newsletter on intellectual freedom

IFC ALA

Editor: Henry Reichman, California State University, East Bay
Founding Editor: Judith F. Krug (1940–2009)
Publisher: Barbara Jones
Office for Intellectual Freedom, American Library Association

ISSN 1945-4546

March 2014 ☐ Vol. LXIII ☐ No. 2 ☐ www.ala.org/nif

ALA calls for passage, signing of USA Freedom Act

At the American Library Associations's recent Midwinter Meeting and Exhibits in Philadelphia, the ALA Council passed a resolution calling upon Congress to pass—and the president to sign—legislation supporting the reforms embodied in the USA FREEDOM Act.

The act, introduced by Sen. Patrick Leahy (D-VT) and Congressman James Sensenbrenner (R-WI), would end bulk collection of U.S. persons' communications records, require court orders to collect such communications under the Foreign Intelligence Surveillance Act (FISA) Amendments Act, create new and shorter sunset provisions to ensure proper oversight, reform the Foreign Intelligence Surveillance Court, increase transparency and oversight and limit the types of records obtainable under Section 215 and National Security Letters and the authority by which they are obtained.

In adopting the resolution, the Council reaffirmed the ALA's commitment to the principles of privacy, open government, governmental transparency and accountability. The ALA has vigorously defended the privacy rights of library users and supported openness, accountability and transparency.

The Council noted that the U.S. National Security Agency (NSA) operates multiple classified programs to collect, mine, retain and share with third parties data on U.S. persons who are not under investigation for criminal activity. The data collected includes the activities of library users.

The Council also noted that these programs are conducted with minimal oversight and inadequate transparency.

In addition, among recent decisions and study group reports, there is no consensus regarding the constitutionality and statutory basis of these programs. □

Published by the ALA Intellectual Freedom Committee, Martin Garnar, Chair

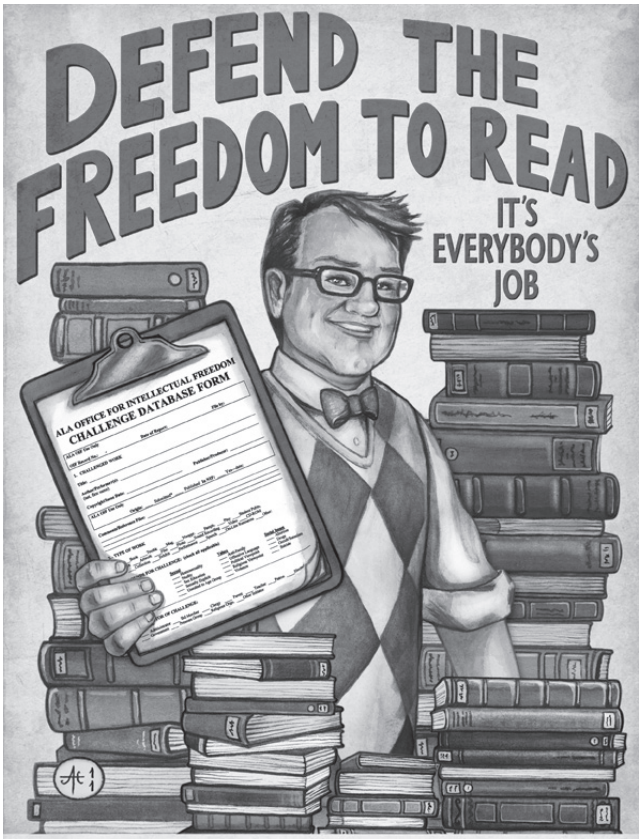
in this issue

targets of the censor

books

periodicals

READ BANNED BOOKS



(ISSN 1945-4546)

Newsletter on Intellectual Freedom is published bimonthly (Jan., Mar., May, July, Sept., Nov.) by the American Library Association, 50 E. Huron St., Chicago, IL 60611. The newsletter is also available online at www.ala.org/nif. Subscriptions: $70 per year (print), which includes annual index; $50 per year (electronic); and $85 per year (both print and electronic). For multiple subscriptions to the same address, and for back issues, please contact the Office for Intellectual Freedom at 800-545-2433, ext. 4223 or oif@ala.org. Editorial mail should be addressed to the Office of Intellectual Freedom, 50 E. Huron St., Chicago, Illinois 60611. Periodical postage paid at Chicago, IL and at additional mailing offices. POSTMASTER: send address changes to Newsletter on Intellectual Freedom, 50 E. Huron St., Chicago, IL 60611.

IFC report to ALA Council

The following is the text of the ALA Intellectual Freedom Committee's Report to the ALA Council delivered on January 28 at the 2014 Midwinter Meeting Philadelphia, by IFC Chair Doug Archer.

The ALA Intellectual Freedom Committee (IFC) is pleased to present this update of its activities.

INFORMATION

The Intellectual Freedom Manual, Ninth Edition

Steady progress continues on the preparations for the forthcoming ninth edition of the *Intellectual Freedom Manual*, slated for publication in the first half of 2015. Editor Trina Magi of the University of Vermont has re-imagined and re-designed the manual for use as a practical guide for librarians in the field, and the Intellectual Freedom Committee continues to review and revise ALA's intellectual freedom policies in preparation for the new edition. Revised policies will be circulated in the spring for comment and suggestions.

Privacy Toolkit

Since September 2013, the Intellectual Freedom Committee's Privacy Subcommittee has worked via email and conference call to revise the Privacy Toolkit, which was last revised in 2005. A final draft was delivered to the IFC for review here at the Midwinter Meeting. The new toolkit provides concise and up-to-date guidance for libraries that are creating or revising their privacy policies, and includes a new section addressing library users' privacy and emerging technologies such as e-books and cloud-based services. The IFC thanks Helen Adams and Ann Crewdson, co-chairs of the subcommittee, for shepherding the project to completion, and thanks committee members and volunteers Carolyn Caywood, Barbara Fiehn, Kent Oliver, Dee Ann Venuto, Bradley Compton, Robert Hubsher, Ray James, and Michael Zimmer for all of their hard work on the project. The new toolkit will be available via the ALA website by March 1.

Committee on Legislation Representatives Join IFC Privacy Subcommittee

Privacy is a vital issue for both the Intellectual Freedom Committee and the Committee on Legislation. The Committee on Legislation considered a proposal to establish their own privacy subcommittee, but after discussions with the IFC at the last Annual Conference in Chicago, the decision was made to add a number of COL representatives to the IFC privacy subcommittee to provide focus and efficiency as the COL and the IFC together address the significant privacy issues faced by libraries and librarians.

To that end, the Office for Intellectual Freedom and the Washington Office are working in partnership to address the issues raised by the government's mass surveillance of U.S. persons.

OIF/OITP Google CIPA Project

Work on the joint OIF/Office for Information Technology Policy (OITP) project to examine the impact of the Children's Internet Protection Act on its tenth anniversary is nearing completion. An executive summary containing the findings of the July, 2013 symposium on the impact of the Children's Internet Protection Act was released here at the Midwinter Meeting, and OIF and OITP co-sponsored a special panel that reviewed the symposium, its findings, and its recommendations and asked for feedback from members attending the panel. The final full report and recommendations will be released in the spring.

Robert B. Downs Award

This year's recipient of the University of Illinois Graduate School of Library and Information Science's Robert B. Downs Intellectual Freedom Award is DaNae Leu, an elementary school librarian. DaNae defended the picture book *In Our Mothers' House* by Patricia Polacco and worked to return the book to school library shelves after her school administration removed it. Her efforts to preserve students' access to the book led to national media attention and an ACLU lawsuit that concluded when the school district agreed to return the book to its school libraries. The Office for Intellectual Freedom and the Freedom to Read Foundation were pleased to provide support and assistance to the district's librarians and the ACLU as they fought to return the book to the shelves.

The Lemony Snicket Prize for Noble Librarians Faced with Adversity

It is the opinion of Lemony Snicket, author, reader, and alleged malcontent, that librarians have suffered enough. Therefore he, with the help of ALA's Office for Intellectual Freedom, will establish a new ALA award honoring a librarian who has faced adversity with integrity and dignity intact—pending the approval of the ALA Executive Board and ALA Council. The prize, if approved, will be a generous amount of cash from Mr. Snicket's disreputable gains ($3,000 + $1,000 for travel), along with an odd, symbolic object from his private stash, and a certificate, which may or may not be suitable for framing. It is Mr. Snicket's hope, and the ALA's, that the Snicket Prize will remind readers everywhere of the joyous importance of librarians and the trouble that is all too frequently unleashed upon them. Details of the award will be available on the ALA website: www.ala.org/awardsgrants.

PROJECTS

Banned Books Week

For the third year in a row, the ALA hosted the Virtual Read-Out during Banned Books Week (September 22-28).

Over 500 readers joined critically acclaimed authors, Khaled Hosseini (*The Kite Runner*) and Markus Zusak (*The Book Thief*). SAGE Publications also participated in the Virtual Read-Out.

In addition to the Banned Books Virtual Read-Out, the sponsors of Banned Books Week have identified outstanding individuals and groups who have stood up to defend the freedom to read by honoring them with the title Heroes of Banned Books Week. Heroes include students, teachers, and librarians from across the country. A listing of the Heroes can be found on www.bannedbooksweek.org/heroes.

Banned Books Week 2014 will take place September 22-28. Banned Books Week merchandise, including posters, bookmarks, t-shirts, and tote bags, are sold and marketed through the ALA Store. New to 2014 will be an updated *Banned Books Resource Guide*. More information on Banned Books Week can be found at www.ala.org/bbooks and www.bannedbooksweek.org.

Choose Privacy Week

Choose Privacy Week will take place May 1-7, 2014. Online materials and programming will encourage libraries and librarians to develop programs and resources for their communities that focus on mass surveillance, commercial data mining, and breaches of data privacy. Posters, buttons, and other items addressing both "Freedom From Surveillance" and "Who's Tracking You?" remain available online via the ALA Store. Planned activities for Choose Privacy Week include a programming webinar for librarians and a number of guest bloggers.

ACTION ITEMS

The Intellectual Freedom Committee moves the adoption of the following action items:

- CD # 19.1, Resolution on Curbing Government Surveillance and Restoring Civil Liberties (see page 41)
- CD # 19.2, Resolution on Expanding Federal Whistleblower Protections (see page 41)

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.

Resolution on Curbing Government Surveillance and Restoring Civil Liberties

Whereas the U.S. National Security Agency (NSA) operates multiple classified programs to collect, mine, retain, and share with third parties data on U.S. persons who are not under investigation for criminal activity;

Whereas the data collected by these programs include activities of library users;

Whereas these programs are conducted with minimal oversight and inadequate transparency;

Whereas among recent decisions and study group reports there is no consensus regarding the constitutionality and statutory basis of these programs;

Whereas the American Library Association (ALA) is committed to the principles of privacy, open government, governmental transparency, and accountability;

Whereas the ALA has defended vigorously the privacy rights of library users and supported openness, accountability and governmental transparency;

Whereas Senator Patrick Leahy (D-VT) and Congressman James Sensenbrenner (R-WI) have introduced the USA FREEDOM Act (H.R. 3361/S. 1599) which :

- ends bulk collection of U.S. persons' communications records
- requires court orders to collect U.S. persons' communications under the Foreign Intelligence Surveillance Act (FISA) Amendments Act
- creates new and shorter sunset provisions to ensure proper oversight
- reforms the Foreign Intelligence Surveillance Court
- increases transparency and oversight
- limits the types of records obtainable under Section 215 and National Security Letters and the authority by which they are obtained;

now, therefore, be it

Resolved, that the American Library Association

1. calls upon Congress to pass legislation supporting the reforms embodied in H.R. 3361/S. 1599 as introduced, and upon the President to sign such legislation; and
2. commends Senator Patrick Leahy and Congressman James Sensenbrenner for sponsoring the USA FREEDOM Act, the 143 legislators in the Senate and the House who have co-sponsored it, and the 85 organizations that have endorsed it, as of January 27, 2014.

Resolution on Expanding Federal Whistleblower Protections

Whereas in 2003 the American Library Association (ALA) cautioned that the USA PATRIOT Act and related laws, regulations, and guidelines would "increase the likelihood that the activities of library users, including their use

(continued on page 68)

FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation's report to the ALA Council, delivered at the ALA Midwinter Meeting in Philadelphia on January 26 by FTRF President Julius Jefferson.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2013 Annual Conference:

LITIGATION ACTIVITIES - *ARCE V. HUPPENTHAL*

Two years ago at the Dallas, Texas Midwinter Meeting, the library community first learned about the State of Arizona's successful effort to shutter the Tucson Unified School District's acclaimed Mexican American Studies (MAS) program. Long a target of politicians and state officials who viewed the program's promotion of Mexican culture and identity as "un-American," the TUSD MAS program was closed after the State Superintendent of Instruction, John Huppenthal, issued a notice stating that the MAS program was in violation of Arizona Revised Statute §15-112, a law crafted to end ethnic studies in schools by prohibiting the use of certain class materials and books.

Adopted specifically to close the TUSD MAS program, §15-112 prohibits both public and charter schools from using class materials or books that "encourage the overthrow of the government," "promote resentment toward a race or class of people," are "designed primarily for pupils of a particular ethnic group," and "advocate ethnic solidarity instead of the treatment of pupils as individuals." If the State Superintendent determines that a program is violating §15-112, the school board must close the program or surrender 10% of the state funds allocated to the school district.

In January 2012, as a result of Huppenthal's findings, all MAS teaching activities were suspended and the MAS curriculum was prohibited. Students looked on as books used in the courses were removed from classrooms, placed in boxes marked "banned," and put in storage. Subsequently, students in the MAS program filed suit in federal district court, challenging the constitutionality of §15-112 on First Amendment grounds. The lawsuit, Arce v. Huppenthal, alleged that the Arizona statute was overbroad, void for vagueness, and violated their rights to free speech, free association, and equal protection.

The district court dismissed the free association claim but went on to address the students' remaining First Amendment claims. It held that the proper test for determining whether the statute violated the First Amendment rights of the students is the test set forth by the Supreme Court in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988): "limitations on curriculum should be upheld so long as they are reasonably related to legitimate pedagogical concerns."

Consequently, the court determined that only one provision, the ban on courses that are "designed primarily for pupils of a particular ethnic group" was unconstitutional because the provision's broad and ambiguous wording could deter school districts from teaching ethnic studies. It upheld the remaining provisions of the statute, rejecting arguments that those provisions were overbroad or unconstitutionally vague. It also dismissed the plaintiffs' equal protection claims. The students have appealed the court's decision to the Ninth Circuit Court of Appeals.

At our last meeting, Candace Morgan reported that the trustees of the Freedom to Read Foundation had voted to assist the students' effort to overturn the district court's decision and restore the MAS program to the Tucson schools. To that end, FTRF retained Jenner & Block on a *pro bono* basis to prepare an *amicus curiae* brief in support of the student plaintiffs' First Amendment arguments. The brief addresses the test to be applied in determining the students' First Amendment rights and also argues that §15-112 is unconstitutional due to its overbreadth.

