newsletter on intellectual freedom

IFC ALA

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intellectual freedom: a casualty of war?

The following is an edited transcript of a program cosponsored by the American Library Association Intellectual Freedom Committee, the Association of American Publishers Freedom to Read Committee, and the American Booksellers Foundation for Free Expression at the ALA Annual Conference in Chicago, June 27. The speakers were Geoffrey R. Stone and Floyd Abrams.

remarks by Geoffrey R. Stone

Following his graduation in 1971 from the University of Chicago Law School where he served as editor-in-chief of the Law Review, *Geoffrey Stone served as law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia circuit and spent the following year as a law clerk for Supreme Court Justice William J. Brennan. He has been a member of the University of Chicago faculty since 1973. From 1987 to 1993 he served as dean of the University of Chicago Law School. From 1993 to 2002 he served as provost of the University. Among his many related professional responsibilities, he has been a member of the Governors of the Chicago Council of Lawyers, the American Law Institute, the Executive Committee of the Association of American Law Schools and on the board of directors of the University of Chicago Hospitals and the Board of Governors of the Argonne National Laboratory. Currently, he is a member of the National Advisory Council of the ACLU, the Board of Directors of the Renaissance Society, the Board of the University of Chicago Center of Comparative Constitutionalism, vice-president of the American Academy of Arts and Sciences and chair of the board of the Chicago Children's Choir. A prolific author and editor, he has written numerous books and articles on the freedom of speech and press, freedom of religion, academic freedom and the Supreme Court. His latest work is* Perilous Times: Free Speech in Wartime from the Sedition Act

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Views of contrubutors to the **Newsletter on Intellectual Freedom** are not necessarily those of the editors, the Intellectual Freedom Committee, or the American Library Association.

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protecting anonymity on the Internet

The following is an edited transcript of a program cosponsored by the Intellectual Freedom Committee and the Committee on Legislation at the ALA Annual Conference in Chicago, June 27. The speakers were Franklin S. Reeder, of the Reeder Group, and Paul Alan Levy, of the Public Citizen Litigation Group.

remarks by Franklin Reeder

Franklin Reeder writes, consults, and teaches on information policy and public management issues with the Reeder Group, a firm he formed after a career of more than thirty-five years in public service. His column on "Managing Technology" appears in Government Executive *magazine. He is chairman of the Center for Internet Security, a not-for-profit, established to help organizations around the world affectively manage the organizational risks related to information security. He also chairs the Information Security and Privacy Act Advisory Board of the National Institute of Standards and Technology, a Federal Advisory Committee. Frank served at the U.S. Office of Management and Budget twice for more than twenty years. Between 1970 and 1995 he was Chief of Information Policy, Deputy Associate Director for Veterans Affairs and Personnel, and Assistant Director for General Management. Among his accomplishments, while a member of the Information Policy staff and later as its chief, he represented the administration in negotiating and securing enactment of the Privacy Act of 1974 and the Computer Security Act of 1987 and wrote guidelines on implementing the Privacy Act. While at O.M.B. he was the U.S. Delegate to the Organization for Economic Cooperation and Developments Public Management Committee from 1992–95 and he chaired that committee from 1993–95. From 1997–80 he was Deputy Director of House Information Systems, the computers and telecommunications support arm of the U.S. House of Representatives. From 1995–97 Frank served as Director of the Office of Administration of the Executive Office of the President.*

Thank you. It's a delight to be here today to talk about a subject that is near and dear to me and that is the intersection of individual rights and public policy in technology. As I thought about the session, mostly on the plane this morning, it occurred to me that what we're really talking about is not just anonymity on the Internet but anonymity in cyberspace because much of what we're talking about doesn't necessarily occur in communications, and I would argue that some of the threats, indeed most of them, occur whether or not you use the Internet. It seems to me it's a fallacy to assume that if you avoid the Internet you will avoid the potential intrusions of your lives and identities that technology presents.

I would submit to you that the challenges we face are the result of three separate but interdependent convergent

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house votes to limit PATRIOT Act's section 215

By a vote of 238–187, the House of Representatives June 15 approved legislation that would scale back Section 215 of the USA PATRIOT Act by amending a Department of Justice appropriations bill to bar the DOJ from using any of the funds to conduct searches of library and bookstore records. The Freedom to Read Amendment, similar to a measure defeated in a dramatic tie vote last year, passed this time with the support of 38 Republicans, 199 Democrats, and sponsor Rep. Bernie Sanders (I-Vt.).

"Library patrons should be thrilled that their champion, Congressman Sanders, has finally prevailed," said ALA Washington Office Executive Director Emily Sheketoff. "People from every political persuasion supported this amendment, and we are grateful that members of the House listened to librarians' concerns."

Some saw the action as a sign of growing concern over the protection of personal privacy, as well as a possible indicator of coming debate over the renewal of sixteen of the act's provisions set to expire at the end of the year. "Congress has the obligation to modify some authorities of the PATRIOT Act that went too far in eroding our civil liberties," said Rep. Jane Harman (D-Calif.), who opposed Sanders's amendment last year but voted for it this time.

However, an aide to one House leader dismissed the vote as "the crazies on the left and the crazies on the right, meeting in the middle." In addition, President Bush has threatened to veto the bill if the final version contains any language that would weaken the PATRIOT Act, and House Appropriations Committee spokesman John Scofield suggested Republican leaders plan to remove what he called "this extraneous rider" when working out any differences between House and Senate versions of the bill.

Supporters of rolling back the library and bookstore provision said the law gives the FBI too much leeway to go on "fishing expeditions" of people's reading habits and innocent people could get tagged as potential terrorists based on what they check out from a library. "If the government suspects someone is looking up how to make atom bombs, go to a court and get a search warrant," said Jerold Nadler, (D-N.Y.).

Supporters of the PATRIOT Act countered that the rules on reading records are a potentially useful tool in finding terrorists and argued that the House was voting to make libraries safe havens for them. "If there are terrorists in libraries studying how to fly planes, how to put together biological weapons, how to put together chemical weapons, nuclear weapons . . . we have to have an avenue through the federal court system so that we can stop the attack before it occurs," said Rep. Tom Feeney (R-FL).

Last year, a similar provision was derailed by a 210–210 tie tally after several Republicans were pressured to switch their votes.

In a June 14 letter to Congress, the Justice Department pointed out that Section 215 has been used only thirty-five times, and never to seek library or bookstore records. "Bookstores and libraries should not be carved out as safe havens for terrorists and spies who have, in fact, used public libraries to do research and communicate with their co-conspirators," wrote Assistant Attorney General William E. Moschella. After the vote, the DOJ issued a statement underscoring the necessity of the provision.

Sheketoff said that although the amendment's margin of victory indicated that lawmakers were hearing from constituents, the bill still faced a "whole lot of hurdles," noting that in addition to the president's promised veto and the House leadership's plan to strip the provision, the Senate hasn't even marked up its version of the appropriations bill. "We've got our work cut out for us," she said. Reported in: *American Libraries* Online, June 17; *San Francisco Chronicle,* June 16. □

libraries say officials do make inquiries

Law enforcement officials have made at least 200 formal and informal inquiries to libraries for information on reading material and other internal matters since October 2001, according to the preliminary report of a new study that adds grist to the growing debate in Congress over the government's counterterrorism powers.

In some cases, agents used subpoenas or other formal demands to obtain information like lists of users checking out a book on Osama bin Laden. Other requests were informal—and were sometimes turned down by librarians who chafed at the notion of turning over such material, said the American Library Association, which commissioned the study.

The association, which is working to scale back the government's powers to gain information from libraries, said its $300,000 study was the first to examine a question central to a House vote on the USA PATRIOT Act: how frequently federal, state, and local agents are demanding records from libraries.

The Bush administration says that while it is important for law enforcement officials to get information from libraries if needed in terrorism investigations, officials have yet to actually use their power under the PATRIOT Act to demand records from libraries or bookstores.

The study does not directly answer how or whether the PATRIOT Act has been used to search libraries. The association said it decided it was constrained from asking direct questions on the law because of secrecy provisions that could make it a crime for a librarian to respond. Federal intelligence law bans those who receive certain types of demands for records from challenging the order or even telling anyone they have received it.

As a result, the study sought to determine the frequency of law enforcement inquiries at all levels without detailing their nature. Even so, organizers said the preliminary data suggested that investigators were seeking information from libraries far more frequently than Bush administration officials had acknowledged.

"What this says to us," said Emily Sheketoff, the executive director of the library association's Washington office, "is that agents are coming to libraries and they are asking for information at a level that is significant, and the findings are completely contrary to what the Justice Department has been trying to convince the public."

Kevin Madden, a Justice Department spokesman, said that the department had not yet seen the findings and that he could not comment specifically on them. But Madden questioned the relevance of the data to the debate over the PATRIOT Act, noting that the types of inquiries found in the survey could relate to a wide range of law enforcement investigations unconnected to terrorism or intelligence.

"Any conclusion that federal law enforcement has an extraordinary interest in libraries is wholly manufactured as a result of misinformation," Madden said.

The study, which surveyed 1,500 public libraries and 4,000 academic libraries, used anonymous responses to address legal concerns. A large majority of those who responded to the survey said they had not been contacted by any law enforcement agencies since October 2001, when the PATRIOT Act was passed.

But there were 137 formal requests or demands for information in that time, 49 from federal officials and the remainder from state or local investigators. Federal officials have sometimes used local investigators on joint terrorism task forces to conduct library inquiries. In addition, the survey found that 66 libraries had received informal law enforcement requests without an official legal order, including 24 federal requests. Association officials said the survey results, if extrapolated from the 500 public libraries that responded, would amount to a total of some 600 formal inquires since 2001.

One library reporting that it had received a records demand was the Whatcom County system in a rural area of northwest Washington.

In June 2004, a library user who took out a book there, *Bin Laden: The Man Who Declared War on America,* noticed a handwritten note in the margin remarking that "Hostility toward America is a religious duty and we hope to be rewarded by God," and went to the Federal Bureau of Investigation. Agents, in turn, went to the library seeking names and information on anyone checking out the biography since 2001.

The library's lawyer turned down the request, and agents went back with a subpoena. Joan Airoldi, the librarian, said in an interview that she was particularly alarmed

after a Google search revealed that the handwritten line was an often-cited quotation from bin Laden that was included in the report issued by the September 11 commission.

The library fought the subpoena, and the FBI withdrew its demand. "A fishing expedition like this just seems so un-American to me," Airoldi said. "The question is, how many basic liberties are we willing to give up in the war on terrorism, and who are the real victims?"

The survey also found what library association officials described as a "chilling effect" caused by public concerns about the government's powers. Nearly 40 percent of the libraries responding reported that users had asked about changes in practices related to the PATRIOT Act, and about 5 percent said they had altered their professional activities over the issues, for instance, by reviewing the types of books they bought.

Representative Bernard Sanders, independent of Vermont, who sponsored the House measure to curtail the power to demand library records, said he was struck by the 40 percent response. "What this demonstrates is that there is widespread concern among the American people about the government having the power to monitor what they are reading," Sanders said. Reported in: *New York Times,* June 20. □

IFC report to ALA Council

The following is the text of the Intellectual Freedom Committee's report to the ALA Annual Conference delivered June 29 by IFC Chair Kenton Oliver.

The ALA Intellectual Freedom Committee (IFC) is pleased to present this update of its activities. Under "Information," this report covers the seventh edition of the *Intellectual Freedom Manual,* Q&A on Labels and Rating Systems, RFID Implementation Guidelines for Libraries, Biometric Technologies in Libraries, Campaign for Reader Privacy, Festschrift to Honor Gordon Conable, Media Concentration, and a brief note on the Resolution on Workplace Speech. Under "Projects" are updates on Lawyers for Libraries, the LeRoy C. Merritt Humanitarian Fund, and 2005 Banned Books Week.

Information

Seventh Edition of the Intellectual Freedom Manual

The projected publication date of the seventh edition of the *Intellectual Freedom Manual* is December 2005; it will be available at the 2006 Midwinter Meeting in San Antonio.

As you know, for each new edition of the *Intellectual Freedom Manual,* the IFC reviews every ALA intellectual freedom policy, and asks all appropriate ALA units, including Council, for comments. These are then carefully considered and discussed. A history of the revisions to ALA intellectual freedom policies can be found on the OIF Web site.

Q&A on Labels and Rating Systems

One of the comments received at the 2005 Midwinter Meeting during the policies review was from the ALA Committee on Professional Ethics (COPE). COPE suggested the IFC develop a Q&A on labels and rating systems. The committee agreed to undertake this project and, at its 2005 spring meeting, formed a subcommittee to draft such a document. At this meeting, the IFC continued work on the document, and began soliciting feedback from ALA members. The committee will seek additional input from the profession and continue its development of the Q & A.

RFID Implementation Guidelines for Libraries

At the 2005 ALA Midwinter Meeting, Council adopted the "Resolution on Radio Frequency Identification (RFID) Technology and Privacy Principles" (CD#19.1). In light of this resolution, and the implementation of RFID systems by a growing number of libraries, the IFC ascertained that ALA members would benefit from RFID implementation guidelines. At its 2005 spring meeting, therefore, the committee formed a subcommittee to draft these guidelines.

At this conference, the IFC reviewed this draft document and, once again, decided to seek input from the profession as it continues development of these guidelines.

Biometric Technologies in Libraries

The Intellectual Freedom Committee, with the Office for Information Technology Policy, discussed the use of biometric technologies in libraries, and the privacy implications for library use. IFC began drafting a resolution on the use of biometric technologies in libraries, and received many comments on the draft resolution at this conference. The committee will review all the comments it received, and will distribute a draft resolution for further comment prior to the Midwinter Meeting. Furthermore, the IFC anticipates holding an open hearing on biometric technologies in San Antonio to gather additional input.

Campaign for Reader Privacy

Two weeks ago, on Wednesday, June 15, the House passed Congressman Bernie Sanders amendment to the House Science–State-Justice Subcommittee (SSJC) appropriations bill. The amendment bars the department from using any of the appropriated money to search library and bookstore records under Section 215 of the USA PATRIOT Act.

Under this section, federal agents have been empowered to get orders from a secret court that allows them to access, among other things, the reading records of Americans in both libraries and bookstores. Because these orders are granted by a secret court, the people whose records are sought have no opportunity to oppose the order. In most cases, the person whose records are acquired would never know it, because

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FTRF report to ALA Council

The following is the text of the Fr eedom to Read Foundation's report to the ALA Council, deliver ed at the ALA Annual Conference in Chicago on June 25 by FTRF Pr esident John W. Berry.

As president of the Freedom to Read Foundation, I am pleased to report on the foundation' s activities since the 2005 Midwinter Meeting:

Remembering Gordon Conable

Last January, as ALA's Midwinter Meeting drew to a close, the friends and colleagues of Gordon Conable came together to remember this remarkable man, who served seven terms as president of the Freedom to Read Foundation before his untimely death last winter . At the gathering, we remembered Gordon's wit, his leadership, and his commitment to his profession and its core values. His students and fellow ALA members recalled how he served as a teacher and mentor; his colleagues told of his heroism during the controversy sparked by the Monroe County Library' s acquisition of Madonna's book *Sex.* Others remembered his devotion to family and his acts of friendship and generosity .

Gordon's wife, Irene, a longtime member of the Freedom to Read Foundation, asked that a memorial fund be established in Gordon' s name to advance the causes he worked for so passionately . Today, I am pleased to report that, to date, the Gordon M. Conable Memorial Fund has received fifty-eight donations totaling $8,830 to support the foundation's work on behalf of intellectual freedom. If you would like to donate to the Conable Fund, send a check payable to the Freedom to Read Foundation, 50 E. Huron St., Chicago, IL 60611, or donate online at www .ftrf.org or by phone at (800) 545-2433 x4226. Please indicate that your gift is in honor of Gordon Conable.

Finally, a *festschrift* is being created in honor of Gordon's passion and ener gy in support of intellectual freedom. Possible topics include (but are in no way limited to): The USA PATRIOT Act, privacy and technology, political influences and intellectual freedom, book censorship, and key court decisions. All proceeds will be donated to the Gordon M. Conable Memorial Fund. If you are interested in contributing, please contact Carrie Gardner , Catholic University of America, 244 Marist Hall, Washington, DC 20064. You can also call (717) 329-4159 or e-mail carrieif@aol.com. Please include your name, a brief biography (wanted by the publisher) and the topic(s) of interest to you before September 1, 2005. Articles are due January 6, 2006.

Defending Our Freedom to Read: State Internet Content Laws

We best pay tribute to Gordon Conable by carrying on his fight to preserve and protect our right to freely read and access ideas and information, whether printed or published online. Our latest lawsuit, a challenge to the new Utah Internet law, continues our efforts to assure that everyone is free to decide for themselves what they will read and view while browsing the vast marketplace of ideas that makes up the World Wide Web.

Filed as *The King's English, Inc., et al.* v. *Shurtleff*, the lawsuit challenges a statute that vastly expands the reach of Utah's "harmful to minors" law by giving the Utah attorney general the authority to create a public registry of Web sites deemed "harmful to minors" and require that ISPs block access to those sites. Other provisions in the new law require Internet users to identify themselves to access constitutionally protected speech and oblige content providers to evaluate and label their Internet content as "harmful to minors."

FTRF is bringing the lawsuit in partnership with the American Booksellers Foundation for Free Expression (ABFFE); the Association for American Publishers (AAP); the Comic Book Legal Defense Fund (CBLDF); the ACLU of Utah; and several Utah bookstores, Internet providers, and residents. Our complaint was filed on June 9, 2005.

The Utah lawsuit does not stand alone. The Freedom to Read Foundation is a plaintiff in other lawsuits challenging state laws that criminalize the distribution of Internet content deemed "harmful to minors."

Shipley, Inc. v. *Long* (formerly *Shipley, Inc. v. Huckabee*): I am pleased to report that Arkansas has decided not to appeal the decision of U.S. District Court Judge G. Thomas Eisele. Last November, Judge Eisele ruled that the recent amendments made to the Arkansas "harmful to minors" laws were unconstitutional. His decision is now final.

ACLU v. Goddard (formerly *ACLU v. Napolitano*): As in the Arkansas case, the state of Arizona has decided not to appeal the decision of the federal District Court that permanently enjoined enforcement of the Arizona "harmful to minors" Internet content law on the grounds it violated rights protected by the First Amendment. The state settled all claims filed by the plaintif fs and withdrew its appeal, marking a successful conclusion to the case.

ABFFE v. Petro (formerly *Booksellers, Inc*. v. *Taft*): The Foundation joined with several other plaintif fs to file this lawsuit to challenge Ohio' s updated "harmful to juveniles" law that af fects both print and Internet content. On September 27, 2004, the District Court sustained in part and overruled in part both parties' motions for summary judgment. The parties are now awaiting an expanded opinion explaining the court's judgment.

Southeast Booksellers Association v. *McMasters* (formerly *Southeast Booksellers Association v. Condon*): FTRF is not a plaintiff in this lawsuit, which challenges the constitutionality of South Carolina's "harmful to minors" Internet content law. The parties in the case both filed motions for

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House again backs ban on flag desecration

Voting once again June 22 on an issue blending emotion, patriotism and politics, the House of Representatives overwhelmingly endorsed a constitutional amendment that would allow Congress to outlaw debasing the American flag.

The House has repeatedly passed the measure in earlier sessions, so the 286-to-130 vote, well over the required two-thirds margin, was not surprising. The focus now will be on the Senate, where the measure has never passed. But lawmakers and lobbyists on both sides say the conservative tilt of that chamber gives the measure its best chance of Congressional approval since the Supreme Court ruled sixteen years ago that flag burning was a form of protected speech.

The Senate Judiciary Committee was expected to take it up right after the Fourth of July holiday. Sixty-five members, only two fewer than needed if all one hundred are present and voting, have voted for it in the past or said they will support it this time, lobbyists for the competing sides said. A few Democratic senators remain uncommitted, including Hillary Rodham Clinton of New York, who has attracted special attention from both sides because she is a likely presidential candidate considered a champion of liberal causes. "I'm studying the issue," she said.

One sponsor of the measure, Senator Orrin G. Hatch, Republican of Utah, said in an interview: "It's time to stand up for our symbol. I consider defecating on the flag, urinating on the flag, burning the flag with contempt—just to mention three—to be offensive conduct, not speech."

The Bush administration, which would have no role in adoption of the amendment, said that it too supported the measure. But opponents attacked it as a violation of freedom of expression.

"The reason our flag is different is because it stands for burning the flag," Representative Gary L. Ackerman, Democrat of New York, said in a speech on the House floor, wearing a flag-print necktie. "The Constitution this week is being nibbled to death by small men with press secretaries."

Once a constitutional amendment clears Congress, ratification by at least thirty-eight states is required to adopt it. With the recent addition of Vermont, all fifty states have passed resolutions against debasing the flag.

Efforts to enact legislation prohibiting the flag's "desecration" began in the late nineteenth century, initially to block use of it to sell products or promote political candidates, said Robert Justin Goldstein, political scientist and author of four books on the flag's history. Then, after World War I, attention shifted to political uses by radicals, he said.

By the 1930's, every state had passed a law prohibiting debasement of the flag; the federal government later adopted its own statutes.

The push for a federal constitutional amendment began in 1989, after the Supreme Court ruled in *Texas* v. *Johnson* that a protester who had burned a flag at the 1984 Republican National Convention, in Dallas, was protected by free-speech rights. The proposed amendment would create an exemption from First Amendment protection by granting Congress "power to prohibit the physical desecration of the flag of the United States."

Proponents of the amendment argue that a majority of the public has consistently supported protecting the flag. Around the time of the Supreme Court ruling in 1989, a nonpartisan poll by the organization now called the Pew Research Center found that 65 percent of respondents favored the amendment and 31 percent opposed it. In June, the Citizens Flag Alliance, founded by the American Legion ten years ago to advocate for the amendment, said a poll it commissioned showed that 80 percent of the public "believe it is important that flag desecration be against the law."

However, the First Amendment Center reported in June that the number of Americans who oppose a constitutional amendment that would give Congress the power to punish flag-burning as protest is up sharply from 2004.

The Center's "State of the First Amendment 2005" survey, conducted in May, showed that 63 percent of those sampled said the U.S. Constitution "should not be amended to prohibit burning or desecrating the American flag," up from 53 percent in 2004 and the highest number against the proposed amendment since the annual survey began in 1997. Of the sample, 35 percent said the Constitution "should be amended"—down from 45 percent in 2004.

"This issue involves one of the nation's most fundamental First Amendment guarantees, the right of free speech; and what many consider the most-venerated symbol of our nation, honored each year on Flag Day, June 14," said Gene Policinski, executive director of the First Amendment Center.

"I have no doubt that most Americans want the flag to be protected and respected, but clearly more Americans seem to be having second thoughts about using a constitutional amendment to deal with the issue of flag desecration, and about the impact such a dramatic move would have on free speech," he said.

Public support for an anti-flag desecration amendment has shifted up and down each year since a 49–49 percent split in 1997, but the 2005 survey's 63–35 percent result is the widest division of opinion yet recorded in the center's annual polling.

But Terri Ann Schroeder, a lobbyist for the American Civil Liberties Union, said public opinion polls should be irrelevant to debates about the First Amendment, since it serves mainly to protect statements and opinions that may be unpopular.

"That is antithetical to what the Bill of Rights is supposed to be about," Schroeder said, adding that she thought the amendment would fail by one or two votes.

Like most Democrats, two Republican senators, Robert F. Bennett of Utah and Mitch McConnell of Kentucky, have consistently opposed the measure. "I don't want to amend the Constitution to solve a nonproblem," Bennett said. "People are not burning the flag. The only time they start is when this amendment gets offered."

Assessing the chances that his side might lose in the increasingly conservative Senate, McConnell said, "We may," and added, "That is democracy." Reported in: *New York Times,* June 22; First Amendment Center online, June 10. □

university presidents worldwide issue statement supporting academic freedom

Universities worldwide must be responsible for ensuring academic freedom on their campuses, according to a statement released June 27 by sixteen presidents of leading research universities around the globe.

The statement, issued by the Global Colloquium of University Presidents, focuses on academic autonomy through the rights and responsibilities of scholars, students, and universities. Those rights and responsibilities are the "bedrock that needs to be protected," said Michael W. Doyle, a law professor at Columbia University and the organizer of the colloquium.

Scholars and students must be able to do their work without fear of intimidation or reprisal, scholars must resist corrupting influences on their research and teaching, and universities must remain autonomous, the statement says.

The Global Colloquium of University Presidents was convened in January by five American institutions and the United Nations secretary general, Kofi Annan. Their goal was to foster communication among university presidents around the world about their common interests and challenges on academic freedom, Doyle said. The presidents of American, Argentine, Australian, British, French, Indian, South African, and Turkish universities endorsed the statement.

Members of the colloquium plan to circulate the statement to other university presidents around the world and hope to gain their support in "reaffirming rights and responsibilities in a time when they're challenged," Doyle said.

Universities face an "ongoing series of threats" to academic freedom, from governments, people inside universities, and corporations seeking to "buy opinions," among other challenges, he said.

In the United States, many academics have complained about what they say is a decline in academic freedom through a series of Bush administration policies since September 11, 2001, including what critics have described as a politicization of scientific research, excessive suspicion of foreign students and scholars, and undue scrutiny of academics who dissent from the Iraq war.

While Doyle said that the statement is not specifically a response to the administration's policies, he said those policies have raised concerns. The statement says that "attacks by outside groups on the freedom of the academy (particularly, but not only, in periods of national crisis) can seriously threaten the autonomy of universities."

A global policy on academic freedom was negotiated by governments and adopted by the United Nations Educational, Scientific, and Cultural Organization in 1997. University presidents who signed the colloquium's statement did not confer with their governments, and future signatories will not do so either, Doyle said.

Governments that threaten academic freedom are likely to prevent their university presidents from signing the statement, he said, but members of the colloquium hope the statement will challenge those governments.

"This is about university presidents, not states, talking to each other about vital issues and what they think the principles should be," Doyle said. "When universities are beleaguered, they can point to the document and say 'this is what universities think.'"

University presidents, he went on, "will have the sense that they are in an international community facing common pressures, with common goals." Reported in: *Chronicle of Higher Education* online, June 30. □

academic groups' statement on rights and freedoms is criticized as too weak

The American Federation of Teachers and some members of the American Association of University Professors criticized a statement on academic rights and responsibilities that was issued in late June by the American Council on Education and twenty-seven other higher-education groups, including the AAUP. They said the statement gives too much legitimacy to David Horowitz and his proposed academic bill of rights and will only weaken efforts to defend against lawmakers seeking to meddle in academe.

"It's an appeasement document," said William E. Scheuerman, vice president of the teachers' federation and a member of the professors' association. "When it comes to academic freedom, the AFT will not compromise."

The organizations that signed the statement, which lists five principles on academic rights and responsibilities, said

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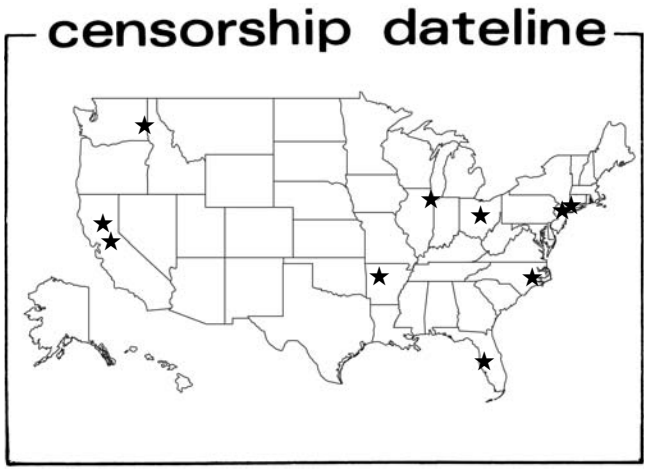
censorship dateline



libraries

Fayetteville, Arkansas

The Fayetteville School District has a procedure for parents to file formal complaints against school library books they find inappropriate. But what if the number of books is seventy?

That's how many alleged sexually explicit books local resident Laurie Taylor claimed she found during a personal "audit" of the library system. Taylor, who has filed previous complaints against school library books, claims the books in question contain segments on "threesomes, teenage sexual foreplay, detailed sexual escapades, explicit homosexual affairs, despicable language, dangerous instruction and promotion of sexual behavior."

Taylor listed seven of the alleged objectionable books in an e-mail to school board members and Superintendent Bobby New. They were *The Homo Handbook: Getting in Touch with Your Inner Homo*, by Judy Carter; *The Other Woman*, by Eric J. Dickey; *Rainbow Boys*, by Alex Sanchez; *Doing It*, by Melvin Burgess; *Choke*, by Chuck Palahniuk; *GLBTQ: The Survival Guide for Queer and Questioning Teens*, by Kelly Huegel; and *Forever*, by Judy Blume.

All of the books except *Forever* are available only at the Fayetteville High School library. *Forever* is available at McNair Middle School and Ramay Junior High.

Taylor said she would like the identified books removed, the school to conduct its own audit of library materials and for the school district to set up a parent review board to oversee future library purchases. She said in the e-mail that she and other parents were willing to file a request for reconsideration on all the books. She said some of the books besides the seven mentioned were "worse." "I have something against this explicit stuff being pandered to our children," she said.

New said he wasn't sure how the current policy for evaluating library book complaints, which involves appointing a committee to review the book and make a recommendation, would work in this case. The policy was designed to generally address one or two books at a time. "The magnitude of the request is overwhelming," he said. "Our current policy might have to be amended."

