newsletter on intellectual freedom

IFC ALA

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Bush wants PATRIOT Act renewed

On January 20, President Bush called for the renewal of the USA PATRIOT Act, the controversial law that has expanded Internet surveillance powers for police and partially expires next year. Using the pageantry of his third State of the Union speech, Bush set in motion a battle over privacy and security that will continue through the presidential campaign and will likely climax before the law's December 31, 2005, partial expiration date.

"Key provisions of the PATRIOT Act are set to expire next year," Bush said. "The terrorist threat will not expire on that schedule. Our law enforcement needs this vital legislation to protect our citizensyou need to renew the PATRIOT Act."

One section that will expire permits police to conduct warrantless Internet surveillance with the permission of a network operator. A second section permits police to share the contents of wiretaps or Internet surveillance with the Central Intelligence Agency, the National Security Agency and other security agencies. Another section makes it easier for prosecutors to seek search warrants for electronic evidence. A fourth, Section 215, became well known after some librarians alerted visitors that it permits the FBI to learn what books a patron has read and what Web sites a patron visited and prohibits the recipient of such an order from disclosing that it exists.

Keeping those portions of the law intact will permit "federal law enforcement to better share information, to track terrorists, to disrupt their cells and to seize their assets," Bush said.

Enacted a month after the September 11, 2001, terrorist attacks, the PATRIOT Act became a target of criticism for giving police broad powers and allegedly curbing civil liberties in the process. Democratic presidential candidates have criticized it to varying extents, with Sen. John Kerry saying last December that he would take a hard look at the PATRIOT Act.

"We will put an end to 'sneak and peak' searches, which permit law enforcement to conduct a secret search and seize evidence without notification," said Kerry, who acknowledged that he voted for the measure in 2001. "Agents can break into a home or business to take photos, seize property, copy computer files or load a secret keystroke detector on a computer. These searches should be limited only to the most rare circumstances."

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Nancy C. Kranich, Chair

in this issue

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IFC report to ALA Council

The following is the text of the ALA Intellectual Freedom Committee's report to the ALA Council presented at the ALA Midwinter Meeting in San Diego, California, on January 14 by IFC Chair Nancy Kranich..

The ALA Intellectual Freedom Committee (IFC) is pleased to present this update of its activities. This report covers the following topics: the post-CIPA environment, USA PATRIOT Act, RFID technology, the Privacy Tool Kit, the impact of media concentration on diversity of resources available through libraries, and other activities.

The Post-CIPA Environment

The U.S. Supreme Court decided that the Children's Internet Protection Act (CIPA) is constitutional in June 2003. Since the ruling, the Office for Intellectual Freedom (OIF) has worked with the Office of Information Technology Policy (OITP), other ALA units, librarians throughout the profession, and technology experts to analyze this decision, determine next steps, and move forward.

Despite this ruling, the responsibilities of librarians to provide access to constitutionally protected materials have not changed. We continue to support access to information by library users of all ages. New resources about CIPA are posted regularly on our Web site at www.ala.org/cipa.

Libraries and the Internet Tool Kit

In December, ALA released an updated and revised Libraries & the Internet Toolkit that includes information to assist librarians making decisions about Internet filtering in response to the CIPA requirements.

In addition, the Tool Kit includes:

- Checklist for creating an Internet use policy and examples of various library policies;
- Tips for parents;
- Information about what makes a great Web site for children;
- Outreach suggestions;
- Fast facts; and
- An extensive list of additional resources.

The new Tool Kit can be found at: www.ala.org/oif/iftoolkits/internet or from the CIPA home page at www.ala.org/cipa.

The USA PATRIOT Act

On December 13, 2003, President George W. Bush signed the Intelligence Authorization Act for Fiscal Year 2004, which redefines "financial institution" to include not only banks, but also any other business "whose cash transactions have a high degree of usefulness in criminal, tax, or regulatory matters." Such businesses include stockbrokers, car dealerships, casinos, credit card companies, insurance agencies, jewelers, airlines, and the U.S. Post Office.

Because the USA PATRIOT Act already authorizes the FBI to obtain client records from "financial institutions" by merely requesting them in a "National Security Letter," which can be obtained without judicial review or a showing of probable cause, President Bush and Congress have effectively granted the FBI far-reaching powers to pry into our private lives. In addition, National Security Letters impose a gag order, preventing financial institutions from informing clients that their records have been surrendered to the FBI. Institutions that breach gag orders face criminal penalties.