Specifically, the brief contends that the *Hazelwood* holding does not apply and that the state does not have absolute discretion over curriculum decisions. It argues that the statute violates the students' First Amendment right to receive information, based on the Supreme Court's holding in *Board of Education v. Pico* (a school library case) that students have the right to receive information and the government cannot censor classroom materials based on political or partisan motivations—as appeared to be the case based on the public statements made by Superintendent Huppenthal and other proponents of the legislation. But FTRF also took the position that the state violated the First Amendment even if *Hazelwood* applies because curriculum decisions based on partisan or political motivations do not constitute a legitimate pedagogical interest.

FTRF also maintained that the statute is unconstitutionally overbroad and will chill school instructors from utilizing course materials in their classrooms that might be held to violate the statute, such as Martin Luther King's "Letter From a Birmingham Jail" on the grounds that it "advocates ethnic solidarity instead of the treatment of pupils as individuals."

We are pleased to have the American Library Association joining FTRF on the brief, along with REFORMA, the Asian Pacific American Librarians Association, and the Black Caucus of the American Library Association. Other organizations on the brief are the American Booksellers Foundation for Free Expression, the Comic Book Legal Defense Fund, the National Association for Ethnic Studies, the National Coalition Against Censorship, and the National Council of Teachers of English. You can find the brief along with much more information on the case, including other briefs, at www.ftrf.org/?Arce_v_Huppenthal.

This brief represents a major step forward in achieving the litigation goals of FTRF's strategic plan: to maintain FTRF's reputation as a center of excellence for litigation on behalf of intellectual freedom by developing a proactive

legal strategy and taking the lead in appropriate litigation. We are particularly grateful to Julie Carpenter and Elizabeth Bullock of Jenner & Block and Theresa Chmara, FTRF's general counsel, for working in concert to develop a brief that challenges the status quo to make a principled argument for expanding students' First Amendment rights in the classroom.

The brief was filed on November 25, 2013. Because the State of Arizona cross-appealed the district court's holding that one part of the statute was unconstitutional, legal counsel for the students expects that briefing may not be completed until June. An oral argument date has not been set at this time.

DEVELOPING ISSUES

Helen Adams, a member of the Foundation's Developing Issues Committee, led a discussion about a growing movement to require K-12 teachers and librarians to "red flag" books for "problematic" content or to exclude books that express disfavored viewpoints on controversial issues. She described one school district's decision to install a "library review committee" to ensure that books in the library presented controversial issues "in the right way" and discussed a Virginia parent's campaign to have the Virginia Board of Education adopt regulations that will require school faculty to identify books containing sensitive or controversial content and to publish a syllabus prior to the commencement of classes that notifies parents about any sensitive or sexually explicit materials that may be included in the course, the textbook, or any supplemental instructional materials. These initiatives substantially interfere with instructors' academic freedom and pose a real risk of chilling teachers' and librarians' acquisition and use of complex and challenging literature.

Theresa Chmara, FTRF's general counsel, provided a helpful overview of the recent federal appellate "Net Neutrality" decision striking down the FCC's Open Internet Order and the various lawsuits that are challenging the legal validity of the National Security Agency's surveillance on First Amendment grounds.

JUDITH F. KRUG MEMORIAL FUND

The Judith F. Krug Memorial Fund, which was created by donations made by Judith's family, friends, colleagues, and admirers, supports projects and programs that assure that her lifework will continue far into the future. At present, the fund supports two major initiatives: a grants program that underwrites Banned Books Week activities in libraries, schools, and community institutions, and a program to augment and improve intellectual freedom education in LIS programs.

For Banned Books Week 2013, FTRF made seven Banned Books Week event grants. The grantee organizations hosted a remarkable variety of events that ranged from an author living behind a wall of banned and challenged books in the window of the Kurt Vonnegut Memorial Library to a celebration of challenged and controversial black male authors hosted by the Atlanta School of Law and Social Justice. Judith's Reading Room teamed with Muhlenberg College to stage a dance performance inspired by Marjane Satrapi's frequently challenged graphic novel *Persepolis* while the public libraries in Gadsden, Ala., Yuma County, Ariz., and Lockport, La. sponsored events including read-outs, video and art projects, lectures on censorship, and a symbolic book-burning. Visit www.ftrf.org/?page=Krug_BBW for details.

The Krug Fund's education initiative seeks to provide top-notch intellectual freedom training for LIS students and professional librarians. At present, two projects are moving forward under the guidance of consultant Joyce Hagen-McIntosh, in cooperation with LIS programs. We anticipate announcing details about both projects in advance of the Annual Conference.

STRATEGIC PLAN INITIATIVE AND FTRF MEMBERSHIP

In order to advance those portions of FTRF's strategic plan addressing organizational capacity and growth, the trustees approved two action items designed to regularize the Foundation's use of interest income from the endowment to support the activities of the Foundation. Among these activities is an active campaign to increase FTRF's membership by reaching out to the general public and institutions with an interest in advancing intellectual freedom.

Your own membership in the Freedom to Read Foundation is needed to sustain and grow FTRF's unique role as the defender of First Amendment rights in the library and in the wider world. I invite you to join me in supporting FTRF as a personal member, and ask that you please consider inviting your organization or your institution to join FTRF as an organizational member. Please visit www.ftrf.org and join today. Alternatively, you can call the FTRF office at (800) 545-2433 x4226 and join by phone, or send a check ($35 + for personal members, $100 + for organizations, $10 + for students) to:

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

READ BANNED BOOKS

watchdog report concludes NSA program is illegal

An independent federal privacy watchdog has concluded that the National Security Agency's program to collect bulk phone call records has provided only "minimal" benefits in counter-terrorism efforts, is illegal and should be shut down.

The findings are laid out in a 238-page report, released on January 23, that represent the first major public statement by the Privacy and Civil Liberties Oversight Board, which Congress made an independent agency in 2007 and only recently became fully operational.

The report was likely to inject a significant new voice into the debate over surveillance, underscoring that the issue was not settled by a high-profile speech President Obama gave the previous week. Obama consulted with the board, along with a separate review group that last month delivered its own report about surveillance policies. But while he said in his speech that he was tightening access to the data and declared his intention to find a way to end government collection of the bulk records, he said the program's capabilities should be preserved.

The Obama administration has portrayed the bulk collection program as useful and lawful while at the same time acknowledging concerns about privacy and potential abuse. But in its report, the board lays out what may be the most detailed critique of the government's once-secret legal theory behind the program: that a law known as Section 215 of the USA PATRIOT Act, which allows the FBI to obtain business records deemed "relevant" to an investigation, can be legitimately interpreted as authorizing the NSA to collect all calling records in the country.

The program "lacks a viable legal foundation under Section 215, implicates constitutional concerns under the First and Fourth Amendments, raises serious threats to privacy and civil liberties as a policy matter, and has shown only limited value," the report said. "As a result, the board recommends that the government end the program."

While a majority of the five-member board embraced that conclusion, two members dissented from the view that the program was illegal. But the panel was united in ten other recommendations, including deleting raw phone records after three years instead of five and tightening access to search results.

The report also sheds light on the history of the once-secret bulk collection program. It contains the first official acknowledgment that the Foreign Intelligence Surveillance Court produced no judicial opinion detailing its legal rationale for the program until last August, even though it had been issuing orders to phone companies for the records and to the NSA for how it could handle them since May 2006.

The privacy board's legal critique of the program was approved by David Medine, the board's chairman and a former Federal Trade Commission official in the Clinton administration; Patricia M. Wald, a retired federal appeals court judge named to the bench by President Jimmy Carter; and James X. Dempsey, a civil liberties advocate who specializes in technology issues.

But the other two members—Rachel L. Brand and Elisabeth Collins Cook, both of whom were Justice Department lawyers in the George W. Bush administration—rejected the finding that the program was illegal.

They wrote in separate dissents that the board should have focused exclusively on policy and left legal analysis to the courts. Last month, two Federal District Court judges reached opposite legal conclusions in separate lawsuits challenging the program.

Brand wrote that while the legal question was "difficult," the government's legal theory was "at least a reasonable reading, made in good faith by numerous officials in two administrations of different parties." She also worried that declaring that counterterrorism officials "have been operating this program unlawfully for years" could damage morale and make agencies overly cautious in taking steps to protect the country.

But the privacy board was unanimous in recommending a series of immediate changes to the program. The three in the majority wanted those changes as part of a brief wind-down period, while the two in dissent wanted them to be structural for a program that would continue.

Some of those recommendations dovetailed with the steps Obama announced the previous week, including limiting analysts' access to the call records of people no further than two links removed from a suspect, instead of three, and creating a panel of outside lawyers to serve as public advocates in major cases involving secret surveillance programs.

Other recommendations—like deleting data faster—were not mentioned in the president's speech. And all members of the board expressed privacy concerns about requiring phone companies to retain call records longer than they normally would, which might be necessary to meet Obama's stated goal of finding a way to preserve the program's ability without having the government collect the bulk data.

The program began in late 2001 based on wartime authority claimed by President Bush. In 2006, the Bush administration persuaded the surveillance court to begin authorizing the program based on the USA PATRIOT Act under a theory the Obama administration would later embrace.

But the privacy board's report criticized that, saying that the legal theory was a "subversion" of the law's intent, and that the program also violated the Electronic Communications Privacy Act.

"It may have been a laudable goal for the executive branch to bring this program under the supervision" of the court, the report says. "Ultimately, however, that effort represents an unsustainable attempt to shoehorn a pre-existing surveillance program into the text of a statute with which it is not compatible."

(continued on page 68)

Obama administration begins changes to NSA phone records program

During his January 17 speech on National Security Agency (NSA) surveillance, President Obama proposed a number of changes to the agency's bulk domestic phone records program. On February 6, the administration announced that the Foreign Intelligence Surveillance Court (FISC) approved a motion to start implementing some of those changes.

Specifically, the Office of the Director of National Intelligence (ODNI) said the court granted a motion to modify the most recent primary order authorizing the Section 215 phone records program to ensure that the metadata will only be queried after a judicial finding that there is a "reasonable, articulable suspicion" that the selection is associated with an international terrorist organization "absent a true emergency." In addition, the motion limited the query results to metadata within two hops of the selection term, rather than the prior three.

The FISC also ordered a classification review of the motions and the most recent primary order authorizing the program from January of this year, the government's motion to amend that order, and the court's order granting that motion, to be completed by Feb. 17. Once the review is completed, ODNI says the documents will "will be published as appropriate."

"It's good to see they're following through on the changes the president announced rapidly, but the fundamental problem isn't this one program—it's a strained interpretation of the law that lets them secretly collect any type of records in bulk," says Julian Sanchez, a research fellow at the Cato Institute. "This should be seen as an important stopgap measure on the way to legislative reform of the underlying authority."

Laura W. Murphy, director of the American Civil Liberties Union's Washington Legislative Office mirrored his sentiments. "It's good to see that some of the president's reforms to the bulk collection program have been implemented," she said. "What we need now, though, is not tinkering around the edges but an end to bulk collection. If the president won't end the program, then Congress must pass the USA FREEDOM Act and shut it down permanently."

The USA FREEDOM Act is a bipartisan proposal co-sponsored by USA PATRIOT Act author Rep. Jim Sensenbrenner (R-Wis.) which would end the current bulk phone records collection program (see page 41). In his January speech, President Obama also announced his administration was looking to transition custody of phone records outside of government. But details of which third parties might take over control of the data or how such a shift might be implemented are still in development.

Less than a week after the president's NSA speech, the Privacy and Civil Liberties Oversight Board—an independent bipartisan government agency created to review the implications of national security policies at the urging of the 9/11 commission—released a report with the majority finding that the phone records program is illegal and should be ended (see page 47). Every member of that board also expressed skepticism at the president's plan to continue to access the data but house it with third parties, with Board Chair David Medine saying "it just doesn't seem to address the concerns" the group had about the program. Reported in: *Washington Post*, February 7. □

censorship dateline

schools

Sweet Home, Oregon

A complainant who protested the use of a controversial young adult novel in a Sweet Home Junior High English class has appealed a committee's decision to keep the book. The Sweet Home School Board was expected to consider the appeal, filed by Rachel Kittson-MaQatish, who has a child coming up in the Sweet Home district, on March 10.

The issue involves *The Absolutely True Diary of a Part-Time Indian*, a young adult novel by Northwest author Sherman Alexie. The largely autobiographical work is voiced by narrator Arnold "Junior" Spirit, 14, who recounts his experiences leaving the reservation to attend an all-white high school.

The novel has received numerous awards, but also has been banned in places for the character's use of profanity, recounting of racist slurs and sexual imagery.

Parents of the eighth-graders in the language arts classes received information summarizing the novel's most controversial issues before the unit started and had the option of asking for an alternate assignment. Thirteen of the 170 families did so.

Superintendent Don Schrader convened a reconsideration committee after five people, including two of the thirteen parents, filed a formal request. The committee determined the book could stay, but said Schrader is responsible for determining the appropriate grade level for its use, which may not be eighth grade.

MaQatish talked with Schrader on February 13, the day after the meeting, and said she wanted to appeal the decision. She said she wants to see what the future standard will be at Sweet Home Junior High and to have a public statement from each board member about where he or she stands, both on this issue and on issues of parents' voices in general.

MaQatish said she and the others who protested the novel have concerns both about its content, particularly what they see as the objectification of women and young girls, and the way alternative lessons were developed and presented.

"The teacher's argument as I heard it at the first hearing was: It's a great book, the students like it and this book will get them reading again, especially the at-risk youth and we aren't teaching them anything new when it comes to profanity and sexual vulgarity," MaQatish said. "We (the complainants) merely asked the committee to hold the school to the same standard they set themselves. The language in the book is a violation of school code of conduct and we do not believe it is appropriate as assigned eighth-grade curriculum."

She said she also had concerns about equitable treatment for students who opted out and questioned why the alternate assignment was limited to Native American writers. Last year, she pointed out, when the same book was pulled from the classroom because parents hadn't had a chance to opt out, teachers replaced it with a unit on *Fahrenheit 451*, which has to do with censorship.

"Teachers need to be able to teach, but parents and community members need to be able to ask questions and be heard when it comes to their concerns," she said.

She said she appreciated the respect shown by people on both sides of the argument, and said she and the others who protested heard the teachers and appreciated their passion in trying to motivate reluctant readers.

"Hopefully, the teachers heard the concerns of the parents and will consider those concerns in formulating their lesson plans and discussions in the future, especially when there are numerous other options to choose from when teaching critical thinking, racism, bullying, poverty and other social issues the teachers are trying to address," she said. Reported in: *Albany Democrat-Herald*, February 19.

student press

Allendale, Michigan

On December 5, the *Lanthorn*, student newspaper at Grand Valley State University (GVSU), ran "No More Billboards" an editorial responding to Carly Simpson's article, "A public university run by private donations." Simpson reported that 31 new rooms had been named after donors just this year, and the editorial questioned whether the increasing presence of donor names on campus buildings hinders GVSU's mission as a public university.

The editorial considered the implication of the strikingly numerous "naming opportunities"—as Vice President for University Development Karen Loth described them—and

what they represent: a level of administrative attachment to and association with donors that could trump dedication to students. The original thought was that perhaps in the future, if the naming trend becomes even more excessive, academic integrity and freedom could be sacrificed.

The editorial was not meant to belittle the benevolence of donors or express ungratefulness; the donors are, as the editorial stated, generous people without whom the university could not have grown and succeeded to the extent that it has—especially as government support fails to meet its needs.