It will take some time to administratively evaluate Taylor's complaints, New said, adding that he planned to discuss the matter with her before formulating a response. He also needed to identify the other sixty-three books she finds questionable. "We'll work through it," he said.

Taylor filed a request for reconsideration against three other books earlier this spring. In May, the school board responded by voting 4–3 to place the books in the parent sections at school libraries, meaning they wouldn't be available to students in most circumstances. She said she considered the decision in that case to be an acceptable compromise. Reported in: *Northwest Arkansas Times*, June 23.

Tampa, Florida

As a graduate student in library science at the University of South Florida, many of Meagan Albright's assignments involve creating special book displays. Several of her projects, on topics ranging from hurricanes to women's health, have been displayed at West Gate Regional Library, where Albright is a part-time librarian. She's not used to her displays being yanked down after complaints and then resurrected in a much smaller version tucked away in the back of the library.

That's what happened after Albright's latest project, on prominent literature by gays, was installed near the Town 'N Country library's main entrance in June. June is Gay and Lesbian Pride Month, and Albright's display included several books with gay themes and characters, a suggested reading list and a large poster with photographs of famous gays.

As with all of her projects, Albright consulted with her supervisors at West Gate and received approval. The display, however, did not have the support of some library patrons. Hillsborough County's chief librarian, Jean Peters, said the library received three complaints about the display's content in three days. Peters went to the library and after discussing the content and quality of the display with library programming staff, she told West Gate to take it down.

That decision sparked more complaints, and Peters then allowed the library to put up the display again; however, the new version was much smaller and was moved from the front to the back of the facility.

Peters insists it was the quality of the display—and not its content—that spurred the county's decision. "It looked like somebody's school project, just a couple of poster boards taped together," Peters said. "It really wasn't the most professional presentation."

Albright, who said she received an A for the project in her master's course, said West Gate staff never complained about the quality of her less-controversial projects. She thinks the county is using the quality issue as an excuse to cover up concern over the topic.

Peters said the county did not intend to discriminate against anyone, but she did acknowledge that parental complaints concerning content were the impetus for the county's initial discussion of the display. "We're just trying to be sensitive because it's a sensitive topic to people on both sides," Peters said.

The incident, however, prompted the Hillsborough County Commission to take action. Hillsborough Commissioner Ronda Storms promised to seek a county policy banning public library displays that promote Gay Pride and Lesbian Pride Month. She went a step further June 15, getting most of her fellow commissioners to ban the county government from so much as acknowledging gay pride.

"I move that we adopt a policy that Hillsborough County government abstain from acknowledging, promoting, or participating in gay pride recognition and events, little g, little p," Storms proposed. After scant discussion that contrasted with many impassioned pleas from gay rights advocates during the morning public comment period, the board passed the proposal 5–1. Commissioner Kathy Castor dissented.

Storms followed up with a second proposal, that commissioners can only repeal the policy on a 5–2 super majority vote that follows a public hearing. This time, a previously absent commissioner was in the room and joined the majority in a 6–1 vote, with Castor again dissenting.

An attorney for the National Center for Lesbian Rights immediately pledged to file a lawsuit contending the policy violates free speech and equal protection rights for gays and lesbians. "You don't hide the discrimination by making it broader," said Karen M. Doering of St. Petersburg, who serves as regional counsel to the group. "She found a mole hill she didn't like and blew up the mountain saying, 'I don't like the mole hill.'"

Others cast blame on all of the commissioners who stood with her. "I think that Hillsborough County commissioners sent a very clear message that not everyone is welcome here," said Vonn New, Central Florida director for the gay, lesbian and transgender rights advocacy group Equality Florida. "I think it's shameful what the commission has done."

In the public comment portion of the meeting, several speakers protested the library actions and any effort to squelch such displays, thinking that was all Storms had in mind. With Storms' "little g, little p" footnote, however, the vote appeared to ban any recognition of gay pride, even outside of June.

However, county officials were still trying to figure out the ramifications of the new policy. Does it necessarily ban any display about gay issues at libraries? Storms would only say afterward that she feels the language is clear. How about a display of books written by gay and lesbian authors, or that explore gay themes? Again, the language is clear, Storms said.

What if a gay student group wants to meet at a county library or any other meeting space? Only on that point would Storms elaborate. "We're not saying that because of your sexual orientation you can't come into the library," she said. Reported in: *Tampa Tribune*, June 9; *St. Petersburg Times*, June 16.

Oak Lawn, Illinois

Stating that pornography can cause sex offenders to endanger victims, Oak Lawn resident Mark Decker called for *Playboy* magazine to be removed from the Oak Lawn Library. The library ignored the request, and reportedly stated that it would keep subscribing to the magazine, and would keep it on its shelves. The adult magazine is kept in the periodical stacks of the library on the second floor.

Playboy, requested forty-four times last year, is kept in a secure area on the library's second floor. Patrons have to show proof of age to view it and cannot take it home or to the first floor, where the children's section is located.

The library has copies dating back two years and has been offering the magazine to patrons since 1973. James Casey, the library's director, said his is the only library in Chicago's south and west suburbs to carry *Playboy*. The magazine can be found in only fifteen libraries in Illinois, including Arlington Heights, Winnetka, and Chicago, he said.

"We build a collection of what we think is a reflection of what the community wants to see," Casey said. "We try to serve the public rather than stand in judgment of their tastes."

Library officials said they would not remove the magazine based on one man's objection, though Decker had the backing of an Illinois social conservative group.

Decker, a father of three children, said that he was worried that sex offenders might look at *Playboy* and become motivated to harm others. "Playboy is pornography," Decker said. "Pornography is a sexual stimulant for men."

After learning that the Oak Lawn Library would not remove Playboy, Decker protested in front of the library for three hours on June 29. "The library is so hypocritical. They sanction themselves," he said. He said library officials called the police on him, but he claimed he was within his rights to protest on a public sidewalk. Decker also was told

that if he wanted to enter the library, he could not bring his protest sign inside the building.

In an attempt to show the library board he is not the only one offended by the presence of *Playboy* in the library, Decker took out an ad in a local newspaper with a form soliciting opinions on the issue. He is hoping hundreds will fill it out and return it to him. "Most people agree with me," Decker said. "The kids need to be protected."

Decker also asked the village board to send a letter to the library urging the library board to reconsider its decision and remove *Playboy* altogether. That was unlikely, said Library Director James Casey, who noted that the library board considered the matter carefully before making its decision. Casey said the library has received "all kinds of comments" from the public since Decker raised the issue, but those calls have been from people on both sides.

"We have a large and diverse community, and we have to decide accordingly," Casey said. "That's final as far as I'm concerned."

But Decker, who is married with three young children, said the library board was "completely out of touch. Ninety percent of the community disagrees with their decision. . . . It's ridiculous to spend tax dollars on *Playboy*."

The village board did not commit to sending a letter to the library but pledged to take a closer look at enforcement of the village's obscenity laws, which mirror state law. Reported in: *Southwest News-Herald*, July 6; *Chicago Tribune*, June 23, July 14.

Columbus, Ohio

Several Upper Arlington residents want two gay publications removed from their local libraries' lobbies. The libraries have several free periodicals in their foyers, but the group is objecting only to *Outlook Weekly* and *Gay People's Chronicle*, calling them "disgraceful." A full-color cover photograph of two men about to kiss and articles about explicit sex cross the line, Mark Bloom said.

"I'm angry about this," he said. "As a heterosexual male, I can't get a copy of *Playboy* at the library. What's next? Pornographic, homosexual DVDs available to check out?"

Upper Arlington Library Director Ann Moore said the group is unfairly targeting gays. "This just feels a little discriminatory," she said. "I am sure that there are some gay or lesbian people who live around here, and they are taxpayers, too."

Upper Arlington's population hovers at about 34,000, but the library has more than double that number of people registered as cardholders.

"We are like any other library in Franklin County—we recognize anybody in the state of Ohio and represent all kinds of people," Moore said.

It isn't about being opposed to homosexuality, said Tim Rankin, one of five residents who spoke to library-board members at their June 14 meeting. Rankin is a city councilman and the president of the Upper Arlington Republican Club, but said he was speaking as a concerned citizen and a father. "I would feel the same way about a woman and man kissing," he said. "This material is a ticking time bomb—there is no one standing around it, watching who picks it up."

The library should be rid of all materials that are sexual in nature, including *Maxim* and the swimsuit edition of *Sports Illustrated*, Rankin said. He isn't opposing other free publications such as *The Other Paper* and *Columbus Alive*. "You have to dig for something explicit in those," he said.

Bloom said he and his two children periodically discard stacks of the gay newspapers in bins outside their local library, which the city attorney's office says is legal. "Once it is in their possession, they can do it, unless they are breaking another law like littering," Jeanine Amid Hummer said.

A disclaimer on *Outlook* calls it theft and asks that only those who intend to read an issue take one, said Editor Chris Hayes. He said *Outlook* has faced opposition in other Columbus suburbs, including Dublin. "Our content is automatically considered more explicit because it's on a hot topic."

The library board asked for legal advice on the matter. Moore said the residents were told that their concerns will be taken into consideration when the board reviews the library's operations. "It's best when these decisions are made at the local level so that they reflect the community," said Lynda Murray, spokeswoman for the Ohio Library Council. Reported in: *Columbus Dispatch*, June 24.

student press

Newark, New Jersey

Students at Essex County College's *Observer* wound up spending $1,100 to print their annual graduation issue—which they turned into a special "bill of rights" edition—after campus officials sought to stop publication of the issue. The *Observer's* editors charged that college officials were upset with the paper's content. Administrators scoff at that charge, and say the newspaper would have been violating its own constitution by publishing without an adviser and without the prescribed minimum of three editors.

The *Essex Observer* comes out irregularly at the two-year institution in Newark. With a skeletal staff, it was published once last fall, and once in May. The paper's editor this year, Melinda Hernandez, said the college-appointed adviser provided little or no guidance and stopped showing up altogether this spring. So the students published their May issue without an adviser, "and no one had a problem with it," Hernandez said.

Soon after, though, as the students planned to publish a graduation edition that would contain a traditional list naming and congratulating all the graduates, the college's dean of students, Susan Mulligan, told the students that

they could not publish without an adviser. Mulligan also said that the newspaper's constitution requires the *Observer* to have at least three editors, and that it had only two: Hernandez and Joel Shofar, the managing editor. "If this paper is going to represent the college as a student paper, I don't see two people being representative of the whole college, and the paper's own constitution seems to agree with that point of view," Mulligan said.

As Hernandez saw it, Mulligan raised the issue of the adviser as a pretext, when what she really didn't like was the content of the *Observer's* May issue, it contained a commentary written by a student concession-stand worker who was fired for refusing to sell cigarettes to a pregnant woman. "She asked us, 'Why is the paper being used as a tool for students to rant?' " Hernandez said of Mulligan. The editor also said that the students put forward a proposed adviser in late May, and that Mulligan rejected him, in part, because he was an adjunct professor.

Mulligan said the students did not take all the necessary steps (in terms of filling out paperwork and the like) to put the new adviser in place, and that it is "absolutely not true" that the content had anything at all to do with her efforts to stop the *Observer* from publishing.

But she acknowledged that she told the students they could not publish without an adviser, and when she found out they were preparing to print an issue for the upcoming graduation that they had produced without an adviser, she called the owner of the printing shop and told him "that the printing was not authorized at this point and to hold up." Because the *Observer* is a student group, its bills are paid through the college's payroll system, and the dean had the ability to withhold payment.

When Hernandez and Shofar found out a few days before graduation that the paper had not been printed, they came up with $1,100 to cover the tab. The graduation issue did not contain the list of graduates, which Hernandez said Essex officials declined to provide because the paper wasn't publishing officially; instead, across the four pages that should have listed the names, it included a disclaimer blaming Mulligan for the absence, and an image of the Constitution, with the Bill of Rights highlighted, on the cover.

On graduation day, the editors said campus officials barred them from distributing the *Observer* inside the gymnasium where the commencement ceremony was held, because the paper was not officially approved by Essex. So the students set up shop outside.

Hernandez said she fears Essex wants to shut the paper down; Mulligan insists that's not so. "It's absolutely critical that students have their voice on campus," she says. "We do what we need to do in terms of providing resources, and we need to work with the small group we have now to figure out how we can get more students involved.There's a meeting planned with the editor next week, and hopefully we will get everything resolved." Reported in: insidehighered.com, June 20.

New Bern, North Carolina

Administrators and student journalists at North Carolina's Craven Community College appear to have worked out their differences after months of tension over some racy content and potential changes in how the newspaper is administered. On the table at various points were the possibility of a panel of administrators making final decisions about what the paper should publish, an idea anathema to the students, and the newspaper being taken over by a for-profit publishing company.

But in the end, campus administrators and student editors reached a compromise that makes the paper independent, shields the college from liability, and appears to have satisfied both sides.

It was a tough year for *The Communicator*, the several-year-old newspaper at Craven. In October, after an altercation on the campus, the newspaper prepared an article that, based on the police report, named the alleged student perpetrator and gave her address and age. When some of the newspaper's own staff members complained to administrators about intrusion into the student's privacy, Craven officials argued that there was "not much journalistic value in printing the address, when you balance it against [the student's] personal safety," said Sandy Wall, the college's community relations coordinator.

The newspaper's editor, Corey Friedman, challenged administrators' view that publishing the name and address would violate federal privacy laws, and went to press with the article that contained the student's name and address. But before the papers were actually distributed, administrators told Friedman the papers could not be distributed with the address intact.

"In my mind that was direct censorship," said Friedman. But because he wanted the papers distributed and didn't feel he had a choice, Friedman and staff members spent hours whiting out the contentious information by hand from 1,100 copies of the paper.

At that point, students who worked at the *Communicator* drafted written guidelines for what the newspaper should publish, but they languished until March, when the next flare-up occurred. The newspaper published a sex column called "Between the Sheets," which offered students ten tips for spicing up their sex lives. One of the tips, about what to look for in a dildo, "offended the sensibilities on campus and out in the community," said Wall. Friedman added: "A lot of readers wrote us, saying they couldn't understand what would possess us to publish that."

Communicator editors decided on their own not to publish the column a second time, but the furor renewed discussion about whether the campus needed clearer editorial

guidelines about what the student paper should and should not publish.

Administrators floated the idea of establishing a panel to adjudicate instances when the paper's student editor and the college-appointed adviser disagreed about whether to print something. "We saw that as unacceptable—as college officials making final decisions for the student newspaper," Friedman says. There was also talk of Freedom ENC Communications, which publishes the local newspaper in New Bern, taking over the *Communicator's* business operations, a move that national First Amendment groups like the Student Press Law Center actively discouraged.

In May, a panel of administrators and students drafted a two-page memorandum that stated clearly that the student newspaper is editorially independent, and that it "does not speak for the college, which we would hope would minimize any exposure of liability for the college," Wall says. The college's board is expected to approve the policy at its next meeting in the fall.

Wall insists that Craven officials never sought to control the student paper's content, although they faced pressure to do so. "Out there in the community, we heard lots of, 'Why can't you do something about these kids?' Well, we're not here to 'do anything' about these students. They put a lot of time and work into the paper, and we're proud to have it. It doesn't always say things we agree with, but that's the nature of news, the nature of commentary."

"It took awhile to get to where we are, and there were some hurt feelings and some harsh words exchanged," he added. "But we're in a good place now. I think we're ready to move forward, and we're looking forward to reading a good newspaper every month."

Friedman, the student editor, said colleges should let the natural forces of the market control what gets published. "If a newspaper publishes something that is, in the minds of its readers inappropriate, the natural process of reader feedback will moderate the press," he said. "There's no room for administrative meddling in that process, and I believe the college has seen the benefits of stepping back and not putting itself in the position where it could be liable for the newspaper's content. The college has dealt with it a lot better than it did initially." Reported in: insidehighered.com, June 20.

colleges and universities

Pullman, Washington

The curtain did not fall silently on the Devil, but rather to a chorus of "I am offended." In fact, the shouts by a group of Washington State University students pervaded the final performance in April of *The Passion of the Musical*—a show that became the subject of a free speech dispute months after its short run.

The protesters, angry at the satire depicting the last of two days of the life of Jesus, forced the show to stop several times. At the behest of campus security guards concerned about a potential riot, Chris Lee, a theater major who wrote, directed, and portrayed the cross-dressing Lucifer in the play, self-censored one of the show's songs. Instead of singing "I would do anything for God, but I won't act black," a parody of Meat Loaf's "I would do anything for love, but I won't do that," the "black" was changed to "blank."

Along with jokes about gay people, AIDS, Hitler, and the use of "nigger," another chorus that roiled audience members was the "And I will always hate Jews" refrain in the parody of Whitney Houston's hit "I Will Always Love You." And of course there was the scene where newborn babies were shot onto the stage, apparently from a Mormon mother's offstage womb, and Jesus, like a good outfielder, caught all sixteen of them.

Lee, like many of those who organized the protests and disrupted the play, is black. "The whole point was to show people we're not that different, we all have issues that can be made fun of," Lee said.

Several months after the play, a free speech group is coming to Lee's defense and demanding to know why college administrators appeared to support those who disrupted the production. The group cited an e-mail obtained by *The Daily Evergreen*, the Washington State paper, in which President Lane Rawlins wrote to a professor: "I too was concerned about the threat to safety but I must say that our students, even though they were upset, exercised their rights of free speech in a very responsible manner by letting the writer and players know exactly how they felt."

Not everyone thought it was free speech that the forty students exercised. "The protesters were the people standing outside with signs," Lee said. "Inside, they were hecklers. I wanted the play to cause discussion, but they didn't even listen to it."

Officials at the Foundation for Individual Rights in Education strongly disagreed with Rawlins that the protesters were exercising free speech, rather than violating it. "Disrupting a play with mob censorship is not protected expression," said Greg Lukianoff, director of legal and public advocacy at FIRE. In a letter to Rawlins, Lukianoff cited a 1970 federal case in which a war protester won the right to hand out fliers. Previously, the University of Arizona had prevented him from doing so on the grounds that his actions caused people to threaten him and created potential for violence.

"The court affirmed that a person has a right to be free from a 'heckler's veto,'" read the letter. Similarly, Lukianoff argued, campus security should have protected Lee's right to continue his play unchanged, rather than pushed him to self-censor to avoid an explosive situation.

Washington State staff members and administrators who supported the protesters right to interrupt the play, including

the president, contend that Lee created a public forum by engaging the crowd early in the play. At the beginning, he read aloud a critical flier that the protesters had been passing out. Twenty minutes into the play, after some vocal interruptions, Lee paused the play and told the crowd he would call the cops if they continued to interrupt.

"We believe that Chris taunted and provoked the crowd from the very beginning of the play," said Raul Sanchez, director of the Center for Human Rights at Washington State, which investigates harassment and discrimination claims. "By his character, Lucifer, reading the protesters' flier, he incorporated something that belonged to them, and made specific asides about them. We believe he converted what was a private forum into a public forum." He likened it to a group assembling to shout down someone on a street corner spewing racial epithets.

Lee's supporters said the protesters had every right to leave the performance, as Rawlins did, but they reject the idea that shouting out during the play was protected speech.

"Legally that's laughable," Lukianoff said of the idea that Lee begged public discourse. "Just because you address someone in the audience, it doesn't make the Winter Garden a public forum," he said, referring to the renowned Manhattan theater. Lukianoff also thinks the audience missed the point. "It's satire, public commentary. It's like South Park. It offends everybody, so that it can't be offensive. No matter how much you disagree with someone, it's dangerous not to hear them."

Lukianoff and Lee also believe that the protesters were not simply reacting to what they saw, but had planned to protest before they ever saw the show. Many of the protesters employed identical, seemingly coordinated, actions: stand, put forward a hand, and say, "I am offended." Some used their cell phones at specific instances, and others criticized audience members who laughed at caustic jokes. Lukianoff contends that these were premeditated acts, and, what's more, that Washington State facilitated the disruptions by not removing protesters from the audience, and by giving them free tickets beforehand.

The Office of Campus Involvement bought forty tickets for students, only one of whom had seen the play, who were concerned about the play's content. Sanchez said the idea was to allow these students to see the play for themselves so they could engage in a discussion with Lee after it. The tickets were distributed by Brenda Maldonado, intercultural student development coordinator. Sanchez said that, as far as he knows, no employees helped or ganize the protest, but Maldonado criticized the play in local papers. "I don't want students to have to pay to support a program that is obviously racist and homophobic," Maldonado told *The Evergreen*.

Lee said that some protesters physically threatened him and his cast. In reviewing a tape of the performance, however, Sanchez said that was not apparent. Some cast members said there was cause for concern. Kenneth Ellis, one of them, recalled protesters yelling "you're going to hell" during one number. "The worst came when the only black girl in our cast was out on stage during the song 'I will always hate Jews,' the protesters yelled out that they would see her tomorrow on the mall, and the way they said it made you think they weren't going to be talking to her," Ellis said.

Despite the uproar, Lee said that the of fensive jokes in the play were meant to depict the ridiculousness of bigotry, not enforce the stereotypes they are built on, much, he said, like South Park does by making fun of all races and religions. Reported in: insidehighered.com, July 18.

newspaper

Chico, California

A graphic and satirical article about drinking and sex at California State University, Chico, has sparked a summertime power play between the school and a local weekly newspaper. The caustic article, called "The Party Rules," was published in the *Chico News & Review's* special fifty-two-page back-to-school edition, which comes out every summer. The university usually includes the annual publication, called "Goin' Chico," in orientation packets for new students and families. The packets are handed out at orientation sessions throughout the summer.

In early June, Chico State of ficials read the article and found it so disturbing and of fensive they decided not to include the entire *News & Review* publication in the packets this year. "When I saw the article, I felt it was not representative of the campus," said Bob Hannigan, vice provost for enrollment management, who made the decision to pull the *News & Review* publication from the packets. About 5,000 copies had been printed at that point.

The university has acknowledged a serious problem with drinking, partying, and hazing on campus. In fact, a week after the publication was pulled, the university announced a major crackdown on fraternity and sorority houses, including a ban on alcohol, in the wake of a string of incidents involving hazings and initiations. But school leaders felt the article made hurtful and inaccurate generalizations.

Many students were disturbed and insulted as well, said Thomas Whitcher, a senior history major from Salinas and president of the campus Associated Students organization. "What they wrote was truly in poor taste," Whitcher said.

Advertisers who bought space in the publication became concerned that it was not being distributed as promised, said Tom Gascoyne, editor of the *Chico News & Review*. In a turn-around in late June, the *News & Review* offered to print 3,000 additional copies without the offending column if the university would distribute them in the packets. The paper substituted a much tamer welcome speech by the university's president, Paul J. Zingg, and the revised copies started going out in orientation packets, Hannigan said.

At first, the original copies that had been delivered to the school sat out of sight in a room where the packets were assembled, said Joe Wills, Chico State's director of public affairs. Eventually the *News & Review* picked them up to distribute elsewhere; other copies of the originals were available on newsstands on campus, Wills said.

Gascoyne said the paper intends to reprint 45,000 copies of the full fifty-two-page "Goin' Chico" edition—with the controversial article back in place—and include them with the regular August 11 weekly edition of the paper. Gascoyne acknowledged the article by writer Josh Indar was graphic enough that even he flinched when he first read it.

But the piece was well-written and provocative, Gascoyne said. Its point was to employ satire and tough, youthful, graphic language to get the point across that Chico State students need to stop drinking to excess, engaging in dangerous sex, and hurting one another and the community.

"We just don't think there's enough being done," Gascoyne said. "The story is very important, and I'm going to stand by it. Sometimes it takes strong medicine to bring change."

The on-again, of f-again article marked an awkward and unusual situation, "one in which reasonable people could disagree," said Peter Scheer, executive director of the California First Amendment Coalition. The university, he said, was not under obligation to distribute a publication it found offensive and at odds with its goals. As long as the school did not try to block public access to the newspaper through the paper's normal distribution channels, it did not violate the First Amendment, Scheer said.

He noted, however, that the *News & Review's* decision to alter editorial content to please advertisers "raises questions about self-censorship." Reported in: *Sacramento Bee*, July 14.

video game

New York, New York

A new video game that lets players join criminal gangs and kill police officers has become the target of a proposed boycott by a U.S. senator. Sen. Charles Schumer, a Democrat from New York, said the "cop killer" video game, called 25 to Life, had hit an "all-time low" and discouraged the sale and distribution of the title, due out this summer.

"25 to Life makes Grand Theft Auto look like *Romper Room,*" Schumer said June 20 in comments e-mailed by a spokeswoman. The blockbuster video game series Grand Theft Auto from Take-Two Interactive is frequently criticized for its violence.

The new video game lets players "be the law" or "break the law," taking the side of police or thugs in running gun battles through a grimy urban landscape. The criminals use human shields in fights, while police call in special weapons and tactics units. The title refers to the length of a jail sentence.

Schumer also urged game console makers Microsoft and Sony to end their licensing agreements with the game's manufacturer. "The last thing we need here in New York is to reinforce a destructive culture of violence and disrespect for the law. Little Johnny should be learning how to read, not how to kill cops," Schumer said in separate comments.

Violent titles are a lightning rod for the video game industry, whose $10 billion in annual U.S. sales rival Hollywood's movie box office receipts. As a national debate rages over whether the industry should be left to regulate itself, lawmakers from several states want to make sales of violent video games to minors illegal—efforts courts have rebuffed saying that the games are protected by laws that apply to creative expression.

25 to Life carries an "M" rating—for those 17 and older—from the Entertainment Software Rating Board for blood and gore, intense violence, sexual themes, strong language and drug references. Reported in: Reuters, June 21.

etc.

Sacramento, California

A painting of the United States sinking into a toilet on display in the cafeteria of the state Department of Justice has raised the ire of the state Republican Party, which is demanding that Attorney General Bill Lockyer remove the image. The painting—part of an exhibit of more than thirty works by lawyer artists and pieces with overt legal themes—has an American flag-painted continental United States heading into a toilet. Next to it are the words: "T'anks to Mr. Bush."

The artist, Stephen Pearcy, a Berkeley lawyer with a house in Sacramento, won earlier notoriety for hanging an effigy of an American soldier on the outside of his home with a sign saying "Bush lied, I died." Angry residents tore the effigies down.

"I don't know why we need to tolerate the cheap artwork of a gadfly with a world view that is so offensive to a majority of the people," said Karen Hanretty, a spokeswoman for the California Republican Party.

One Web log, Conservative Schooler, collected signatures for a petition calling on Lockyer to remove the painting because it desecrates the flag, and "material that is offensive to most people does not belong in a government office."

Although the debate centered on the appropriateness of art in public places, the exhibit was neither commissioned by Lockyer, nor did he participate in selecting the pieces, and no public funds were spent on the show. "We played no role in developing the guidelines on what the curator of this exhibit could pick or not pick," said Nathan Barankin, a Lockyer spokesman. "His only constraints were his creative muse and space limitations."

Barankin said all the works in the exhibit would be on display until the show ended August 31, a likely result since Lockyer, for most of his political career, has kept a representation of a man with a hand over his mouth on his office wall. Beneath the man are the words: "No Censorship."

The art displayed in the first floor cafeteria at the Department of Justice on I Street includes paintings, sculptures, and photographs, and runs the gamut from a copy of Vermeer's "Girl with a Pearl Earring" to Blind Justice cowering in a prison cell with red paint splashed across the frame, apparently to symbolize blood.

The sponsor of the show was California Lawyers for the Arts, a nonprofit group founded in the San Francisco Bay Area in 1974 to aid artists with their legal issues. "You may disagree with what is being expressed by one particular painting in the exhibition, but we can't censor the artist for his right to express his own opinion," said Ellen Taylor who heads the Sacramento office of Lawyers for the Arts. "We have freedom of speech and freedom of expression and art is speech according to every law in the land."

The exhibit's curator, Chuck Miller, said the Pearcy piece was not included in the collection to antagonize any, including the Republican Party. "In the context of the show and what it's about, the painting is perfectly alright," he said. ". . . It's just one point of view."

Hanretty countered that Lockyer, a Democrat and staunch supporter of free speech, would not have allowed art to be displayed that gays or lesbians found offensive or promoted violence toward women. Pearcy's painting is in a second, smaller room at the far end of the cafeteria and is only visible by diners sitting in that room. To the right of Pearcy is a poster with a dove above the head of a Palestinian peering grimly from behind barbed wire. Across the top are the words: "Palestine—Stop U.S. Financed Genocide in the Middle East."

In a statement that accompanied the exhibit, Pearcy said he had made the painting on July 4, 2003, to "show the direction this country was (and still is) headed under the Bush administration." The painting also "confronted the absurd display of 'fanatical patriotism' following 9/11," he said.

"There is a good spectrum represented in the show, pieces that are 180 degrees from some of the others. And if you don't like something, you don't have to look at it," said Miller, the curator, who is an art consultant and former owner of the Michael Himovitz Gallery.

Larry Brecht, who has run the cafeteria since 1999, enjoyed the "nice personal drawings" of high school students at the Natomas Charter School, the previous exhibit. "I don't mind the art," Brecht said. "It does add to the facility but some of the art, in my opinion, hasn't been much too look at. Abstract stuff just doesn't float my boat, but if they wanted to get some conversation generated, they really have." Reported in: *San Francisco Chronicle*, July 20.

foreign

Amman, Jordan

The Press and Publications Department (PPD) has banned the publication of a novel written by Iraq's ousted President Saddam Hussein on the grounds it could harm ties with the war-torn country. "We feel that allowing the publishing of such a book could negatively affect the Kingdom's ties with neighboring Iraq," PPD Director Ahmad Qudah told *The Jordan Times*.