The IFC will continue to provide information on how the USA PATRIOT Act and its enhancements affect libraries and library users. For the most up-to-date information, please continue to visit www.ala.org/oif/ifissues/usapatriotact.

OIF and the Washington Office are working with a broad coalition to support the legislative measures before Congress that would limit the expanded powers granted to law enforcement by the USA PATRIOT Act. These measures include Bernie Sanders' Freedom to Read Protection Act (one of ten pieces of legislation). For more information, visit the page "Pending Legislation Concerning the USA PATRIOT Act," found from www.ala.org/oif/ifissues/usapatriotact.

USA PATRIOT Act Buttons

The Office for Intellectual Freedom has introduced a new product for the thousands of librarians who fight every day to protect the privacy rights of library users. "Another 'Hysteric' Librarian for Freedom" button acknowledges this important work while referencing the recent misstatement by U.S. Attorney General John Ashcroft. If you missed buying buttons at the ALA Store during Midwinter Meeting, you can purchase them for $2.00 each (shipping included) by visiting the OIF Web site at www.ala.org/oif/hystericlibrarian.

Privacy Issues

Radio Frequency Identification (RFID) Technology and Libraries

Beth Givens, Director of the Privacy Rights Clearinghouse; Lee Tien, Senior Staff Attorney at the Electronic Frontier Foundation; and Pam Dixon, Executive Director of the World Privacy Forum, spoke to the ALA Intellectual Freedom Committee and to the audience at the IFC Issues Briefing Session on "RFID Implementation in Libraries" on January 10. Their handouts are available at: www.privacyrights.org/ar/RFID-ALA.htm, and will soon be posted on the OIF RFID Web page.

RFID refers to a new technology that imbeds radio frequency tags with a unique identifier into tangible products including books. This technology is traditionally used for inventory control and security purposes, but is now expanding into other functions.

In the near future, manufacturers are likely to imbed RFID tags in almost every product produced worldwide. Already, several publishers are using the technology, as are a growing number of libraries, not only for circulation purposes but also for inventory management and book processing. Because this technology is developing rapidly, both the IFC and OITP are eager to develop principles and best practices to help libraries protect user privacy. Over the coming months, we will work together to identify key issues and interest groups concerned with influencing RFID privacy protections. We also will cosponsor a program in Orlando on RFID. The IFC is eager to hear about other ALA units reviewing RFID technologies and the experiences of libraries using the RFID tags. IFC will report on progress at the 2004 Annual Conference in Orlando.

Privacy Tool Kit

The IFC is completing its Privacy Tool Kit. Similar in style and purpose to the Libraries & the Internet Tool Kit, this resource will assist librarians in protecting users' privacy. Guidelines for Developing a Library Privacy Policy and Conducting a Privacy Audit, a chapter of the Privacy Tool Kit, was distributed in draft form to ALA Council in Toronto and completed last summer. The Tool Kit is available at www.ala.org/oif/iftoolkits/privacy, and includes:

- Background Information about Privacy and Libraries
- ALA Privacy Policies and Guidance
- Federal and State Privacy Laws and Policies
- Court Orders
- Guidelines for Dealing with Law Enforcement Inquiries (available on the OIF Web site)
- Privacy Procedures
- Privacy Communications
- Bibliography

ALA Communication Preferences

During the summer of 2003, the IFC sent a letter to the ALA Web Advisory Committee expressing its concerns about the ALA Web Site Communication Preferences. At the Midwinter Meeting, the IFC endorsed a resolution prepared by the Web Advisory Committee recommending that ALA adopt a communications preferences opt-in policy for commercial programs and services other than those originating within ALA.

Privacy Q & A

The IFC Privacy Subcommittee will review the entire Q&A document over the coming months and add three new topics: RFID in Libraries; the Use of Social Security Numbers in Library Records; and Library Workplace Privacy.

Media Concentration

At the 2003 Annual Conference, ALA Council adopted "New FCC Rules and Media Concentration," opposing recent rules changes related to media ownership caps and cross-ownership rules that will encourage further concentration of the media.

Following Annual Conference, the IFC established a subcommittee on the Impact of Media Concentration on Libraries that will examine the impact of these mergers on intellectual freedom, access to information, and diversity of opinion in local communities. The subcommittee also will review how libraries can counter the effects of media consolidation by identifying innovative ways that libraries provide materials and information presenting all points of view. IFC will cosponsor a program on these issues with the Committee on Legislation at the 2004 Annual Conference in Orlando.

