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

September 2012 ☐ Vol. LXI ☐ No. 5 ☐ www.ala.org/nif

Internet censorship and cell phone surveillance requests on the rise

Government requests for Internet censorship and cell phone surveillance have increased dramatically, according to reports issued this summer by the online search firm Google and by cell phone carriers.

According to Google's report of censorship requests it receives from governments around the world, takedown requests from the United States included those for the termination or removal of five YouTube accounts, 1,400 YouTube videos, 218 search results and a blog that allegedly "defamed a law enforcement official in a personal capacity." In total the United States reportedly increased its requests by 103 percent in the first six months of 2012. Google said it complied with 42 percent of U.S. requests, removing 187 pieces of content.

The cellphone carriers' reported a startling 1.3 million demands for subscriber information last year from law enforcement agencies seeking text messages, caller locations and other information in the course of investigations. The reports, which came in response to a Congressional inquiry, document an explosion in cellphone surveillance in the last five years, with the companies turning over records thousands of times a day in response to police emergencies, court orders, law enforcement subpoenas and other requests.

The reports also reveal a sometimes uneasy partnership with law enforcement agencies, with the carriers frequently rejecting demands that they considered legally questionable or unjustified. At least one carrier even referred some inappropriate requests to the FBI.

"When we started releasing this data in 2010, we also added annotations with some of the more interesting stories behind the numbers," wrote Google Senior Policy Analyst Dorothy Chou in a company blog.

Chou wrote that she was alarmed by the number of requests to take down political speech, and the number of requests Google's had from "Western democracies not typically associated with censorship."

The report indicates that Google declined to comply to take down the blog post, the videos or the majority of the search results. The company did remove four YouTube accounts, which had around 300 videos, and 25 percent of the search requests. The company said, overall, it had complied with an average of 65 percent of court orders and 47 percent of "more informal" requests in the six months detailed in the data.

The past six months also saw a 49 percent increase in requests from the Indian government, as well as first-time requests from four countries: Bolivia, the Czech Republic, Jordan and Ukraine.

(continued on page 222)

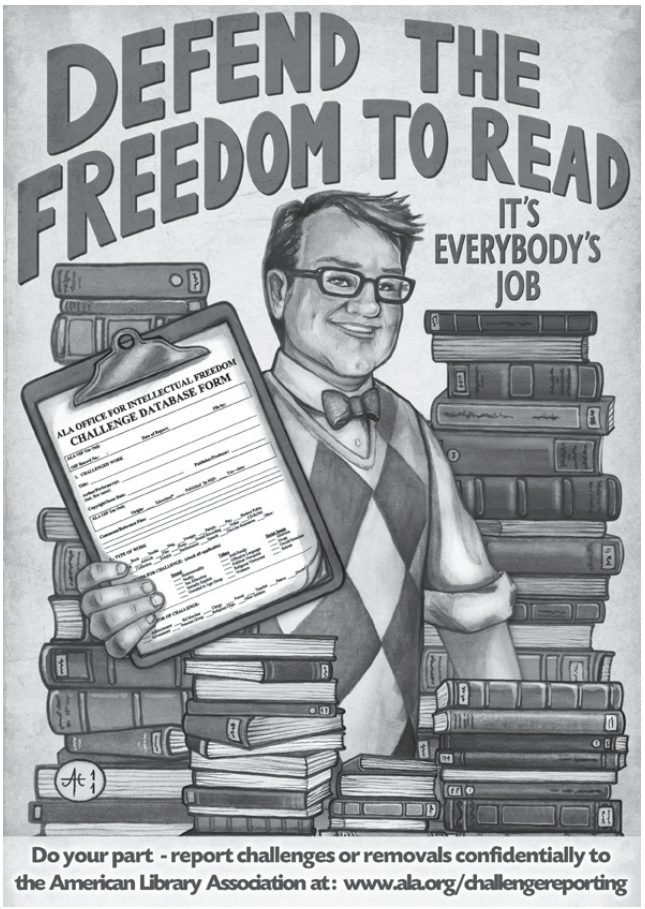
Published by the ALA Intellectual Freedom Committee, Martin Garnar, Chair

in this issue

targets of the censor

books

magazines



SUPPORT THE MERRITT FUND

WWW.MERRITTFUND.ORG

(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 Intellectual Freedom Committee's report to the ALA Council, delivered at the ALA Annual Conference in Anaheim, California on June 26 by IFC Chair Pat Scales.

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

INFORMATION

Internet Filtering and Libraries

The IFC and the Office for Intellectual Freedom (OIF) are instigating a broad initiative to dispel misinformation and misunderstandings about the Children's Internet Protection Act (CIPA), e-rate, and Internet filtering in libraries. The initiative is, in part, a response to the decision in Bradburn v. NCRL, but also due to the numerous inquiries and requests for assistance received by OIF.

Our plans, which are still in development, involve collaboration with the Office for Information Technology Policy (OITP) Taskforce and other groups and individuals such as Bob Bocher, a CIPA expert recently retired from the Wisconsin Department of Instruction. We hope to develop librarians' and trustees' understanding about filtering and the First Amendment through articles, workshops, and webinars, including "train the trainers" programs that will ensure that one or two persons are available in each state to provide accurate information and training about filtering in the library. We are also contemplating toolkits that will help libraries evaluate filtering software; adjust their filters to avoid liability by ensuring that the minimum amount of constitutionally protected information is blocked; and offer effective, user-friendly unblocking and disabling policies that conform with the guidance offered by the Supreme Court.

In addition, OIF will continue to provide direct assistance to libraries who are developing or altering their Internet use policies and practices, or who are addressing public concerns about filtering.

Intellectual Freedom Manual Ninth Edition

Planning is underway to update the *Intellectual Freedom Manual*. The ninth edition is scheduled to be published in 2015. In preparation of the new edition, OIF and IFC will undertake a thorough review of all the Interpretations of the *Library Bill of Rights* so that they reflect current library practices and affirm equal and equitable access for all library users.

Online Learning

OIF has undertaken a number of online learning efforts thus far in 2012. In April, OIF partnered with ALA JobLIST and the Merritt Fund to offer the webinar, "Moving Difficult Conversations Toward Positive Outcomes: Coping with Challenges in the Library Workplace." 343 people registered for the event, over 150 attended, and 89% of survey respondents found the session either useful or extremely useful. This session was recorded and is freely available online as a webcast via the JobLIST site.

For the 2012 celebration of Choose Privacy Week, OIF offered three separate recorded webcasts, which are also freely available online. Amie Stepanovich of the Electronic Privacy Information Center spoke on "The Future of Biometrics and Government Surveillance"; Michael German of the ACLU spoke on "Data Mining, Government Surveillance, and Civil Liberties"; and George Christian of the Library Connection in Connecticut spoke on "Government Surveillance in the Library." These recordings can all be accessed through the Choose Privacy Week website at *www.privacyrevolution.org.*

OIF also offered two webinars in May on privacy and access issues around self-service holds practices. These webinars grew out of a resolution passed at the 2011 ALA Annual Conference, urging libraries implementing self-service holds to protect patron identity by adopting practices and procedures that conceal the library user's personally identifiable information in connection with the materials being borrowed. These two small, interactive sessions were recorded and are freely available as webcasts.

Plans for OIF's online learning efforts for the remainder of 2012 and into 2013 include a strong focus on filtering; offerings for state chapters; development of a web-based Lawyers for Libraries curriculum; and continued participation in ALA's Online Learning group to pursue ALA-wide online learning solutions.

Challenge Database Upgrade Project

Using funds from ALA, the Office for Intellectual Freedom is working with a team of researchers at the University of Illinois at Urbana-Champaign to upgrade its challenge database. The new database will feature improvements and automation in data input and reporting functions, including streamlining the extraction of data for use in publications and other reports. OIF has always been committed to protecting the privacy of contributors and the new database continues that policy with a segmented structure for fire-walling of private information. The new database with decades of collected data is expected to be in place by the end of summer 2012.

In addition, OIF is working with researchers at MIT's Center for Civic Media on advanced applications and visualization of public challenge data – those censorship efforts that have received media attention and are therefore not considered confidential. The goal of this project is to deploy historical records about challenges in conjunction with other public data sets in order to help visualize and understand trends, patterns, and insights which may be gleaned from the data. For example, users will be able to locate incidents geographically and chronologically; to track the propagation of censorship directed at certain authors, titles,

or for certain reasons across time and space; and to relate these trends to the type of institution and to the result of the challenge. Work is now underway and OIF expects to announce initial results by the end of the summer.

PROJECTS

Choose Privacy Week

Choose Privacy Week (CPW) took place May 1–7, 2012, and featured the theme "Freedom from Surveillance." The keystone of this year's campaign is the new film, "Vanishing Liberties: The Rise of State Surveillance in the Digital Age," which examines the government's growing use of surveillance tools to track and spy on immigrant communities and the proposals to adopt these same tools to monitor and track the activities of all Americans. Featured speakers include Michael German, American Civil Liberties Union senior policy counsel for national security and privacy, and a former FBI agent; Margaret Huang, executive director of the Rights Working Group; Paromita Shah, associate director of the National Immigration Project; Julia Shearson, executive director at Council on American Islamic Relations - Cleveland; and Vincent Warren, executive director of the Center for Constitutional Rights.

In addition to the film, Choose Privacy Week featured a number of well-received blog posts and online webinars highlighting the theme. Most notable among these was Michael German's webinar on data mining and government surveillance, which was picked up by Maine public radio stations; and Washington University law professor Neil Richards' timely essay on the perils of social reading. All of these resources, including "Vanishing Liberties," can be found on the CPW website at *www.privacyrevolution.org*.

We are pleased to announce that OIF will receive the 2012 Consumer Excellence Award in October 2012 from Consumer Action, a 41-year-old consumer advocacy group. The award will honor OIF's outstanding efforts to educate consumers on their privacy rights via their participation in privacy coalitions and their public outreach through CPW and *www.privacyrevolution.org*.

Banned Books Week

Banned Books Week 2012, September 30 through October 6, marks the 30th anniversary of this celebration of the freedom to read and features the tagline: "30 Years of Liberating Literature." In celebration of this landmark anniversary, OIF will partner with state IFCs and state chapters to create videos that will form a virtual 50 State Salute to Banned Books Week. More information on how to become part of this event will be posted on *www.ala.org/bbooks* in the coming months.

For the second year in the row, the ALA along with its co-sponsors will host a virtual Banned Books Week Read-Out. The Read-Out will feature YouTube videos of authors reading from their favorite banned/challenged books or talking about the importance of the freedom to read. We also will feature audio PSAs of members of Rock Bottom Remainders. Amy Tan, Matt Groening, James McBride, Dave Barry, Scott Turow, and Mary Karr are among the members of the band who participated.

BBW merchandise, including posters, bookmarks, t-shirts, and tote bags, are sold and marketed through the ALA Store (*www.alastore.ala.org/*). More information on Banned Books Week can be found at *www.ala.org/bbooks*.

News Know-How

Under the leadership of Barbara Jones, OIF's latest initiative is the News Know-How program, supported by a grant from the Open Society Institutes. This grant brings together journalists, librarians, and high school students to discuss how to check facts and discern fact from opinion in the news—from newspapers to radio to social media. News Know-How draws from librarians' expertise in information literacy in general. This summer and autumn there will be programs in Iowa, Chicago Public Library, Oak Park Public Library and Pratt Free Library (Baltimore). For more information, contact the Office for Intellectual Freedom (*oif@ala.org*).

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. □

FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation's report to the ALA Council delivered June 25 at the ALA Annual Conference in Anaheim, California, by FTRF President Kent Oliver.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2012 Midwinter Meeting.

LITIGATION ACTIVITIES: DEFENDING THE RIGHT TO READ FREELY

Over four decades ago, librarians, lawyers, and other individuals committed to protecting free expression and open access to ideas in libraries and schools founded the Freedom to Read Foundation to provide legal resources to libraries, librarians, and other individuals who fight to preserve the freedom to read in their communities and to engage in litigation intended to advance First Amendment freedoms for every citizen.

This month marks the fifteenth anniversary of one of the Foundation's signal achievements: the unanimous Supreme Court decision in *Reno v. ACLU*, which declared unequivocally that the government could not, in order to deny minors access to speech that might possibly be harmful to minors, suppress speech on the Internet that adults have a constitutional right to receive and to address to one another. That decision—argued by FTRF's then general counsel, Bruce Ennis—secured full First Amendment protection for the Internet.

Despite this plain and unambiguous ruling, states and government agencies continue to adopt laws and regulations intended to restrict publication of constitutionally protected materials on the Internet. One such law is Utah's "harmful to minors" statute that would impair access to lawful Internet content and allow the Utah attorney general to create an Adult Content Registry that could sweep in any site the attorney general deems unacceptable. In 2005, FTRF joined with booksellers, publishers, authors, and other free expression advocates to file a lawsuit seeking to overturn those parts of the law that threatened to limit free expression on the Internet.

I am pleased to report that our lawsuit, *Florence v. Shurtleff*, reached a successful conclusion after many years of litigation and negotiation with the state of Utah. On May 16, 2012, the district court entered an order and declaratory judgment in favor of FTRF and other plaintiffs, ruling that the statute violates the First Amendment. In its order, the court said that persons cannot be prosecuted for posting content constitutionally protected for adults on generally accessible websites, and further held that those publishing constitutionally protected material on the Internet are not required by law to rate or label that material.

Another, more effective means of Internet censorship is the use of Internet filters to block library users' access to constitutionally protected speech. When I last spoke to you in January, I reported on the growing number of lawsuits brought against schools and libraries whose overzealous or misguided filtering regimes were denying library users their right to access sites that expressed a disfavored viewpoint or favorably described a minority religion. While FTRF is not a participant in these lawsuits, we monitor their progress and remain vigilant for opportunities to defend the right to read.

One such lawsuit, *PFLAG, Inc. v. Camdenton R-III School District*, ended earlier this year with a victory that upholds minors' First Amendment right to access information that is constitutionally protected for youth. In that case, a student and a number of websites sued the school district when its custom-built Internet filtering software blocked access to websites supportive of lesbian, gay, bisexual and transgender people while allowing full and free access to sites that opposed LGBT rights and criticized LGBT people by employing a discriminatory "sexuality" category that classified pro-LGBT sites as smut—no matter their content. On February 15, 2012, the district court entered a preliminary injunction ordering the school district to stop using the discriminatory filter and subsequently approved a consent decree. Under the settlement, the school district has agreed to stop blocking pro-LGBT sites, to submit to monitoring for 18 months to confirm compliance with the decree, and to pay $125,000 in legal fees to the plaintiffs and their attorneys.

A second lawsuit, *Bradburn et al. v. North Central Regional Library District*, which we have been following since 2006, has ended less successfully. As you may recall, three library users, represented by the ACLU of Washington State, filed suit in federal district court to challenge the library system's refusal to honor requests by adult patrons to temporarily disable Internet filters for sessions of uncensored reading and research. On April 10, 2012, the federal district court held that the library filtering policy did not violate the federal constitution, holding that the library may make content-based decisions on which material can be provided to patrons on Internet terminals in the same manner as it makes collection decision for hard copies of material in the library, despite the fact that the same space limitations and funding issues do not apply to Internet materials. The court upheld the policy in part because of the court's belief that such a policy was necessary because the libraries involved "are relatively small in size and only one has a partition separating the children's portion of the library from the remainder of the library."

The court's decision upholding the library's filtering policy appears to be in conflict with the decision of the Supreme Court in the Children's Internet Protection Act (CIPA) case, which was upheld because the justices concluded—based on the statements of the Solicitor General at oral argument—that filtering for adults would be disabled by request and without the need for adults to justify their request for access to particular sites. Thus we firmly believe that the court wrongly decided that the library's policy is consistent with CIPA and with the Supreme Court's decision on CIPA.

The ACLU has decided not to appeal the decision, based on both factual and legal considerations. Among the considerations are the fact that the library itself has altered its filtering policies in response to the lawsuit, the age of the case, and the fact that the court thought so little of its own opinion that it refused to allow the opinion to be published. As an unreported, unpublished opinion, the case has little or no precedential value in other courts. Thus, the court's decision cannot be used to justify or defend filtering policies that do not conform to the CIPA statute and the Supreme Court's decision. Moreover, it is no assurance that a library will not be sued if and when it adopts a filtering policy that does not allow users to disable or unblock the filter to access constitutionally protected materials.

This is amply demonstrated by *Hunter v. City of Salem* and the Board of Trustees, Salem Public Library, the ongoing lawsuit that charges the Salem Public Library and its board of trustees with unconstitutionally blocking access to websites discussing minority religions by using filtering software that improperly classifies the sites as "occult" or "criminal." This past April, the court refused to dismiss Ms. Hunter's lawsuit and ordered the case to trial to determine if the library director and library board violated Ms. Hunter's First Amendment rights by refusing to unblock websites discussing astrology and the Wiccan religion that were blocked by the library's filter. The court has set a trial date of June 24, 2013.

(continued on page 225)

THE JUDITH F. KRUG FUND AND BANNED BOOKS WEEK

On June 5, the Freedom to Read Foundation, via our Judith F. Krug Memorial Fund, announced eight $1,000 grants to libraries, schools and other organizations in support of Banned Books Week events. Banned Books Week, which will take place Sept. 30–Oct. 6, 2012, celebrates the freedom to access information, while drawing attention to the harms of censorship. 2012 marks the 30th anniversary of Banned Books Week, and the third year of FTRF's Judith Krug Fund grants. It is also the first year that FTRF is an official sponsor of Banned Books Week

Recipients of this year's grants are the ACLU of Pennsylvania, California Polytechnic State University, City Lit Theater Company (Chicago), Friends of the Talkeetna (Alaska) Public Library, Judith's Reading Room, Lawrence (Kan.) Public Library, St. Catharine College (Ky.) and Simon Sanchez High School (Guam).

FTRF also is providing Banned Books Week merchandise, sold by the ALA Store, to the grant recipients. In exchange for the grant, recipients agree to provide FTRF with photos and video of their events. Video and photos of 2011 grant winners can be accessed at *www.ftrf.org*.

FTRF's founding executive director, Judith F. Krug, was passionate about the need to educate both librarians and the public about the First Amendment and the importance of defending the right to read and speak freely. The Judith F. Krug Fund, a memorial fund created by donations made by Judith's family, friends, and colleagues, funds projects and programs that assure that her lifework will continue far into the future.

In addition to the Banned Books Week grants, the Judith F. Krug Fund is funding the development of various initiatives to provide intellectual freedom curricula and training for LIS students. Both Barbara Jones and Jonathan Kelley continue to work with the members of the Association for Library and Information Science Education (ALISE) to identify the best means of accomplishing this goal.