Instead, the purpose of the editorial was to consider the consequences of increasing attachment to private entities on the part of the administration. This attachment, again, would not in and of itself be a bad thing. The *Lanthorn* only hypothesized that excessive attachment might discourage students from speaking freely if that speech could adversely affect university fundraising.

Just before exams began, the *Lanthorn* editor Lizzy Balboa was contacted by three of GVSU's top administrators; one called a private cell phone, and the other two co-wrote a message that was sent to Balboa's student email account and published in the December 9 issue.

In the two messages, the administrators said the *Lanthorn* staff is clearly "ungrateful" to donors as evidenced by its "disappointing" editorial, and it did a "disservice to students" with its disrespect. They suggested that, perhaps because of these offenses, the editors were undeserving of their merit-based scholarships and should relinquish them "for reissuance to students who would be more appreciative of our donors." The three administrators suggested further that the editors recant the message of the editorial and that, rather than challenging policy regarding donors, write editorials thanking them.

Responding to the letters, Balboa wrote *Lanthorn* readers: "To recap: at our liberal arts university, which preaches free and critical thought, there is at least one topic not up for honest debate and discussion. And, if anyone disagrees with the views of a few administrators, they should remain quiet and know that their dissent renders them undeserving of their financial aid.

"Now, based on the administrative responses, I could take this opportunity to discuss the freedom of the press. I could also deliver the age-old lecture about freedom of speech and how public institutions—above all, universities—should protect this principle. And I could also point out that the administrators neglected to address any point made in the Dec. 5 editorial.

"But this is not about freedom of the press. After all, I was admonished not as editor-in-chief Lizzy Balboa, but as private student Lizzy Balboa.

"And this is not so much about freedom of speech. The complaint was not about expression of ideas; it was about the ideas, themselves—an 'ungrateful' attitude.

"And this is not even so much about the December editorial. A new issue has arisen: the business model of education appears to be valued over education, itself.

"Based on the, quite frankly, over-the-top reaction against the editorial, it seems that some administrators have lost sight of one of the primary responsibilities of a university—no less one that champions the liberal arts. These few are beginning to put money and donor interest above learning and student interest, and they are making personal calls to discourage critical thinking for the sake of placating donors (who I would like to think invested in our education because they believed in its mission, not in its marketing opportunities).

"They are creating a system that discourages dissent, promotes consensus and suggests that financial aid be contingent upon thoughtless allegiance to themselves and the donors they have secured. Is this attitude conducive to the critical thinking demanded of a liberal arts education? I think not." Reported in: *Grand Valley Lanthorn*, January 12.

colleges and universities

Angwin, California

Pacific Union College has backed down from a threat to dismiss a longtime psychology professor over lectures on sex that administrators said clashed with church teachings. But the controversy has stirred up questions over how committed the liberal-arts college is to academic freedom.

The professor will keep his job, but his department chairman resigned, citing the dispute as a key factor. The situation illustrates the challenges of protecting academic freedom while observing church doctrine at liberal-arts colleges with strong religious ties.

Pacific Union, about fifty miles north of San Francisco, is "sponsored and maintained" by the Seventh-day Adventist Church, and each year faculty members must sign a contract that states: "The performance of all duties and obligations under this contract should be in harmony with the philosophy and purpose of PUC and the Seventh-day Adventist Church."

Nancy Hoyt Lecourt, the college's academic dean, says students are at the center of determining the balance between professors' freedom to teach and the college's obligations to promote the church. "How do we get students thinking? We poke at them, we introduce them to new ideas, and we ask difficult questions," says Lecourt. "But how do we get them thinking without losing their faith?"

The problems between college administrators and the psychology professor—Aubyn S. Fulton, who has taught there 26 years—began in September, when Heather J. Knight, the college's president, called him into her office and gave him a three-page letter saying he faced dismissal. Fulton had breached his duties to uphold church teachings, he says the letter said, and Knight accused him of insubordination.

He said Knight had asked him several times before their meeting to tone down his lectures on sex, which he delivers

in his introductory psychology class. But he says he has refused to change, citing the faculty handbook's support of academic freedom.

Knight, however, says she was concerned that Fulton was condoning both premarital sex and homosexual relationships, and teaching his views as "truth," something the handbook forbids.

In his lecturers on human sexuality, Fulton says he challenges students' views on whether they may have sex before marriage and still live by the tenets of the church, which says intercourse before marriage is wrong.

"I say, 'Church teachings reserve intercourse for marriage, but intercourse is not your only option,'" said Fulton. Sometimes, he acknowledges, students leave the class believing he is endorsing premarital sex.

He also asks students to use their classroom clickers to estimate what proportion of the college's students have had intercourse, and then he asks the students themselves if they have done so. Inevitably, he says, students believe a much larger proportion of undergraduates at Pacific Union have had intercourse than the behaviors of the class demonstrate.

Fulton also lectures about sexual orientation, and, he says, students usually ask if he believes the church's teachings that homosexuality is a sin.

"I say, 'After careful study, my view is that the Bible does not condemn as sin a loving and committed homosexual relationship,'" says Fulton, who has been a faculty adviser of a gay-student support group at Pacific Union that is not officially recognized by the college. "Then I say, 'That's just my view. People I love and respect differ.'"

Fulton said that, in their meeting last September, Knight objected to his teachings on sexual intercourse and homosexuality. She had received complaints from students, parents, board members, and religious leaders over the years, he said she told him.

But Fulton said he told the president he believed the faculty handbook's commitment to academic freedom protected him. The handbook says: "Teachers are entitled to freedom in the classroom to discuss their subjects honestly."

However, the handbook adds: "The Church expects that teachers in the Church's educational institutions will not teach as truth what is contrary to those [church] beliefs. Teachers who hold views in conflict with the published 'Fundamental Beliefs' will not present their ideas to students or in public forums without first counseling with their peers."

Fulton acknowledged that he offers views that challenge church teachings, but he said he has abided by the handbook's restrictions that he not teach those views as truth and that he first consult with his colleagues.

"All of us who work for a faith-based liberal-arts college realize that we are going to have to tolerate and even embrace ongoing tension between the basic principles of the academy and our faith," said Fulton. "We are committed to our religious faith. But we are not a Bible college."

The dispute between the president and Fulton began to attract widespread attention among alumni, students, and professors in mid-January, when an undergraduate at Andrews University, a Seventh-day Adventist institution in Michigan, started a Facebook page called "Stand with PUC."

Commenters wrote that they were concerned Fulton might be fired. And they were disappointed that Monte Butler, chairman of the college's department of psychology and social work, had been prompted to leave because of the dispute.

Butler attended the meeting between Fulton and the president last fall, and said he came away upset enough that he began looking for another job. In January he announced that he would leave Pacific Union in June, after 18 years, to become a professor of social work and social ecology at Loma Linda University, another Seventh-day Adventist institution in California.

"I always planned to retire from PUC, but between September and November, I decided I was going to leave," Butler said. "It took a number of factors to lead me to decide that, and one of those key factors was President Knight's perspective and her actions related to academic freedom."

Knight said she dropped her threats to fire Fulton after "he made it clear that he would tell his classes where he is speaking for himself versus saying something is truth."

"As we hashed through the whole thing," she added, "it all came back to that."

The dispute at Pacific Union and the efforts to resolve it have taken on a less-contentious tone than is typical elsewhere. Both professors and administrators at the college say that its church ties caused both parties to try to listen to the other side.

"There is a collegiality and an agreement to disagree in nonpersonal ways," said Fulton.

Lecourt, the academic dean, agreed. "Eighty percent of us here—students, faculty, administrators—we live together on a hill above the Napa Valley, we don't commute," she says. "We go to church together, eat together, play baseball together. I think that sense of a tear in the community is much more important to us that we need to heal that and not let it become fatal."

Still, the episode has shaken longtime professors at the college who agree with Lecourt that collegiality, not confrontation, is the way to go but who also have believe it is their responsibility to be serious scholars who give students a genuine education.

"This damages the fabric, and it's going to take some reweaving," says A. Gregory Schneider, a professor of religion and social science who has taught for 37 years at Pacific Union. Schneider plans to retire soon and has pledged to train his replacement when that person is hired. But he says he now wonders how he can tell someone to come make their career there. And, he asks, "Can I still, with my whole being, communicate to my students that this is where you ought to be?" Reported in: *Chronicle of Higher Education* online, February 7.

Pueblo, Colorado

On January 17, many at Colorado State University-Pueblo nervously awaited word from administrators on exactly how many jobs would be eliminated there. Officials had warned that the number could be as high as fifty—a prospect that angered many students and professors at the university who dispute administrators' assertions that the institution faces a deficit requiring layoffs.

Timothy McGettigan, a professor of sociology, sent out an email to students and faculty members in which he urged them to fight the cuts. His subject line was "Children of Ludlow," referring to a 1914 massacre of striking coal miners in southern Colorado. McGettigan compared the way the central system administration was treating Pueblo to the bloody way coal mine owners treated their workers 100 years ago. He went on to say that, just like a century ago, those without power were being mistreated.

He said that the announcement that afternoon would reveal who was on Chancellor Michael Martin's "hit list," and said that the chancellor was "putting a gun to the head" of those who would lose their jobs, "destroying the livelihood of the people that he is terminating" and "incinerating the best opportunity that southern Coloradans have to earn their own little piece of the American dream."

There is no doubt that there are violent images in the email, but they are historic: McGettigan's metaphors for what he thinks the administration is doing. His call to action was to urge people to oppose the cuts and attend a rally against them.

Hours after he sent the email, the university system removed his email account. A memo he received in printed form stated that the university had determined that he had violated a rule banning use of email to "intimidate, threaten, harass other individuals or interfere with the activity of others to conduct university business."

The letter—from the deputy general counsel of the university system—stated that administrators had determined that his "Children of Ludlow" email was "one in which immediate action must be taken," so McGettigan was not given a chance to argue that he had done nothing wrong. (The Colorado Conference of the American Association of University Professors has published both the email and the memo in full.)

The news that eventually came was a bit better than some feared, but 22 people (none of them tenured or tenure-track faculty) will lose their jobs. The campus AAUP has argued that no teaching jobs at all should be eliminated, and has questioned many of the budget assumptions used by the administrators.

Faculty members are particularly upset because Martin has talked about how their part of the state is not seeing population growth. They say that may be true, but that their part of the state serves many people who lack other access to higher education—many of them Latino, low-income or first-generation students—and that a state university system has obligations to all citizens, not just those in fast-growing (wealthier) counties.

But aside from the debate over the budget cuts, the action against McGettigan infuriated faculty leaders, who say it is a violation of academic freedom, and a clear example of retaliation against a professor for speaking out against the administration.

McGettigan said that the university's action has made it impossible for him to do his job since the Blackboard account for his courses is based on his university email. And he said that it was absolutely untrue that he was doing anything but exercising his rights to criticize. He said that he believes only in nonviolent protest.

"I think what the administration is saying is that you can be critical thinkers here to the extent you agree with what we say, but that anyone who would dare to engage with the administration's policies in ways that are antithetical to the administration's goal, that will not be tolerated, and those faculty will be shut down."

Jonathan Poritz, vice president of the AAUP at Pueblo and associate professor of mathematics, said that McGettigan had every right to make the historical comparison he did. "McGettigan's offending email ... makes an analogy between the famous Ludlow massacre of miners and their families in southern Colorado, instigated by mine owners in Denver, and the CSU System's recent power-play: the system has imposed significant financial cuts, whose specifics were to be decided in a matter of weeks—therefore potentially causing enormous harm to our students, colleagues, and the community—at a time when the system is in fact so flush with funds that a new football stadium is being built in Fort Collins and a new campus is being established in the Denver Metro South.

"How the administration could think that McGettigan's Ludlow metaphor rises to the level of 'safety, security, or another matter of an emergency nature' [the standard for immediate removal of an email account] is beyond me. In fact, he is concerned with the welfare of the students at our institution, with the excellence and indeed viability of our programs in the face or such an aggressive central system chancellor."

Poritz added: "Tim McGettigan speaks passionately, in person and by email, in defense of this university and its students. His words are an example of the highest purpose of academic freedom, to nurture and improve the pedagogy and scholarship of an institution of higher education, even when they go against the plans of an ambitious administrator acting as an cruel absentee landlord."

On January 20, a spokeswoman for Colorado State-Pueblo charged that McGettigan had violated the policy on use of electronic communications. Further, she released a statement from President Lesley Di Mare, in which she invoked recent incidents of violence in education. "Considering the lessons we've all learned from Columbine, Virginia Tech, and more recently Arapahoe

High School, I can only say that the security of our students, faculty, and staff are our top priority," Di Mare said. "CSU-Pueblo is facing some budget challenges right now, which has sparked impassioned criticism and debate across our campus community. That's entirely appropriate, and everyone on campus – no matter how you feel about the challenges at hand – should be able to engage in that activity in an environment that is free of intimidation, harassment, and threats. CSU-Pueblo has a wonderful and vibrant community, and the university has a bright future. I'm confident that we can solve our challenges with respectful debate and creative problem-solving so that we can focus on building that future together." Reported in: insidehighered.com, January 20.

New Haven, Connecticut

"I hope I don't get kicked out of Yale for this," wrote Yale student Sean Haufler in a blog post explaining why he had created the Chrome extension Banned Bluebook.

Haufler made the extension in response to a January uproar over the university's reaction to a student-made site, originally called Yale BlueBook+ and later renamed CourseTable, which made it possible to compare course evaluations at a glance. The creators of that site, fellow students Harry Yu and Peter Xu, were threatened with a disciplinary committee unless they took it down.

"The extension adds CourseTable's functionality to Yale's official course selection Web site in a way that doesn't infringe upon Yale's copyrighted course data," explained Haufler over e-mail. "Once you install it, the code lives in your Web browser and does some basic math to change how the course evaluations are presented."

The administration first contacted Xu and Yu about their site the week before. The registrar's office questioned how the pair obtained the copyrighted course data, expressed concern over its display of course evaluation information, and objected to their use of Yale trademarks. Despite Xu and Yu's efforts to address their concerns, Yale banned the site from university networks January 13, calling it "malicious activity," and then threatened them with disciplinary action if the site was not removed by 5 p.m. the next day. They took the site down, but launched an online petition which garnered nearly 700 signatures asking Yale to reconsider.

Yale College Dean Mary Miller addressed the issue in an open letter, writing that Xu and Yu "were unaware that they were not only violating the appropriate use policy but also breaching the trust the faculty had put in the college to act as stewards of their teaching evaluations." The evaluation information, she wrote, "became available to students only in recent years and with the understanding that the information they made available to students would appear only as it currently appears on Yale's sites—in its entirety."

According to an updated blog post from Xu and Yu, the specific format displaying evaluations information is the result of an agreement between the faculty and the Yale administration.

Haufler read Miller's argument about the evaluation information as, "you can use our course evaluation data, but only if you view the data as we tell you to view it." In fact, he was aghast at what he considered censorship by the university and assumed that the administration would realize they made a mistake, until Miller's letter appeared. But after the letter was released, he "became angry and motivated." Knowing that the university's justification for shutting down CourseTable was that it "hosted Yale's course descriptions and student evaluations," or at least derivations of them, he realized that he could do the same thing without running afoul of university rules. So he rushed to it.