Projects

Seventh Edition of the Intellectual Freedom Manual

The Intellectual Freedom Committee has begun revising the *Intellectual Freedom Manual*. The seventh edition will include information about CIPA, new and revised intellectual freedom tool kits, new policies and guidelines, and again will seek to integrate text with online material.

Lawyers for Libraries

Lawyers for Libraries, an ongoing project of OIF, is creating a network of attorneys involved in, and concerned with, the defense of the freedom to read and the application of constitutional law to library policies, principles, and problems. In 2003, three regional training institutes were held, one in Washington, D.C. (February 2003), Chicago (May 2003), and San Francisco (October 2003). A fourth and fifth are scheduled in Dallas (February 12–13, 2004) and Boston (May 6–7, 2004), respectively.

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

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

These sessions are open to lawyers and library trustees; librarians also may attend, if accompanied by an attorney. Registration is $500 per registrant. For more information about the Lawyers for Libraries project, please contact OIF at lawyers@ala.org or 1-800-545-2433, ext. 4226.

In closing, the Intellectual Freedom Committee thanks the Division and Chapter Intellectual Freedom Committees, the Intellectual Freedom Round Table, the various unit

liaisons, and Judith Krug, OIF director, and staff, Beverley Becker, Deborah Caldwell-Stone, Jen Hammond, Jonathan Kelley, Nanette Perez, and Don Wood, for their commitment, assistance, and hard work. □

FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation report to the ALA Council delivered at the ALA Midwinter Meeting in San Diego, California, on January 12 by FTRF President Gordon M. Conable.

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the Annual Meeting.

CIPA Litigation

United States v. *American Library Association*: As you know, on June 23, 2003, while we were meeting in Toronto, the U.S. Supreme Court handed down its opinion in *United States* v. *American Library Association*, our lawsuit challenging the Children's Internet Protection Act (CIPA). A divided court upheld the law, overturning the unanimous decision of the three-judge panel of the Eastern District of Pennsylvania, which ruled CIPA unconstitutional.

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, and Thomas, ruled that CIPA does not induce librarians to violate library users' First Amendment rights by requiring the installation of Internet filters on library computers as a condition of receiving federal assistance. The four justices held that librarians traditionally make content-based decisions in deciding what materials are provided to patrons and, therefore, there are no Constitutional difficulties with CIPA's filtering requirement. They pointed to CIPA's provision permitting librarians to disable Internet filters at the user's request.

Justices Breyer and Kennedy both concurred with the judgment upholding CIPA, but disagreed with Chief Justice Rehnquist's opinion that CIPA raised no special First Amendment concerns. Instead, the two justices ruled that the law's disabling provision negated any concerns raised by blocking access to Constitutionally protected speech. In addition, Justice Kennedy warned that, if in practice, a library cannot or will not provide an adult user with unfiltered Internet access at the user's request, the user would be able to bring a second, "as-applied" challenge to CIPA, based on actual practice.

Justices Stevens, Souter, and Ginsberg all dissented from the court's judgment upholding the law. Justice Stevens found CIPA's threat to withhold funds to be a violation of the First Amendment, observing that "an abridgement of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty."

Justice Souter took care to note that the library community itself has rejected Justice Rehnquist's view that public libraries and librarians are "gatekeepers," only acquiring materials of "requisite and appropriate quality."

The Foundation remains prepared to support libraries, librarians, and library users coping with the implementation and effects of CIPA's filtering mandate. FTRF donated $200,000 to the legal effort to overturn CIPA.

The USA PATRIOT Act and Library Privacy and Confidentiality

The Freedom to Read Foundation remains steadfast in its opposition to the USA PATRIOT Act's encroachment on library users' privacy and civil liberties, and remains alert for opportunities to mount a Constitutional challenge to the law. In furtherance of this effort, the Foundation joined with the American Booksellers Foundation for Free Expression and many other free expression and civil liberties organizations as *amicus curiae* in *Muslim Community Association of Ann Arbor* v. *Ashcroft*, a facial legal challenge to Section 215 of the USA PATRIOT Act, which amends the business records provision of the Foreign Intelligence Surveillance Act to permit FBI agents to obtain all types of records, including library records, without a showing of probable cause.