DEVELOPING ISSUES

Our Developing Issues Committee identified two emerging issues that may impact intellectual freedom in libraries and give rise to future litigation. The first is libraries' increasing adoption of new online public access catalogs (OPACs) that may compromise user privacy and ALA policies that counsel against the use of prejudicial labels on books. The second issue is the expansion of CIPA's filtering requirements to students' off-campus activities in their homes by installing highly restrictive filtering software on school-issued laptop computers. This raises concerns about the ability of youth to acquire digital literacy by exploring the unfiltered Internet under the tutelage of their parents; and the widening of the digital divide, favoring those whose parents can afford both an Internet connection and a private computer over those youth who can only use filtered computers.

Missouri book challenges run gamut

Getting a book removed from a public school in Missouri is a long shot, but the odds haven't stopped residents from trying. Since 2008, parents, students and others have tried to toss or restrict more than fifty books from libraries or classrooms in school districts across the state.

Students in a course taught by Professor Charles Davis at the Missouri School of Journalism sent Sunshine requests for public records of challenges to all 566 school districts in the state. The letters asked the districts to provide all correspondence regarding book challenges since Jan. 1, 2008. Some districts responded immediately; others needed to be contacted two or three times before following through.

During several months of reporting, 495 Missouri school districts, or 87.5 percent of them, responded. As the records came in, some themes emerged. Many of the challenges had less to do with the overall content of a book but more to do with whether it was appropriate for certain age groups. Others argued that the books they were challenging were inconsistent with community values or that they contained language and references to behavior that conflicted with school conduct rules.

In Columbia, it was *The Face on the Milk Carton*, by Caroline B. Cooney. A parent challenged the book at Paxton Keeley Elementary School because it contains sexual situations and because "livid descriptions (of the main character's) emotional and physical distress are the main crux of this work."

In Republic, it was Kurt Vonnegut's classic *Slaughterhouse-Five* and two other books labeled "soft porn" by the challenger. The school district garnered national attention when it banned Vonnegut's book. The decision was later reversed.

In Camdenton, it was *The Kite Runner*, by Khaled Hosseini. A rape scene drew challenges from at least eight parents who felt it shouldn't be required reading in an honors English class. The book was removed from the curriculum but remained on library shelves.

In Jackson, it was *The Hunger Games*, by Suzanne Collins. A mother said the novel was too violent for her 11-year-old in 2009. She and her daughter have since become fans of the book and the movie. The district kept the book without restrictions.

In Wentzville, it was *Baby Animals—Puppies*, by Kate Petty. A parent objected because the book referred to a female dog as a "bitch." "Although the word is used in context, this type of language is absolutely inappropriate for an elementary school library," the parent wrote. The

(continued on page 226)

bird flu paper is published after debate

The more controversial of two papers describing how the lethal H5N1 bird flu could be made easier to spread was published June 21, six months after a scientific advisory board suggested that the papers' most potentially dangerous data be censored.

The paper, by scientists at Erasmus Medical Center in the Netherlands, identified five mutations apparently necessary to make the bird flu virus spread easily among ferrets, which catch the same flus that humans do. Only about 600 humans are known to have caught H5N1 in the last decade as it circulated in poultry and wild birds, mostly in Asia and Egypt, but more than half died of it.

The paper's publication, in the journal *Science*, ended an acrimonious debate over whether such results should ever be released. Critics said they could help a rogue scientist create a superweapon. Proponents said the world needed to identify dangerous mutations so countermeasures could be designed.

"There is always a risk," Dr. Anthony S. Fauci, the director of the National Institute for Allergy and Infectious Diseases, said in a telephone news conference held by *Science*. "But I believe the benefits are greater than the risks."

Two of the five mutations are already common in the H5N1 virus in the wild, said Ron A. M. Fouchier, the paper's lead author. One has been found in H5N1 only once. The remaining two have never been found in wild H5N1, but occurred in the H2 and H3 flus that caused the 1957 Asian flu pandemic and the 1968 Hong Kong flu.

The Dutch team artificially introduced three mutations. The last two occurred as the virus was "passaged" through 10 generations of ferrets by using nasal washes from one to infect the next. Four changes were in the hemagglutinin "spike" that attaches the virus to cells. The last was in the PB2 protein. As the virus became more contagious, it lost lethality. It did not kill the ferrets that caught it through airborne transmission, but it did kill when high doses were squirted into the animals' nostrils.

Dr. Fouchier's work proved that H5N1 need not mix with a more contagious virus to become more contagious. By contrast, the lead author of the other bird flu paper, Dr. Yoshihiro Kawaoka, of the University of Wisconsin-Madison, took the H5N1 spike gene and grafted it onto the 2009 H1N1 swine flu. One four-mutation strain of the mongrel virus he produced infected ferrets that breathed in droplets, but did not kill any.

The controversy erupted in December when the National Science Advisory Board for Biosecurity asked that details be removed before the papers were published. On March 30, it reversed itself after a similar panel convened by the World Health Organization recommended publication without censorship. Dr. Kawaoka's work was published by the journal *Nature* in May. Dr. Fouchier had to delay until the Dutch government gave him permission, on April 27.

Some of the early alarm was fed by Dr. Fouchier speaking at conferences and giving interviews last fall in which he boasted that he had "done something really, really stupid" and had "mutated the hell out of H5N1" to create something that was "very, very bad news." He said his team had created "probably one of the most dangerous viruses you can make." After the controversy erupted, he claimed the news media had overblown the danger.

Science published seven other articles about H5N1. One, by a team at Cambridge, concluded that it was not possible to accurately calculate the likelihood of all five mutations occurring in nature. Up to three in a single human is "a possibility," said Derek J. Smith, the lead author. "Five mutations is pretty difficult, but we don't yet know how difficult it is," Dr. Smith said.

Having H5N1 still circulating in birds is like "living on an active fault line," he said. But asking whether a five-mutation strain could evolve in human hosts, he said, was like asking if it could ever snow in the Sahara—unlikely, but not inconceivable.

Presumably, if an outbreak with several of the most dangerous mutations were spotted, the world would move quickly to try to eradicate it with vaccines and quarantine; whether it would work is an unanswered question.

An important result of the controversy, Dr. Fauci said, is that the United States is now drafting new guidelines for dangerous research. For the moment, most researchers are honoring a voluntary moratorium on this line of flu research.

Asked if a rogue researcher could now try to duplicate Dr. Fouchier's work, Dr. Fauci said it was possible. But he argued that open discussion was still better than restriction to a few government-cleared flu researchers, because experts in unrelated fields, like X-ray crystallography or viral epidemiology, might take interest and eventually make important contributions, he said.

"Being in the free and open literature makes it easier to get a lot of the good guys involved than the risk of getting the rare bad guy involved," he said. Dr. Fouchier said that many papers are published about pathogens more dangerous than flu. Also, many scientists have said that the two papers have been so widely discussed that experts knew every detail anyway. Reported in: *New York Times*, June 21. □

Human Rights Council passes resolution to protect Internet speech

The United Nations Human Rights Council on July 5 passed its first-ever resolution to protect the free speech of

individuals online. The resolution was approved by all 47 members of the council, including China and Cuba, who have been criticized for limiting Internet freedom.

The resolution is written to guarantee Internet freedom, including the free flow of information and freedom of expression. It was passed at the 20th Session of the council in Geneva. While the resolution is the UN's first on the issue, the UN International Telecommunication Union has applied the principle since 2003. The US co-sponsored the Swedish-led motion with countries that included Brazil and Tunisia.

Internet Freedom remains a controversial issue around the world. In June, the Chinese Ministry of Information and Technology revealed its proposed changes to Chinese Internet law that seek to limit the ability of users to post anonymous comments on micro-blogs and forums. A Bangkok criminal court in May sentenced Chiranuch Premchaiporn, webmaster of independent Internet news site Prachatai, to an eight-month suspended sentence for failing to delete defamatory comments against Thailand's royal family. Earlier that month, a Dutch court ordered Internet service providers in the Netherlands to block the file-sharing website The Pirate Bay or else pay a fine of US $12,750 per day. Reported in: *jurist.org*, July 5. □

privacy trumps cybersecurity in recent poll

Proposals to increase cybersecurity by allowing businesses and government to share information may enjoy bipartisan support in Washington, but Americans aren't sold on the idea, a recent United Technologies/National Journal Congressional Connection Poll finds.

Almost two-thirds of respondents—63 percent—said government and businesses should not be allowed to share information because it would hurt privacy and civil liberties. But 29 percent of those surveyed said information-sharing should be allowed to better protect computer networks.

The United Technologies/National Journal Congressional Connection Poll, conducted by Princeton Survey Research Associates International, surveyed 1,004 adults from July 5-8. The poll has a margin of error of plus or minus 3.7 percentage points.

The poll's results strike at the heart of bipartisan proposals that would encourage businesses to share information by providing liability protections and revising some privacy laws. Those measures also would allow government agencies to share classified threat information with some businesses. Reported in: *National Journal*, July 10. □

most Americans, when reminded, support First Amendment freedoms

Americans once again don't run up big positive numbers in an annual First Amendment Center survey when it comes to being able to name all five freedoms in the opening 45 words of the Bill of Rights. But once reminded of "religion, speech, press, assembly and petition," they do have some strong opinions about how those freedoms ought to work.

The annual State of the First Amendment national survey was released in July. For all of the results from this and past years, see *http://www.firstamendmentcenter.org/sofa.*

The 2012 survey shows that although just 4% of Americans can name all five freedoms, and only "speech" is named by more than half of respondents, we're pretty protective of our rights. We support videotaping police, think it's OK to use copyrighted material just for fun, and oppose giving the government too much power over the Internet, even in a national emergency.

Just 4% of the 1,006 adults sampled in this year's survey—conducted in June for the First Amendment Center—could name "petition," and just 13% could name either "press" or "assembly." There were some slightly encouraging results: 28% identified "religion" and 65%, cited "speech." Though not exactly jump-for-joy figures, both were the highest for those freedoms since the survey began in 1997.

But once past that opening question, participants were reminded of all five freedoms—and generally a majority took a protective stance when it came to "their" freedoms.

Just 13% said the First Amendment "goes too far in the rights it guarantees," the lowest figure ever on that question. Still, that means about one in eight of our fellow citizens would cut back on some part of the First Amendment—even though in much of the world, people are willing to risk lives and liberty to get even a portion of the rights that we have enjoyed since 1791.

Some states—most notably, Illinois—have laws that limit or even criminalize the act of taking video or photographs of police activities in public. But the public overwhelmingly endorses the idea of holding authorities accountable through digital imagery, with 85% saying such activities should be allowed.

A majority—57%—opposes allowing public schools to discipline students who use personal computers at home to post material that authorities say is offensive.

And though 59% of respondents are OK with the government's being able to prosecute those who illegally distribute copyrighted music and movies online, they draw a distinction on what's "illegal" or not: 46% say using copyrighted material without paying a fee is fine as long as no money is being made. If there's a profit motive, 64% say a fee should be paid.

(continued on page 227)

censorship dateline

libraries

Mobile, Alabama

The hottest book of the Summer may be hard to find, especially in Mobile. Some claim *Fifty Shades of Grey* is erotica, and that's why the Mobile Public Library has banned it.

"It's not what you hear and read about everyday. We're talking about it at work, we're talking about it last night at dinner with friends, we're talking about it sitting at the pool," said Jodi Skinner, who has read the book. Charles Miller at Books-A-Million said the books in the "50 Shades" trilogy are the hottest sellers in the store for more reason than one.

The E-book has topped the National Best Seller lists, but finding a hard copy can be a challenge. Walmart is not selling it and the Mobile Public Library doesn't have it either. "We haven't banned it but it doesn't meet our current selection criteria. And that criteria is we don't carry erotica in our library," said Amber Guy with the Mobile Public Library. Guy said that could change if enough library customers request it.

"That's why the library is keeping an open mind about this because this may be a sign of changing times of what's considered acceptable and what people consider to be true literature and worth their time," added Guy. Reported in: local15tv.com, June 27.

Greenville, South Carolina

The Greenville Public Library Board of Trustees has come under fire from The National Coalition Against Censorship, the American Booksellers Foundation for Free Expression and the Comic Book Legal Defense Fund after the board decided to hear a challenge regarding Alan Moore's graphic book *Neocomicon*. The book contains sexual acts and language for which one parent issued a challenge.

In a statement regarding the possible removal of the book a letter sent to the Library Board of Trustees reads: "Removing the book because of sexual content not only fails to consider the indisputable value of the book as a whole, but also ignores the library's obligation to serve all readers, without regards to individual tastes and sensibilities."

A patron objected to the book after the patron's teenage daughter checked it out of the library's adult section. The teenage girl, however, was given an adult library card, which allowed her to check out adult-themed books.

The groups opposing the challenge warn that the book's removal could lead to First Amendment implications.

Alan Moore is the acclaimed author of the graphic novels *Watchmen* and *V for Vendetta*, both of which have been turned into Hollywood action movies. The groups opposing the challenge call Moore "one of the most influential and acclaimed authors in both the graphic novel category and the larger literary culture." *Neonomicon* was called an "essential work by an author who is indisputably a master within his field." Reported in: inquisitr.com, June 18.

Davis County, Utah

Brigitte Bowles, a lesbian mother of four teenagers and a special education teacher, has faced moments of adversity while living in conservative Davis County. Her children have been careful about disclosing their mother is gay. Over the years, Bowles said, her kids have lost friends as a result of her sexual orientation.

Such painful incidents helped draw Bowles to a June 19 meeting of the Davis Board of Education. She joined about a dozen representatives of lesbian, gay, bisexual and transgender (LGBT) communities who hoped to introduce themselves to board members in the wake of a recent decision to remove a book about lesbian mothers from shelves of elementary school libraries (see *Newsletter*, July 2012, p. 155).

Students can read the book, *In Our Mothers' House* by Patricia Polacco, only if they have a permission slip signed by parents—a requirement that many in the LGBT community, including Bowles, consider hurtful.

Bowles, who last year worked at Centennial Junior High in Kaysville, was thrilled to hear that Windridge Elementary School, also in Kaysville, had purchased a copy of the picture book, which depicts a lesbian couple raising their children. Her own children didn't have access to books that were representative of their family in elementary school, she recalled. But the decision to limit access to *In Our Mothers' House* has dampened her optimism that attitudes

were perhaps changing in a community where her own family has felt a need to remain closeted at times.

"This is just five steps back," said Bowles of the controversy over *In Our Mothers' House*. "If parents can't let their children learn that families come in all ways, we're not going too far."

Some members of the LGBT community who attended the meeting were confused about why they weren't allowed to briefly speak to the school board. Weston Clark, a Woods Cross High School graduate and former teacher at Viewmont High School, said he submitted a request to be placed on the board's June 12 agenda.

Clark said that after he submitted the request, Superintendent Bryan Bowles called to say Clark would not be placed on the agenda. Instead, Clark said, Bowles promised to allow him and a few other families to informally introduce themselves to the board at the start of the meeting.

Clark said Bowles withdrew his offer after Clark spoke to news media about his plans to attend the board meeting.

Davis School District spokesman Chris Williams said Bowles never made any agreement with Clark to allow LGBT families to address the board, even informally. Allowing someone to speak who isn't on the agenda would violate state law, which requires agenda items to be posted before a public meeting convenes, he said.

Williams reiterated that a school board meeting may not be the best place for a discussion of diversity issues. He invited LGBT families to stay until the end of the meeting, where they could then talk to school board members and Bowles after the meeting adjourned. School board president Marian Storey also invited guests to stay after the meeting to chat.

But Clark said that he believes the district may be trying to avoid a public discussion about shelving the book. He referenced the recent suicide of a Mountain Green teen who was reportedly bullied for being gay as a reason the community needs more discussion on fostering inclusion in schools.

"We're having an epidemic of bullying in the county and the state and it's a serious issue. Whenever you set a certain group of people aside and give them a parental note to have to view or see a group of people, we are segregating them from the general population and we're making them second-class citizens. That fosters an environment where people can bully and that's OK, because that person is 'less than.' It's giving a green light to bullies," said Clark. "We need to be more tolerant and inclusive."

Clark and others grilled Williams outside the board meeting about the district's policy on selecting members for the committee that voted to place the book behind the counter. Williams said the names of committee members who voted on the book will not be made public and that minutes from their meetings are not subject to Utah's Government Records Access and Management Act.

He said previously the committee was made up of parents, teachers, librarians and administrators. Revealing the names of those involved would make it difficult to recruit future volunteers to serve on similar committees, Williams said.

Meanwhile, the controversy over *In Our Mothers' House* continued to draw attention. Heidi and Jamie Justice recently relocated to Layton from Arkansas, where they would like to start a family. They said they are disappointed by the actions of the district where they plan to one day send their children.

"This book is locked down. Who is going to know about it?" said Jamie Justice outside the meeting. She said of the district's decision, "It speaks volumes, really." Reported in: *Salt Lake Tribune*, June 20.

schools

Erie, Illinois

The Erie School Board on June 14 upheld its decision to ban a book and lesson plan on diversity and tolerance of same-sex parents. In May, the School Board banned the *The Family Book*, by Todd Parr, and accompanying materials.

The materials, which are part of the "Ready, Set, Respect!" lesson endorsed by the Gay, Lesbian and Straight Education Network, were implemented at the elementary school this spring as part of the diversity and tolerance unit in the school.

One of the contested lines in *The Family Book* states "some families have two moms or two dads." After receiving complaints from several parents, the materials selection committee reviewed the book and lessons before the board voted 5-2 to ban them at its May meeting.

Board member Charles Brown defended the ban and the board's choice to use other materials for the tolerance and diversity curriculum. "We have nothing but the students' best interest in our mind. But we live in a democracy and a vote is a vote. This board voted," Brown said.

Brown, along with some fellow board members, suggested the community use the school board election in April if they were unsatisfied with the current board.

The ban gained national attention after an online petition called for the school board to reverse its decision. The petition was started by 2010 Erie High School graduate Sean Leeds. Leeds joined a mixed group of more than 100 book supporters and ban supporters who packed the Erie Middle School cafeteria during the board session.

"It's crucial to instill tolerance and diversity in our community's children during a young age...The only agenda here is to promote tolerance in our children," Leeds said during the meeting. "Exposing children to the reality that is this incredibly diverse world that we live in is not a narrow view, excluding groups from children by trying to protect them from reality is."

Parent Mindy Jepson said she supports the ban because

she believes it's what's best for her three children at Erie Elementary. "I don't feel it's the school's job to teach family diversity, gender expressions or any other lifestyles... Parents know their children best and how best to approach these situations. I think 'Ready, Set, Respect!' crosses the line when it starts redefining family, males and females," Jepson said.