He said the PPD recently received requests by publishers wanting to print the novel, said to have been written by President Saddam Hussein before the 2003 U.S.-led war on Iraq. Titled "Damned one, get out of here," the novel tells the story of a man named Haskeel who plots to overthrow the ruler of a town but is eventually defeated by an Arab warrior and the ruler's daughter.

Reports of the novel surfaced when *Al-Arab Al-Yawm* newspaper reported the novel was expected to be printed and sold in bookstores around Jordan and other Arab countries within a week. The daily quoted a source close to Saddam Hussein's family—currently residing in Jordan—as saying that English and French translations of the book would follow.

The newspaper said President Saddam's eldest daughter Raghad Hussein Kamel, who fled to the Kingdom with other family members several months after the war, wrote a dedication to her father on the book's back cover.

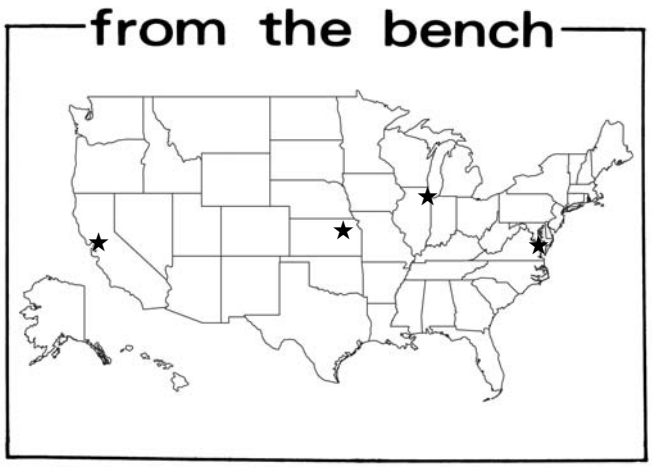
"You, who raised our heads high, the heads of the Iraqis, Arabs and the Muslims . . . we present to you our souls . . . to the father of the heroes, to my beloved and dear father, with all my respect and glory to you," she wrote.

Iraqi President Saddam Hussein has been in U.S. custody in Iraq since his capture by American troops in December 2003. Raghad said the former Iraqi President had finished his novel on March 18, 2003—one day before the war—and had expressed a desire to publish the book under his name. She said an Iraqi artist designed the book's cover and that a Jordanian publishing house was to print the book in Arabic.

"Having been written by a figure like Saddam Hussein and the fact that printing such a book nowadays could influence ties with Iraq, we decided it's better not to allow it to be printed," Qudah said.

But according to bookstore owners and distribution companies, "unofficial copies" of the book have been on bookshelves in Jordan for the past six months. "We received several copies of the book last month and we sold them," said one bookstore owner who refused to be named. He said the unofficial version of the novel was being printed in Iraq and hand-delivered to bookstores and distribution agencies in the Kingdom.

(continued on page 254)



U.S. Supreme Court

A fractured Supreme Court, struggling to define a constitutional framework for the government display of religious symbols, on June 27 upheld a six-foot-high Ten Commandments monument on the grounds of the Texas Capitol while ruling that framed copies of the Commandments on the walls of two Kentucky courthouses were unconstitutional. The decisions in the two separate cases came on the final day of the court's 2004–2005 term.

The vote in each Ten Commandments case was 5 to 4, with both majorities emphasizing, to varying degrees, the significance of the particular context in which the Commandments were displayed. The question was whether either display violated the First Amendment's prohibition against an official "establishment" of religion.

To the extent that the decisions provided guidelines for the further cases that are all but certain to follow, it appeared to be that religious symbols that have been on display for many years, with little controversy, are likely to be upheld, while newer displays intended to advance a modern religious agenda will be met with suspicion and disfavor from the court.

Only Justice Stephen G. Breyer agreed with both decisions, a development that appears to give him the balance of power in a contentious area of the court's docket that has been controlled most often in the past by Justice Sandra Day O'Connor.

For her part, Justice O'Connor, who announced her retirement several days later, voted in each case with the group that found the displays unconstitutional, a surprising development given her past voting record. She explained herself in a concurring opinion in the Kentucky case, *McCreary County* v. *American Civil Liberties Union,* which was decided with a majority opinion by Justice David H. Souter.

"It is true that many Americans find the Commandments in accord with their personal beliefs," Justice O'Connor said in her concurring opinion. "But we do not count heads before enforcing the First Amendment."

Justice O'Connor said the country had worked well, when compared with nations gripped by religious violence, by keeping religion "a matter for the individual conscience, not for the prosecutor or bureaucrat." She added: "Those who would renegotiate the boundaries between church and state must therefore answer a difficult question: why would we trade a system that has served us so well for one that has served others so poorly?"

The result in the Kentucky case provoked a particularly bitter dissenting opinion from Justice Antonin Scalia, who read from it at length. He accused the majority of expressing hostility to religion and deviating from the intent of the Constitution's framers. "Nothing stands behind the court's assertion that governmental affirmation of the society's belief in God is unconstitutional except the court's own say-so," Justice Scalia said.

Noting the court's inconsistency in the church-state area, in which decisions have upheld property-tax exemptions for churches and the employment of chaplains by state legislatures, Justice Scalia said the court had often deviated from the principle the majority now invoked of official neutrality between religion and nonreligion. What could be the reason for the inconsistency, he asked, and then gave this answer:

"I suggest it is the instinct for self-preservation, and the recognition that the court, which 'has no influence over either the sword or the purse,' cannot go too far down the road of an enforced neutrality that contradicts both historical fact and current practice without losing all that sustains it: the willingness of the people to accept its interpretation of the Constitution as definitive, in preference to the contrary interpretation of the democratically elected branches."

The two cases produced a total of ten opinions, totaling 136 pages. Outside the court, the split decisions enabled each side in the larger debate over the role of religion in the public square to claim a measure of victory. It may take further litigation, not in these particular cases but in others that raise related questions, before the import of the decisions becomes clear.

At the least, the ruling in the Texas case, *Van Orden* v. *Perry*, will immunize from constitutional challenge hundreds of granite Ten Commandments monuments that were erected in public places around the country by the Fraternal Order of Eagles, a national civic organization, in the 1950's and 1960's. According to the Eagles at the time, exposing

the nation's youth to the Ten Commandments would lead to a decrease in juvenile delinquency.

The monument on the grounds of the Texas Capitol is one of seventeen monuments and twenty-one historical markers that decorate the twenty-two-acre park. The Ten Commandments monument was challenged by Thomas Van Orden, a law school graduate, now homeless, who passes it as he uses the library at the state Supreme Court, near the Capitol. Both the federal district court in Austin and the United States Court of Appeals for the Fifth Circuit, in New Orleans, found that the monument had a valid secular purpose and did not violate the Constitution.

The Supreme Court affirmed that ruling with the combined opinions of Chief Justice Rehnquist and Justice Breyer. The Rehnquist opinion attracted three other votes, those of Justices Scalia, Anthony M. Kennedy and Clarence Thomas.

"Of course, the Ten Commandments are religious," Chief Justice Rehnquist said; some supporters of displaying the Commandments had tried to argue to the court that the monuments should essentially be regarded as codes of secular law. The chief justice said that in addition to their religious significance, "the Ten Commandments have an undeniable historical meaning." He added, "Simply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."

Chief Justice Rehnquist drew a distinction between the Texas monument and a case from 1980 in which the court struck down a Kentucky law requiring copies of the Commandments to be posted in public school classrooms. The display on the Capitol grounds "is a far more passive use of those texts," he said.

Justice Breyer's concurring opinion said the case was a "borderline case" that depended not on any single formula but on context and judgment. The monument's physical setting, he said, "suggests little or nothing of the sacred." The fact that forty years had passed without dispute, until Van Orden filed his lawsuit, suggested that the public had understood the monument not as a religious object but as part of a "broader moral and historical message reflective of a cultural heritage."

Further, Justice Breyer said, a contrary decision would lead to the removal of many longstanding depictions of the Ten Commandments in public places, and "it could thereby create the very kind of religiously based divisiveness that the Establishment Clause seeks to avoid."

The dissenters in the Texas case were the four justices who, along with Justice Breyer, found the Kentucky courthouse displays unconstitutional. They were Justices John Paul Stevens and Ruth Bader Ginsburg in addition to Justices Souter and O'Connor. Justice Stevens, in a dissenting opinion in the Texas case, said the Ten Commandments were inherently religious and by displaying them, Texas gave the message that "this state endorses the divine code of the Judeo-Christian God."

In his majority opinion in the Kentucky case, Justice Souter emphasized the history of the courthouse displays, which began as solitary displays of the Ten Commandments and became part of a broader display of historical documents only in the face of litigation. The claim by Pulaski and McCreary Counties that the displays had a secular purpose "was an apparent sham," he said, adding, "Reasonable observers have reasonable memories."

The decision upheld a ruling by the United States Court of Appeals for the Sixth Circuit, in Cincinnati. Reported in: *New York Times*, June 28.

The Supreme Court handed a major victory to the entertainment and recording industries June 27 by reinstating a copyright-infringement suit against two file-sharing services. In a unanimous opinion, the court strongly suggested that the services, Grokster and StreamCast Networks, should be found liable for the vast copyright infringement committed by those using their software to download music and movies.

Two lower federal courts in California had ruled in favor of the two companies, dismissing the lawsuit without a trial on the basis of a legal analysis that the Supreme Court found seriously flawed.

In his opinion for the court, Justice David H. Souter suggested that when properly evaluated, the evidence against Grokster and StreamCast was, in fact, so strong that the entertainment-industry plaintiffs might be entitled to summary judgment.

At the least, he said, MGM Studios and the other plaintiffs—including the Recording Industry Association of America, the Motion Picture Association of America and a class of 27,000 music publishers and songwriters— were entitled to a trial to prove their accusations that the file-sharing companies were in business primarily to enable and induce computer users to find and download copyrighted material.

In the Supreme Court's view, the plaintiffs have effectively made that case already. Justice Souter called the record "replete with evidence" that the companies "acted with a purpose to cause copyright violations by use of software suitable for illegal use." The opinion referred to "evidence of infringement on a gigantic scale" and said "the probable scope of copyright infringement is staggering."

The movie and music industries, even armed with a decision affirming their legal recourse, have a long way to go to capitalize on it, and they plan new efforts to persuade or force those actually doing the downloading to desist.

Digital rights advocates, while somewhat relieved that the court did not go further, were concerned that the ruling could invite a deluge of lawsuits and a risk that they would inhibit innovation.

There is no dispute that individual users violate copyright law when they share files of copyrighted material, and the industry has had some modest success in seeking fines from college students and others. But with millions of users

downloading billions of files each month, retail prosecution proved inefficient, so the music and entertainment industries turned their attention several years ago to the commercial services that make the file sharing possible.

That effort led to the Supreme Court's most important copyright case since its ruling in 1984 that shielded the manufacturers of the videocassette recorder from copyright liability for possibly infringing use by home consumers.

The court based its decision then, in *Sony* v. *Universal City Studios*, on a finding that the VCR was "capable of substantial noninfringing uses," like time-shifting, in which home users simply recorded programs for viewing later.

In ruling last year for Grokster and StreamCast, the United States Court of Appeals for the Ninth Circuit in San Francisco relied on the *Sony* decision, finding that the file-sharing software had possible noninfringing uses. Because the software operates in a decentralized way without using a central computer, the appeals court found, Grokster and StreamCast could not track users and had no direct knowledge of any specific instance of infringement.

The Supreme Court held that the appeals court had misapplied the *Sony* decision by focusing only on the technology, without regard to the business model that the technology served. "One who distributes a device with the object of promoting its use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster infringement, is liable for the resulting acts of infringement by third parties," Justice Souter wrote.

Movie and music industry executives hailed the decision. "If you build a business that aids and abets theft, you will be held accountable," said Dan Glickman, chief executive of the Motion Picture Association of America, the lobbying organization for the major Hollywood studios. BMI, representing more than 300,000 songwriters and composers, called the decision "good news indeed for the creative community whose work has been blatantly infringed."

The movie and music industries had warned that file sharing was hurting them financially, and could ultimately inhibit the creation of content. The music industry has blamed song-swapping over the Internet for its decade-long sales slump.

While movies and television shows are more difficult to trade online because of the size of their files, technological advances are making that easier and threatening the rich source of cash that DVD sales have become for the studios.

On the other hand, groups including the American Civil Liberties Union, Consumers Union, the Consumer Electronics Association and other elements of the computer and technology industries warned the court that too broad a rule of contributory copyright infringement would stifle innovation if there was a possibility that consumers might put a product to an infringing use.

It was clear from the opinion, *Metro-Goldwyn-Mayer Studios Inc*. v. *Grokster, Ltd.*, that the justices had taken note of that argument and tried to draw a line that would protect both copyright holders and innovators. The court identified the line as "inducement"—deliberately urging consumers to make illicit use of the product or showing them how it could be done.

"Mere knowledge of infringing potential or of actual infringing uses would not be enough here to subject a distributor to liability," Justice Souter said. He added: "Nor would ordinary acts incident to product distribution, such as offering customers technical support or product updates, support liability in themselves. The inducement rule, instead, premises liability on purposeful, culpable expression and conduct, and thus does nothing to compromise legitimate commerce or discourage innovation having a lawful promise."

James Gibson, a professor of intellectual property and computer law at the University of Richmond School of Law, applauded what he called a balancing act between artistic creators and technological innovators.

By putting so much weight on proving companies' bad behavior, he said, the decision could create more legal expenses and unpredictability for technology companies. At the same time, he added, it should provide peace of mind to creators of technology that could be used for both legitimate and infringing uses.

But several technology advocates expressed concern, saying innovators would now be saddled with the befuddling notion of "intent." Matthew Neco, StreamCast's general counsel, said the ruling turned Hollywood and the recording industry into "thought police."

Michael Petricone, vice president for technology policy at the Consumer Electronics Association, said that without clear guidelines from the court on what a company must do to avoid being held liable for contributing to copyright infringement, "the legal clarity has decreased and the risk of litigation has increased."

Attorney General Alberto R. Gonzales said he was pleased the court had "determined that those who intentionally induce or encourage the theft of copyrighted music, movies, software or other protected works may be held liable for their actions." The Bush administration joined the argument in support of the studios.

While the court's judgment was unanimous, the justices did not share the same view of how useful the *Sony* precedent remained after more than twenty years of changing technology. A concurring opinion by Justice Ruth Bader Ginsburg, which Chief Justice William H. Rehnquist and Justice Anthony M. Kennedy joined, suggested that the Sony case's reference to "substantial noninfringing use" was too easily misunderstood by lower courts and might have to be tailored for different types of technology.

The file-sharing software might be used to swap large numbers of noninfringing files, Justice Ginsburg said, but even a big number would be "dwarfed by the huge total volume of files shared."

Justice Stephen G. Breyer, in a concurring opinion also signed by Justices John Paul Stevens and Sandra Day O'Connor, said the Sony decision had basically achieved its "innovation-protecting objective" and struck the right balance between protecting copyrights and technology. It should be retained, he said. Reported in: *New York Times*, June 28.

The Supreme Court rejected appeals June 27 from two journalists who refused to testify before a grand jury about the leak of an undercover CIA officer's identity. The cases asked the court to revisit an issue that it last dealt with more than thirty years ago—whether reporters can be jailed or fined for refusing to identify their sources.

The justices' intervention had been sought by thirty-four states and many news groups, all arguing that confidentiality is important in news gathering. "Important information will be lost to the public if journalists cannot reliably promise anonymity to sources," news organizations, including The Associated Press, told justices in court papers.

Time magazine's Matthew Cooper and The *New York Times'* Judith Miller, who filed the appeals, faced up to eighteen months in jail for refusing to reveal sources as part of an investigation into who divulged the name of CIA officer Valerie Plame.

Plame's name was first made public in 2003 by columnist Robert Novak, who cited unidentified senior Bush administration officials for the information. The column appeared after Plame's husband, former Ambassador Joseph Wilson, wrote a newspaper opinion piece criticizing the Bush administration's claim that Iraq sought uranium in Niger.

Disclosure of an undercover intelligence officer's identity can be a federal crime and a government investigation is in its second year. No charges have been brought. U.S. Attorney Patrick Fitzgerald of Chicago, the special counsel handling the probe, told justices that the only unfinished business is testimony from Cooper and Miller.

Cooper reported on Plame, while Miller gathered material for an article about the intelligence officer but never wrote a story.

A federal judge held the reporters in contempt last fall, and an appeals court rejected their argument that the First Amendment shielded them from revealing their sources in the federal criminal proceeding.

Every state but Wyoming recognizes reporters' rights to protect their confidential sources of information, justices were told in a brief filed on behalf of thirty-four states, and without those privileges "reporters in those states would find their news-gathering abilities compromised, and citizens would find themselves far less able to make informed political, social, and economic choices."

But Fitzgerald said in his own filing that the federal government is different. "Local jurisdictions do not have responsibility for investigating crimes implicating national security, and reason and experience strongly counsel against adoption of an absolute reporter's privilege in the federal courts," he said.

In the last journalist source case at the Supreme Court, the 1972 *Branzburg* v. *Hayes*, a divided court ruled against a Louisville, Kentucky, reporter who had written a story about drug trafficking and was called to testify about it. Justices said that requiring journalists to reveal information to grand juries served a "compelling" state interest and did not violate the First Amendment.

That decision has been interpreted differently and clarification is needed because dozens of reporters around the country have been subpoenaed over the past two years, said Washington lawyer Miguel Estrada, representing *Time* magazine.

The cases are *Miller* v. *United States,* and *Cooper* v. *United States.*

Subsequent to the court's ruling, *Time* reporter Matthew Cooper agreed to testify before the grand jury after receiving a waver from his source. Judith Miller, however, was jailed. Reported in: *New York Times*, June 28.

libraries

Antioch, California

A federal judge has ordered Contra Costa County to let religious groups use its public rooms for meetings in a case involving the Antioch Library. The county says use of its public spaces for religious purposes violates its policies and it will continue to fight a lawsuit demanding access.

Last year, it banned a religious group from the community meeting room at the Antioch Library and the group went to court to assert its free speech rights. U.S. District Court Judge Jeffrey White ruled in June that when the county makes available a room in a library, it cannot enforce a policy that bans religious purposes.

The ruling affects libraries with meeting rooms managed by county library staffers. Libraries with meeting rooms managed by cities, such as Danville, San Ramon, Moraga and Orinda, are not affected, said Kelly Flanagan, a Contra Costa deputy counsel.

The attorney for the banned group was firm in her view and other free speech groups sided with her in comments. "It's unfair for the government to discriminate based on a person's viewpoint," said Elizabeth Murray, an attorney with the Arizona-based Alliance Defense Fund. The Defense Fund took up the case for Faith Center Church Evangelistic Ministries, which had sought to use the library room.

Faith Center sued last year after the county forbade it from using the library meeting room for its free, public meetings that include prayer, religious songs and Bible study.

A librarian who overheard the group's meeting last May informed officials, said county attorney Kelly Flanagan.

Flanagan said the county cannot allow a group to practice religion in space funded by taxpayers. The group's free speech is protected as long as taxes don't pay for it, she maintained.

Free speech group representatives offered little support for the county viewpoint. The government cannot exclude groups "simply because they have a religious viewpoint," said Rob Boston, a spokesman for Americans United for Separation of Church and State, a Washington, D.C.-based organization that opposes religion in government. "They had a policy from the get-go that discriminated against religious groups," he said. "We don't often agree with Alliance Defense Fund, but in this case, they have a point."

The head of an Oakland-based free-speech group also agreed with White's injunction. Until religious groups use a community room so often that it becomes a publicly funded place of worship, all groups should get equal access, said David Greene, executive director of the First Amendment Project.

"If a county library has opened its doors to other groups, it can't close its doors to religious groups," he said. Reported in: *Contra Costa Times*, June 14.

student press

University Park, Illinois

A 1988 Supreme Court decision that gave high-school administrators the authority to review and censor student publications is applicable to student newspapers at public colleges, a federal appeals court ruled June 20.

The U.S. Court of Appeals for the Seventh Circuit made the ruling in finding that a dean at Governors State University had immunity from a lawsuit filed by the editors of *The Innovator*, the student newspaper at the Illinois institution.

The student editors had sued Patricia A. Carter, dean of student affairs and services at Governors State, after she told the newspaper's printer that a university official had to approve the content of the publication before it could be printed. Carter, who did not dispute that claim, argued that the suit should be dismissed because of uncertainty about the constitutional protections to which college journalists are entitled. Her lawyers cited the 1988 Supreme Court decision in *Hazelwood School District* v. *Kuhlmeier*, which curtailed high-school students' First Amendment protections. Some free-speech groups have feared that the Hazelwood decision could be used to limit the rights of student journalists on college campuses.

A federal district court and a three-judge panel of the Seventh Circuit court both rejected Carter's bid for immunity, holding in *Hosty* v. *Carter* that *Hazelwood* did not apply to student newspapers at public colleges. But in its 7-to-4 ruling the full appeals court reversed that conclusion. The majority opinion, written by Judge Frank H. Easterbrook, says "that *Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."

The Seventh Circuit majority said the analysis of the Supreme Court's 1988 *Hazelwood* decision, which allowed the censorship of a high school student newspaper, should be used to assess censorship claims at public universities. The court said a court confronted with an act of student newspaper censorship by a school official must first determine if the publication had been opened up as a "designated public forum" where students have been given the authority to make the content decisions. Traditionally, courts have presumed that a student-edited newspaper was, by its very nature, a public forum. The Seventh Circuit opinion said that even entirely extracurricular activities could be limited by school officials under Hazelwood.

"Let us not forget that academic freedom includes the authority of the university to manage an academic community . . . free from interference by other units of government," Judge Easterbrook wrote.

The key question in deciding when *Hazelwood* applies, the opinion said, is whether the publication operates as "a designated public forum." The ruling did not declare *The Innovator* to be such a forum but stated that a trial court might reasonably conclude it to be one.

Even so, the court held that Carter was entitled to qualified immunity from damages sought by the plaintiffs because she was not "bound to know" that the paper could be considered a public forum. The appeals court did not say whether or not Carter's actions had violated students' free-speech rights.

"What it did was . . . muddy the water," said Mark Goodman, executive director of the Student Press Law Center, a nonprofit group that provided plaintiffs from *The Innovator* with legal help. "A school that is looking for an excuse to censor and wants some legal principles to hang its hat on will use this ruling as a justification."

Goodman said the court's decision opened the doors to censorship of a wide variety of student and faculty expression on campuses in Illinois, Indiana and Wisconsin, the states within the Seventh Circuit's jurisdiction.

"As a practical matter, most college student newspapers are going to be considered designated public forums and entitled to the strongest First Amendment protection because that's the way they've been operating for decades," said Goodman. "But this decision gives college administrators ammunition to argue that many traditionally independent student activities are subject to school censorship. I fear it's just a matter of time before a university prohibits a student group from bringing an unpopular speaker to campus or showing a controversial film based on the *Hosty* decision. Such actions invite havoc on college campuses."

"As the Supreme Court, itself, has noted (and the dissenting judges in this case pointed out), no where is free

expression more important than on our college and university campuses where we hope to expose students to a true 'marketplace of ideas'," said Goodman. "This Court has snubbed its nose at that notion."

Goodman cautioned censor-prone school administrators not to read the decision as an indication that Governors State University officials had the legal authority to censor the *Innovator*. "What this court concluded, incorrectly, I believe, was that the application of *Hazelwood* to colleges was unclear enough in 2000 when Dean Carter's actions took place that she could not be required to pay money damages to the student editors," said Goodman. "The Student Press Law Center stands ready and willing to defend the rights of other college journalists in the Seventh Circuit and around the nation to be free from administrative censorship. We will not hesitate to seek injunctions or request declaratory relief to make the censorship stop."

A group of twenty-five state and national media organizations, university journalism schools, and civil rights groups lead by the Student Press Law Center urged the court to uphold the students' First Amendment rights in the case. Reported in: *Chronicle of Higher Education* online, June 21; SPLC Press Release, June 20.

Manhattan, Kansas

A federal judge has dismissed a journalism professor's lawsuit charging that administrators at Kansas State University fired him as adviser of the Kansas State *Collegian* because they were unhappy with the student newspaper's content.

The newspaper's adviser, Ron Johnson, had drawn significant support in news media circles and among some critics of political correctness in academe because he was dismissed in May 2004 in the wake of protests on the Kansas State campus over the newspaper's perceived lack of coverage of diversity issues.

The lawsuit filed by Johnson and two former student editors charged that the two Kansas State administrators who decided not to renew the adviser's contract had violated his, and the editors', constitutional rights. But in her ruling in the case, U.S. District Court Judge Julie A. Robinson rejected that claim. While Kansas State officials did cite the *Collegian's* "content" in justifying their decision, Robinson concluded, the review by Todd F. Simon, chairman of the board of Student Publications, Inc., "compared the total bylined items, the number of news stories, the number of feature stories, the percentage of campus stories, the number of sources per story, the number of sports stories, the number of bylined opinion items, and the number of diversity items in six campus newspapers comparable to the *Collegian*."

"The content analysis performed by Simon," Robinson wrote, "thus had nothing to do with the particular stories appearing in the *Collegian*. Rather, the analysis reflected that the overall quality of the *Collegian* was far inferior to comparable campus papers."

Without proof that Johnson was removed because of what stories did or did not appear in the *Collegian*, the judge said, the students cannot claim that "their First Amendment rights to freedom of the press were implicated." The judge also ruled that Johnson himself had no standing to bring a First Amendment claim against Kansas State because he does not control the content of the student newspaper.

A lawyer for Kansas State, Cheryl Strecker, said the court's ruling "vindicates the university, the administrators and the process." She added: "The university did not take any action to censor the content of the Collegian or to control anyone's freedom of expression."

Johnson, who remains an assistant journalism professor at Kansas State, said he was "disappointed" by the judge's decision, which he said "neglected the chilling effect" that the administration's move against him could have on student journalists at Kansas State and elsewhere. Johnson said that he and the former student editors were reviewing their legal options.

Mike Hiestand, a lawyer and legal consultant to the Student Press Law Center, said in a news release by the center that the ruling set a dangerous First Amendment precedent. "We are not aware of—and the court certainly doesn't cite—any other case where a judge has ever bought into this concocted distinction between a newspaper's quality and its content," Hiestand said. "This ruling really lowers the First Amendment bar in a way that I think is going to shock—and absolutely should shock—a lot of people." Reported in: insidehighered.com, June 14

freedom of the press

Washington, D.C.

The federal appeals court in Washington upheld contempt citations June 28 against four reporters who refused to disclose their confidential sources to Wen Ho Lee, an atomic scientist who is suing the government for violating his privacy. The reporters were ordered to pay fines of $500 a day.

The ruling came a day after the United States Supreme Court turned down appeals from two other reporters in a different case. Those reporters, Judith Miller of The *New York Times* and Matthew Cooper of *Time* magazine, were ordered jailed for refusing to testify about their sources in a grand jury investigation of the disclosure of the identity of a covert CIA agent, Valerie Plame.

Dr. Lee, then a scientist at the Los Alamos National Laboratory, was suspected of espionage in 1999 but ultimately pleaded guilty to a lesser charge. In his lawsuit, he

(continued on page 242)

libraries

Scottsdale, Arizona

The U.S. Department of Justice used court orders three times in early 2004 to obtain documents from the Scottsdale Public Library containing reader account information, according to records released by the city. The federal grand jury subpoenas arrived during March and April of last year. Records do not detail exactly what documents federal investigators obtained, making it impossible to determine how many people were tar geted in the probe and what information was sought.

The orders do, however, include information suggesting they were connected to the investigation of a mail bomb attack against Scottsdale Diversity director Don Logan. Attached to the subpoenas were letters from the U.S. Attorney's Office in Phoenix requesting city officials keep the orders a secret.

Laura Thomas Sullivan, Arizona Library Association president, said she did not know of any other libraries in the state being served subpoenas. It is unknown whether that is because there have been none, or whether they have been kept under wraps.

Arizona law protects library records from being released unless the institutions are presented with a court order, making it impossible for taxpayer-funded libraries to fight a subpoena.

Sullivan, director of the Tucson-Pima Public Library, said libraries do not object to the state law, but are worried over the expanded discretion the federal government is giving law enforcement. "It's the (USA) PATRIOT Act that has generated the concern," she said.

The U.S. Attorney's Office did not use the PATRIOT Act in the subpoenas presented to Scottsdale's library, records show. But Scottsdale's disclosure of the subpoenas comes against the backdrop of library organizations and American civil liberties advocates campaigning for increased oversight of a federal government they deem too quick to step on citizens' right to read without being watched over.

"It seems to me a fairly fundamental American freedom to read what the hell you please without the government putting its fingers into it," said Michael Gorman, president of the American Library Association.

Federal law enforcement officials defend their practices, arguing they have shown restraint and never used a provision in the USA PATRIOT Act granting law enforcement easier access to information on reading habits and purchases from libraries and book stores.

"Look, we know they already used (libraries)," Kim Smith, a Justice Department spokeswoman, said of terrorists. "Then why on earth would we carve it out for it to be a safe haven for them. Why would we want to support an amendment that says the government cannot seek library records, period, end of discussion?"

In Scottsdale's case, a letter from U.S. Attorney for Arizona Paul Charlton and assistant U.S. attorney for Arizona Ann Scheel accompanied each subpoena, calling on Scottsdale Library director Rita Hamilton to produce certain documents. Hamilton said she turned over the documents, as state law mandates.

The city's disclosure of the subpoenas marked a rare instance in which federal investigators' acquisition of reading histories becomes public, library advocates said.