The Foundation continues to support the efforts made by several members of Congress to amend or repeal portions of the USA PATRIOT Act in order to protect libraries and library users from unreasonable government surveillance. In particular, the Foundation is encouraging its members and all members of the library community to work on behalf of the Freedom to Read Protection Act, introduced by Congressman Bernie Sanders (I-VT), and the Security and Freedom Enhanced Act (SAFE), introduced by Senators Feingold (D-WI), Leahy (D-VT), Craig (R-ID), and Durbin (D-IL). A full listing of pending legislation addressing the problems in the USA PATRIOT Act can be found attached as an exhibit to this report.

Litigation

Since the Foundation last reported to Council, it has joined in the following lawsuits:

New Times v. *Isaaks*: This lawsuit is a defamation action brought against the *Dallas Observer*, an alternative newsweekly, and its parent company, New Times, Inc. Two elected officials filed suit against the publication after a fictitious article satirized the officials' actions in enforcing a school violence "zero tolerance" policy after the pair chose to jail a 13-year-old boy for writing a school-assigned essay discussing the shooting of a teacher and two students. The Texas Court of Appeals permitted the lawsuit to move forward after denying the defendants' motion for summary judgment, despite plain indicators in the publication that the article was a work of satire. FTRF has joined an *amicus*

brief to defend the paper's right to engage in political satire and parody as a means of commenting on the actions of government officials.

Center for Democracy and Technology v. *Fisher*: The Foundation recently agreed to join the Center for Democracy and Technology's challenge to a Pennsylvania statute that allows a Pennsylvania district attorney or the state's Attorney General to require Internet service providers--including libraries--to block access to specified Web sites. To date, the Pennsylvania Attorney General has already issued hundreds of blocking requests without adequate due process protections, barring access to both targeted sites and other, wholly innocent Web sites, raising serious First Amendment concerns. The Foundation anticipates a vigorous challenge to this law.

The Foundation is also involved in these ongoing lawsuits:

Ashcroft v. *American Civil Liberties Union* (formerly *ACLU* v. *Reno*): After the Third Circuit Court of Appeals once again found the Children's Online Protection Act (COPA) an unconstitutional abridgment of speech, the government sought review of the decision by the U.S. Supreme Court. On October 14, 2003, the Supreme Court granted *certiorari*, and the case is currently being briefed before the high court. The Foundation will join with other First Amendment groups to file an *amicus* brief arguing that COPA's restrictions on Internet content violate the First Amendment.

United States v. *Irwin Schiff, et al*.: The Foundation filed an *amicus* brief in this lawsuit after the federal government successfully sought a temporary restraining order against Irwin Schiff and his publisher, Freedom Books, forbidding them to publish Mr. Schiff's book, *The Federal Mafia: How Government Illegally Imposes and Unlawfully Collects Income Taxes*. The government argued that the book aids and abets the commission of a crime by counseling people on how to avoid paying taxes. FTRF's brief opposed the court's prior restraint of Mr. Schiff's book. On June 17, 2003, a federal judge in Las Vegas upheld the restraining order. Mr. Schiff and the ACLU of Nevada are appealing the ruling to the Ninth Circuit Court of Appeals, and FTRF will continue to join with other organizations to fight the court's order forbidding publication of Mr. Schiff's book.

Yahoo! v. *La Ligue Contre Le Racisme et L'Antisemitisme*: In April, 2000, two French organizations, La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students, attempted to enforce an order by a French court imposing fines against Yahoo! for hosting Web pages accessible to French citizens containing auctions of Nazi and racist memorabilia. Yahoo! sued in federal court in California, and a district court judge ruled that no other nation's law, no matter how valid in that nation, could serve as a basis for quashing free speech in the United States. The French organizations appealed that ruling and launched a second suit in France accusing Yahoo! of "justifying war crimes."

In February 2003, a French court dismissed that suit on its merits. Yahoo! banned Nazi material on its auction sites when they imposed fees on such sites, but continues to allow other material that violates the French court's 2000 order. FTRF has supported Yahoo! throughout the litigation, filing *amicus* briefs with both the trial and appellate courts. The case remains pending before the Ninth Circuit Court of Appeals.