After hearing from several other speakers on both sides of the issue, the School Board had a brief discussion of its previous decision. Board member Thomas Pons questioned holding a referendum on the issue. "Do we want to be the town that puts that on there and the stigma that's going to go with it?" Pons asked. Rather, Pons joined Brown in suggesting the voters hit the polls in April.

"The final decision, the final word, will be in the hands of the community. This is not the teacher's school. This is not the administrator's school. This is the community's school," board member Mike Heun said. After board members stated they would not change their votes, the meeting was adjourned.

"This matter is probably over with until April 2013," Brown said. Reported in: *Clinton Herald*, June 15.

Frederick County, Maryland

While Frederick County Public Schools plans to remove a social studies textbook that critics say promotes liberal viewpoints, the parents who advocated against the text say the process is moving too slowly. Parents have appealed the proposed timeline, which calls for the book to be removed in the 2014-15 school year. Parents also say they want the process for their appeal to be open to the public.

"We are trying to get them to open the process," said Cindy Rose of Knoxville, who has been fighting against the textbook since last year. "I think the people have the right to witness this."

The appeal was scheduled for August 6, and school board members decided to conduct the process behind closed doors. The process that led to a recommendation to remove the book has been open to the public, so there is no reason to close the appeal, Rose said. The appeal would not concern personnel matters or union negotiations, which are the most common reasons for closed sessions by the board, she said.

"We are not talking about national security here," Rose said.

But school officials defend their position and say they are following procedure by conducting the appeal discussions behind closed doors. "Most of the appeals to the board are done in a closed session," said school board President Angie Fish. "In fact, I cannot recall an appeal that was done publically."

In this case, board members voted not to open the process, said Fish, who also noted the appeal does concern a school system staff member. "Technically it is appealing a decision of the superintendent," she said.

This is the latest clash between parents' and school officials' opinions in an year-long battle, led by a handful of parents, who want to get rid of the socials studies textbook.

The *Social Studies Alive!: Our Community and Beyond* textbook has been a part of Frederick County schools' curriculum since 2004, and is one of 15 to 20 printed and online resources that teachers use for third-grade social studies. But some parents think that it does not teach facts objectively, and tends to promote liberal ideologies on issues such as health care, public education and government.

For example, the text explains how paying for health care can be a hardship for families in the U.S., while families in other countries can go to the doctor without paying immediately or for a small fee. Immediately after, the text asks students if they think health care should be free.

A taskforce in September examined the book and, in March, determined some statements in it could be seen as "left-leaning." The taskforce recommended the school system start searching for a new resource as soon as possible. But Superintendent Theresa Alban has indicated replacing the textbook may take some time and thinks the book can remain in use until the 2014-15 school year.

Alban has cited a lack of money for new textbooks and the introduction of the new Common Core State Standards in her decision to delay a change. Alban did not want the school system to rush in replacing the book before making sure that its replacement would align with the Common Core, she said.

Parents are appealing that decision. Andrew Nussbaum, the attorney who represents the school board in the matter, said Maryland law allows the local board to handle the process behind closed doors. Unlike personnel and student appeals, where the board has to work behind closed doors, the law allows the school board to choose whether to handle it publically, Nussbaum said. Reported in: *gazette.net*, July 16.

foreign

Kuala Lumpur, Malaysia

Controversy continues to surround the Malaysia government's crackdown over a book by Canadian Muslim and lesbian author Irshad Manji, which was banned in May and has led to a raid on a Borders bookstore in the country.

Malaysia's Minister in charge of religious affairs has defended the raid, which resulted in the bookstore manager being charged in the Syariah court for distributing and selling the book that is now banned. Malaysia's Minister in charge of religious affairs, Jamil Khir Baharom, said, "The country has laws, we have rules and regulation. We will answer in court." His deputy said parties involved should have known the book was banned, since her department had already advised the Home Ministry (KDN) that it considers the book "un-Islamic."

Masitah Ibrahim, Deputy Minister in charge of Islamic affairs, argued, "We did our part, if Borders wants to sue, we will see them in court. She should be responsible for distributing something that's against Islam. Our part from Jawi is that we've give our comments, we should prevent things that go against Islam. Other than that, the store manager, etc., they have to deal with KDN."

Allah, Liberty, and Love was banned because officials in Malaysia said it went against Islamic teachings, but activists and others said they believe Manji's book was banned because she is a lesbian (see *Newsletter*, July 2012, p. 183).

Bookstore manager 36-year-old Nik Raina Nik Aziz was charged at the Syariah court for distributing and selling the book. If convicted, she could be fined up to $1,000 or jailed for two years. The company said Nik Raina has been victimized and is demanding that the charge against her be dropped.

The chief operating officer (COO) claimed that she had no knowledge of the ban at the time of the raid. In fact, the notice only came from the Home Ministry a week later. As store manager Nik Raina was not involved in the book selection process, adding that she was grossly mistreated and wants all charges against her be dropped immediately.

Yau Su Peng, COO, Borders Malaysia, said: "This current event has really broken her down. There are a lot of concerns of the safety of her family, pressures being put on them from around, she kept on saying to me 'I understand why I have to go through this, but my family, my friends not all of them will understand what's this all about, to them I am already guilty.' For me, that's really sad because all she was doing was performing her duty."

Yau is now worried about her other staff who are mostly Muslim.

She said she may have to reconsider the hiring policy from now on.

"You are asking me whether (am I) going to relook our hiring policies and consider excluding Muslim – my personal reaction to that is absolutely not. As a business person, I have to say, it has crossed our mind," she added.

Activists and readers in the country told Bikyamasr.com that the ban was "ridiculous" and that "people should be able to choose for themselves what they read and how they react."

Mohid Datuk Serat, a university student and political science major in Kuala Lumpur, told *Bikyamasr.com* that he hopes the charges will be dropped, or the government will intervene somehow. "It is really a dark spot on our future right now to be banning books and trying to force a certain belief over people," he began. "I just wish the government would let us choose how we want to react to different views."

The Home Ministry banned the book after it was deemed offensive to Islam, contained "elements that could mislead the public," and was "detrimental to public order."

According to Manji's website, the book "shows all of us how to reconcile faith and freedom in a world seething with repressive dogmas." She has been a longtime proponent of tolerance and understanding within Islam, and describes herself as a "practicing Muslim." Reported in: *bikiyamsr.com*, June 27.

Moscow, Russia

Russia's parliament has voted to approve a law that would give the government the power to force certain Internet sites offline without a trial. Supporters of the amendment to the Act for Information say it will help the authorities block sites containing images of child abuse and other illegal material. But opponents have warned that censorship could later be extended.

The bill still needs to be signed by President Vladimir Putin to become law. It must also be approved by Russia's upper house, the Federation Council of Russia. Local reports suggest it could come into force by November.

The Russian-language version of Wikipedia took its content offline for a day ahead of the vote claiming the law "could lead to the creation of extra-judicial censorship of the entire Internet in Russia, including banning access to Wikipedia in the Russian language." Local search engine Yandex also signaled concern. It crossed out the word "everything" in its "everything will be found" logo.

"Such decisions should not be taken hastily," wrote the service's editor-in-chief, Elena Kolmanovskaya, on its blog. "The bill should be discussed in open forum with the participation of the Internet industry and technical experts."

The Russian social networking site Vkontakte also posted messages on users' homepages warning that the law posed a risk to its future.

Russian parliament chamber The Duma voted in favor of the bill despite calls for more time to consider the change *The Moscow Times* reported that deputies amended the law to remove a reference to "harmful information," replacing it with a limited list of forbidden content. The blacklist is now restricted to sites offering details about how to commit suicide, material that might encourage users to take drugs, images featuring the sexual abuse of children, and pages that solicit children for pornography.

If the websites themselves cannot be shut down, Internet service providers and web hosting companies can be forced to block access to the offending material.

Prime Minister Dmitry Medvedev defended the law, saying "people's basic rights and freedoms must be upheld, including the right to information on the one hand and the right to be protected against harmful content on the other hand," according to a report by Radio Free Europe.

But critics have complained that once Internet providers have been forced to start blocking certain sites, the government may seek court orders to expand the blacklist. Reported in: BBC News, July 11.

Birzeit, West Bank

Birzeit University occupies an important place in Palestinian history. The oldest Palestinian university, it grew out of an elementary school for girls created in 1924, when schooling was rare for Palestinian children. It became a college in 1942 and a university in 1975. Birzeit has been the site of numerous protests and clashes with Israeli authorities, who shut down the university frequently and for lengthy periods in the 1980s.

`"The university is guided by the principle of academic freedom and upholds independence of thought, freedom of discussion, and unimpeded circulation of ideas. Ironically, these principles made the Birzeit University community a target of harassment under the Israeli military occupation," says a history of Birzeit on its website.

Now the university is facing questions about whether it has abandoned those principles in failing to defend a professor who is a target not of Israelis, but of the university's Islamist students.

Musa Budeiri might seem an unlikely target. He has taught at Birzeit for nineteen years, published extensively on Palestinian nationalism, and devoted his career to the university through periods when it was very difficult to work there. But he got into trouble with campus Islamists because of a habit he shares with academics in many countries: He posts political cartoons on his office door.

Budeiri said that "since the outbreak of the Arab revolutions I have been in the habit of picking out cartoons from newspapers or the Internet illustrating and commenting on what is happening, and sticking them on my office door." Budeiri has taught cultural studies at the university, so he said he wants students thinking about a range of ideas that are in play online and in print. "I thought this would help provoke and stimulate discussion among students," he said.

He said that the controversy started at the end of the academic year, when he had five cartoons on his door, some of which offended Islamist students.

"The cartoons in question are a couple of pages from Superman comics," he explained. "A blogger from the Emirates had taken a few pages from the comics, added a beard to Superman and declared him Islamic Superman, and posted on the Internet. He also erased the English blurb and inserted words of his own in Arabic. In the first, Superman is lying in bed with a woman and she asks him if he is going to marry her, he responds by saying that on the planet Krypton, they are 'not allowed to take a fifth wife.'

"The second is a scene with Superman and Batman. Superman is reading a fatwa condemning Batman to death for being dressed in women's garb, which according to Superman is not allowed in Islam according to the ruling of some ancient authority; Batman is protesting that he is a Shiite and that the ruling only applies to Sunnis. The third cartoon is about Afghanistan, it is by a French cartoonist. A couple are standing fully clothed in the shower room. The man looks at the shower curtains and says 'you are looking particularly nice today.' The woman responds 'I am standing here.' Fourth cartoon is about Hillary Clinton. [Fifth] is a picture of people demonstrating in a Syrian village against the massacres being committed there." (The Superman and Batman cartoons have caused the most controversy, although some critics of Budeiri have cited the other cartoons as well.)

The turmoil started when a group of students distributed a leaflet on campus saying that the cartoons were "an insult to Islam," and that he should be punished and should apologize for posting them, Budeiri said. A Facebook page denouncing him (which was removed from Facebook) followed, as did protests. According to Budeiri, the university then removed the cartoons from his door, and sent three vice presidents to ask him to issue an apology. He agreed to issue an explanation, but not to apologize.

Budeiri provided an English translation of his statement, in which he stated his educational objectives in posting cartoons, and said that posting a cartoon that involves Muslims in some way cannot be assumed to be an insult to Islam. Further, he said it was dangerous to the exchange of ideas for people to assume they know what goal someone has in doing something like putting a cartoon on an office door.

"The presumption of some students that they 'know' the underlying motives of the person who posted the caricatures better than he does himself, and the collective threat they see in the [cultural studies] department as being engaged in a nefarious plot/conspiracy to subvert students' religious beliefs, qualifies them at the very least, to be in possession of supernatural powers and in that sense they ought to be teachers and not students. The same applies to their demand that they should decide on the content of the academic curriculum," he wrote in his explanation.

Budeiri wrote that the reactions made him feel "vindicated in my decision to post the cartoons." He explained: "They have opened up a discussion and have exhibited an ability of students to exercise their empowerment, potentially to ask, question, object, discuss, defend, in order to express their ideas and beliefs. This is something I have always fought for, and tried to convey since the first days of my teaching career, much more than the 'knowledge' confined in the pages of official textbooks.

"It is a shame that instead of pursuing this path, and advancing their ideas by argument and reasoning, and winning as many adherents to their point of view as are convinced, (and these will never constituted the whole community, because people are individuals and not robotic replicas, and each mind is an individual creation possessing its own unique characteristics), they chose to resort to abuse, and threats of physical violence, attempting to appropriate to themselves the sole authority of what Muslims can and can not think, can and can not do. There are and will remain as many different Muslims as there are unfettered minds."

At that point, the university issued a statement that said Budeiri did not intend to offend Muslims. While the

university criticized attacks on anyone for expressing their views, Budeiri said that no action was taken against the students who threatened him. Student protesters also reported having been told that Budeiri would not be returning to the university, he said, and so considered that a victory. He said that various university officials have continued to ask him to apologize and/or take a leave and go abroad for a semester.

While Budeiri said that the university never informed him that he wouldn't be teaching again, he said that even though he has asked for a contract for the next academic year, he has had "no response." The academic year at Birzeit starts next month.

The Middle East Studies Association of North America is backing Budeiri. The group issued a letter to Birzeit denouncing the way it has responded to the controversy. The case was investigated by the association's Committee on Academic Freedom, and Fred M. Donner, president of the association and a professor of Near Eastern history at the University of Chicago, sent the letter, which said that "the actions of the university administration to date risk establishing a dangerous precedent that privileges those who resort to intimidation and violence to contest the freedom of expression."

The letter praised Birzeit for having a record, despite "insurmountable challenges," as "an exemplary model of free academic exchange." But in this case, the letter says, the university is not living up to that record. "We are disappointed that the BZU administration has not been unequivocal in its support of Professor Budeiri," the letter says. "For example, the administration has insisted that Professor Budeiri should issue a personal apology as a way to diffuse tension, and to date, the students responsible for the incitement against Musa Budeiri, including making threats to his life and demanding that he be fired, have not been disciplined.

"The university's statement condemning the incitement does nothing to fulfill its obligation as an academic institution to guarantee the security of all its members. More important, the actions of the university administration to date have done nothing to protect the members of the university – students, faculty, and staff alike – from the excessive demands of an extremist group. Such threats, regardless of the political affiliation of the perpetrators, need to be guarded against if the academic principle of free inquiry and expression is to be upheld."

The letter goes on to say that it was inappropriate for the university to ask Budeiri to take a leave for his own safety. "Such a course of action establishes a dangerous precedent, one that is sure to embolden extremist elements who believe they can influence university policy (and force people out) by threats and intimidation," the letter says.

Further, the letter says that the university's failure to provide Budeiri a contract for next year will be seen as "a clear capitulation to the students contesting Professor Budeiri's freedom of expression." Some Birzeit officials have also discussed creating multiple sections of any course Budeiri would teach, so that offended students would not need to have him as an instructor. The Middle East studies letter calls this response "yet another capitulation to unreasonable demands – even if the latter are buttressed by threats of boycotts by the students now expressing their own opinions in such a violent manner."

In a response to the Association, Khalil Hindi, president of Birzeit University, did not dispute most of the facts as described by Budeiri and the association, except that he said that some students have in fact been referred to disciplinary authorities. That those processes have not been completed, he said, does not mean that the charges have not been taken seriously, and instead reflects a commitment to due process.

But Hindi objected both to the conclusions and tone of the letter. "Notwithstanding the great regard I have for MESA, I deplore the haughtiness of your letter. Sir, one is left with the impression that you think of the Middle East as your 'subject' in more senses than one."

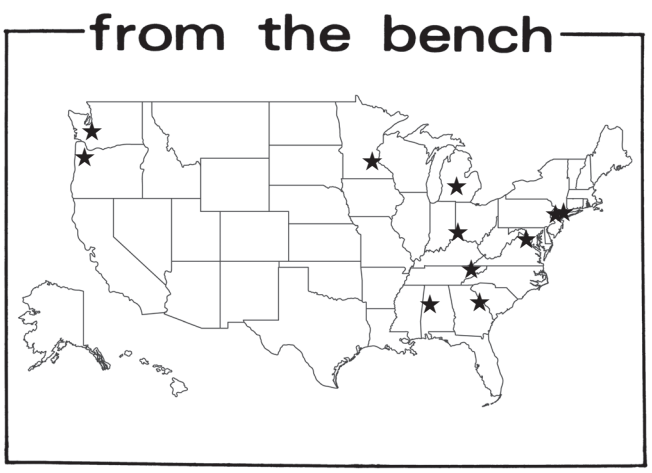
On several of the actions that the association criticized, Hindi said that there was good reason to act as the university did. He wrote that he personally asked to have the cartoons taken down. "This was done to calm tempers and avert the real risk of violent clashes on campus between opposing factions," he said. He also said that it was legitimate to make sure that students could avoid Budeiri's course in the future if they want to. "This was done in order to give freedom of choice, but also to avert the possibility of problems arising out of class," he said.

Hindi wrote that the controversy at Birzeit "raises serious and difficult general issues: 1) Where and how to draw the balance between academic freedom and general freedom of expression (including protest by students)? 2) What are the limits of academic freedom (every freedom has limits)? Do they extend beyond teaching, research and publications (do they, for example, extend to ostentatious display of provocative posters in public space)? 3) How to manage the evident rift in Palestinian society without curtailing freedoms?" And for academics at Birzeit, he said that "grappling with these issues is not just a question of intellectual debate, but also of every day practice in difficult, sometimes explosive, situations."

Further, Hindi questioned why the association was focused on Birzeit and not on Israel. "At the risk of being accused of implicitly leveling a charge of hypocrisy, may I respectfully suggest that MESA turn its attention, more usefully, to the defense of the collective academic freedoms of the Palestinian people, which are being trampled upon daily by the Israeli occupation," Hindi wrote.

MESA in fact does write letters to Israeli officials objecting to what the association considers violations of academic freedom, and wrote recently on an issue cited by

(continued on page 227)



U.S. Supreme Court

The Supreme Court on June 21 declined to address whether the government still has the authority to regulate indecency on broadcast television, but on narrow grounds it ruled in favor of two broadcasters who had faced potential fines for programs featuring cursing and nudity.

The court ruled that the broadcasters had not been given fair notice of a new Federal Communications Commission policy. It left open the question of whether changes in the media landscape have undermined the rationales for limiting their free-speech rights in ways the First Amendment would not tolerate in other settings. Cable television and the Internet are not subject to government regulation of ostensibly indecent material.

The case, *Federal Communications Commission v. Fox Television Stations*, was making a return appearance at the court. In 2009, the justices also passed up an opportunity to examine the First Amendment issues raised by the case.

The case arose from the broadcast of fleeting expletives by celebrities on awards shows on Fox and partial nudity on the police drama "NYPD Blue" on ABC. Justice Anthony M. Kennedy, writing for seven justices, said the broadcasters must win, but only because the commission had changed the rules in the middle of the game.