Scheel, who applied for the subpoenas according to records, asked Hamilton to keep even the orders themselves secret. In a March 3, 2004, letter, Scheel stated that: "Any such disclosure could impede the investigation being conducted and thereby interfere with the enforcement of the law."

The Justice Department, Smith said, does not require that grand jury subpoenas ask that the orders remain secret. That is a decision made by the local U.S. attorney, she said.

On February 26, 2004, Scottsdale diversity director Don Logan opened a package bomb at his desk. The resulting explosion shredded Logan's hands, driving shrapnel into his body as well as the wall, ceiling, and floor of his office. Shrapnel also injured two other employees. The subpoenas contain information indicating they are tied to an investigation of the Logan bombing.

The court orders are dated March 3, March 19, and April 6 of 2004. The orders also show that a special agent with the U.S. Postal Inspection Service, the federal mail agency's investigative arm, was to receive the subpoenaed documents.

The U.S. Postal Service transported the package, investigators said last year. The Postal Service has been the lead agency investigating the Logan bombing. Hamilton said the subpoenas are tied to a single "incident."

Jose Obando, the postal inspection' s special agent named in the subpoenas, confirmed he was involved in the bombing investigation. There have been no arrests in the sixteen-month-old case.

The only other requests for patron information have been informal inquiries by Scottsdale Police Department beat officers and detectives, Hamilton said. Library employees have been instructed not to turn over any information to police and to direct officers to Hamilton.

"There have been occasions, times a police of ficer will ask who was using a computer at 'X' time of day. We always have to tell them we don' t keep those records, or you have to get a subpoena," Hamilton said. "And that dissolves it."

Besides the Justice Department, no other law enforcement agency has ever subpoenaed documents from the library, Osborn said.

Scottsdale Police Chief Alan Rodbell said he has never been informed that one of his officers had asked the library for information. Due to the chain of command, Rodbell said those details do not usually make their way to his desk.And there is no department policy regarding acquiring information from the library, he said.

"I don't know if we've ever done that. We may have gotten subpoenas twenty times. The bottom line is, officers can ask for things," Rodbell said. "W e try to get things . . . lawfully."

Federal investigators have long had access to library records through grand jury subpoenas, such as those issued to Scottsdale. The PATRIOT Act allows the FBI to sidestep that and apply for an order from the Foreign Intelligence Surveillance Court in cases where the agency is investigating international terrorism.

If Hamilton had received subpoenas from the intelligence court, she said no one could know about it. People know about them now only because the city rebuf fed the Justice Department's request and made the records public.

The key, she said, is that there is appropriate oversight to ensure law enforcement has good cause before forcing libraries to hand over information. "It has to be a major investigation with an evidence trail leading to us that a judge can see," Hamilton said. Before turning over patrons' private information, "we like to know that there is a bona fide reason." Reported in: *East Valley Tribune*, July 17.

San Francisco, California

San Francisco's budget committee approved increased funding of 5 percent for the San Francisco Public Library in a late-night budget meeting June 30, but rejected 4–1 the library's request for $680,000 to phase in microchip cir - culation technology at the Main Library and twenty-eight branches. In a plan announced in May 2004, library commissioners proposed adopting radio frequency identification devices (RFID) to speed up check-out procedures, but the measure has been opposed by privacy advocates who fear the devices will jeopardize patron information.

SFPL Public Affairs Director Marcia Schneider said that although the Board of Supervisors was "not comfortable funding RFID during this budget round, the decision in no way diminishes the enormous goodwill that was demonstrated to library services during a dif ficult budget year for the city." She added that the library' s $62-million budget calls for "more money for books and materials, funding for Every Child Ready to Read and a Successful Teens initiative, and funds for Main Library building enhancements."

State legislators also are treating RFID technology with a measure of caution. The proposed Identity Information Protection Act (SB 682), introduced in February, originally called for a ban on the use of RFID in all identity documents in California. However , an amendment approved in late June replaced the ban with a three-year moratorium in cases where specific security controls are in place to prevent surreptitious access. The bill specifies public library cards as falling under the moratorium, so if the bill passes the state assembly and is not vetoed by Gov. Arnold Schwarzenegger, RFID tags will be permitted in state, county, or municipal library cards as of January 1, 2009. Reported in: *American Libraries* online, July 8.

Woodland Park, Colorado

A religious-liberty group filed a federal lawsuit against a Front Range library district June 16 saying the district violated its rights by refusing to allow a lecture on the biblical perspective on marriage and homosexuality.

The Liberty Counsel, a Florida-based advocacy group, is asking the court to force the Rampart Library District Board to allow it to hold its lecture, according to the lawsuit filed in U.S. District Court in Denver . The group had wanted to use the community room of the Woodland Park Public Library for its lecture, which also would address what the group calls the "necessity of marriage being only between one man and one woman."

The group contends the library district discriminated against religious speech and denied the Liberty Counsel the same access that a secular group would get. Reported in: *Denver Post*, June 17.

colleges and universities

Victorville, California

Instructors place all sorts of limits on students' term paper topics. But can they ban God from them? That's the

question being raised by an unusual legal dispute at Victor Valley Community College. A student there—backed by a national legal group that focuses on the rights of religious people—says she was given a failing grade on a term paper because she repeatedly mentioned God in the paper, against her instructor's wishes.

The legal group is demanding that the college change the grade and apologize to the student. The college is investigating the complaint and won't comment on the specifics of the case, except to say that the student didn't utilize the grievance process that was open to her at the college. And some faculty members say their colleague had every right to restrict the topics he would accept for the term paper.

The student—Bethany Hauf—wrote a paper called "Religion and Its Place Within the Government," to fulfill a research paper requirement in English 101 this spring. Her instructor, Michael Shefchik, approved the topic. But according to Hauf, he imposed a restriction, sending her an e-mail message saying, "I have one limiting factor: no mention of the big 'G' gods, i.e. one, true god argumentation." After she handed in her paper with repeated references to God, Hauf said that Shefchik told her the highest possible grade she could receive on the paper was a 69, because she had ignored his instructions and her references to God could be "offensive" to other students. Taking off additional points for other matters, he gave Hauf a 49, a failing grade, she said.

The American Center for Law and Justice is representing Hauf and threatening to sue the college if it doesn't back down. "It is absolutely unbelievable that a student would be punished for presenting a thoughtful and well written paper that included references to God," said Jay Sekulow, a lawyer at the center, in a statement. Sekulow said that the instructor at Victor Valley had demonstrated "a profound hostility toward religious expression."

Bill Greulich, a spokesman for the college, said that officials there took the complaint "very seriously," and were investigating it. "It's a convoluted story and we don't have all the facts yet," he said. While declining to discuss details of the case, Greulich stressed that Hauf had not exhausted her options at the college when she obtained legal help. She went to the department chair, Greulich said, but she had other internal options available to her and did not use them.

Greulich said he did not know the precise instructions Hauf was given, but said that it was not strange to have professors set guidelines for papers. "Instructors give specific instructions all the time," he said.

Some of his fellow adjuncts are backing Shefchik. One, Judith Pfeffer, published a letter in *The Victor Valley Daily Press* saying, "Students who refuse to follow their teacher's specific instructions should expect an unsatisfactory grade, just as employees who defy clear orders from their employer should expect appropriate consequences." Reported in: insidehighered.com, July 5.

Colorado Springs, Colorado

The U.S. Air Force Academy has failed to accommodate minority religious beliefs and to set guidelines on acceptable forms of religious expression, but there is no overt religious discrimination on the Colorado campus, Air Force investigators concluded in a report released June 22.

The institution has a "lack of awareness" about "where the line is drawn between permissible and impermissible expression of beliefs," the report says. It cites a need for diversity training on the campus and guidance for academy officials regarding religious expression.

Speaking at a Pentagon news conference, Lt. Gen. Roger A. Brady, the Air Force's deputy chief of staff for personnel and head of the investigative team, said that the "youth and inexperience" of some members of the student body had contributed to the "perception of religious intolerance" through their reported religious slurs and disparaging remarks.

Johnny Whitaker, the academy's communications director, said the report "validates what we've been saying for a year—that we know we have problems."

"We're taking it very seriously," Whitaker said, "and we have been for over a year."

The document, titled "The Report of the Headquarters Review Group Concerning the Religious Climate at the U.S. Air Force Academy," followed a heated, yearlong public debate over religious intolerance at the institution. In March 2004, an academy survey first revealed concerns about religious discrimination. A report commissioned by the academy the following July said some chaplains had encouraged evangelical Protestant cadets to proselytize classmates. The report also said that one academy official had told cadets that those not "born again will burn in the fires of hell."

In March 2005, the academy created a training program on respect for spiritual values, which is required for every cadet, faculty member, and staff member. But critics have called the academy's response "insufficient." Michael L. Weinstein, an academy alumnus, has called the training a "Band-Aid solution" to a systemic problem. He said he was "discouraged, disappointed, and outraged" by the Air Force investigators' report.

"The report completely fails to reflect the outrage and depression of hundreds of cadets who have anonymously come to me to report evangelical intrusion," Weinstein said in an interview. "It gives mere lip service to the separation of church and state. It is woefully inadequate—this is a very serious issue that they're getting a pass on."

But Whitaker, the academy spokesman, questioned how pervasive the problem is. "When we have specific incidents or reports of inappropriate activity, whether it's slurs, or proselytizing, or somebody stepping over the line, we act on those," he said. "And we've acknowledged that it's complex, it's sensitive, and it's an emotional issue."

The issue also has been discussed in Congress. On June 20, the House of Representatives voted, largely along party

lines, to strip an appropriations bill of language criticizing the "coercive and abusive religious proselytizing" of cadets at the academy. Representatives instead called for the development of "a positive climate of religious freedom and tolerance." Reported in: *Chronicle of Higher Education* online, June 23.

Washington, D.C.

Echoing widespread criticism from academics and scientists, the American Civil Liberties Union released a report June 22 condemning the Bush administration for its "assault" on academic freedom and scientific inquiry since September 11, 2001.

At a news conference, Anthony D. Romero, the ACLU's executive director, noted that the organization is not scientific or academic. But he said it had heard complaints from many scientists and is in a "unique position" to connect their concerns to the organization's response to what it called the Bush administration's "attack" on civil rights stemming from the war on terrorism.

"Protecting the freedoms of the scientific and academic communities is essential to ensuring the constitutional protections that we all hold dear," Romero said.

The report, "Science Under Siege: The Bush Administration's Assault on Academic Freedom and Scientific Inquiry," says the administration has imposed "excessive, unnecessary, and ineffective" restrictions on scientists and academics in order to control scientific inquiry for political purposes.

The report specifically criticizes the administration's restrictions on publishing scientific and academic information, its "ill-conceived" visa policies that prevent many international students and researchers from entering the United States or contributing to research, and its limits on the production and use of biomedical agents and on access to materials and technology.

The Bush administration's policies have delayed crucial research, squelched the free flow of ideas, and resulted in a sharp decline in foreign-student applications to and enrollment in American universities, Romero said. The policies may also keep American scientists from staying on the cutting edge of science and technology for years to come.

The ACLU's findings mirror concerns voiced since September 11 by academic and scientific organizations, such as the American Association of University Professors and the Union of Concerned Scientists. In response, the Bush administration has called some of the criticisms "wrong and misleading" and has defended restrictions as necessary to national security. But it has also retooled some of its policies. Reported in: *Chronicle of Higher Education* online, June 23.

Harrisburg, Pennsylvania

The Pennsylvania House of Representatives has voted to form a committee to investigate claims by some students that professors graded them unfairly because of their political views and used class time to talk about their own political opinions.

The resolution to establish the panel passed the House July 5, 111 to 87. The measure, HR 177, states that students and faculty members "should be protected from the imposition of ideological orthodoxy," and that students should be "graded based on academic merit, without regard for ideological views."

"We need to have an academic atmosphere that facilitates diversity of ideas, diversity of thought," said Rep. Gibson Armstrong, a Republican from Lancaster, who introduced the resolution.

Complaints from roughly fifty college students who said they had been discriminated against because of their politics prompted him to sponsor the measure, Armstrong said. Other factors in his decision, he said, were national news reports citing a lack of intellectual diversity on college campuses and a lawsuit against a state university in Pennsylvania over its student-conduct code.

But some faculty members contend that Armstrong made the wrong decision. "It's disquieting," Richard P. Mulcahy, an associate professor of history and political science at the University of Pittsburgh at Titusville, said of the House committee's formation. "It makes an assumption that we need to be watched. It seems we're not trusted to be professional people, to understand that a university is a place where ideas occur."

The Pennsylvania resolution came at a time when Republican lawmakers in several state legislatures have introduced a measure, known as the academic bill of rights, that they say will make college campuses more intellectually diverse. That bill has been pushed in a national campaign by David Horowitz, a California-based activist. Republican leaders in the U.S. House of Representatives also have included the measure in legislation to renew the Higher Education Act.

No legislature has passed Horowitz's bill so far. Critics, including many prominent professors and faculty groups, oppose the measure and say it would give government officials control over academic matters that should be left to faculty members' professional judgment.

Armstrong was quick to distance the Pennsylvania resolution from the academic bill of rights. "This legislation does not at all propose an academic student bill of rights," he said. "This simply directs the subcommittee on higher education to study academic freedom on our state-owned and state-related institutions of higher education."

According to the resolution, which does not need the governor's signature to take effect, the investigative committee will be composed primarily of members of the House's higher-education subcommittee and two appointees, one named by the speaker of the House and the other by its minority leader. The panel will "examine, study, and inform" the House "on matters relating to the academic

atmosphere and the degree to which faculty have the opportunity to instruct and students have the opportunity to learn in an environment conducive to the pursuit of knowledge and truth and the expression of independent thought."

The committee may hold hearings, take testimony, and conduct investigations, but, Armstrong said, it will not have subpoena power. Armstrong emphasized that he hoped the committee would consider each case individually, on its merits, "but have a very high threshold when it comes to students' simply complaining about the grades they receive."

Any legislative action stemming from the committee's work is, at this point, pure speculation, Armstrong said. "I'd hope that what we will find there is no significant problem," he said, "or if there is a problem that our administrators are doing what is appropriate."

Thomas E. Gluck, director of communications for the Pennsylvania State System of Higher Education, said that the system would support the House's decision. "We'll certainly work with the subcommittee of the higher-education committee in the same way we work with the committee on other issues," he said. He noted that each of the system's universities already has mechanisms in place to handle students' complaints, and that the system has not received complaints from students "along the lines that HR 177 seems to suggest."

Mulcahy, the Pittsburgh professor, is secretary of the Pennsylvania division of the American Association of University Professors. He called the resolution an overreaction. He said that although Mr. Armstrong said fifty students had complained to him of discrimination, that is a small number in comparison with the thousands of students that the state's colleges serve.

Meanwhile, Horowitz, president of the Center for the Study of Popular Culture, declared a "victory" in Pennsylvania. On his Web site, Frontpagemag.com, he praised Armstrong for sponsoring the legislation. "This is a huge first step," he wrote, "towards prompting university administrations to do the right thing by seeing that academic standards are enforced and that faculty do not use their classrooms for political and other agendas that have no educational justification." Reported in: *Chronicle of Higher Education* online, July 7.

Internet

Salt Lake City, Utah

Citing free speech and interstate commerce violations, a broadly-based group of Utah bookstores, artistic and informative Web sites, Internet service providers, and national trade associations filed a federal lawsuit June 9 challenging the constitutionality of a Utah law meant to restrict children's access to material on the Internet.

"This law has nothing to do with the laudable goal of protecting children," said Wesley Felix, a shareholder at the Salt Lake City law firm of Bendinger, Crockett, Peterson, Greenwood & Casey and co-counsel for the plaintiffs. "Not only does it not accomplish its stated objective, but it casts such a wide net that a lot of valuable and perfectly legal speech will be censored."

Betsy Burton, owner of The King's English Bookshop in Salt Lake City and the lead plaintiff in the lawsuit, is worried about the effect the law will have on her business's Web site that features descriptions and jacket art from a wide variety of books for children and for adults. "Unless I limit the Web site to children's books or attempt to exclude children from our Web site, I risk the danger of a criminal charge. Both of these alternatives are incompatible with the nature of a general community bookstore such as The King's English," she said.

Burton also noted that the law does not outline any sort of appeals process, and wondered, "If I found out that my site is considered harmful to minors, how would I challenge this designation?"

Michael Bamberger of Sonnenschein Nath & Rosenthal LLP, New York, NY, co-counsel in the case, noted the chilling effect the law has on the speech of people like Burton. "It is very likely that some Web publishers may try to avoid problems altogether by not posting speech they think might be considered in violation of the law," said Bamberger. "Courts have repeatedly rejected laws that lead to this sort of self-censorship."

The new law, passed by the 2005 session of the Utah legislature, has three primary components: (1) Utah Internet content providers must evaluate and rate their speech, at the risk of criminal punishment; (2) the Utah Attorney General must create a public registry of Internet sites worldwide containing "material harmful to minors"—speech that is unlawful to intentionally distribute to minors but that is constitutionally protected for adults; (3) it extends existing criminal restrictions on distribution of "harmful" materials to distribution on the Internet.

Similar provisions have been uniformly held unconstitutional under the Commerce Clause and the First Amendment by federal courts across the nation.

The lawsuit also challenges a provision that may lead to the blocking of a significant number of innocent Web sites simply because they have the same Internet protocol addresses as targeted sites. "To comply with the law, Internet Service Providers are authorized to block access to certain content, and this would almost unavoidably lead to the blocking, and thus the censorship, of innocent Web sites," said co-counsel John Morris of the Center for Democracy and Technology. "Also troubling is the fact that the publishers of these sites may never realize they're being blocked."

Plaintiffs Utah Progressive Network and Andrew McCullough have Web sites that are hosted on shared IP

addresses with unrelated sites, some of which contain material likely harmful to minors. They fear that because of the new law, their sites and their constitutionally-protected speech will be blocked.

"Unfortunately, legislators chose to pass a convoluted bill, despite warnings that courts have consistently struck down laws like this because they violate the First Amendment and the Commerce Clause," said ACLU of Utah staff attorney Margaret Plane.

The name of the case is *The King's English* v. *Shurtleff*. Plaintiffs are The King's English, Inc.; Sam Weller's Zion Bookstore; Nathan Florence; W. Andrew McCullough; Computer Solutions International, Inc.; Mountain Wireless Utah, LLC; the Sexual Health Network, Inc., Utah Pro gressive Network Education Fund, Inc.; the American Booksellers Foundation for Free Expression; the American Civil Liberties Union of Utah; the Association of American Publishers; the Comic Book Legal Defense Fund; the Freedom to Read Foundation; and the Publishers Marketing Association.

protest

Sacramento, California

The California National Guard's monitoring of a Mother's Day anti-war rally in Capitol Park sparked a state Senate investigation into domestic spying and a Sacramento protest at Guard headquarters. The Guard denied that it spies on Californians and downplayed its Mother's Day activity as an effort to track media coverage of the Capitol Park event.

But protesters and state Sen. Joe Dunn, D-Santa Ana, said they fear the Guard uses state resources to monitor politically active residents. Dunn also is concerned by the Guard's erasure of computer evidence related to its monitoring efforts.

"If they can spy on peaceful grandmothers like us, what's next, the PTA?" asked Ruth Robertson, co-chair of the Peninsula Raging Grannies, one of the groups behind the Mother's Day rally. "Why are we wasting taxpayers' money on this?"

Dunn began researching the unit after the *San Jose Mercury News* reported the Guard tracked a Mother 's Day protest in Sacramento involving grandmothers and families of Iraq war victims. Dunn chairs the Senate budget subcommittee that oversees the Guard's state funding. He reiter ated his demand that the Guard turn over all records on the "Information Synchronization, Knowledge Management, and Intelligence Fusion" program. The obscure division analyzes data gathered by state agencies to determine potential terrorism targets in California, among other tasks, said Lt. Col. Doug Hart, the Guard's public affairs director.

Dunn asked Gov. Arnold Schwarzenegger to order that all relevant records be kept in California. In a response letter, Schwarzenegger's deputy chief of staf f, Richard Costigan, stated that the governor will assure that Dunn has access to those records.

"There is no intention to deny you critical information, and the governor has directed that all pertinent information (including the computer hard drive mentioned in your letter) is retained and secured for your eventual review ," Costigan wrote.

The senator sought a subpoena through the Senate Rules Committee to enforce his request, but the committee will not decide on the matter until next week at the earliest, said Alicia Dlugosh, a spokeswoman for Senate President Pro Tem Don Perata, D-Oakland.

Dunn was further alarmed after learning that the Guard had erased a computer belonging to the unit' s leader, Col. Jeff Davis, who retired in June. The senator said the erasure could amount to evidence destruction, and sought immediate access to the computer so a Senate technician could recover any information.

Hart said Davis' computer had been erased as a standard practice for departing employees. But he said the Guard likely will recover the information.

All Guard officials did, Hart said, was monitor the rally on TV news—he wasn't even sure the protest made it onto any of the local stations. Such monitoring is standard, he said, adding that Guard of ficials need to see if any public safety problems occur that require the Guard' s help. Also, Hart said, Guard officials often just like to see what people are saying about them in the media.

"We don't monitor TVs to watch protesters," Hart said. "We watch it for instances where we might be asked to support other agencies."

"This is a police job and not a job of our California National Guard—who should be home, who should be protecting us . . . and not spying on our wives, our mothers and our grandmothers," said George Main, president of the Sacramento chapter of Veterans for Peace.

Hart responded quickly. "You're absolutely right, and we are not doing any of those things."

Guard Brig. Gen. John R. Alexander wrote Dunn that the Guard could not respond to the senator 's request until it coordinated with federal investigators who began an inquiry on the matter.

Dunn said any obstruction of the Senate investigation to accommodate federal officials would be tantamount to a "cover-up." He said there are outstanding questions about whether federal officials used Guard units to spy on citizens in California and elsewhere to circumvent a federal restriction on domestic spying.

"That is the classic fox guarding the henhouse situation," Dunn said of a possible federal investigation. "If in fact the creation of this unit was done at the request of the federal authorities, they ought to be honest enough to have independent investigators come to California to look at the activities of the unit."

According to the May e-mail thread released by the Guard that led to the Mother's Day controversy, a Schwarzenegger press aide alerted the Guard of the May 8 event at the Vietnam Veterans' Memorial in which various groups urged state officials to bring home Guard personnel from Iraq by Labor Day. The message bounced between Guard officials, with brief comments. In one message, Davis noted, "Thanks. Forwarding same to our Intell. folks who continue to monitor."

Even if Guard officials were just keeping tabs on the rally on TV, they still broke the law, said Natalie Wormeli, one of the organizers of the Mother's Day rally. Guard officials, she said, can only legally monitor people if there is reasonable suspicion they are involved in illegal activities.

"There is no reasonable suspicion," she said. "There is no nexus between us and any illegal activity. They were on duty, in that building, watching TV to see what we were up to." Reported in: *Sacramento Bee*, July 7.

Colorado Springs, Colorado

Six peace activists' lawsuit against Colorado Springs may come down to a single issue: Do security concerns in today's world outweigh the First Amendment?

Attorneys for the city and for protesters who picketed an October 2003 conference of NATO defense ministers at The Broadmoor hotel wrapped up arguments in a three-day federal trial July 7. The American Civil Liberties Union sued Colorado Springs on the demonstrators' behalf, saying the city violated the protesters' free-speech rights by keeping them outside a security ring around the conference.

Tom Marrese, the city's senior litigation attorney, argued that the city restricted access around the resort to maintain the safety of delegates from nineteen countries. Rules were tailored specifically for the event because of the possibility of terrorist attacks at a time of war, he said. But Mari Newman, a Denver civil rights attorney, said Citizens for Peace in Space was known to be peaceful and posed no threat when it sought access. Though NATO officials requested that protesters be kept away from the hotel, local leaders should have demanded that U.S. laws be followed, she said.

"There may be some sensitivities and some discussions that have to happen," Newman said. "The fundamental principle is the Constitution and its rights, which don't give way just because we're hosting other nations."

The activists were relegated to an area more than 300 feet from the nearest site where North Atlantic Treaty Organization delegates met. U.S. District Court Judge Richard Matsch told the attorneys he will weigh the need for protection of national leaders against the protesters' need to have their voices heard. In doing so, he will consider "the most compelling but also the most fragile protection to our society"—freedom of speech.

At the same time, he noted the First Amendment must be enforced in a way that can work with new security precautions in a post-9/11 world. "I don't think those who wrote the Constitution ever contemplated a day when the courthouse of the United States has to be accessed through a security device, but here we are," Matsch said. Reported in: *Denver Gazette*, July 11.

Washington, D.C.

The Federal Bureau of Investigation has collected at least 3,500 pages of internal documents in the last several years on a handful of civil rights and antiwar protest groups in what the groups charge is an attempt to stifle political opposition to the Bush administration.

The FBI has in its files 1,173 pages of internal documents on the American Civil Liberties Union, the leading critic of the Bush administration's antiterrorism policies, and 2,383 pages on Greenpeace, an environmental group that has led acts of civil disobedience in protest over the administration's policies, the Justice Department disclosed in a July court filing in a federal court in Washington.

The filing came as part of a lawsuit under the Freedom of Information Act brought by the ACLU and other groups that maintain that the FBI has engaged in a pattern of political surveillance against critics of the Bush administration.A smaller batch of documents already turned over by the government sheds light on the interest of FBI counterterrorism officials in protests surrounding the Iraq war and last year's Republican National Convention.

FBI and Justice Department officials declined to say what was in the ACLU and Greenpeace files, citing the pending lawsuit. But they stressed that as a matter of both policy and practice, they have not sought to monitor the political activities of any activist groups and that any intelligence-gathering activities related to political protests are intended to prevent disruptive and criminal activity at demonstrations, not to quell free speech. They said there might be an innocuous explanation for the large volume of files on the ACLU and Greenpeace, like preserving requests from or complaints about the groups in agency files.

But officials at the two groups said they were troubled by the disclosure. "I'm still somewhat shocked by the size of the file on us," said Anthony D. Romero, executive director of the ACLU "Why would the FBI collect almost 1,200 pages on a civil rights organization engaged in lawful activity? What justification could there be, other than political surveillance of lawful First Amendment activities?"

Protest groups charge that FBI counterterrorism officials have used their expanded powers since the September 11 attacks to blur the line between legitimate civil disobedience and violent or terrorist activity in what they liken to FBI political surveillance of the 1960's. The debate became particularly heated during protests over the war in Iraq and the run-up to the Republican National Convention in New York City last year, with the disclosures that the FBI had collected extensive information on plans for protests.

In all, the ACLU is seeking FBI records since 2001 or earlier on some 150 groups that have been critical of the Bush administration's policies on the Iraq war and other matters.

The Justice Department is opposing the ACLU's request to expedite the review of material it is seeking under the Freedom of Information Act, saying it does not involve a matter of urgent public interest, and department lawyers say the sheer volume of material, in the thousands of pages, will take them eight to eleven months to process for Greenpeace and the ACLU alone. The ACLU, which went to court in a separate case to obtain some 60,000 pages of records on the government's detention and interrogation practices, said the FBI records on the dozens of protest groups could total tens of thousands of pages by the time the request is completed.

The much smaller files that the FBI has already turned over in recent weeks center on two other groups that were involved in political protests in the last few years, and those files point to previously undisclosed communications by bureau counterterrorism officials regarding activity at protests.

Six pages of internal FBI documents on a group called United for Peace and Justice, which led wide-scale protests over the Iraq war, discuss the group's role in 2003 in preparing protests for the Republican National Convention.

A memorandum by counterterrorism personnel in the FBI's Los Angeles office circulated to other counterterrorism officials in New York, Boston, Los Angeles, and Washington makes passing reference to possible anarchist connections of some protesters and the prospect for disruptions but also quotes at much greater length from more benign statements protesters had released on the Internet and elsewhere to prepare for the Republican convention.

One section of the FBI memo, for instance, quotes from a statement put out by protesters to rally support for convention protests: "Imagine: A million people on the street, representing the diversity of New York, and the multiplicity of this nation —community organizers, black radicals, unions, anarchists, church groups, queers, grandmas for peace, AIDS activists, youth organizers, environmentalists, people of color contingents, global justice organizers, those united for peace and justice, veterans, and everyone who is maligned by Bush's malicious agenda—on the street—en masse."

A second file turned over by the FBI on the American Indian Movement of Colorado includes seven pages of internal documents and press clippings related to protests and possible disruptions in the Denver area in connection with Columbus Day. In that case, a 2002 memorandum distributed to FBI counterterrorism officials from agents in Denver said that "although the majority of demonstrators at the Columbus Day events will be peaceful, a small fraction of individuals intent on causing violence and property damage can be expected."

An agent in Denver requested that the FBI open a preliminary investigation "to allow for identification and investigation of individuals planning criminal activity during Columbus Day, October 2002," the memorandum said. The file does not indicate what came of the request.

The documents are similar in tone to a controversial bulletin distributed among FBI counterterrorism officials in October 2003 that analyzed the tactics, training and organization of antiwar demonstrators who were then planning protests in Washington and San Francisco.

The 2003 memo led to an internal Justice Department inquiry after an FBI employee charged that it improperly blurred the line between lawfully protected speech and illegal activity. But the Justice Department's Office of Legal Counsel found that the bulletin raised no legal problems and that any First Amendment impact posed by the FBI's monitoring of the political protests was negligible and constitutional.

Still, the debate over the FBI's practices intensified last year during the presidential campaign. The FBI questioned numerous political protesters, and issued subpoenas for some to appear before grand juries, in an effort to head off what officials said they feared could be violent and disruptive convention protests. And the Justice Department opened a criminal investigation and subpoenaed records regarding Internet messages posted by critics of the Bush administration that listed the names of delegates to the Republican convention.