State Internet Content Laws

The Foundation continues to participate as a plaintiff in lawsuits challenging state laws that criminalize the distribution of materials deemed "harmful to minors" on the Internet. Most recently, FTRF became a plaintiff in *Shipley, Inc*. v. *Huckabee*, which mounts a First Amendment challenge to recent amendments made to the Arkansas "harmful to minors" display statute. FTRF and its fellow plaintiffs filed a motion for summary judgment on July 25, 2003, and oral arguments were heard on December 8. We are now awaiting a decision from U.S. District Judge G. Thomas Eisele in Little Rock, Arkansas.

ABFFE v. *Petro* (formerly *Booksellers, Inc*. v. *Taft*), the lawsuit filed by FTRF and other plaintiffs to challenge the State of Ohio's amendment to its definition of "harmful to juveniles" materials, has been remanded to the District Court by the Sixth Circuit Court of Appeals after the state legislature amended the law again in an effort to moot the lawsuit. Plaintiffs filed an application for fees and an amended complaint on August 6, 2003, and a motion for summary judgment on October 13. Cross-motions for summary judgment were submitted to the court on December 15. A decision is expected shortly.

PSINet v. *Chapman*: Attorneys for FTRF and other plaintiffs argued this case before the Fourth Circuit Court of Appeals on June 2, 2003, encouraging the court to uphold the permanent injunction forbidding enforcement of Virginia's Internet content law. Instead of deciding the appeal, however, the Fourth Circuit certified two questions of state law to the Virginia Supreme Court. Following briefing by the parties, the Virginia Supreme Court refused the certified questions, and the case is once again pending before the Fourth Circuit Court of Appeals.

ACLU v. *Goddard* (formerly *ACLU* v. *Napolitano*): The Arizona state legislature amended its new "harmful to minors" statute after a federal district court struck down the state's new Internet content law and entered a permanent injunction barring its enforcement. As a result, the case has now been remanded back to the District Court, where the parties exchanged briefs on the effect of the new statute on the lawsuit. The state has agreed not to enforce the new law while the court's decision on the briefs is pending. At the request of the court, the parties are briefing whether a new

lawsuit must be brought to challenge the amended statute.

ABFFE v. *Dean*: After the U.S. District Court in Brattleboro, Vermont, declared Vermont's "harmful to minors" Internet statute unconstitutional, the state appealed the decision to the Second Circuit Court of Appeals. On August 27, 2003, the Second Circuit handed down its opinion, which affirmed the District Court decision in part and modified the decision in part, limiting the protection of the District Court's injunction forbidding enforcement of the law to two of the plaintiffs. After the Second Circuit denied the parties' motion for rehearing, plaintiffs filed their application for fees on the appeal and renewed their application for fees for the trial. Those motions remain pending before both courts while the state considers whether to petition the U.S. Supreme Court for *certiorari*.

Southeast Booksellers v. *McMasters* (formerly *Southeast Booksellers Association* v. *Condon*) is a lawsuit challenging an amendment to the South Carolina "harmful to minors" law that sweeps in visual matter communicated via the Internet. On July 25, 2003, the District Court denied South Carolina's motion to dismiss or certify the case to the Supreme Court of South Carolina. The defendants then submitted a motion for summary judgment, and the plaintiffs filed a brief in opposition to the motion on December 5. The parties are awaiting the court's decision. FTRF is not currently a plaintiff in this case.

Fundraising

In addition to its efforts in the courts, the Foundation's Board of Trustees is presently exploring new fundraising ventures to further buttress the Freedom to Read Foundation's efforts on behalf of intellectual freedom and the First Amendment.

To become a member of the Freedom to Read Foundation, please send a check to:

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

You can also use a credit card to join the Foundation. Call (800) 545-2433 ext. 4226 or visit us online at www.ftrf.org to use our online donation form. □

Pinnell-Stephens, Texas group win Downs Award

Alaska librarian June Pinnell-Stephens and the Texas advocacy group Mainstream Montgomery County are the recipients of the 2003 Robert B. Downs Intellectual Freedom Award given by the faculty of the Graduate School of Library and Information Science (GSLIS) at the University of Illinois/Urbana–Champaign.

Pinnell-Stephens, collections services manager for Fairbanks North Star Borough Public Library, has been actively involved in intellectual freedom activities with the American Library Association, the Pacific Northwest Library Association, and the Alaska Library Association. In 1997, she chaired a group that produced "Libraries: An American Value," an intellectual freedom statement adopted as policy by ALA Council in 1999.

