unwarranted invasion of personal privacy" and "a clearly unwarranted invasion of personal privacy" because it "requires the applicant to provide his name, social security number, date and place of birth, criminal record, conviction information, information about any post-conviction relief sought, a detailed account of the circumstances surrounding the offense, and a detailed explanation of the reasons clemency should be granted." The court said the AP "failed to show that release of the information would shed light on the workings of government."

In a footnote, the court added that the AP had also contacted Lindh through his attorney, asking him to provide all or part of the petition, but the negotiation failed when the AP insisted on more personal information than Lindh was willing to provide. "Because AP is unsatisfied with Lindh's offer to release the petition redacted only to the extent necessary to protect his personal privacy and safety," the court said, "it is difficult to escape the conclusion that AP seeks release of purely private information."

On Jan. 13, 2009, the AP reported that it asked that either the original three-judge panel to reconsider its finding in *Associated Press v. Department of Justice* or that the full appeals court hear the case.

– Patrick File
Silha Fellow and *Bulletin* Editor

FOIA and Access

Courts Continue to Deal with Bush Records Policies, E-mails

As President George W. Bush prepared to make way for his successor, Barack Obama, on Jan. 20, 2009, a trio of lawsuits filed by watchdog groups concerned with the preservation of Bush administration records continued to wind their way through federal courts in Washington.

Citizens for Responsibility and Ethics in Washington (CREW) and George Washington University's National Security Archive (NSA) alleged in the first two lawsuits that the outgoing administration's e-mail preservation policies failed to comply with the Federal Records Act. The suits, which were later combined, allege the executive branch staff lost somewhere between five and 23 million messages beginning in 2003 and ending in 2005. (See "Roundup: Government E-mails as Public Records" in the Fall 2008 Silha *Bulletin*.)

> "President Obama on Day One ordered the government to become more transparent, but the Justice Department apparently never got the message, and that same day tried to dismiss the very litigation that has brought some accountability to the White House e-mail system."
>
> – News Release, George Washington University's National Security Archive

After more than a year of procedural fights and appeals, a federal district court judge issued an order Jan. 14, 2009 directing the outgoing administration to search all computers and other hardware for the missing e-mails, and directing executive branch employees to turn over any "media" that might contain the messages.

The next day, a magistrate judge issued a second order clarifying the scope of the requirements in response to a government motion. The magistrate judge ruled that the order applies to both executive branch agencies and offices within the White House. The order can be found at *CREW v. Executive Office of the President*, CV Nos. 07-1707, 07-1577, 2009 WL 102146 (D.D.C. Jan 15, 2009).

The administration had argued that only those offices and agencies whose records are governed by the Federal Records Act (FRA), 44 U.S.C. § 2101 *et seq.*, should be required to turn over computers and other media for the search. Offices covered by the Presidential Records Act (PRA), 44 U.S.C. §§ 2201–2107, the administration argued, should be exempt.

The PRA covers the White House itself, while the FRA covers executive branch agencies that are not part of the president's office. The suit was brought under the FRA, which creates a right of action that allows citizens to bring suit to enforce its provisions. The PRA provides for more limited judicial review. But the magistrate judge ruled that agencies and offices covered by both statutes were bound by the order.

A key difference between the two statutes is that most FRA agency records are immediately available to the public through the Freedom of Information Act (FOIA), 5 U.S.C. § 552, while the PRA requires that the White House preserve the records but does not make them available through FOIA for between five and 12 years after the president has left office.

A January 15 CREW news release called the orders a "major victory" in the battle to recover the missing e-mails. "We are gratified the Court recognized that unless these materials are preserved, the country faces the loss of historic records of national importance. Even once a new administration takes office, CREW will continue seeking to hold the Bush administration accountable for its role in the disappearance of the 14 million emails," CREW's chief counsel Anne Weismann said in the release.

It remains unclear whether the orders will effectively preserve the missing e-mails, or even whether any e-mails remain missing. On January 21, government lawyers filed a motion to dismiss four of the watchdog groups' claims, arguing that they were moot because 23 million missing e-mails had already been found.

The government motion acknowledged that some e-mails had been miscounted and appeared to be missing from White House servers, but argued that subsequent government action proved all the messages were later accounted for. The brief argued that "technical limitations" led to a counting error that made 2005 records appear 23 million messages short even though all 104 million e-mails were present.

The government argued that their actions to correct the technical error proved "agency action" and mooted the claims alleging failure to comply with statutory mandates. "Under controlling D.C. Circuit law, such *agency action* in the face of allegations of *agency inaction* moots any entitlement to relief and deprives this Court of subject matter jurisdiction," the brief said.

That motion came one day after President Bush left office and the archived e-mails and backup tapes were shipped to the National Archives and Records Administration (NARA) in accordance with the PRA. Weismann told the Huffington Post in a Jan. 27, 2009 story that the only thing left to do is wait. Under the PRA, the e-mails and other records turned over to NARA by the Bush administration are not available for public inspection until at least 2014.

But in court papers filed February 20, the NSA disputed the government's argument that all the missing e-mails had been found and the case was moot. The brief argued that the uncertainty surrounding the controversy and the lack of evidence divulged by the White House created a possibility that some e-mails remained missing.

"When there is a risk of records destruction, the FRA requires, and can only be satisfied by, one specific enforcement action: initiation of legal action through the Attorney General," the brief argued. It said that because the court retained authority to order the attorney general to initiate a court action to recover the allegedly lost e-mails, the case remained an active dispute with a potential remedy.

According to a Feb. 21, 2009 news release issued by the NSA, the January 21 motion signaled the new administration's willingness to continue to fight the lawsuit. "President Obama on Day One ordered the government to become more transparent, but the Justice Department apparently never got the message, and that same day tried to dismiss the very litigation that has brought some accountability to the White House e-mail system. Justice could have pulled back from that first misstep but they have not. The White

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Bush Records, *continued from page 12*

House e-mail presents a high-level test of the new Obama openness policies, and so far, the grade is at best an incomplete," NSA director Tom Blanton said in the release.

The second suit, filed in September 2008, sought a declaratory judgment and mandamus from a federal district court judge in Washington D.C. directing Vice President Dick Cheney to comply with the PRA.

Enacted in 1978, the PRA makes all the records created by the White House public property and directs that they be preserved. It states in part that "the President shall take all such steps as may be necessary to assure that the activities, deliberations, decisions, and policies that reflect the performance of his constitutional, statutory, or other official or ceremonial duties are adequately documented and that such records are maintained as Presidential records … ."

Section 2207 of the statute states that "Vice-Presidential records" should be treated identically to Presidential records, and charges the Vice President with formulating a policy to make and keep those records.

The lawsuit, also filed by CREW and several other open government advocates, highlights the limited scope of review available under the PRA compared to the FRA. In *CREW v. Cheney*, No. 08-1548, 2009 WL 113472 (D.D.C. Jan. 19, 2009), the court held that even though CREW had demonstrated through discovery that procedures developed by Cheney may not comply with the statute, the court lacked authority to order changes.

"To the extent that this case highlights any deficiencies in – or unintended consequences of – the PRA, that is an issue for Congress to consider. This Court is bound to apply the law only as it is written, not how the Court or any party believes it ought to be," Judge Colleen Kollar-Kotelly wrote.

CREW argued in the lawsuit that Cheney's record retention policies violated the PRA because the policies incorrectly limited the definition of the activities that require record keeping. CREW also argued that the NARA violated the statute by failing to direct the vice president on how to correctly preserve official records.

The PRA requires that vice presidents maintain records about their "constitutional, statutory, or other official or ceremonial duties." According to the court, that broad definition should include all the vice president's activities, whether he is performing executive functions or serving as the president of the Senate.

But CREW pointed to a Nov. 1, 2001 executive order issued by President George W. Bush that said the PRA only applies to "executive records," and several public appearances where Cheney argued the vice president is not part of the executive branch, in an effort to show Cheney was not complying with the PRA.

Cheney's office responded with a series of inconsistent factual assertions, initially arguing the PRA had limited applicability to vice presidential records, but soon abandoning that position and asserting that all records related to the vice president's duties were in fact consistently cataloged and reserved in accordance with the PRA. Kollar-Kotelly chastised the vice president's lawyers for the inconsistent positions, but following discovery, she dismissed the claims against the NARA and granted summary judgment in favor of the vice president.

As to the NARA, the opinion said that the court could not order the agency to provide the vice president with updated directions and procedures for properly cataloging records because the NARA lacked authority to direct the records preservation process. According to the opinion, the PRA incorporates an assumption that the vice president would act in good faith, and therefore does not provide the NARA with power to order particular record keeping procedures.

"Congress limited the scope of judicial review and provided little oversight authority for the President and Vice President's document preservation decisions. As a consequence, even though Plaintiffs in this case have identified (through discovery) that the National Archives and Records Administration may have provided the Vice President with document preservation guidance that conflicts with the requirements in the PRA, Plaintiffs cannot obtain relief under the Act *as Congress enacted it*," the opinion said (emphasis in original).

Moving to the claims against Cheney, Kollar-Kotelly held that the lawsuit raised several questions about whether the vice president's office was properly preserving records. She also held that the PRA provides for judicial review of those claims in conjunction with private rights of action available under the Declaratory Judgment Act, 28 U.S.C. § 2201, and the Mandamus Act, 28 U.S.C. § 1361.

But the court nevertheless granted summary judgment for the vice president because Cheney's most recent position conceded that the vice president must preserve all records related to his "*constitutional*, statutory, or other official or ceremonial duties" and the court was obligated to accept that position. "[T]he Court expects that all of the Defendants will, in good faith, comply with the representations that their officials have made, by way of testimony, in this case," Kollar-Kotelly wrote.

According to a Jan. 20, 2009 *Washington Post* story, one of the plaintiffs said he had less faith than the court that Cheney would comply with the requirements of the PRA. "When the Archives goes to open Cheney's papers, they are going to find empty boxes," said Stanley I. Kutler, an emeritus professor of history and law at the University of Wisconsin Law School.

"[Cheney] spent most of his time making sure he left no footprints," Kutler said in the *Post* story. "Why did he fight this order so much if he did not have the intent to leave with these papers? I'm guessing that a lot of it will not be there."

Under the PRA, whatever records Cheney did preserve were handed over to the NARA at noon on Jan. 20, 2009. They will start to become available to historians and researches under the FOIA after a five-year holding period.

– Michael Schoepf
Silha Fellow

FOIA and Access

FERPA Expanded; Critics Call New Rules 'Irrational'

The United States Department of Education released a 54-page document on Dec. 9, 2008 that detailed several modifications to the enforcement of the Family Educational Rights and Privacy Act (FERPA). The new rules, which went into effect on January 8, essentially expand the definition of what constitutes a confidential "education record" under federal privacy standards.

FERPA is also known as the Buckley Amendment, 20 U.S.C. § 1232 *et seq*. It was passed in 1974 to condition the receipt of federal funds on whether educational institutions met its privacy requirements regarding the "education records" of students. Additional regulations for FERPA are listed in 34 C.F.R. § 99.1 *et seq*.

Generally, FERPA requires that a school obtain written permission from a student or parent before releasing any information from a student's "education record," unless the requesting party is a qualified school official, law enforcement agency, or other party specifically listed in 34 C.F.R. § 99.1.

The introduction to the rule changes stated that the amendments were "needed to implement a provision of the USA Patriot Act and the Campus Sex Crimes Prevention Act, which added new exceptions permitting the disclosure of personally identifiable information from education records without consent. The amendments also implement two U.S. Supreme Court decisions interpreting FERPA, and make necessary changes identified as a result of the Department's experience administering FERPA and the current regulations." The entire rule, including summaries and examples, is available at http://www.ed.gov/legislation/FedRegister/finrule/2008-4/120908a.pdf.

Of particular interest to media groups were the Department's modifications pertaining to 34 C.F.R. §§ 99.3 and 99.31(b). The regulations prohibit the release of "personally identifiable information" in most circumstances. Under the new regulations, "personally identifiable information" includes not only such information as a student's name, address, and social security number, but any "other information that, alone or in combination, is linked or linkable to a specific student that would allow a reasonable person in the school community, who does not have personal knowledge of the relevant circumstances, to identify the student with reasonable certainty," and "information requested by a person who the educational agency or institution reasonably believes knows the identity of the student to whom the education record relates."

The Department of Education said in the Federal Register notice accompanying the final regulations that the decision was based solely on concern for student privacy.

"FERPA is not an open records statute or part of an open records system. The only parties who have a right to obtain access to education records under FERPA are parents and eligible students," the Register notice stated. "Journalists, researchers, and other members of the public have no right under FERPA to gain access to education records for school accountability or other matters of public interest, including misconduct by those running for public office."

The Register notice also explained the use of the "reasonable person" standard in determining whether information could be released. "The 'reasonableness' standards … do not require the exercise of subjective judgment or inquiries into a requester's motives. Both provisions require the disclosing party to use legally recognized, objective standards by referring to identification not in the mind of the disclosing party or requester but by a reasonable person and with reasonable certainty, and by requiring the disclosing party to withhold information when it reasonably believes certain facts to be present."

The Federal Register notice also emphasized that new regulations provided for nondisclosure based on whether information is personally identifiable "with regard to what a reasonable person in the school or its community would know."

"For example, it might be well known among students, teachers, administrators, parents, coaches, volunteers, or others at the local high school that a student was caught bringing a gun to class last month but generally unknown in the town where the school is located … a school district may not disclose that a high school student was suspended for bringing a gun to class last month, even though a reasonable person in the community where the school is located would not be able to identify the student, because a reasonable person in the high school would be able to identify the student," the notice said.

Critics of the new regulations said they will make it much more difficult for journalists and parents to investigate the performance of schools and colleges.

"The [Department of Education] made no attempt to strike a balance between legitimate privacy interests and the public's right to hold schools accountable. [It] simply said that accountability doesn't matter and that its only concern is secrecy," said Frank LoMonte, the executive director of the Student Press Law Center (SPLC) in a December 15 press release. "[The Department of Education]'s interpretation flies in the face of every court ruling to interpret FERPA, and it goes well beyond what Congress intended in enacting the law."

LoMonte was especially critical of the Department's specific example that it would seal the information of a student suspended for bringing a gun to school. "The public has a right to know essential safety information such as what steps administrators take when they catch a student carrying a gun into a high school." LoMonte said. "There is no legitimate 'privacy' interest in committing a felony on school grounds, and the Department's insistence on protecting the 'privacy' of a would-be school shooter over the safety interests of the public shows

FERPA, *continued on page 16*

"[The Department of Education's] interpretation flies in the face of every court ruling to interpret FERPA, and it goes well beyond what Congress intended in enacting the law."

– Frank LoMonte, Executive Director, Student Press Law Center

Government Wiretaps

Former NSA Analyst Says Wiretap Program Included Journalists

A former National Security Agency (NSA) analyst said the agency's warrantless surveillance program monitored American news organizations and domestic communications, contrary to assertions by the Bush administration that the program targeted only communications between U.S. residents and suspected terrorists overseas.

Russell Tice, one of the anonymous sources for the Dec. 16, 2005 *New York Times* story that first made the wiretapping program public, said that the program included journalists' communications and U.S. citizens' domestic phone calls and faxes, according to a Jan. 22, 2009 story posted on the *Wired* magazine blog Threat Level.

Tice spoke with MSNBC host Keith Olbermann on "Countdown with Keith Olbermann" on Jan. 21, 2009. "[I]t didn't matter whether you were in Kansas, you know, in the middle of the country, and you never made … foreign communications at all. They monitored all communications," Tice said, according to a transcript of the interview available online at http://www.msnbc.msn.com/id/28794766/.

Tice said he initially thought the NSA monitored news organizations in order to prevent the agency from targeting them. "[I]n one of the operations that I was in, we looked at [news] organizations just supposedly so that we would not target them. So that we knew where they were, so as not to have a problem with them," he said. Tice said that he ultimately realized, however, that the NSA conducted the collection of news organizations' and journalists' communications around the clock, and that the information was not being discarded. Instead, the information was digitized and put on a database, but Tice said he did not know what was done with the information after that.

Tice also said that the NSA specifically tailored briefings to congressional committees in order to prevent disclosure of the domestic wiretapping program. He told Olbermann that a kind of "shell game" existed – the NSA would tell congressional intelligence committees that a program was a defense program and therefore under the defense committee's purview, and then tell the congressional defense committee that a program was an intelligence program, thereby avoiding disclosure to either committee.

In a second appearance on Olbermann's show on January 22, Tice said he did not know whether the NSA targeted specific journalists or news outlets. "But, you know, from the avenue I know about, everyone was collected. So they sucked in everybody. And at some point, they may have cherry picked from what they had. I wasn't aware of who got cherry picked out of the big pot," Tice said. A transcript of Tice's second interview with Olbermann is available at http://www.msnbc.msn.com/id/28817572/.

In 2006, President George W. Bush said that the NSA's secret wiretapping program was targeted at terrorism suspects making international communications to or from the United States. He described the program in a Jan. 23, 2006, speech at Kansas State University. "What I'm talking about is the intercept of certain communications emanating between somebody inside the United States and outside the United States; and one of the numbers would be reasonably suspected to be an al Qaeda affiliate or al Qaeda," Bush said. "I repeat to you, even though you hear words, 'domestic spying,' these are not phone calls within the United States."

New York Times reporter James Risen, who co-authored the story regarding the domestic warrantless wiretapping program with reporter Eric Lichtblau in 2005, told Olbermann on the January 22 program that he might have been among the reporters whose communications were monitored.

Risen's phone records were disclosed to a federal grand jury investigating information contained in his 2006 book "State of War" regarding CIA efforts to halt Iran's nuclear program. (See "Reporters Fight Federal Subpoenas" in the Winter 2008 Silha *Bulletin*.) Risen told Olbermann that he did not know whether his records had been obtained by the FBI through a warrant or through the NSA spying program. He also said the NSA program could have "a chilling effect on potential whistleblowers in the government to make them realize that there's a Big Brother out there that will get them if they step out of line."

The NSA fired Tice in May 2005, according to a Jan. 22, 2009 story on technology news Web site Ars Technica. In his first interview with Olbermann, Tice said his firing was linked to inquiries he began to make regarding the use of the information that was gained from wiretapping, saying the NSA fired him when he tried to investigate the program more closely.

Questions regarding Tice's credibility were raised shortly after he revealed to ABC News that he was one of Risen and Lichtblau's anonymous sources on Jan. 10, 2006. A Jan. 11, 2006 post on CBSNews.com's blog Public Eye said Tice's critics questioned his credibility as a source and alleged that he was embittered by his firing from the NSA.

Citing a May 5, 2005 *Pulse-Journal* (Mason, Ohio) story, Public Eye stated that Tice might have been fired from the NSA in part because he reported suspicions that a former co-worker at the Defense Intelligence Agency, where Tice worked until 2002, was a spy for China after noting that the woman "voiced sympathies for China, traveled extensively abroad and displayed affluence beyond her means."

After Tice reported his suspicions to the NSA, he was ordered by the agency to submit to a psychological evaluation, which determined he suffered from psychotic paranoia, the *Pulse-Journal* reported. In a letter to the Department of Defense Office of Inspector General's Civilian Reprisal Investigations division, Tice wrote, according to the

Wiretapping, *continued on page 16*

> "[I]t didn't matter whether you were in Kansas, you know, in the middle of the country, and you never made ... foreign communications at all. They monitored all communications,"
>
> – Russell Tice
> Former analyst,
> National Security
> Agency

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just how arbitrary and irrational these rules are."

The Society of Professional Journalists reacted to the regulations by sending a letter to various members of Congress who served as ranking members of education-related committees. The letter, dated January 6, said the new regulations would hinder school accountability and diminish public safety.