Leslie Cagan, the national coordinator for United for Peace and Justice, a coalition of more than 1,000 antiwar groups, said she was particularly concerned that the FBI's counterterrorism division was discussing the coalition's operations. "We always assumed the FBI was monitoring us, but to see the counterterrorism people looking at us like this is pretty jarring," she said.

At Greenpeace, which has protested both the Bush administration's environmental record and its policies in Iraq, John Passacantando, executive director of the group's United States operation, said he, too, was troubled by what he had learned.

"If the FBI has taken the time to gather 2,400 pages of information on an organization that has a perfect record of peaceful activity for thirty-four years. It suggests they're just attempting to stifle the voices of their critics," Mr. Passacantando said.

Greenpeace was indicted as an organization by the Justice Department in a highly unusual prosecution in 2003 after two of its protesters went aboard a cargo ship to try to unfurl a protest banner. A federal judge in Miami threw out the case last year. Reported in: *New York Times*, July 18.

copyright

New York, New York

The Association of American Publishers has asked Google to stop scanning copyrighted books published by

the association's members for at least six months while the company answers questions about whether its plan to scan millions of volumes in five major research libraries complies with copyright law.

Allan R. Adler, vice president for legal and governmental affairs at the publishing group, said in an interview that the association made its request in a letter, sent June 10, that stopped short of calling for a "cease and desist" of Google's Library Project.

"We've simply asked for a six-month moratorium to facilitate discussion" in an environment "where there isn't going to be the tension of ongoing practices that some of our members may object to."

A growing number of publishing groups and individual publishers have formally questioned the legality of Google's project, which is part of a larger program, called Google Print, that aims to make book content searchable online. The Library Project, announced in December, involves libraries at Harvard and Stanford Universities, the University of Michigan at Ann Arbor, and the University of Oxford, in England, as well as the New York Public Library.

Two of those libraries, at Michigan and Stanford, have agreed to let Google scan books that are still in copyright.

Adler said the letter was sent because members of the publishers' association feel they have not "gotten satisfactory answers to their questions about copyright infringement." Many publishers say that Google does not have the right even to scan a copyrighted book—they argue that making a digital copy of a volume for any commercial purpose requires the permission of the copyright holder.

Adler said the letter was sent to Eric Schmidt, Google's chief executive officer, and it requests a meeting between top Google executives and leaders of the publishing group.

Google officials said that they had not yet replied to the association. "We have received the letter, and we have read it, and we are in discussions with publishers, authors, and the associate organizations to understand their concerns—to listen to them as well as talk about the benefits of Google Print," said Susan Wojcicki, director of product management for Google Print.

Does Google believe it has the right to scan copyrighted books without permission, provided the company—as it has promised—offers only short excerpts of those works to the public in search results? "Yes," said Wojcicki. "We believe that our program is fully consistent with fair use under copyright law."

Officials of the publishing group would not release the text of the letter itself, saying that they want to give Google officials time to respond before doing so. Adler said he was only answering questions about the letter because word of its existence had leaked out during the annual meeting of the Association of American University Presses, which took place June 16–19 in Philadelphia. Reported in: *Chronicle of Higher Education* online, June 21.

PATRIOT Act

Summit, New Jersey

The U.S. Justice Department criticized a New Jersey municipality June 29 for invoking the USA PATRIOT Act to defend itself from a lawsuit over kicking homeless people out of its train station.

In an answer to a federal lawsuit brought by a homeless man who objected to being told to leave the Summit train station, the city said its conduct is protected by the PATRIOT Act and the lawsuit should be barred. The city cited a section of the law regarding "attacks and other violence against mass transportation systems."

But Kevin Madden, a Justice Department spokesman, said Summit has no business invoking the anti-terrorism law to justify its treatment of the homeless. "That represents a fundamental misunderstanding of what the PATRIOT Act is," he said. "The PATRIOT Act is a law enforcement tool to identify and track terrorists and stop them from further attacks on America. To apply it to this case is, shall we say, an overreaching application of the law."

The city is among several defendants being sued in U.S. District Court in Newark by Richard Kreimer, fifty-five. He is seeking at least $5 million in damages against NJ Transit, the city of Summit, nine police officers and several other defendants, claiming he and other homeless people have been unlawfully thrown out of train stations since August, 2004. He also wants a federal judge to decide whether transit stations are public or private property, and whether people who are not ticketed passengers have the right to be in them.

The PATRIOT Act defense was one of fifteen made by Harry Yospin, the attorney who filed Summit's response to the lawsuit. In legal papers filed in response to the suit, Yospin also termed Kreimer's suit "frivolous," and said police officers were exercising lawful discretion in their dealings with Kreimer.

Similar defenses were made by the state Attorney General's office on behalf of NJ Transit. The state termed the lawsuit "frivolous" and "a sham," but did not cite the PATRIOT Act.

Kreimer garnered national attention—and nearly a quarter of a million dollars—in 1991 after suing Morristown, the Morris Township public library and the police department over his treatment there. The library threw him out at least five times, claiming his body odor and the way he looked at library patrons offended them.

Morristown paid $150,000 to settle a harassment suit, and the library's insurer kicked in $80,000 to get Kreimer to drop his suit after a federal judge ruled the library's rules on hygiene were unconstitutional. That ruling was

later overturned, but not before Kreimer had been paid. Reported in: Associated Press, June 29.

science

Washington, D.C.

A White House official who once led the oil industry's fight against limits on greenhouse gases has repeatedly edited government climate reports in ways that play down links between such emissions and global warming, according to internal documents.

In handwritten notes on drafts of several reports issued in 2002 and 2003, the official, Philip A. Cooney, removed or adjusted descriptions of climate research that government scientists and their supervisors, including some senior Bush administration officials, had already approved. In many cases, the changes appeared in the final reports.

The dozens of changes, while sometimes as subtle as the insertion of the phrase "significant and fundamental" before the word "uncertainties," tend to produce an air of doubt about findings that most climate experts say are robust.

Cooney is chief of staff for the White House Council on Environmental Quality, the office that helps devise and promote administration policies on environmental issues. Before going to the White House in 2001, he was the "climate team leader" and a lobbyist at the American Petroleum Institute, the largest trade group representing the interests of the oil industry. A lawyer with a bachelor's degree in economics, he has no scientific training.

In one instance, in an October 2002 draft of a regularly published summary of government climate research, "Our Changing Planet," Cooney amplified the sense of uncertainty by adding the word "extremely" to this sentence: "The attribution of the causes of biological and ecological changes to climate change or variability is extremely difficult."

In a section on the need for research into how warming might change water availability and flooding, he crossed out a paragraph describing the projected reduction of mountain glaciers and snowpack. His note in the margins explained that this was "straying from research strategy into speculative findings/musings."

Other White House officials said the changes made by Cooney were part of the normal interagency review that takes place on all documents related to global environmental change. Robert Hopkins, a spokesman for the White House Office of Science and Technology Policy, noted that one of the reports Cooney worked on, the administration's ten-year plan for climate research, was endorsed by the National Academy of Sciences. And Myron Ebell, who has long campaigned against limits on greenhouse gases as director of climate policy at the Competitive Enterprise Institute, a libertarian group, said such editing was necessary for "consistency" in meshing programs with policy.

But critics said that while all administrations routinely vetted government reports, scientific content in such reports should be reviewed by scientists. Climate experts and representatives of environmental groups, when shown examples of the revisions, said they illustrated the significant if largely invisible influence of Cooney and other White House officials with ties to energy industries that have long fought greenhouse-gas restrictions.

A senior Environmental Protection Agency scientist who works on climate questions said the White House environmental council, where Cooney works, had offered valuable suggestions on reports from time to time. But the scientist, who spoke on the condition of anonymity because all agency employees are forbidden to speak with reporters without clearance, said the kinds of changes made by Cooney had damaged morale. "I have colleagues in other agencies who express the same view, that it has somewhat of a chilling effect and has created a sense of frustration," he said.

Efforts by the Bush administration to highlight uncertainties in science pointing to human-caused warming have put the United States at odds with other nations and with scientific groups at home.

Prime Minister Tony Blair of Britain has been trying to persuade President Bush to intensify United States efforts to curb greenhouse gases. Bush has called only for voluntary measures to slow growth in emissions through 2012.

On June 13, saying their goal was to influence that meeting, the scientific academies of eleven countries, including those of the United States and Britain, released a joint letter saying, "The scientific understanding of climate change is now sufficiently clear to justify nations taking prompt action."

The American Petroleum Institute, where Cooney worked before going to the White House, has long taken a sharply different view. Starting with the negotiations leading to the Kyoto Protocol climate treaty in 1997, it has promoted the idea that lingering uncertainties in climate science justify delaying restrictions on emissions of carbon dioxide and other heat-trapping smokestack and tailpipe gases.

On learning of the White House revisions, representatives of some environmental groups said the effort to amplify uncertainties in the science was clearly intended to delay consideration of curbs on the gases, which remain an unavoidable byproduct of burning oil and coal.

"They've got three more years, and the only way to control this issue and do nothing about it is to muddy the science," said Eileen Claussen, the president of the Pew Center on Global Climate Change, a private group that has enlisted businesses in programs cutting emissions.

Cooney's alterations can cause clear shifts in meaning. For example, a sentence in the October 2002 draft of "Our

(continued on page 240)

libraries

Guilderland, New York

An effort by a trustee of the Guilderland Public Library to have sexually-explicit young adult books labeled with "PG" stickers failed 7–1, after the proposal drew scorn from the community. Initially, John Daly would have had staff screen every one of the 1,600 or so teen books acquired each year. Then, acknowledging complaints about the workload required, he proposed screening five percent of new books and letting those already acquired go unlabeled. Daly said he wasn't against sexual content; he just wanted parents to know when young adult fiction had, according to the proposal, "descriptions of sexual intercourse, oral sex, transgender masturbation, or other physical contact with genitalia." Library director Barbara Nichols Randall opposed the policy, calling it "prejudicial labeling." Reported in: *Library Journal* online, June 14.

schools

Fargo, North Dakota

A Fargo Public Schools committee has upheld a decision not to ban John Grisham's novel *A Time to Kill* from an accelerated English course at a high school. A Fargo North High committee made the decision in May to keep the book in class. The parent who first asked that the book be removed appealed that decision to the district level.

"It's a continuing trend of very bad decision-making at the district level," Pamela Sund Herschlip said of the latest decision. "It's also a question of age-appropriateness. It's not an issue of banning books. It's an issue of placement of material."

Grisham's best-selling novel tells the story of a small-town Mississippi lawyer who defends a black man after he shoots two white men who raped his young daughter. The book describes a rape scene.

"It was our belief that the novel could be used to teach tolerance against discrimination, the judicial system and prejudices," said North Principal Andy Dahlen. The district review committee said the novel's graphic scenes served a purpose and were not sensational.

Sund Herschlip said she planned to appeal the decision to Fargo Public Schools Superintendent David Flowers. If Flowers upholds the ruling, Herschlip can appeal to the Fargo School Board, which would give a final recommendation. Reported in: Associated Press, June 18.

publishing

Berkeley, California

The University of California Press will proceed with the publication of a controversial book that attacks supporters of Israel despite efforts by its chief target, the Harvard law professor Alan M. Dershowitz, to block the book's release. The press's intentions were announced July 8 by its director, Lynne Withey.

The book, Norman G. Finkelstein's *Beyond Chutzpah: On the Misuse of Anti-Semitism and the Abuse of History,* examines the evidence of human-rights groups, such as Amnesty International, and the writings of pro-Israel commentators to expose what the introduction terms "the vast proliferation of sheer fraud masquerading as serious scholarship" on Israel and its treatment of Palestinians.

Finkelstein, an assistant professor of political science at DePaul University, describes Dershowitz's 2003 book, *The Case for Israel* (John Wiley & Sons), as "among the most spectacular academic frauds ever published on the Israel-Palestine conflict."

Beyond Chutzpah was poised to go to press in late June when lawyers for the University of California system halted publication to review again Finkelstein's allegations, which include the charge that Dershowitz lifted large portions of *The Case for Israel* from Joan Peters's 1984 *From Time Immemorial: The Origins of the Arab-Jewish Conflict Over Palestine* (Harper & Row). Finkelstein debunked Peters's work in a previous book, *The Holocaust Industry: Reflections on the Exploitation of Jewish Suffering* (Verso, 2000).

After ten days of what Finkelstein described as "nonstop, round-the-clock negotiations with lawyers," he agreed to several wording changes designed to forestall legal action by Dershowitz, a noted proponent of the First Amendment as well as one of Israel's most prominent American supporters.

Withey said that the press hoped to meet the original publication date of August 28. "We're aiming to have bound books by the end of July," she said.

The eleventh-hour delay was far from the first hurdle that *Beyond Chutzpah* had to clear on its road to publication. Under pressure from Dershowitz and his lawyers, the New York firm of Cravath, Swaine & Moore, Finkelstein's original publisher, the New Press, delayed publication in order to review the plagiarism accusations. Finkelstein then took the project to the University of California Press and its history editor, Niels Hooper, whom he had worked with on *The Holocaust Industry* when Hooper was an editor at Verso. Dershowitz sent letters to the University of California and others, including Gov. Arnold Schwarzenegger of California, who is an ex officio member of the university's Board of Regents, protesting the press's decision to publish Finkelstein's book.

The depth of Dershowitz's feeling can be gauged by a July 5 column he wrote for the online journal FrontPageMag.com that carried the headline "Why Is the University of California Press Publishing Bigotry?" In the column, he invokes hate speech and The Protocols of the Elders of Zion and attacks "this bigoted book by this anti-Semite" and Finkelstein's "penchant for making up facts about people with whom he disagrees."

Dershowitz denied that he has sought to block the book's publication, but in comments published in *The Boston Globe* July 9 he said, "I don't think a university press should be publishing this kind of garbage." He added that he had told the California press that "if you say I didn't write the book or plagiarized it, I will own your company."

"He doesn't want the book published," Withey said, adding that it was "outrageous" for Dershowitz to charge the book with being anti-Semitic. "To say that the book is anti-Semitic is to say that any criticism of Israel is anti-Semitic," she said.

One letter from one of Dershowitz's lawyers said that the California press, in publishing the book, was "part of a conspiracy to defame" Dershowitz, adding, "The only way to extricate yourself is immediately to terminate all professional contact with this full-time malicious defamer."

Dershowitz said that sending such letters was not inconsistent with his support for the First Amendment, which he noted assured citizens both of free speech and of the right to petition the government over grievances. He was exercising the latter right, he said, when he sent copies of his letters to California officials. As to the part of the First Amendment that provides for free speech, Dershowitz said, "Any person has a right to make an honest mistake, but no one has the right to defame another maliciously and knowingly."

Even before the latest delay, *Beyond Chutzpah* had been through several rounds of legal vetting. The University of California retained several outside lawyers, including American and British legal experts, to examine the manuscript along with its in-house counsel. Finkelstein said that the book had been through some fifteen drafts in the past eight months.

The final changes to *Beyond Chutzpah* center on specific phrases concerning plagiarism and its definition. "There was a question about how to raise the issue of plagiarism without incurring very costly litigation," Finkelstein said. "What they asked me to do, and what I agreed to do, was provide the Harvard definition of plagiarism and reiterate my own findings in the appendix and let readers judge for themselves."

In the body of the book, the word "plagiarizes" has been replaced with such phrases as "lifts from" or "appropriates from without attribution," according to Finkelstein. An appendix now refers readers to the definition of plagiarism laid out in Harvard University's *Writing With Sources: A Guide for Students*. "We juxtapose the definition with the evidence and leave it to the reader to decide," Finkelstein said.

The online edition of Harvard University's student handbook notes that "students should always take great care to distinguish their own ideas and knowledge from information derived from sources."

"The term 'sources,'" the handbook says, "includes not only primary published and secondary material, but also information and opinions gained directly from other people."

In a telephone interview, Finkelstein read a reporter a paragraph inserted in the appendix during the final round of talks. The new wording asserts that Dershowitz "directly appropriates" a key idea from Peters without attribution and that he "repeatedly copied information" from her book, and invites the reader to judge based on the evidence submitted in *Beyond Chutzpah.* Reported in: *Chronicle of Higher Education* online, July 11; insidehighered.com, June 27 □

(is it legal . . . from page 238)

Changing Planet" originally read, "Many scientific observations indicate that the Earth is undergoing a period of relatively rapid change." In a neat, compact hand, Cooney modified the sentence to read, "Many scientific observations point to the conclusion that the Earth may be undergoing a period of relatively rapid change."

A document showing a similar pattern of changes is the 2003 "Strategic Plan for the United States Climate Change Science Program," a thick report describing the reorganization of government climate research that was requested by Bush in his first speech on the issue, in June 2001. The doc-

ument was reviewed by an expert panel assembled in 2003 by the National Academy of Sciences. The scientists largely endorsed the administration's research plan, but they warned that the administration's procedures for vetting reports on climate could result in excessive political interference with science. Reported in: *New York Times*, June 8.

Washington, D.C.

An unusual investigation into the work of three climate scientists by a powerful congressman has drawn public rebukes from another prominent House Republican and from scientific associations in the United States and abroad.

The critics characterize the investigation by Rep. Joe Barton, a Texas Republican, as a form of intimidation aimed at scientists whose work he disagrees with. The scientists have published studies suggesting that the earth is warmer now than at any time in the past 1,000 years.

Barton, chairman of the House Energy and Commerce committee, is a longstanding opponent of international efforts to curb emissions of greenhouse gases, the pollution that scientists say is likely to have caused much of the recent warming.

In mid-July, Sherwood L. Boehlert, a New York Republican and chairman of the House Science Committee, sent a letter to Barton expressing "strenuous objections to what I see as the misguided and illegitimate investigation you have launched." The investigation, wrote Boehlert, "breaks with precedent and raises the specter of politicians opening investigations against any scientist who reaches a conclusion that makes the political elite uncomfortable."

The investigation began on June 23, when Barton sent letters to Michael E. Mann, an assistant professor of environmental science at the University of Virginia; Raymond S. Bradley, a professor of geosciences at the University of Massachusetts at Amherst; and Malcolm K. Hughes, a professor in the University of Arizona's Laboratory of Tree-Ring Research. The letters demanded detailed data about all the studies on which the scientists were authors or co-authors and asked them to answer specific questions about their studies on temperature change over the past millennium.

It also demanded that the scientists turn over the computer programs they used in their analyses, in spite of statements by the National Science Foundation that such programs are the intellectual property of the investigators. The three scientists received support from the foundation for the climate studies at the focus of the investigation.

Barton singled out Mann and his two colleagues, he said, because questions about their work had been raised in *The Wall Street Journal* earlier this year. He also said their work formed the basis for a key conclusion in a report from the Intergovernmental Panel on Climate Change, or IPCC, a group convened by the United Nations to assess scientific information on global warming.

Mann sent a response to Barton, saying that all of the data for their studies are on publicly available Web sites, as are descriptions of their methods. Although Mann reaffirmed his right to not release his computer program, he wrote that he has put the code on a public Web site.

In response to the criticism of his studies, Mann wrote that several other authors have used independent data and methods and reached similar conclusions: that the earth is warmer now than at any time in the past 1,000 years.

In Bradley's response to the investigation, he disputed the idea that the IPCC based the central conclusion of its 881-page report—that human beings have probably caused much of the recent warming—primarily on the work he did with Mann and Hughes. "It would be absurd to think that the weight of its conclusions rests on any one figure or table," he wrote.

Hughes made similar points in his letter to Barton. The Arizona professor charged that Barton had been mistaken when he asserted that the three scientists had not made available enough information about their studies to permit other researchers to replicate the analyses.

None of the three researchers, however, responded to the detailed requests that Barton had made about the location and content of data files for all of their previous studies. Hughes noted that he had 120 published reports since 1965 and Bradley wrote that his publication list includes 140 papers and eleven books going back more than thirty years.

For the moment, though, the debate over the scientific details of the three scientists' work has been overshadowed by questions about the merits of Barton's highly unusual investigation and the public fight between Barton and Boehlert.

"My primary concern about your investigation is that its purpose seems to be to intimidate scientists rather than to learn from them, and to substitute Congressional political review for scientific peer review," wrote Boehlert. "That would be pernicious."

He questioned the jurisdiction of Barton's committee, which has never held a hearing on global climate change during his tenure as chairman. "One has to conclude there is no legitimate reason for your investigation," wrote Boehlert, who has advocated cutting emissions of greenhouse gases to combat global warming.

Larry Neal, a spokesman for Barton's committee, responded to Boehlert's letter by saying that "requests for information are a common exercise of the Energy and Commerce Committee's responsibility to gather knowledge on matters within its jurisdiction."

In his letter, Boehlert said that the appropriate way for Congress to try to understand scientific disputes would be to hold hearings and request a review from the National Academy of Sciences or other experts. "The precedent your investigation sets is truly chilling," wrote Boehlert. "Are scientists now supposed to look over their shoulders to determine if their conclusions might prompt a Congressional inquiry no matter how legitimate their work?"

It is rare for two key committee chairmen from the same party to hold such a sharply worded debate in public. David Goldston, chief of staff to the Science Committee, said, "It's unusual for a chairman to write this kind of a letter , but we feel the situation is unusual."

Even as such fireworks were bursting in Congress, top scientists weighed in on the debate by challenging Barton and his inquiry. Ralph J. Cicerone, the newly appointed president of the National Academy of Sciences and an atmospheric scientist, wrote a letter to Barton, which stated, "A Congressional investigation, based on the authority of the House Commerce Committee, is probably not the best way to resolve a scientific issue, and a focus on individual scientists can be intimidating." He added that the National Academy would be willing to create an independent expert panel to answer the kind of questions raised by Barton.

Cicerone, who previously was chancellor of the University of California at Irvine, was expected to discuss the investigation further when he testifies at two Senate hearings on the topic of climate change.

Also, a group of twenty eminent earth scientists wrote to Barton that they were "deeply concerned about your approach." A draft of the letter said that Barton' s request for "all working materials related to hundreds of publications stretching back decades can be seen as intimidation—intentional or not—and thereby risks compromising the independence of scientific opinion that is vital to the preeminence of American science." The authors of the letter include Mario Molina, a professor of chemistry and biochemistry at the University of California in San Diego who shared a Nobel Prize in 1995, and John P. Holdren, a professor of environmental policy at Harvard who is president-elect of the American Association for the Advancement of Science.

Alan I. Leshner, chief executive officer of that association, sent a separate letter to the Texas congressman last week expressing deep concern about the letters to the three scientists, which "give the impression of a search for some basis on which to discredit these particular scientists and findings, rather than a search for understanding."

Leshner's letter also states that "we are concerned that establishing a practice of aggressive Congressional inquiry into the complete professional histories of scientists whose findings may bear on policy in ways that some find unpalatable could have a chilling ef fect on the willingness of scientists to conduct work on policy-relevant scientific questions."

The European Geosciences Union issued a position statement in early July , saying that "we do not consider personal inquisition of individual scientists as an appropriate way of probing the validity of the general scientific statements in the IPCC" report from 2001. Reported in: *Chronicle of Higher Education* online, July 18. □

(from the bench . . . from page 228)

contends that several government agencies leaked information to reporters about his employment history , finances, travels, and polygraph test results.

Dr. Lee is suing the government for violating the Privacy Act, which allows individuals to sue government agencies for money for making improper disclosures of personal information. He has not sued the reporters.

Dr. Lee's lawyers conducted depositions of twenty government officials, but none of them admitted to having provided personal information to the reporters. He also deposed five reporters: Jef f Gerth and James Risen of *The New York Times*, H. Josef Hebert of the Associated Press, Robert Drogin of the *Los Angeles Times,* and Pierre Thomas, then of CNN and now of ABC.

In those depositions, four of the reporters declined to answer questions about their sources. Gerth said he had no information relevant to the inquiry.

In August, Judge Thomas Penfield Jackson of the United States District Court in Washington, D.C., held all five reporters in contempt. Judge Jackson ruled that Dr . Lee had overcome the protections available to reporters in civil cases in the District of Columbia by showing that the information he sought was crucial to his lawsuit and by demonstrating that he had exhausted reasonable alternative sources of information.

The three-judge panel, in a unanimous decision written by Judge David B. Sentelle, expressed some skepticism about whether the reporters were entitled to even that level of protection, citing a 1972 Supreme Court decision, *Branzburg* v. *Hayes*, holding that the First Amendment provides no protection to reporters at least in the context of grand jury subpoenas.

But Judge Sentelle wrote that a 1981 decision of the appeals court had fashioned a dif ferent standard for civil suits.

The appeals court panel upheld the contempt sanctions for four of the reporters. It reversed the contempt order against Gerth, saying that at his deposition he never refused to answer questions directly covered by a court order and "consistently professed ignorance of the identity of sources who provided information" about Dr . Lee for articles Gerth wrote with Risen. Reported in: *New York Times*, June 28. □

READ

BANNED

BOOKS

(intellectual freedom . . . from page 207)

of 1798 to the War on Terrorism. Perilous Times *received the 2004 Los Angles Times Book Prize for the Best Book of the Year in history and the Robert F. Kennedy Memorial Book Prize for 2005.*

I am a great admirer of the American Library Association and its steadfast defense of freedom of thought and freedom of inquiry. These are fundamental values of democracy and ALA plays a critical role in offering its voice in support of those freedoms. I'm also honored as always to share the podium with my friend, Floyd Abrams, who is truly one of my great heroes in the law. No one has done more to defend the First Amendment over the past quarter-century than Floyd, and he is truly a great lawyer and a great person.

What I have been asked to talk about this afternoon is the impact of war on intellectual freedom and that is in a sense a theme of the book, *Perilous Times*, that you already heard about. Not surprisingly in wartime, it is natural for a society to feel a sense of anxiety, fear, panic and, as a consequence, to be tempted to restrict civil liberties when those liberties seem to be in conflict with issues of national security or military necessity. To some degree, a contraction of civil liberties in time of war may, in fact, be appropriate.

But throughout American history, we have repeatedly seen a pattern in which the government, faced with the anxieties and pressures of wartime, has excessively restricted civil liberties, often in ways that undermine fundamental American freedoms, without adequate justification. This comes about for a variety of reasons. In part, it is because wartime often presents this atmosphere of hysteria. In part, it is because individuals demand that the government protect them, and government officials act quickly to demonstrate their eagerness to meet that demand. And part is because government officials or political leaders take advantage of the pressures that arise in wartime to restrict civil liberties in ways that serve partisan political purposes rather than legitimate national security concerns, and in part because we often in these circumstances don't have our bearings. When we are in a state of high anxiety and fear, it is difficult to make the fine calibrations of what restrictions of civil liberties are appropriate and what restrictions are excessive.

What I want to do this afternoon is first to very briefly mention the six episodes that I discuss in *Perilous Times* to give you an overview of the circumstances in which these patterns have emerged, and the different ways in which they have emerged, then to circle back and focus at a bit more length on two of them which seem to be of particular interest. Finally, I want to talk a bit about the war on terrorism and, particularly, about the PATRIOT Act.

The six episodes that I used to illustrate this pattern in *Perilous Times* begin first with the Sedition Act and Alien Act of 1798, which were enacted at a time when the United States was on the verge or thought it was on the verge of a war with France. That legislation authorized the president, John Adams, to detain and to deport any non-citizen whom he found to be a possible risk to the national security. This was an unreviewable power to be exercised in the soul discretion of the president and the individual had no opportunity to present evidence, to challenge the evidence against him or to cross-examine witnesses. Under the Sedition Act of 1798, Congress made it a crime effectively for any person to criticize the president, the Congress, or the government of the United States, and since the period of the Sedition Act is one I will come back to, I won't say anything more about that just yet.

The second period was the Civil War, perhaps the most difficult military situation ever to face the United States. During the course of the Civil War, Abraham Lincoln suspended the writ of habeas corpus on eight separate occasions. Now the writ of habeas corpus is critical to the protection of Anglo-American liberties. If you are arrested by a government official and taken into custody, whether to a police station or to a military detention facility, you or your representative has the right to go to a federal court and seek a writ of habeas corpus. What that means effectively is the court will demand that the government justify the basis on which it has seized and detained you, and if it cannot offer a satisfactory justification under the law, the court will issue the writ and order your release.

So you can see the importance of the availability of the writ of habeas corpus. Without it, government officials could seize and detain you and if you went to a court to seek a review of the legality of your detention without the writ of habeas corpus available, the court would say, "Sorry, there's nothing I can do. I have no jurisdiction to hear this matter." Now the Constitution authorizes the suspension of habeas corpus at times of rebellion or invasion, and the ordinary courts are for those reasons not available. During the war, Lincoln suspended the writ, as I said, on eight separate occasions. The most expansive of those suspensions covered the entire United States and authorized military commanders to seize civilians if they were thought to have engaged in any disloyal act or practice.

During the course of the Civil War, some 38,000 civilians were seized under the suspension of writ of habeas corpus. Many of these involved issues unrelated to intellectual freedom, but many of them also involved individuals who had criticized the administration or the war or the emancipation proclamation, and for those criticisms, they were in many instances detained by military authorities. In addition, during the Civil War, some 300 newspapers at one time or another were closed down by federal authorities because of their criticism of the Lincoln administration.

In World War I, the United States enacted legislation under which some 2,000 dissenters were prosecuted for their criticism of the war, the draft, the government, the

flag, the constitution, or the uniform of the military of the United States. This is the second period that I will discuss at greater length, so I will come back to that later, as well.