Mainstream Montgomery County, a group of more than 100 county residents and 40 high school students, was formed in 2002 in response to challenges to remove two award-winning sex-education books from the shelves of the Montgomery County, Texas, Memorial Library System. Later, MMC was instrumental in ensuring that the library's revised review policy required members of its reconsideration committee to have formal training in child development or work experience with the age group for which a book was intended.

Both were honored January 10 at a reception during ALA's 2004 Midwinter Meeting in San Diego, California. The library school and Greenwood Publishing Group cohosted the event. □

CDT releases proposed guidelines for library filtering

At the American Library Association's Midwinter meeting, The Center for Democracy and Technology (CDT) released the first version of its "Principles for CIPA-Mandated Filtering in Public Libraries." The principles are intended to help libraries that are required to install Internet filtering software under the Childrens Internet Protection Act do so in a manner that promotes free speech and robust access to information. CDT invites public comment on the principles.

Preserving the Freedom to Read in an Era of Internet Filtering:
Principles For the Implementation of CIPA-Mandated Filtering in Public Libraries (Version 1.0)

By next summer, thousands of communities across America will have to decide whether to filter library access to the Internet, and if so how. The Supreme Court's decision upholding the Children's Internet Protection Act means that libraries receiving certain federal funds to provide Internet access must put in place filters that block access to certain types of content. The Center for Democracy and Technology continues to believe that while filters can serve as a useful tool to tailor the online experience when used voluntarily by families, their mandated use by government does not promote the interests of free expression and open access to the Internet.

However, libraries now face such a mandate from the federal government. For those who choose to receive the relevant funding, it is critically important that filtering be carried out in a manner that is, as much as possible, consistent with the role of libraries as centers of information and

consistent with the needs of users for rich access to resources, research and information. While filters are deployed in a variety of settings, many of which have quite different objectives and requirements, it is imperative that those implemented in libraries be tailored to specifically serve that environment. As a first step in articulating the interests of users in library-appropriate filtering, we offer below a set of proposed principles that would guide libraries and communities as they evaluate and implement filtering systems. CDT welcomes comments on these principles from the library community and the public.

Tailored Blocking

- Blocking should be limited to the categories of adult content specifically set out in the CIPA statute.
- Ideally, the marketplace should make available a range of filtering products tailored for use by libraries that enable local libraries to select filters that comport with their communities' standards while fostering an open library and the free flow of information.
- Certain broad categories of content—among them journalistic, medical, educational, and public affairs information—should be exempted from filtering, even if content involves a sexually-oriented subject or contains visual depictions of sexual activity.
- Libraries and communities should be able to tailor filtering through use of white lists—lists of sites that filters do not block. Each local library should be able to create a white list based on the needs and requirements of its community.

Right of Adult Internet Users to Avoid Filtering and Blocking

- Adult users should have ultimate control over Internet filters. Adults should be able to have a filter disabled anonymously and without explanation.
- Libraries should provide adult users with clear and conspicuous information about how filters may be disabled or a block removed (both prior to Internet usage and at the time a web site is blocked).
- Adult users should be provided, without a requirement of an explanation, with access to an unfiltered computer.
- Adult users should be able to have the Internet filter disabled at any time, including in advance of an Internet session or in the middle of a session. Disabling of a filter should persist for the amount of time required by the user.
- Adult users should have a means to obtain unfiltered access that persists for a period of time, such as a month or a year.

Transparency

- Information about the ongoing blocking of content by filters required by CIPA should be made available to library users and communities. Users and communities should have access to information about categories of blocked content, lists of blocked sites, the extent to which filters can be adjusted and fine-tuned and the manner in which filters block content. Opportunity for public review and comment of filtering practices and products used by libraries must be made available.
- Blocking of content for any reason should be plainly indicated at the time the user is blocked from viewing the material.

Privacy and Anonymity

- Users should be able to access and use the Internet anonymously.
- The sites visited by users should not be recorded by filtering software.
- A user's requests to have sites unblocked or filters removed should not be recorded in any way that can be linked to the user's identities

For more information, or to comment on these principles, please visit CDT's web site at www.cdt.org/speech, or contact Paula Bruening (pbruening@cdt.org), Alan Davidson (abd@cdt.org), or John Morris (jmorris@cdt.org) at CDT, 202-637-9800. The Center for Democracy and Technology is an independent, non-profit public interest group that works to promote democratic values and constitutional liberties in the digital age. CDT has opposed and challenged broad Internet content regulations (including CIPA), and seeks practical solutions to enhance free expression and privacy online. □

almanacs may be tool for terrorists, says FBI

Amid heightened indications that al Qaeda operatives may be planning catastrophic attacks in the United States, the FBI has warned police about a new potential tool for terrorism: almanacs. An FBI intelligence bulletin sent to law enforcement agencies in late December warned that "terrorist operatives may rely on almanacs to assist with target selection and pre-operational planning" because they include detailed information on bridges, tunnels and other U.S. landmarks, officials said.