"As we move toward a more market-based, competitive model for improving school performance, families should be entitled to more, not less, information before choosing the school in which their children enroll," the letter said. "We hope you will consider calling for hearings on this issue in order to prevent FERPA from being expanded, via the new regulations, to require the secrecy of records that in no way infringe on the privacy of individual students."

– Jacob Parsley
Silha Research Assistant

Wiretapping Journalists, *continued from page 15*

Pulse-Journal story, that the psychologist "admitted that I did not show any of the normal indications of someone suffering from paranoia."

Tice was terminated in early 2005 shortly after he spoke to a congressional committee, testifying in favor of legislation to protect federal whistleblowers, the *Pulse-Journal* reported. The 1989 Whistleblower Protection Act, 5 U.S.C. §2302, does not cover federal employees in the intelligence community. Federal whistleblower protection for national security employees remains a contested issue, according to a Feb. 18, 2009 *Washington Post* story. The *Post* reported that provisions providing stronger protections for national security whistleblowers were removed from the stimulus package signed by President Obama on February 17.

The American Civil Liberties Union (ACLU) has challenged the U.S. government's warrantless wiretapping program in the U.S. District Court for the Southern District of New York in a pending case, *Amnesty International v. McConnell*, No. 1:2008-CV-06259 (S.D.N.Y. 2008), on behalf of a coalition of journalists, authors, and activists. The FISA Amendments Act of 2008, PL 110-261, 122 Stat. 2436 (codified as amended in scattered sections of 50 U.S.C.), which was enacted July 10, 2008, authorizes the government to monitor the international communications of U.S. citizens without first obtaining a warrant. The ACLU asserts the FISA amendments are unconstitutional because they violate the First Amendment right to free speech and the Fourth Amendment prohibition against unreasonable searches and seizures.

The Reporters Committee for Freedom of the Press (RCFP) filed a friend-of-the-court brief in the case on Dec. 19, 2008, asserting that the FISA amendments should be declared unconstitutional. The RCFP brief stated that the amendments violate the First Amendment rights of journalists by eliminating their ability to communicate with sources confidentially and by undermining the role of the news media as a watchdog. The RCFP *amicus* brief is available online at http://www.rcfp.org/news/documents/20081219-amicusbrie.pdf.

– Amba Datta
Silha Research Assistant

International

Accused Politkovskaya Conspirators Acquitted

Editors, Reporters Threatened and Harassed in Russia

On Feb. 19, 2009, a jury unanimously acquitted three men accused of helping to organize the 2006 killing of Russian journalist Anna Politkovskaya. The presiding judge ordered the case reopened and press freedom advocates are demanding a renewed and vigorous investigation.

The New York Times reported February 19 that Sergei Khadzhikurbanov, a former police officer, was accused of organizing logistics for the killing, and Chechen brothers Dzhabrail and Ibragim Makhmudov were accused of acting as a lookout and driver for the unidentified triggerman. The three men have been in custody since they were among 10 people arrested in August 2007 as part of the investigation. *The New York Times* reported that a fourth acquitted suspect, former Federal Security Service Lt. Col. Pavel Ryaguzov, was tried alongside the other three because he had criminal ties to them, but was not accused of playing a role in the murder itself. The Silha *Bulletin* reported in the Summer 2008 issue that investigators had previously said Ryaguzov provided Politkovskaya's address to the killers. (See "Charges Filed in Politkovskaya Murder, Killer Still at Large" in the Summer 2008 issue and "Russia: Politkovskaya Investigation Continues; Reporter Detained for Alleged Extortion" in the Fall 2007 Silha *Bulletin*.)

Politkovskaya was shot and killed in the lobby of her Moscow apartment building on Oct. 7, 2006. The circumstances of her death led many to speculate that the killing was in retaliation for her outspoken criticism of government officials and policies targeting Chechnya, the topic for much of the reporting for which she was renowned. *The Washington Post* characterized the shooting as an "apparent contract killing," the killer having left the murder weapon at the feet of the victim as an assassin's mark. (See "Famed Russian Reporter Murdered in Contract Killing" in the Fall 2006 Silha *Bulletin*.)

The Committee to Protect Journalists (CPJ) reported Feb. 19, 2009 that lead investigator Petros Garibyan told Politkovskaya's former employer *Novaya Gazeta* in October 2008 that a third Makhmudov brother, Rustam, is Politkovskaya's suspected killer. Rustam remains at large and is sought on an international warrant, and investigators have yet to name the suspected mastermind of the killing, the CPJ reported.

The New York Times reported Nov. 20, 2008 that when the trial began, Judge Yevgeny Zubov announced that it would be open to the media, but then reversed himself a day later saying that jury members had requested that it be closed. The trial was reopened after juror Evgeny Kolesov said that no such request had been made. Kolesov said a court secretary had given jurors a petition requesting that journalists be barred from the trial on the grounds that the jury was frightened, and had asked them to sign it, but the jurors had all refused. Instead, Kolesov said, jurors asked for the removal of television crews and photographers, but said print media reporters could remain in the courtroom. According to the CPJ on Feb. 19, 2009, Kolesov was later dismissed from the jury for talking to the media.

The New York Times reported February 19 that following the acquittals, Zubov ordered the Russian Investigative Committee to reopen the case. Prosecutors said they will appeal the acquittals of Khadzhikurbanov and the Makhmudov brothers.

Press freedom advocates called on government investigators to find and prosecute Politkovskaya's killers. CPJ Europe and Central Asia Program Coordinator Nina Ognianova said, "Though we respect the jury's decision … based on the presented evidence, we are deeply disappointed at the continued impunity in the murder of Anna Politkovskaya. We call on Russian authorities to work with renewed commitment and vigor to find all responsible for this terrible crime and bring them to justice."

According to The Associated Press on January 20, Amnesty International Europe and Central Asia Program Director Nicola Duckworth said in a statement "The end of the trial does not lift the onus from the authority to find the murderer and his sponsors," and a press release from Reporters sans Frontieres (RSF or Reporters without Borders) said, "Until the triggerman and the masterminds are identified, it will be impossible to know who ordered this murder and why. Everything remains to be done."

RSF was specifically critical of Russian authorities' efforts thus far, stating the acquittal resulted from "an incomplete investigation that was brought to trial prematurely."

In the meantime, harassment and murders continue to threaten Russian journalists.

On Jan. 19, 2009, part-time *Novaya Gazeta* reporter Anastasia Baburova and human rights lawyer Stanislav Markelov were shot and killed while walking on a Moscow sidewalk.

According to CPJ, Baburova and Markelov were leaving a press conference at approximately 3 p.m. when a man approached Markelov and shot him in the back of the head. CPJ said local media reported that Baburova had apparently tried to stop the killer when she was also shot in the head. Markelov died immediately; Baburova died later in a Moscow hospital.

Novaya Gazeta deputy editor Sergei Sokolov told CPJ, "It appears that Markelov was the main target," but added *Novaya Gazeta* was waiting for official investigation results to determine whether Baburova was also targeted.

CPJ reported that at the press conference Markelov had criticized the early release of a former tank commander that had been convicted and imprisoned on charges of murdering a Chechen girl. Markelov

Politkovskaya, *continued on page 19*

> "Though we respect the jury's decision ... based on the presented evidence, we are deeply disappointed at the continued impunity in the murder of Anna Politkovskaya."
>
> – Nina Ognianova
> Europe and Central Asia Program Coordinator, Committee to Protect Journalists

International

Iraq Remains the Deadliest Nation for Journalists

Deaths Down Overall, but Arrests Up, Especially for Online Journalists

> "Afghanistan was the forgotten war; that's what they were calling it, actually. Now it's swapping places with Iraq."
>
> – Michael Yon
> Freelance reporter

Although Iraq remains the deadliest country in the world for journalists, the total number of reporters killed in Iraq in 2008 dropped significantly from the record numbers of deaths in the preceding two years, in part reflecting a decline in Western media presence there.

A report issued Dec. 18, 2008 by the Committee to Protect Journalists (CPJ), a non-profit organization dedicated to defending press freedom, said that 11 journalists were killed in Iraq in 2008 for reasons connected to their work, making Iraq the most dangerous country in the world for journalists for the sixth consecutive year.

However, CPJ's report noted that the number of journalists killed has dropped significantly from 2007 and 2006 when there were 32 recorded journalist deaths in Iraq each year. CPJ's report is available at http://cpj.org/reports/2008/12/for-sixth-straight-year-iraq-deadliest-nation-for.php.

In a report issued Dec. 20, 2008, the Paris-based free press advocacy organization Reporters sans Frontieres (RSF or Reporters without Borders) recorded 15 deaths in Iraq, a higher number than CPJ's findings, but nevertheless representing a marked decrease from its 2007 report, which documented 47 journalist deaths in Iraq. RSF's report is available at http://www.rsf.org/article.php3?id_article=29797. Both the CPJ and RSF reports noted that journalist deaths worldwide have decreased in the past year. CPJ reported 41 journalists killed in 2008, down from 65 deaths in 2007. RSF reported 60 journalists killed in 2008, a drop from 87 journalists killed the previous year.

CPJ's report attributed the decline in journalist deaths in Iraq to a number of factors, including improved security, the declaration of a cease-fire against U.S. and coalition forces by Shiite cleric Moqtada al-Sadr, and an increase in U.S. troop strength in Iraq in 2007. Journalists also told CPJ that a decline in Western media presence had resulted in the drop in media fatalities in Iraq.

The New York Times reported Dec. 28, 2008 that U.S. broadcast networks ABC, CBS, and NBC had stopped sending full-time news correspondents to Iraq, a decision reflecting the transformation of the conflict in Iraq from a "story primarily about violence to one about reconstruction and politics," according to the *Times*. The three broadcast news networks operate through rotating correspondents based in bureaus in Baghdad. The *Times* reported that the staff cuts may be due to budget pressures at the networks. *The New York Times*, *The Washington Post*, The Associated Press (AP), and Reuters continue to have multiple reporters in Iraq, and CNN and Fox News Channel maintain one correspondent each.

The *Times* reported December 28 that the amount of air time devoted to coverage of the Iraq conflict on the three network evening newscasts dropped from 1,888 minutes in 2007 to 423 minutes for 2008 as of December 19, according to news analyst Andrew Tyndall.

National Public Radio's Baghdad bureau chief Lourdes Garcia-Navarro told *The Washington Post* for an Oct. 11, 2008 story that Iraq was also competing with other events in the U.S. and around the world. "When you have other things going on in the world – a financial crisis, elections and Afghanistan, which is now becoming a more serious conflict – it's harder to get on the air," Garcia-Navarro said.

The *Post* reported that coverage of the Iraq war has also taken on a more political tone, making stories more complex and nuanced and consequently harder to get on the air or in print. *New York Times* foreign editor Susan Chira told the *Post*, "The evolving story in Iraq does present editing and conceptualization challenges right now. It's more amorphous. There's less overt conflict."

The *Post* also reported that the practice of "embedding" reporters with army units became less common in 2008. In September 2007, the U.S. military embedded journalists 219 times with its forces; in September 2008, it did so 39 times. Journalists told the *Post* that the military has become reluctant to facilitate the practice of reporters traveling with military forces to the front lines of military operations. U.S. military officials confirmed that they do not want to highlight military operations led by U.S. forces when the Iraqi government has advocated a limited role for American troops, the *Post* reported.

According to the *Times*, the decline in Western media coverage of Iraq has been replaced by a shifting focus to the conflict in Afghanistan. The *Times* reported that the Obama administration is expected to focus on Afghanistan and Pakistan, resulting in the relocation of journalists to those countries. Michael Yon, a freelance reporter, told the *Times* "Afghanistan was the forgotten war; that's what they were calling it, actually. Now it's swapping places with Iraq." Until recently, no major American television network maintained a bureau in Afghanistan, according to the *Times*.

The *American Journalism Review* (*AJR*) reported in its October/November 2008 issue that although Afghanistan replaced Iraq as the deadliest country for American soldiers in June 2008, the American news media have largely ignored the ongoing conflict in Afghanistan since the Iraq war began in 2003.

The Project for Excellence in Journalism (PEJ), an arm of the Pew Research Center, conducted a study finding that Afghanistan-related coverage in 2008 comprised an average of 0.8 percent of all news coverage. Iraq received six times more coverage, according to the PEJ's findings, which are available at http://journalism.org/node/11676.

AJR said television news networks are increasing their presence in Afghanistan, however. ABC, CNN, and Fox News Channel have assigned reporters to cover the region, many of whom are based in Islamabad, Pakistan. National Public Radio Kabul Bureau Chief Soraya Sarhaddi Nelson estimated the

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total number of Western correspondents on the ground in Afghanistan to be about a dozen, AJR reported. *The New York Times* and the AP both operate bureaus in Afghanistan.

Fewer Journalists Killed, but More Threats to Online Reporters

The RSF report stated that the decrease in journalist fatalities in 2008 did not indicate a safer climate for journalists worldwide. "The figures may be lower than [2007]'s, but this should not mask the fact that intimidation and censorship have become more widespread, including in the West," the report said. The report also noted a rise in "predatory activity [that] is increasingly focusing on the Internet."

In a report issued Dec. 4, 2008 documenting the number of journalists jailed worldwide, CPJ found that for the first time more Internet journalists – including bloggers, online editors, and reporters for online publications – are behind bars than reporters from any other medium. Fifty-six online journalists were jailed in, 2008 compared to 53 print-medium journalists, out of a total of 125 journalists imprisoned worldwide, CPJ reported.

According to the report, 59 percent of the jailed journalists face allegations such as subversion, divulging state secrets, and acting against national interests, while 13 percent face no formal charge at all. CPJ also reported that at least 16 journalists are being held in undisclosed locations around the world. In China, which CPJ reported has jailed the most journalists for 10 consecutive years, 24 of 28 jailed journalists worked online.

"The future of journalism is online and we are now in a battle with the enemies of press freedom who are using imprisonment to define the limits of public discourse," said CPJ executive director Joel Simon, according to a Dec. 4, 2008 Agence France-Presse (AFP) story.

The report specifically cited China's regulations for Internet service providers restricting material that can be posted online as creating a model of "self-censorship" that is being emulated by other countries in Southeast Asia, including Burma and Thailand. (See "In State of Emergency, Thai Government Blocks Web Sites but Not Mainstream Media" in the Fall 2008 Silha *Bulletin*, "Yahoo, Chinese Journalists' Families Settle Suit" in the Winter 2008 issue, and "International Roundup: China, Burma, Zimbabwe, Iran" in the Fall 2007 issue.)

– Amba Datta
Silha Research Assistant

Politkovskaya, *continued from page 17*

represented the girl's family and was planning to appeal the man's early release.

CPJ reported that Markelov had also appealed for the opening of a criminal case against the suspected masterminds of the murder of *Novaya Gazeta* journalist Igor Domnikov, who was beaten to death with a hammer in 2000. Before Politkovskaya's death, Markelov defended her in multiple lawsuits, Sokolov told CPJ.

CPJ reported that Baburova was the fourth *Novaya Gazeta* reporter to be killed in a work-related murder since 2000, including the beating death of Domnikov, the death of Deputy Editor Yuri Shchekochikhin due to a suspicious poisoning in 2003, and the Politkovskaya shooting in 2006. In a November 2007 interview *Novaya Gazeta* editor Dmitry Muratov told CPJ, "We have suffered war-like casualties."

Russian press agency RIA Novosti reported January 21 that the investigation of the Baburova and Markelov murders had been passed from a Moscow city agency to the national-level Russian Investigation Committee. RIA Novosti reported that Russian Investigation Committee Chairman Alexander Bastrykin said "the audacity of the murder of the lawyer and the journalist in the center of Moscow and the public outcry that followed" led to the case's transfer to an agency with more resources, but the investigation would be difficult to solve because of the large number of connections that the victims had.

CPJ said violence against journalists rose in Russia during the fall of 2008 and winter of 2009. Another of Markelov's clients, Mikhail Beketov, editor of the pro-opposition newspaper *Khimkinskaya Pravda* of Khimki, was severely beaten in November 2008 and remains hospitalized in serious condition in Moscow. CPJ reported that Beketov had heavily criticized the Khimki administration's decision to cut down a large area of forest in order to build a freeway connecting Moscow and St. Petersburg, and he had received multiple threats and was often at odds with the local government.

In December 2008, a local correspondent for the Regnum news agency was attacked and beaten by two unidentified assailants in the North Caucasus republic of Karachai-Cherkessiya, and editor of the Murmansk-based online regional news agency RIA 51, Shafig Amrakhov, was shot in the head, dying from his wounds a week later.

On December 22, CPJ reported that at least a dozen journalists were detained and beaten by riot police in Vladivostok. The journalists were covering a rally to oppose the government's plans to increase tariffs on imported cars.

On February 5, CPJ reported that Aleksei Venediktov, editor of the radio station Ekho Moskvy, had found a "veiled threat" in the form of an ax stuck into a log by his door and a video camera left in front of his apartment.

– Patrick File
Silha Fellow and *Bulletin* Editor

International

Media Locked Out of Gaza Conflict

Israel banned journalists from entering Gaza during its military operations there in December and January, drawing outcry from international press organizations and the United Nations (U.N.). The Israel Supreme Court ruled against the ban on Jan. 25, 2009.

The Associated Press (AP) reported Jan. 22, 2009 that Israel restricted entry to Gaza in early November 2008 when a cease-fire with Gaza's Hamas rulers began to collapse. The rules were tightened after Israel launched a military offensive on Dec. 27, 2008 to halt Hamas from firing rockets into southern Israel.

The Israeli Supreme Court ruled that the Israeli government must allow access to reporters whenever the borders are otherwise open, and the court said it assumed the crossings would be closed "only in dire circumstances of concrete danger."

After protests from Israel's Foreign Press Association, Israel's Supreme Court proposed a compromise on Jan. 2, 2009 that would allow for a "pool" of international reporters to enter Gaza when the border was opened for humanitarian aid or other purposes. But according to the AP and *The New York Times*, the Israeli military did not honor that compromise, citing increased fighting near the border crossing and danger to Israeli staff there. International organizations that support press freedom, such as the Committee to Protect Journalists (CPJ) and Article 19, criticized the ongoing restrictions, and on January 9, U.N. Undersecretary-general for Communications and Public Information Kiyo Akasaka wrote to Israel's U.N. ambassador, invoking international agreements meant to ensure access to information, even in armed conflict, and adding that it is "of great importance to all concerned that international reporting be allowed to take place so that accurate information about the situation can inform global responses."

The AP reported January 22 that during the final Israeli offensive, small numbers of journalists were allowed to enter Gaza from Israel, but only in the company of Israeli troops. The AP reported that after a cease-fire was declared on Jan. 18, 2009, "a trickle of journalists" was allowed into Gaza, and the government said that starting on January 23 journalists would be free to enter and leave the territory. The January 25 Supreme Court ruling was a response to the Foreign Press Association's challenge to banning media access during current hostilities and in the future. According to the AP, the court ruled that the Israeli government must allow access to reporters whenever the borders are otherwise open, and the court said it assumed the crossings would be closed "only in dire circumstances of concrete danger."

According to the AP, while the ban was in place, international media organizations relied on journalists already inside Gaza to report on the fighting once it began, while the foreign media that flooded Israel in late December and early January was limited to reporting from the Israeli side of the conflict. Israeli reporters, along with all Israeli citizens, have been banned from entering Gaza for the past two years. *The New York Times* reported January 6 that in contrast, foreign journalists in Israel were given full access to Israeli political and military commentators, who were eager to show them around the areas where Hamas rockets had been landing and exploding. Private groups financed mostly by Americans also helped guide the press around Israel, *The New York Times* reported.

According to *The New York Times* and AP, Israeli officials said the restrictions also had a political purpose. Daniel Seaman, director of Israel's Government Press Office said the foreign media, if allowed into Gaza, were likely to report fabricated information supplied by Hamas and intended to portray Israel negatively. "Any journalist who enters Gaza becomes a fig leaf and front for the Hamas terror organization, and I see no reason why we should help that," Seaman told *The New York Times* for its January 6 story.