"The commission failed to give Fox or ABC fair notice prior to the broadcasts in question that fleeting expletives and momentary nudity could be found actionably indecent," Justice Kennedy wrote.

Two of the challenged broadcasts involved cursing on the Billboard Music Awards. The first involved Cher, who reflected on her career in accepting an award in 2002. "I've also had critics for the last 40 years saying I was on my way out every year," she said. Then she, in the words of Justice Antonin Scalia in the earlier decision in the case, "metaphorically suggested a sexual act as a means of expressing hostility to her critics." Justice Kennedy transcribed the crucial word as the letter F followed by three asterisks.

The second bout of celebrity cursing came in an exchange between Paris Hilton and Nicole Richie in 2003 in which Richie discussed in vulgar terms the difficulties in cleaning cow manure off a Prada purse.

The commission also took issue with a 2003 episode of "NYPD Blue" that included images of, in Justice Kennedy's words, "the nude buttocks of an adult female character for approximately seven seconds and for a moment the side of her breast."

In 2004, after the three broadcasts and in connection with cursing by the singer Bono at the Golden Globe Awards, the commission announced that broadcasts of even fleeting indecency were subject to punishment. It did not matter, the commission said, that some of the offensive words did not refer directly to sexual or excretory functions. Nor did it matter that the cursing was isolated and apparently impromptu. The commission imposed no punishment on Fox, but it fined ABC and its affiliates $1.24 million.

In the Fox case, the United States Court of Appeals for the Second Circuit, in New York, ruled that the commission was not entitled to change its policies "without providing a reasoned explanation justifying the about-face." The Supreme Court reversed that ruling in 2009 on administrative-law grounds, returning it to the Second Circuit for consideration of the First Amendment issues. The appeals court then ruled that the commission's policies were unconstitutionally vague. It later applied that reasoning to the ABC case.

When the two cases made their way to the Supreme Court recently, one of them for a return trip, First Amendment advocates hoped for a square ruling from the justices on the constitutional issues. They were disappointed.

"This opinion leaves the commission free to modify its current indecency policy in light of its determination of the public interest and applicable legal requirements," Justice Kennedy wrote. "And it leaves the courts free to review the current policy or any modified policy in light of its content and application."

Justice Sonia Sotomayor, who was a judge on the Second Circuit before being appointed to the Supreme Court, recused herself from consideration of the FCC case.

Only Justice Ruth Bader Ginsburg, who voted with the majority but did not join its reasoning, was prepared to address the First Amendment issues raised by changes in the world of broadcasting and related media since 1978, when the Supreme Court decided the leading case in this area, *Federal Communications Commission v. Pacifica.*

That decision said the government could restrict George Carlin's famous "seven dirty words" monologue, which had been broadcast on the radio in the afternoon. The court relied on what it called the uniquely pervasive nature of

broadcast media and its unique accessibility to children. Both points are open to question given the rise of cable television and the Internet.

"In my view," Justice Ginsburg wrote, the *Pacifica* decision "was wrong when it issued. Time, technological advances, and the commission's untenable rulings in the cases now before the court show why *Pacifica* bears reconsideration."

In recent remarks before the American Constitution Society, Justice Ginsburg discussed the case, and she suggested wryly that there were gaps in the justices' knowledge of popular culture.

"The Paris Hiltons of this world, my law clerks told me, eagerly await this decision," she said of the case. "It is beyond my comprehension, I told my clerks, how the FCC can claim jurisdiction to ban words spoken in a hotel on French soil." Reported in: *New York Times*, June 21.

A divided Supreme Court on June 28 overturned a law that made it a crime to lie about having earned a military decoration, saying that the act was an unconstitutional infringement on free speech.

The case arose from the prosecution of Xavier Alvarez under the Stolen Valor Act, a law signed in 2006 that made it a crime for a person to falsely claim, orally or in writing, "to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States."

Alvarez, an elected member of the board of directors of a water district in Southern California, said at a public meeting in 2007 that he had received the Medal of Honor, the nation's highest military award, after being wounded in action as a Marine. All of those claims were lies, his lawyers later conceded.

Charged with violating the law, Alvarez argued that his remarks were protected speech under the First Amendment. The trial judge rejected his defense, saying the First Amendment does not apply to statements the speaker knows to be false.

But in 2010, a divided three-judge panel of the United States Court of Appeals for the Ninth Circuit, in San Francisco, reversed that decision, saying that if the law were upheld, "there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook."

A six-justice majority of the Supreme Court agreed with the appeals court, ruling that the law was overly broad and posed a threat to First Amendment rights by criminalizing speech, even when it was knowingly false. Though the government has a clear interest in protecting the integrity of military honors, the court said, the Obama administration had failed to demonstrate in its defense of the Stolen Valor Act how Alvarez's falsehoods undermined the awards system.

"The First Amendment requires that there be a direct causal link between the restriction imposed and the injury to be prevented," Justice Anthony M. Kennedy wrote in an opinion joined by Chief Justice John G. Roberts Jr. and Justices Ruth Bader Ginsburg and Sonia Sotomayor. "Here, that link has not been shown."

"The Nation well knows that one of the costs of the First Amendment is that it protects the speech we detest as well as the speech we embrace. Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment," Kennedy declared.

A concurring opinion written by Justice Stephen G. Breyer and joined by Justice Elena Kagan agreed that criminal prosecution of false statements could have a chilling affect on public debate. But Justice Breyer also provided possible templates for rewriting the act, saying it had "substantial justification."

"The First Amendment risks flowing from the act's breadth of coverage could be diminished or eliminated by a more finely tailored statute," Justice Breyer wrote. "For example, a statute that requires a showing that the false statement caused specific harm or is focused on lies more likely to be harmful or on contexts where such lies are likely to cause harm."

In a sharply worded dissent, Justice Samuel A. Alito Jr. wrote that there had been "an epidemic of false claims about military decorations," which Congress had reasonably concluded were "inflicting real harm on actual medal recipients and their families." He was joined by Justices Antonin Scalia and Clarence Thomas.

"By holding that the First Amendment nevertheless shields these lies," Justice Alito wrote, "the court breaks sharply from a long line of cases recognizing that the right to free speech does not protect false factual statements that inflict real harm and serve no legitimate interest."

The ruling by the court was somewhat surprising. During oral arguments in February, most of the justices seemed to accept that the First Amendment did not protect calculated falsehoods that caused at least some kinds of harm and that the government did have a substantial interest in protecting the integrity of its system of military honors.

First Amendment advocates hailed the decision.

"The First Amendment reserves to individual citizens, not the government, the right to separate what is true from what is false, and to decide what ideas to introduce into private conversation and public debate," said Jameel Jaffer, deputy legal director for the American Civil Liberties Union.

But many veterans organizations expressed dismay, saying that criminal prosecution was the only way to deter false claims about military awards. The act called for fines and imprisonment of up to one year.

Mark Seavey, a lawyer who is the new-media manager for the American Legion, said he was confident that a more narrowly drawn Stolen Valor bill would easily pass

Congress. "It's not a good day for us, but it's not Black Thursday," he said.

A bill that would make it illegal to knowingly misrepresent military service with the intent of obtaining "anything of value" was introduced in Congress last year by Representative Joe Heck, Republican of Nevada.

Heck contends that his bill will pass constitutional muster because it does not attempt to restrict speech but instead prohibit a type of fraud. Reported in: *New York Times*, June 28.

If the U.S. Supreme Court upholds the conviction of a Thai-born graduate student who allegedly made close to $1 million importing cheaply made foreign editions of textbooks and selling them to U.S. students on eBay, then academic libraries might not be allowed to lend certain books and electronic materials, according to library advocates who filed an *amicus* brief on the case July 3.

The Library Copyright Alliance, a consortium of three major library associations, argues that a lower court's ruling in *John Wiley & Sons, Inc. v. Supap Kirtsaeng* could make libraries liable for copyright infringement if they lend out library books and other materials that were "not lawfully manufactured in the United States" without purchasing expensive "lending licenses." Libraries, the alliance asserts, tend to have large numbers of foreign-made books in their collections.

Such an outcome could give publishers greater leverage to dictate the terms under which patrons may access copyrighted works, according to Brandon Butler, director of public policy initiatives for the Association of Research Libraries and co-author of the amicus brief.

In 2008, Wiley, one of the world's largest textbook publishers, sued Supap Kirtsaeng, a graduate student at the University of Southern California, for coordinating with friends and family in Thailand on a lucrative ploy to sell low-quality editions of Wiley textbooks manufactured by the company's Asia division to customers in the United States, where Wiley was selling prettier, sturdier editions of the same textbooks for substantially higher prices.

A district court found Kirtsaeng guilty of copyright infringement and ordered him to pay $600,000 in damages to Wiley. An appellate court upheld the decision. In April the Supreme Court agreed to hear the case, which it will decide sometime within the year.

The legal issue at hand is whether the "first sale doctrine," which says copyright holders may only control the price of a textbook the first time it is sold, applies to textbooks that are assembled outside the United States. The language of the first-sale doctrine, which is part of the U.S. Copyright Act of 1976, refers to works "lawfully made under this title." But does that phrase mean "manufactured in the United States," or "manufactured with the lawful authorization of the holder of a work's U.S. reproduction and distribution rights"?

The Second Circuit Court of Appeals went with the former reading. Now the library associations are saying a Supreme Court affirmation would mean disaster for libraries.

"Many of the materials in the collections of U.S. libraries were manufactured overseas," wrote Butler and Jonathan Band, a Washington-based copyright attorney who frequently represents libraries, in a draft of the brief. "Indeed, U.S. publishers now print an increasing number of books in China and other countries with lower labor costs."

"Thus, an affirmance of the decision below could jeopardize the ability of libraries to lend a substantial part of their collection to the public," they write.

Publishers will no doubt argue that the library associations' concerns are overblown. There is an exception in U.S. copyright law that permits libraries to import "no more than one copy of an audiovisual work solely for its archival purposes, and no more than five copies or phonorecords of any other work for its library lending" purposes. Band and Butler admit in their brief that "an exception to the distribution right is implied… It would make no sense for Congress to allow importation for the purpose of lending, but then not allow the lending itself."

Nevertheless, they argue that there is enough room for interpretation within the legalese to make libraries skittish. On the subject of audiovisual library content in particular, the library advocates point out that the exception only applies to foreign-made works imported "solely for archival purposes" and does not mention lending at all.

Publishers have argued that the implications of an alternative reading—one that enables importing and reselling by third-party entrepreneurs like Kirtsaeng—would be dire for the publishing industry. In *Costco Wholesale Corporation v. Omega, S.A.*, a 2010 case with similar implications for the first-sale doctrine, the Association of American Publishers (AAP) filed an *amicus* brief of its own, forecasting apocalyptic fallout for publishers if the High Court blessed such a reading. It didn't.

"Copies of foreign editions [of textbooks] would be imported en masse, by large campus-based bookstores, Internet resellers, and others," the AAP wrote at the time. "The loss of revenue from domestic editions would drastically reduce the ability of publishers to compensate authors for their work and lead to significant changes in the publishers' business models which, in turn, will cause ripple effects beyond the publishing industry."

A spokeswoman for the publishing industry said textbook publishers would not try to crack down on libraries lending foreign-made books and materials. "A positive outcome in *Wiley v. Kirtsaeng* would not put libraries at risk for lending books in their collections that were imported from abroad," she said. "Publishers have also stated they have no intention of combing library stacks and databases to identify such publications; their stated objectives have been to influence future purchases, strengthen legitimate channels and discourage gray goods transactions."

Butler, the co-author of the brief, said he thought the sort of upheaval foretold by the AAP was unlikely, given how difficult it was to successfully run the sort of reselling operation Kirtsaeng had managed to set up. Asked if he thought it was likely that a publisher would sue a library for lending foreign-made copies of its books, Butler said it was improbable but not implausible. Recent legal wrangling between publishers and libraries has made it clear that publishers are willing to be bold about asserting their copyrights, he says.

"If a publisher can decide whether to allow lending," Butler said, "sometimes they might decide they would rather not."Reported in: *insidehighered.com*, July 3.

library

Portland, Oregon

Religious ceremonies may soon be held at the Seaside Public Library following a ruling by a federal court judge over the library's policy prohibiting use of the library room's for religious meetings.

U.S. District Court Judge Michael W. Mosman ordered the Seaside Library to pay $10,500 to the Florida-based nonprofit Liberty Counsel as well as court and attorney fees following his June 6 decision over a lawsuit filed in February. Seaside Library Director Reita Fackerell said steps had already been taken to comply with federal and state laws.

"We are here to serve the public and if this is how we need to comply, so be it," she said. "This ruling means that religious groups may now hold religious services in our building because that is freedom of speech."

In May, the Seaside City Council altered the library policy removing the clause that prohibited the library's rooms from being used for "religious services or proselytizing" in response to the lawsuit.

The plaintiff wrote to the Seaside Library in August 2010 requesting a meeting room to sponsor a free evangelical outreach in Seaside "to help mold children into responsible and respectful citizens by shaping their moral consciousness from a Christian and Biblical viewpoint." The request for the meeting room was denied based on the library's policy prohibiting use of the meeting rooms for such religious services.

The suit sought a federal judge's order requiring the Seaside Library to allow public meetings in its community rooms "without regard to the religious viewpoint or content of Liberty Counsel's message, on the same terms and conditions of any other group that is permitted to use the room."

"We will pay this penalty and the other court costs through the library's $573,000 budget, Fackerell said. "The library board is also in the process of updating our policy manual so we are in compliance with all state and federal laws." Reported in: *Seaside Signal*, July 18.

colleges and universities

Tuscaloosa, Alabama

A federal appeals court in June largely upheld a lower court's decision that the University of Alabama at Tuscaloosa's football uniforms are not protected by trademark law. The ruling, by a unanimous three-judge panel of the U.S. Court of Appeals for the 11th Circuit, found that the artist Daniel A. Moore's images of the famous Crimson Tide football team were protected by the First Amendment. The court also ruled that the university's own actions—displaying and even selling Moore's unlicensed works—undermined its ability to strictly enforce its trademark rights.

The appeals court also sent a portion of the case back to the district court, to reconsider how to deal with Moore's images of the football uniforms on mugs and other "mundane products."

The lawsuit drew wide attention from higher-education lawyers, with more than two dozen universities seeking to file briefs in support of Alabama's appeal—a sign that many of them worried that a ruling against the university would imperil their rights to their lucrative school colors. Because the outcome of this case is specific to how Alabama has enforced its trademark, it's unclear whether the decision will spark a wave of legal challenges to other universities.

The case stemmed from a disagreement between the football-powerhouse university and Moore, who has been painting and selling images of the football team since 1979, according to the court's summary of the case. The university did nothing to protest Moore's work until the 1990s, when he signed a dozen licensing agreements with the university, to produce and market officially licensed products for the institution. The contracts also restricted Moore's use of any logos or images that the university thought should be protected by its trademark, including the colors of the football team's uniforms.

At the same time, however, the university allowed Moore to produce and sell unlicensed paintings and other works, including $12,000 worth of calendars that were sold at a campus store. The university also displayed Moore's work on a brochure of the institution's Bryant Museum and in the offices of its athletics department, and asked the artist to sketch images from a 2001 football game.

But in 2002 the university told Moore that he would have to license, and pay royalties on, all of his Alabama-related products. The artist disagreed, and in 2005 the university sued, accusing him of breaching his contracts with the university and violating trademark law.

A federal district court ruled in Moore's favor in 2009, finding that the licensing agreements did not specifically exclude the depiction of the uniforms, that the university's colors "were not especially strong marks on the trademark spectrum," and that the artist had a First Amendment right to paint historical football events.

The federal appeals court agreed with the lower court's decision that the portraits and other images were protected by the First Amendment. But the appeals court also concluded that the licensing agreements were too vague to decide whether uniforms and team colors could be considered as trademarked items. Instead, the issue should be decided by the parties' actions, including the university's allowing the artist to continue to produce and sell unlicensed works.

"For many years," the appeals court concluded, "the university had displayed unlicensed Moore prints in its own athletic-department office and had granted Moore press credentials so he could take photographs to be used as source material for paintings, many of which were never licensed. The parties' course of conduct clearly indicates that they did not intend that Moore would need permission every time he sought to portray the university's uniforms in the content of his paintings, prints, and calendars."

The issues are less clear on how the university and Moore have handled images on "mini-prints, mugs, cups ... flags, towels, T-shirts, or any other mundane products," the court ruled, in returning that part of the case to a district court.

"There is a lack of evidence indicating how the parties viewed Moore's portrayal of the university's uniforms on mugs and other 'mundane products,' the court found. "In thirty years, Moore has produced only three sets of mugs. The fact that two of the sets were licensed perhaps indicates that the parties thought that Moore would need permission to produce mugs portraying the university's uniforms. However, the fact that one set was not licensed implies the opposite." Reported in: *Chronicle of Higher Education* online, June 12.

Augusta, Georgia

A federal judge has dismissed a lawsuit by a former student who challenged the right of Augusta State University's counseling program to require all students to learn to treat gay patients in a supportive, nonjudgmental manner. Judge J. Randal Hall found that the university's rules did not violate the rights of religious students such as the woman who sued.

The Augusta State case is one of two that involve public universities seeking to require counseling students to adhere to professional standards about equitable treatment and complaints from religious students who argue that their rights are being violated because of the university rules. The Augusta State suit has already been the subject of rulings at the district court and appeals court levels (with both rulings backing the university), but those decisions were about the request from Jennifer Keeton, the former student, for an injunction. This new ruling, in contrast, is about the merits of the lawsuit itself.

Specifically, Keeton's suit said that the university had no right to require her to complete a "remediation plan" over her unwillingness to counsel gay people in supportive ways. She said she was willing to counsel gay people, but also repeatedly expressed the view that gay people were making an "immoral personal choice."

A wide consensus among psychology experts and others holds that being gay is not a choice, that morality is not what makes someone gay, and that making such suggestions to gay people can be damaging.

The university maintained that it was not trying to change Keeton's religious beliefs, but to adhere to the guidelines of the the American Counseling Association, which requires that students be trained to work with clients whose views differ from those of their counselors, without the counselors imposing their views on clients or judging their backgrounds.

Judge Hall's ruling largely refused to engage in debate about the morality of being gay or of the value of religious freedom. He framed the issue as an academic one. He said that the issues should be considered this way: "Baldly stated in outline, they amount to no more than this: a student enrolled in a professional graduate program was required to complete a course of remediation after being cited for purported professional deficiencies by educators in her chosen field of study; she refused to do so and was dismissed from the program."

Given Keeton's suit, he said it was important to examine the reasons for the university's requirements. He concluded that these reasons were legitimate and not motivated by religious views.