Although noting that "the use of almanacs or maps may be the product of legitimate recreational or commercial activities," the bulletin urged police to watch for suspects carrying almanacs, especially if they include suspicious notations or marks, because "the practice of researching potential targets is consistent with known methods of al-Qaida and other terrorist organizations."

The warning came as a surprise to purveyors of almanacs, which range from statistical tomes listing the

tallest buildings and the longest bridges to folksy journals including planetary charts and apple-pie recipes.

"Our almanac is about as far away as you can get from terrorism and about as close as you can get to what you would think of as Americana," said Peter Geiger, editor of the *Farmers' Almanac*, a 185-year-old compendium of weather predictions, cleaning tips and other advice. "It takes people away from all the hype and terrorism and scaring that's going on."

The bulletin also prompted objections from civil liberties advocates, who argued that the warning appears to encourage police to arrest or interrogate people based on their reading habits. "Founding Father Benjamin Franklin probably never imagined that the almanac he created would be the subject of an FBI terrorism bulletin," said Nadine Strossen, president of the American Civil Liberties Union.

The almanac alert was part of the FBI's regular Intelligence Bulletin distributed weekly to law enforcement agencies nationwide. Since the September 11, 2001, attacks, the bulletin has often included general warnings and information related to terrorism. The bureau has been criticized at times for its choice of topics, including a recent bulletin outlining possible dangers posed by violent antiwar protesters.

FBI representative Ed Cogswell said the bulletin was meant to provide general information to local police and was not the result of a specific threat. It does not refer to any specific cases involving almanacs. But investigators have said that during a search of the apartment of alleged al Qaeda sleeper agent Ali Saleh Kahlah al-Marri, they found an almanac with bookmarked pages on major U.S. dams, rivers, reservoirs and railroads.

One of the most popular mainstream publications, the *World Almanac*, includes a dozen pages listing the tallest buildings, longest bridges and other notable landmarks. But senior editor Kevin Seabrooke said the book does not include specific locations or other details that might be useful for terrorists planning an attack.

"The idea of using it for terrorism never even occurred to me," he said. "They certainly didn't need the almanac to locate the twin towers." Reported in: *Washington Post*, December 30. □

ACLU files complaint with UN seeking justice for 9/11 detainees

In its first-ever official submission to the United Nations Working Group on Arbitrary Detention, the American Civil Liberties Union on January 29 presented an official complaint to the United Nations on behalf of immigrants imprisoned and deported from the United States after September 11, 2001.

The Complaint, presented to UNWGAD at a press briefing at the UN in Geneva, with a follow-up briefing in New York, calls on the United States government to maintain its high standards of justice for all despite the threat of terrorism.

"We are filing this complaint before the United Nations to ensure that U.S. policies and practices reflect not just domestic constitutional standards, but accepted international human rights principles regarding liberty and its deprivations," said Anthony Romero, Executive Director of the ACLU, at the Geneva press briefing.

"With today's action, we are sending a strong message of solidarity to advocates in other countries who have decried the impact of U.S. policies on the human rights of their citizens," Romero added. "The ACLU will go where it must to seek justice for the men who were unfairly detained and deported by the U.S. government after September 11."

Romero and ACLU attorney Jameel Jaffer were joined at the Geneva press conference by Khurram Altaf, a deportee now in Pakistan after eighteen years residence in the United States. Altaf, manager of a large truck stop in New Jersey and father of three American-born children, was deported in 2002 following two months of detention. After a year's separation, his wife and two children joined him in Rawalpindi, where he now operates a small grocery store. A third daughter, Anza, was born deaf and has remained in the United States under the care of her uncle and extended family. His family misses her terribly, he said. "Anytime we talk to her—with the implant, she hears and speaks—they cry. And she does too." Altaf's brother Azim and his daughter Anza, who are both currently living in New Jersey, spoke at the UN press briefing in New York.