In World War II, the greatest restriction on civil liberties really did not involve intellectual freedom, at least not in the narrow sense of the term. It rather involved the interment of 120,000 individuals of Japanese descent, two-thirds of whom were American citizens. In this instance, these individuals were ordered, men, women and children, to leave their homes, to leave their possessions, and were confined in concentration camps in isolated areas for the better part of three years.

Immediately after World War II, the United States fell into the Cold War, during which we entered a period of brutal repression of individuals based upon their past or current political beliefs, activities, or affiliations in an era that we now think of as McCarthyism because of fear of Soviet espionage, sabotage, or subversion of American values. The United States government, and state and local governments, used a variety of techniques, including criminal prosecutions, black lists, and legislative investigations to harass, humiliate and often destroy the lives of individuals who had at some time or another been deemed to have affiliated with the wrong people or with the wrong organization.

Finally, in the Vietnam War, during both the Nixon and Johnson administrations, the FBI created an aggressive program of counter-intelligence, COINTELPRO, Counter Intelligence Programs, during which FBI agents and confidential informants infiltrated a wide range of anti-war organizations, gathered information about those organizations and then used that information to harass, expose, and neutralize their effectiveness as dissenters. When all of this came to light in 1976, Attorney General Edward Levi enacted regulations for the Department of Justice prohibiting the FBI to examine any political or religious organization or to infiltrate any political or religious organization or to keep records on any political or religious organization in the absence of clear and articulable proof that the organization was engaged in criminal conduct.

Now after each of these six episodes, indeed relatively quickly after each of these six episodes, the United States and its citizens came to realize that they had acted excessively and unjustly. After each of these episodes, the American people said, "What have we done? How could we have interned 120,000 people merely because they were of Japanese descent? How could we have prosecuted 2,000 individuals for doing nothing more than criticizing the war in World War I? How could we have suspended the writ of habeas corpus in the Civil War when regular courts were open in states like Indiana and Ohio and move to military tribunals in their stead?" And in each instance, the American people and its government said, "We will learn from this experience and we will not repeat this mistake again." And yet, with each succeeding episode the same natural tendencies generated by fear and anxiety and suspicion take hold, and the lessons of the past are largely if not completely lost.

Now let me go back to the two periods where I think it's useful to give a little more substance to provide some of the dynamic by which these actions took place. In the last decade of the eighteenth century, right after the Constitution was enacted, the United States was in a very turbulent period. The Constitution that had been created was an experiment, and there was no confidence on the part of American leaders that this experiment would succeed. Indeed, there was great anxiety that within a very short period of time, the new nation would fall apart through Civil War or secession.

By the mid-1790s, political parties had come into existence. This was something that the framers had not anticipated, and they were very worried about the risk of individuals organizing themselves into interest groups instead of thinking of themselves simply as citizens of the whole. By the mid 1790s, the Federalist Party and the Republican Party had come into existence. The Federalist Party was led by John Adams and Alexander Hamilton, and we might think of it as somewhat akin today to the Republican Party. It was particularly interested in stability and security. It was unnerved by what had happened in France with the reign of terror, suspicious about the value of true democracy, worried about mob rule and very distrustful of the ability of individual citizens who were not part of the elite to handle the responsibility of democracy. The Republicans, led by Thomas Jefferson and James Madison, were much more focused on individual liberty, more interested in a decentralized structure, interested more in agricultural development than economic or mercantile development, and much more sympathetic to the French revolution and more suspicious of the English.

These two groups eyed each other suspiciously, believing that the other, if enabled to gain power, in the long run would move the nation in directions that would be destructive of the interest of the opposing side. Indeed, in the election of 1796, John Adams defeated Thomas Jefferson by only three electoral votes, and that gave great anxiety to the Federalists, who although they controlled the House, the Senate, the White House, and the judiciary, felt that their hold on that power was somewhat tenuous.

At the same time all of this was going on, a war was raging in Europe between the English and the French. As I said a moment ago, the English were seen as the party of identification by the Federalists, who saw them as a strong voice for mercantile security and stability, and the French were seen very much as the ally of the Republicans, Republicans believing that if the French could defeat the English then that would assure the future development of Republicanism in Europe.

In 1798, John Adams went to Congress and essentially declared that the United States was in a virtual state of war with France. This came about partly because as the

United States declared neutrality, the French were upset at the terms of that neutrality, and they began seizing American ships. That led Adams to go to Congress and seek war measures. Those war measures included an expanded army, an expanded navy, additional forts to be built, abrogation of treaties with France and the Alien and Sedition Acts of 1798.

I want to focus in particular on the Sedition Act because of its relationship to intellectual freedom. As I said earlier, the Sedition Act of 1798 made it a crime for any person to criticize the president, the government, or the Congress of the United States. The Republicans argued that such legislation was patently unconstitutional. What could more obviously violate the First Amendment which provided that Congress shall make no law or abridge the freedom of speech, than a law enacted by Congress less than a decade after the First Amendment was put into place, providing essentially that no person would criticize the president, the Congress, or the government?

The Federalists argued, among other things, that this was simply wrong, that at the very least in wartime it was essential that the nation be unified, that if we were to fight a war—and the Federalists believed we were on the verge of a war with France—if we were to fight a war successfully it was imperative that individual citizens have a good and positive view of their leaders, that they trust those leaders and that they be united in their defense of the homeland. And so the Sedition Act, they said, was necessary to insure that individuals did not lose confidence in their national leaders.

Not surprisingly, the Sedition Act was used by federalist prosecutors, federalist judges, and federalist jurors only against Republicans. Every major editor of a Republican newspaper in the Untied States was prosecuted under the Sedition Act of 1798 and even some elected officials, such as Congressman Mathew Lyon from Vermont, were prosecuted for their criticisms of the administration. The real purpose of the Sedition Act was not so much about national security, but about attempting to silence Republicans with an eye towards the 1800 presidential election to insure that John Adams would be reelected over Thomas Jefferson.

To the great credit of the American people it backfired. Jefferson was elected despite the Sedition Act, and after being elected, Jefferson released from prison all of those who had been convicted. Fifty years later, Congress enacted legislation declaring that the Sedition Act was a violation of the United States Constitution and repaying all of the fines that had been paid. The Supreme Court of the United States has never missed an opportunity in the years since to declare that the Sedition Act of 1798 was a violation of the First Amendment in the court of history.

But one thing we can learn clearly from the episode of the Sedition Act is that, faced with a period of great anxiety, it is well within the ability of government officials to seize the opportunity presented by such a situation and to put in place laws that are drafted in the guise of protecting the nation but where the real purpose is to perpetuate or to attain political power.

The second of these episodes I want to focus on isWorld War I. It is important to understand what happened inWorld War I, to recall that initially the United States had no interest in being involved in this war. The war raged in Europe for several years and the vast majority of American citizens took the view that this war, whatever it was about, and that was pretty obscure, did not in any way implicate fundamental interests of the United States. Indeed, Woodrow Wilson, as you will recall, was reelected president in 1916 on the platform that he had kept us out of war, which was in fact a very popular platform.

Nonetheless, a year later, Wilson did seek a declaration of war. Why did he do so? Well, fundamentally, Wilson's argument was that Germany had violated the freedom of the seas and thus violated international law and the rights of the American people, and in fact, Wilson was correct. Under the principle of freedom of the seas, neutrals are entitled to trade with the belligerents and belligerents are not supposed to sink the ships of neutrals. The Germans, however, found themselves in a rather awkward position. Because Germany had almost no access to the sea, all England and France had to do to prevent American shipping from reaching Germany was to mine several rivers or harbors which were the only ways in which American ships could reach Germany, and indeed they did that, and American shippers were not so foolish as to sail into those mined locations.

Germany, however, could not retaliate to the use of mines because England and France have such enormous coastlines; their only way of evening the score was to use submarine warfare. So they essentially told the neutrals that if you attempt to ship armaments, war supplies, or other supplies that would be useful in the war to England or France, then we will have no recourse but to sink your shipping, and indeed, the Germans did just that. The sinking of the Lusitania, by the way, which people think of as the cause of World War I, actually happened two years before the United States declared war on Germany. There were many other instances after the Lusitania. So Wilson finally said, "We need to fight this war to preserve the freedom of the seas and to protect our rights under international law."

Many Americans were very skeptical about this. Many of them thought that this was not a war to make the world safe for democracy, as Wilson now described it, but rather a war to make the world safe for armament manufacturers and ammunition shippers. Why shouldn't we just stand aside? We don't need to get involved in this war, given what is going on in the battlefields of Europe, the extraordinary casualty list. Why can't we forgo trading with England and France and simply step aside? Many elements of the American people were unenthusiastic about entering the war and others were extremely opposed to our entry into the war.

Now this posed a problem for Wilson because he knew that you could not fight a war with significant segments

of the public in opposition. He needed to build that public opinion and to do so, he did two things: he created the Committee on Public Information, which was a government-run propaganda agency , literally run out of the executive branch, headed by a man named Geor ge Creel, who was a professional publicist, and a very good one. The Committee on Public Information produced a flood of pamphlets, leaflets, lectures, editorials, movies, all of which were designed to generate a hatred of all things German and of anyone who might be suspected of disloyalty to the American cause.

At the same time, the Department of Justice created programs that encouraged the development of private organizations, such as the American Protective League, that would essentially spy on American citizens to report to the Department of Justice about any one who might be thought to be disloyal or to raise questions about the war . The goal of this part of the Wilson program was to propagandize the American people about the reasons for the war , the need for the war, the fear of the Germans, the fear of German invasion and to intimidate those who might have qualms about the war.

The second part of the program was because if you simply had this "positive side" encouraging people to believe in the war but you didn' t also silence those people who were criticizing the war, they would just offset the Committee on Public Information and you wouldn't achieve your goal. So the Wilson administration put forth legislation in Congress, the Espionage Act of 1917 and the Sedition Act of 1918, which effectively made it a crime for any person to criticize the war, the draft, the president, the government, the Constitution, the flag, or the uniform of the military of the Untied States. And as I said earlier, some 2,000 individuals were prosecuted under this legislation.

Examples of the kinds of people who were prosecuted ran from the obscure to the relatively powerful. On the obscure end, there was a young woman, twenty years old, named Molly Stimer, a Russian Jewish immigrant who had come to the United States four years earlier , worked in a sweat shop, was four -foot, nine-inches tall and weighed ninety pounds, was a real firebrand and threw leaflets from a rooftop on the lower east side of New York in Yiddish protesting actions of the United States government and the war. She was arrested, prosecuted, convicted, and sentenced to fifteen years in prison. She was later deported to the Soviet Union for throwing those leaflets.

On the other end of the spectrum, there was someone like Eugene Debs, the national leader of the Socialist Party of the United States. Debs had run for president in 1912 on the Socialist ticket. He had received more than million votes, which is about 6 percent of the entire electorate and, in 1917, he gave a speech in Ohio in which, by innuendo, he criticized the war and in particular the draft, as a result of which he was prosecuted and convicted and sentenced to ten years in prison.

But between Molly Stimer and Eugene Debs were 2,000 other individuals who did things like make a movie that was about the American revolution and accurately depicted, in addition to all of the wonderful and patriotic scenes, a scene in which British soldiers bayoneted American women and children. True, actually happened. But he was prosecuted and convicted under the Act and sentenced to ten years in prison because this was not a time for the American people to think bad thoughts about our allies.

Another individual gave a speech to the Women's Dining Club of Kansas City in which she said, "I'm for the people, the government is for the profiteers," for which she was sentenced to ten years in prison for violating the Espionage Act. The amazing thing about World War I is that when the cases reached the Supreme Court, cases involving people exactly like Molly Stimer and Eugene Debs, the Supreme Court upheld all of those convictions, saying that in time of war the government may do things it may not do in time of peace and, therefore, these convictions of ten or fifteen years in prison should be upheld.

In the years since then, all of those decisions have been overruled and the episode of World War I has been regarded as one of the great tragedies of American history. Yet, it again it illustrates the capacity to go completely overboard in these circumstances.

Let me close with some thoughts about the current situation and, in particular, the PATRIOT Act. The first thing I want to say is that those people who believe we are living in the most repressive period of American history know nothing about American history. In fact, relative to the Sedition Act of 1798 or the Espionage and Sedition Acts of World War I or the detentions of 120,000 people of Japanese descent during World War II, or the era of McCarthyism, what we see today is relatively mild. This is not to say it should not be a source of concern, but it is also useful to put it into perspective.

One way to look at the progress we have made is that no one would have imagined in 2004 that it would have been appropriate or even thinkable to prosecute Howard Dean for his criticism of the Iraq War, yet that was precisely analogous to what Eugene Debs was prosecuted for during World War I. Indeed, Dean' s speeches were much more aggressive in their opposition to the war than anything that Debs had said. In that eighty-five-year period, we changed legally and culturally in our understanding of these issues in profound and important ways.

On the other hand, that progress is fragile and there is no guarantee that if we had had three 9/1 1s instead of one that we would not be living today under a very different state of government regulation than we in fact are.

Now I want to talk about Section 215 of the P ATRIOT Act. The first thing I want to say about the P ATRIOT Act is that it isn't on the whole as bad as most people think it is. John Ashcroft blew it way out of proportion when it was drafted, saying it was like a finger in the eye. His threats

that anyone who opposed the act would be seen as providing aid and comfort to the terrorists created a sense of both anger and suspicion on the part of civil liberties or ganizations and Americans about what must be in this act if it is in fact so terrible that anyone who opposes it is actually helping the enemy.

In fact, if one goes through the act provision-by-provision, there is a lot in it that I don' t like and a lot that I think probably is unwise but very little that in fact comes anything close to many of the abuses that we have enacted in past eras. One provision that has gotten special attention, of course has been Section 215.

It is important to understand the context in which the PATRIOT Act was enacted. It was enacted only six weeks after 9/11 when the nation was still in a state of great fear and uncertainty, in which the American people very much wanted the government to do something decisive to protect it, in which the Attorney General, as I said a moment ago, made clear that anyone who raised questions about the act would be deemed disloyal. There were no hearings, no debates, no deliberation. It was essentially pushed through the Congress without any opportunity for reflection.

Now, given that atmosphere, given that process, it would be quite astonishing, particularly given what I have said about our history and the patterns of that history, if the PATRIOT Act did not in fact include some provisions that err too much on the side of national security and did not give due regard to the interest of civil liberties. Indeed, with that concern in mind, the act included a sunset provision, which said that after four years, on December 31, 2005, the most controversial or most of the most controversial provisions of the legislation would automatically expire unless they were affirmatively reenacted by Congress.

This is a useful device to allow a period in which the government can reexamine legislation, enacted in an emergency setting, in a period of presumably greater calm and decide whether the legislation needs to continue to be on the books. One would expect that, given the circumstances, there would be provisions that need reconsideration.

So let's talk about Section 215. Section 215 authorizes federal officials to demand access to records of businesses, organizations, and institutions without any showing of probable cause to believe that a crime has been committed or that there is any information in those records that is in fact relevant to a crime that has been committed or is being planned. Essentially it gives the federal of ficials pretty close to carte blanche to demand such information.

Now at first blush you might say , "This must violate the Fourth Amendment to the Constitution which prohibits unreasonable searches and seizures and ordinarily requires a showing of probable cause in order to make a search or seizure reasonable." But it turns out it is not so simple. Suppose that you are walking down the street and a police officer follows you in order to observe your conduct. Now you might say that is a search, but the Supreme Court has said that the Fourth Amendment does not apply unless the government is intruding upon your reasonable expectations of privacy. The court says, in that situation, because you are exposing to the public your movements and your conduct, there is no reasonable expectation of privacy and, therefore, there is no search within the meaning of the Fourth Amendment and there need be no showing of probable cause, not even any showing of reasonableness.

Well, that seems plausible. Now suppose the government wants to obtain your bank records. This may seem much more personal and much more private, and if the government demands a bank to turn over to government of ficials your bank records you might say that is an invasion of my privacy. Here the court has gone astray; it has said that since you disclosed your financial records to strangers, the employees of the bank, then you have no reasonable expectation of privacy of that information and there is no search. If you expose yourself to the public by walking down the street, there is no reasonable expectation of privacy . If you expose information to a stranger , there is no reasonable expectation of privacy and, therefore, obtaining those records do not implicate the Fourth Amendment. That may be troubling but that is settled Fourth Amendment law.

Now I know the one thing you are concerned about is the demand for library records. In the library context, there is an additional concern, even beyond the concern about bank records, and that concern has to do with the potential chilling effect on the behavior of individuals who use libraries if they know that the government may obtain their records in order to investigate them and to create records on them, create files on them.

Here it is important to go back to what I said earlier about World War I. I said 2,000 individuals were prosecuted and you may say to yourself, "W ell in a nation of 135 million, or whatever the population of the United States was at that time, so 2,000 people were prosecuted. If it was really a lot of opposition to the war, then millions of other people were still presumably free to protest the war , so what if 2,000 people were being prosecuted?" Here it is important to understand a critical facet of the very nature of free speech. Each of us knows that whether we choose to give a speech, to march in a demonstration, to sign a petition, or to take a book out of a library, it will have virtually zero impact on national policy. But if we know that the prospect of winding up being one of the people who is prosecuted with the potential of being sentenced to ten years in prison is the price we may pay for signing that petition or participating in that demonstration, then each one of us is likely to say , "You know, I think I will skip it. I think I will stay home today. I'm not going to make any difference anyway. There are those FBI agents out there taking pictures and I don' t really want to be the one who is prosecuted."

But even if it is not a criminal prosecution, even if it is just the fear that the FBI may see you in one of these demonstrations or see a book that you take out of the library on the

history of terrorism and put you in a FBI file, and somewhere down the road you decide to apply for a job and that FBI file, unbeknownst to you, pops up and the employer says, "I don't think so. I don't know exactly what to make of this guy, he was reading those books or participating in those demonstrations, I don't know if I want him in this position." The knowledge of those possibilities has a significant impact on the willingness of individuals to exercise their rights under the First Amendment and that is the fundamental concern about the library and about the library records.

The response of the Bush administration to this is fascinating. The Bush administration says, "We have never used in the four years the PATRIOT Act has been on the books this provision in any way with libraries." That is probably true by the way, because if they used it, a librarian has to know it happened by definition. Even if the librarian is not allowed to tell anybody under the act, I would hope members of the ALA would find a way to tell somebody. Then they need a warrant—not a probable cause warrant—but they need a warrant to do it and if the government was saying, "We have never done this in four years" and there were judges who know that is not true, you can expect that would be called into question. So it is probably true that they haven't used that PATRIOT Act provision against libraries in these four years.

So the Bush administration's argument is, "So what do you care?" This doesn't really matter. We will only use it in the case that it is justified." The answer to that should be that the legislation to begin with was emergency legislation. The argument was that in the face of a national crisis, the government needed certain powers for which there was a compelling necessity in order to defend the nation. If you hadn't needed to use the power in four years it hardly seems it is a compelling necessity to use it.

You can be sure that one of these days it is, in fact, going to be used and to me, the most annoying thing about the discussion over Section 215, despite the fact that, as you know, the House has voted to prohibit any federal funds to be used to enforce Section 215 against libraries, is that the Bush administration said they would veto that legislation. This is an administration where even in light of the history of our own nation, of the natural tendency to overact, to demand too much power in the face of a crisis, even though as time passes we have a long record of recognizing our mistakes and pulling back, this administration seems utterly unable and unwilling ever to recognize a mistake. Although they admit they have never used the provision and although it is impossible to make a plausible argument for why they need the provision and why it is obvious that even though they don't use the provision, it can have a real chilling effect on people and it does raise serious First Amendment questions, the Bush administration remains adamant that it will veto any legislation that amends or changes Section 215 even as applied to libraries. This is for me a very troubling part of the present.

Let me then finish simply by saying that I very much respect what ALA does, what you are doing with regard to this particular issue. If we had organizations throughout our history who were as steadfast in defending our liberties in World War I, World War II, Vietnam, the Civil War, as the ALA has with respect to Section 215, then the story that I tell would have been I think a much less unpleasant one. So thank you for all that you do and I'm delighted to be here.

remarks by Floyd Abrams

Floyd Abrams has been an ardent legal defender of First Amendment rights for more than thirty years. He was awarded the 2004 Anvil of Freedom Award from the Edward W. Estlow Center for Journalism and New Media, School of Communication, The University of Denver, for his unwavering commitment to defending the First Amendment. He has argued frequently at the Supreme Court in a large number of its most significant First Amendment cases. He was co-counsel to The New York Times *in the Pentagon Papers case and counsel to the Brooklyn Museum of Art in its legal battles with Rudolph Giuliani. He has represented* The Times, *ABC, NBC, CBS,* Time *magazine,* Business Week, The Nation, Reader's Digest, *and other clients in trials and appeals. He represented CNN in 1998 in investigating a report on its broadcast accusing the United States of using nerve gas on a military mission in Laos in 1970 and in 1999, in seeking to persuade the Unites States Senate to permit the public to view its deliberations as it determined whether or not to convict President Clinton of alleged high crimes and misdemeanors. He represented Nina Totenberg and National Public Radio in the 1992 "leak" investigation conducted by the United States Senate arising out of the confirmation hearing of Justice Clarence Thomas. In 2003 and 2004, he represented Senator Mitch McConnell and the National Association of Broadcasters in a First Amendment-rooted challenge to the constitutionality of the McCain-Feingold Campaign Finance Reform Law. He currently represents* The New York Times' *reporter Judith Miller in her efforts to avoid revealing her confidential sources. Floyd Abrams is a partner in the New York law firm of Cahill Gordon & Reindel. Additionally, he is the William J. Brennan, Jr., Visiting Professor of First Amendment law at the Columbia Graduate School of Journalism. His latest work is* Speaking Freely: Trials of the First Amendment. *In it he chronicles eight of the most famous American First Amendment cases.*

It is a great pleasure for me to be here too and I also tip my hat to the organization which has brought panic to this administration. I want to say first that I'm overcome with admiration for Geoff, not just because he is a great scholar and his book, *Perilous Times*, is really a landmark and very readable, which I recommend to all of you. I admire that he can get up in front of you and talk for forty minutes without a note!

I am very much in agreement with just about everything that you have just heard and I'm not going to go and pick and choose to try to conjure up some major disagreement with Geoff said. What I would like to do is supplement it with a few thoughts. My own book, *Speaking Freely*, begins with a discussion of the Pentagon Papers case, which is another example in our country's history of the reaction to war by the people and by the courts.

In some ways, you may think of it as a dif ferent sort of example. After all, that was a situation in which *The New York Times* did publish materials which were classified as top secret, relating to how we joined the war in Vietnam. They put them before the public in the face of great public criticism, as well as praise, in the face of legal advice from their counsel that it would violate the Espionage Act and that the publisher would personally be jailed if *The Times* published these classified documents or even summarized these classified documents. As it turned out, and as *The Times* maintained, [these documents] were essentially historical in nature about how we got into the war in Vietnam. [There were no] secrets to speak of. The secrets were diplomatic in nature so the worst that could be said was that some countries would be upset—and for a few days, a few were—at the revelation in some cases that their leaders were helping the United States to try to extricate itself from Vietnam at a time when they were attacking the U.S. publicly and, occasionally, for other reasons as well.

We did win the case. If we had lost it, I really believe we would live in a very dif ferent country, one in which a government could go to court, could obtain a prior restraint—an injunction against publication of news that the government thinks shouldn't be printed, something more suggestive of the Sedition Act of 1798, which itself was not a prior restraint statute, it was a criminal statute, but more suggestive of those terms.

One of the results of that victory was that no government now, of either party, however upset they are with the press, starts down the road of saying, "Let's go to court and stop them from printing that." There are other reasons for that—political reasons, technological reasons. It is much harder to stop things from being said now because of the Internet. *The New York Times* might not have been needed for a Pentagon Papers in 2005. But nonetheless the sort of on-the-ground lesson of the case—even though the court did not establish an absolute principle against prior restraints but simply limited itself to saying that there is a heavy presumption against prior restraints on the press—despite all of that, the lesson that has been learned by every president and every administration since then was that "This isn't a weapon I have. I won't go to court. I won't think of going to court. That is not something I can do, period."When new judges are taught what their weapons are and are not, they are basically taught, "You can't stop the press from printing something." That, basically, has been the way we have lived and we lived before 1971 like that. My point is that we would have lived differently after 1971 if that case had come out the other way.

The striking thing to me, looking back on the case, is that all the justices on the Supreme Court were per - suaded that publication would do harm, including the ones that voted for us. The two most liberal libertarian First Amendment members of the court who we miss so much, Justices Douglas and Black, said the disclosures of the Pentagon Papers "may have a serious impact." Justices White and Stewart said that publication will do substantial damage to pubic interests. Justice Blackmun said, "Further publication could clearly result in great harm to the nation" and went on to say that if our soldiers who were being held as prisoners of war and were not released, the people would know who to blame, meaning *The New York Times* and the other members of court. Chief Justice Bur ger and Justice Harlan certainly shared those basic views.

So what was it that persuaded them? Why, as we look back now, is it so easy for us to say, "Well, you know there really wasn't any danger at all from the *Pentagon Papers* and yet, I would say that of the nine justices, least seven were persuaded that there was not only danger but a great likelihood of harm. It was because the government said so, because they submitted an af fidavit saying that publication would threaten national security . It is not an easy thing, nor something we should expect judges to do, to just throw aside such representations from the executive branch of government. They are the people after all who run the Defense Department, and judges are not.

So how do we reconcile that? We reconcile it by insisting that judges do their job of enforcing the Constitution and of giving life to the principles in the Bill of Rights. That means sometimes judges have to do something which does and should make them uncomfortable, which is to make the government persuade the judge that unless publication is stopped, there will be some enormous calamity , to the nation, and thereby force the government to prove to a judge, with classified information if it must, that ter - rible things will happen. The judge—and this is one of the lessons of the Pentagon Papers case—would have to receive that evidence with a good deal of skepticism for the sort of reasons that Geoff was outlining earlier. But the government still must meet its burdens; otherwise, we have nothing protecting us from the government simply making ultimate decisions about how may speak and who must remain silent and what may be said and who may say it. That is a job, a painful and dif ficult job sometimes—that judges have.

But it is that part of the case which lingers with me. We made a lot of ar guments designed to persuade the court in the Pentagon Papers case that there was no harm really . We cross-examined the government witnesses, and were quite effective indeed at the district court level in persuading the district court judge, who, fortunately for us, had a background in military intelligence and, therefore, was

more self confident about saying in his opinion. There just isn't much here by way of provable case by the government to demonstrate the high likelihood of serious harm to the nation and its people.

I want to close with a comment I can't refrain from saying before this audience. As you may have heard, the U.S. Supreme Court has refused to hear the case of Judith Miller and Matt Cooper, two journalists who have been ordered to jail for refusing to reveal their confidential sources. As things look right now, there is no reason to expect the journalists will be relieved of the obligation imposed on them by law and, therefore, we may well see jailing lies ahead. I couldn't help but wonder about the degree to which national security rings so real as a potential threat to us could have had an effect on everyone who has come upon this case from a judicial perspective. The material that was published was the name of a CIA agent; it was published by Robert Novak and was made available to Mr. Novak and to other journalists by someone or some people in the administration. There was very good reason, I think, for people to be upset. The CIA was, for good reason, and a lot of the rest of us, too, when Mr Novak chose to publish that material. The degree to which we are effected in this case, by the times in which we live, and the potential for harm that we may view as surrounding us, is something that is very very hard to judge. It should suffice to say that on the ground level, it will obviously have the potential for serious effect of a bad sort on the press. Whether in a different time, on a different subject, the courts would have viewed it differently is not within my capacity to know or to say. But, certainly, having represented both journalists for awhile and representing Judy Miller now, it is a day of grief.

That said, let me wind up with a thought that was provoked by the way Geoff wound up. It really is the case that only this organization's insistence on making Section 215 a central issue, focusing on the potential harm to libraries and the freedom of inquiry, and the ability and willingness of people to borrow books, and librarians to participate in that process, it is only because of that that we have a national debate going on at all about Section 215.

That is a fact, and I'm sure it was an utter surprise to the administration, which only recently has been saying, "We never used it so don't worry." They used to say, "We need it so badly because it is so important, because the threat is so grave and so immediate that if you [cannot] strip us of this power, [they forget] of course, that they can go to a grand jury and get a subpoena to go anywhere—my law office; a newspaper, a library—anywhere—subject to certain First Amendment constraints. It was over two years after this really surfaced before the administration was finally pushed to come before a congressional committee which had asked them the question many times before—how often have you used it? I think they couldn't decide whether they should be proud or unhappy that the answer was, "Well, really never."

Finally, the fact that they answered "never" doesn't mean that FBI agents don't come into libraries sometimes, and it doesn't mean they are always wrong in doing so. In New York City, we had a situation a year after 9/11 in which there was credible evidence of people staking out the Brooklyn Bridge to see what they would have to do to blow it up. It does not seem wrong to me in such circumstances for the FBI to be involved to try to find out who is taking out books about the moorings, or whatever they call them, of the Brooklyn Bridge.

But that said, at the same time it must be said that the administration was so reluctant even to allow the possibility of error to be suggested and so reluctant to seem to give in on anything that we have had this debate going on where the administration wouldn't answer the question of how many times they have used it and then, when they answered it sort of shamefacedly, that they couldn't bring themselves to say, "You know, we still need that power under some circumstances," but that was not to be heard. In good part, indeed in the totality, I would say the reason the administration has been put in this position and quite rightly has been put in a very embarrassing position for them is this organization. So, I'm very proud to be here. Thank you.

discussion

Clark Kissinger: Yes, my name is Clark Kissinger! I have a question for Mr. Stone. By the way, I do disagree with you on how bad the PATRIOT Act is, particularly when you see the intrusion of secret courts and domestic criminal prosecutions. I don't think we have seen that in the past. But my question is—I'm very much interested in the promotion of popular outright defiance of this legislation and I would like to cycle back to the period of the Alien and Sedition laws and talk about the significance of the Kentucky and Virginia resolutions and the extent to which editors actually went out and published these criticisms of the government, knowing full well that they would be prosecuted but understanding that conscience actually required them to do that.