"The counselor program's charge is to train and prepare students to become licensed professional counselors, and to this end ASU faculty and officials have incorporated into the program professional codes of conduct applicable to practicing counselors. Indeed, adoption of the professional codes and the concomitant remediation mechanism were measures animated in large part by the desire to obtain and maintain the counselor program's professional accreditation—an important designation that assures students, employers, and the public that its curriculum meets professional standards. The legitimate sweep of the program's policies therefore cannot be doubted."

The judge noted that Keeton was free to believe whatever she wants about gay people, and that the department was focused, legitimately, on how she would treat clients in the future.

"Keeton's conflation of personal and professional values, or at least her difficulty in discerning the difference, appears to have been rooted in her opinion that the immorality of homosexual relations is a matter of objective and absolute moral truth," the judge wrote. "The policies which govern the ethical conduct of counselors, however, with their focus on client welfare and self-determination, make clear that the counselor's professional environs are not intended to be a crucible for counselors to test metaphysical

or moral propositions. Plato's Academy or a seminary the counselor program is not; that Keeton's opinions were couched in absolute or ontological terms does not give her constitutional license to make it otherwise." Reported in: *insidehighered.com*, June 27.

Lansing, Michigan

The Michigan Supreme Court on July 27 declared unconstitutional a Michigan State University ordinance under which a student was convicted following a 2008 dispute over a parking ticket. In the 5-to-2 ruling, the court's majority, citing a U.S. Supreme Court decision, said that the ordinance was unconstitutional because it "criminalizes a substantial amount of constitutionally protected speech."

The ordinance made it an offense to "disrupt the normal activity" of a university employee performing his duty. The Michigan court called that policy "overbroad" on its face, in that it had been written such that people on the campus could be prosecuted in "seemingly infinite ways."

The case stemmed from a confrontation between Jared S. Rapp, who was ticketed for parking his Land Rover at an expired meter, and Ricardo Rego, a parking attendant. When Rapp vehemently disputed that the meter had expired, shouting and taking pictures of Rego with his cellphone, the attendant summoned campus police officers.

Rapp, who is now a lawyer in Illinois, won dismissal of the parking ticket, but he was convicted of violating the ordinance. A subsequent court ruling, however, overturned the conviction. The decision reversed an appellate court that had restored Rapp's conviction.

A university spokesman said Michigan State was reviewing the decision "with an eye toward what changes are needed to ensure the ordinance meets the court's ruling." Reported in: *Chronicle of Higher Education* online, July 30.

Minneapolis, Minnesota

The Minnesota Supreme Court on June 20 upheld the right of the University of Minnesota to punish a mortuary science student for posts on Facebook that made fun of a cadaver. The court's ruling said that because of the nature of the student's career-related academic program, the university did not violate the student's rights in failing her in an anatomy laboratory course.

In a technical sense, the Minnesota Supreme Court affirmed the finding of a state appeals court that also found no First Amendment violations by the university. But the appeals court's ruling was broad, suggesting that the university could punish off-campus speech that "materially and substantially disrupted the work and discipline of the university." Advocates for student speech rights said that the breadth of the appeals court's ruling created the ability for public universities to punish all kinds of off-campus student activity.

The ruling by the Minnesota Supreme Court explicitly rejected the breadth of the appeals court's decision. And it limited its findings to students in professional programs with standards of conduct. It seems likely, in other words, that a physics student who mocked a cadaver on Facebook could not be punished by his university, at least under this decision.

While the decision applies only in Minnesota, it deals with an issue relevant not just to mortuary science, but to a range of health professions programs that expect students to adhere to certain standards of professionalism, even before they become professionals. Johnson County Community College faced a controversy last year over nursing students who were kicked out of their program over photographs they posted of students with a human placenta.

In the Minnesota case, Amanda Tatro was a junior in the mortuary science program. The program's rules specifically require students to be "respectful and discreet" in dealing with cadavers, and not to blog about their cadavers. The university said that Tatro violated these rules with four Facebook status updates in which she talked about her cadaver, whom she named "Bernie." The posts (unedited) are:

"Amanda Beth Tatro Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve..."

"Amanda Beth Tatro is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar."

"Amanda Beth Tatro Who knew embalming lab was so cathartic! I still want to stab a certain someone in the throat with a trocar though. Hmm..perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code..."

"Amanda Beth Tatro Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket."

The mortuary science program at Minnesota and other programs at the university rely on people to agree to donate their bodies when they die. The program has said that in requiring respectful treatment of cadavers, the university is teaching students the standards of the field they plan to enter.

Tatro characterized her Facebook posts as "satirical commentary" that should be protected by the First Amendment.

In examining restrictions on speech by a public university, the Minnesota Supreme Court kept it simple, rejecting the various precedents cited by the lower court. By focusing on professional standards of professions and professional schools, the court ruled, there is little danger that a

university could punish students for Facebook posts that were simply offensive to an administrator or a powerful official.

"[A] university may regulate student speech on Facebook that violates established professional conduct standards. This is the legal standard we adopt here, with the qualification that any restrictions on a student's Facebook posts must be narrowly tailored and directly related to established professional conduct standards," the court ruled.

"Tying the legal rule to established professional conduct standards limits a university's restrictions on Facebook use to students in professional programs and other disciplines where student conduct is governed by established professional conduct standards. And by requiring that the restrictions be narrowly tailored and directly related to established professional conduct standards, we limit the potential for a university to create overbroad restrictions that would impermissibly reach into a university student's personal life outside of and unrelated to the program. Accordingly, we hold that a university does not violate the free speech rights of a student enrolled in a professional program when the university imposes sanctions for Facebook posts that violate academic program rules that are narrowly tailored and directly related to established professional conduct standards," the court added.

Minnesota's position had strong support from groups of colleges. The American Council on Education, the American Association of Medical Colleges and three other organizations filed a brief that argued Minnesota had the right to punish Tatro. "This is a case about the academic freedom of a university to set and enforce reasonable course standards and reasonable campus rules. The course standards at issue were designed to teach ethics and professional norms to students enrolled in a professional program."

The Foundation for Individual Rights in Education and the Student Press Law Center, however, had urged the Minnesota Supreme Court to reverse the appeals court decision. While the court didn't do so, both groups said that the narrow approach taken by the high court is much better than the lower court's approach to the issue.

A statement from FIRE said: "Despite the disappointing affirmation of the lower court's ruling, the Minnesota Supreme Court's opinion is in some respects a significant improvement from the Court of Appeals' earlier decision. The Supreme Court's opinion explicitly cabins a public university's authority to police online, off-campus student speech in a way that the earlier decision did not." Reported in: *insidehighered.com*, June 21.

Newark, New Jersey

The New Jersey State Supreme Court has held that the state's open-records law does not require a Rutgers University legal clinic to relinquish client files, handing a major victory to higher-education associations, which warned that an inability to maintain attorney-client privilege would badly damage the nation's public law schools.

Overturning a state appeals-court decision against the public law clinic, the State Supreme Court unanimously ruled July 5 that the state's open-records act does not cover documents related to such clinics' efforts to represent clients.

In holding that the Rutgers Environmental Law Clinic is not legally obliged to hand over the records at issue in the case, the State Supreme Court held that the New Jersey Legislature, in passing the state's open-records law in 2001, clearly did not intend to thwart public legal clinics' efforts to keep their client records confidential. The majority opinion said subjecting public legal clinics' client files to open-records requests would likely "harm the operation of public law clinics and, by extension, the legal profession and the public," and also would have the "absurd result" of leaving public law-school clinics subject to different disclosure requirements than the clinics associated with private law schools.

In a concurring opinion, a fifth justice, Barry T. Albin, took a different route to the same conclusion, arguing that law clinics' lawyers can be seen as covered by the open-records act's exemptions for pedagogical records, legal deliberations, and many of the records of lawyers for government agencies.

In a written statement issued by the Rutgers School of Law at Newark, John J. Farmer Jr., the school's dean, hailed the State Supreme Court's decision as recognizing "the need to protect the autonomy of the university and academic freedom."

"We are particularly gratified," Farmer said, "that the court recognized the threat to the integrity of our judicial system and the unique disadvantages our clinics and clients would have faced" if the open-records act were held to apply.

The lawsuit against the Rutgers environmental-law clinic had been brought by Sussex Commons Associates, a developer that had accused a citizens' group represented by the clinic in opposing the developer's plans for a new outlet mall of receiving financial support from the owner of two existing outlet malls in the region. Among the groups that had signed on to friend-of-the-court briefs backing the legal clinic were the Association of American Law Schools, the American Association of University Professors, the Clinical Legal Education Association, and the Society of American Law Teachers. Reported in: *Chronicle of Higher Education* online, July 5.

Cincinnati, Ohio

The University of Cincinnati's restrictions on speech by students and others on its campus violate the First Amendment and "cannot stand," a federal judge declared Junle 12 in an order that directed the university not to enforce the policy. The order, by Judge Timothy S. Black of the U.S. District Court in Cincinnati, came in a case brought by students who had been denied permission to gather petition signatures on the campus and had been threatened with arrest if they attempted to do so without permission.

"It is simply unfathomable that a UC student needs to give the university advance notice of an intent to gather signatures for a ballot initiative," the judge wrote. "There is no danger to public order arising out of students walking around campus with clipboards seeking signatures." The ruling barred the university from using its existing policy, but permitted the university to propose new rules.

The Foundation for Individual Rights in Education, a free-speech advocacy organization, aided the student plaintiffs in finding counsel and filing the suit. Reported in: *Chronicle of Higher Education* online, June 13; *insidehighered.com*, June 13.

Knoxville, Tennessee

Like many colleges and universities that send undergraduates abroad to study, the University of Tennessee at Knoxville takes their health and safety seriously, and has an emergency line for students that the coordinators of its Programs Abroad Office monitor 24 hours a day, seven days a week.

That was a problem for Kimberly Crider, who, as a new coordinator in the office in May 2008, told her supervisor that her membership in the Seventh-Day Adventist Church prevented her from working from sundown Friday through sundown Saturday. After two months of back-and-forth between Crider and her managers over possible alternatives, the university fired her in June 2008.

Crider sued the university for religious discrimination later that year, saying that Tennessee officials had not taken reasonable steps under Title VII of the Civil Rights Act to accommodate her. The law requires employers to make reasonable accommodations—in ways that do not cause "undue hardship" on the employer's business, for the religious practices of its employees. A federal court last year backed the university's request for a summary judgment, saying that while Crider had provided evidence that the university had discriminated based on her religion, "the university also met its burden of showing that it cannot reasonably accommodate Crider without incurring undue hardship."

But Crider appealed to the U.S. Court of Appeals for the Sixth Circuit, and in its ruling a divided three-judge panel reversed the lower court, saying that it had erred in concluding (without a full trial) that Tennessee had reasonably accommodated her or that accommodating would cause too much hardship. A third judge dissented, saying he believed the university had proven its case.

As the court tells it, based on facts that are not in dispute, Crider proposed a new schedule in which she would be on call more total days than the other two coordinators, but they would carry a heavier burden on weekends. Her supervisor ran that plan by the other two coordinators (who until Crider's hiring had been solely responsible for monitoring the emergency line), but they demurred, saying such an arrangement would make it impossible for them to "disengage" from work.

The supervisor asked Crider if she would carry the phone on weekends if the other coordinators were out of town or had emergencies, and Crider said she would not monitor the line on the Sabbath. Crider's other suggestions—that the supervisor or campus police monitor the line until a planned fourth coordinator was hired—were also deemed unacceptable, the court said.

An employee seeking religious accommodation is required to cooperate with his or her employee's attempts at accommodation, but "cooperation is not synonymous with compromise, where such compromise would be in violation of the employees' religious needs," the Sixth Circuit said. "Offering Crider fewer Saturday shifts is not a reasonable accommodation to religious beliefs which prohibit working on Saturdays."

Having raised doubts about whether Tennessee reasonably accommodated Crider, the court then asked whether the university's reason for declining to do so—the burdens that accommodating her would impose on other workers—rose to the level of "undue hardship." One of her co-workers reportedly threatened to quit if she had to carry the phone every other weekend, the Sixth Circuit notes. The lower court deemed that it did, citing a 1977 Supreme Court decision involving changing one worker's shifts to accommodate another's religious needs.

"The district court heavily relied on [the 1977 decision] in determining that UTK would incur an undue hardship if it were required to force [Crider's co-workers] to resume responsibility of carrying the emergency phone every other weekend," the Sixth Circuit majority wrote. But the university "seems to twist the district court's finding and the [1977] decision by insisting that a significant effect on a co-worker will suffice to establish an undue hardship. This is an inaccurate reading of the [1977] holding... Title VII does not exempt accommodation which creates undue hardship on the employees; it requires reasonable accommodation "without undue hardship on the conduct of the employer's business."

The Sixth Circuit did not conclude that it would be impossible for Tennessee to meet that standard—only that it had not done so yet, so that the lower court's decision to dismiss the case was premature.

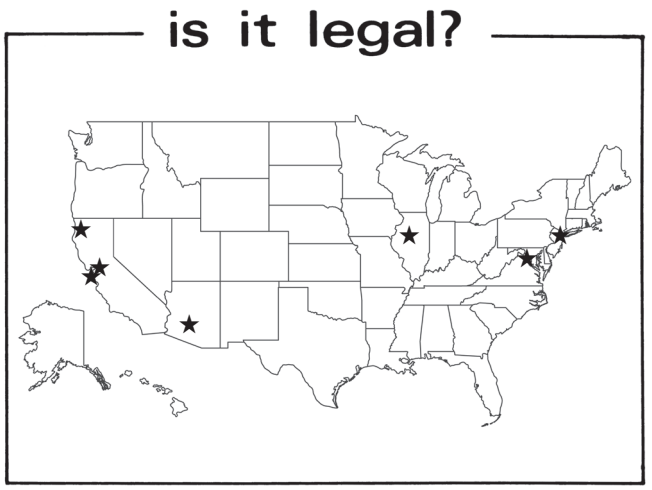
"We conclude, therefore, that the existence of genuine issues of material fact as to both the reasonableness of the accommodation UTK provided Crider and UTK's ability to reasonably accommodate her without undue hardship preclude summary judgment," the Sixth Circuit decision states. Reported in: *insidehighered.com*, July 25.

Internet

Olympia, Washington

On July 27, a federal judge in Washington State imposed a preliminary injunction blocking the implementation of a

(continued on page 227)



libraries

Phoenix, Arizona

School and public libraries in Arizona have been filtering online content for years to protect minors from accessing obscene materials on their computers. A new state law, which went into effect August 1, establishes significant consequences for those entities that don't have a strict policy against such materials.

House Bill 2712 specifies the types of material the schools and libraries must block and includes a tough penalty—the state can withhold ten percent of its funding if the school or library doesn't comply.

The new law has several requirements: Schools and libraries must filter and block questionable websites from minors and the general public; they must establish a policy to enforce the ban on these materials; and they have to make the rules available to the public. If an adult needs to access blocked material, the library may lift the filter if it is for research purposes.

Rep. Steve Court (R-Mesa), who sponsored the bill, said he pushed for the funding penalties to give schools and libraries more incentive to have strict filters in place. If a school or library is notified that it is not in compliance, it has sixty days to change the policy. After that, the state can withhold up to ten percent of funding until the entity resolves the problem.

The law previously required schools and libraries to prevent minors from accessing "harmful material" on the Internet. Now, it specifies that it must block minors from gaining access to "visual depictions that are child pornography, harmful to minors or obscene."

"It just makes it a little more clear and a little more stringent," Court said.

Jeremy Giegle, president of Arizona Family Council, lobbied for the bill, which modifies a law originally written more than ten years ago. "There's been a lot of changes since then so we wanted to get the bill up to date," Giegle said. "If the schools are going to have more and more technology, how are we going to keep our kids safe?"

Chris Kotterman, deputy director of policy development and government relations for the Arizona Department of Education, said most schools seem to follow the policy already, but it could still have an impact in terms of funding. "That's a pretty significant penalty if you don't comply for a long period of time," Kotterman said.

Craig Pletenik, spokesman for Phoenix Union High School District, said he's not worried about losing funding. He said the district was already in the process of reviewing its policy, and its computer system updates the filters constantly for potentially harmful websites.

He said the district has been following the Federal Communications Commission's Child Internet Protection Act since it was created in 2001. The act requires schools and libraries to block or filter any content that is obscene, child pornography or harmful to minors in order to receive certain federal funding.

"I just don't know that (the new state law) applies to us because we've already been following these rules," he said. "It's just part of that whole trend of trying to protect our kids, really everybody, but especially our kids from all the garbage out there."

Kathleen Sullivan, collection development coordinator for the Phoenix Public Library, said the library also has been operating under CIPA. They work with an outside company, Websense, to block harmful sites, and all computer users must agree to the policy before logging on. "There really isn't anything they need to do to comply with the law because they already are," Sullivan said. Reported in: *Arizona Republic*, June 23.

university

Berkeley, California

Two Jewish University of California, Berkeley graduates have agreed to drop a lawsuit against the university that claimed Muslim students had subjected them to slurs, threats and assaults, but their attorneys have now filed a federal civil rights complaint against the university.

Attorneys Neal Sher and Joel Siegal filed a complaint July 9 with the U.S. Justice Department and U.S. Department of Education against UC Berkeley on behalf of graduates Jessica Felber and Brian Maissy alleging that "Jewish students have been subjected to a pervasive hostile environment and that the university has failed to take effective measures to cure the situation."

"We filed (the federal complaint) because once the plaintiffs in the lawsuit graduated, we lost the ability to affect changes to correct the hostile environment," said

Sher, adding that the plaintiffs were not pursuing the case to collect money, but rather to correct an "intolerable situation."

A university official said claims of a hostile environment for Jewish students at UC Berkeley are unfounded. "The campus takes great pride in its vibrant Hillel chapter, the broad range of other Jewish student groups, our world-class Jewish Studies program, and the recently created Institute for Jewish Law and Israeli Law at the Berkeley law school," UC Berkeley Dean of Students Jonathan Poullard said in a statement.

In December, U.S. District Court Judge Richard Seeborg threw out the students' lawsuit, writing that the pair had failed to prove the harassment violated their constitutional rights and that many of the examples the plaintiffs cited did not involve them. A motion to dismiss the plaintiffs' attempt to re-establish their claim was pending when the plaintiffs agreed to drop their suit.

"The allegations in the complaint are copied entirely from the lawsuit, the very same lawsuit that a U.S. District Court has already found to have no legal merit," said campus spokesman Dan Mogulof. "And the same court found that the university had not violated any laws."

With the dismissal of the March 2011 lawsuit, the university has agreed to consider in the next academic year two minor clarifications to policies that govern campus demonstrations. UC Berkeley will consider a revision to campus policies that would clarify that mock firearms can't be displayed in public on campus "unless it would be obvious to a reasonable observer that the imitation weapon is not a real weapon," and the display is approved by campus police

The plaintiffs allege that two student groups were allowed during a campus function "to carry realistic looking assault weapons which they brandish as they interrogate innocent students on campus about their religious and ethnic backgrounds."