"I wrote my essay and coded the Chrome extension for the next 48 hours nearly nonstop until I published them he said.

On January 20, Miller released a second open letter—and specifically addressed Haufler's innovation. "Just this weekend, we learned of a tool that replicates YBB+'s efforts without violating Yale's appropriate use policy," wrote Miller, "and that leapfrogs over the hardest questions before us." Those hardest questions, she believes, are those related to classroom evaluations.

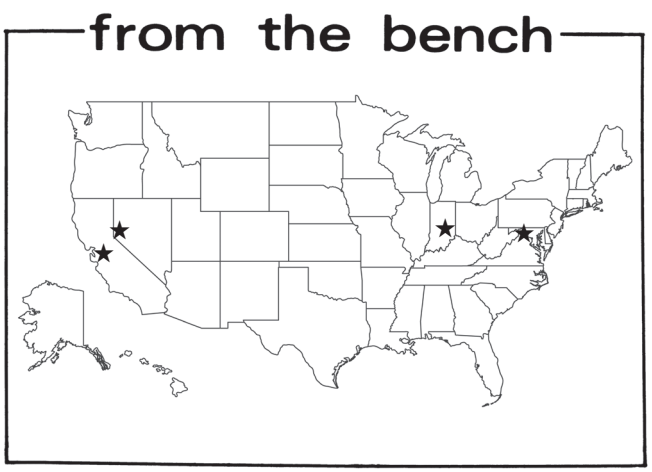
"When a faculty committee decided in 2003 to collect and post these evaluations online for student use, it gave careful consideration to the format and felt strongly that numerical data would be misleading and incomplete if they were not accompanied by student comments." CourseTable and Banned Bluebook, she argues, "encouraged students to select courses on the basis of incomplete information" by displaying the averages rather than "the richer body of information" including student comments available via official Yale sites.

But Miller also acknowledged that the university "could have been more patient" before blocking the Web site and it had "erred" in attempting to compel students to use the sanctioned services. "In the end," she wrote, "students can and will decide for themselves how much effort to invest in selecting their courses."

The university, she wrote, would be reviewing how it handled the situation—and take up the question of how to respond to developments like Haufler's extension. "Technology has moved faster than the faculty could foresee when it voted to make teaching evaluations available to students over a decade ago, and questions of who owns data are evolving before our very eyes."

While no one from the university has officially contacted Haufler so far, he said he appreciates Miller's response and hopes the university will use this as a learning experience. "The CourseTable incident was a complicated issue and we

(continued on page 69)



U.S. Supreme Court

The Freedom to Read Foundation (FTRF) and American Library Association (ALA) on February 28 joined a broad range of organizations and bookstores in filing an *amicus* brief with the U.S. Supreme Court in a case potentially affecting the right to challenge laws that infringe on the First Amendment prior to their enforcement.

The case, *Susan B. Anthony List v. Driehaus*, is on appeal to the High Court after the U.S. Court of Appeals for the Sixth Circuit affirmed a lower court ruling that the Susan B. Anthony List (SBAL) lacked standing to submit a facial (or pre-enforcement) challenge to an Ohio law regulating speech in campaign advertising. The lower court found that SBAL couldn't demonstrate that prosecution under the law was "likely" or "imminent."

In the brief, written by Michael Bamberger and Richard Zuckerman of Dentons US LLP, general counsel to Media Coalition, the *amici* argue that three decades of case law have clearly demonstrated the importance and effectiveness of allowing pre-enforcement challenges to statutes that violate the First Amendment. The brief cites 23 cases in which such statutes were found unconstitutional or were only found constitutional under narrow readings. The *amici* argue that the Sixth Circuit's definition of standing could have made it difficult for these challenges to be filed, thus creating a chilling effect on the First Amendment rights of booksellers, publishers, librarians, and others who had demonstrated that they could be subject to prosecution if the statutes were allowed to go into effect.

FTRF executive director and ALA Office for Intellectual Freedom director Barbara Jones said, "The importance of the brief submitted by FTRF, ALA, and the other organizations goes beyond the facts of any one case and speaks to the fundamental principle that Americans shouldn't have to wait for arrests or other penalties to occur in order to challenge laws that clearly violate our freedoms to speak, publish, and receive information. The library community is pleased to join this effort to preserve our right to challenge unconstitutional laws before they impair our freedom."

Media Coalition has created a web page with more information about the case, a link to the brief, and an interactive map detailing the cases cited in the brief (including many in which FTRF and ALA participated). Other parties in the brief include the American Booksellers Association, American Booksellers Foundation for Free Expression, Association of American Publishers, Comic Book Legal Defense Fund, Dark Horse Comics, and several book stores and bookseller associations. Reported in: ftrf.org, March 4.

The Supreme Court appeared evenly divided on January 15 as it heard arguments in a First Amendment challenge to a Massachusetts law that created buffer zones around abortion clinics in the state.

But a significant piece of data was missing: Chief Justice John G. Roberts Jr., who almost certainly holds the crucial vote, asked no questions. His earlier opinions suggest, however, that he is likely to provide the fifth vote to strike down the law.

The court's four more liberal members asked questions indicating that they believed that the 35-foot buffer zones created by the 2007 law were a valid response to decades of harassment and violence at abortion clinics in Massachusetts, including a shooting rampage at two in 1994.

"There was a considerable history of disturbances and blocking the entrance," Justice Ruth Bader Ginsburg said.

Justice Stephen G. Breyer said the clinic setting might justify some limits on speech. "Everyone is in a fragile state of mind," he said.

The lead plaintiff in the case, Eleanor McCullen, has said that she wants to engage in friendly conversations with women seeking abortions in an attempt to tell them they have alternatives. She added that the buffer zone frustrated her efforts and violated her First Amendment rights.

The court's more conservative members questioned the need for the law, which they said was a blunt and selective instrument. "This is not a protest case," Justice Antonin Scalia said. "These people don't want to protest abortion. They want to talk to the women who are about to get abortions and try to talk them out of it."

But Justice Breyer said that only a general prohibition on entering the buffer zone would work. "It's just tough to say whether they're counseling somebody or screaming at somebody," he said.

The justices and the lawyers arguing before them tried to convey a sense of just how long 35 feet is, pointing to parts of the courtroom and people in it. "I guess I'm just a little hung up on why you need so much space," Justice Elena Kagan told Jennifer Grace Miller, an assistant state attorney general.

Miller, the state's lawyer, said the buffer zone left ample opportunities for speech on other parts of the sidewalk near the

clinics and in other places. "No one is guaranteed any specific form of communication," she added later. "There is no guarantee, as a doctrinal matter, to close, quiet conversations."

This drew an incredulous response from Justice Anthony M. Kennedy. "Do you want me to write an opinion and say there's no free-speech right to quietly converse on an issue of public importance?" he asked.

"In speech cases," he added in a chastising tone, "when you address one problem, you have a duty to protect speech that's lawful."

Mark L. Rienzi, a lawyer for McCullen, said the law was unconstitutional for at least two reasons. In limiting its application to abortion clinics, he said, the law effectively singled out one subject. And in allowing clinic employees to stay in the zone, it favored one side of the debate, he added.

"Public sidewalks occupy a special position in First Amendment analysis," he said, adding that his argument to the justices would sound very different shouted from 35 feet away, particularly if the opposing lawyer was allowed to argue from the usual spot.

Justice Samuel A. Alito, Jr. seemed to agree that the law made impermissible distinctions among speakers based on their point of view.

Much of the argument in the case, *McCullen v. Coakley*, concerned how striking down the Massachusetts buffer zones would affect similar zones nationwide around funerals, slaughterhouses, fraternal lodges, political conventions, circuses and the sites of labor disputes.

The Supreme Court upheld a law similar to the one in Massachusetts by a 6-to-3 vote in 2000 in *Hill v. Colorado*, with Justices Scalia, Kennedy and Clarence Thomas dissenting. The court has four new members since then: Chief Justice Roberts and Justices Alito, Kagan and Sonia Sotomayor.

Chief Justice Roberts, though he asked no questions, has often been receptive to free-speech arguments, and he wrote the majority opinion in a 2011 decision overturning an award of damages for hateful protests near military funerals.

The 2000 decision upheld a Colorado law that established 100-foot buffer zones outside all health care facilities, not just abortion clinics. Inside those larger zones, the law banned approaching others within eight feet for protest, education or counseling without their consent.

Massachusetts experimented with a similar law but later replaced it with a simpler one that, among other changes, eliminated the need to determine who approached whom and whether the listener consented. Instead, the law barred everyone from entering fixed 35-foot buffer zones around entrances to reproductive health care facilities. There are exceptions for people going into or coming out of the buildings, people using the sidewalk to get somewhere else, law enforcement officials and the like, and clinic employees. Reported in: *New York Times*, January 15.

The U.S. Supreme Court on March 10 declined to hear a school district's appeal over an attempt by officials to ban breast cancer awareness bracelets bearing the message "I ♥ boobies," handing victory to two students who challenged the decision on free speech grounds.

The court's decision not to take up the case means that an August 2013 ruling by the Philadelphia-based U.S. Court of Appeals for the Third Circuit in favor of students Brianna Hawk and Kayla Martinez is left intact.

School officials at Easton Area Middle School banned seventh- and eighth-grade students from wearing the bracelets in October 2010 prior to national Breast Cancer Awareness Day. At the time, Hawk was in eighth grade and Martinez was in seventh.

The bracelets are sold by a group called the Keep-A-Breast Foundation, which supports breast cancer awareness. The group has expressed support on its website for students who have worn the bracelets against the wishes of school officials.

Both girls continued to wear the bracelets, citing their freedom of speech rights, and refused to remove them when asked. School officials punished the girls by giving them one and a half day in-school suspension. The girls also initially were banned from the school's winter ball, although they were later allowed to attend. The school district eventually banned the bracelets from all schools.

The girls, through their mothers, sued the school district in federal court in November 2010. In April 2011, the district court issued an injunction preventing the school from disciplining students for wearing the bracelets. The case is *Easton Area School District v. B.H*. Reported in: Reuters, March 10.

On January 13, the Supreme Court let stand a March 2013 ruling that established—at least in the Ninth Circuit in the western United States—that extended and sophisticated forensic analysis of a digital device requires a reasonable suspicion of wrongdoing.

The case, *United States v. Cotterman*, involved an American man who was driving back into the country from Mexico with his wife in 2007 and had his laptop cursorily searched, with a more advanced search then performed at a government facility 170 miles away. The Supreme Court declined to hear Howard Cotterman's appeal of the legality of the extensive search.

As part of a routine check, a border computer system returned a hit for Cotterman—he is a sex offender convicted on several counts, including child molestation in 1992. The agents then searched his car, finding two laptops and three digital cameras, which they also inspected. Those devices had several password-protected files.

The border agents suspected, based in part on the existence of password-protected files, that Cotterman may have been engaged in sex tourism. They interviewed him and his wife and ultimately released them—but kept the laptops and one camera. The laptop was brought to an Immigration and Customs Enforcement (ICE) office in Tucson, Arizona,

where an ICE agent performed intensive forensic search on the laptops. On one laptop, the search found 75 images of child pornography in the "unallocated space" of the hard drive, which is where deleted data resides.

Cotterman later argued for suppression of the evidence of child porn that turned up as a result of that forensic analysis. A lower court initially suppressed that evidence, which was then overruled by the Ninth Circuit Court of Appeals in March 2013.

As the Ninth Circuit judges wrote:

"Although courts have long recognized that border searches constitute a 'historically recognized exception to the Fourth Amendment's general principle that a warrant be obtained,' reasonableness remains the touchstone for a warrantless search. Even at the border, we have rejected an 'anything goes' approach.

"Mindful of the heavy burden on law enforcement to protect our borders juxtaposed with individual privacy interests in data on portable digital devices, we conclude that, under the circumstances here, reasonable suspicion was required for the forensic examination of Cotterman's laptop. Because border agents had such a reasonable suspicion, we reverse the district court's order granting Cotterman's motion to suppress the evidence of child pornography obtained from his laptop."

Cotterman's case was referred to in a recent case involving a New York-based student who had his digital devices searched at the U.S.-Canada border. That case, *Abidor et al v. Napolitano*, was dismissed in December 2013. Reported in: arstechnica.com, January 14.

The Supreme Court said January 18 that it would rule on two cases that will determine whether police can search suspects' cell phones after they've been arrested.

The twin rulings are likely to have broad implications for electronic privacy. Although a 1973 court case found that it was legal for law enforcement officers to perform a search of any containers on an arrestee's body—in order to determine whether the suspect was armed or carrying destructible evidence—the sheer amount of data carried on a mobile device these days makes it a potential source of valuable information to law enforcement agents.

On August 22, 2009, David Riley was pulled over by San Diego police for driving with expired license plates. When officers inspected the vehicle, they discovered loaded firearms and put Riley under arrest. Officers then searched Riley's smartphone, learning of his connection with gangs and other gang members. That evidence, which included photos and videos from the phone, helped lead to Riley's conviction. The case is *Riley v. California*.

The second case in question, *U.S. v. Wurie*, involves the warrantless search of a simple flip phone and its call log. Brima Wurie, a Boston man, was arrested on suspicion of dealing drugs. When Wurie was searched by police, it turned up two phones. Officers used the call log from one of those phones to locate Wurie's home, search it, and find more drugs and a firearm—a discovery that resulted in additional charges.

"Although the two cases raise the same constitutional issue, the Court did not consolidate them for review, so presumably there will be separate briefing and argument on each," wrote SCOTUSblog's Lyle Denniston.

According to Hanni Fakhoury, a staff attorney at the Electronic Frontier Foundation, the declining share of Americans using flip phones puts a greater weight on the outcome of Riley's case.

"If you're going to decide the issue, you should decide it as it pertains to a smartphone, because it's what a majority of Americans are carrying," said Fakhoury. "If the court says you can make a narrow search of a flip phone, the question is, how do you apply that to a smartphone? Can you look at photos? Text messages? … How far into the phone can you go?" Reported in: *Washington Post*, January 18.

The Supreme Court on March 3 agreed to decide whether prison officials in Arkansas may prohibit inmates from growing beards in accordance with their religious beliefs.

The policy was challenged by Gregory H. Holt, who is serving a life sentence for burglary and domestic battery. Holt said his Muslim faith required him to grow a beard.

The state's policy allows trimmed mustaches, along with quarter-inch beards for those with dermatologic problems. Prison officials said the ban on other facial hair was needed to promote "health and hygiene," to minimize "opportunities for disguise" and to help prevent the concealment of contraband.

Holt sued under the Religious Land Use and Institutionalized Persons Act, a federal law that requires prison officials to show that policies that burden religious practices advance a compelling penological interest and use the least restrictive means to do so. The United States Court of Appeals for the Eighth Circuit, in St. Louis, ruled in June that the justifications offered by the officials satisfied that standard.

Holt filed a handwritten petition in September asking the justices to hear his case, *Holt v. Hobbs*, pointing out that other courts had struck down policies banning beards in prisons. In an interim order in November, the Supreme Court ordered that Holt be allowed to grow a half-inch beard.

In their response to Holt's Supreme Court petition, prison officials told the justices that "homemade darts and other weapons" and "cellphone SIM cards" could be concealed in even half-inch beards. They added that they did not welcome the task of monitoring the lengths of inmates' beards.