Geoffrey Stone: During the period of the Alien and Sedition Acts, there was widespread opposition from members of the Republican Party to this legislation. The Kentucky and Virginia resolutions, which had been drafted by Jefferson and Madison somewhat secretly, essentially argued that the statutes were unconstitutional, that they exceeded the powers granted to the federal government under the Constitution of the United States, and that it was for the states to determine whether or not the acts of the legislature, of the Congress were constitutional. The theory being that it was the states who had ceded authority to the federal government with the creation of the Constitution and that, therefore, they could determine and had the responsibility or the power to determine for themselves whether the actions of the national government were lawful. The Virginia and Kentucky resolutions called on the other states to take a position similar to theirs that would

declare the Alien and Sedition Acts null and void as a violation of the powers of the federal government.

All of the other states rejected the Kentucky and Virginia resolutions. Some of them simply said, "No thank you." Most of them, much more aggressively, said that it is not for the individual state to make the determination as to whether the laws of the nation are constitutional. It is for the courts of the nation to make those determinations. Ironically, the Kentucky and Virginia resolutions became a precedent for secession in the years leading up to the Civil War. But the idea that there were statements made by the states of Kentucky and Virginia and also many communities during this period adopted resolutions that opposed the Alien and Sedition Acts and declared them to be null and void and unenforceable, again, not without any effect, but with the desire to make clear the positions that this legislation was not permissible under the federal Constitution.

Barbara Jones: I'm Barbara Jones from Wesleyan University and thank you for two terrific presentations. I'm really sorry to hear about the Judith Miller case, as I'm sure many are. My question is that at the University of Connecticut, I believe, a survey was done about the Bill of Rights and how much young people know about the Bill of Rights. Less than half understand the issue of the government and prior restraint and newspapers and so on. What can we do about this?

Floyd Abrams: I feel like saying, "It's the librarians fault." I don't know; how do we teach them? It makes me feel as if I'm wearing a different sort of political hat than I usually wear to say it. Teaching courses wasn't a bad way to have a place to put the teaching of sort of basic hard core constitutional law for kids. I couldn't agree with you more that it is very important to try to get the sort of core principles upon which we like to think our country is based, talk to the kids really no later than high school and I think a lot of them before high school.

Geoffrey Stone: This is a deeply important question. There is a culture of a democracy, at least a democracy as we know it, and when we talk about creating democracy in Iraq, whatever else that may mean, it doesn't mean just shipping over a bunch of voting booths. It means creating a culture in which individuals share certain understandings in common. It is similar to the problem that existed in this country in the 1790s, that one has to be willing to question one's leaders and understand that the role of the individual is not the role of a subject but the role of a governor, that the government official works for you, not the other way around, the ability to learn and listen to both sides of an argument, to tolerate disagreement, to not immediately pick up a rock, to recognize that you lose sometimes and you go back and lick your wounds, but you don't make the system fall apart. Those are hard things to learn.

It seems to me that we have to understand in this country that with each new generation there is a need to educate people to those values, that we can't take them for granted and I don't think we have succeeded in the last twenty-five to thirty years in inculcating young people with those values, with that understanding of our history, with an appreciation of the fragility of their freedoms, and I think that is an enormously important challenge that we face going forward. If we fail to do that, a nation that relies ultimately upon elected officials or courts to protect their liberties is not going to have those liberties. It is ultimately the people themselves who have to understand and protect them.

James Scarborough: I'm a student in a library school. I wanted to get back to this idea of reasonable expectation of privacy. As individuals, we carry on transactions with various organizations. We look at the privacy policies and such; for example, going to the library, we see the privacy policies of the library. Also, forty-eight states have state laws protecting the confidentiality of library circulation records. How does the court define reasonable expectation of privacy? It would seem to me that that would create a reasonable expectation of privacy.

Geoffrey Stone: There is no good answer to that question. From the first time the court used the concept almost forty years ago, now people said, "Well how do you know when there is a reasonable expectation of privacy? Are you making a descriptive point so that if the government says, "You no longer have any privacy in your telephone calls. We are announcing that and, therefore, you have no reasonable expectation that your telephone calls won't be wiretapped. Or, do we mean a normative judgment, that people should be entitled to have certain reasonable expectations? If that is what we mean, then how does the court determine what those normative judgments about reasonable expectations are?

The only useful answer one can give is that it's a combination of the two, and it's not very scientific. The court is groping towards some useful concept because you have to figure out what you do with the person who walks down the street and says, "The police officer saw me wearing a pink shirt and they want to testify that I was wearing a pink shirt on the morning of the murder that I'm accused of committing because the person who committed the murder was wearing a pink shirt, but when the police officer saw me walking down the street that was a search. It didn't have probable cause." Well, that's crazy, right? If everybody else can see you, why can't the police officer see you wearing a shirt? How you deal with that situation is where you get into this notion of what is a search and what is not a search.

The other side where it became necessary has been with trespass. The historical concept of a search is a physical trespassing to somebody's property. Then you have the problems of wire taps, which [might be placed at] the edge of the property. So then the question is, you are not entering a physical space, so how could it be a search of that house or of your telephone lines? So the court began using this

concept of a reasonable expectation of privacy to say you do have an expectation of privacy in your telephone line, you do have an expectation of privacy in not having people over hear you using a microphone, even if you are in a public park. If you are in a public park talking with a friend you may not have a reasonable expectation that somebody who walks past you won't overhear you, but you do have reasonable expectation that somebody is not using a microphone from half a mile away. So those are the kind of judgments that inescapably have to be made as to what is a search and what is not a search. I think what the court does is try to have a sense of what those core elements of individual privacy are that are essential for society to maintain, somewhat along the lines that were envisioned 220 years ago, in a world of changing technology.

Nora Foster: I have been hearing much about rendition and the Guantánamo Bay case, and I'm interested in your comments on that. I also am concerned about the veto of the PATRIOT Act. Is there any way we can effect a change in that veto situation?

Floyd Abrams: I would say rendition is something I had hoped was journalistic overstatement. Rendition is the practice of sending people to foreign countries that are allies of ours for the purpose of having them tortured because we don't do things like that as part of the effort to prevent and punish acts of terrorism. There are countries around the world including Egypt, Syria, strangely, and a number of others to which it is now confirmed that the U.S. has sent people. The recent articles you may have read about the arrest warrants in Italy for sixteen CIA members who are alleged to have taken someone off a street in Italy and brought him to a foreign country that engages in practices that we don't use for the purpose of interrogation is one such example. While there are situations which are very difficult to make judgments about, it does seem to me that a policy such as rendition is a terrible blot on the nation. I also think that Guantánamo has taken on a coloration throughout the world, in part justifiably, which has done enormous damage to this country. I have a friend who is the Attorney General of India whom I have known for many years, a more pro-American person I have never met, who loves American law and has sought to introduce it more and more into Indian jurisprudence, who loves American jazz, who loves the American people and he just said to me, "My gosh, Floyd, how could this country do Guantánamo?" For a country that cared, in Jefferson's phrase, about the decent opinion of mankind, a decent regard for the opinion of mankind to choose not to care about these things is very distressing.

Geoffrey Stone: The core of these issues are both moral and legal questions. The moral question: is it ever moral to engage in torture? is where you get into the ticking bomb or the buried child. The legal question really turns very much on the issue of the power of the commander-in-chief under the Constitution. The argument of this administration is that the commander-in-chief's power is essentially absolute, that when acting in the capacity of commander-in-chief that the president of the United States has absolute authority to make judgments that cannot be second guessed by courts or even by Congress.

And there are circumstances where we in fact accept that quite readily. Truman's decision to drop the atomic bomb was an executive decision made by the commander-in-chief without any approval by anybody else, even though tens of thousands, hundreds of thousands of people ultimately died as a result of it. [In regard to] the rendition question, it is quite clear that under American law, torture—if we agree that what we are talking about is torture—is illegal and that is part of the reason for rendition. The question is, can you in fact escape legal liability for an act by knowingly turning somebody over to a third party who will do the thing that if you did it would be unlawful?

The second argument, by the administration is it doesn't matter because that law is unconstitutional. I have the authority as president to order torture, if in fact I see fit, regardless of a federal law to the country. Guantánamo is much about the same thing. It is again about the president's determination that he has the authority to detain individuals who the executive branch decides are enemy combatants, without much regard for what courts or anybody else has to say about it.

The most aggressive claim made by this administration, which people I think have not adequately focused on, and the one that I think reaches far beyond what any American president has ever set forth in any time of our history, war or peace, is the claim of this executive that it has the authority to seize an American citizen on American soil to take that individual to a military facility, not to inform any family, friends, co-workers, or acquaintances that they have done this, not give the individual any access to a court or to a lawyer and to hold him incommunicado indefinitely for interrogation or otherwise until the executive branch decides to release him, all of which is to be done on the determination of some person in the executive branch that this individual is something called an enemy combatant, which is not even a legal concept.

When one talks about—and I don't use this phrase lightly or to be hysterical—but when one uses the phrase "Gestapo-like tactic," that is the paradigm. It is to make somebody disappear and that is what our government has claimed in the Padia case. It has the authority to do it and that, to me, is simply breathtaking. I don't think the American people have begun to understand the lengths to which this administration is prepared to go in defining what it believes to be its lawful authority under the Constitution.

Nancy Kranich: I am concerned about the remarks from the administration, the Justice Department, and the President, that if we change Section 215, we will have a safe haven in libraries. This morning, Patrick Fitzgerald spoke defending Section 215. He used the same statement, saying, "we need 215 because libraries could become a safe haven for terrorists." How do you respond to such a statement?

Floyd Abrams: Let me try first. I think the first response is that without Section 215, Pat Fitzgerald, who has grand juries in each of his pockets, can just lift one of the grand juries out of his pocket and go get a subpoena. But he would have to meet the ordinary legal requirements, which are not much but at least [they do provide] some protection.

Geoffrey Stone: You shouldn't applaud, by the way, the notion that he can simply go to grand jury and get a subpoena to go to the library and get the records. That is not good news. That power has been there all along and one of the questions is—What does the PATRIOT Act actually do under Section 215? Does it change anything? Since Fitzgerald says you could, in fact, go get a subpoena, why does anybody care, including Fitzgerald, about Section 215? I don't have a clear answer to that. I debated Fitzgerald about this a couple of times, but I think that part of it is that 215 does not require that there be an ongoing criminal investigation.

Floyd Abrams: There has to be a terrorism related investigation. It doesn't have to be of any actual crime or anything like that. And also, if you have to get a grand jury subpoena there is a process available and there are judges used to dealing with that process. People can go into a court and say, "I have received a subpoena and I ought not to have to respond to it for one civil libertarian reason or another." Under the PATRIOT Act, there is a very limited judicial review, even more limited then the usual grand jury case.

Gina: I have a question again about the 215 Section. I went to the Conference of the California LibraryAssociation and some of the librarians told me that they have in fact been visited by the FBI, that they did have subpoenas, that all these things happen, and I don't understand why the Bush administration is saying they haven't used this when all of these things are going on. My question is—Is it just a technicality that they say they are not using it? Are they just lying about it or what? It doesn't seem to make sense to me that these things are happening, that the FBI is coming in and people are taking these records and then how can they get away with saying they are not using it at all?

Geoffrey Stone: I don't know the situation, but I would assume that this is exactly the point we were just making, that in those instances, they were not using Section 215 of the PATRIOT Act, they were simply using the usual power available for prosecutors to get subpoenas from a grand jury to subpoena records from a library the same way they can from any business.

Floyd Abrams: Or what they are doing is something they don't need a subpoena for. The FBI can walk in anywhere and say, "I'm agent so-and-so from the FBI, we are doing a terrorism investigation. We would like your help." Whatever happens happens. The extent people cooperate. I don't want to make this sound too easy, but there are circumstances in which we honor the FBI for trying to protect us against future acts of terrorism. But in the library context, where there are special problems, it is especially threatening to have a statute which is so easily converted into a tool of repression. □

(IFC report . . . from page 211)

the law itself makes it a criminal offense for the librarian or bookseller to tell anyone about the order.

Like his Freedom to Read Protection Act, the Sanders Freedom to Read Amendment prohibits the government from using these secret court orders to gain access to Americans' reading records. The amendment passed 238–187 despite a Bush administration veto threat issued the day before the vote.

In a collaborative effort to raise awareness about Section 215 and the threat it poses to reader privacy by making it easier for federal agents to gain access to bookstore, library and publisher records, the American Library Association, along with the American Booksellers Association, PEN American Center, and the Association of American Publishers, initiated the Campaign for Reader Privacy. The Campaign is collecting signatures on its online petition at www.readerprivacy.com to support legislative efforts to amend the USA PATRIOT Act to restore traditional reader privacy protections.

Reader Privacy bookmarks are available at the documents table in the back of the room, free of charge, in packets of 250, on a first-come, first-served basis. If you used public transportation to get around Chicago, you may have seen the Reader Privacy public awareness campaign on the Chicago Transit Authority "el" trains. The Red (to Wrigley Field and beyond) and Blue (to O'Hare) lines each feature posters asking "Is someone reading over your shoulder?"—with information about the campaign and the USA PATRIOT Act.

Section 215 is scheduled to expire on December 31, 2005, but many in Congress want to make it permanent. The book community opposes reauthorizing Section 215 unless it includes safeguards to protect the privacy of our reading records.

Don't let the government read over your shoulder! The IFC urges you to sign the petition today. It can be found at www.readerprivacy.org/petition.jsp.

Festschrift to Honor Gordon Conable

At the 2005 Midwinter Meeting, Barbara Jones, Intellectual Freedom Round Table (IFRT) chair, asked IFC to work with IFRT on a *Festschrift* to honor Gordon Conable. IFC members Jack Forman and Carrie Gardner volunteered to work with IFRT. The Freedom to Read Foundation has expressed its desire to be involved in this project. Suggested topical themes include the Universal Right to Free Expression, a document dear to Conable.

Media Concentration

The Intellectual Freedom Committee's Subcommittee on the Impact of Media Concentration on Libraries has drafted a checklist to help libraries counter the impact of media consolidation on the diversity of ideas and localism in their communities. The checklist covers a broad range of topics, such as collection building, cataloging, twenty-first-century literacy, electronic resources, children's services, and library programming. At this Annual Conference, the subcommittee incorporated suggestions it received from ALA units and members. Over the coming months, the subcommittee will continue to annotate the checklist. The subcommittee anticipates presenting the draft checklist to the IFC at the 2006 Midwinter Meeting in San Antonio.

Resolution on Workplace Speech

At the 2005 Midwinter Meeting in Boston, the Social Responsibilities Round Table (SRRT) submitted its Resolution on Workplace Speech, which was referred to IFC to consider implications of the proposed policy. On March 28, 2005, Judith F. Krug, director, Office for Intellectual Freedom, wrote a memorandum to the ALA Executive Board regarding IFC's deliberations on SRRT's resolution at its 2005 spring meeting. IFC determined the resolution did not comport with current case law regarding workplace speech, and at that time did not support adoption of the proposed resolution.

IFC recognized, however, that ALA needed a policy addressing workplace speech, and invited SRRT to work together to draft an alternative resolution. Council adopted SRRT's revised resolution on Sunday, June 26, 2005.

Projects

Lawyers for Libraries

Lawyers for Libraries, an ongoing OIF project, is creating a network of attorneys involved in, and concerned with, the defense of the freedom to read and the application of constitutional law to library policies, principles, and problems. Six regional training institutes have been held since 2002 in Boston, Chicago, Dallas, San Francisco, Washington, D.C., and Atlanta. The next institute will be held in Seattle on November 17, 2005. To date, over 175 attorneys, trustees, and librarians have attended these trainings, and an e-list has been created to allow for ongoing communication.

Topics addressed include the USA PATRIOT Act, Internet filtering, the library as a public forum, meeting room and display area policies, and how to defend against censorship of library materials.

As OIF continues to sponsor institutes, more and more attorneys are learning about the intricacies of First Amendment law as applied to libraries, and the country's library users can be more secure knowing that their rights will continue to be vigorously protected.

For more information about the Lawyers for Libraries project, please contact Jonathan Kelley at jkelley@ala.org or 1-800-545-2433, ext. 4226.

LeRoy C. Merritt Humanitarian Fund

This week at conference, the LeRoy C. Merritt Humanitarian Fund celebrated its thirty-fifth anniversary with a fundraiser. The Merritt Fund is stronger than ever, and continues to assist librarians who have been harmed in their jobs due to discrimination or their defense of intellectual freedom. For more information on the LeRoy C. Merritt Humanitarian Fund, visit www.merrittfund.org.

Banned Books Week

ALA's annual celebration of the freedom to read—Banned Books Week—begins September 24 and continues through October 1, 2005. This year's theme—It's Your Freedom We're Talking About—highlights that intellectual freedom is a personal and common responsibility in a democratic society.

More information on the twenty-fourth BBW can be found at www.ala.org/bbooks, including images of this campaign's posters, t-shirts, and bookmark.

In closing, the Intellectual Freedom Committee thanks the Division and Chapter Intellectual Freedom Committees, the Intellectual Freedom Round Table, the unit liaisons, and the OIF staff for their commitment, assistance, and hard work. □

(censorship dateline . . . from page 222)

"Anyone can bring in these books and try to sell them," the bookstore owner added. He said he sold ten copies of the novel.

Qudah said he wasn't aware of such copies being sold in Jordan. "We do not censor books coming in from anywhere, but if these copies were brought into the country then they were smuggled," Qudah said. He said it was premature to decide if measures should be taken to censor or ban the import of the novel, considering that the PPD was not aware of any such copies in Jordan in the first place.

Some Arab newspapers had published excerpts of the novel last year without obtaining prior permission to reprint. The London-based Arabic newspaper *Asharq Al-Awsat*, which had published the entire work over several days, was quoted by agencies as saying the manuscript was found in the Ministry of Culture after Baghdad's fall. It said it had received its copy from Saddam Hussein's physician Alla Bashir, who fled Iraq after the war and was believed to be in Qatar.

The book has reportedly been on sale in Iraq since March 2003, but without Saddam's name on it. Saddam Hussein has written two other works of fictions titled "Zabiba and the King" and "The Impregnable Fortress." Reported in: *Jordan Times*, June 27. □

(FTRF report . . . from page 222)

summary judgment, and oral arguments on the motions were heard on April 15, 2005. The parties are waiting for the decision of the court, which has set a July date for a full trial on the merits. FTRF will continue to monitor this lawsuit.

Other First Amendment Litigation

FTRF also participates in litigation that vindicates general First Amendment principles. An example of this type of action is a new lawsuit, *Lyle* v. *Warner Brothers Television Productions*, a court case filed by a writers' assistant for the *Friends* television show. She claims that the writers' banter and sexual jokes subjected her to a hostile work environment during writers' conferences, even though none of the banter or jokes were directed at her. An intermediate California appellate court ruled that unless the production company can show the conversations were "necessary" to the creative process, the comments could support a hostile work environment claim.

FTRF joined with ABFFE, AAP, CBLDF, and the Publishers Marketing Association to file an *amicus curiae* brief in support of the show's producers. The brief asks the California Supreme Court to overturn the decision on the grounds that the "creative necessity" test eliminates the First Amendment protections extended to the creative and editorial process that bar government intrusions into that process.

FTRF also is a participant in other legal actions seeking to protect and defend intellectual freedom and the First Amendment:

Gonzales v. *American Civil Liberties Union* (formerly *CLU* v. *Reno*): After the Supreme Court upheld the injunction barring enforcement of the Children's Online Protection Act (COPA) last June, it returned the lawsuit to the District Court in Philadelphia for a trial to determine whether COPA's "harmful to minors" restrictions are the least restrictive means of achieving the government's goal of protecting children from seeing sexually explicit materials online. Discovery is just beginning in the case, and a trial date is set for June 2006.

Kaczynski v. *United States of America:* FTRF has joined with the Society of American Archivists to file an *amicus curiae* brief asking the Ninth Circuit Court of Appeals to reverse a lower court's decision allowing the government to withhold public access to the original writings of Ted Kaczynski, who pled guilty to the "Unabomber" crimes. Kaczynski is hoping to donate his journals and other writings to the University of Michigan if the lawsuit is successful. The Ninth Circuit heard oral arguments on June 16, 2005, and we are awaiting a decision.

Chiras v. *Miller:* FTRF is supporting author Daniel Chiras and a group of students and parents who are challenging the Texas State Board of Education's decision to reject Chiras' textbook, *Environmental Science: Creating a Sustainable Future,* because it believed the textbook was "anti-Christian" and "anti-free enterprise." The District Court dismissed the group's lawsuit, ruling that the school board can reject a textbook if they disagree with the author's viewpoint if such "viewpoint discrimination" is "reasonably related to legitimate pedagogical concerns." Plaintiffs appealed the decision to the Fifth Circuit Court of Appeals, and FTRF joined with ABBFE and the National Coalition Against Censorship to file an *amicus curiae* brief supporting the plaintiffs. Oral arguments before the Fifth Circuit are now scheduled for July 7, 2005.

Yahoo!, Inc. v. *La Ligue Contra Le Racisme et L'Antisemitisme* remains pending before the Ninth Circuit Court of Appeals. It is an ongoing case involving monetary penalties and criminal sanctions imposed by the courts in France against Yahoo! for allowing Nazi-related book excerpts and auction items to be posted to its U.S. Web sites. Such postings violate French law but are fully protected speech under the First Amendment to the U.S. Constitution. Two French groups, La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students, initiated the legal action against Yahoo! in France and won the initial lawsuit. Afterwards, Yahoo! filed suit in the United States to obtain a ruling on the validity of the French court's order in light of its users' First Amendment rights.

After the District Court judge ruled that the First Amendment barred any enforcement of the French court's order in the United States, the two French groups filed an appeal before the Ninth Circuit Court of Appeals. A three-judge panel reversed the lower court on the grounds that the District Court lacked jurisdiction over the French parties, but the full court granted review *en banc* and allowed the parties a rehearing before the court. The parties are now awaiting a decision. FTRF has been an *amicus* in this action and joined in an *amicus curiae* brief supporting Yahoo!'s petition for rehearing or rehearing *en banc*.

FCC petition for reconsideration: FTRF joined with several other First Amendment and free expression organizations to file a petition before the Federal Communications Commission that asks the FCC to reconsider and reverse its decision to impose penalties on NBC for airing allegedly indecent comments made by the singer Bono during the 2003 Golden Globe awards. The petition also urges the FCC to set aside new rules imposing more stringent punishment on broadcasters for indecency. The petition remains pending before the FCC.

FTRF also is monitoring *The Center and Hernandez* v. *Lingle*, a lawsuit filed by the ACLU on behalf of a library user in Hawaii who was ejected from the library by a security guard for viewing the Web site "gayhawaii.com." The lawsuit seeks to overturn Act 50, a recently enacted trespass statute that authorizes public institutions like the library to ban individuals from using public spaces such as beaches, streets, or sidewalks. The parties have agreed to stay the

lawsuit while the legislature considers a bill to repeal Act 50. FTRF is not currently a party to this lawsuit.

The USA PATRIOT Act and library confidentiality

To ensure our right to read without a government of ficial looking over our shoulder, FTRF has joined in the following legal actions to defend privacy and to oppose those portions of the USA PATRIOT Act that threaten the reader's right to privacy and confidentiality.

A new legal action, *Forensic Advisors, Inc.* v. *Matrixx Initiatives, Inc.*, challenges a subpoena seeking to discover the names of persons subscribing to a financial advisor 's newsletter published by Forensic Advisors, Inc. Forensic Advisors is an independent financial research firm that analyzes the financial statements and other filings of publicly traded companies and provides this information to investors and creditors. In August 2003, the firm issued a report on a publicly traded company, Matrixx Initiative, Inc., the maker of Zicam cold remedy zinc products.

Matrixx Initiatives filed a lawsuit in Arizona, alleging that certain anonymous Internet message board posters have defamed the company. As part of that lawsuit, Matrixx served a subpoena on Forensic Advisors, seeking a list of the subscribers and the names of news sources, claiming that a subscriber or a source may be the anonymous posters.

Forensic Advisors filed a motion to quash with the Maryland courts, but lost its initial motion. It is now appealing that decision to the Maryland Court of Special Appeals. FTRF has joined with Public Citizen to file an *amicus curiae* brief supporting the right to read anonymously. Also joining in the brief are ABBFE, AAP, the Electronic Frontier Foundation (EFF), Electronic Privacy Information Center (EPIC), the ACLU of the National Capital Area, and the Reporters Committee for Freedom of the Press. The parties are awaiting a decision.

FTRF also is an *amicus curiae* in a legal challenge to the National Security Letter authority contained in Section 505 of the PATRIOT Act, *John Doe and ACLU* v. *Gonzales* (formerly *John Doe and ACLU* v. *Ashcroft*). The trial of the case concluded with a judgment in favor of the anonymous plaintiff, an Internet Service provider (ISP) challenging an FBI-issued National Security Letter (NSL) that ordered the ISP to turn over certain user records. Judge Marrero of the Southern District of New York ruled that because the NSL authority permits the FBI to compel the production of information without judicial review, it is unconstitutional.

The government has appealed his decision to the Second Circuit Court of Appeals. FTRF will continue to support the plaintiffs as *amicus curiae,* along with ALA and ABFFE. Briefs are being filed over the summer, with oral argument to take place after September 5.

We hope for similar success in *Muslim Community Association of Ann Arbor* v. *Gonzales* (formerly *Muslim Community Association of Ann Arbor* v. *Ashcroft*), the facial legal challenge to Section 215 of the USA PATRIOT Act, which amends the business records provision of the Foreign Intelligence Surveillance Act to permit FBI agents to obtain all types of records, including library records, without a showing of probable cause. The District Court heard oral arguments on the government's motion to dismiss the plaintiffs' complaint in December 2003. We are still awaiting a decision in the case.

Fundraising and Membership Development

Challenges to the freedom to read are growing, and the Foundation is looking for ways to increase our membership and funds. Even after thirty-seven years, many ALA members don't realize that the Freedom to Read Foundation has a separate membership structure from ALA (and is, in fact, a separate 501(c)(3) or ganization), and we are exploring ways to increase awareness of the foundation. If you are not currently a member, please consider becoming one by sending a check to:

Freedom to Read Foundation
50 E. Huron St.
Chicago, IL 60611

You may also join online at www .ftrf.org/joinftrf or by calling (800) 545-2433 x4226. If you are a member, please accept my sincere thanks for your continued support. □

(academic groups' statement . . . from page 214)

it is meant to clearly articulate their views on academic freedom and their commitment to a pluralism of ideas.

The statement comes at a time when Republican lawmakers in several state legislatures have introduced the academic bill of rights, a set of principles they say will make college campuses more intellectually diverse. Republican leaders in the U.S. House of Representatives have also included the measure in legislation to renew the Higher Education Act.

Critics—including many prominent professors and traditional faculty groups—say such legislation would give government officials control over academic matters that should be left to faculty members' professional judgment.

But the college groups' statement tacitly invites such government intervention in college classrooms, Scheuerman contended, because there is nothing in the statement that discourages it. The document, he said, should have included the sentence "Keep government out."

Terry W. Hartle, a senior vice president of the American Council on Education, disputed that ar gument, saying the statement makes clear that the government should not try to dictate what goes on in college classrooms.

Scheuerman also said he found the timing of the statement's release odd since, he said, Horowitz appears to be on the defensive. Horowitz, president of the California-based Center for the Study of Popular Culture, has led a national campaign to urge state legislators and members of Congress to pass the bill, after hearing complaints from conservative college students across the country who have said they are discriminated against because of their political views. Horowitz's proposal urges colleges to foster a variety of political and religious beliefs in such areas as making tenure decisions, developing reading lists for courses, and inviting speakers to campuses.

But several state legislatures rejected the bill this spring. The college groups' statement "gives new life to a bad idea," Scheuerman said, and gives Horowitz credibility he does not deserve.

Representatives of the American Federation of Teachers and the National Education Association, which did not sign the statement either, met with ACE officials to discuss their concerns.

Hartle said the council wrote the statement, with help from other groups, because it had been hearing from a majority of college and university presidents who "were being pressured on this issue and felt they were at a disadvantage because they did not have a statement they could point to."

"It was never our intention to do it because we thought it would help or hurt David Horowitz," he said.

Hartle also disputed Scheuerman's contention that the document legitimizes Horowitz's campaign. "The notion that David Horowitz does not have credibility or legitimacy on this issue is ludicrous," he said. "David Horowitz has gotten the attention of the media and legislators on this issue."

Hartle said his group had not asked Congress to endorse the statement, and whether lawmakers will do so remains to be seen. The disagreement with the teachers' federation, Hartle said, is over not principles but strategy.

Officials of the American Association of University Professors, meanwhile, stood by their decision to sign the statement. "There have been some concerns that this could be appeasement, which is not how I read it," said Mark Smith, the AAUP's director of government relations. The statement "does tell government to stay out of these issues."

Smith said that he agreed with Scheuerman that proponents of the academic bill of rights were on the defensive, noting that it had been introduced in fifteen state legislatures this year and that not one passed it.