The other proposed change would clarify that groups who hold functions around Sather Gate allow a clear and unobstructed path for people to walk through. The agreement does not call for the university to make changes, only consider them. Reported in: *Oakland Tribune*, July 13.

freedom of assembly

Eureka, California

On March 30, three participants in a "Candlelight Vigil for the First Amendment" were arrested on the Humboldt County courthouse steps, peacefully asserting Constitutional rights in the face of an 'urgency ordinance,' passed three days earlier, that seeks to criminalize everyday activity in front of the courthouse such as sharing food, setting down a bag, or holding a protest between 9:30 p.m. and 6:00 a.m. The courthouse has been Humboldt County's historic forum for free speech activity for over fifty years.

The trial of the three candlelight vigilers, Peter Camacho, Kimberly Starr, and Amanda Tierney, was the first test of the courthouse curfew. It may also have been the last if the Board acts on a June 18 vote to remove the curfew portion of the ordinance. Supervisors Virginia Bass, Mark Lovelace, and Ryan Sundberg voted for the curfew to be rescinded in the interest of preserving the public's right to hold night-time vigils and gatherings. The Board plans, however, to expand prohibitions to use of public space surrounding over 120 county facilities.

The jury in the vigil case was in deliberations for six days. Arguments during trial largely centered around the question—does the county legislature have the authority to trump First Amendment Constitutional rights?

"We hold strongly to the firmly planted belief that no government body can trump the Constitution. The Board of Supervisors tread where no government in the U.S. should go," said defendant Kimberly Starr in closing arguments. "This courthouse is a visible, central, and most reasonable and traditional place for protest activity in Humboldt."

"It is 'as American as apple pie' to believe that it is every citizen's right to utilize this traditional public forum for such a simple, peaceful exercise of the First Amendment," added attorney Casey Russo. Russo of the Public Defender's Office represented Camacho, who was held for six days in jail for the candlelight vigil arrest.

Russo described the three vigilers as "concerned Americans who are brave enough to put themselves out there and exercise their First Amendment rights."

The jury viewed a video of the vigil from the night of the arrest; it showed a calm, peaceful, and principled gathering.

The jury acquitted the defendants on July 11, reinforcing popular sentiment that the curfew is an unlawful abridgment of the right to assemble and speak. "We believed they had the right to be there and we believed they thought they could be there," a juror told the victorious demonstrators and their supporters after the verdict.

"They violated the ordinance but the Constitution gave them a right to be there. The Constitution is the law of the land," said another juror.

Community members have been conducting nightly "Candlelight Vigils for the First Amendment" in front of the Humboldt County courthouse for over three months, in opposition to the passage of the controversial ordinance. Reported in: Peoples Action for Rights and Community Press Release, July 11.

National Security Letters

Washington, D.C.

In a rare test of a tool expanded in the USA PATRIOT Act, a telecom company is fighting the government's use of a secretive tool called a national security letter to get access to customer records without a court order.

Early last year, the Federal Bureau of Investigation sent a secret letter to a phone company demanding that it turn over customer records for an investigation. The phone company then did something almost unheard of: It fought the letter in court.

The U.S. Department of Justice fired back with a serious accusation. It filed a civil complaint claiming that the company, by not handing over its files, was interfering "with the United States' sovereign interests" in national security.

The legal clash represents a rare and significant test of an investigative tool strengthened by the USA PATRIOT Act, the counterterrorism law enacted after the attacks of September 11, 2001.

The case is shrouded in secrecy. The person at the company who received the government's request—known as a "national security letter," or NSL—is legally barred from acknowledging the case, or even the letter's existence, to almost anyone but company lawyers.

"This is the most important national-security-letter case" in years, said Stephen Vladeck, a professor and expert on terrorism law at the American University Washington College of Law. "It raises a question Congress has been trying to answer: How do you protect the First Amendment rights of an NSL recipient at the same time as you protect the government's interest in secrecy?"

The confidentiality requirements make it impossible to definitively identify the company fighting the case. Its name and other identifying details have been redacted in court documents obtained by newspapers. The phone company's lawyer declined to name his client or respond to questions from reporters about its identity.

There are thousands of telecom companies in the U.S. However, the court papers offer clues that can be used to narrow down the list. The *Wall Street Journal* cross-referenced the court papers against corporate websites and Federal Communications Commission records of telecom firms, and identified five firms that appeared to be possible matches with the company described in the case.

Four of the five companies denied any involvement in the case and declined to be interviewed about national security letters. At the fifth company, a top executive declined to confirm or deny, either on or off the record, whether his firm had received an NSL or is involved in the case.

That company, Working Assets Inc., runs a San Francisco-based telecom subsidiary called Credo, and uses some of its revenue to support liberal causes.

The chief executive of Credo, Michael Kieschnick, offered his firm's view, in general terms, of these types of government requests. "There is a tension between privacy and the legitimate security needs of the country," he said. "We think it is best to resolve this through grand jury or judicial oversight."

Unlike search warrants, NSLs don't require a judge's oversight. National security letters, which date back to the 1980s, have become more common since the passage of the USA PATRIOT Act, which expanded the government's ability to use them to collect information about people. As long as the head of an FBI field office certifies that the records would be relevant to a counterterrorism investigation, the bureau can send an NSL request without the backing of a judge or grand jury.

Nicholas Merrill mounted an early attack on national security letters in 2004, forcing a change in the law, which previously offered no clear way for the letters to be challenged.

Since the 1970s, the Supreme Court has largely held that authorities don't need a full search warrant to obtain information that people have stored with "third parties"—such as their bank or phone company—on the principle that people have already willingly given up that data.

NSLs generally seek financial, phone and Internet records but don't request information about the content of emails, texts or phone calls. According to a Justice Department report, the FBI sent 192,499 such requests between 2003 and 2006. The vast majority go uncontested.

In the challenge playing out in California, the company is fighting the letters on constitutional grounds. It is arguing, among other things, that the gag orders associated with most of these letters improperly restrain speech without a judge's authorization.

The FBI says it must maintain the secrecy of national security letters to avoid tipping off potential terrorists. The letters are "critical to our ability to keep the country safe," then-Acting Assistant Attorney General for National Security Todd Hinnen told the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security last year.

National security letters were originally for FBI investigations where there were "specific and articulable facts" indicating the information was related to a foreign agent. The USA PATRIOT Act eliminated the requirements for specific facts and a link to a foreign agent.

Since then, use of the letters has increased. In 2000, there were about 8,500 such requests; last year, the FBI made 16,511, according to the Justice Department. That number includes letters asking for things such as records of the numbers called by a phone, or the "to" and "from" lines of emails, but it doesn't count requests that ask only what subscriber is associated with an account. Including those, more than 49,000 requests were sent in 2006, according to a report from the Justice Department's inspector general.

Justice Department officials have testified that NSLs have been instrumental in breaking up terrorist cells in Lackawanna, N.Y., and northern Virginia. But the department's inspector general also reported in 2007 that the FBI sometimes used the letters improperly, and in more than 700 cases circumvented the law altogether. To speed the processing of letters, phone-company representatives were embedded with the FBI and sometimes let investigators see data even without proper NSLs, the inspector general said

in a separate finding. After the 2007 report, the FBI said it put a new system in place to address the problems.

The first public legal challenge to national security letters came in 2004. Nicholas Merrill, founder of a small New York Internet service provider, disputed the law's constitutionality after receiving an NSL. That year, the U.S. District Court for the Southern District of New York found the law was unconstitutional in part because there was no clear way to challenge the letters. Congress changed the law in 2006 to explicitly allow challenges.

The company in the current California case is challenging the letter as well as the gag order, arguing that the national security letter statute itself is unconstitutional. The 2006 amendment allows such a challenge, the company says.

Such challenges appear to be unusual. A 2010 letter from the Office of the Attorney General indicated that over nearly two years, there were only four challenges to a letter's gag order. Statistics on challenges to the letters themselves aren't available.

The Justice Department argues that people who get these letters can't use the 2006 amendment to contest the law itself, only to fight individual letters and secrecy orders. A challenge to the law itself would need to be brought under the Constitution, not the amendments to the law, a Justice Department spokesman said. The government also said the company is violating federal law because it "has not complied with" the request in the letter.

Rep. Jeff Flake, an Arizona Republican who crafted the 2006 amendment, said the law means that people who challenge a letter don't need to provide the information sought by the government until the court orders them to do so.

The Justice Department also argues that the court doesn't have the right to determine the constitutionality of the law in this case because of "sovereign immunity," a long-standing legal principle that exempts the government from lawsuits unless the government consents.

Orin Kerr, a professor at George Washington University Law School and former computer-crime attorney at the Justice Department, said sovereign immunity usually is applied in lawsuits against the government that seek monetary damages, not in cases disputing the constitutionality of a law. "I would say this is a puzzling argument," he said. "There has to be a way to challenge the constitutionality of the law."

The Justice Department's civil suit against the unnamed telecom company seeks a judge's order compelling the firm to give up the data. The government has agreed to a temporary stay of that lawsuit, a Justice Department spokesman said. But the government is still separately seeking the judge's order to compel release of the data.

Matt Zimmerman, a lawyer with the Electronic Frontier Foundation, a civil-liberties group that is representing the telecom company, said his client intends to comply with the outcome of the judicial process. "We don't appreciate the assertion that we are trying to break the law," he said.

The NSL sent to Zimmerman's client, which isn't on the regular public docket but is available for review at the U.S. District Court in the Northern District of California, states that the recipient has a right to challenge "if compliance would be unreasonable, oppressive, or otherwise unlawful."

The letter in the case is one of the more limited types of NSLs: It asks for the name, address and length of service associated with one or more accounts.

While it is impossible to identify the firm with certainty, court documents suggest it is an atypical phone company. Particularly, a line from the government's court papers suggests the company may be involved in actions that aren't telecom-related. For example, the company's argument rests partly on the idea that disclosing a customer's name would impinge on the First Amendment right of free association. The government responds by saying it served the NSL on the firm "solely in its corporate capacity as a telephone company."

That exchange implies the company has other activities, perhaps involving the principle of free association.

Credo, the firm that agreed to speak with the *Wall Street Journal*, is unusual in that it is also engaged in activities largely unrelated to telecommunications. It is active in funding and helping to organize left-leaning political events and activities. Some of its recent efforts include one to "jail Wall Street crooks" and to call on the FCC to "revoke the broadcast licenses held by Rupert Murdoch's media empire." (Murdoch is the chief executive of News Corp., which owns the *Journal*.)

Credo has fought various parts of the USA PATRIOT Act in the past. It also sends a percentage of its revenues to what it describes on its website as "progressive nonprofit groups" including the Electronic Frontier Foundation, the legal counsel in the California case. This year, Credo started a "super PAC," a political-action committee, aimed at ousting 10 Tea Party Republicans from Congress.

Credo has about 120,000 mobile customers and three million activists on its rolls, it says.

Three of the five other companies identified by the *Journal* as possibly being involved in the case are more traditional small telecoms. They are: Michigan-based Long Distance Consolidated Billing Co., California-based Network Enhanced Technologies Inc. and Telecare Inc., which is based in Indiana. The fourth company, Cause Based Commerce Inc., located in Ohio, donates proceeds from its business to Catholic and antiabortion charities.

Executives at all four of these companies said they weren't familiar with or involved in the case. The CEO from Credo said he was willing to discuss NSLs in general terms in order to tell his customers that his company can't protect their privacy in all situations.

It remains unclear whether Credo is the recipient of the NSL in the court fight in California. If Credo is the company, Kieschnick took a risk by speaking. The penalty for knowingly breaking the gag order with the intent to

interfere with an investigation is up to five years in prison.

In its legal arguments, the Justice Department says the company in question "remains free" to talk about national security letters generally, as long as it didn't get the information from the investigation. "The object of the nondisclosure provision is not to censor private speech," the Justice Department says in its filings. Reported in: *Wall Street Journal*, July 18.

privacy and surveillance

San Francisco, California

Three whistleblowers—all former employees of the National Security Agency (NSA)—have come forward to give evidence in the Electronic Frontier Foundation's (EFF) lawsuit against the government's mass surveillance program, *Jewel v. NSA*.

In a motion filed July 2, the three former intelligence analysts confirmed that the NSA has, or is in the process of obtaining, the capability to seize and store most electronic communications passing through its U.S. intercept centers, such as the "secret room" at the AT&T facility in San Francisco first disclosed by retired AT&T technician Mark Klein in early 2006.

"For years, government lawyers have been arguing that our case is too secret for the courts to consider, despite the mounting confirmation of widespread mass illegal surveillance of ordinary people," said EFF legal director Cindy Cohn. "Now we have three former NSA officials confirming the basic facts. Neither the Constitution nor federal law allow the government to collect massive amounts of communications and data of innocent Americans and fish around in it in case it might find something interesting. This kind of power is too easily abused. We're extremely pleased that more whistleblowers have come forward to help end this massive spying program."

The three former NSA employees with declarations in EFF's brief are William E. Binney, Thomas A. Drake and J. Kirk Wiebe. All were targets of a federal investigation into leaks to the *New York Times* that sparked the initial news coverage about the warrantless wiretapping program. Binney and Wiebe were formally cleared of charges and Drake had those charges against him dropped.

Jewel v. NSA is back in U.S. District Court after the U.S. Court of Appeals for the Ninth Circuit reinstated it in late 2011. In the motion for partial summary judgment filed July 2, EFF asked the court to reject the state secrets arguments that the government has been using in its attempts to sidetrack this litigation and instead apply the processes in the Foreign Intelligence Surveillance Act that require the court to determine whether electronic surveillance was conducted legally.

"The NSA warrantless surveillance programs have been the subject of widespread reporting and debate for more than six years now. They are just not a secret," said EFF senior staff attorney Lee Tien. "Yet the government keeps making the same 'state secrets' claims again and again. It's time for Americans to have their day in court and for a judge to rule on the legality of this massive surveillance." Reported in: *kpbj.com*, July 6.

Washington, D.C.

The surveillance experts at the National Security Agency won't tell two powerful United States Senators how many Americans have had their communications picked up by the agency as part of its sweeping new counterterrorism powers. The reason: it would violate privacy rights to say so.

That claim came in a short letter sent June 18 to Senators Ron Wyden (D-OR) and Mark Udall (D-CO). The two members of the Senate's intelligence oversight committee asked the NSA a simple question: under the broad powers granted in 2008's expansion of the Foreign Intelligence Surveillance Act, how many persons inside the United States have been spied upon by the NSA?

The query bounced around the intelligence bureaucracy until it reached I. Charles McCullough, the Inspector General of the Office of the Director of National Intelligence, the nominal head of the sixteen U.S. spy agencies. In a letter McCullough told the senators that the NSA inspector general "and NSA leadership agreed that an IG review of the sort suggested would itself violate the privacy of U.S. persons."

"All that Senator Udall and I are asking for is a ballpark estimate of how many Americans have been monitored under this law, and it is disappointing that the Inspectors General cannot provide it," Wyden said. "If no one will even estimate how many Americans have had their communications collected under this law then it is all the more important that Congress act to close the 'back door searches' loophole, to keep the government from searching for Americans' phone calls and emails without a warrant."

What's more, McCullough argued, giving such a figure of how many Americans were spied on was "beyond the capacity" of the NSA's in-house watchdog—and to rectify it would require "imped[ing]" the very spy missions that concern Wyden and Udall. "I defer to [the NSA inspector general's] conclusion that obtaining such an estimate was beyond the capacity of his office and dedicating sufficient additional resources would likely impede the NSA's mission," McCullough wrote.

The changes to the Foreign Intelligence Surveillance Act in 2008—which President Obama, then in the Senate, voted for—relaxed the standards under which communications with foreigners that passed through the United States could be collected by the spy agency. The NSA, for instance, no longer requires probable cause to intercept a person's phone calls, text messages or emails within the United States as long as one party to the communications is "reasonably"

believed to be outside the United States.

The FISA Amendments Act of 2008, as it's known, legalized an expansive effort under the Bush administration that authorized NSA surveillance on persons inside the United States without a warrant in cases of suspicion of connections to terrorism. Wyden has attempted to slow a renewal of the 2008 surveillance authorities making its way through Congress.

Longtime intelligence watchers found the stonewalling of an "entirely legitimate oversight question" to be "disappointing and unsatisfactory," as Steve Aftergood, a secrecy expert at the Federation of American Scientists said. "If the FISA Amendments Act is not susceptible to oversight in this way," Aftergood said, "it should be repealed, not renewed."

Even though McCullough said the spy agencies wouldn't tell the senators how many Americans have been spied upon under the new authorities, he told them he "firmly believe[s] that oversight of intelligence collection is a proper function of an Inspector General. I will continue to work with you and the [Senate intelligence] Committee to identify ways we can enhance our ability to conduct effective oversight." Reported in: *wired.com*, June 18.

Washington, D.C.

The head of the U.S. government's vast spying apparatus has conceded that recent surveillance efforts on at least one occasion violated the Constitutional prohibitions on unlawful search and seizure.

The admission came in a letter from the Office of the Director of National Intelligence declassifying statements that a top U.S. Senator wished to make public in order to call attention to the government's 2008 expansion of its key surveillance law.

"On at least one occasion," the intelligence shop has approved Sen. Ron Wyden (D-OR) to say, the Foreign Intelligence Surveillance Court found that "minimization procedures" used by the government while it was collecting intelligence were "unreasonable under the Fourth Amendment." Minimization refers to how long the government may retain the surveillance data it collects. The Fourth Amendment to the Constitution is supposed to guarantee rights against unreasonable searches.

Wyden did not specify how extensive this "unreasonable" surveillance was; when it occurred; or how many Americans were affected by it.

In the letter, Wyden asserts a serious federal sidestep of a major section of the Foreign Intelligence Surveillance Act. That section—known as Section 702 and passed in 2008—sought to legalize the Bush administration's warrantless surveillance efforts. The 2008 law permitted intelligence officials to conduct surveillance on the communications of "non-U.S. persons," when at least one party on a call, text or email is "reasonably believed" to be outside of the United States. Government officials conducting such surveillance no longer have to acquire a warrant from the so-called FISA Court specifying the name of an individual under surveillance. And only a "significant purpose" of the surveillance has to be the acquisition of "foreign intelligence," a weaker standard than before 2008.

Wyden said that the government's use of the expanded surveillance authorities "has sometimes circumvented the spirit of the law"—a conclusion that the Office of the Director of National Intelligence does not endorse. The office does not challenge the statement about the FISA Court on at least one occasion finding the surveillance to conflict with the Fourth Amendment.