Some said the restrictive policy in Gaza was rooted in the perception that a more open policy during the 2006 conflict with Hezbollah in Lebanon had backfired for Israel. Nachman Shai, a former army spokesman who is writing a doctoral dissertation on Israel's public diplomacy, told *The New York Times* that foreign media coverage during the Lebanon conflict "helped the enemy and confused and destabilized the home front," saying, "The media were everywhere. Their cameras and tapes picked up discussions between commanders. People talked on live television."

CPJ reported that Israel also fired missiles at buildings housing Hamas-affiliated media and international media. On the night of January 5, Israel Defense Forces fired two missiles into the offices of Hamas-affiliated *Al-Risala* newsweekly, CPJ reported, destroying the equipment housed in the paper's Gaza City headquarters, and forcing residents of the building to abandon it. On January 9, CPJ reported that a missile hit the rooftop of Al-Johara Tower, which houses more than 20 international news organizations. Al-Jazeera reported that one of its journalists was injured while filing a report from the Al-Johara Tower roof. On January 15, Israel Defense Forces fired a missile at Gaza City's Al-Shuruq Tower, which housed the offices of Reuters, Fox News, Al-Arabiya, and more than a dozen other regional and international news organizations and production companies, CPJ reported. No one was killed in the attack, but the offices were evacuated. CPJ reported that an Israeli military spokesperson told Reuters that Hamas militants had taken over a media office in the area, but Reuters reported that its journalists did not see gunmen near the building before it was hit.

The AP reported January 22 that journalists called the Israeli restrictions on movement "bogus" and expressed hope that they would not be used again in the future. Simon McGregor-Wood, bureau chief

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Digital Media

Subpoenas Seek to Identify Anonymous Web Site Commenters and Viewers

Plaintiffs in several defamation lawsuits are seeking court orders to identify anonymous Internet users, raising First Amendment concerns regarding the protections afforded to anonymous communicators on the Internet.

In February 2009, Maryland's highest state court quashed a subpoena requesting disclosure of the identities of five anonymous participants in a discussion forum and outlined a five-part test for the state's trial courts to use in evaluating whether to order disclosure in such cases. But in Texas, a state trial court ordered a news Web site to reveal the identities of 178 anonymous commenters in an online news forum. Another subpoena in Virginia requested identifying information for commenters on a blogger's site and, more notably, included a request for the Internet Protocol (IP) addresses for all viewers of the blog post, a development that may have significant implications for online speech.

Maryland High Court Rejects Subpoena to Identify Anonymous Commenters, Adopts Five-Part Test

Maryland's highest state court ruled on Feb. 27, 2009 that a newspaper publishing company does not have to reveal identifying information for anonymous commenters who posted allegedly defamatory comments regarding Centreville, Md. businessman Zebulon J. Brodie on an online community forum. The court said it decided to hear the case in order to provide guidance to the state's trial courts in future defamation cases in which plaintiffs seek identifying information about anonymous Internet forum participants from a Web site host.

The Court of Appeals of Maryland heard the case, *Brodie v. Independent Newspapers, Inc.*, No. 17-C-DG-0116509, 2009 WL 484956 (Md. Feb. 27, 2009), on appeal from the trial court, bypassing the mid-level appellate court.

The court adopted a five-factor test developed by the Superior Court of New Jersey, Appellate Division in *Dendrite International v. Doe*, 775 A.2d 756 (N.J. Super. Ct. App. Div. 2001) for evaluating defamation claims concerning anonymous commenters on Internet forums. In evaluating whether disclosure is appropriate using the test, the court should require the plaintiff to notify the anonymous posters that they are the subject of a subpoena; allow the anonymous poster a reasonable opportunity to file opposition to the subpoena; require the plaintiff to identify the exact statements allegedly made by each anonymous poster that are actionable; determine whether the complaint has set forth a *prima facie* defamation case; and, provided the other four elements are met, balance the anonymous poster's First Amendment right of free speech against the strength of the *prima facie* case presented by the plaintiff and the necessity for disclosure of the anonymous defendant's identity.

Judge Lynne A. Battaglia wrote that the test addressed the complexities of the disclosure decision effectively. "On the one hand, posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity. On the other, viable causes of actions for defamation should not be barred in the Internet context," Battaglia's opinion stated.

Brodie filed his defamation lawsuit on May 26, 2006 against Independent Newspapers, Inc. (INI), which hosts the online news forum Newszap.com, and three anonymous defendants. Newszap.com's "Centreville Eyesores" discussion thread featured allegedly defamatory comments made by the three anonymous defendants in March 2006 regarding Brodie's decision to sell his home to a developer. The three anonymous defendants were identified by the screen names "CorsicaRiver," "Born & Raised Here," and "chatdusoleil" on the discussion thread. Brodie also alleged that other comments on the Newszap.com forum regarding the Dunkin' Donuts store he owns were defamatory, including the statement that the store is one "of the most dirty and unsanitary-looking food-service places I have seen."

On March 12, 2007, the trial court dismissed the charges of defamation based on statements regarding Brodie's home because they were about the developer that bought the home from Brodie and not about Brodie himself, but it ordered INI to comply with the subpoena requesting identifying information for the commenters who made statements regarding the Dunkin' Donuts store. However, Brodie's counsel revealed that the comments about the Dunkin' Donuts store were authored by two commenters who were not included in Brodie's original subpoena, "RockyRacoonMD" and "Suze." Brodie then served another subpoena on INI requesting identifying information for all five commenters. The trial court ordered INI to comply with the subpoena on Feb. 19, 2008, and INI appealed the decision.

Judge Battaglia's opinion stated that Brodie had not pleaded a viable claim for defamation. The Court of Appeals affirmed the trial court's dismissal of the charges with respect to comments regarding Brodie's former home. With respect to the Dunkin' Donuts comments made by "RockyRacoonMD" and "Suze," the court said the statute of limitations barred claims against them in February 2008, when the trial court ordered INI to reveal information regarding their identities. Therefore, the court determined INI's motion to quash the subpoena should have been granted.

The Reporters Committee for Freedom of the

Commenters Subpoenaed, *continued on page 22*

> "On the one hand, posters have a First Amendment right to retain their anonymity and not to be subject to frivolous suits for defamation brought solely to unmask their identity. On the other, viable causes of actions for defamation should not be barred in the Internet context."
>
> – Judge Lynne A. Battaglia
> Maryland Court of Appeals

Comments Subpoenaed, *continued from page 21*

Press (RCFP) filed an *amicus* brief in the case on July 28, 2008, asking the appellate court to apply the *Dendrite* standard to evaluate requests for disclosure of anonymous message board commenters' identities. The RCFP emphasized the importance of protecting anonymous speakers on the Internet. "In light of the extensive First Amendment interests in preserving a robust marketplace of ideas on the Internet, the Court should establish a strict standard to protect the anonymity of online speakers," the brief stated.

Texas Judge Orders Topix.com to Identify Anonymous Commenters

A Texas judge ordered news Web site Topix.com on Feb. 5, 2009 to comply with a subpoena to identify 178 anonymous commenters in an online forum who allegedly defamed a Texas attorney and his wife, both of whom were charged in April 2008 with aggravated sexual assault of a former client.

Judge Dana Womack of the 348th District Court in Tarrant County, Texas, approved the order for the subpoena in the defamation lawsuit, *Lesher v. Does 1-178*, No. 348235791-09 (Tex. D.C. 2008), filed against Topix.com, a news Web site that hosts online message boards. The Tarrant County Court issued a letter rogatory, a request to the Superior Court of California, County of Santa Clara to obtain discovery from Topix.com, which has an office in Palo Alto, Calif. Once information provided in response to the subpoena is collected by the Santa Clara court, the letter rogatory requests it be forwarded to the Leshers' attorney. On Feb. 26, 2009, Topix.com filed a motion to quash the subpoena in the court in Santa Clara. A hearing will be held on March 27, 2009.

A former client of attorney Mark Lesher filed charges against Lesher and his wife Rhonda in April 2008, alleging they sexually assaulted her on July 26, 2007 when she was spending a week at the Leshers' ranch after seeking Mark Lesher's help in divorce proceedings, the *Clarksville* (Texas) *Times* reported in a Jan. 19, 2009 story. The Leshers were found not guilty of the charges on Jan. 16, 2009 after a jury trial in Collin County, Texas, according to the *Clarksville Times*.

After the lawsuit was filed against the Leshers in April 2008, according to the their complaint, the Leshers said that over 1,700 anonymous defamatory comments authored by 178 commenters regarding the allegations were posted on news forums on Topix.com. "They were perverted, sick, vile, inhumane accusations," Mark Lesher said, according to a Feb. 7, 2009 *Dallas Morning News* story.

The Leshers filed a lawsuit against Topix.com and the anonymous defendants, alleging the statements were defamatory and requesting unspecified damages for reputational, emotional, and psychological harm. The Leshers' 365-page complaint lists each of the 178 commenters' online pseudonyms, a portion of their comments, and the initial charge of defamation.

In a letter dated February 4 posted on Topix.com, attorney William Pieratt Demond, who represents the Leshers, listed the screen names of the 178 defendants and said that the Leshers had filed a defamation lawsuit against them. The letter also stated that the anonymous posters could come forward and negotiate a settlement with the Leshers. The letter is available online at http://www.topix.com/forum/city/idabel-ok/TAFNU5RQSNM7CSOCU. *Texas Lawyer* reported in its February 24 story that Demond said he hopes to obtain the IP addresses for the anonymous commenters from Topix.com, along with any other available identifying information concerning the posts.

Texas Lawyer reported that Topix.com CEO Chris Tolles said the Web site can only provide IP addresses, which he said would "potentially provide a step in identifying the individuals involved. It's not a final step. It's not a definitive way of getting someone's information. But, that said, it's the only way that there's a definitive way of reaching that person through us."

Tolles addressed the subpoena in a February 7 *Dallas Morning News* story. "We do not just give up people's privacy. We're very, very careful about that," Tolles said. However, he added "If there is a line that's been crossed from a libel standpoint – and it seems reasonable – we do, in fact, cooperate with the courts."

Virginia Blogger Subpoenaed For Information Regarding Online Viewers, Commenters

The plaintiff in a defamation lawsuit against a Charlottesville, Va. weekly newspaper has served a broad subpoena on a blogger who wrote about the defamation suit, requesting identifying information for anonymous commenters, and more unusually, the IP addresses associated with every viewer of the blog post, in order to gain evidence for the original lawsuit against the newspaper.

In his lawsuit *Garrett v. Better Publications*, No. CL08000197-00 (Va. Cir. Ct. 2008), filed Dec. 19, 2008 against the publisher of the newspaper, *The Hook*, in the Circuit Court for the County of Buckingham, Thomas Garrett alleged the newspaper defamed him in its coverage of state criminal proceedings in which Garrett was prosecuted for charges of forgery.

Blogger Waldo Jaquith posted a story Dec. 23, 2008 on the blog cvillenews about *The Hook*'s stories. Calling Garrett "a train wreck in slow motion," Jaquith wrote that it was "impossible to ignore the really sketchy aspects" about Garrett, a chicken farmer, radio show host, and Hollywood publicist. Jaquith is not a party to Garrett's lawsuit against *The Hook*.

On Jan. 15, 2009, Garrett sent Jaquith a subpoena requesting identifying information for all of the viewers of Jaquith's post regarding the defamation lawsuit and 81 anonymous individuals who commented on it. The information requested by the subpoena included the names of persons posting comments, their IP addresses, the IP addresses of viewers of the story online, any e-mail

Commenters Subpoenaed, *continued on page 25*

Digital Media

Federal Judge Recognizes AP's 'Hot News' Claim in Suit over Online Use of Content

On Feb. 17, 2009, a federal judge refused to dismiss The Associated Press's (AP) claim that the AP can assert an ownership interest in "hot news" against a competing online service.

The AP sued the Web site All Headline News (AHN) in U.S. District Court in Manhattan on January 12, alleging six counts of copyright and trademark infringement, unfair competition, and misappropriation of "hot news," also called "breaking news." AHN markets itself as a service that provides news updates to Web sites and print news organizations for a subscription fee. It can be found online at http://www.allheadlinenews.com/.

According to Judge P. Kevin Castel's order in *The Associated Press v. All Headline News Corp.*, No. 08 Civ. 323, 2009 WL 382690 (S.D.N.Y. Feb. 17, 2009), the AP alleged that AHN hires "poorly paid individuals" to find news stories on the Internet, many of which are AP stories, and rewrite them or copy them directly under the AHN name, removing any information identifying the stories' original authors or copyright holders, indicating instead that the stories originate with AHN. The AP alleged AHN is "free riding" on the AP's original reporting. AHN moved to dismiss all of the AP's claims except those for copyright infringement.

The Associated Press alleged that All Headline News hires "poorly paid individuals" to find news stories on the Internet, many of which are AP stories, and rewrite them or copy them directly under the AHN name, removing any information identifying the stories' original authors or copyright holders.

Castel wrote that under the "hot news" tort, recognized by the U.S. Supreme Court in *International News Service v. Associated Press*, 248 U.S. 215 (1918), a news organization can claim that "hot news" is its "quasi property," and thus can be protected against a competitor's interference. This is in contrast to copyright law, which permits a news organization to claim a copyright to the words and structure of a news story, but not to its underlying facts. Castel quoted the Supreme Court's holding that allowing one news agency to appropriate and profit from the work of another would "render publication profitless, or so little profitable as in effect to cut off the service by rendering the cost prohibitive in comparison with the return."

Castel observed that although he was not bound by the *International News Service* case because the Supreme Court later held in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), that federal common law does not apply to state law claims, the doctrine of "hot news" persists in several states, including New York.

AHN argued that Florida law should apply because its principal place of business was Florida, but Castel found instead that New York law applied because the AP is headquartered in New York, where the alleged injury occurred. Moreover, AHN is alleged to have offices at Rockefeller Center in New York City.

Castel found that under *National Basketball Association v. Motorola, Inc.*, 105 F.3d 841 (2d Cir. 2007), a "hot news" claim can be brought in New York when a five-part test is met: "(i) a plaintiff generates or gathers information at a cost; (ii) the information is time-sensitive; (iii) a defendant's use of the information constitutes free riding on the plaintiff's efforts; (iv) the defendant is in direct competition with a product or service offered by the plaintiffs; and (v) the ability of other parties to free-ride on the efforts of the plaintiff or others would so reduce the incentive to produce the product or service that its existence or quality would be substantially threatened."

The AP also alleged that AHN violated the Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 1202(b), by removing or altering information in AP stories that identified the AP as the copyright holder. AHN argued that the DMCA should be construed as protecting only "technological measures" of copyright management. But Castel said AHN "cited no textual support for limiting the DMCA's application to the 'technological measures of automated systems,' a phrase that appears nowhere in the statute."

Although Castel upheld the AP's claims of misappropriation of "hot news" and violation of the DMCA, he dismissed its claims of trademark infringement under 15 U.S.C. § 1114(1) and unfair competition under 15 U.S.C. § 1125(a). Castel said the AP failed to explain what specific AHN conduct infringed the AP's copyright or amounted to unfair competition.

– Patrick File
Silha Fellow and *Bulletin* Editor

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for ABC News in Jerusalem and a Foreign Press Association board member, said, "We never accepted the argument that it was about our security. We always thought it was a strategic decision to restrict access to Gaza for whatever benefit they thought it would give them."

Meanwhile, Seaman defended the restrictions. "Israel operated in accordance with the Supreme Court guidelines in a time of war and behaved in accordance with its own interests," he said. "The atmosphere of crisis was created by the journalists and not the state of Israel."

– Patrick File
Silha Fellow and *Bulletin* Editor

Digital Media

Judge Allows Live Webcast of Copyright Trial; RIAA Appeals

A U.S. District Court judge in Boston authorized a live Internet video stream of oral arguments in a widely followed file-sharing lawsuit in January 2009, but the plaintiff recording companies seeking to prevent the webcast have appealed the order to the 1st Circuit U.S. Court of Appeals.

The defendant in the suit, Joel Tenenbaum, is a Boston University graduate student who was sued by several record companies in 2004. A Harvard Law School professor, Charles Nesson, agreed to defend Tenenbaum and has filed a counterclaim against the record companies challenging the legality of the music industry's suits and the constitutionality of some portions of U.S. copyright law.

> "The public benefit of offering a more complete view of these proceedings is plain, especially via a medium so carefully attuned to the Internet Generation captivated by these filesharing lawsuits."
>
> – Judge Nancy Gertner
> District of Massachusetts

According to her January 14 order, *Capitol Records, Inc. v. Alaujan*, Nos. 03cv1161-NG and 07cv1146-NG, 2009 WL 82486 (D. Mass. Jan 14, 2009), U.S. District Judge Nancy Gertner agreed to allow the webcast of a hearing in which oral arguments will be presented on the topic of Nesson's counterclaim. The hearing was originally scheduled for January 22, but the record companies requested a temporary stay to postpone the hearing while they appealed the webcast authorization to the 1st Circuit.

Gertner granted the stay, and the 1st Circuit has scheduled oral arguments regarding the webcast for April 7. The district court hearing has been moved to April 30, pending the 1st Circuit's decision.

Tenenbaum is one of many college students sued by the music industry in an attempt to quell illegal music downloads. Many have defaulted or settled their suits for amounts between $3,000 and $10,000, often without legal counsel, Gertner's January 14 order said.

Nesson has challenged the constitutionality of the Digital Theft Deterrence and Copyright Damages Improvement Act, 17 U.S.C. § 504(c), which can impose damages of $150,000 for each violation if the court finds that the infringement was willful.

Nesson said in his counterclaim that the lawsuits are "civil in form but criminal in nature," and that current copyright law unconstitutionally delegates prosecutorial power to private parties, in violation of the protections guaranteed by the Fifth and Eighth Amendments to the U.S. Constitution.

Nesson filed a motion on Dec. 23, 2008 asking Gertner to authorize the video cameras already installed in courtrooms to be used to capture the proceedings and transmit the material to Harvard's Berkman Center for Internet & Society to stream it on its Web site. Nesson is the founder of the Berkman Center.

"Net access to this litigation will allow an interested and growingly sophisticated public to understand the RIAA's education campaign." Nesson said in his petition. "Surely education is the purpose of the Digital Deterrence Act of 1999, the constitutionality of which we are challenging. How can RIAA object?"

In her January 14 order, Gertner called the webcast "uniquely appropriate" considering its subject matter.

"The public benefit of offering a more complete view of these proceedings is plain, especially via a medium so carefully attuned to the Internet Generation captivated by these filesharing lawsuits," Gertner said. "The Defendants are primarily members of a generation that has grown up with the Internet, who get their news from it, rather than from the traditional forms of public communication, such as newspapers or television."

Gertner quoted court precedent in holding that "court proceedings [should] be open to the public whenever practicable," and said that "the public should be permitted and encouraged to observe the operation of its courts in the most convenient manner possible."

In the January 14 order, Gertner dismissed the recording industry's objections that the webcast could influence potential jurors, calling them "curious," and stating that the industry's strategy of using the lawsuits as a deterrent "effectively relies on the publicity resulting from this litigation."

The record companies filed an appeal and a request for a stay in response to Gertner's order. The companies argued in their appeal that the order violated the court's rules, and that streaming the proceedings on the Berkman Center's Web site, since it was affiliated with the defendant's counsel, "undermines basic principles of fairness and is flatly inconsistent with the public interest."

The record companies also said in their petition that they "were concerned that, unlike a trial transcript, the broadcast of a court proceeding through the Internet will take on a life of its own in that forum. The broadcast will be readily subject to editing and manipulation by any reasonably tech-savvy individual. Even without improper modification, statements may be taken out of context, spliced together with other statements and ... rebroadcast as if it were an accurate transcript."