For his part, Horowitz applauded the college groups for issuing their statement. "This is the first time the door has opened to a conversation," he said. He also criticized the AFT for not signing it. "To say that a statement on behalf of fairness helps David Horowitz is ridiculous," he said. "I'm for fairness. Isn't the AFT?" Reported in: *Chronicle of Higher Education* online, July 1. □

(protecting anonymity. . . from page 209)

trends. The first is the accelerated development of technology, particularly mass storage—our ability to collect more and more data, access it very quickly and correlate it. If you will, it's the technologist's field of dreams. "Build it and they will come." Those of you who followed the privacy literature in the early '70s might have had the same "ah-ha" moment I did when I suddenly realized that what we were doing was realizing George Orwell's dream.

But we're really dealing with a phenomenon that is less than fifty years old. The invention of the stored program in the computer at the University of Pennsylvania occurred in the 1940s and, in less than half a century, we have developed, and continue to develop at an increasing pace, technologies that allow us to do things that none of us could imagine and with them, a generation of well intended technologists, who, I guess following the good American ethic, applied the technology they have at every opportunity, not with malicious intent, I would argue, at least not most of them but simply because it's there. As I said, "A field of dreams."

The second is a more recent phenomenon. We beat it down once in the '50s, but we haven't been able to beat it down in the twenty-first century, and that is the perception that we are threatened as a society in ways that we have not been threatened in the past. So we have the technology that enables us to store large amounts of information and a perception, at least in portions of the political system among decent human beings, that we need to use that technology to protect ourselves.

The third trend is, perhaps as a consequence of the first, a growing expectation that the technology will enable us to change the way we conduct our business. We expect the Department of Motor Vehicles somehow to know us at one o'clock in the morning. So I would submit that these are the three trends.

What I'd like to do in my remarks this morning is to create a framework and vocabulary that we can use in our dialog, to set forth a couple of principles, none of which will be particularly strange or foreign to you, list a few of the arguments on both sides, that is, what are the arguments for giving up our anonymity and what are the arguments against giving up anonymity, suggest five questions that both providers, those of you who are asked to give up individual information, and collectors, those who ask others for information, ought to ask ourselves. Then I'd like to think about some alternatives, think about some strategies that you as an individual can take to protect your anonymity, to protect yourself.

I would single out among them two that I think are particularly germane to today's conversation. The first the OECD refers to as a minimization, that is, collect only that data about individuals that is necessary for the purposes for which the information is being collected. You can see already how the technologists "I can do it, I can

know everything" and that principle can potentially be in conflict. The second isn't discussed as often but I think it is particularly relevant in light of recent events, namely, information that is used to make determinations about an individual ought, to the extent possible, be collected from that individual.

In fact that is the federal law. The Federal Privacy Act explicitly says "That to the extent that information is used to make determinations about individuals, information ought to be collected from the subject." That is, from the individual about whom the determination is made.

So why do we need to know who you are in a transaction? First, and those of you who are practicing librarians can get this one pretty easily, to authorize access. It's a legitimate concern in some instances. Resources are scarce, and in some instances, access to certain classes of service are conditioned on membership in some group or affiliation. So that's a legitimate argument for giving up some piece of your identity, at least to the extent it is necessary to demonstrate that you are a member of a group entitled to a service. The second, and I would argue this is legitimate, but we will come to discussion perhaps of limitation, is to improve service. To the extent that we know about you and your habits, we can tailor the service, we can tailor your Internet experience, if you will, to those things that you want to do. Knowing what you have looked at in the past may help us find what you want to look for in the future.

I find it helpful when Amazon can tell me that people who have ordered the kinds of books that I've ordered from Amazon are also looking at some other books. The marketing term for it is "tie-in sales," to be able to relate sales, but as a general matter, the notion that knowing about you helps improve the quality of your experience in interacting with some service provider is a legitimate argument for collecting characteristics about the person. The third is accounting; that is, in some instances, there may be moneys due or some other requirement. Again, in the library universe, they certainly want to know who checked out the book. It's as simple as that. And finally, some would argue that requiring individuals to identify themselves deters malicious acts.

So why should we want to protect our identity? First, in a seminal case, Justice Frankfurter found a right to be left alone. Second, and I think even if you don't buy that one there's a practical argument against giving up your identity, and that is the potential for misuse or abuse of the information that you provide. The more information that exists about you that is in the hands of others, the greater the possibility that somebody can misuse it.

So I would suggest that there are five questions you would want to ask both as a provider and as a collector of information. Do we need to know who you are? If you're the IRS giving out tax information I would submit there is absolutely no reason to know who I am. If you're going to the Government Printing Office and looking at the U.S. Code, the Government Printing Office has no interest and no need to know who I am when for the umpteenth time I go back and look at the same piece of law. But if there is a need to know, if there is a need to have for the reasons that I have suggested above, for accounting or other purposes to get a piece of your anonymity.

The second question is: How much do we need to know? Do we have to do an electronic strip search every time somebody shows up at the door? The challenge, of course, is that we have the ability to do that increasingly easily.

Third, from the user's perspective, and also from the data collector's perspective, what are the rules of secondary use that is beyond the purposes for which the information is collected, namely to provide you with some good or service? What are the rules regarding who else would get that information? A couple of years ago, there was a rather interesting case in the Washington area, a pharmacy chain was helping its provider partners by giving them user profile information so pharmaceutical companies could market to users. Many of us would argue that that was an inappropriate secondary use of that information. I would argue that the pharmacy had a very strong interest in having a fair amount of personal information about individuals not only so they could dispense properly but so they could look into our drug interactions. But to go the next step and provide it to pharmaceutical companies is arguably problematic.

Fourth, does the entity have a privacy policy? Is it clearly disclosed and is it enforced? Those are three separate questions and you need to look at all three.

And finally, and here I think we get to the real problem that most of us have observed, certainly in the revelations of the last several weeks, is housing the information safe? It's all well and good for Visa or MasterCard to have strong policies, but if, indeed, this stuff is coming out the back door, they provide no help at all.

So what can providers do, those who collect the information, those who provide services? First, I would submit they need to minimize the data they collect and secondly, and this is something that is probably the key to much of what we been doing, we have need to give people notice and choice. I may choose to have Amazon know everything about my buying habits because I find it provides better service. That may intrude into your space in a very fundamentally different way than it does mine. Privacy is inherently a notion that is very personal and just as each of us has a different view of what constitutes our comfortable physical space, we need to recognize that we have different comfort zones in cyberspace. Thus, we need, as collectors of information, to give folks choices. Well run Web sites and well run organizations give those choices.

From a data provider's standpoint, what can you do? One option, in some instances, is what I would call subanonymity, that is even if you're asked for an identity make one up. I have a friend who wants to take advantage of

frequent purchaser programs that all of the merchants provide and those of course are linked to making sure that all of his transactions are captured. All they need to know is that the same person is showing up each time. They don't need to know who he is or where he lives, so he makes up an identity for each one. If you think about it from the standpoint of the merchant, it serves their purposes. They're trying to build consumer loyalty and they're trying to learn something about patterns. You can, obviously, remain anonymous, that would be the other choice, but in remaining anonymous, he's decided he would be giving up the benefits of a frequent purchaser. So rather than remain anonymous which would have been his first choice, he's made the decision to be subanonymous, that is, to invent an identity for each instance.

I ran into an interesting situation on Friday. One of my many weaknesses is that I am an avid baseball fan. So I went on a Web site to vote for the all-star teams, and it turns out it's a sponsored Web site. Of course, the reason that the organization that's sponsoring it, which happens to be a financial services organization, is that they are trying to collect information about the people who vote. So whereas I could have voted at the ball game on Saturday night and given them a paper ballot, when I went online, they wanted to know my name and my e-mail address and my date of birth. So I gave them a name and an e-mail address and a date of birth. It didn't happen to be mine.

We have an interesting argument about the ethics of doing that. I lied, but that is a coping thing.

A third technique is to challenge the request. Ask why am I being asked this question? If you're at a gambling casino and you've decided to take advantage of their Frequent Bettor Program—it's not just airlines who use these things—they really don't need to know how old you are. In my case, I don't have any problem convincing you that I'm over eighteen. That's all they really need to know. It's not that my age is something I hold particularly private but nonetheless, I would suggest to you that unless it does matter, not to you challenge the request for the information. Why do you need to know this to complete this transaction? In some instances, and again this is a question of where your comfort zone begins and ends, be prepared to walk. If the answer doesn't satisfy you, be prepared to walk away and say "I'm sorry, that's a piece of me I'm not giving you."

Finally, and this I credit to my colleague at the Center for Democracy and Technology, Ari Schwartz, start to think more narrowly. Yes the bank, the store does need to know that you have the ability to pay, but it doesn't need to know a great deal more about you. This is one of the concerns that many of us have with the new passport and the RFID technology.

I would leave you with two other thoughts that are tangential to the issue but I think are becoming increasingly important. One is an old problem that I alluded to in the beginning but I think it is worth remembering. Most of the problem with misuse of your identity, that is not just identity theft but misuse of information about you, has nothing to do with whether or not you have provided that information on the Internet. It turns out to be very difficult technically to steal information on the Internet. It's much easier to steal it out of the back room whether using insiders or in some other way hacking in so that the issue is not, as I had suggested earlier, whether or not you're providing your identity information on the Internet, the issue is when you fill out that warranty card that you put in the mail. You're certainly no safer and you ought to be asking the same questions about whether the information that is being asked of you is relevant to the purposes for which you're being asked and challenge it. Certainly, unless you enjoy filling out little bingo cards, there's no reason ever to tell anybody in a response to a warranty card your consumer preferences. That has absolutely nothing to do with the warranty process and my lawyer friends tell me, "You probably don't even have to send the warranty card in to be protected should a product prove ineffective."

The second issue that I would leave you with is that you are increasingly no longer in control of your identity, not because of what you do but because of what can be done by getting information about you from third parties. I would argue the most egregious recent example is the revelation by the Department of Defense and the creation of the database of high school seniors, none of which is collected from the individuals, all collected from third party services. It's an issue of great concern to me, an issue that I think would be increasingly under scrutiny in the years ahead, at least I certainly hope it is. To a large extent, the tools available to you and me go back to the policy arena where we need to start agitating, if you will, in the legislative arena to look at gaps in the existing legal framework about use of third party information, which I would submit is in violation of basic principle. Information that is used to make determinations about you ought to come from you.

remarks by Paul Levy

Paul Levy is an attorney with Public Citizens Litigation Group, a public interest law firm founded by Ralph Nader in 1972. Among the issues on which the group litigates are federal health and safety regulations, consumer litigation, open government, union democracy, separation of powers and the First Amendment. The group litigates cases at all levels of the federal and state judiciaries and has a substantial practice before Federal Regulatory Agencies. After working as a law clerk to the honorable Wade H. McKree, Jr., United States Court of Appeal Sixth Circuit, and special assistant to Solicitor General McKree, Paul Levy joined the Litigation Group in December of 1977 to represent workers in rank and file law cases, largely representing dissident

union members in cases involving union government. He has been there ever since with the exception of a one-year sabbatical when he taught at Car dozo Law School in New York. He has ar gued scores of cases in the United States Court of Appeals. Moreover, he has ar gued four cases in the Supreme Court of the United States, as well as writing briefs for parties in seven other cases. He has litigated cases in state and federal courts thr oughout the country about the identification of anonymous Internet speakers. His amicus brief in a New Jersey case, which was adopted by the appeals court there, has become the model for other cases. His Internet fr ee speech practice also includes the defense of trademark and copyright claims br ought as means of suppressing critical Web sites. His cases in this area have established the right to cr eate Internet gripe sites that includes the trademark names of companies and their domain names. In addition, Paul is the chair of the subcommittee on domain name litigation of the American Bar Association's Intellectual Property section.

When you visit a Web page, the server that hosts the Web page keeps track of the Internet protocol number that you are using to get access to the Internet and thus to their Web page, and of the exact time of your visit. Because there is a directory of which ISP, Internet service provider, controls which IP numbers and because ISPs keep track of which of their customers are using which IP number at exactly which time, there are records from which, in theory, every Web visitor can be traced. So when you make a posting, for example, to a discussion site, you're leaving behind all this information which is retained, to some extent, by the operator of the discussion site. If you create a Web site, the contract you form with the registrar when you register a domain name contains contact information and the form contract that you have with the Internet service provider that provides a server to host your Web site also has contact information.

If you send an e-mail, you can easily create an e-mail address which doesn't seem to reveal your identity, but your ISP knows who you are, and even if you provide false contact information to your Internet service provider, there is payment information which can be traced back to you. Or, if you access the Internet from a library, most libraries these days, because access to Internet connected computers is so popular, keep some sort of information, often identifying information in order to maintain the queue and decide when somebody is entitled to access the next computer that comes free. Many Internet discussion sites allow postings only by those who register and you provide identifying information as part of the registration process, if nothing else, an e-mail address. These days, most providers of discussion sites require a real e-mail address, not a hotmail address which you can access simply by being on the Internet, and they won't complete the registration process unless you receive the e-mail and confirm that you've received it. Now this isn't always true. Some Web providers deliberately set their servers so they don't keep information on visitors. Server space is not infinite so most ISP's purge their server information, at least to some extent, on a regular basis. But in theory, if you had accessed all the information on all the servers all the time, or if you had the power to propel disclosure of this information when you decided you needed it, you can keep track of who is visiting what Web site and who is speaking where. Plus, although members of the public surf the Internet and participate in online discussions or send e-mails on the assumption that they may be doing so anonymously, it is in fact an illusion.

I'd like to recount a few instances in which problems of anonymity have been litigated, one of which is an apocryphal case, the others are all real. The first involved postings on the Yahoo message board for Eurocorps Incorporated, postings that accused Dr. Graham, the head of the urology department, of taking kick backs from the lab to which all of their tests where sent. The posting claimed that Graham had been forced out of his job as a result of the discovery and it was signed "FBI informant." Graham sued this individual for libel and the first step was to subpoena the identity of the person who put the posts up. Now the subpoena process didn't pan out and it's not entirely proven why it didn't, but other investigative methods produced the identity of this poster.

This individual was a former staf f pathologist at Eurocorps who had gone of f to set up his own business and so he was a rival of Eurocorp, and wanted Eurocorp's reputation to be hurt in order to get more business. This person had admitted in another context to using the e-mail address and moniker "FBI informant" in other postings. He claimed he really didn't know Graham, that he had just heard this rumor and posted it on the Internet. The jury didn't believe that and assessed $675,000.00 in damages for this nasty lie that had been posted online anonymously.

The second case involved Jeron Fritz, who is the vice president and general counsel of a steel company in Ohio. He filed a prelitigation petition seeking to identify, for the purpose of eventually bringing a lawsuit, postings to a bulletin board about the steel company from somebody who identified himself as Sanibel and also identified himself as an employee of the steel company. He attached to his prelitigation, twenty screen shots of messages that said nasty things about the company's environmental practices and its treatment of its employees. Under libel law, a plaintiff can only sue for libel for things that are said about himself that damage his own reputation and only one of the screen shots actually mentioned Fritz. It talked about how he was inappropriately litigious, costing too much money to the company for all the lawsuits he brought, including the choice phrase "Fritz will litigate the time of day, oops, I will be in court," and in fact Sanibel won. He was worried obviously that if he were identified as the poster, Fritz, as a powerful figure in the company, would manage to get him fired and

wouldn't have to prove that there had actually been any actionable libel.

Sanibel retained counsel who opposed the enforcement of the subpoena and, without even trying to justify the enforcement of the subpoena, Fritz stopped pursuing his case. He obviously had no intention of really pursuing a libel case against real opposition.

The third case involves The Viewpoint Corporation, a software company which sued a number of individuals accusing them of revealing company trade secrets, but it didn't identify any of the statements that allegedly revealed these trade secrets. We were contacted by a few of the defendants and on their behalf we contacted the company, at first, just to decide whether to take the case, and asked—What are the statements that allegedly revealed these trade secrets? The company couldn't say but it wasn't willing to simply drop the case. It said "We'll dismiss all of your individual clients if they will sign statements agreeing that they didn't reveal trade secrets. We don't even insist on their identities. You tell us, you represent to us that your clients have given you signed statements, provide the statements to us with the names redacted and that will be enough. We will dismiss the case. We'll trust you that these are in fact the people in the case."

And so those whose identities were subpoenaed and could find lawyers to protect [them were protected and] those whose identities were subpoenaed and didn't find lawyers were identified. In fact, we frequently find that we show up and a few people contact us; of course, it's in the interest of our clients that we get them off, they don't want to have to defend the whole case and the other people identified because they didn't happen to find a free lawyer.

The fourth case involves Jimmy Cokeanos, who was a county commissioner in Jefferson County, Texas. A public employee in Jefferson County sent a series of messages to all the other public employees in Jefferson County using a Yahoo e-mail address, johndoe1, criticizing both [the county commissioner] and all the other public officials who were up for re-election for alleged waste of funds. They had spent some money on building a park complex for the purpose of earning money for the county through the provision of entertainment that hadn't panned out. The public officials sued for defamation and also alleged a violation of Texas Campaign Finance Law, arguing that because this person was a public employee, maybe he was using his public computer and Campaign Finance Law forbids the use of public property for campaign purposes. Also, the e-mail messages were sent to public employees. So our client was allegedly causing people to use their work computers for the viewing of campaign literature.

The plaintiff was represented by a former United States attorney now working for a very politically connected firm. In Texas, judges run for election and you have to pay to play, so to speak. If you don't give campaign contributions to the judges, people worry that it could be used against you. He couldn't find local counsel because the plaintiffs were so influential and the plaintiff's lawyer was so influential. In order to find local counsel, we had to find a union lawyer who represented a small segment of the public employees in Jefferson County who was willing to be our local counsel, but this also tended to narrow the scope of the number of employees who could be our clients, which was worrisome. The employee, of course, was worried—if they find out who I am, they'll fire me. They won't even have to prove that there is libel and, of course, there wasn't anything that was libel.

We were able to show that the work computer was not used to send the messages because immediately after the controversy arose, the sheriff's department and the IP office in the sheriff's department, where our client was employed, had checked all the header information in the e-mails and found that the IP numbers in the e-mail messages were not work computers. Thus, they had to use a subpoena to find out who was using the IP numbers. We also showed that Texas Campaign Finance Law can't be used in an individual suit, only the Texas Election Commission can enforce it and so, luckily, a courageous local judge, somebody who had to run for re-election, was willing to quash the subpoena.

The fifth case involves the HealthSouth Corporation and a gentleman by the name of Richard Scrushy, who brought a John Doe action against an anonymous speaker who claimed on a Yahoo! message board that Scrushy was submitting fraudulent billings and that he, the e-mail sender, was sleeping with Scrushy's wife. The Doe was identified and forced to sign a humiliating apology and paid $20 a week for a certain period of time. People stopped criticizing HealthSouth and Scrushy on the Yahoo! message board. They learned their lesson—that if you say something, even if you say something that might be appropriate, you can be sued and can you really afford to defend yourself? This is the same HealthSouth Corporation and the same Richard Scrushy featured in a recent corporate abuse prosecution based on the submission of fraudulent books. I've always wondered whether the lawsuit that Scrushy brought back in 1999 or 2000 when this case was litigated, suppressed information and prevented people from coming forward earlier with the wrong doing.

The sixth and final case involves a president of the United States who was annoyed at an anonymous source who was reporting on the cover up of his re-election campaign's commission of a burglary. He didn't bother to sue the deep pocketed newspaper that carried these allegations; instead, he filed a John Doe petition and demanded the right to identify the Doe, allegedly to pursue the lawsuit, and he did this long before cases developed the requirement of showing proof before you get to learn somebody's identity. The court said "Well, it's reasonable. How can you pursue a

defamation case against the outrageous allegations that this Doe is making without knowing who the defendant is?"

So it ordered the paper to turn over his name and Deep Throat was identified and Gordon Liddy deposited his body in the Chesapeake Bay and that was the end of the investigation.

This, of course, is the apocryphal case, but I hope it suggests that anonymous speech, and Deep Throat was a version of anonymous speech speaking through the *Washington Post,* has real value. The deprivation of the right to speak anonymously can not only have a chilling af fect on other people who want to speak anonymously, but may eliminate speech of real value from the marketplace of ideas.

The Internet provides a tremendous opportunity for ordinary citizens to speak on a variety of issues, ranging from legislative issues to political candidates to the doings of corporations and so forth. Much of what is said is anonymous or, more properly speaking, subanonymous. It's just as true of the people who say nice things about people on the Internet, although nobody ever sues those people. But reading chat boards and message boards and other Internet communications gives members of the public a vast amount of information which they can take for what it's worth. Obviously, the anonymous nature of many communications is going to affect the credibility that many people will give those communications. But the decision about whether to give one's name is a decision for the speaker to make.

We think, however, that public dialog is enhanced by this give and take and that, although the technology exists to identify just about any speaker, if you have enough time and money and lawyers to pursue subpoenas to one ISP after another to determine the real identity of the speaker, the fact is that technology makes it possible. Our nation, of course, has a rich legal tradition and culture of anonymous and subanonymous speech. Think of Shakespeare and the Federalist papers. Many people want to speak anonymously or subanonymously and for entirely good reasons. They fear retaliation from their employers or from public officials about whom they may be speaking. They fear retaliation from other speakers because the give and take on message boards is awfully nasty and you don't know who is out there and who might be angry about something you said.

People want to speak anonymously because they fear being stereotyped by their race or their gender or their class or their occupation. They want their words to be taken for their inherent worth, particularly in an environment where there is registration and you can't just use a pseudonym that somebody else used a dif ferent day. People can develop a reputation based on the quality of their expression, whether what they say is worth reading or not, whether it's credible or not. People also want to be able to speak as individuals without having their speech attributed to institutions with which they're affiliated. You can say on a list—af filiation provided for purposes of identification only—but most people assume that you're really speaking in some manner for, or that your opinion is shared in some manner by, your institution. I might want to speak about something that's contrary to public citizen without my opinions being attributed to public citizen or public citizen may not have a view on a particular issue.

The respect for anonymity is not just cultural but legal. The Supreme Court has recognized a First Amendment right to speak anonymously so long as the right isn't abused. On the other hand, there is no question as, for example, the Eurocorp case or at least part of the HealthSouth case, that the illusion of anonymity creates the opportunity for abuse. The air of anything goes certainly encourages people to say things which could properly and legally be the subject of sanction. Reputations can be harmed by speech and people have a right to protect their reputations. They have a right to redress in court if they have been libeled, truly libeled, or against a variety of other wrongs that may be committed by speech. So when a private party thinks that it has been the subject of wrongful speech and wants to sue, its first step would be to serve a subpoena to identify the speaker.

Obviously, to pursue a suit to conclusion, you need to know who the defendant is. You may need to take discovery from the defendant to show actual malice. It's quite common in many kinds of litigations to identify the defendant at the outside of the case through discovery.

For example, if you were injured at your work place, you get your workers' compensation, but you can't sue your employer. You can sue the person who made the machine that injured you and you don't necessarily know either who made the machine or who serviced the machine. It's quite common at the outset of such a suit to subpoena the employer to get records about the machine maker and servicer, so you know who the right person is to sue.

But when speech is at stake, there is more at issue and we tend to think that plaintif fs often sue because they want to suppress criticism without any real intention of pursuing a libel suit. It's amazing how candid some of these plaintif fs and their lawyers are. Lawyers who represent companies in these cases troll for business by bragging about pursuing subpoenas against Internet speakers. They'll say "You can file suit, get a subpoena, identify the defendant and then you decide if you really want to pursue the litigation." Maybe you can identify somebody inside your company and you can take care of them privately, without ever proving that what they said was liable. Just by getting a subpoena, they say you will slow down criticism because you're reminding people that they're really not anonymous and they can be identified. That's not only because people are afraid of being unmasked but also because most people who speak on the Internet can't afford to hire a lawyer to defend themselves and they know that. So when you shake the prospect of litigation at them, they'll shut up.

But using litigation to suppress speech is bad for public policy. In our society, the first line of defense against unfair

local speech should be more speech and often companies sue without even trying to rebut the harmful speech, what they allege is false speech, even though they could reply on the message board environment. You reply and you reach the same audience that heard the harmful speech. But companies want to sue because they want to suppress the speech.

In these circumstances, where we're worried about suits brought to suppress speech and where counter speech is the preferred remedy, we've been arguing for a standard that strikes a balance so a plaintif f who has been wronged should be able to bring a suit and proceed with litigation, but a plaintiff who is only suing to suppress the speech and identify the speaker, but who doesn't have much of a case, shouldn't be able to get the identity . We need a standard which is balanced and protects those interests.

Under the First Amendment, the usual rule is that you need a compelling interest to suppress First Amendment rights. Courts have been deciding for years what interests are compelling enough to surmount First Amendment rights. In *Dendrite* v. *Doe*, the New Jersey appellate division promulgated a standard and a procedure for courts to follow. Years later, it remains the only appellate decision directly on the standard to use to decide these message board and other Internet anonymity cases.

Dendrite was a software company in Morristown which sued four individuals who had posted on the Yahoo! message board messages which both criticized the company and allegedly revealed trade secrets. The trial judge entered an order which allowed the two individuals who hadn' t obtained counsel to oppose the subpoena to be identified but protected the other two who had found counsel against being identified. The company then took an appeal against one of the individuals, allowing one to remain secret, and the appellate court in New Jersey entered a decision which set a four-part standard.

First, the court and the plaintiff have to find a way to notify the anonymous speaker that an attempt is being made to obtain his identity . That notice can be posted on the message board itself and the Internet service provider can also send a message to the speaker. Second, the plaintiff is required to identify the specific words which were allegedly defamatory or otherwise wrongful, and the court has to review those words to make sure they are actionable on their face. Third, the plaintiff has to set forth evidence showing at least that it has some evidence to support its claims, setting forth a time efficient case that the speech is wrongful. Finally the court should balance the right of the plaintif f to identify the defendant against the right of the defendant to remain

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anonymous, so that the greater the danger to the defendant from retaliation on the particular situation that is presented, the greater the evidence that is required to be presented to show that there is a real case there.

Now it may seem odd to require evidence just to get the name of the defendant so you can proceed with your lawsuit. But the question we've asked is: Is there a compelling interest sufficient to overcome the right to speak anonymously when all we know is that the plaintiff has enough money to be able to afford a filing fee and has filed a complaint alleging that words might be defamatory if they're false and if they caused damage, or to meet a compelling interest standard, does the plaintiff have to produce at least some evidence of falsity and damages and so forth?

Normally, in court, you don't get relief that gives you a benefit or hurts your adversary unless you produce evidence. An order compelling the identification of a speaker does provide information that can be useful to the plaintiff and that can be harmful to the defendant and it gives, therefore, a good juncture in the case in which to require the deduction of evidence. Now if the evidence that the plaintiff has to produce were more than it could reasonably be expected to have at the outside of the case before it's taken discovery you could speak of improperly impeding the prosecution of its case. But the plaintiff ought to have evidence that what was said about it was false or what was revealed was a trade secret. The plaintiff ought to have some evidence of damages; it doesn't need to take discovery to do that.

Many state courts are following the *Dendrite* approach. We will seek opportunities on a continuing basis to find more states in which to mount this defense and make these arguments. But we have limited resources and although there is a coalition of groups and lawyers interested on this issue—we call it the "cyber slap coalition" and we have a Web site, www.cyberslap.org, that you can visit to find information about our activities—all of us together have limited resources and we can't handle every case.

As much as people want to preserve their anonymity, they often can't afford to do so, and as I've indicated, even in cases where we've become involved, the unrepresented people get identified. But there are some other things we can do. One is to urge those who maintain records of Internet activity to consider what records they really need to keep for their purposes. Internet service providers should consider how long they need to keep their server logs which record the IP numbers and times of your visits. Libraries that collect information about computer users for the purpose of maintaining a queue should consider whether the public record laws really require them to maintain that information after the queue has been used and if not, they should consider whether they ought to discard that information.

We've heard recently about a government proposal in the name of fighting terrorism to require Internet service providers to keep their server records for up to three years. Fighting terrorism is a worthy goal, but I'm worried about the chilling of the speech of the rest of us. Legislation is another thing to look to. In Virginia, the home of America Online, which was reporting in the early part of this century that they were receiving over four hundred subpoenas a year to identify their subscribers, the state has adopted a statute requiring ISP's to give notice to subscribers in providing a minimum time to respond. The Internet Clinic at UC Berkeley has developed a model statute which not only requires not noticing a time to respond but which sets forth a standard of proof, and that legislation is currently under consideration in California. Another approach is legislation aimed at using litigation against free speech activity.

When one of these cases comes up in California, we don't have to file a *Dendrite*-type motion because they have what they call a SLAPP Statute. A SLAPP is strategic litigation against public participation. Early in the case when somebody has filed [a lawsuit against] speech activity, a defendant can file a special motion to strike the complaint, showing that the suit was filed over speech about a matter of public concern or about participation in a public proceeding. If the defendant shows that, then the plaintiff has to show enough evidence that it has a probability of success. Perhaps most important, if the defendant prevails on the motion, the defendant gets an award of attorney fees.

Even if the plaintiff drops its suit as its response to the SLAPP motion still there's an opportunity to get an award over attorney fees. As a plaintiff, if you sue over a workplace injury or something else, that's been done to you that has a prospect of damages, you can think of arranging a contingent fee with representation to the lawyer, but as a defendant it's hard to conjure up a way to develop a contingent fee arrangement. The SLAPP statute allows the defendant in a speech case to reach a contingent fee arrangement with a lawyer because the lawyer has a certain means of getting paid; that is to say by the plaintiff. Several states, not just California, have such laws and we hope that other states will consider adopting those laws as a way of dealing not only with Internet stock litigation but other litigation against important speech. □

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