When the law was up for reauthorization this spring, Director of National Intelligence James Clapper wrote to congressional leaders to say its renewal was his "top priority in Congress," as the law "allows the Intelligence Community to collect vital information about international terrorists and other important targets overseas while providing robust protection for the civil liberties and privacy of Americans."

Suspicions about abuse of the government's new surveillance powers are almost as old as the 2008 expansion of the law. In 2009, citing anonymous sources, the *New York Times* reported that "the NSA had been engaged in 'overcollection' of domestic communications of Americans. They described the practice as significant and systemic," if unintentional. The Justice Department told the *Times* that it had already resolved the problem.

But as the American Civil Liberties Union noted in a May letter to lawmakers, "There is little in the public record about how the government implements" the expanded law. An ACLU Freedom of Information Act request discovered that the Justice Department and intelligence bureaucracy refer to "compliance incidents" in their internal accounting of the new surveillance—which seemed to suggest difficulty staying within the broadened boundaries of the law.

Wyden has been a lonely congressional voice against renewing the government's broadened surveillance powers. In June, he quietly used a parliamentary maneuver to stall the renewal after it passed a key Senate committee.

Wyden's argument was that the government had not fully disclosed the extent of its new surveillance powers. It argued to Wyden that it is "not reasonably possible to identify the number of people located in the United States whose communications may have been reviewed under the authority of the [FISA Amendments Act]." Separately, the National Security Agency insisted that it would violate Americans' privacy even to tally up how many Americans it had spied upon under the new law.

On July 20, Wyden said in a statement: "I applaud the DNI for agreeing that transparency should prevail in this situation… I believe that protections for Americans' privacy need to be strengthened, and I believe that the FISA Court's

rulings help illustrate why this is necessary. I look forward to debating this issue on the Senate floor."

In her letter to Wyden, DNI spokesperson Kathleen Turner insisted—as the government has in the past—that all constitutional and legal problems with the expanded surveillance have already been rectified. The government, she wrote, believes the FISA Amendments Act is "a well-calibrated statute that strikes an appropriate balance between protecting national security and safeguarding privacy and civil liberties."

"At no time," she continued, "have these reviews found any intentional violations of law." Reported in: *wired.com*, July 20.

Washington, D.C.

The Obama administration warned federal agencies June 20 that monitoring their employees' personal e-mail communications could violate the law if the intent is to retaliate against whistleblowers.

A memo to chief information officers and general counsels across government from the Office of Management and Budget set out guidelines from Special Counsel Carolyn N. Lerner that agencies should heed when they consider surveillance of employee communications.

The legal guidance—from the head of the independent office that represents whistleblowers—came five months after the *Washington Post* reported that the Food and Drug Administration secretly monitored the personal e-mail of a group of scientists who warned Congress and others that the agency was approving medical devices they considered dangerous.

The FDA surveillance, detailed in e-mails and memos written by six medical device reviewers, took place over two years as they accessed their personal Gmail accounts from government computers. The FDA took electronic snapshots of the employees' computer desktops and reviewed documents they saved on their computers' hard drives.

The scientists have filed a lawsuit against the FDA in U.S. District Court in Washington, alleging that the monitoring contributed to the harassment or dismissal of all six of them. They say the government violated their constitutional privacy rights by reading communications with Congress, journalists, the inspector general's office and the Office of Special Counsel.

The FDA said the scientists had improperly disclosed confidential business information about the radiological devices, which detect breast cancer, diagnose osteoporosis, screen for colon cancer and monitor pregnant women in labor.

Two congressional committee are investigating the monitoring. On June 20, the Obama administration stepped in, with a memo from Chief Information Officer Steven VanRoekel and General Counsel Boris Bershteyn informing agencies of Lerner's warning.

"We strongly urge you to carefully review [the guidelines] when evaluating your agency's monitoring policies and practices," VanRoekel and Bershteyn wrote, "and to take appropriate steps to ensure that [they] do not interfere with or chill employees' use of appropriate channels to disclose wrongdoing."

Federal law prohibits retaliation against an employee who discloses wrongdoing, whether mismanagement, waste, abuse of authority or a danger to public health and safety. With some exceptions it also protects employees who expose wrongdoing to an inspector general or the special counsel's office.

"In light of this legal framework, agency monitoring specifically designed to target protected disclosures to the OSC and IGs is highly problematic," Lerner wrote. She warned that such "deliberate targeting," or "deliberate monitoring" of communications between an employee and these agencies "could lead to a determination that the agency has retaliated against the employee," as the FDA scientists allege.

An attorney representing the scientists called the directive a "significant" step forward for whistleblower rights that puts a dent in the government's practice of monitoring employees' personal communications.

"This is the first time the federal government is acknowledging that there are limits to the surveillance of employees' computers and e-mails," said Stephen Kohn of the Washington law firm Kohn, Kohn & Colapinto. "It's a significant first step."

The memo does not directly address the government's ability to monitor employees' communications with Congress. Federal agencies are not allowed to "interfere" with such communications, but the law is murkier on whether they are protected by whistleblower laws. Reported in: *Washington Post*, June 21.

Springfield, Illinois

As of January 1, 2013, Illinois employers won't be able to compel employees or job applicants to disclose passwords for social networking sites. On August 1, Gov. Pat Quinn signed the law at the Illinois Institute of Technology, making the state the second, after Maryland, to halt the practice. Other states, including Washington, Delaware, and New Jersey, are considering adopting similar legislation.

"Members of the workforce should not be punished for information their employers don't legally have the right to have," Gov. Quinn said in a statement. "As use of social media continues to expand, this new law will protect workers and their right to personal privacy."

In March 2012, the Associated Press published an article detailing how some employers, notably law enforcement, were effectively compelling job applicants to disclose their

social network passwords, especially on Facebook. That, in turn, prompted Facebook to say it would consider lawsuits against firms that demand such information.

The article also prompted attention from American senators, who queried the United States Department of Justice for a ruling on the practice. Two separate Congressional bills have been introduced on Capitol Hill in April and May, although they have not yet been brought to a vote. Reported in: *arstechnica.com*, August 1.

New York, New York

American Civil Liberties Union affiliates in 38 states sent requests July 30 to local police departments and state agencies that demand information on how they use automatic license plate readers (ALPR) to track and record Americans' movements.

In addition, the ACLU and the ACLU of Massachusetts filed federal Freedom of Information Act requests with the departments of Justice, Homeland Security and Transportation to learn how the federal government funds ALPR expansion nationwide and uses the technology itself.

ALPRs are cameras mounted on patrol cars or on stationary objects along roads—such as telephone poles or the underside of bridges—that snap a photograph of every license plate that enters their fields of view. Typically, each photo is time, date, and GPS-stamped, stored, and sent to a database, which provides an alert to a patrol officer whenever a match or "hit" appears.

"Automatic license plate readers make it possible for the police to track our location whenever we drive our cars and to store that information forever," said Catherine Crump, staff attorney with the ACLU's Speech, Privacy & Technology Project. "The American people have a right to know whether our police departments are using these tools in a limited and responsible manner, or whether they are keeping records of our movements for months or years for no good reason."

ALPRs are spreading rapidly around the country, but the public has little information about how they are used to track motorists' movements, including how long data collected by ALPRs is stored, and whether local police departments pool this information in state, regional or national databases. If ALPRs are being used as a tool for mass routine location tracking and surveillance and to collect and store information not just on people suspected of crimes, but on every single motorist, the American people should know that so that they can voice their concerns.

ALPRs have already proven controversial. In June, the Drug Enforcement Administration withdrew its request to install ALPRs along certain portions of Interstate 15 in Utah after they were met with resistance by local lawmakers.

"Tracking and recording people's movements raises serious privacy concerns, because where we go can reveal a great deal about us, including visits to doctor's offices, political meetings, and friends." said Kade Crockford, Director of the Technology for Liberty Project of the ACLU of Massachusetts. "We need legal protections to limit the collection, retention and sharing of our travel information, and we need these rules right away." Reported in: ACLU Press Release, July 30. □

---

internet censorship…from page 193)

Google offered detailed looks at some, though not most, of the requests. For example, the company said it did not comply with a Canadian request to remove a "YouTube video of a Canadian citizen urinating on his passport and flushing it down the toilet." A British request to remove 640 videos from five user accounts that allegedly support terrorism was honored after Google found that those users had violated its community guidelines. In other cases, the company removed content to comply with court orders or to abide by local laws.

The list doesn't include any censorship from countries that don't bother with requests to censor Google's information, such as China or Iran. They censor the information themselves.

The cell phone information represents the first time data have been collected nationally on the frequency of cell surveillance by law enforcement. The volume of the requests reported by the carriers—which most likely involve several million subscribers—surprised even some officials who have closely followed the growth of cell surveillance.

"I never expected it to be this massive," said Representative Edward J. Markey, a Massachusetts Democrat who requested the reports from nine carriers, including AT&T, Sprint, T-Mobile and Verizon, in response to an article in April in *The New York Times* on law enforcement's expanded use of cell tracking.

While the cell companies did not break down the types of law enforcement agencies collecting the data, they made clear that the widened cell surveillance cut across all levels of government—from run-of-the-mill street crimes handled by local police departments to financial crimes and intelligence investigations at the state and federal levels.

AT&T alone now responds to an average of more than 700 requests a day, with about 230 of them regarded as emergencies that do not require the normal court orders and subpoenas. That is roughly triple the number it fielded in 2007, the company said. Law enforcement requests

of all kinds have been rising among the other carriers as well, with annual increases of between 12 percent and 16 percent in the last five years. Sprint, which did not break down its figures in as much detail as other carriers, led all companies last year in reporting what amounted to at least 1,500 data requests on average a day.

With the rapid expansion of cell surveillance have come rising concerns—including among carriers—about what legal safeguards are in place to balance law enforcement agencies' needs for quick data against the privacy rights of consumers.

Legal conflicts between those competing needs have flared before, but usually on national security matters. In 2006, phone companies that cooperated in the Bush administration's secret program of eavesdropping on suspicious international communications without court warrants were sued, and ultimately were given immunity by Congress with the backing of the courts. The next year, the FBI was widely criticized for improperly using emergency letters to the phone companies to gather records on thousands of phone numbers in counterterrorism investigations that did not involve emergencies.

Under federal law, the carriers said they generally required a search warrant, a court order or a formal subpoena to release information about a subscriber. But in cases that law enforcement officials deem an emergency, a less formal request is often enough. Moreover, rapid technological changes in cellphones have blurred the lines on what is legally required to get data—particularly the use of GPS systems to identify the location of phones.

Under the Electronic Communications Privacy Act of 1986, officials do not need to establish probable cause to obtain various kinds of phone and e-mail records if they are not seeking the content of the communications. If all officials want to know is whether someone was near a cellphone tower on a given date, say, or whom that person called or e-mailed last month, the law says the government need only demonstrate to a judge that there are "reasonable grounds to believe" that the information sought is "relevant and material to an ongoing criminal investigation."

Given that low bar, it is not surprising that such requests are routinely granted. What is surprising is how little we know about the orders granting them.

In a recent article, Magistrate Judge Stephen W. Smith of U.S. District Court in Houston wrote that most surveillance orders "might as well be written in invisible ink." In the article Judge Smith describes a secret docket that dwarfs that of the Foreign Intelligence Surveillance Court, which considers warrant applications in national security investigations. Using data from 2006 and not a little extrapolation, Judge Smith estimated that there were about 30,000 sealed surveillance orders in federal courts that year, surpassing in a single year the entire output of the national security court since 1978.

By way of comparison, he wrote, there were more surveillance orders in 2006 than the total of all antitrust, employment discrimination, environmental, copyright, patent, trademark and securities cases filed in federal court.

That is but a dated glimpse of a vast expansion of government monitoring of electronic communications with light judicial oversight and vanishingly little public information. Surveillance has since exploded with the rise of smartphones and other digital technologies. And many law enforcement surveillance requests do not require court orders, and those that do often come from judges in state courts.

Some temporary secrecy is surely warranted—to make sure that suspects are not tipped off, that evidence is not destroyed and that investigations are not disrupted. "The problem is that these surveillance orders remain secret long after the criminal investigations come to an end," Judge Smith wrote. Unless criminal charges are filed, he went on, "law-abiding citizens will never know that the government has accessed their e-mails, text messages, Twitter accounts or cellphone records."

By long tradition and under the First and Sixth Amendments, what goes on in criminal proceedings is presumptively open to public scrutiny. The federal courts generally take pains to make this so. But the practice is different under the 1986 law. "The problem is that temporary sealing orders almost always become permanent," Judge Smith wrote. From 1995 to 2007, magistrate judges in Houston alone issued 3,886 orders concerning electronic surveillance. As of 2008, he found, 99.8 percent of them remained sealed.

Marc Rotenberg, the executive director of the Electronic Privacy Information Center, said Judge Smith is on to something. "You can put in place substantive limitations on the collection and use of this data, which is always a good idea," Rotenberg said. "But regardless of substantive limitations, you also need much more transparency."

As cell surveillance becomes a seemingly routine part of police work, Rep. Markey said that he worried that "digital dragnets" threatened to compromise the privacy of many customers. "There's a real danger we've already crossed the line," he said.

With the rising prevalence of cellphones, officials at all levels of law enforcement say cell tracking represents a powerful tool to find suspects, follow leads, identify associates and cull information on a wide range of crimes.

"At every crime scene, there's some type of mobile device," said Peter Modafferi, chief of detectives for the Rockland County district attorney's office in New York, who also works on investigative policies and operations with the International Association of Chiefs of Police. The need for the police to exploit that technology "has grown tremendously, and it's absolutely vital," he said in an interview.

The surging use of cell surveillance was also reflected in the bills the wireless carriers reported sending to law enforcement agencies to cover their costs in some of the tracking operations. AT&T, for one, said it collected $8.3 million last year compared with $2.8 million in 2007, and other carriers reported similar increases in billings.

Federal law allows the companies to be reimbursed for "reasonable" costs for providing a number of surveillance operations. Still, several companies maintained that they lost money on the operations, and Cricket, a small wireless carrier that received 42,500 law enforcement requests last year, or an average of 116 a day, complained that it "is frequently not paid on the invoices it submits."

Because of incomplete record-keeping, the total number of law enforcement requests last year was almost certainly much higher than the 1.3 million the carriers reported to Markey. Also, the total number of people whose customer information was turned over could be several times higher than the number of requests because a single request often involves multiple callers. For instance, when a police agency asks for a cell tower "dump" for data on subscribers who were near a tower during a certain period of time, it may get back hundreds or even thousands of names.

As cell surveillance increased, warrants for wiretapping by federal and local officials—eavesdropping on conversations—declined 14 percent last year to 2,732, according to a recent report from the Administrative Office of the United States Courts.

The diverging numbers suggest that law enforcement officials are shifting away from wiretaps in favor of other forms of cell tracking that are generally less legally burdensome, less time consuming and less costly. (Most carriers reported charging agencies between $50 and $75 an hour for cellphone tower "dumps.")

To handle the demands, most cell carriers reported employing large teams of in-house lawyers, data technicians, phone "cloning specialists" and others around the clock to take requests from law enforcement agencies, review the legality and provide the data.

With the demands so voluminous and systematic, some carriers have resorted to outsourcing the job. Cricket said it turned over its compliance duties to a third party in April. The outside provider, Neustar, said it handled law enforcement compliance for about 400 phone and Internet companies.

But a number of carriers reported that as they sought to balance legitimate law enforcement needs against their customers' privacy rights, they denied some data demands because they were judged to be overreaching or unauthorized under federal surveillance laws.

Sometimes, the carriers said, they determined that a true emergency did not exist. At other times, police agencies neglected to get the required court orders for surveillance measures, left subpoenas unsigned or failed to submit formal requests.

C Spire Wireless, a small carrier, estimated that of about 12,500 law enforcement demands it received in the last five years, it rejected 15 percent of them in whole or in part. (Most carriers did not provide figures on rejections.)

At TracFone, another small carrier providing prepaid service, an executive told Markey that the company "shares your concerns regarding the unauthorized tracking of wireless phones by law enforcement with little or no judicial oversight, and I assure you that TracFone does not participate in or condone such unauthorized tracking."

T-Mobile, meanwhile, said it had sent two law enforcement demands to the FBI because it considered them "inappropriate." The company declined to provide further details.

Requests from law enforcement officials to identify the location of a particular cellphone using GPS technology have caused particular confusion, carriers said. A Supreme Court ruling in January further muddled the issue when it found that the authorities should have obtained a search warrant before tracking a suspect's movements by attaching a GPS unit to his car.

Law enforcement officials say the GPS technology built into many phones has proved particularly critical in responding to kidnappings, attempted suicides, shootings, cases of missing people and other emergencies. But Sprint and other carriers called on Congress to set clearer legal standards for turning over location data, particularly to resolve contradictions in the law.

While the carriers said they always required proper legal orders before turning over nonemergency information, their assurances were somewhat at odds with anecdotal evidence recently gathered by the American Civil Liberties Union from more than 200 law enforcement agencies nationwide.

The reports provided to the ACLU showed that many local and state police agencies claimed broad discretion to obtain cell records without court orders, and that some departments specifically warned officers about the past misuse of cellphone surveillance in nonemergency situations.

Chris Calabrese, a lawyer for the ACLU, said he was concerned not only about officials gathering phone data on people with no real connection to crimes but also about the agencies then keeping those records indefinitely in internal databases.

"The standards really are all over the place," Calabrese said. "Nobody is saying don't use these tools. What we're saying is do it with consistent standards and in a way that recognizes that these are tools that really can impact people's privacy." Reported in: Washington Post, June 18; *New York Times*, July 8, 23. □

FTRF report…from page 198)

2010 ROLL OF HONOR RECIPIENT MICHAEL BAMBERGER

It is my privilege to report that First Amendment attorney Michael Bamberger has been named the recipient of the 2012 Freedom to Read Foundation Roll of Honor Award. The Roll of Honor was established in 1987 to recognize and honor those individuals who have contributed substantially to FTRF through adherence to its principles As the general counsel of the Media Coalition, Bamberger has successfully challenged dozens of federal, state and local laws that attempted to censor material protected by the First Amendment, including books, magazines, recordings, movies, videos, videogames and the Internet. In his position as partner at SNR Denton law firm, Bamberger serves as Adjunct Professor of Law at Cardozo Law School and Lecturer at University of California, Berkeley, School of Law. He is author of 2000's *Reckless Legislation: How Lawmakers Ignore the Constitution*.

He is perhaps best known for the landmark case *Hudnut v. American Booksellers Association*, a challenge to an Indianapolis anti-pornography ordinance that outlawed "graphic, sexually explicit subordination of women, whether in pictures or in words," presenting women as sex object, or as enjoying pain, humiliation, or servility. The law was inspired by Andrea Dworkin and framed as a matter of civil rights. FTRF filed *amicus* briefs in that case with the district court and the Seventh Circuit Court of Appeals. The Supreme Court affirmed the lower courts' decisions to strike down the ordinance as unconstitutional.