The 1st Circuit has asked both parties to submit briefs addressing the legal effect of a 1996 resolution that states the court's intention, "in response to the urging of the Judicial Conference of the United States at its March 1996 Meeting, to continue to bar the taking of photographs and radio and television coverage of proceedings in the United States district courts within the circuit, except as otherwise provided for ceremonial occasions."

In a February 19 story in *The Chronicle of Higher Education*, one of Nesson's students assisting in the case, Debbie Rosenbaum, said they consider the webcast critical. "We're going to work really hard to have the [1]st Circuit rule in our favor," she said. "We believe that this is a really important right."

The record companies have also vowed to

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continue the fight. "We are for an open trial in an open courtroom," Cara Duckworth, a spokesperson for the recording industry, said in the February 19 *Chronicle of Higher Education* story. "What we are against is the manipulation of the judicial process and using a court of law for legal theater and gamesmanship, which is the clear objective of the other side."

Tenenbaum is accused of downloading at least seven songs and making 816 music files available for distribution on the Kazaa file-sharing network in 2004. He offered to settle the case for $500, but music companies rejected that, ultimately demanding $12,000.

Nesson counterclaimed on Tenenbaum's behalf, alleging that "Plaintiffs filed this suit primarily to advance ulterior purposes." The counterclaim specifically accused the record companies of "Unlawfully sacrificing Defendant to intimidate other Internet users into altering the norms of Internet usage," and "Unlawfully sacrificing Defendant to intimidate other accused infringers into settling without exercising their constitutional right to have their defenses heard in court. "

In a Nov. 22, 2008 Associated Press story, Nesson said that his goal is to "turn the courts away from allowing themselves to be used like a low-grade collection agency."

The webcast disagreement is only applicable to Nesson's counterclaims against the record companies. Other contested areas of the case are proceeding without cameras present.

– Jacob Parsley
Silha Research Assistant

Commenters Subpoenaed, *continued from page 22*

communications sent or received by Jaquith relating to his December 23 blog post, and any notes and documents relating to information obtained or created in writing the December 23 post.

In a Jan. 30, 2009 post on the Citizen Media Law Project Web site, Sam Bayard, a fellow at the Berkman Center for Internet & Society at Harvard University, wrote, with respect to the request in the subpoena for information identifying viewers of the blog post, "Disclosure of this information could be a potentially huge breach of reader privacy, and nothing seems to justify it. Remember, the lawsuit in question involves *another* newspaper and website altogether, so the number and (rough) location of cvillenews.com readers has no bearing on the reputational damage caused by the original, allegedly defamatory posts on the newspaper's website." The post is available online at http://www.citmedialaw.org/blog/2009/virginia-blogger-targeted-outrageous-subpoena.

Jaquith drafted and submitted a motion to quash the subpoena on Jan. 31, 2009. He cited the constitutional journalist's privilege based upon the First Amendment in asserting that the information Garrett sought to compel from him by means of the subpoena was a privileged communication and therefore not subject to disclosure. Jaquith also argued that Garrett's subpoena failed to comply with the requirements of Virginia Code § 8.01-407.1, which governs efforts to identify anonymous Internet speakers in civil proceedings.

Virginia Code § 8.01-407.1 states that subpoenas seeking identifying information for anonymous online speakers must include an assertion that specific statements by the anonymous communicator are tortious or illegal, that other reasonable efforts have been made to identify the communicator and have been fruitless, and that the identity of the communicator is needed to advance a claim or is materially relevant to the claim. Jaquith's motion to quash argued Garrett's subpoena did not describe verbatim the allegedly illegal communications on the blog cvillenews.

On Feb. 13, 2009, Garrett submitted a motion to compel asking Jaquith to comply with the subpoena, stating that he believes that many of the comments on Jaquith's blog post were made by employees of Better Publications, the publisher of *The Hook*, rather than disinterested third parties. Therefore, he said the anonymous comments could help substantiate Garrett's claims Better Publications acted with malice in his defamation lawsuit.

– Amba Datta
Silha Research Assistant

Copyright

AP Alleges Copyright Infringement over Iconic Obama Image

The creator of a popular poster featuring President Barack Obama filed a lawsuit in federal district court in New York City on Feb. 9, 2009 against The Associated Press (AP), asking the judge to issue a declaration that he did not infringe the AP's copyright for a photograph that inspired the poster. On March 11, 2009, the AP filed an answer and countersuit.

The AP alleged in a Feb. 4, 2009 story that street artist Shepard Fairey had infringed its copyright of a photograph Fairey used as the basis for his collage depicting Obama's upturned face and the word "hope."

AP spokesman Paul Colford told Bloomberg news service for a Feb. 9, 2009 story that "The photograph used in the poster is an AP photo, and its use required permission from AP," adding, "AP believes it is crucial to protect photographers, who are creators and artists. Their work should not be misappropriated by others."

Fairey reproduced his original image of Obama, which was created in multi-media collage format, on posters and stickers. *Roll Call* reported Jan. 15, 2009 that Fairey's portrait has been displayed in the National Portrait Gallery in Washington, D.C., and has been added to the gallery's permanent collection.

Fairey sold the posters and stickers through his Web site ObeyGiant.com, according to his complaint. Many of the posters and stickers were distributed at Obama campaign events, although the image was never officially endorsed by the campaign, according to a Feb. 9, 2009 *New York Times* story. Fairey did, however, receive a letter dated Feb. 22, 2008 from Obama thanking him for his artistic contribution to the campaign. The letter is available online at http://obeygiant.com/post/check-it-out.

Fairey filed the lawsuit, *Fairey v. Associated Press*, 09-CV-01123 (S.D.N.Y. 2009), against the AP in the U.S. District Court for the Southern District of New York in Manhattan. In his complaint, Fairey cites the "fair use" doctrine of copyright law as the grounds for his claim that he is entitled to use the AP photograph as the basis for his poster.

"Fair use" is a principle that allows the use of copyrighted material for certain purposes, depending on the nature of the use, the nature of the copyrighted work, the amount of the work used, and the economic impact of the use. Fair use of a copyrighted work does not constitute an infringement of copyright, according to the Copyright Act of 1976, 17 U.S.C. § 107. Specifically, Fairey argues in his complaint that he used the photograph as a visual reference in a transformative manner, thereby giving the image "new meaning, new expression, and new messages."

Fairey's complaint asked the court to grant Fairey relief in the form of a declaration that he did not infringe AP's copyright and that his use of the photograph was protected by the "fair use" doctrine. The complaint also asked the court to enjoin the AP from asserting its copyright against Fairey in connection with any of his works depicting Obama that were based on the same photograph. Fairey incorporated the image of Obama in other works, including posters containing the words "progress" and "be the change." Fairey also requested an award of attorneys' fees in the complaint.

Fairey's complaint said that an attorney representing the AP spoke with a representative for Fairey on Jan. 30, 2009, telling him that the AP had used "special technology" to detect the source of the poster depicting Obama. The photograph Fairey used as the basis for his poster was taken by freelance photographer Mannie Garcia on an assignment for the AP, and showed then-Senator Obama at an event held in April 2006 at the National Press Club in Washington, D.C.

The AP's attorney stated the AP owned the rights to the photograph and demanded payment from Fairey for its use. On Feb. 3, 2009 and Feb. 6, 2009, counsel for the AP threatened to file suit against Fairey for copyright infringement if he did not negotiate a license with the AP. The AP indicated that it would file suit on Feb. 10, 2009 if the matter had not been resolved before then.

The AP's March 11 countersuit alleges that Fairey's poster "cop[ies] all the distinctive and unequivocally recognizable elements of [Garcia's photo] in their entire detail, retaining the heart and essence of The AP's photo, including but not limited to its patriotic theme. Simply put, the fair use doctrine cannot be contorted to permit Fairey to wholly replicate a photographer's prescient photograph and exploit it for his own commercial benefit ... ."

Fairey is represented by Anthony Falzone of Stanford Law School's Center for Internet and Society "Fair Use Project," which provides legal support to projects it believes extend the doctrine of "fair use" to enhance "creative freedom," according to the Center's Web site at http://cyberlaw.stanford.edu/taxonomy/term/374. "We believe fair use protects Shepard's right to do what he did here," Falzone said, according to a Feb. 5, 2009 *Times* of London story.

The Wall Street Journal Law Blog reported Feb. 10, 2009 that Wendy Seltzer, a visiting professor at American University's Washington College of Law and a fellow at Harvard University's Berkman Center for Internet & Society, said that she did not think the AP's claim was valid. "[P]olitical commentary is given an added bump on the fair use scale," she said. "If someone had tried to appropriate that image for a news story without paying the AP, that would have been unfair. But making it into a poster commentary on the election campaign, I think that is not something the copyright monopoly should cover."

However, intellectual property attorney Howard Weingrad, a partner at New York law firm Davis & Gilbert, said "there was a little too much taking from the photo. Particularly the lighting, the shading and the right side of the face," the *The Wall Street*

Hope Poster, *continued on page 28*

"If someone had tried to appropriate [the] image for a news story without paying the AP, that would have been unfair. But making it into a poster commentary on the election campaign, I think that is not something the copyright monopoly should cover."

– Wendy Seltzer, Law Professor, American University

Copyright

Music Industry to Abandon Mass Copyright Lawsuits

The Recording Industry Association of America (RIAA) announced that it will reduce its use of lawsuits to combat illegal online music sharing, and will instead cooperate with Internet service providers (ISPs) to stop the transfer of copyrighted works, a Dec. 19, 2008 story in *The Wall Street Journal* reported.

The RIAA's new approach involves sending letters to ISPs to inform them that a customer is accused of file sharing that infringes copyright. A copy of the ISP notice letter is available online at http://news.cnet.com/8301-1023_3-10127050-93.html.

The standard form letter informs the ISP that "[The RIAA] believe[s] a user on your network is offering an infringing sound recording for download through a peer to peer application," and proceeds to "respectfully request that you remove or disable access to the unauthorized music."

The letter also includes a notice that "this letter serves as an official notice to you that this network user may be liable for the illegal activity occurring on your network," and that "this letter does not constitute a waiver of our members' rights to recover or claim relief for damages incurred by this illegal activity, nor does it waive the right to bring legal action against the user at issue for engaging in music theft."

"We believe it is in everyone's interest for music consumers to be better educated about the copyright law and ways to legally enjoy music online. The major record companies have actively licensed their music to dozens of innovative services where fans can go to listen to and/or purchase their favorite songs," the letter continues.

At the conclusion of the letter, there is a "list of infringing content," which includes the filename(s) in question and the IP address and port number of the user.

According to the December 19 *Wall Street Journal* story, critics of the RIAA's previous attempts to control online piracy through lawsuits said the method ultimately did little to stem the tide of illegally downloaded music, and instead created a public relations disaster for the industry. The RIAA has initiated legal action against about 35,000 individuals for illegal file sharing since 2003, including several single mothers, a dead person, and a 13-year-old girl.

The Wall Street Journal story reported that the RIAA said its new strategy relies on the cooperation of ISPs, and that it had reached preliminary agreements with several major providers. Depending on the agreement, the ISP will either forward the notice to the individual customers or alert customers that they appear to be uploading music illegally and ask them to stop.

If the customers continue the file-sharing, they will receive additional warnings from the ISP, potentially accompanied by limits on bandwidth, and consequently, slower upload speed, the *Journal* story said. Continued violations may result in the ISP cutting off the user's access altogether.

But according to a Dec. 22, 2008 cnet story, not all ISPs intend to cooperate with the RIAA. Under the Digital Millennium Copyright Act, 17 U.S.C. § 512, they are not responsible for copyright violations that take place on their networks without their direct participation.

If the ISPs do not help, the RIAA may continue to sue. According to a Dec. 19, 2008 cnet story, music industry sources said that the RIAA will continue to litigate lawsuits that are already filed and to file new lawsuits against the "most egregious offenders" who download "5,000 or 6,000 songs a month."

RIAA President Cary Sherman said the organization did not regret its prior lawsuits. "Doing nothing was basically agreeing to watch your industry get totally decimated," Sherman said in the Dec. 19, 2008, cnet story. "It was a hard decision to make but it was one where there was no alternative if we were going to establish the rules for digital music on the Web."

A Dec. 19, 2008 post on *The Wall Street Journal*'s Law Blog speculated that the RIAA's decision to change tactics may have been motivated by the first ever file-sharing trial in the U.S. District Court for the District of Minnesota. After a jury verdict found Jammie Thomas guilty on 24 counts of copyright infringement, District Court Judge Michael Davis ordered a new trial because the jury instructions incorrectly stated that merely making songs available for download constituted a copyright violation.

"The plain meaning of the term 'distribution' does not including making available and, instead, requires actual dissemination," Davis wrote in *Capitol Records, Inc. v. Thomas*, 579 F. Supp. 2d 1210 (D. Minn. 2008). (See "Music Industry Wins First Internet Privacy Case" in the Fall 2007 Silha *Bulletin*.)

In the opinion, Davis also decried the excessive penalties defendants faced in file-sharing lawsuits. "Thomas acted like countless other Internet users. Her alleged acts were illegal, but common," Davis wrote. "Her status as a consumer who was not seeking to harm her competitors or make a profit does not excuse her behavior. But it does make the award of hundreds of thousands of dollars in damages unprecedented and oppressive."

In a separate Dec. 19, 2008 story on cnet, RIAA president Sherman described some of the specific details of the new policy. He said the length of time a network will deny Internet access to an accused file sharer had not been determined, and that the RIAA is negotiating cooperative procedures to combat file sharing with ISPs on a case-by-case basis.

"The details on the sanctions have to be worked out," Sherman said. "There's no one-size-fits-all approach."

Sherman said that early results had been positive. "We've been encouraged by not only what some of the studies have shown, but even from the e-mails we've received from users [who] have said 'You got me, I won't do it again,'" Sherman said. "We've received some e-mails from people [saying] 'Hey, I

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> "Doing nothing was basically agreeing to watch your industry get totally decimated. [Filing mass lawsuits] was a hard decision to make but it was one where there was no alternative if we were going to establish the rules for digital music on the Web."
>
> – Cary Sherman
> President, Recording Industry Association of America

Copyright

Update: Blogger Pleads Guilty for Leaking Guns N' Roses Songs

A blogger who was arrested and charged by federal agents with illegally streaming nine tracks from the then-forthcoming Guns N' Roses album "Chinese Democracy" pleaded guilty to one misdemeanor count of copyright infringement as part of a deal with prosecutors. He is scheduled for sentencing on March 17, 2009.

Kevin Cogill, a regular contributor at the music blog Antiquiet under the alias "Skwerl," entered his plea in a federal district court in Los Angeles on Dec. 10, 2008. He was arrested by FBI agents last August after the RIAA notified the Department of Justice that the tracks had been leaked. (See "Blogger Arrested for Posting Unreleased Guns N' Roses Songs" in the Fall 2008 Silha *Bulletin*).

In the plea agreement, signed Oct. 16, 2008, Cogill pleaded guilty to violating 17 U.S.C. § 506(a)(1)(A) and 18 U.S.C. § 2319, two statutes that define criminal copyright infringement. Cogill admitted that he acted willfully to infringe a known copyright and that he "acted for the purpose of commercial advantage or private financial gain," because he knew the songs would drive additional traffic to his site and increase advertising revenues.

Under the plea agreement, Cogill faces a maximum one-year prison sentence and a fine of $100,000.

Cogill was originally charged with a felony under 17 U.S.C. § 506(a)(1)(C), which implements the copyright amendments included in the Family Entertainment and Copyright Act of 2005. The felony charged was punishable by up to three years in prison and up to $250,000 in fines.

According to a Feb. 6, 2009 story in the *Los Angeles Times*, "Chinese Democracy" has sold 2.6 million copies worldwide since its release on Nov. 23, 2008, and peaked at No. 3 on the U.S. charts.

In a February 6 interview with *Billboard* magazine, Guns N' Roses front-man Axl Rose was asked his reaction to the leak. "Having someone jeopardize your efforts so cavalierly is pretty much a nightmare," Rose said. "I don't know that it hurt us though, at least as one might think."

Cogill still faces the threat of a potential civil suit for streaming the songs.

– Jacob Parsley
Silha Research Assistant

> "Having someone jeopardize your efforts so cavalierly is pretty much a nightmare. I don't know that it hurt us though, at least as one might think."
>
> – Axl Rose
> Singer, Guns N' Roses

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Journal Law Blog reported. "There are copyright principals [sic] in play here that could be eroded if we don't carefully consider if this is transformative enough to qualify for fair use."

Fairey was arrested on two unrelated outstanding warrants for property defacement on Feb. 6, 2009 when he was on his way to an event launching an exhibition of his work at the Institute of Contemporary Art in Boston, *The Boston Globe* reported Feb. 8, 2009. A Feb. 9, 2009 press release from the Suffolk County (Mass.) District Attorney's office said Fairey was arraigned on two charges on February 9 in two state courthouses in Suffolk County. In Brighton Municipal Court, Fairey pleaded not guilty to a vandalism charge for placing a poster on an electrical box. Fairey was arrested for this charge in 2000 and failed to appear in court at the time. In his second arraignment in Roxbury Municipal Court, Fairey pleaded not guilty to a charge of defacing property in Boston. Fairey was released on personal recognizance, a pretrial release without bail granted in exchange for Fairey's promise to reappear in court. Fairey was ordered to return to the Brighton Municipal Court on March 10 and the Roxbury Municipal Court on March 11 for pre-trial hearings, according to the press release.

– Amba Datta
Silha Research Assistant

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didn't know my kid was doing this[;] I'll talk to him and he won't do it again.' There is a deterrent effect and we're hoping to see more of that."

ISPs not participating in the program said it is not their job to police their customers. Jerry Scroggin, owner-operator of Bayou Internet and Communications, an Internet provider with between 10,000-12,000 customers in Louisiana, said he receives several notices each month with requests that he remove suspected file sharers from his network. "I ask for their billing address," Scroggin said in a Dec. 22, 2008 cnet story in which he said he could not afford to act as an enforcement arm for groups alleging infringement. "Usually, I never hear back."

"They have the right to protect their songs or music or pictures," Scroggin said. "But they don't have the right to tell me I have to be the one protecting it. I don't want anyone doing anything illegal on my network, but we don't work for free."

The RIAA's new policy has also met with criticism from Internet user groups. "In the 21st century, the idea that we're going to ban people from the Internet based on unproven allegations is troubling," said Fred von Lohmann, an attorney with the Electronic Frontier Foundation, an Internet-user advocacy group, in a Dec. 20, 2008 *San Francisco Chronicle* story. "Even if you're guilty, is a ban from the Internet really an appropriate punishment?"

Jonathan Lamy, a spokesman for the RIAA, said in the Dec. 20 *Chronicle* story that a process will be developed for users who feel they've been wrongly accused. As to penalties such as suspended access, he said Internet providers already forbid their customers to use the service for illegal purposes. "We're only asking them to enforce their own terms of service," Lamy said.

– Jacob Parsley
Silha Research Assistant

Libel

1st Circuit Rules Truth Not Always a Defense to Libel

On Feb. 13, 2009, the 1st Circuit U.S. Court of Appeals in Boston held that truth may no longer be a defense to libel in lawsuits brought by private figure plaintiffs under Massachusetts law if the allegedly libelous statement was published by a defendant acting out of "ill will."

Judge Juan R. Torruella, writing for a three-judge panel of the appeals court, ruled in *Noonan v. Staples*, 2009 U.S. App. Lexis 2848 (1st Cir. 2009), that Alan S. Noonan, a former employee of the office supply company Staples, could maintain an action for libel in Massachusetts against Staples after it sent an e-mail to more than 1,500 employees stating truthfully that Noonan was fired for violating the company's travel and expenses policy.