In a reply brief, Holt, now represented by Douglas Laycock, a law professor at the University of Virginia, said 39 state corrections systems and the federal system allow prisoners to grow beards. He added that the justifications for the policy were illogical as there were easier places

to hide contraband—shoes, say—than in a short beard. Reported in: *New York Times*, March 3.

schools

Morgan Hill, California

A federal appeals court has upheld a California school administrator who barred white students from wearing U.S. flag apparel during a high school's Cinco De Mayo celebration because of hostilities between the white students and students of Mexican descent.

The case stemmed from the Cinco de Mayo celebration at Live Oak High School in the Morgan Hill Unified School District in 2010. The school has a history of violence and gang issues, and the 2009 Cinco de Mayo event had sparked a minor clash between white students and students of Mexican descent.

The next year, several white students wore American flag shirts to school on Cinco de Mayo, a May 5 celebration of Mexican heritage and pride that is primarily observed in the United States. Some students of various ethnic backgrounds expressed concerns that the U.S. flag shirts were intended to provoke Mexican or Mexican-American students.

During lunchtime, a group of students of Mexican descent gathered in the school's outdoor quad. One asked Assistant Principal Daniel Rodriguez why the white students got to wear "their flag" while Mexican students could not wear "our flag." (The record suggests that at least some students were allowed to wear Mexican-flag clothing and were not required to stop.)

Rodriguez met with the white students and told them they had to turn their U.S. flag shirts inside out or else go home. Two students who were wearing shirts with less prominent flag designs were allowed to return to class. Two other students refused to turn their shirts inside out and opted to go home. They were not disciplined. Those students, identified only as D.M. and D.G., and their parents sued the school district and Rodriguez, among others, alleging a violation of the First Amendment free speech rights.

A federal district judge in 2011 dismissed the school district as a defendant on sovereign immunity grounds, which the appeal didn't challenge. The district judge granted summary judgment to Rodriguez, holding that the assistant principal did not violate the students' rights.

In its February 27 decision in *Dariano v. Morgan Hill Unified School District*, a three-judge panel of the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, unanimously upheld the district court.

"There was evidence of nascent and escalating violence at Live Oak," the appeals court said, with the school imposing "minimal" restrictions on student expression. "In keeping with our precedent, school officials' actions were tailored to avert violence and focused on student safety."

"The events of 2010 took place in the shadow of similar disruptions a year earlier, and pitted racial or ethnic groups against each other," the court added. "Moreover, students warned officials that there might be physical fighting at the break."

The opinion by U.S. Circuit Judge M. Margaret McKeown noted that "our role is not to second-guess the decision to have a Cinco de Mayo celebration or the precautions put in place to avoid violence."

Usually when a judge phrases the idea that way, it means that he or she actually does have at least some doubts about a school's policy or decision. Reported in: Education Week, February 27.

Greensburg, Indiana

A federal appeals court has struck down an Indiana school district's policy requiring short hair for boys on the basketball team, ruling that the lack of a similar policy for girls'-team basketball players results in illegal sex discrimination.

A panel of the U.S. Court of Appeals for the Seventh Circuit, in Chicago, ruled 2-1 for a boy identified as A.H., who beginning in junior high school sought to wear his hair longer than short-hair policy permitted.

Greensburg Junior High School in Greensburg has a code of conduct for athletes (not the general student population) that bars hair styles that may obstruct vision or draw attention to the athlete, such as mohawks, dyed hair, or having numbers or initials cut into the hair. The hair-length policy, though, was established by the basketball coach, and requires hair to be cut above the "ears, eyebrows, and collar" to promote a "clean-cut image."

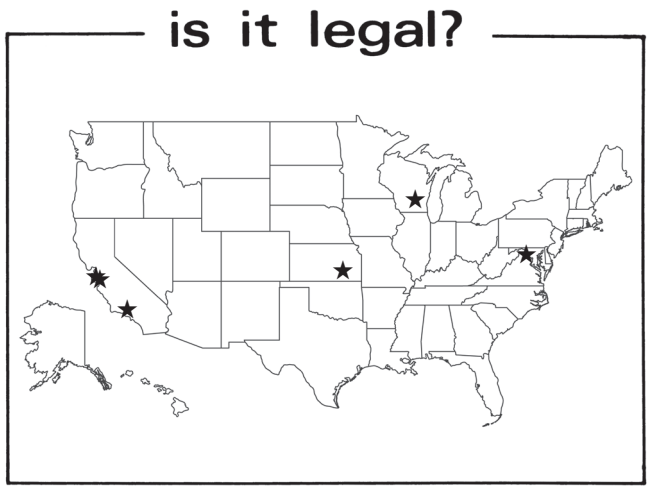
A.H. is now a high school junior, and the court worked on the assumption that Greensburg High School had the same policy as the junior high.

The policy evokes the look and era of "Hoosiers," the 1986 basketball movie set in small-town Indiana in the 1950s. But basketball great Larry Bird, who wore long hair that was typical of his era when he played high school ball in French Lick, Indiana, in the early 1970s, would not have been in compliance with the Greensburg policy.

The Seventh Circuit court said in its February 24 decision in *Hayden v. Greensburg Community School Corporation* that based on jointly stipulated facts, the hair-length policy violated A.H.'s 14th Amendment right to equal protection of the law and Title IX's prohibition against sex discrimination in federally funded schools. That's because there is no comparable limitation on the hair length of girls basketball players in the district, the court said.

"The hair-length policy applies only to male athletes, and there is no facially apparent reason why that should be so," U.S. Circuit Judge Ilana D. Rovner wrote for the majority. "Girls playing interscholastic basketball have the same need as boys do to keep their hair out of their eyes,

(continued on page 69)



schools

Wichita, Kansas

The Kansas Senate may consider a bill that would make it easier to prosecute teachers, librarians or school principals for exposing students to offensive materials.

Senate Bill 401, approved by the Senate Judiciary Committee in early March, was drafted in response to a January incident at a Shawnee Mission middle school in which a poster used in sex education classes was put on a classroom door. Supporters of the legislation say a clause in the current law protects materials that are part of "an approved course or program of instruction." They say that lets schools ignore community standards for what might be considered "harmful to minors."

Opponents of the bill – including education groups and the American Civil Liberties Union – say it amounts to broad-brush censorship and would make teachers, libraries or anyone with supervision of a public establishment culpable for even accidental exposure to material somehow deemed offensive. That potentially could include works such as Michelangelo's statue of David or Shakespeare's Romeo and Juliet, opponents say.

Senate President Susan Wagle (R-Wichita) said she thinks the bill will return to the Judiciary Committee for some more work. It is unclear when, or if, the bill will get full hearing on the Senate floor.

Phillip Cosby is state director for the American Family Association of Kansas and Missouri. His group testified this week in support of the bill. "It's a chilling hurdle for any prosecutor or any grand jury or any person who wants to question educators in Kansas," he said of the current state law. "It almost translates to the word 'license.' It gives them a pass. … And parents are stymied."

Holly Weatherford, spokeswoman for the Kansas chapter of the ACLU, said the bill is "facially unconstitutional."

"The way this bill is currently written, it is so overly broad that it's hard to even evaluate what all of the implications or consequences are of its reach," she said.

Randy Mousley, president of United Teachers of Wichita, said the proposed legislation is "a solution in search of a non-existent problem. It's just an overreach where some particular group is trying to impose their values on everybody else in society," he said. "There's not that many instances (of teaching materials being challenged), but the unforeseen consequences are numerous."

The bill was introduced by Sen. Mary Pilcher-Cook (R-Shawnee), who also sponsored a bill that would require parental consent for students to receive sex education in public schools. Both bills were prompted by the middle school poster, which was part of a sex ed program called "Making a Difference," she said.

The poster was titled "How Do People Express Their Sexual Feelings?" and featured a list of seventeen behaviors or sex acts, including cuddling, holding hands, massage, kissing, oral sex and anal sex. It was removed after a parent complained, and Shawnee Mission district officials later said in a letter to parents that the curriculum had been suspended "pending a detailed review of the material."

"Because of the way the law is written, although everyone else has to follow community standards, schools do not," Pilcher-Cook said. "Right now if a teacher were to give pornography (to a student) … it is not likely at all that a prosecutor would take the case because there is such a high hurdle protecting our schools."

Steve Maack, who teaches senior English in East High's International Baccalaureate program, called that claim and the bill "absurd."

"They're essentially criminalizing the teaching profession. That's what it comes down to," Maack said. "It says, 'You, as a professional, are not capable of choosing your own materials without the threat of criminal prosecution if you make the wrong step.' If something like this were to pass, I would leave the state. I can't even imagine teaching under these circumstances," he said. "I think it's horrible, it's insulting, and ultimately it's bad for kids."

Officials with the Kansas-National Education Association said in a blog post that the proposed bill would "purge literature from our schools, censor art classes, and stop field trips" because teachers likely would self-censor to protect themselves from potential prosecution.

"A teacher who takes a field trip to the state capitol and suddenly notes the bare-breasted woman in the artwork in the rotunda can be accused of recklessly exposing students to nudity," the group said.

Cosby, of the American Family Association, said such works still would be protected under a clause in the law that protects materials that a "reasonable person" would find

to have "serious literary, scientific, educational, artistic or political value for minors."

"They're saying somehow this is equated with art, but no, no, no," he said. "That is not the issue in front of us."

Wagle, the Senate president, said the bill – particularly the change of one word – needs to be revisited by the Judiciary Committee. "There was a lot of questions raised about a one-word change. … 'Knowingly' was changed to 'recklessly,' " Wagle said. "And I think we're going to put that bill back in committee and look at that question. "Sometimes you get a bill out and catch something that's wrong. And we did that today." Reported in: Wichita Eagle, March 4.

government surveillance

Washington, D.C.

The Obama administration says it will allow Internet companies to give customers a better idea of how often the government demands their information, but will not allow companies to disclose what is being collected or how much.

The new rules—which have prompted Google, Microsoft, Yahoo and Facebook to drop their respective lawsuits before the nation's secret surveillance court—also contain a provision that bars start-ups from revealing information about government requests for two years.

Attorney General Eric H. Holder, Jr. and James R. Clapper, director of national intelligence, said the new declassification rules were prompted by President Obama's speech on intelligence reform earlier in January.

"Permitting disclosure of this aggregate data addresses an important area of concern to communications providers and the public," Holder and Clapper said in a joint statement.

The companies' dispute began last year after a former government contractor, Edward J. Snowden, revealed that FBI and National Security Agency surveillance programs rely heavily on data from United States email providers, video chat services and social networking companies.

"We filed our lawsuits because we believe that the public has a right to know about the volume and types of national security requests we receive," a representative for Google, Microsoft, Yahoo and Facebook said in a joint statement. "While this is a very positive step, we'll continue to encourage Congress to take additional steps to address all of the reforms we believe are needed."

Privacy advocates, however, said the new rule will prevent the public from knowing if the government is snooping on an email platform or chat service provided by a young tech outfit.

Sometimes, FBI agents demand data with administrative subpoenas known as National Security Letters. Other times, the Justice Department makes the demand under the authority of the surveillance court but without a specific warrant. Either way, the justification is typically secret and companies are prohibited from saying much.

The companies wanted to be able to say how many times they received court orders, known as FISA orders, for the Foreign Intelligence Surveillance Act. The government opposed that. Currently, they are allowed to disclose only the number of National Security Letters, but only in increments of 1,000. That made it impossible for users to know whether government agents grabbed data from their email provider once or 999 times.

Companies say that has hurt their businesses. Forrester Research projected the fallout from Snowden's disclosures could cost the so-called cloud computing industry as much as $180 billion—a quarter of its revenue—by 2016.

Under the new agreement, companies will be able to disclose the existence of FISA court orders. But they must choose between being more specific about the number of demands or about the type of demands. Companies that want to disclose the number of FISA orders and National Security Letters separately can do so as long as they publish only in increments of 1,000. Or, companies can narrow the figure to increments of 250 if they lump FISA court orders and National Security Letters together.

The technology firms will be allowed to publish the information every six months, with a six-month delay. So data published at midyear would cover the last half of the previous year. Companies will also be allowed to release the number of "selectors"—user names, email addresses or Internet addresses, for instance—that the government sought information about.

On January 27, Apple became the first technology company to amend its latest transparency report to reflect the new guidelines. The Justice Department had endorsed the new rules months ago but intelligence officials argued they still revealed too much. But the new rule for start-ups persuaded intelligence officials, a United States official with knowledge of the discussions said. The Justice Department proposed the changes to the companies in late January and within days they agreed to drop their case before the FISA court.

Privacy advocates point out that the new rules still fall short of various proposals before Congress, including the Surveillance Order Reporting Act, a bill introduced by Zoe Lofgren (D-Calif.), and several other bills proposed by both Democrats and Republicans.

"The bottom line is that this is a positive step forward but still falls short of proposals before Congress right now," said Harley Geiger, a deputy director for the Center for Democracy and Technology. "It's a good step, but a temporary step towards greater transparency."

But Ladar Levison, the founder of Lavabit, a secure email service used by Snowden, said the new rules cast doubt on young companies and didn't provide the information consumers really need. "They could be ordered to turn over their source code to the government. A single request could cover 1,000 different user accounts," Levison said. "Just simply disclosing the number of FISA court orders

doesn't tell you how pervasive the request is or how much information is being turned over." Reported in: *New York Times*, January 27.

Washington, D.C.

When a smartphone user opens Angry Birds, the popular game application, and starts slinging birds at chortling green pigs, spies could be lurking in the background to snatch data revealing the player's location, age, sex and other personal information, according to secret British intelligence documents.

In their globe-spanning surveillance for terrorism suspects and other targets, the National Security Agency and its British counterpart have been trying to exploit a basic byproduct of modern telecommunications: With each new generation of mobile phone technology, ever greater amounts of personal data pour onto networks where spies can pick it up.

According to dozens of previously undisclosed classified documents, among the most valuable of those unintended intelligence tools are so-called leaky apps that spew everything from the smartphone identification codes of users to where they have been that day.

The NSA and Britain's Government Communications Headquarters were working together on how to collect and store data from dozens of smartphone apps by 2007, according to the documents, provided by Edward J. Snowden, the former NSA contractor. Since then, the agencies have traded recipes for grabbing location and planning data when a target uses Google Maps, and for vacuuming up address books, buddy lists, telephone logs and the geographic data embedded in photographs when someone sends a post to the mobile versions of Facebook, Flickr, LinkedIn, Twitter and other Internet services.

The eavesdroppers' pursuit of mobile networks has been outlined in earlier reports, but the secret documents, shared by the *New York Times*, *The Guardian* and ProPublica, offer far more details of their ambitions for smartphones and the apps that run on them. The efforts were part of an initiative called "the mobile surge," according to a 2011 British document, an analogy to the troop surges in Iraq and Afghanistan. An NSA analyst's enthusiasm was evident in the breathless title—"Golden Nugget!"—given to a slide for a top-secret talk in 2010 that described iPhones and Android phones as rich resources, another document noted.