Bamberger received the Roll of Honor Award during this conference's Opening General Session. We are very pleased to add Michael Bamberger to the FTRF Roll of Honor.

2012 CONABLE CONFERENCE SCHOLARSHIP

I'm pleased to introduce this year's winner of the Conable Conference Scholarship, Steven Booth. Booth is an archivist with the Presidential Materials Division at the National Archives and Records Administration. He received his Master of Library Science with an emphasis in Archives Management from Simmons College in Boston in 2009 and holds a B.A. from Morehouse College in Atlanta. As an intern at Boston University, he helped produce an electronic finding aid for the Martin Luther King, Jr. Papers, and recently wrote an essay, "A Charge to Keep I Have," that was included in the recently published book, *The 21st Century Black Librarian in America: Issues and Challenges*. His study and work as an archivist has led him to become an advocate for open access to archived material for all.

The Conable Scholarship was created to honor the memory of former FTRF President Gordon Conable and to advance two principles that Conable held dear: intellectual freedom and mentorship. His unexpected death in 2005 inspired his wife, Irene Conable, and the FTRF Board to create the Conable Fund, which sponsors the Conable Scholarship. The funds provided by the Conable Scholarship provided the means for Booth to attend this conference, and specifically the various FTRF and intellectual freedom meetings and programs here. He has been consulting with professional mentors, and will prepare a formal report about his activities and experiences after his return to Washington, D.C.

FTRF MEMBERSHIP

The Foundation is in the second year of our multi-pronged strategic plan (available to view at *www.ala.org*). One of the major areas of action is building our organizational capacity in order to achieve our litigation, education, and awareness building objectives. We are working with former ALA staffer John Chrastka and his firm, AssociaDirect, to build a new website, scheduled to launch this summer, with enhanced membership interactivity. Concurrently, we are embarking on an ambitious project to increase our membership. Via social media, direct mail, and several other avenues, we want to introduce FTRF to a larger group of librarians and non-librarians who share our values of free speech, access to information, and the First Amendment.

Membership in the Freedom to Read Foundation is the critical foundation for FTRF's work defending First Amendment freedoms in the library and in the larger world. As always, I strongly encourage all ALA Councilors to join me in becoming a personal member of the Freedom to Read Foundation, and to have your libraries and other institutions become organizational members. Please send a check ($35.00+ for personal members, $100.00+ for organizations, $10.00+ for students) to:

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

Alternatively, you can join or renew your membership by calling (800) 545-2433, ext. 4226, or online at *www.ftrf.org*.

VALEDICTORY

As I rotate off the FTRF Board and complete my third year as Board President I would like to thank the FTRF staff for their excellent work in defense of the First Amendment. Due to an assertive strategic plan and prudent financial management FTRF is poised to take some giant leaps forward in the coming years. It is critical that all ALA members be aware of and support the important work of the Foundation. Intellectual Freedom and our First Amendment rights are at the core of what we do as librarians. How we defend these values will tell the story of how we succeed as a profession in the coming years. □

Missouri book challengest…from page 198)

school district retained the book.

Those are just a few examples of the 51 titles challenged in 32 Missouri school districts since 2008. Two titles, *Yankee Girl*, by Mary Ann Rodman and *Fallout*, by Ellen Hopkins, were challenged twice.

Of all the books challenged, twelve were banned by the school districts. Another eleven were removed from required reading lists, labeled with "young adult" stickers or restricted in some other way. Twenty-nine of the 53 challenges were rejected and the books stayed. The result of one challenge was unreported.

The reasons for book challenges in Missouri run the gamut. Those seeking to ban or restrict books cited sexual themes and situations in 21 cases; language was cited 18 times. Challengers also objected to violent content, racial slurs and references to religion, the paranormal, self-injury, drugs and alcohol.

To respond to challenges, schools evaluate complaints by looking at the entire book, not just particular passages. When they retain books, many schools cite important themes that spawn constructive classroom discussions or intellectual exploration on the part of the reader.

For example, the Camdenton School District – which restricted *The Kite Runner* in 2009—a year earlier decided to retain the classic *Of Mice and Men* by John Steinbeck without restriction, despite a complaint about foul language in the novel.

Brian Henry, then principal of Camdenton High School, responded to the challenge after a committee appointed to review the book decided it should be kept. "In the opinion of the committee, the relevance and value of the curricular themes outweigh the author's use of objectionable language to convey the characteristics of the individuals in the novel," he wrote.

Similarly, a committee in the Pattonville R-3 School District, decided to retain *Yankee Girl* in 2009, but restricted it to students in the fourth grade and up. "The book, taken as a whole, is important as it can lead to conversation about racism and sexism," Assistant Superintendent for Curriculum and Instruction Tim Pecoraro wrote in a letter to the challenger. "In addition, the title has significant merit due to the historical context, sense of realism, and emotional depth of the story."

So what does it take to get a book banned? School districts generally set the bar very high, but some books don't make the cut when parents or others call attention to them.

The Mehlville School District in 2008, for example, banned the *Pretty Little Liars* series by author Sara Shepard for explicit sexual content. A parent had complained about the books, saying one of the titles described a sexual encounter between a drunken underage girl and her adult teacher in a bathroom. She described numerous references to sexual situations that she argued were unacceptable for a middle school library. "As a parent, I am upset and disgusted," the challenger wrote. "As a student, my daughter felt uneasy and disturbed."

Last year, the Norborne School District took *Gemini Bites*, by Patrick Ryan, out of its library and donated it to the city library. A ninth-grade student complained of an explicit description of two boys having sex. The school librarian noted in public records that the book was a Junior Library Guild "selection of the month." The guild, however, had recommended it for grades 11 and up.

Decisions to ban books, however, also generate challenges. When the Stockton school board banned the award-winning *The Absolutely True Diary of a Part-Time Indian*, by Sherman Alexie, from its middle school in April 2010, it by no means ended the controversy. The school received hundreds of pages worth of letters; some supported the ban while others opposed it.

Glen Cox, a parent of Stockton students, was among scores who applauded the board's decision. "A lot of people try to twist this to say that the school is taking the students' rights away from them by not allowing this book on campus," Cox wrote. "They ignore the fact that the board is not against the good story of this book of a young man making something out of himself. It is the language and terminology that make this book inappropriate for the school setting."

Several national organizations opposed the ban, including the Writers Hall of Fame, the American Library Association, the National Coalition Against Censorship, the Association of American Publishers and the American Civil Liberties Union of Kansas and Western Missouri. In a letter signed by twenty members of the English faculty at Missouri State University, professor Jane Hoogestraat argued that Alexie's book contains a redeeming message.

"In such cases as this one, what often happens is that a relatively small list of passages (supplied either by an individual or an external political group) are distributed as representative of the overall novel," Hoogestraat wrote. "I wish to assure the board that Alexie's primary purpose in the novel is not to engage in vulgarity for its own sake, to present prurient or pornographic material, or in any way to foster discrimination. Instead, Alexie's novel stands as a literary representation with a strong anti-bullying message, and the strongest anti-alcohol message I have ever encountered in literature."

The intensity of the feedback prompted the board to reconvene the committee that initially recommended the ban. During a special meeting in September 2010, the board unanimously upheld its earlier decision and chose not to allow the book in the high school library either. Reported in: *Columbia Missourian*, July 18. □

most Americans…from page 200)

About two-thirds of respondents said the U.S. Supreme Court got it wrong in a 2010 decision, *Citizens United v. Federal Election Commission*, which removed federal campaign spending limits on corporations and unions. The Court said it was protecting political free speech—the most protected kind of speech—for those groups. But by 65% to 30%, those surveyed opposed the idea of such wide-open spending.

Even in the event of a national emergency, it would seem, we want our Facebook and Twitter—and all the rest of the World Wide Web: 59% disagreed with giving the government the power to take emergency control of the Internet and limit access to social media.

But at least for now, such power is in place. In July, President Obama signed an executive order, the "Assignment of National Security and Emergency Preparedness Communications Functions," that authorizes federal officials to take control over telecommunications and the Web during natural disasters and national-security emergencies.

For those aiming to roll back that order, history suggests we may well be only one crisis away from broad public support for such federal control. In 2002, about eight months after the 9/11 terror attacks, the State of the First Amendment survey found that 49% said the amendment went "too far" in its freedoms.

The larger meaning in that ten-year-old result is chilling—but also a call to action, to be better prepared and more engaged in society's ongoing discussion about how our core freedoms are applied in the 21st century. Reported in: firstamendmentcenter.org, July 19. □

censorship dateline…from page 206)

Hindi, the obstacles faced by students in Gaza who wish to study at universities on the West Bank.

Finally, Hindi said he believed Budeiri had indicated he was unsure if he could be safe and wanted to return to Birzeit.

Budeiri acknowledged he is unsure about his safety, but does want to teach at the university. Asked if he feels safe on campus, Budeiri said that he does not believe that everyone who protested would want to hurt him or that there is any "conspiracy out there." But he noted that some of those who called for his dismissal said that he should face the same fate as the assassinated Egyptian leader Anwar Sadat.

"What worries me is the lone fanatic, who will take it upon himself to carry out a deed which he believes is justified," Budeiri said. "Whether I will ever feel safe on campus again is something I have to think about." Still, he said, he wants to resume teaching in August if the university will send him a contract. Reported in: *insidehighered.com,* July 5. □

from the bench…from page 214)

new law that aimed to impose stronger ID requirements for online sex ads, as a way to combat child prostitution. The law cannot be enforced until the court hears the case further.

In June, the Electronic Frontier Foundation filed a motion to the court on behalf of the Internet Archive to stop the law, arguing it was overbroad as written. The EFF argued that because the Internet Archive might have unknowingly cached a sex ad, it could be liable for prosecution.

The law aimed to strengthen protections of underage children forced into sexual exploitation and prostitution. Most notably, it would force Backpage.com, the company owned by Village Voice Media, to impose in-person age verification for adult sex-related classified ads. Backpage had also filed a similar suit in federal court, asking for the law to be overturned.

Among other arguments, both Backpage and the EFF argued that the state law conflicts primarily with Section 230 of the Communications Decency Act.

"No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider," it states.

In his order, Judge Ricardo Martinez wrote that the state law was in conflict with this federal law, and that the federal law takes precedence.

"SB 6251 is inconsistent with Section 230 because it criminalizes the 'knowing' publication, dissemination, or display of specified content," he wrote. "In doing so, it creates an incentive for online service providers not to monitor the content that passes through its channels. This was precisely the situation that the CDA was enacted to remedy." Reported in: *arstechnica.com*, July 28.

twitter

New York, New York

Twitter Inc. must produce tweets and user information of an Occupy Wall Street protester, a judge has ruled, discounting objections from the social media website in a case of first impression.

"The Constitution gives you the right to post, but as numerous people have learned, there are still consequences for your public posts. What you give to the public belongs to the public. What you keep to yourself belongs only to you," Criminal Court Judge Matthew Sciarrino, Jr. sitting in Manhattan, wrote in *People v. Harris*.

Sciarrino on June 30 ordered the site to produce in chambers Malcolm Harris's user information and tweets from a more than three-month period—information the Manhattan District Attorney's Office is seeking for its prosecution of a disorderly conduct case charge against Harris.

Harris was one of some 700 Occupy Wall Street protesters arrested on Oct. 1, 2011, during a march across the Brooklyn Bridge. The district attorney's office subpoenaed Twitter in January seeking user information and tweets from Harris' account, @destructuremal, between September 15 and December 31.

Prosecutors expect to use the material to counter an anticipated defense argument that police intentionally led marchers onto a non-pedestrian part of the bridge, where they were arrested. Harris knew the police instructions not to block traffic but still did so, prosecutors argued in support of the subpoena.

Sciarrino's latest ruling followed an April 20 decision blocking Harris' own attempts to quash the subpoena. There, the judge held Harris lacked standing, as Harris had no proprietary interest in his account's user information.

Saying he "partially based" his April ruling on Twitter's terms of service at the time, Sciarrino noted that on May 17 Twitter included a "newly added portion" of the terms stating, "You Retain Your Right to Any Content You Submit, Post or Display on or Through the Service."

Twitter filed court papers on May 7 seeking to quash the subpoena.

Civil liberties groups also filed as *amicus curiae* in support of Harris, calling the April 20 decision contrary to case law and in violation of Harris' First and Fourth amendment rights.

The *amicus* brief—filed by the American Civil Liberties Union, New York Civil Liberties Union, Electronic Frontier Foundation and Public Citizen—added that disclosure of an individual's location when saying something, how long it takes to say something or what tools they choose to use for communication "are private, intimate details about individuals' communications and communication habits. None of this information is the government's business, and the D.A. cannot simply obtain it without first satisfying constitutional scrutiny."

Sciarrino again rejected the constitutional claims. "If you post a tweet, just like if you scream it out the window, there is no reasonable expectation of privacy. There is no proprietary interest in your tweets, which you have now gifted to the world," the judge said, pointing out that Twitter agreed in 2010 to supply the Library of Congress with every tweet since the site's start.

The judge emphasized that the public postings in question were different from private e-mails, direct messages, chats or other ways to have a private conversation via the Internet.

"Those private dialogues would require a warrant based on probable cause in order to access the relevant information," he observed.

Sciarrino likened the relevance of the prosecution's request to a case where a passerby overheard a man yell 'I'm sorry I hit you, please come back upstairs.'" At trial, that passerby could be compelled to testify what the man said.

"Well today, the street is an online, information superhighway, and the witnesses can be the third party providers like Twitter, Facebook, Instragram, Pinterest, or the next hot social media application," said Sciarrino. The judge also rejected Twitter's argument that compliance with the subpoena would be "an undue burden."

In court papers, the site complained it could be put in the "untenable position" of having to choose between uniform compliance with all subpoenas or constant attempts to quash subpoenas on behalf of users. "In no other jurisdiction has Twitter faced this overwhelming burden in response to law enforcement subpoenas," the site said in court papers.

But Sciarrino wrote, "That burden is placed on every third-party respondent to a subpoena and cannot be used to create standing for a defendant where none exists."

Though ordering Twitter's compliance for all information between September 15 and December 30, Sciarrino denied prosecutors' request for December 31 tweets. He said prosecutors would have to obtain a search warrant for those, noting the Stored Communications Act's requirement on disclosure of contents in temporary "electronic storage" for less than 180 days from the date of his decision.

To prevent any "alleged non-impartiality," Sciarrino said the request for a warrant should be made to another Criminal Court judge.

Sciarrino acknowledged the law on social media is "evolving." He observed that founding fathers such as Samuel Adams, Alexander Hamilton, Benjamin Franklin and Thomas Jefferson "would have loved to tweet their opinions as much as they loved to write for the newspapers of their day (sometimes under anonymous pseudonyms similar to today's twitter user names)."

But, the judge added, "Those men, and countless soldiers in service to this nation, have risked their lives for our right to tweet or to post an article on Facebook; but that is not the same as arguing that those public tweets are protected."

Chief Assistant District Attorney Daniel Alonso said in a statement, "We are pleased that the court has ruled for a second time that the tweets at issue must be turned over. We look forward to Twitter's complying and to moving forward with the trial."

Aden Fine, a senior staff attorney at the ACLU, said "the most troubling aspect of this decision is the court again concluded individual Twitter users don't have a right to go to court to protect their constitutional rights. That is a very troubling proposition… Regardless of who owns the tweets or the Twitter account information, individuals have a right to go to court to protect their constitutional rights when their speech activities are at issue."

Twitter will appeal the ruling. "At Twitter, we are committed to fighting for our users," wrote Ben Lee, Twitter's legal counsel. "Accordingly, we are appealing this decision which, in our view, doesn't strike the right balance between the rights of our users and the interests of law enforcement." Reported in: *New York Law Journal*, July 3; *PC World*, July 19. □

The Merritt Fund

The LeRoy C. Merritt Humanitarian Fund was established in 1970 as a special trust in memory of Dr. LeRoy C. Merritt. It is devoted to the support, maintenance, medical care, and welfare of librarians who, in the Trustees' opinion, are:

- Denied employment rights or discriminated against on the basis of gender, sexual orientation, race, color, creed, religion, age, disability, or place of national origin; or

- Denied employment rights because of defense of intellectual freedom; that is, threatened with loss of employment or discharged because of their stand for the cause of intellectual freedom, including promotion of freedom of the press, freedom of speech, the freedom of librarians to select items for their collections from all the world's written and recorded information, and defense of privacy rights.

If you are in need of assistance, please submit an application online at http://www.ala.org/ala/mgrps/affiliates/relatedgroups/merrittfund/assistance/assistance.cfm or contact the Merritt Fund at (800) 545-2433 x4226 or merrittfund@ala.org.

The Merritt Fund is supported solely by donations and contributions from concerned groups and individuals. To learn more about donating to the Merritt Fund, please visit the Fund's online donation page at http://www.ala.org/ala/mgrps/affiliates/relatedgroups/merrittfund/donations/donations.cfm or contact the Merritt Fund at at (800) 545-2433 x4226 or merrittfund@ala.org.

intellectual freedom bibliography

Compiled by Angela Maycock, Assistant Director, Office for Intellectual Freedom

"Farewell Ray Bradbury, SF Writer and Library Fan." *Library Hotline.* Vol. 41, no. 24, June 18, 2012, pp. 3-4.

Fialkoff, Francine. "NYPL Secrecy Must Go." *Library Journal,* Vol. 137, no. 11, June 15, 2012, p. 8.

"Fifty Shades Returns to Brevard County Libraries." *Library Journal*, Vol. 137, no. 11, June 15, 2012, pp. 12-13.

Hockenos, Paul. "Defusing 'Mein Kampf.'" *The Chronicle Review*, Vol. 63, no. 40, July 6, 2012, pp. B11-12.

Honig, Megan. "Speaking Out." *School Library Journal*. Vol. 58, no. 6, June 2012, pp. 40-45.

"LA House Passes Library Sex Offender Ban." *Library Journal*, Vol. 137, no. 11, June 15, 2012, p. 12.

"No Filters Means Still Penalties in Arizona." *Library Hotline*. Vol. 41, no. 29, July 23, 2012, pp. 1-2.

"NYC Politicians Urge Ban on Sex Offenders." *Library Hotline*. Vol. 41, no. 29, July 23, 2012, pp. 2-3.

Scales, Pat. "Scales on Censorship: Separating Church & State." *School Library Journal*. Vol. 58, no. 7, July 2012, p. 14.

"UT District Restricts Access to Picture Book." *Library Hotline*. Vol. 41, no. 25, June 25, 2012, p. 6.

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