According to the court's opinion, Staples Executive Vice President Jay Baitler sent an e-mail the day after Noonan was fired for falsifying travel expense reports that said, "It is with sincere regret that I must inform you of the termination of Alan Noonan's employment with Staples. A thorough investigation determined that Alan was not in compliance with our policies." In his lawsuit against Staples, Noonan did not challenge the truth of the statements in the e-mail before the appeals court.

Under Massachusetts libel law, a plaintiff must prove that the alleged libel is defamatory and false. A defendant in a libel lawsuit may then assert the statement's truth as a defense to a libel claim. But the 1st Circuit ruled that a 1902 Massachusetts state law recognizes a narrow exception to truth as a defense against libel if the defendant acted with "actual malice" in publishing the libelous statement. Mass. Gen. Laws ch. 231 § 92 states that the defendant in an action for libel may introduce into evidence "the truth of the matter contained in the publication charged as libelous; and the truth shall be a justification unless actual malice is proved."

The 1st Circuit ruled that "actual malice" should be defined in accordance with state common law as "actual malevolent intent or ill will." In doing so, the federal appeals court rejected the standard for "actual malice" set forth in the U.S. Supreme Court case *New York Times v. Sullivan*, 376 U.S. 254 (1964). In that landmark case regarding libel of a public official, the Supreme Court defined "actual malice" as knowledge of falsity or reckless disregard for the truth.

Judge Torruella's opinion refused to apply the *New York Times v. Sullivan* definition of "actual malice" to the Massachusetts statute because the 1902 law predated the 1964 Supreme Court case. Therefore, the court concluded, applying the modern definition of "actual malice" to the statute's terms would be inconsistent with the intent of the state legislature that enacted the statute.

Furthermore, Torruella's opinion stated the Supreme Court defined the term "actual malice" in *Sullivan* in the context of libelous statements regarding public officials. *Noonan v. Staples*, however, concerned a private figure, Torruella wrote, thus rendering the *Sullivan* standard inapplicable.

In *Gertz v. Robert Welch*, 418 U.S. 323 (1972), the Supreme Court said that public figures are individuals who "have assumed roles of special prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." Such figures can include famous celebrities and star athletes.

Private individuals, however, do not have the same ability as public figures to rectify damage to reputation through rebuttal in the media or other channels of communication, nor have they submitted themselves voluntarily to the scrutiny directed at public officials, according to *Gertz*. Therefore, the Supreme Court concluded, private figure plaintiffs do not have to meet the heightened standard of proving "actual malice" in defamation lawsuits. *Gertz* left to the states the responsibility of specifying the degree of fault private figure plaintiffs would have to prove in defamation lawsuits, so long as the states did not impose liability without fault in such cases.

In considering whether summary judgment was appropriate, the 1st Circuit determined that a jury could infer that the allegedly libelous statements regarding Noonan's termination were made with actual malice. Baitler had never before in his twelve years with Staples referred to a terminated employee by name in an e-mail. Therefore, according to the court's opinion, "a jury could permissibly infer that Baitler singled out Noonan in order to humiliate him."

Baitler also did not send an e-mail to employees naming another Staples employee who was terminated for similar reasons. Finally, Baitler sent the e-mail to more than 1,500 employees, some of whom did not travel and had no reason to be aware of the company's travel policy. The court's opinion stated that the fact the e-mail was sent to a large number of employees could constitute evidence of Baitler's "malevolent desire to harm Noonan's reputation." The 1st Circuit determined Noonan had provided sufficient evidence to defeat Staples' motion for summary judgment, and remanded the case to the lower court for trial.

The 1st Circuit had initially issued a ruling in the same case on Aug. 21, 2008 in *Noonan v. Staples, Inc.*, 539 F.3d 1 (1st Cir. 2008). In that opinion, the court granted summary judgment for the defendant, Staples. The appeals court ruled that libelous statements published with "actual malice" might be actionable in Massachusetts, even if true, but said the common law definition of "actual malice" in Massachusetts law had been superseded by the modern definition contained in *New York Times v. Sullivan*. The court subsequently withdrew its first ruling after granting a petition for rehearing in the case on Feb. 13, 2009.

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The 1st Circuit ruled that a 1902 Massachusetts state law recognizes a narrow exception to truth as a defense against libel if the defendant acted with "actual malice" in publishing the libelous statement. The court ruled that "actual malice" should be defined in accordance with state common law as "actual malevolent intent or ill will."

Libel

New Jersey Court Ruling Casts Doubt on 'Fair Report Privilege'

The court held the fair report privilege does not apply because the libel plaintiff's complaint had not yet been subjected to "judicial action" when *The* (Hackensack, N.J.) *Record* stories ran. The court did not specify what it meant by "judicial action," or a phrase it used synonymously, "judicial review."

The New Jersey Superior Court, Appellate Division, ruled Nov. 12, 2008 that the "fair report privilege" does not extend to fair and accurate reports of a complaint filed by a debtor's trustee in a bankruptcy case, at least until there has been "judicial review" of the complaint.

The decision would have allowed Thomas John Salzano – accused of fraud in a 2006 bankruptcy filing – to proceed with his defamation case against two newspapers that reported the allegations set forth in the pleadings. But the state's high court quickly stepped in and stayed the ruling on Jan. 13, 2009, pending its decision on whether to hear the newspapers' appeal.

The "fair report privilege" protects media defendants from liability for the publication of defamatory material if the publication is a full, fair, and accurate report of an official government action or a public meeting. The privilege generally covers reports on judicial proceedings and documents, but some jurisdictions recognize an exception for pleadings or other filings that have not yet received judicial consideration. The New Jersey mid-level appellate court's decision in *Salzano v. North Jersey Media Group, Inc.*, 958 A.2d 1023 (N.J. Super. Ct. App. Div. 2008), endorsed the so-called pleadings exception.

The case originated March 1, 2006 when the bankruptcy trustee for NorVergence Inc., a Newark, N.J.-based telecommunications company, filed a complaint alleging Salzano used $500,000 in company funds for personal entertainment and to purchase a home. A story the next day in *The Record* (Hackensack, N.J.) reported the allegations in the complaint under the headline "Man Accused of Stealing $500,000 for High Living." Versions of the story also ran on two Web sites and in the *Glen Ridge Voice*, a weekly newspaper in eastern New Jersey.

The Record story said that Salzano "allegedly stole" money from the company and went on to relate details about NorVergence's collapse amid allegations of fraud and corruption. The company's chief managing officer was Thomas N. Salzano, Thomas John Salzano's father.

Following publication of the stories, Thomas John Salzano filed a complaint in New Jersey state court alleging that the claim he "stole" money from NorVergence was false and defamatory. North Jersey Media Group, owner of both newspapers, moved for dismissal for failure to state a claim and the trial court agreed, but the Appellate Division reversed.

The New Jersey appellate court held that the story was a "fair and accurate" representation of the bankruptcy trustee's complaint. But the three-judge panel nevertheless reversed the lower court, holding the fair report privilege does not apply because the trustee's complaint had not yet been subjected to "judicial action" when the stories ran. The court did not specify what it meant by "judicial action," or a phrase it used synonymously, "judicial review."

"To summarize, because the trustee's complaint was filed in the bankruptcy court the day prior to the first of these articles, and was not subject to any sort of judicial review by the time the articles were published, we must conclude that the fair report privilege does not apply and defendants were not relieved of liability for republishing the alleged defamatory statements contained within the bankruptcy complaint on that basis," Judge Clarkson S. Fisher Jr. wrote for the unanimous three-judge panel.

The court acknowledged that several jurisdictions have explicitly rejected the so-called pleadings exception to the fair report privilege, but nonetheless endorsed it following limited discussion. Citing the Restatement (Second) of Torts, the court noted that the historic justification for the exception is to discourage litigants with bad motives from filing complaints containing defamatory information in order to establish grounds for the privilege, then publicizing the defamatory information under the protection of the privilege and withdrawing the complaint.

The court did not consider other potential disincentives to such a course of action. For example, in a federal court, Rule 11 of the Federal Rules of Civil Procedure authorizes a judge to sanction an attorney or unrepresented party for signing a complaint if it is filed for an improper purpose or it contains factual information that has no evidentiary basis. New Jersey's own procedural rule 1:4-8 provides a similar remedy in state court.

After dealing with the fair report privilege, the court went on to hold that the allegedly defamatory stories were about matters of public concern, and therefore only actionable under New Jersey law if they were published with "actual malice." The standard requires that Salzano prove the defendants knew the stories were false or acted with reckless disregard for the truth. The appellate court remanded the case to the trial court to allow Salzano an opportunity to amend his complaint and present proof of actual malice.

After the Appellate Division issued its ruling, Salzano said the decision would "fortify" the First Amendment because it would ensure "integrity in reporting while protecting private citizens," according to a Nov. 19, 2008 *Record* story. "Reporters should verify their facts and verify the sources where they get their facts from."

Attorneys for *The Record*, however, disagreed with Salzano's characterization of the case. They said the decision would impair free speech rights and chill reporting on judicial proceedings, the November 19 story said.

Following the appellate court decision, the newspaper appealed to the New Jersey Supreme Court where it was supported by an *amicus* brief filed by the New Jersey Press Association and 18 other press and civil liberties groups. The Press Association's Dec. 11, 2008 brief argued that the

Fair Report Privilege, *continued on page 34*

Libel

Libel Tourism Bills Introduced in U.S. House and Senate

A new bill aimed at protecting American journalists, writers, and publishers from defamation judgments in foreign jurisdictions with less stringent speech protections was introduced in the United States Senate on Feb. 17, 2009.

The Free Speech Protection Act of 2009, S. 449, was introduced by Sen. Arlen Specter (R-Pa.), along with Sens. Joseph Lieberman (I-Conn.) and Charles Schumer (D-N.Y.), and referred to the Senate Judiciary Committee. The senators introduced a similar bill, S. 2977, in 2008 that was not enacted.

"Journalists, academics, commentators, experts, and others subjected to [foreign defamation] suits are suffering concrete and profound financial and professional damage for engaging in conduct that is protected under the Constitution of the United States and essential to informing the people of the United States, their representatives, and other policymakers," the bill stated in its "Findings" section. "The United States respects the sovereign right of other countries to enact their own laws regarding speech, and seeks only to protect the first amendment rights of the people of the United States in connection with speech that occurs, in whole or in part, in the United States."

The bill would give "any United States person against whom a lawsuit is brought in a foreign country for defamation" the right to bring a lawsuit in a U.S. federal district court to bar enforcement of the foreign suit. The bill provides for jurisdiction over a lawsuit against any person or entity that brought the foreign suit as long as "the writing, utterance, or other speech at issue in the foreign lawsuit does not constitute defamation under United States law."

In addition to barring the enforcement of the foreign judgment in United States, the law provides for the recovery of damages if the American plaintiff prevails. The damages are to be calculated based on the amount of the foreign judgment, attorney's fees incurred, and the "harm caused" to the affected person. If the court determines that the foreign plaintiff intentionally "engaged in a scheme to suppress rights under the [F]irst [A]mendment to the Constitution of the United States," it can triple the damage award.

"There is a real danger that American writers and researchers will be afraid to address the crucial subject of terror funding and other important matters without these protections," Specter said in a press release on Feb. 17, 2009.

"Supporters of Islamist terror are using foreign courts to silence journalists trying to expose those supporting terrorist networks around the world," Lieberman said in the same press release. "This important bill will protect the Constitutional rights of American journalists so that they can continue their work that is critical to the safety and security of our country."

Although last year's S. 2977 and its companion bill in the House of Representatives, H.R. 5814, authored by Rep. Peter King, (R-N.Y.), did not survive their respective congressional committees, another bill aimed at libel tourists, H.R. 6146, authored by Rep. Steve Cohen (D-Tenn.), passed the House by a unanimous voice vote. (See "House Passes Libel Tourism Bill; Illinois Enacts Its Own Law" in the Fall 2008 Silha *Bulletin*). Although H.R. 6146 was subsequently received in the Senate, no further action was taken, and the bill died.

The version of the bill backed by Specter and King gives greater protection than Cohen's bill, which only provided for an injunction against the foreign judgment and the possibility of recovering attorney fees.

According to a Feb. 17, 2009 story reported by the Reporters Committee for Freedom of the Press (RCFP), a new version of Cohen's bill, as well as King's partner bill to S. 449, are expected to be introduced in the House later this year.

New York-based author Rachel Ehrenfeld, who fought a libel judgment from England in American courts, testified before the House Subcommittee on Commercial and Administrative Law, which Cohen chairs, on Feb. 12, 2009. Ehrenfeld was sued by Khalid bin Mahfouz, a billionaire Saudi businessman, for her 2003 book, "Funding Evil: How Terrorism is Financed and How to Stop It."

In her book, Ehrenfeld alleged that bin Mahfouz had funded Osama bin Laden and other terrorists. In response, bin Mahfouz filed the lawsuit in Britain, where plaintiff-friendly laws make it easier to prevail in defamation cases, even though only a handful of books were sold overseas. In *Ehrenfeld v. bin Mahfouz*, 518 F.3d 102 (2d Cir. 2008), the court refused to enter a declaratory judgment that would have held the British libel judgment unenforceable in the United States. (See "New York High Court Rules in Libel Tourism Case" in the Winter 2008 Silha *Bulletin*.)

Ehrenfeld's case led the New York Legislature to pass The Libel Terrorism Protection Act, N.Y. C.P.L.R. § 302, last spring. This law gave New York's state courts jurisdiction over any foreign libel plaintiff who had secured a foreign defamation judgment against an author with sufficient ties to New York. The jurisdiction was limited to declarations that the foreign judgment is not enforceable. (See "New York Law Protects Authors from Libel Tourists" in the Summer 2008 Silha *Bulletin*). Illinois has since enacted a similar law.

"I am a scholar dedicated to exposing the enemies of freedom and Western Democracies through publications in books and articles. The psychological[,] emotional, and financial effects of the threat of this libel lawsuit against me in London will stay with me as long as I live," Ehrenfeld said at the hearing. "Until the New York legislature passed the Libel Terrorism Protection Act last May, I spent many sleepless nights worried that Mahfouz will try to enforce the English judgment against me in

Libel Tourism Bills, *continued on page 32*

"There is a real danger that American writers and researchers will be afraid to address the crucial subject of terror funding and other important matters without these protections."

– Sen. Arlen Specter (R-Pa.)

Libel Tourism Bills, *continued from page 31*

New York. His deliberate non-enforcement left it hanging over my head like a sword of Damocles, which aggravated the chilling effects."

New York University School of Law Professor Linda Silberman said she was concerned that the proposed bills all include ideas that are "much too aggressive" in asserting U.S. jurisdiction.

"[The bills] may encourage U.S. courts to apply U.S. law principles without regard to context and to invoke public policy too reflexively without sufficient regard for the competing interests of other countries," Silberman said in a statement before the subcommittee. "But to the extent that Congress seeks a solution, it should do so by developing a broader proposal for federal law on the recognition and enforcement of foreign judgments and viewing the issues in the context of the foreign relations concerns of which they are a part."

The RCFP reported that Cohen suggested at the hearing that his provision requiring foreign plaintiffs to pay the attorney fees of the media defendants might achieve the same goal as the Specter bill, but in a more constitutionally acceptable manner.

On February 10, the Society of Professional Journalists (SPJ) released a statement praising the efforts of Congress to address libel tourism and encouraging further action. "This is a serious issue that demands serious attention," SPJ President Dave Aeikens said in the statement. "The First Amendment exists to protect citizens from attacks on expression and speech. The issue has moved overseas. That's why it's so important for Congress to address this problem head on."

The American Civil Liberties Union (ACLU) also supported the passage of a bill. "Americans should not lose their free speech rights simply because it's now easier for foreign audiences to access materials published in the [United States]," said Michael Macleod-Ball, ACLU Chief Legislative and Policy Counsel, in a Feb. 12, 2009 press release. "Freedom of expression is a cornerstone of American democracy and while that right may stop at our shores, the restrictions that exist in foreign lands should not be allowed to chill the speech rights of Americans at home."

Meanwhile, some British sources are saying that their government is feeling pressure to change its defamation laws in the wake of the recent litigation. *The Guardian* (London) reported on Feb. 23, 2009 that both the Ministry of Justice and the Parliamentary Committee on Media, Culture and Sport are planning consultations on libel law reforms.

"It is a moment of monstrous shame for British freedom of expression traditions that the U.S. Congress has to protect its writers, intellectuals and journals from British judges," said Dennis MacShane, the Labour MP for Rotherham, in the February 23 *Guardian* story.

According to a Jan. 8, 2009, story in *The Economist*, MacShane said that libel tourism was "an international scandal" and "a major assault on freedom of information." Lawyers and courts, he said, were "conspiring to shut down the cold light of independent thinking and writing about what some of the richest and most powerful people in the world are up to."

– Jacob Parsley
Silha Research Assistant

Truth Defense, *continued from page 29*

First Amendment lawyer Robert Bertsche, a partner at Boston law firm Prince Lobel Glovsky & Tye, called the February 13 ruling "troubling on so many levels that it beggars the imagination," according to a Feb. 17, 2009 post on the blog Media Nation. "With this decision, the First Amendment has been replaced by the maxim, 'If you don't have anything nice to say, don't say it.' . . . Even if what you say is true, you will be made to pay damages if a judge decides that what you said is not of 'public concern' and a jury decides you were motivated by ill will."

First Amendment lawyer Robert Corn-Revere, a partner at law firm Davis Wright Tremaine, said, however, that the case should be understood as a narrow ruling on Massachusetts state law, according to a Feb. 24, 2009 First Amendment Center story available online at http://www.firstamendmentcenter.org/news.aspx?id=21284. "[The court] does its best to interpret the law of Massachusetts," Corn-Revere said. He said he believed that if a First Amendment defense had been argued by Staples, the speech would have been protected.

– Amba Datta
Silha Research Assistant

Libel

Criminal Libel Charges in Colorado, Wisconsin

Authorities in Colorado and Wisconsin have charged three people with criminal libel in separate incidents all involving the Internet. The charges concern commentators who argue that it is constitutionally impermissible to criminalize speech.

Colorado Man Faces Criminal Libel Charges from Craigslist Rant

A Loveland, Colo. man faces two counts of felony criminal libel charges for unflattering comments made about a former lover and her attorney on the Craigslist Web site.

According to a Dec. 2, 2008 Associated Press (AP) story, the case began when a woman told Loveland police in December 2007 about posts made about her on Craigslist's "Rants and Raves" section between November and December 2007. Court records show that the posts suggested she traded sexual acts for legal services from her attorney and mentioned a visit from child services because of an injury to her child.

Detectives confronted J.P. Weichel about the posts at his workplace in August 2008. Weichel, who fathered a child with the complainant, said he was "just venting" when he made the comments.

Colorado law states that any person who "shall knowingly publish or disseminate, either by written instrument, sign, pictures, or the like, any statement or object tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue, or reputation or expose the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, or ridicule, commits criminal libel." The truth of the statement can be used as a defense against the charge, "except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living." Colo. Rev. Stat. § 18-13-105.

Thomas Kelley, an attorney with the Denver office of the law firm Levine Sullivan Koch & Schulz, criticized the charge in a Dec. 2, 2008 ABC News report. "Criminal libel is just an anachronism," he said. "Using the criminal law to punish speech is just such an ugly display of the power of the state that I think most law enforcement officers would tell someone with a complaint like that to file a civil action."

Colorado Man Charged with Criminal Libel for Allegedly Doctoring Photos

In an unrelated incident, another Colorado man was recently charged under the same Colorado statute for allegedly digitally doctoring photographs of a woman.