The scale and the specifics of the data haul are not clear. The documents show that the NSA and the British agency routinely obtain information from certain apps, particularly those introduced earliest to cellphones. With some newer apps, including Angry Birds, the agencies have a similar ability, the documents show, but they do not make explicit whether the spies have put that into practice. Some personal data, developed in profiles by advertising companies, could be particularly sensitive: A secret British intelligence document from 2012 said that spies can scrub smartphone apps to collect details like a user's "political alignment" and sexual orientation.

President Obama announced new restrictions in January to better protect the privacy of ordinary Americans and foreigners from government surveillance, including limits on how the NSA can view the metadata of Americans' phone calls—the routing information, time stamps and other data associated with calls. But he did not address the information that the intelligence agencies get from leaky apps and other smartphone functions.

And while Obama expressed concern about advertising companies that collect information on people to send tailored ads to their mobile phones, he offered no hint that American spies have routinely seized that data. Nothing in the secret reports indicates that the companies cooperated with the spy agencies to share the information; the topic is not addressed.

The agencies have long been intercepting earlier generations of cellphone traffic like text messages and metadata from nearly every segment of the mobile network—and, more recently, computer traffic running on Internet pipelines. Because those same networks carry the rush of data from leaky apps, the agencies have a ready-made way to collect and store this new resource. The documents do not address how many users might be affected, whether they include Americans or how often, with so much information collected automatically, analysts would see personal data.

"NSA does not profile everyday Americans as it carries out its foreign intelligence mission," the agency wrote in response to questions about the program. "Because some data of U.S. persons may at times be incidentally collected in NSA's lawful foreign intelligence mission, privacy protections for U.S. persons exist across the entire process." Similar protections, the agency said, are in place for "innocent foreign citizens."

The British spy agency declined to comment on any specific program, but said all its activities complied with British law.

Two top-secret flow charts produced by the British agency in 2012 showed incoming streams of information skimmed from smartphone traffic by the Americans and the British. The streams were divided into "traditional telephony"—metadata—and others marked "social apps," "geo apps," "http linking," webmail, MMS and traffic associated with mobile ads, among others. (MMS refers to the mobile system for sending pictures and other multimedia, and http is the protocol for linking to websites.)

In charts showing how information flows from smartphones into the agency's computers, analysts included questions to be answered by the data, like "Where was my target when they did this?" and "Where is my target going?"

As the program accelerated, the NSA nearly quadrupled its budget in a single year, to $767 million in 2007 from $204 million, according to a top-secret analysis written by

Canadian intelligence around the same time.

Even sophisticated users are often unaware of how smartphones offer spies a unique opportunity for one-stop shopping for information. "By having these devices in our pockets and using them more and more," said Philippe Langlois, who has studied the vulnerabilities of mobile phone networks and is the founder of the Paris-based company Priority One Security, "you're somehow becoming a sensor for the world intelligence community."

Smartphones almost seem to make things too easy. Functioning as phones to make calls and send texts and as computers to surf the web and send emails, they both generate and rely on data. One secret report showed that just by updating Android software, a user sent more than 500 lines of data about the phone's history and use onto the network.

Such information helps mobile advertising companies, for example, create detailed profiles of people based on how they use their mobile device, where they travel, what apps and websites they open, and other factors. Advertising firms might triangulate web shopping data and browsing history to guess whether someone is wealthy or has children.

The NSA and the British agency busily scoop up this data, mining it for new information and comparing it with their lists of intelligence targets. One secret British document from 2010 suggested that the agencies collected such a huge volume of "cookies"—the digital traces left on a mobile device or a computer when a target visits a website—that classified computers were having trouble storing it all. "They are gathered in bulk, and are currently our single largest type of events," the document said.

The two agencies displayed a particular interest in Google Maps, which is accurate to within a few yards or better in some locations. Intelligence agencies collected so much data from the app that "you'll be able to clone Google's database" of global searches for directions, according to a top-secret NSA report from 2007.

"It effectively means that anyone using Google Maps on a smartphone is working in support of a GCHQ system," a secret 2008 report by the British agency said.

In December, The *Washington Post*, citing the Snowden documents, reported that the NSA was using metadata to track cellphone locations outside the United States and was using ad cookies to connect Internet addresses with physical locations.

In another example, a secret 20-page British report dated 2012 included the computer code needed for plucking the profiles generated when Android users play Angry Birds. The app was created by Rovio Entertainment, of Finland, and has been downloaded more than a billion times, the company has said.

Rovio drew public criticism in 2012 when researchers claimed that the app was tracking users' locations and gathering other data and passing it to mobile ad companies. In a statement on its website, Rovio says that it may collect its users' personal data, but that it abides by some restrictions. For example, the statement says, "Rovio does not knowingly collect personal information from children under 13 years of age."

The secret report noted that the profiles vary depending on which of the ad companies—which include Burstly and Google's ad services, two of the largest online advertising businesses—compiles them. Most profiles contain a string of characters that identifies the phone, along with basic data on the user like age, sex and location. One profile notes whether the user is currently listening to music or making a call, and another has an entry for household income.

Another ad company creates far more intrusive profiles that the agencies can retrieve, the report said. The names of the apps that generate those profiles were not given, but the company was identified as Millennial Media, which has its headquarters in Baltimore.

In securities filings, Millennial documented how it began working with Rovio in 2011 to embed ad services in Angry Birds apps running on iPhones, Android phones and other devices. According to the report, the profiles created by Millennial contain much of the same information as others, but several categories that are listed as "optional," including ethnicity, marital status and sexual orientation, suggest that much wider sweeps of personal data may take place.

Possible categories for marital status, the secret report said, include single, married, divorced, engaged and "swinger"; those for sexual orientation are straight, gay, bisexual and "not sure." It is unclear whether the "not sure" category exists because so many phone apps are used by children, or because insufficient data may be available.

There is no explanation of precisely how the ad company defined the categories, whether users volunteered the information or whether the company inferred it by other means. Nor is there any discussion of why all that information would be useful for marketing—or intelligence.

The agencies have had occasional success, at least by their own reckoning, when they start with something closer to a traditional investigative tip or lead. The spies say that tracking smartphone traffic helped break up a bomb plot by Al Qaeda in Germany in 2007, and the NSA boasted that to crack the plot, it wove together mobile data with emails, logins and web traffic. Similarly, mining smartphone data helped lead to the arrests of members of a drug cartel hit squad in the killing of an American Consulate employee in Mexico in 2010.

But the data, whose volume is soaring as mobile devices have begun to dominate the technological landscape, is a crushing amount of information for the spies to sift through. As smartphone data builds up in NSA and British databases, the agencies sometimes seem a bit at a loss on what to do with it all, the documents show. A few isolated experiments provide hints as to how unwieldy the data can be.

In 2009, the American and British spy agencies each

undertook a brute-force analysis of a tiny sliver of their cellphone databases. Crunching just one month of NSA cellphone data, a secret report said, required 120 computers and turned up 8,615,650 "actors"—apparently callers of interest. A similar run using three months of British data came up with 24,760,289 actors.

"Not necessarily straightforward," the report said of the analysis.

The agencies' extensive computer operations had trouble sorting through the slice of data. Analysts were "dealing with immaturity," the report said, encountering computer memory and processing problems. The report made no mention of anything suspicious in the data. Reported in: *New York Times*, January 28.

net neutrality

Washington, D.C.

Regulators are taking another crack at their effort to keep the web free and open, introducing new rules that would discourage Internet service providers from charging companies to stream their movies, music and other content through a faster express lane.

The proposal, unveiled by the Federal Communications Commission February 19, is part of a continuing battle over the basic pipelines through which information flows on the Internet. With the latest plan, the FCC is hewing close to previous efforts—albeit with some technical differences—with rules that would prevent Internet service providers from blocking any legal sites or services from consumers and would aim to restrict, but not outlaw, discrimination.

An online petition has attracted more than 105,000 signatures since January 14, when a federal appeals court ruled that the Federal Communications Commission had overstepped its authority regarding so-called network neutrality.

Broadband players like Verizon and Time Warner Cable have spent billions of dollars upgrading their infrastructure, and they argue that they should manage their networks as they like. They are pushing, for example, to give Netflix, Amazon and other content providers faster access to their customers at a cost.

But regulators want to prevent such deals, saying large, rich companies could have an unfair advantage. The worry is that innovation could be stifled, preventing the next Facebook or Google from getting off the ground. Consumer advocates have generally sided with regulators in the belief that Internet providers should not give preferential treatment to content companies willing to pay extra—a cost that could be passed on to customers.

The new proposal came as the FCC was considering Comcast's bid to buy Time Warner Cable. The deal, which would unite two of the nation's largest cable and broadband providers, has raised concerns that these bigger players would have the heft to strong-arm Internet content companies into paying for the right to reach customers.

Tom Wheeler, who took over the FCC in November, has made so-called net neutrality a core issue for the agency. Under the latest proposal, Wheeler said that broadband companies would be subject to strict requirements to disclose their practices and would face greater enforcement efforts if they strayed from their promises.

"Preserving the Internet as an open platform for innovation and expression while providing certainty and predictability in the marketplace is an important responsibility of this agency," Wheeler said in a statement.

The plan represents a reboot of sorts for the FCC. Two previous efforts were thrown out by the U.S. Court of Appeals for the District of Columbia Circuit, the first in a 2010 case filed by Comcast. Despite the ruling, Comcast agreed to follow the rules as a condition of its purchase of NBCUniversal. Comcast said in February that this agreement would extend to its purchase of Time Warner Cable.

In another case, brought by Verizon, a federal appeals court ruled in January that a similar set of the FCC's rules illegally treated Internet service providers as regulated utilities, like telephone companies. But the court said that the commission did have authority to oversee Internet service in ways that encourage competition.

In essence, that ruling expanded the commission's oversight, prompting the regulator to introduce the latest plan.

The main differences with the latest rules are technical, rather than substantive. In a strictly legal sense, the FCC will cite another part of the law—Section 706 of the Communications Act—for its authority. Some of the rules would also be enforced case-by-case, avoiding a "bright line" regulation that the court said was so strict that it treated broadband companies like regulated telephone service.

In taking advantage of the ruling, the FCC will not seek immediately to reclassify Internet service as a telecommunications service, subject to rate regulation and other oversight. Wheeler said that the commission would retain the right to do so, however, if its new rules were approved and did not appear to be working adequately. The commission also said it would not appeal the January court ruling.

One portion of the new proposal would significantly expand what are called the Open Internet rules. Wheeler said that the commission would look closely at overruling state laws that restrict the ability of cities and towns to offer broadband service to residents. That possibility was raised in a dissent to the court's recent opinion.

Consumer advocacy and public interest groups—many of which had pressed the FCC to regulate broadband companies the same way as utilities—expressed cautious optimism about the commission's proposal.

"While skeptical that the FCC's initial focus on Section 706 will yield meaningful results, we are encouraged to see that the FCC plans to keep its 'reclassification' proceeding open," Gene Kimmelman, president of Public Knowledge, said in a statement.

But the FCC's plan was poorly received by the agency's two Republican commissioners. Mike O'Reilly, the most recently appointed commissioner, said he was "deeply concerned by the announcement that the FCC will begin considering new ways to regulate the Internet."

"As I have said before, my view is that Section 706 does not provide any affirmative regulatory authority," he added, referring to the section of the Communications Act cited by the court. "We should all fear that this provision ultimately may be used not just to regulate broadband providers, but eventually edge providers," or Internet content companies, he said.

Republican congressmen also expressed dismay. "No matter how many times the court says 'no,' the Obama administration refuses to abandon its furious pursuit of these harmful policies to put government in charge of the web," said a statement from Representative Fred Upton of Michigan, chairman of the committee that oversees the FCC, and Representative Greg Walden of Oregon, leader of the technology subcommittee. "These regulations are a solution in search of a problem."

But the agency has five commissioners—three of whom, including Wheeler, are Democrats. So it is likely the rules will still get approved.

The FCC immediately began accepting public comments on the outline of its new proposal, although it has not yet written the formal rules. The commission said it hoped to consider a formal set of rules by late spring or early summer. Reported in: *New York Times*, February 19.

copyright

Los Angeles, California

The fight began as a lawsuit between two bloggers over a rude hand gesture, but when lawyers representing two of California's signature industries showed up in federal court in Boston, it became part of a growing battle between Hollywood and Silicon Valley over the rules governing how and where creative works can be used.

For decades, Hollywood practically owned the laws that protect copyrights and other forms of intellectual property. The studios and their allies in the music industry dominated congressional debates whenever the laws came up for an overhaul.

Now, however, Congress has begun an update of the nation's copyright law—most of which predates not just the Internet, but even widespread use of computers. And as the legislation proceeds along a lengthy path, the Hollywood lobby is struggling not to get outmaneuvered by an emboldened and increasingly sophisticated coalition of Silicon Valley technology firms, digital rights groups and free marketeers.

Intellectual property rules until recently rarely attracted much public attention. But they have long been crucial to the film industry's profitable business model. Protecting them is a priority, which is why lawyers for some of the industry's biggest players rushed to the courthouse in Boston to intervene in an otherwise obscure suit.

The case had started after Gina Crosley-Corcoran, a blogger with strong feelings about giving birth at home, posted a picture of herself directing an obscene gesture at Amy Tuteur, another blogger who writes about obstetrics and parenting. When Tuteur posted the picture on her blog, Crosley-Corcoran sent her Internet provider what is known as a takedown notice, threatening legal action if the image was not immediately removed. Tuteur sued Crosley-Corcoran, claiming she was wrongly trying to use the copyright law to stifle free expression.

The studios feared that if Tuteur won, the case could damage a legal tool, the takedown demand, which they use extensively. Their intervention to protect the law was routine. What was unusual was what happened next: The studio lawyers found attorneys for the Electronic Frontier Foundation at court to fight them.

That confrontation, in which Hollywood so far has prevailed, is part of a larger shift. Two years ago, tech firms and digital rights groups mobilized millions of voters to derail major antipiracy laws championed by the studios. On January 18, 2012, Wikipedia's millions of users found the site blacked out—save for a warning that antipiracy legislation Hollywood was pursuing would make it impossible for them to use the Internet the way they wanted. Thousands of other sites, including Google, mounted protests in tandem. Congress was deluged with letters and petitions against the Stop Online Piracy Act.

Since then, "everything has changed," said Pamela Samuelson, director of the Center for Law and Technology at UC Berkeley. "This has become something a lot of people feel strongly about."

Now, Hollywood is increasingly finding itself playing defense. In November, for example, amid charges by Sen. Ron Wyden (D-Ore.) that the Motion Picture Association of America knew more than he did about the U.S. position in negotiations over a major Pacific trade treaty, WikiLeaks went to work getting and publishing a draft. More protest followed.

"This is the kind of thing that would have gotten pushed through without much public comment ten years ago," said Corynne McSherry, intellectual property director at the Electronic Frontier Foundation. "That is not happening now."

Film industry officials and their backers in Congress say Hollywood is getting miscast as a villain in its bid to do something most Americans support: stop the online theft of films.

As copyright overhaul hearings got underway last year, Rep. Melvin Watt (D-N.C.) lamented "the shift in public discourse about copyright away from the people who actually devote their talent to create works for the benefit of society."

"Free speech does not mean free stuff," he cautioned.

Michael O'Leary, executive vice president of global policy for the MPAA, denounces as "ludicrous" the idea "that our industry has adopted a policy that we are somehow restricting free speech. With the possible exception of the news media, there is not an industry out there that is more reliant on free speech than we are," he said.

The griping that Hollywood has special access in Washington is ironic, he said, coming from a tech coalition backed by "large corporations frequently on the cover of the paper having breakfast with the president."

But Hollywood is not just tangling with the likes of Google. It is also bumping against savvy activists like Derek Khanna. As a staffer at the House Republican Study Committee, Khanna wrote a scathing report in 2012 declaring that copyright policies cherished by Hollywood amounted to corporate welfare. Some lawmakers squawked. The committee jettisoned the report and let Khanna go.

But Khanna, now a visiting fellow at Yale Law School, had awakened interest among influential conservative think tanks and commentators, who have begun pressuring Republican lawmakers to reconsider a longtime alliance with moviemakers.

While the tech activists have sought to change the way the public engages with Washington, they have also stolen a few pages out of the Hollywood lobbying script. Google and other firms are spending lavishly on lobbyists, and also kicking funds toward advocacy groups with clout.

As the Stop Online Piracy Act debate raged, one of Hollywood's staunchest allies was the influential conservative group Americans for Tax Reform, famous for pressuring candidates to sign pledges vowing never to vote for tax hikes. Recent disclosure forms revealed the organization had received a $100,000 contribution from the MPAA around the time it was crusading for the piracy law.

After the piracy proposal was defeated and a new one emerged, the organization had become less enthusiastic. Around that time, records show, Americans for Tax Reform got a new donor: Google. Reported in: *Los Angeles Times*, February 17.

Mountain View, California

In a filing with the district court, the Authors Guild gave notice that it is appealing Judge Denny Chin's decision to dismiss its copyright suit over Google's library scanning program (see *Newsletter*, January 2014, p. 18). There was no brief filed at this time, only a basic notice of appeal to the Second Circuit. But the filing makes good on the Authors Guild's vow to file an appeal.

In a statement following the decision, Authors Guild executive director Paul Aiken told *Publishers' Weekly* that Chin's decision represented "a fundamental challenge to copyright that merits review by a higher court." Aiken claims that Google's unauthorized mass digitization and exploitation far exceeds the bounds of the fair use defense."

The appeal could be complicated by fact that the Second Circuit is already preparing to rule on a parallel case, *Authors Guild v. HathiTrust*. In that case, the Authors Guild sued a collective of Google's library scanning partners, but, like Chin, Judge Harold Baer delivered an emphatic summary judgment ruling against the guild. And in a hearing in late October, the Appeals Court seemed likely to affirm that ruling.

In his November decision, Chin not only dismissed the case against Google, he delivered a ringing endorsement of Google's scanning program. "In my view, Google Books provides significant public benefits," Chin wrote. "It advances the progress of the arts and sciences, while maintaining respectful consideration for the rights of authors and other creative individuals, and without adversely impacting the rights of copyright holders."

Chin's decision came after more than eight years of legal wrangling—including three years spent unsuccessfully stumping together for a controversial settlement. In October of 2012, publishers dropped their lawsuit against Google after a settlement. Reported in: *Publishers Weekly,* December 30.

privacy

Menlo Park, California

Facebook has been hit with a second potential class-action lawsuit accusing it of violating users' privacy by scanning their messages to each other.

"Facebook's desire to harness the myriad data points of its users has led to overreach and intrusion on the part of the company as it mines its account holders' private communications for monetary gain," Los Angeles resident David Shadpour alleges in the new complaint, filed in January in the Northern District of California.

Shadpour's lawsuit, like a similar one filed late last year by Matthew Campbell and Michael Hurley, focuses on allegations that the social networking service scans private messages in order to determine whether they contain URLs to other Web sites. When Facebook finds URLs within messages, the company counts those links as "likes" and includes them in the total number of "likes" that appear on publishers' pages, according to the complaint.

"Contrary to its representations . . . 'private' Facebook messages are in fact scanned by the company in an effort to glean, store and capitalize on the contents of its user's communications," Shadpour alleges. He is accusing Facebook of violating California state laws.

Allegations that Facebook intercepts links within messages date to 2012, when a security researcher reported that Facebook considers such URLs as "likes." At the time, Facebook acknowledged that it includes links in the "like-counter," but said it doesn't publicly associate users' names with the content.

It's not clear why consumers waited nearly two years to challenge the alleged practice in court, but one possibility is that the litigation was fueled by an anti-Google privacy ruling issued last year by U.S. District Court Judge Lucy Koh. She said that Google potentially violates the wiretap law by scanning Gmail messages in order to serve contextual ads.

Google recently asked Koh to send that matter to the U.S. Court of Appeals for the Ninth Circuit, arguing that the ruling could have "widespread effects on a broad swath of Internet industries." Google called Koh's attention to the lawsuit against Facebook filed by Campbell and Hurley.

Google says that the Facebook lawsuit is "directly relevant" to Google's request to appeal: "It demonstrates that plaintiffs in other matters are filing claims based on the unsettled interpretation" of electronic privacy laws, Google argues. Koh hasn't yet ruled on the request. Reported in: Online Media Daily, January 27.

Madison, Wisconsin

New legislation should shield Wisconsin job seekers from prospective employers who want access to their private social media accounts. Authored by Rep. Melissa Sargent (D-Madison), SB 223 prohibits employers, schools and landlords from requesting the passwords for applicant, student or potential tenants' Facebook and other social media pages. The legislation was introduced in 2013, but was passed in late January by both the Wisconsin Assembly and Senate. Gov. Scott Walker was expected to sign the bill into law later this year.

Once law, the bill will protect people from being penalized or discriminated against by refusing to turn over personal Internet and social media account information. The legislation does not, however, prevent an employer from observing or acting on a person's publicly-available social media data.

Sargent said she decided to work on the legislation after seeing that the messaging aspects of social media platforms were being used as primary communication vehicles, instead of just fun diversions. She believes the bill will protect the Fourth Amendment rights of the account holder and the people with whom that person is communicating.

Sargent was adamant that if an employer is not allowed to ask an employee or prospective employee for their private snail mail or emails, then they shouldn't have access to private social media information either.

"If someone has your login and password, they can see all that backend stuff … and it's that type of protection that I am taking into account in bringing our laws up-to-date with the times," Sargent said.

Wisconsin would be one of several states to adopt this kind of legislation. Washington set social media privacy policy early last year, while a New Jersey bill on social media protection went into effect last December. The Garden State was the twelfth state in the U.S. to implement a law regulating social media privacy in the workplace.

Sheila Gladstone, principal attorney with the Lloyd Gosselink Rochelle & Townsend law firm in Austin, Texas, noted that fifteen more states have a social media password protection law pending. She added that a similar law was proposed but didn't pass in Texas, but she's advising her employer clients to respect the trend and not ask prospective employees for access. Instead, she's encouraging them to review only what is open to the public or to any members of a particular social media site.

Many of the social media password protection laws being circulated around the country have received bipartisan support. Sargent agreed and said her bill was bipartisan in both houses. In addition, she revealed the Wisconsin bill had support from a local Chamber of Commerce, a conservative business group and a branch of the ACLU.

An amendment to the bill was made to ensure employers still had the right to "friend" employees on the various social media platforms. Sargent explained some parties were concerned that the legislation would prohibit employers and employees who had personal relationships from connecting online.

The Wisconsin Legislative Council – a nonpartisan agency of the state that analyzes bills – determined that the legislation was a bit ambiguous on the point, leading to the amendment. Sargent said the change clarifies that employers and employees can mutually agree to connect on social media.

In addition to employee protections, Sargent's bill also maintains a variety of employer rights. For example, some employees are in charge of providing social media for a company or use social media on equipment owned by a company. Under the new legislation, employers are still allowed to monitor what's being done on a company owned computer, and the employer has the right to conduct investigations and compel employees to cooperate if there are any alleged unauthorized use of confidential information using social media. Reported in: *Government Technology,* January 28.

press freedom

Washington, D.C.

Attorney General Eric H. Holder, Jr., who drew fire last spring over the Justice Department's aggressive tactics for secretly obtaining reporters' phone logs and emails as part of leak investigations, on February 21 signed new guidelines narrowing the circumstances in which law enforcement officials may obtain journalists' records.

The rules carry out a set of changes that Holder announced last July and described in a six-page report at the time. A preamble described the revisions as intended

(continued on page 70)

success stories

schools

Brunswick County, North Carolina

The fight over the *The Color Purple* and its place in Brunswick county schools came to a close January 21 as school board members rejected a motion to limit access to the controversial book, while also taking the first steps to set up a permanent advisory committee to deal with any future challenges.

The motion and subsequent vote took place during a board committee meeting that centered on a policy review concerning challenges to instructional materials such as the one lodged by County Commissioner Pat Sykes against *The Color Purple* near the end of last year.

The motion, made by school board Vice Chairwoman Shirley Babson, would have restricted access to Alice Walker's *The Color Purple* to eleventh- and twelfth-grade students and required parents to "opt in" to its use with their signature.

"I've never wanted to take the book out of circulation," Babson said. "With this (motion), parents can choose to authorize or not authorize books on their reading list."

Current district policy does not require parental approval of reading materials but does provide parents a reading list and the option to "opt out" of a particular reading they find objectionable by requesting an alternative assignment for their child.

The motion was defeated in a 2–3 vote, effectively ending the fight to see the book banned or restricted in the district. Voting yes were Babson and board member Charlie Miller, while members Bud Thorsen, Catherine Cooke and Chairman John Thompson voted no. Thorsen made it clear he was happy to see the matter resolved with no change to district policy.

"I don't think we should be changing anything," he said. "We need to leave it up to our Advanced Placement teachers and parents to be having this discussion."

Despite being vocally opposed to book's use in schools throughout the recent challenge process, board member Catherine Cooke was also pleased with the results of the months-long debate. "If nothing else, the process we have gone through has made parents aware that they have oversight on material they may object to," said Cooke. "That is federal law, the decision is really up to the parents what their children are reading."

While the *The Color Purple* will remain in classrooms, school officials made it clear they would be doing a few things differently next year when it comes to informing parents about what controversial books their children may be reading. Starting next year, Superintendent Edward Pruden said, the school staff will offer more details about the reading lists that are sent home with students at the start of each semester.

"Next year we will be providing additional information for parents for each book on the reading list," he said. "We will explain why the books are on the reading list – what the literary value is – and if a book is on the frequently challenged list, we will say why it has been challenged and on what grounds."

Additionally, the school board directed the staff to look into setting up a permanent media advisory committee, which would review future challenges. If created, this committee would likely be made up of parents, teachers, administrators and at least one student, according to guidelines set forward by the state board of education and department of public instruction. Reported in: *Wilmington Star-News,* January 21.

Watauga, North Carolina

After listening to parent Chastity Lesesne and tenth grade honors English teacher Mary Kent Whitaker for thirty minutes each during a third and final appeal hearing February 27, the Watauga County Board of Education voted 3-2 to fully retain *The House of the Spirits*, by Isabel Allende.

Board members Ron Henries, Barbara Kinsey and Brenda Reese voted to uphold the second appeal committee's decision to retain the book in the curriculum while Chairman Dr. Lee Warren and Vice Chairwoman Delora Hodges voted against the motion. Hodges made a motion earlier to partially retain the book by removing it from the required reading list but keeping it in the school's library, but the motion failed.

"I didn't know what to expect," Whitaker said after the hearing. "I'm thrilled for all students and thrilled that the freedom to read has been upheld and the students right to read has been upheld."

Lesesne said that she respects Whitaker and "could not be more supportive" of all the school's teachers. "Battle lines were drawn from the beginning and I never wanted that," she said.

The 1982 work, originally in Spanish, tells the story of three generations of the Trueba family as they interact in a spirit-filled world amid turbulent social revolution. Lesesne described the book as "horrific," "graphic" and "immoral" and said the challenging themes and ideas the book presents are lost within the novel's graphic descriptions of rape, prostitution, violence, abuse, abortion and death.

More than 200 people gathered for the school board meeting. The courthouse, to which the board moved the session, provides seating for approximately 205 people, about twice the capacity of the original location. The hearing was not a public forum and only Lesesne and Whitaker spoke to the board.

Lesesne addressed the board first, and for a final time explained why she believed *The House of the Spirits* should be removed from the required reading list. She also gave the board a petition she said contained 1,500 names from Watauga County community members "who agree with the challenge."

Lesesne said that having no class discussion available for students who choose an alternate reading option was "discriminatory." "Is this book so educationally necessary that it's worth it to boot students out of the classroom?" she asked.

Lesesne told the board that the novel contains more than fifty depictions of sexual deviance, which in her opinion, makes the enforcement of the school's public display of affection policy seem "ridiculous." She also read a sexually explicit passage from the novel: "How does that make you feel right now?" she asked the board members.

Lesesne said she had no intention of censorship or banning books and that she was simply asking for the book to be removed from the required reading list for the sophomore honors English class and to give every student equal educational opportunities.

Mary Kent Whitaker presented to the board next. According to Whitaker, even with all the attention given to the book by the challenge, 93 percent of her students chose to read the book; only four opted for the alternate option. Whitaker said that no student is forced to read *The House of the Spirits* and four options are available for sophomore students.

Students can take the sophomore honors English class and read the book, take the honors English class and choose the alternate reading, take an online course or take a regular English class. "Teachers should not have to defend a book recommended by the state," Whitaker added.

Through the themes of the book and the book's high level of challenge, students "not only come away as better readers, they come away as better citizens," she said. Whitaker said she handles the difficult adult content in a careful and thoughtful manner. "I respect my students," Whitaker said.

Beth Satterfield, a parent of three children in Watauga County schools, said after the meeting that many students were afraid to speak out in support of alternatives to *The House of the Spirits*—for fear of being ostracized. "I've talked with several parents, and they've told their child to keep their nose to the ground and get through it. That's not acceptable for education in Watauga County," Satterfield said. "That's a big part of the 93 percent (of students Whitaker said had parental permission to read the book)—they're just keeping their nose to the ground and getting through it. That's appalling to me."

Kauner Michael, a WHS junior who read the book as a sophomore, had a different opinion about the board's decision. "It shouldn't have been close. It should have been a no-brainer in favor of education," said Michael. "I'm excited that future students will get an opportunity to read this book in sophomore English. It was one of the most enlightening books I've ever read. A lot of life lessons contained in the book ... and I think it helps to make us all global citizens."

Representatives from the American Civil Liberties Union of North Carolina were present during the meeting and also held a community rally and news conference to urge officials to keep *The House of the Spirits* in the Watauga County high school honors curriculum, before the board meeting.

The rally and news conference consisted of more than fifty Watauga County community members, including parents and students and representatives from the ACLU of North Carolina. ACLU of North Carolina's communication director Mike Meno said that the organization has been following the book challenge from the beginning and had been contacted by concerned community members. Watauga High School students also organized a read-in at the school.

For almost five months *The House of the Spirits* book challenge divided members of the Watauga County community and consumed a large portion of the board of education's discussions. Local law enforcement involvement came into play when anonymous letters concerning the book were sent to several teachers at Watauga High School on February 17. The Boone Police Department is still working with the district attorney's office, Watauga County Sheriff's Office and school officials to track down the author of the letters. According to Lt. Chris Hatton with the Boone Police Department, the teachers who received the letters said they felt "threatened."