According to a November 2 story in *The Pueblo Chieftain*, Robert Ezekiel Tafoya was charged with one felony count of criminal libel, according to court records.

According to the *Chieftain*, District Attorney Bill Thiebaut said Tafoya used computer programs to alter pictures of the complainant.

"The investigation showed that the defendant pasted pictures of the face of one person onto the body of other persons and published or disseminated the pictures electronically to others," Thiebaut said. "We believe it impeached the reputation [of the complainant] and those pictures were being used to ridicule her."

Thiebaut did not elaborate on the relationship between Tafoya and the person depicted in the photographs or what the doctored photos depicted, except to say that they cast the complainant "in a compromising position," the story said.

"There were some really deep-seeded [sic] motives on (Tafoya's) part to depict this person in a certain way," Thiebaut told the newspaper.

The *Chieftain* reported that sources familiar with the Pueblo court system said they cannot recall any previous criminal libel charges in the jurisdiction.

The December 2 ABC News story on the Colorado cases attributed the recent rise in criminal libel charges to the proliferation of the Internet.

"Many people convince themselves it's anonymous," said Sandra Baron, director of the New York-based Media Law Resource Center, according to the ABC News story. "And, of course, the reach of the Internet is such that once it's out there, it's so widespread and so provocative that it inspires people to want to take action to stop it." Colorado's criminal libel laws have been challenged on constitutional grounds before. In 2007, the United States Court of Appeals for the Tenth Circuit declined to strike down the statute in *Mink v. Suthers*, 482 F.3d 1244 (10th Cir. 2007), a case that involved a University of Northern Colorado college student's satirical online publication used to spoof a UNC professor. (See "Tenth Circuit Declines to Strike Down Colorado's Criminal Libel Law After Finding Student's Challenge Moot" in the Spring 2007 Silha *Bulletin*.)

The Silha Center joined the Student Press Law Center in an *amicus* brief filed with the 10th Circuit in *Mink*. The brief argued that criminal libel is "facially and ideologically inconsistent with the principles of the First Amendment." (See "Silha Center Joins Student Press Law Center in *Amicus* Brief" in the Winter 2005 Silha *Bulletin*.)

In a 2004 blog post regarding the *Mink* case on the legal blog The Volokh Conspiracy, University of California, Los Angeles law professor Eugene Volokh criticized the arbitrary nature of criminal libel.

"My sense is that these sorts of criminal libel prosecutions, seizures, and arrests almost invariably involve favoritism on the part of the government," Volokh wrote. "I suspect criminal libel law ends up punishing not libel generally, but libel against people who are prominent or influential, or with whom the police and prosecutors sympathize."

In 1991, the Colorado Supreme Court held in *People v. Ryan*, 806 P.2d 935 (Colo. 1991), that its criminal libel statute was constitutional as applied to matters of private concern. The court also upheld the statute's classification of truth as an affirmative

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Under Colo. Rev. Stat. § 18-13-105 the truth of an allegedly libelous statement can be used as a defense, "except libels tending to blacken the memory of the dead and libels tending to expose the natural defects of the living."

Fair Report Privilege, *continued from page 30*

appellate court's decision not only misinterpreted prior New Jersey precedent concerning the fair report privilege, but also violated the First Amendment to the U.S. Constitution.

The brief said the Appellate Division misinterpreted the 1994 New Jersey Supreme Court case *Costello v. Ocean County Observer*, 643 A.2d 1012 (N.J. 1994). In *Costello*, the state high court held that the fair report privilege did not apply to a story about a harassment complaint, not because it was a complaint that had yet to receive judicial attention, but because the report itself was not "full, fair, and accurate." According to the brief, discussion in *Costello* of the pleadings exception was therefore dicta, and the *Salzano* court should not have treated it as binding precedent.

More importantly, the *amicus* brief argues that the *Salzano* court's interpretation of the fair report privilege violates the First Amendment, a discussion that is absent from Judge Fisher's opinion in the case.

In *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), the U.S. Supreme Court held that "States may not impose sanctions on the publication of truthful information contained in official court records open to public inspection." According to the brief, the word "truthful" means that the report must be an accurate representation of the public record, but does not require that the underlying facts contained in the record actually are true. The fair report privilege is therefore not just a common law privilege, but a constitutional privilege that New Jersey courts lack authority to undermine, the brief argues.

On Jan. 13, 2009 the state's chief justice issued a stay preventing enforcement of the mid-level appellate court's decision pending a resolution from the New Jersey Supreme Court on whether to hear the appeal. As the *Bulletin* went to press, the court had not issued a decision.

Thomas Cafferty, an attorney for the New Jersey Press Association, said in a Jan. 14, 2009 story reported by the Reporters Committee for Freedom of the Press that the high court's decision to issue a stay was an encouraging sign. "We hope this bodes well for the court taking the case and ultimately reversing the appellate decision," he said.

– Michael Schoepf
Silha Fellow

Criminal Libel, *continued from page 33*

defense, placing the burden of proof on the defendant.

In 1964, the U. S. Supreme Court in *Garrison v. Louisiana*, 379 U.S. 64 (1964), held that in cases regarding matters of public concern about public figures, a defendant could not be held liable unless the prosecution could prove that the defendant knew the statement was false, or was aware of a high probability that it was false. The court did not hold that criminal libel statutes were *per se* impermissible.

Wisconsin Woman Pleads Guilty to Criminal Libel Charges

Laura Lee Janzig pleaded no contest in October 2008 to charges of criminal defamation in Superior, Wis. for sending e-mails to members of the local school board alleging that a local teacher was having sex with her students and videotaping it.

Janzig, of nearby Duluth, Minn., was charged under a Wisconsin statute, Wis. Stat. § 942.01, which states that "Whoever with intent to defame communicates any defamatory matter to a 3rd person without the consent of the person defamed is guilty of a Class A misdemeanor." The statute defines defamatory matter as anything which exposes its subject to "hatred, contempt, ridicule, degradation or disgrace in society or injury in the other's business or occupation." The law does not apply if the subject matter was true or "communicated with good motives and for justifiable ends."

According to an Oct. 29, 2008 story from the Northland's NewsCenter, a news Web site for Northern Minnesota and Wisconsin, the emails from Janzig anonymously alleged that the inappropriate behavior took place between the Superior teacher and several of her male and female students.

The accused teacher was put on administrative leave while the allegations were investigated by the Superior Police Department, and the e-mails were later traced to Janzig, who was dating a former boyfriend of the accused teacher.

On Dec. 8, 2008 Janzig was sentenced to 20 days in jail, a $100 fine, and one year of probation, according to court records.

– Jacob Parsley
Silha Research Assistant

Student Media

New California Law to Protect School Journalism Advisers

As of Jan. 1, 2009, a new California law offers journalism advisors and other school employees increased protection from retaliatory administrative action for material published by their students.

The Journalism Teacher Protection Act modified four sections of the California Education Code that deal with free speech rights of students in an effort to expand protection for their teachers. The legislation adds a new paragraph to sections 48907, 48950, 66301, and 94367 that states: "An employee shall not be dismissed, suspended, disciplined, reassigned, transferred, or otherwise retaliated against solely for acting to protect a pupil engaged in the conduct authorized under this section, or refusing to infringe upon conduct that is protected by this section, the First Amendment to the United States Constitution, or Section 2 of Article I of the California Constitution."

The law had faced several hurdles in its path to enactment, including a delay caused by a legislative backlog during a government budget stalemate and hostility from the University of California system. (See "Bill to Protect Journalism Teachers Passes California Legislature; Awaits Governor Approval" in the Summer 2008 Silha *Bulletin*).

The law was initially introduced by Sen. Leland Yee (D-San Francisco/San Mateo), and was officially titled S.B. 1370. It passed 72-1 in the California State Assembly and 31-2 in the Senate before being signed by Gov. Arnold Schwarzenegger on Sept. 28, 2008.

"Allowing a school administration to censor in any way is contrary to the democratic process and the ability of a student newspaper to serve as the watchdog and bring sunshine to the actions of school administrators," Yee said in a statement after the law was signed. "It is quite disheartening to hear, that after we specifically prohibited prior restraint by administrators, that some are engaging in this type of nefarious activity and even firing quality teachers because of content in the student newspaper."

Adam Keigwin, Yee's communications director, said in a Sept. 29, 2008 story from the Student Press Law Center (SPLC) that he gets phone calls from journalism advisers who have to choose between either violating the law by censoring a newspaper or facing potential retaliation from administrators.

"We had about a dozen cases or so prior to introducing the bill," Keigwin said. "And then since introducing the bill, there's been probably another dozen or so in terms of calls that I've gotten from college professors and high school journalism advisers who are saying 'oh yeah, this happened to me, too.'"

Colorado Revised Statute 22-1-120 and Kansas Statute 72-1506(e) are the only other state statutes that prohibit retaliation against teachers who advise student publications, the SPLC reported. The California law is even broader than these states' laws, because it applies to all modes of lawful student speech, not just publications.

"Teachers losing their jobs for refusing to censor their students' news reporting is a real and pervasive problem, and it is going on all too commonly in America's schools," SPLC Executive Director Frank D. LoMonte said.

In a January 12 story in *The San Joaquin Record*, California Newspaper Publishers Association attorney Jim Ewert said he hopes the law will stop a trend that has resulted in at least 15 teachers being punished for protecting student speech rights in the past three years.

"It's kind of sad that we even had to do it," Ewert said. "No other state in the country has had these kind[s] of incidents where teachers have been reassigned over free speech."

Janet Ewell, who oversaw an award-winning journalism program at Rancho Alamitos High School in Garden Grove, Calif., lost her adviser job in 2002 after her students wrote editorials criticizing filthy bathrooms and bad cafeteria food. According to a Jan. 5, 2009 story in the *Los Angeles Times*, her experience was often cited by supporters of the new law to demonstrate its necessity.

Ewell, who was reassigned as an English teacher at the same school, said in the *Times* story that she sympathized with school administrators who are under pressure to make their schools look good, but that the bottom line is that student newspapers are not publicity newsletters for principals.

She said she hopes the new law will ensure that stories are published, regardless of how they may be perceived. "It's wonderful to see that people care about 1st Amendment rights and care about protecting students' rights," Ewell said.

– Jacob Parsley
Silha Research Assistant

"Allowing a school administration to censor in any way is contrary to the democratic process and the ability of a student newspaper to serve as the watchdog and bring sunshine to the actions of school administrators."

– Sen. Leland Yee (D-San Francisco/San Mateo)

Student Media

High School Editors Face off with Principals

School administrators objected to stories about an investigation into a middle school teacher in Minnesota, same-sex marriages in South Carolina, and a student who was removed from a school in Texas.

The student newspaper at Faribault High School in Faribault, Minn. returned to the presses in February 2009 after a fight over prior review resulted in the school's superintendent suspending publication and students turning to the local newspaper and the Internet as alternative means of publishing.

The *Faribault Daily News* reported that School District Superintendent Bob Stepaniak shut down the student paper, the *Echo*, on December 15, saying he and the paper's student editors were "at loggerheads" over whether administrators at the public high school should be allowed to review the paper's content prior to it going to print. At issue was a story about a middle school teacher who was the subject of an investigation over complaints that she had "inappropriate communication" with students, sending them text messages outside of school hours.

According to the Web site MinnPost.com, the students were investigating the story in fall 2008 when Stepaniak said he wanted to see any story about the teacher or the related investigation before it was published. The student journalists declined to allow Stepaniak prior review. Instead, they collaborated with the *Faribault Daily News* on a story about the teacher published December 10. *Daily News* reporter Jim Hammerand told MinnPost.com, "We said [to the students], 'If you help us out, you might not be able to publish in the *Echo*, but we can publish in the *Daily News*.' They were inside the school system, so they had information we couldn't get. They knew the teacher's name." The byline for the December 10 *Daily News* story included *Echo* co-editors Benjamin Jackson and Christen Hildebrandt alongside Hammerand.

The *Faribault Daily News* reported December 15 that the students wanted to include a story similar to the one published December 10 in the *Daily News* in the forthcoming edition of the *Echo*. They offered to allow the school district's attorney to review the story rather than school administrators, but Stepaniak declined the offer and shut the paper down the day before it went to press.

Jackson, Hildebrandt, and faculty adviser Kelly Zwagerman differed with Stepaniak over the central legal question of whether school administrators have the power under the First Amendment to review and restrain a newspaper published by the school district. The *Daily News* reported that Stepaniak pointed to the U.S. Supreme Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which held that public school administrators can censor school-sponsored student speech, such as a student newspaper, when they can show a legitimate pedagogical purpose for doing so, and when it has not been established, by policy or practice, as a forum for student expression. In *Hazelwood*, a school principal had removed two stories from a student newspaper, one about student pregnancy and the other about students with divorced parents, because the principal believed they dealt with issues too mature for many in the high school reading audience and because he did not believe the stories met traditional journalistic standards of professional ethics.

The *Echo*'s student editors and their adviser, meanwhile, argued that they have a right to report on what Zwagerman called "public information about a public employee." According to the *Daily News*, they cited the 2004 federal district court decision in *Dean v. Utica Community Schools*, 345 F. Supp. 2d 799 (E.D. Mich. 2004) in which the court declared the Utica, Mich. High School student newspaper to be a "limited purpose public forum," meaning the school's principal could regulate the newspaper based on the time, place, or manner of its publication and distribution, but not its content. The court ruled that the principal's removal of a story about school bus fumes contributing to a Utica resident's cancer was "unreasonable" and "unconstitutional."

In a Dec. 11, 2008 letter to Stepaniak, Zwagerman pointed out that the Faribault school district's policy on student publications states, "Official school media and activities are free from prior restraint by officials except as provided by law." The policy's guidelines generally follow the *Hazelwood* standard, however, stating that school-sponsored student media are subject to the editorial control of the School District "as long as the School District's actions are reasonably related to legitimate pedagogical concerns," including "assuring that media and activities are appropriate for the age level" and "assuring that the school is not associated with any position other than neutrality on matters of public controversy." Officials may also make certain that school-sponsored student speech is not "inconsistent with the shared values of a civilized social order," and is not "for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane." Stepaniak told MinnPost.com that he had never interfered with the *Echo* before, but was concerned that the story, if published, would damage the middle school teacher's reputation, and might result in a lawsuit for the school district.

The Associated Press (AP) reported January 12 that the students turned to the Internet after being blocked from publishing the student newspaper. A company that creates Web sites for student publications, School Newspapers Online, offered the student editors of the *Echo* a free site after the print operation was shut down.

Hildebrandt told the AP that the Web site, Truth With Echo, available at http://www.truthwithecho.com/, would cover school news and events, but would not have any association with the district or use any school resources. Zwagerman told the AP her role in the Web site would be minimal, but that she would attend meetings, edit stories, or offer guidelines for ethics outside of class time.

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High School Editors, *continued from page 36*

According to the *Faribault Daily News*, Stepaniak said January 23 that he would allow the February issue of the *Echo* to be published, provided student editors agree to meet with him if they choose to publish a story about the investigation of the middle school teacher, and Zwagerman agree to contact district administrators about any potentially controversial stories in the future. Hildebrandt and Stepaniak said this arrangement reflects conditions that were in place prior to the shutdown.

The students also went before the district school board on January 26 to share their views on student free press rights and to discuss the current student publications policy. According to the *Daily News*, the students gave a PowerPoint presentation provided by the Student Press Law Center (SPLC) titled, "Press Freedom for High School Student Journalists," which discusses the role of a free press in society, case law relevant to student journalists, the role of school officials as publishers, and their ability to control content. The board is considering changes to the district's current media policy, the *Daily News* reported.

Myrtle Beach Principal Blocks Student Paper Distribution

Principal Ronnie Burgess of the public Academy for Arts, Science & Technology in Myrtle Beach, S.C. did not allow the Nov. 6, 2008 edition of the student newspaper, *The Academy Post*, to be distributed because he objected to an editorial and accompanying photograph.

The AP reported Dec. 18, 2008 that Burgess said the editorial, which advocated same-sex marriages, and the photograph, which featured two male students holding hands, would be disruptive.

Burgess said he consulted attorneys before preventing the quarterly newspaper from being distributed, and school district spokeswoman Teal Britton said district policy gives principals discretion over student publications, the AP reported.

The AP reported December 23 that *The Academy Post*'s student reporters had asked the school district to address the issue at its next meeting, but when the *Bulletin* went to press the issue had not been resolved.

Principal Cites FERPA, Hazelwood in Holding Up Article

A high school principal in Houston, Texas held back an individual article from a student newspaper there, citing federal law and his objections to its content.

Principal Claudio Garcia of Houston's Cypress Ridge High School cited the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g, as well as the *Hazelwood* standard when he prevented a story from being published in the school newspaper, the *Rampage*, the SPLC reported on February 2.

FERPA is a federal law meant to protect the privacy of student education records. It prohibits school officials from disclosing student educational records unless they have obtained the permission of the student and parent if the student is under 18, and applies to all schools that receive funds from the U.S. Department of Education. Press advocacy groups have claimed that a recent change in the law will restrict journalists and other citizens from receiving information about violence in public schools. (See "FERPA Expanded, Critics Call New Rules 'Irrational'" on page 14 of this issue of the Silha *Bulletin*.)

The SPLC reported Feb. 2, 2009 that student journalist Tara Cobler was investigating a story about a student who was removed from the school last November when Garcia refused to comment and, according to Cobler, "shut down the story."

Cobler told the SPLC that Garcia said the story involved a privacy issue, but Cobler claimed that FERPA does not apply to student journalists who are not school officials, and said she had the student and his parents' permission to report on the issue anyway.

SPLC legal consultant Mike Hiestand said, "In this case, Tara and the students on the newspaper staff are not school officials, or acting as agents of the school. FERPA does not prohibit them from talking to their classmates and reporting what they find out. Moreover, given that Tara had lengthy interviews with both the student and his mom, I think it's a pretty easy call that they've consented to disclosing this information."

The SPLC reported that Garcia also said that the *Hazelwood* decision supported his decision to prevent the story from being published. "Our campus newspaper is not an open forum for indiscriminate use by the general public or campus students and staff," Garcia said. "Rather it is an educational course, over which school officials exercise reasonable editorial control to ensure that the pedagogical goals of the course are fulfilled."

Cobler told the SPLC that she feels that "this is the definition of censorship," and said she submitted her story to the Houston *Chronicle* in the hopes of getting it published.

– Patrick File
Silha Fellow and *Bulletin* Editor

Media Ethics

Defense Department Finds 'No Wrongdoing' in TV Analysts' Pentagon Ties

FCC, Other Agencies also Investigating

The first of three federal agencies scheduled to weigh in on the controversy surrounding the use of retired military officers as independent analysts on television news programs reported in January 2009 that it found "insufficient evidence" to support allegations that the Defense Department violated federal law.

The New York Times first reported in April 2008 that the military analysts' often pro-war commentary could increase their access to the Pentagon, and in turn, lead to lucrative consulting deals with defense contractors. The story described a web of conflicting interests tying the retired officers to the Pentagon and private contractors while at the same time the networks touted their independence. (See "*Times*' Story about Military Analysts Makes Ripples, Not Waves" in the Spring 2008 Silha *Bulletin*.)

The Defense Department Inspector General's report declares that "the evidence in this case was insufficient to conclude" that the Defense Department's "outreach activities ... violated statutory prohibitions on publicity or propaganda."

The *Times*' investigation led several Democratic legislators to call for inquiries by the Defense Department, the Government Accountability Office (GAO), and the Federal Communications Commission (FCC). The Defense Department Inspector General, the first to issue a report, found nothing wrong with the department's public relations program, which involved a series of high level meetings with the analysts at the Pentagon and several department-paid trips overseas.

Meanwhile, the *Times* followed up on its original investigative work with a lengthy Nov. 30, 2008 story describing the continued use of the military analysts by television news programs without disclosing their substantial self-interests in defense companies that stand to profit from the ongoing war.