"It is one thing to disagree with a policy or a procedure or a book used in the schools. It is a completely different and unacceptable thing to threaten someone because they

hold a different opinion," WCS interim superintendent David Fonseca said in a previous statement.

The controversy began in October 2013, when Lesesne challenged Whitaker's selection of the novel as a sophomore honors English reading assignment. According to Lesesne, she read the book in its entirety before entering her formal complaint and after she was "flooded" with emails, calls and texts from parents who felt the same. The book is simply not the type of book Lesesne said she wants her teenage son reading as he and his peers are being fashioned into quality citizens.

The House of the Spirits is a recommended reading for tenth graders in the state's Common Core curriculum and is considered to have a high Lexile score, a measure of literary difficulty. The challenge inspired a letter in support of the book from the author and a teach-in at Appalachian State University.

Prior to the board's decision two committees also voted to retain the book. Reported in: Watauga Democrat, February 27. □

IFC report to ALA Council. . . . from page 44

of computers to browse the Web or access e-mail, may be under government surveillance without their knowledge or consent;"

Whereas the public now knows that the National Security Agency (NSA) has been collecting the telephone call metadata of millions of customers of Verizon Business Services, AT&T, and Sprint pursuant to orders issued by the Foreign Intelligent Surveillance Court (FISC) under Section 215 of the USA PATRIOT Act;

Whereas pursuant to court orders issued by the FISC under Section 702 of the FISA Amendments Act (FAA) the NSA operates programs that collect and retain vast quantities of data on Internet usage; and while authorized to target communications of foreign persons, the NSA has admitted that it also collects and stores Internet data from U.S. persons;

Whereas in 2004 ALA affirmed its "support for accountable government and the role of whistleblowers in reporting abuse, fraud, and waste in governmental activities;"

Whereas in 2011 ALA urged "Congress to pass legislation that expands protections for whistleblowers in the Federal government," and further urged "the U.S. President, Congress, the federal courts, and executive and legislative agencies to defend the inalienable right of the press and citizens to disseminate information to the public about national security issues and to refrain from initiatives that impair these rights;"

Whereas Presidential Policy Directive 19 of October 10, 2012, prohibits retaliatory actions against federal employees in intelligence agencies but limits such protected communications to superiors within their agency chain of command and relevant Offices of Inspector General, and is exclusively enforced on the administrative level by the intelligence community targeted in a whistleblower's disclosure and does not include judicial review of administrative rulings;

Whereas public access to information by and about the government is essential for the healthy functioning of a democratic society and a necessary prerequisite for an informed and engaged citizenry empowered to hold their government accountable for its actions;

Whereas the ALA values access to documents disclosing the extent of public surveillance and government secrecy, as access to these documents enables the critical public discourse and debate necessary to redress the balance between our civil liberties and national security;

Whereas such disclosures enable libraries to support discourse and debate by providing resources for deliberative dialogue and community engagement; and

Whereas the ALA remains concerned about due process and protection for persons who provide such revelations; now, therefore, be it

Resolved, that the American Library Association (ALA) on behalf of its members:

1. urges Congress to amend the Whistleblower Protection Enhancement Act of 2012 to extend existing legal protections for whistleblowers to employees of all national security and intelligence agencies, and to non-federal employees working for civilian contractors;
2. urges Congress to establish a secure procedure by which all federal employees, and all non-federal employees working for civilian contractors, may safely share evidence they have discovered of fraud, waste, or abuse with the appropriate oversight committees of Congress, and directly with the press and the American people, with the protection of legally enforceable rights against retaliation or prosecution;
3. commends the courage and perseverance of federal employees, and non-federal employees working for civilian contractors, who risk their livelihoods, their reputations and their liberty to expose evidence of government fraud, waste, or abuse. □

---

watchdog report. . . . from page 47

Defenders of the program have argued that Congress acquiesced to that secret interpretation of the law by twice extending its expiration without changes. But the report rejects that idea as "both unsupported by legal precedent and unacceptable as a matter of democratic accountability."

The report also scrutinizes in detail a handful of investigations in which the program was used, finding "no instance in which the program directly contributed to the discovery of a previously unknown terrorist plot or the disruption of a terrorist attack."

Still, in her dissent, Cook criticized judging the program's worth based only on whether it had stopped an attack to date. It also has value as a tool that can allow investigators to "triage" threats and provide "peace of mind" if it uncovers no domestic links to a newly discovered terrorism suspect, she wrote. Reported in: *New York Times*, January 23. □

---

censorship dateline. . . . from page 53

all make mistakes," he said. Reported in: *Washington Post*, January 21.

Charleston, South Carolina

A South Carolina legislative committee has voted to punish two public colleges for assigning freshmen to read books with gay themes by cutting the institutions' budgets by the total spent on the books in programs for freshmen. The College of Charleston was criticized for making *Fun Home*, an acclaimed autobiographical work by Alison Bechdel, and the University of South Carolina Upstate assigned *Out Loud: The Best of Rainbow Radio*, which is a collection from the state's first gay radio show.

Representative Garry Smith, a Republican, said he proposed the cuts to get colleges to take his concerns seriously. "I understand diversity and academic freedom," he said. "This is purely promotion of a lifestyle with no academic debate."

Representative Gilda Cobb-Hunter, a Democrat, said legislators were interfering in academic decisions, and would draw ridicule from outside the state. "We are now in a posture where individual moral compasses and beliefs are being pushed down on our institutions of higher education," she said. "Do you think for one minute some companies are going to look seriously at us, when they think about their workforce coming to a state like this, with members of a legislature who believe their job is to pass judgment on colleges of higher learning to dictate what books people are going to read?" Reported in: insidehighered.com, February 21.

foreign

Tokyo, Japan

Anne Frank's *The Diary of a Young Girl* and scores of books about the young Holocaust victim have been vandalized in Tokyo public libraries since earlier this year. The damage was mostly in the form of dozens of ripped pages in the books. Librarians have counted at least 265 damaged books at 31 municipal libraries since the end of January.

Japan and Nazi Germany were allies in World War II, and though Holocaust denial has occurred in Japan at times, the motive for damaging the Frank books is unclear. Police are investigating.

In the Nakano district libraries, the vandals apparently damaged the books while unnoticed inside reading rooms, according to city official Mitsujiro Ikeda. "Books related to Ms. Anne Frank are clearly targeted, and it's happening across Tokyo," he said. "It's outrageous."

At another library, all the books that were damaged could have been found using the keywords "Anne Frank" in an online database. At least one library has moved Anne Frank-related books behind the counter for protection, though they can still be checked out.

Anne Frank wrote her diary over the two years she and her family hid in a concealed apartment in Nazi-occupied Netherlands during World War II. After her family was betrayed and deported, she died in a German concentration camp at age 15 in 1945. Her father survived and published her diary, which has become the most widely read document to emerge from the Holocaust.

The Simon Wiesenthal Center, a Jewish human rights organization based in the U.S., issued a statement calling the vandalism a hate campaign and urging authorities to step up efforts to find those responsible. Reported in: Toronto Globe and Mail, February 21. □

---

from the bench. . . . from page 57

to subordinate individuality to team unity, and to project a positive image."

The court said that under modern sex-discrimination legal doctrine, including landmark U.S. Supreme Court cases on sex discrimination in the workplace, the school district might have been able to justify the disparate treatment.

To defeat the inference of sex discrimination, "it was up to the school district to show that the hair-length policy is just one component of a comprehensive grooming code that imposes comparable although not identical demands on both male and female athletes," the court said.

"What we have before us is a policy that draws an explicit distinction between male and female athletes and imposes a burden on male athletes alone, and a limited record that does not supply a legally sufficient justification for the sex-based classification," Judge Rovner said.

Writing in dissent, Judge Daniel A. Manion said he would have upheld the hair-length policy. "On the record we have, the grooming policies for boys and girls, as a whole, are comparable," Manion said. "Requiring men, but not women, to keep their hair at a certain length has

never been held to be unequally burdensome." Reported in: *Education Week*, February 25.

Reno, Nevada

A Nevada public school's uniform policy requiring students to display a motto—"Tomorrow's Leaders"—might not jibe with the First Amendment, an appeals court has ruled.

In January 2012, a district court dismissed Mary and Jon Frudden's claim that Reno's Roy Gomm Elementary School's mandatory uniform policy violated their children's right to freedom of speech. But in an opinion released February 14, the U.S. Court of Appeals for the Ninth Circuit reversed the decision and sided with the parents, saying the policy "compels speech because it mandates the written motto, 'Tomorrow's Leaders,' on the uniform shirts."

The court also took issue with a part of the policy that allows students to don uniforms of "nationally recognized youth organizations such as Boy Scouts or Girl Scouts on regular meeting days." That exemption is content-based and subject to strict-scrutiny review, the court opinion said.

"In a nutshell, we disagreed with the process and the reasons for establishing and implementing the school uniform," Mary Frudden said in an interview, adding that she was "very thrilled" with the court's decision.

The Fruddens' issues began in the fall of 2011, when their children wore American Youth Soccer Organization uniforms to school. The AYSO is a nationally recognized organization and meets at least Monday through Friday, the court opinion said. Despite Mary Frudden's protests, both children were removed from class and asked to change their clothes. Principal KayAnn Pilling told Mary Frudden that the exemption for national youth organization uniforms on meeting days did not apply because the children did not have a meeting or soccer practice that day. The children wore the same outfits to school the next day and were, again, removed from class and asked to change.

The Student Press Law Center filed a friend-of-the-court brief on behalf of the Fruddens. SPLC's brief argued that the precedent set by 1969's *Tinker v. Des Moines Independent Community School District* set a threshold that students protesting a school uniform rule shouldn't face disciplinary blowback unless the protest causes "material and substantial disruption."

The Ninth Circuit agreed with the Frudden family's analogy to a 1977 Supreme Court case in which the U.S. Supreme Court struck down a New Hampshire law that required drivers to exhibit license plates with the state slogan, "Live Free or Die."

People probably didn't think all drivers lived by that motto, but it required some motorists to display a message they openly opposed, said Eugene Volokh, a law professor at the University of California Los Angeles, who represented the Fruddens pro bono. "People have the right to not be compelled to be moving billboards," Volokh said.

When the lower court threw out the Fruddens' case in January 2012, it cited the Ninth Circuit's decision regarding *Jacobs v. Clark County School District*, which upheld a high school's dress code allowing students to wear only certain solid colors without messages or images. The Ninth Circuit rejected this comparison because Roy Gomm's uniform policy's exemption for Boy Scouts and Girl Scouts makes the policy content-specific, rather than "content-neutral," and requires students to exhibit an "expressive message."

The Jacobs case stemmed from a student wearing religious materials to school, said Allen Lichtenstein, general counsel of the American Civil Liberties Union of Nevada. The court got it wrong with its ruling on Jacobs, he said, but the decision regarding the Frudden children was a "step in the right direction, albeit a small one."

To contrast, the Fruddens' case establishes that students can't be compelled to make statements with their clothing, while the Jacobs case holds the opposite—uniform policies can outlaw students from making statements with their clothing, Lichtenstein said.

"This cuts back a little on Jacobs," Lichtenstein said. "I think that the right of free speech should not stop at the schoolhouse door, and that students should have the right to, one, opt out of any school-uniform policy and, more importantly, that they should have the right to wear messages on their clothing to express religious or political points of view." Reported in: splc.org, February 18. □

---

is it legal?. . . . from page 65

to ensure that the department "strikes the proper balance among several vital interests," like protecting national security and "safeguarding the essential role of the free press in fostering government accountability and an open society."

Among other things, the rules create a presumption that prosecutors generally will provide advance notice to the news media when seeking to obtain their communications records.

The Justice Department had been criticized for issuing subpoenas for phone records of Associated Press reporters and bureaus without notice, giving The A.P. no chance to negotiate over their scope or contest the matter in court. The logs led investigators to a former FBI agent, who pleaded guilty in September.

The rules also address a law forbidding search warrants for journalists' work materials, except when the reporter is a criminal suspect. It says that the exception cannot be invoked for conduct based on "ordinary news-gathering activities."

Holder had also been criticized over a search warrant for a Fox News reporter's emails that invoked the "suspect exception" by portraying the reporter as a criminal participant in the crime of the leak to the reporter; the department later said it never intended to prosecute the reporter. A former State Department contractor pleaded guilty in that case this month.

A crackdown on leaks in the Obama administration has brought indictments in eight such cases so far, compared with three under all previous presidents. After the furor over the A.P. and Fox News investigations in May, President Obama directed Holder to review the rules for investigations into leaks to reporters, and Holder met with news media leaders to discuss changes.

The rules cover grand jury subpoenas used in criminal investigations. They exempt wiretap and search warrants obtained under the Foreign Intelligence Surveillance Act and "National Security Letters," a kind of administrative subpoena used to obtain records about communications in terrorism and counterespionage investigations. Reported in: *New York Times*, February 21. □

intellectual freedom bibliography

Compiled by Nanette Perez, Program Officer, ALA Office for Intellectual Freedom

Cavanagh, Sean. "Ruling Raises Internet-Access Concerns." *Education Week*. Vol. 33, No. 19. January 29, 2014, Pp. 1, 12.

Davidson, Sandy. "First Amendment Fighters Get Trigger-Happy." *Editor & Publisher*. Vol. 146, no. 7, July 2013, p. 66.

Davis, Michelle R., Cavanagh, Sean. "Cloud Computing Expands, Raising Data-Privacy Concerns." *Education Week*. January 8, 2014, p. 9.

Gould, Rebecca. "Aaron Swartz's Legacy." *Academe: Magazine of the American Association of University.* Vol. 100, No. 1. Pp. 19-23.

Herold, Benjamin. "Personal Danger of Data Breaches Prompts Action." *Education Week.* January 22, 2014, Vol. 33, No. 18, p.1, 11.

Kelley, Michael. "Check It Out." *Publishers Weekly*. Vol. 261, No. 2, January 13, 2014, pp. 20-21.

Knox, Emily J.M. "Supporting Intellectual Freedom: Symbolic Capital and Practical Philosophy in Librarianship." *The Library Quarterly*. Vol. 84, No. 1, January 2014, pp. 8-21.

"Isabel Allende Defends Her Novel." *School Library Journal*. Vol. 60, No. 1, January 2014, pp. 8-9.

Latham, Don., Hollister, Jonathan M. "The Games People Play: Information and Media Literacies in the Hunger Games Trilogy." *Children's Literature in Education*. March 2014, Vol. 45, No. 1, pp. 33-46.

"Midwinter Report." *Library Journal*. Vol. 139, No. 4, March 1, 2014, pp. 14-18.

Schachter, Abby W. "The War on Fun." *Reason.* Vol. 45. No. 11, pp. 60-61.

Schrecker, Ellen. "One Historian's Perspective on Academic Freedom and the AAUP." *Academe: Magazine of the American Association of University*. Vol. 100, No. 1, January/February 2014, pp. 30-34.

Talbot, Margaret. "Opened Files." *The New Yorker*. Vol. 89, No. 45, January 20, 2014, pp. 19-20.

Wright, Lawrence. "The Al Qaeda Switchboard." *The New Yorker*. Vol. 89, No. 44, January 13, 2014. pp. 17-18.

NEWSLETTER ON INTELLECTUAL FREEDOM
50 East Huron Street • Chicago, Illinois 60611