Report: Nothing Wrong with Rumsfeld's Public Relations Campaign

In response to the April 2008 story in the *Times*, Congress directed the Defense Department Inspector General to submit a report discussing the department's public relations campaign involving military analysts. In January, the inspector issued a report finding no wrongdoing.

The congressional directive was included in the 2009 military appropriations bill, P. L. 110-417, signed by President Bush on Oct. 14, 2008. The provision requesting the report also directs the GAO to prepare a legal opinion on whether the department's activities violated federal laws prohibiting propaganda. That opinion is now overdue, but it had not been posted on the GAO's Web site as the *Bulletin* went to press.

In addition to ordering reports, section 1056(a) of the 2009 appropriations bill also reiterates the ban on using congressionally provided funds for domestic propaganda. "No part of any funds authorized to be appropriated in this or any other Act shall be used by the Department of Defense for publicity or propaganda purposes within the United States not otherwise specifically authorized by law," the bill states.

The Defense Department Inspector General's report, dated Jan. 14, 2009 but released two days later on a Friday afternoon, declares that "the evidence in this case was insufficient to conclude" that the Defense Department's "outreach activities … violated statutory prohibitions on publicity or propaganda."

The report focused on the department's efforts to meet with the television analysts and provide information about military activities. The April 2008 *Times* story suggested those high-level meetings were only available to analysts who expressed pro-war views. Critical analysts would find themselves left out, the story said.

But the Inspector General's report concluded that such retaliatory actions were rare, and that the department had done nothing wrong.

The substantive conclusions turn on the definition of the terms "publicity and propaganda." The report states that the terms have three potential meanings: activities involving "self-aggrandizement or puffery;" activities that are "purely partisan in nature;" and activities that are "covert, that is, the communications do not reveal to the target audience the government's role in sponsoring the material."

According to the report, the Defense Department's activities were not "puffery" because they were simply intended to "inform" the retired officers "so they would be better prepared to speak publicly on [Defense Department] combat operations overseas," not to "aggrandize" the department's policies or personnel. Nor were the department's activities "partisan" because retired officers were not "asked or expected to conceal the source of information," only the name of the official who provided it.

Finally, the report concludes the activities were not "covert" because inspectors did not find documentation to "institutionalize and formalize" covert procedures; there was no effort to "identify, recruit, or train" particularly influential or effective analysts; only one analyst, retired Gen. Barry McCaffrey, was "disinvited" to regular briefings because of unfavorable commentary; the analysts were "distinguished military officers" who would recognize any effort to "manage/manipulate" information; and the department's efforts to catalog the analysts commentary was consistent with Defense Department policies and rules.

The report also states that it is consistent with department policy to inform the public of its positions and refute attacks on its policies. The report states: "As a network vice-president with 40 years of media experience told us, 'Everyone understands that the Pentagon gives out information that is not harmful to its interests. It can't be expected to put out information that is harmful. I consider that fair.'"

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Military Analysts, *continued from page 38*

The report garnered little attention from the popular press, but in a Jan.17, 2009 *Times* story by David Barstow, the investigative reporter whose April 2008 story prompted the report, several Democratic legislators criticized the Inspector General's report for misrepresenting the facts. "To say there are factual inaccuracies in this report is the understatement of the century. I think it is a whitewash. It appears to be the parting gift of the Pentagon to [then-President Bush]," Rep. Paul W. Hodes (D-N.H.) said in the story.

Among the factual errors, the *Times* story pointed out that the Inspector General's list of 43 military analysts with no connections to defense contractors included McCaffrey, whose extensive ties to contractors were detailed in the November 2008 story by Barstow.

In a Jan. 17, 2009 news release available on PR Newswire and McCaffrey's Web site, the retired general lashed out at the *Times* and Barstow and indicated he considered himself at least partially vindicated by the report.

"Barstow should not have been allowed to defend his own flawed reporting in the face of contrary sworn official evidence to his central argument. The [Defense Department] Inspector General report mentions me and other retired military analysts and notes that 'extensive searches found no instance [where the retired officers used their increased access] to achieve a competitive advantage' and stated that there was 'no conflict.' … This is Journalism 101. Barstow fails to reveal a central inconvenient fact which undermines his entire 5000+ word attack," McCaffrey said in the statement.

But *Times* Public Editor Clark Hoyt responded to similar criticism from NBC News President Steve Capus in a January 25 column, arguing that Barstow's articles focused on a distinct issue compared to the Inspector General's report. The government report was primarily concerned with whether government officials broke the law. Barstow's articles, on the other hand, disclosed conflicts of interest that called the reliability of the analysts' commentary into question, but never addressed the legality of their conduct or the military's conduct.

Hoyt also defended the *Times*' decision to assign Barstow to cover the government report. "It would [create an inherent conflict] if the report had made Barstow himself the issue, but investigative reporters routinely write follow-up articles, and Barstow's was a straightforward account that said the inspector general 'found no wrongdoing,'" he wrote in the column.

FCC Investigates Military Analysts

Following the April *Times*' story, Reps. Rosa L. DeLauro (D-Conn.) and John D. Dingell (D-Mich.) sent then-FCC Chairman Kevin Martin a letter urging an investigation of the networks and the analysts for possible violations of sponsorship identification rules. Those rules, 47 C.F.R. § 73.1212, require that broadcast stations disclose the sponsor of any content that is directly or indirectly paid for by a third party.

The rules, and the statutes on which they are based, 47 U.S.C. §§ 317 and 508, originated as a response to "payola" at radio stations. "Payola" refers to payments made by music producers to disc jockeys in exchange for increased airtime for particular songs or artists.

Recently, however, the rules have been used to levy fines against a television analyst who promoted Department of Education policies on air without disclosing he had accepted payments from the department in exchange for his support. (See "Cable Companies Fined for Airing Paid-for Punditry" in the Fall 2007 Silha *Bulletin*.) The rules have also been cited as a way to combat controversial video news releases – pre-packaged segments produced by private corporations or government entities and designed to look like regular news stories. (See "FCC Fines 'Fake News' Produced by Undisclosed Sponsors" in the Fall 2007 Silha *Bulletin*.)

In their letter, DeLauro and Dingell argue that the military analysts were indirectly paid – through access to military officials and Defense Department-paid travel to Iraq and Cuba – for promoting a pro-war position in their television appearances. According to the legislators, that violates the FCC rules.

"When seemingly objective television commentators are in fact highly motivated to promote the agenda of a government agency, a gross violation of the public trust occurs. The American people should never be subject to a covert propaganda campaign but rather should be clearly notified of who is sponsoring what they are watching. We therefore respectfully request that you immediately commence a full investigation of this matter to determine whether any violations have occurred," the May 2, 2008 letter said.

According to an Oct. 6, 2008 story on usnews.com, the online companion to *U.S. News & World Report*, the FCC sent letters to each of the analysts seeking information and setting a 30-day deadline for response. As this issue went to press, the FCC had not released any additional information about its investigation.

New York Times *Continues Investigation of Military Analysts*

In his April 2008 story about military analysts, the *Times*' Barstow described the connections between dozens of analysts and the Defense Department's campaign to use the retired officers as "message force multipliers" pushing a pro-war message to the American people. The follow-up, which appeared Nov. 30, 2008, focused on NBC analyst and retired Gen. McCaffrey's ties to defense companies that stood to profit from a prolonged war.

Like the first story, the follow-up generated praise from media critics for its investigative depth, scorn from McCaffrey who insisted on his ability to provide "objective" analysis, and silence from the television networks.

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Media Ethics

Pentagon Criticized for Mixing PR and Propaganda

Efforts by the U.S. military to merge "public affairs" information operations with those aimed at propaganda have drawn criticism from NATO allies in Afghanistan as well as the Defense Department's Inspector General.

Reuters reported Nov. 29, 2008 that U.S. General David McKiernan, the commander of NATO's International Security Assistance Force (ISAF) in Afghanistan, reversed an earlier plan that would have combined the offices of Public Affairs, Information Operations, and Psychological Operations into a single office. According to NATO's policy on public affairs, the Public Affairs office is concerned with press releases and media relations. Information Operations, meanwhile, serves the "military function" of advising and coordinating information activities designed to affect the will of the enemy, while Psychological Operations can include outright deception in order to achieve military or political objectives.

The Defense Department Inspector General criticized the office of the Assistant Secretary of Defense for Public Affairs for a lack of "clearly defined strategic communications responsibilities," saying the Defense Department "may appear to merge inappropriately the public affairs and information operations functions."

Reuters reported that McKiernan's planned reorganization was a response to the perception that NATO forces are losing the information war against the Taliban, who use sophisticated Web sites, text messages, and contacts with the media to spread information and propaganda.

According to the Reuters report, the proposed combination of the three offices led Germany to threaten to pull out of media operations in Afghanistan, citing concerns that the credibility of public affairs information released to the public might be undermined.

NATO's policy states that Public Affairs, Information Operations, and Psychological Operations "are separate, but related functions," adding "While coordination is essential, the lines of authority will remain separate … to maintain credibility of [Public Affairs] and to avoid creating a media or public perception that [Public Affairs] activities are coordinated by, or are directed by [Information Operations]." The full NATO policy is available online at http://www.nato.int/ims/docu/mil-publ-aff-policy.htm.

Reuters reported that under McKiernan's revised plan, a one-star general will head an office of strategic communications, which will remain separate from public affairs.

A report issued Dec. 10, 2008 by the Defense Department's office of the Inspector General criticized the office of the Assistant Secretary of Defense for Public Affairs for a lack of "clearly defined strategic communications responsibilities," saying the Defense Department "may appear to merge inappropriately the public affairs and information operations functions." The report was specifically concerned with approximately $1 million the office of the Assistant Secretary of Defense for Public Affairs contracted out in 2007 and 2008 as part of a strategic communications program developed in collaboration with the State Department.

Strategic communications are information operations and propaganda programs developed for use in Iraq, Afghanistan, and the Middle East. According to the report, strategic communications responsibilities should remain under the oversight of the Undersecretary of Defense for Policy, separate from the office of the Assistant Secretary of Defense for Public Affairs. Department of Defense Directive 5122.5 established the office of the Assistant Secretary of Defense for Public Affairs in September 2000, making it responsible for the U.S. military's national and international public relations and public information programs, and to "ensure the free flow of information to [Defense Department] personnel, the general public, and the news media."

The full Inspector General's report, titled "Organizational Structure and Managers' Internal Control Program for the Assistant Secretary of Defense (Public Affairs) and American Forces Information Service" can be downloaded at http://www.dodig.osd.mil/Audit/reports/09report.htm.

Information operations and propaganda remain central to U.S. military efforts in Iraq. *The Washington Post* reported Oct. 3, 2008 that the Defense Department will pay four private U.S. contractors up to $300 million over the next three years to produce news stories, entertainment programs, and public service advertisements for the Iraqi media in an effort to "engage and inspire" the local population to support U.S. objectives and the Iraqi government.

The four American companies sharing in the $300 million contract are SOS International, of Reston, Va.; the Lincoln Group, of Washington D.C.; MPRI, of Alexandria, Va.; and Leonie Industries, of Los Angeles.

The Lincoln Group was at the center of controversy in 2005 and 2006 when it was reported that the company, under contract from the Department of Defense, had paid Iraqi news organizations thousands of dollars to publish articles that were favorable to the U.S. and its military and political objectives. In some cases the articles were written by American soldiers, and their source was usually not disclosed. A Pentagon inquiry found the Lincoln Group had not violated military policy or acted illegally, but *The New York Times* and *Los Angeles Times* reported that senior military officials expressed concerns about the program. (See "Pentagon Inquiry Concludes No Wrongdoing Occurred when P.R. Firm Planted News Stories in Iraqi Media" in the Spring 2006 Silha *Bulletin.*)

According to *The Washington Post*, defense officials that were questioned about the new $300 million contract maintained that strict rules are enforced against disseminating false information.

The Washington Post reported that senior military officials said that news items are now a minor part of the media placement program operation, which is focused on public service promotions and media monitoring.

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Pentagon Propaganda, *continued from page 40*

However, the list of "deliverables" under the new contract proposal includes "print columns, press statements, press releases, response-to-query, speeches and … opinion editorials"; radio broadcasts "in excess of 300 news stories" monthly and 150 each on sports and economic themes; and 30- and 60-minute broadcast documentary and entertainment series, *The Washington Post* reported.

– Patrick File
Silha Fellow and *Bulletin* Editor

Military Analysts, *continued from page 39*

The November story explained McCaffrey's connections to several military suppliers, including the hedge fund Veritas, which owns several defense contractors. According to the *Times*, McCaffrey has earned more than $500,000 from Veritas while appearing on NBC without disclosing the connection and providing commentary that could further Veritas's interests.

For example, early in the war Veritas acquired DynCorp, a business involved in the training of foreign security forces. The company earns 37 percent of its revenues from business in Afghanistan and Iraq, the story said. In the summer of 2005 McCaffrey, by then a member of the DynCorp board, departed on an eight-day tour of Iraq paid for by the defense department. When he returned, he made extensive appearances on NBC News programming praising American progress in Iraq, especially in training new Iraqi security forces. NBC did not disclose McCaffrey's ties to DynCorp.

One year earlier, before taking his seat on the DynCorp board, McCaffrey had been highly critical of the training received by Iraqi security forces. According to the *Times*, he had called the forces "badly equipped, badly trained, [and] politically unreliable."

Many media critics praised Barstow's reporting and criticized NBC and other television news outlets for ignoring the apparent conflict. On Salon.com, Glenn Greenwald called NBC's conduct "plainly dishonest" and argued the network had entered "self-protective mode."

Greenwald obtained e-mails "from a very reliable source" that were exchanged between McCaffrey and NBC executives discussing an appropriate response to Barstow's story. According to Greenwald, the e-mails made clear the response would focus on McCaffrey's character, history of critical commentary on the war, and distinguished military career, without addressing the appearance of a conflict of interest.

In the *Times* story McCaffrey seemed to do exactly that in a statement he sent to the newspaper. McCaffrey emphasized his criticism of "Rumsfeld's arrogance and mismanagement" of the war and stressed his military accomplishments. "Thirty-seven years of public service. Four combat tours. Wounded three times. The country knows me as a nonpartisan and objective national security expert with solid integrity," the statement said.

According to Greenwald, McCaffrey's response ignored the real issue: NBC presented the retired general as an objective analyst on issues in which he had considerable undisclosed self interests. That created the appearance of a conflict no matter how strong McCaffrey's character. "NBC points to the numerous shiny medals on McCaffrey's chest in order to imply that it is simply wrong and offensive to question the propriety of such a great and credentialed man," Greenwald wrote.

Joseph Galloway, a reporter, former soldier, and self-described friend of McCaffrey, defended the retired general in an opinion piece published on McClatchyDC.com on Dec. 4, 2008. Galloway praised McCaffrey's character, calling him "a true American hero with service to the nation bred into him and with the old West Point motto of Duty, Honor, Country still ringing in his ears."

But notably, Galloway specifically declined to address NBC's failure to disclose McCaffrey's ties to defense contractors. "Whether NBC News … should have disclosed McCaffrey's business dealings is a different issue," he wrote.

– Michael Schoepf
Silha Fellow

Media Ethics

Lobbyist Settles with *New York Times* over McCain Story

Iseman Says Paper Lied about Apology and Retraction

A lobbyist whose relationship with former Republican presidential nominee Sen. John McCain (R-Ariz.) was the focus of a Feb. 21, 2008 *New York Times* story settled her defamation lawsuit against the newspaper on Feb. 19, 2009. Following the settlement, Washington lobbyist Vicki Iseman claimed that the *Times* violated the spirit of their agreement through a statement published on its Web site and lied about whether it apologized for its story during the settlement negotiations. The *Times* disagreed.

> "They were calling people I hadn't seen in fifteen years. They were calling friends and family and colleagues and former staffers ... it was nuts. It was just unbelievable."
>
> – Vicki Iseman
> Washington lobbyist

On Feb. 21, 2008, *The New York Times* published a story that said Iseman attended fundraisers with McCain at the beginning of his 2000 presidential campaign and visited his offices frequently. The *Times* story questioned the Senator's close involvement with the lobbyist in light of his attempts to portray himself as an enemy of special interests.

The *Times* also cited anonymous sources within the McCain campaign who said they were "convinced the relationship had become romantic" and reported McCain's top advisors' efforts to "protect the candidate from himself" by instructing staff members to block Iseman's access to McCain and warn her away from him. The story sparked criticism against the newspaper regarding its use of confidential sources. (See "*New York Times*' McCain Story Draws Much Criticism, Little Support" in the Winter 2008 Silha *Bulletin*.)

In a March 2 interview on the CBS "Early Show," Iseman said John Weaver, a former member of McCain's campaign and the only source named in the story who had suggested an inappropriate link between Iseman and McCain, had "taken umbrage" with a comment she had made to McCain following a speech during his 2000 presidential campaign. Weaver later met with Iseman at Union Station in Washington, the *Times* reported, and asked her to stay away from McCain. Iseman said of the allegations of an unethical or inappropriate relationship, "all roads lead back to" Weaver. In the interview, Iseman again denied any inappropriate relationship, saying she thought the *Times* "became so invested in [the allegations' truth] that they couldn't walk away."

Iseman said *Times* reporters had come to her house and had asked people in her office whether she had had an affair with McCain. "They were calling people I hadn't seen in fifteen years," Iseman said. "They were calling friends and family and colleagues and former staffers … it was nuts. It was just unbelievable." Iseman said after the story was published, people had refused to ride in an elevator with her and in one instance, approached her on an airplane and told her she "should be ashamed" of herself. "The *Times* developed a caricature of me that they knew was not true," Iseman said.

On Dec. 30, 2008, Iseman filed a defamation lawsuit against the *Times* in the U.S. District Court for the Eastern District of Virginia in Richmond. The complaint in *Iseman v. The New York Times Co.*, No. 3:08CV848 (E.D. Va. filed 2008), said that the Feb. 21, 2008 story constituted defamation *per se* under Virginia common law. A lawsuit for defamation *per se* recognizes that some statements are so harmful to reputation that a court will presume harm without further proof from the plaintiff.

In response to the Iseman lawsuit, Abbe Ruttenberg Serphos, director of public relations for the *Times*, issued a statement on Dec. 30, 2008 defending the Feb. 21, 2008 story. "We fully stand behind the article," the statement said. "We continue to believe it to be true and accurate, and that we will prevail."

On Feb. 19, 2009, Iseman settled the lawsuit with the *Times* without payment. As part of the settlement, however, the *Times* agreed to publish a "Note to Readers" in the February 20 print edition of the newspaper. Three other statements regarding the settlement were posted on the *Times* Web site on February 19, including a joint statement from both sides, a statement by Iseman's lawyers, and "A Response From The Times" authored by Executive Editor Bill Keller.

The "Note to Readers" said "The [Feb. 21, 2008] article did not state, and The Times did not intend to conclude, that Ms. Iseman had engaged in a romantic affair with Senator McCain or an unethical relationship on behalf of her clients in breach of the public trust."

Following the settlement agreement, *Times* editors continued to defend the story. Iseman claimed the *Times* apologized to her during settlement negotiations for the story's publication, according to a Feb. 19, 2009 post on the *Legal Times* blog BLT. The blog post also quoted a statement Iseman issued after the settlement saying, "I am pleased that The New York Times on behalf of its reporters, editors and company has issued a retraction and clarification."

Meanwhile, *Politico* reported February 21 that in an internal memorandum to the *Times* staff dated February 19, *Times* Washington Bureau Chief Dean Baquet said the *Times* did not apologize for the story or retract any part of it. Keller's February 19 "Response" said, "We stand by our coverage, and we are proud of it."

Politico reported that Iseman said the *Times* lied about the fact that there was no apology during the settlement negotiations. "They are absolutely not telling the truth when they say there is no apology," she said.

Iseman also criticized Keller's statement, saying it "totally redefines the joint statement, which clearly wasn't in the spirit of the settlement," according to a Feb. 20, 2009 post on *The Wall Street Journal* Law Blog. However, Baquet told the Law Blog, "we were always very clear that nobody was restricted from saying anything."

The Wall Street Journal Law Blog also reported February 20 that Iseman said she was told during

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Iseman and the *Times*, *continued from page 42*

settlement negotiations that the *Times* does not retract stories, and instead, the most the newspaper will do is publish a "Note to Readers." But George Freeman, assistant general counsel for the *Times*, said, "Of course we retract when we make factual errors, but here we simply feel that wasn't at issue."

In their statement published Feb. 20, 2009 on the *Times* Web site, Iseman's lawyers said that her case raised questions regarding the degree of scrutiny cast on private individuals involved in matters of public concern. "To abandon, in law or in social convention, the division between public and private life, does not serve to advance the free exchange of ideas, but does coarsen our culture, cheapen our public discourse, and diminish our respect for human dignity," the statement said.

Iseman's complaint, which asked for $27 million dollars in damages for reputational harm and damage to physical and mental health, said Iseman was a private figure for purposes of her defamation claim.

Defamation lawsuits require plaintiffs to prove a degree of fault on the part of the defendant publishing the defamatory statement. If the plaintiff is a private figure, the plaintiff must demonstrate the defendant acted with negligence. Public figure plaintiffs, however, must meet a more demanding standard and demonstrate that the defendant acted with "actual malice" at the time of publication. "Actual malice" was defined by the U.S. Supreme Court in *New York Times v. Sullivan*, 376 U.S. 254 (1964), as knowledge of the statement's falsity or reckless disregard for its truth or falsity.

Courts draw a line between public and private figure plaintiffs depending on the factual circumstances of each case. In *Gertz v. Robert Welch*, 418 U.S. 323 (1972), the Supreme Court said that public figures are individuals who "have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes." Such figures include celebrities and star athletes. Individuals may also be public figures for limited purposes in "particular public controversies in order to influence the resolution of the issues involved," according to *Gertz*. Limited purpose public figures must prove actual malice with respect to defamatory statements involving the context in which they are considered public figures.

Iseman argued in her complaint that she need only prove negligence, a less demanding standard than "actual malice," to support her claim. In the "Response From The Times," Keller disagreed. "[W]e do not share the plaintiff attorneys' views that their client is 'not even a public figure.' A publicly registered lobbyist is hired to influence public officials on matters of public policy. That seems to us to be exactly the sort of figure journalists are supposed to watch with close attention, and who thus are required to meet a higher standard in proving defamation," the statement said.

– Amba Datta
Silha Research Assistant

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Silha Center for the Study of Media Ethics and Law

School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church St. SE
Minneapolis, MN 55455

Phone: (612) 625-3421
Fax: (612) 626-8012
E-mail: silha@umn.edu
www.silha.umn.edu

Please contact us to be added to our mailing list

Media Ethics

Citing Impartiality, BBC Refuses to Air Gaza Aid Appeal

> "We concluded that we could not broadcast [the] appeal, no matter how carefully constructed, without running the risk of reducing public confidence in the BBC's impartiality in its wider coverage of the story."
>
> – Mark Thompson
> Director General, BBC

The BBC announced Jan. 22, 2009 that it would not broadcast a video appeal from a group of British charities on behalf of the civilian victims of recent fighting in Gaza. The announcement was met with immediate criticism and protest from citizens, members of Parliament, and other media outlets.

The BBC said broadcasting the appeal would compromise the impartiality of the network's coverage of the conflict between Israel and Palestine. The three-minute video is part of a campaign by the Disasters Emergency Committee (DEC) – a coalition of 13 humanitarian aid agencies in Great Britain – to provide assistance to civilians in Gaza following the military action there in November and December of 2008. The video solicits donations to provide medical care, blankets, clean water, and food to those affected by the conflict, and does not mention Israel. Media and aid organizations were barred from entering Gaza while military operations were in progress. (See "Media Locked Out of Gaza Conflict" on page 20 of this issue of the Silha *Bulletin*.)

According to a January 23 story in *The Times* of London, the DEC approached broadcasters with its appeal on January 21. On January 22, the BBC announced that it would not broadcast the appeal, stating, "Along with other broadcasters, the BBC has decided not to broadcast the DEC's public appeal to raise funds for Gaza. The BBC decision was made because of question marks about the delivery of aid in a volatile situation and also to avoid any risk of compromising public confidence in the BBC's impartiality in the context of an ongoing news story. However, the BBC will, of course, continue to report the humanitarian story in Gaza."

The decision was immediately controversial. *The Guardian* of London reported on January 23 that British Secretary of State for International Development Douglas Alexander wrote to the BBC along with Sky News and ITV, encouraging them to broadcast the appeal. The DEC has an agreement with British broadcasters to receive free airtime in situations of national or international crisis or emergency. Similar calls for aid have been made on behalf of civilian victims of fighting in the Congo and Darfur, and victims of natural disasters such as the recent cyclones in Myanmar and Bangladesh and the 2004 Asian Tsunami, according to the DEC's Web site, http://www.dec.org.uk/. *The Guardian* reported that this is the first time in the history of the DEC that the BBC has declined to broadcast a DEC appeal.

According to *The Times*, British broadcasters were first approached by the DEC for a joint appeal when the organization was founded in 1963. At that time, the broadcasters agreed to give free airtime and help create appeals for the DEC when an agreement to do so could be reached among the broadcasters. Customarily, *The Times* reported, "if all broadcasters do not agree to carry the appeal, none does." The BBC Web site states that DEC appeals are "reserved for major disasters and emergencies which cannot be dealt with by the usual in-country coping mechanisms, and where DEC member agencies are in a position to respond quickly and effectively." *The Guardian* reported that other broadcasters typically look to the BBC for leadership in deciding whether to broadcast a DEC appeal.

On January 24, ITV and Channel 4 announced that they would broadcast the appeal. The same day, BBC Director General Mark Thompson affirmed the BBC's decision not to show the video, writing in a blog post on the BBC Web site, "We concluded that we could not broadcast a free-standing appeal, no matter how carefully constructed, without running the risk of reducing public confidence in the BBC's impartiality in its wider coverage of the story." CNN reported that about 5,000 people gathered in protest outside the BBC's Broadcasting House in central London that evening. *The Scotsman* of Edinburgh reported that the BBC had received 15,000 complaints regarding its decision by January 26.

ITV, Channel 4, and FIVE showed the appeal on January 26, but Sky News announced that day that it would not. According to CNN.com, John Ryley, the head of Sky News, said "Broadcasting an appeal for Gaza at this time is incompatible with our role in providing balanced and objective reporting of this continuing situation to our audiences in the UK and around the world." According to *The Guardian*, Sky News also cited the BBC's leadership as important to their decision not to air the appeal, stating that Sky News was "considering this request internally when the DEC contacted us to let us know that the BBC had decided not to broadcast the appeal at this time. As, by convention, if all broadcasters do not carry the appeal then none do, the decision was effectively made for us."

Criticism of the BBC's decision came from other media outlets, members of parliament, and church leaders. In a critical editorial on January 25, *The Sunday Telegraph* (London) cited the BBC's 2005 "Make Poverty History" campaign as an example of hypocrisy, contending that advocacy for the poor in Africa during that campaign was analogous to what the BBC would be doing if it aired the Gaza aid appeal.

The Guardian reported January 25 that 50 members of Parliament called on the BBC to reverse its decision. *The Guardian* also reported that Archbishop of Canterbury Rowan Williams, along with Scottish First Minister Alex Salmond and Justice Minister Shahid Malik, called on the BBC to air the appeal. According to Turkish news Web site The World Bulletin, Archbishop of York John Sentamu also criticized the BBC's descision, saying "This is not an appeal by Hamas asking for arms but by the Disasters Emergency Committee asking for relief."

The Scotsman reported that a coalition of actors had written an open letter to the BBC threatening

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BBC Criticized, *continued from page 44*

to "never work for the BBC again unless this disgraceful decision is reversed," adding, "We will urge others from our profession and beyond to do likewise."

According to *The Times*, the BBC has faced criticism for its coverage of the conflict between Israel and Palestine in the past, and responded by conducting an inquiry into its own coverage. Inquiries into the BBC's impartiality have also taken place over the last few years. (For example, see "BBC Report: Network Should be More 'Impartial'" in the Summer 2007 Silha *Bulletin*, and "New Editorial Guidelines, Other Changes at the BBC," in the Summer 2005 Silha *Bulletin*.)

The public service responsibilities of U.K. broadcasters are prescribed by law. The U.K. has five designated Public Service Broadcasters (PSBs): the BBC, ITV1, Channel 4, FIVE and S4C (Channel 4 Wales). Each of these is required to comply with a public service broadcasting "remit" as laid out in the 2003 Communications Act, S. I. 2003 No. 1900. The Office of Communications (Ofcom), which regulates U.K. broadcasting, telecommunications, and wireless communications sectors, oversees the public service components of the television networks' programming.

The BBC is unique among the PSBs in that it is publicly funded. It receives its funding from government grants and money from television licenses, which everyone who owns a television set in the U.K. must buy. The BBC is granted a royal charter for its operations, which, according to the BBC Charter Review Web site, has been reviewed roughly every 10 years since 1927. The BBC is required by its charter to be "independent, resisting pressure and influence from any source," and is overseen by the BBC Trust, which oversees the BBC's six "Public Purposes." These purposes, according to the BBC Trust Web site, are "1) sustaining citizenship and civil society; 2) promoting education and learning; 3) stimulating creativity and cultural excellence; 4) representing the UK, its nations, regions and communities; 5) bringing the UK to the world and the world to the UK; 6) in promoting its other purposes, helping to deliver to the public the benefit of emerging communications technologies and services and, in addition, taking a leading role in the switchover to digital television."

Other PSBs in the U.K. do not rely on public funding. Channel 4, ITV, and FIVE are all funded by their own commercial activities. However, Channel 4 is regarded by Ofcom to be "the heart" of the public service "alternative" to the BBC. Under its public service remit, laid out in section 265 of the Communications Act of 2003, Channel 4 must "(a) demonstrate innovation, experiment and creativity in the form and content of programmes; (b) appeal to the tastes and interests of a culturally diverse society; (c) make a significant contribution to meeting the need for the licensed public service channels to include programmes of an educational nature and other programmes of educative value; and (d) exhibit a distinctive character." ITV and FIVE are also PSBs, but have less onerous requirements than Channel 4. Under section 265 of the Communications Act, they are required only to provide "a range of high quality and diverse programming."

Sky News is a commercial network with no public service obligations. However, Sky is also overseen and regulated by Ofcom and must conform to U.K. broadcast regulations, including those for "taste and decency" enforced by Ofcom for all television and radio content.

The Guardian reported that the DEC's chief executive, Brendan Gormley, said the BBC's decision could have a negative impact on its appeal. "We are used to our appeal getting into every household and offering a safe and necessary way for people to respond. This time we will have to work a lot harder because we won't have the free airtime or the powerful impact of appearing on every TV and radio station," Gormley said. "We are totally apolitical and are driven by the principles of the Geneva conventions in terms of impartiality and neutrality. This appeal is a response to those humanitarian principles."

As of February 16, the DEC Web site reported that 5.4 million pounds had been raised in response to the Gaza appeal. On February 19, the BBC Trust announced that it would not overrule the decision not to air the appeal. In a statement on its Web site, the Trust said, "We recognise that the Director-General's decision was a matter of great controversy for many members of the public. However, having carefully examined the Director-General's reasons, the Trust believes he acted correctly throughout, and we are satisfied that the decision the Director-General took was reasonable given the importance of preserving the reputation of the BBC for impartiality. "

– Sara Cannon
Silha Center Staff

Media Ethics

Human Rights Advocates and Media Critics Question NBC News' Rwandan War Criminals Investigation

"As journalists, we struggle to keep an arm's length from all sorts of officials, whether they're cops or prosecutors or diplomats, because it's really important that our audience view us as independent – not carrying water for someone else."

– Kelly McBride
Ethics group leader,
The Poynter Institute

NBC News producers and a Rwandan prosecutor apparently joined forces for a series of surprise confrontations at Goucher College in Baltimore where a man they said was involved in the 1994 mass killings in Rwanda was working as a professor.

The unusual group first approached Goucher College President Sanford Ungar in his office on Dec. 10, 2008 and told him a visiting French professor at the small college was also a war criminal, *The New York Times* reported February 10. The producers confronted the professor, Leopold Munyakazi, in his classroom later that day.

"I think they wanted it to be an ambush, to be frank," said Kate Pipkin, director of communications at Goucher in the *Times* story. Pipkin was also interviewed by NBC on December 10.

As a result of the allegations, Munyakazi was suspended from his job and later arrested for overstaying his visa, the *Times* reported in separate stories published Feb. 6 and 10, 2009. Munyakazi denied allegations in the Rwandan indictment that he participated in genocide, saying the indictment was politically motivated and an effort by the Rwandan government to force his return. He remains under house arrest in Maryland, awaiting an April trial on the immigration charge and his asylum request.

The charges stem from a 1994 conflict in which 800,000 Tutsis and moderate Hutus were killed during 100 days of intense violence, the BBC reported Feb. 3, 2009. Munyakazi, who is Hutu, spent five years in a Rwandan jail following the killings, but was never charged or tried.

He first came to the United States on a tourist visa for a 2004 academic conference in Atlanta, five years after his release from jail. He decided to stay because he feared persecution if he returned to his home country, the BBC report said. Munyakazi has been a frequent critic of the current political leaders in Rwanda, including a 2006 speech at the University of Delaware where he argued the 1994 killings were not genocide motivated by ethnicity, but civil war motivated by differences in social class, said an Oct. 25, 2006 story on *UDaily*, an online publication produced by the University of Delaware's public relations department.

He came to Goucher to teach French in the fall of 2008 through a program called the Scholar Rescue Fund, Goucher College President Sanford Ungar said in a Feb. 13, 2009 broadcast of National Public Radio's "On the Media."

"The Scholar Rescue Fund gets applications from many more people than it supports. It screens them and decides whom it will recommend to various colleges and universities to spend a year or two teaching and, in effect, being sponsored because for one reason or another, wherever they're from around the world, they can't go home because they might be in danger," Ungar said.

But when Munyakazi was hired, Ungar did not know that a month after the controversial 2006 speech at the University of Delaware, a Rwandan prosecutor issued an indictment authorizing Munyakazi's arrest on charges of genocide, the Feb. 6, 2009 *Times* story said. Following the indictment, Interpol issued a "Red Notice" featuring Munyakazi's image on a wanted poster. Interpol, an international police organization, uses "Red Notices" to circulate arrest warrants issued by its member countries. They do not mean that the featured person is guilty of any crime, Interpol's Web site said.

According to a Feb. 3, 2009 story on Web site Inside Higher Ed, Human Rights Watch officials questioned the veracity of the charges against Munyakazi and the propriety of NBC's involvement.

"Any attempt to establish facts 15 years after a crime, especially for such as genocide, is difficult," Senior Adviser Alison Des Forges said in the Inside Higher Ed story. "The claims do not seem to be well substantiated. Based on my reading thus far of the two indictments, they have some serious failings."

"If a judicial authority wants to exercise its functions in another country, there are certain procedures that need to be followed." Des Forges told Inside Higher Ed. "In this case, they weren't followed. As I understand it, the Rwandan prosecutors were on visitors' visas and accompanied an NBC television crew around the country. This is questionable at best."

Kenneth Roth, the executive director of the New York-based Human Rights Watch, said in the February 10 *Times* story that he called NBC's general counsel to express his concerns. "I was worried that a journalist was making false accusations, due to some extent to his close collaboration with the Rwandan government," Roth said.

Ungar also criticized NBC's involvement in the confrontations in a Jan. 31, 2009 letter sent to Goucher professors, students, and parents, the Inside Higher Ed report said. The letter explained the decision to suspend Munyakazi from Goucher.

Ungar also described how he was confronted in his office by a Rwandan prosecutor and NBC News producers "working on a series about international war criminals living in the United States … ." It goes on to note parenthetically "the unusual circumstance in which the prosecutor traveled around the United States with a television producer and camera crew, rather than talking with the appropriate U.S. government officials through standard channels."

Before joining Goucher College, Ungar worked as a journalist at *The Washington Post* and *The Economist* and hosted National Public Radio's "All Things Considered," his profile on Goucher's Web site said.

In a Feb. 10, 2009 media criticism column published by the online news outlet Slate, Jack Shafer wrote that the association of NBC and the Rwandan prosecutor searching for war criminals

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NBC Criticized, *continued from page 46*

living in the United States "[s]ounds strange to my ears." Shafer reported that award winning journalist Adam Ciralsky and documentary film producer Charlie Ebersol were both working on the series, but that an NBC News spokesman would not comment on the series or other "newsgathering" activities.

But according to the February 10 *Times* story, NBC defended its work on the series in a statement to the newspaper. "Any contact with foreign governments has been consistent with acceptable journalistic practices," NBC News said in the statement.

Kelly McBride, the ethics group leader for the Poynter Institute, expressed a different opinion in the *Times* story. She said the association between NBC and the Rwandan prosecutor was "a classic case where a news organization teamed up with a special interest that had an agenda."

"As journalists, we struggle to keep an arm's length from all sorts of officials, whether they're cops or prosecutors or diplomats," she said according to the *Times*. "Because it's really important that our audience view us as independent – not carrying water for someone else."

Goucher president Ungar said in the *Times* story that the collaboration was likely arranged by NBC, not the prosecutor. "If the prosecutor has evidence or has concerns he wants to present, why is he doing it in the company of NBC News? … I don't think it was the prosecutor's idea. I don't think he sat in Kigali and said, 'Hmm, what would be the best way for me to achieve justice? I think I'll call NBC and ask them.'"

During the February 13 "On the Media" program, Ungar explained further. "You would think if [the prosecutor] was coming to this country to finger some alleged war criminals from Rwanda that he would have gone to the Justice Department or the State Department, not typically to a television network. It just didn't inspire confidence that I was dealing with a genuine law enforcement matter, if you know what I mean."

But the Rwandan government insisted that reports suggesting its prosecutors tagged along with NBC News were "untrue," according to a Feb. 15, 2009 report in the Kigali *New Times*. "Any information on wanted fugitives is provided to whoever seeks it by the Fugitive Tracking Unit and there is nothing wrong with a member of the unit being present when a media organization is present while interviewing a subject for a news report," Rwandan Prosecutor General Martin Ngoga said according to the story.

According to Ungar's letter, NBC producers indicated the show featuring Munyakazi would air in February or March. It had not yet aired as the Silha *Bulletin* went to press.

– Michael Schoepf
Silha Fellow

2009 SILHA CENTER SPRING FORUM

Fever Pitch:

Does Health News Reporting Leave Consumers Out in the Cold?

Featuring: Gary Schwitzer, Associate Professor,
School of Journalism and Mass Communication, University of Minnesota;
Publisher, HealthNewsReview.org

April 30, 2009
7:00 p.m
Cowles Auditorium
Hubert H. Humphrey Center
University of Minnesota
www.silha.umn.edu ~ 612-625-3421

The Silha Center for the Study of Media Ethics and Law is partnering with the Society of Professional Journalists, the Minnesota Pro Chapter of the Society of Professional Journalists, and the Minnesota News Council to produce this program for the SPJ's Town Hall Meeting Series. The purpose of the meetings is to increase dialogue between the public and the press.

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School of Journalism and Mass Communication
University of Minnesota
111 Murphy Hall
206 Church Street SE
Minneapolis, MN 55455
(612) 625-3421

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