In the weeks following the destruction of the World Trade Center on September 11, US government officials have admitted to detaining 765 Arab-American and Muslim immigrants without charges, without access to attorneys and, in many cases, without access to their own family members. The government acknowledged deporting a total of 478 of these immigrants. Efforts to identify detainees or investigate charges against them were rejected by U.S. government officials.

The ACLU complaint alleges that the United States government arbitrarily and indiscriminately arrested immigrants unconnected to terrorism or crime. Many languished in jail—sometimes in solitary confinement—for weeks and sometimes months, and the government refused to release them even when it became clear they were innocent of any charges related to terrorism.

Through independent research, and with the cooperation of the Pakistani Embassy, the ACLU was able to identify a number of Pakistani immigrants then imprisoned and/or deported. In November 2002, representatives of the ACLU traveled to Pakistan to interview several of the deportees.

A new report released January 29, *America's Disappeared: Seeking International Justice for Immigrants*

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in review

***Religious Expression and the American Constitution*. Franklyn S. Haiman. Michigan State University Press, 2003. 254 p. $24.95**

Religious Expression and the American Constitution is a remarkably comprehensive treatment of a very complex subject in a relatively small space. The text is actually only 137 pages. The remaining space is mostly given over to appendices containing reprintings of fifteen significant documents of American religious liberty.

After a speedy overview of religious expression in human history, Haiman analyzes the origins of the First Amendment to the United States Constitution and its subsequent interpretation. He pays particular attention to the question of original intent and its application to the establishment and free exercise clauses.

Haiman then devotes individual chapters to historical analyses of the constitutional issues related to religious expression in public places, religious expression in public schools and public funding of religious schools. This is followed by a chapter briefly reviewing several issues which Haiman believes are "settled matters as far as the Supreme Court is concerned (p.109). [This is a belief not shared by this reviewer. When it comes to interpretation of the Constitution, nothing is ever finally settled.] Topics covered include tax exemptions, polygamy, the draft and conscientious objection, the use of alcohol, other drugs and animal sacrifice in sacraments. The next chapter address current issues including private employment; public health, education and safety; and faith-based social services. He closes with an essay on the role of religious expression in political life.

Of particular interest for the library community are 1) the relatively brief coverage of the role of religion in public school textbook and library censorship conflicts (p. 64–67) and 2) the author's linkage of the freedoms of religion and speech to each other and to an underlying freedom of conscience (p. 11 and p. 51).

The text is thoroughly documented in endnotes. Indexes for both topics and Supreme Court cases are provided.

Haiman has taken on a major task and, on the whole, succeeded admirably. He makes his viewpoint clear at the outset (that of an agnostic, First Amendment junkie) and plays fair with the opposing sides on various issues. For instance, while providing occasionally sharp judgements regarding the validity of a particular viewpoint, he allows the opponent space to speak. He does this by providing lengthy quotations from all sides in various Supreme Court decisions.

In taking on such a sweeping topic, Haiman is open to a few unavoidable criticisms. One could quibble with some of the very broad generalizations and oversights in the opening chapter. For instance, he gives no credit to the continental Anabaptists for advocating freedom of religion several generations before Roger Williams and William Penn. However, the occasional factual lapse is of more concern. For instance, Haiman links Little Rock's Central High School with Alabama's govenor, George Wallace, in the 1960's when the events in question occurred under Arkansas's govenor, Orval E. Faubus, in the 1950's (p. 59).

There is one other drawback. The appendices, while providing an excellent selection of primary documents, are curiously not themselves documented. Since the author notes that "most of the documents in these appendices are extensive excerpts from lengthy original versions" and that "omissions of textual materials are indicated by ellipses" (p. 139), it would have been particularly helpful to indicate the original sources for readers who might wish to read the ellipses.

Haiman has produced a lively, engaging and informative study suitable for anyone with an interest in First Amendment issues other than perhaps First Amendment attorneys or scholars who would already be familiar with the material. This title would be a valuable addition to any public or academic library. *Reviewed by: J. Douglas Archer, Reference and Peace Studies Librarian, University Libraries of Notre Dame*.

***Christianity and the Mass Media in America: Toward a Democratic Accommodation*. Quentin J. Schultze. Michigan State University Press, 2003. 512 p. $84.95.**

This work is a scholarly foray into the historical and theoretical relationship between the media and Christian religion in America. According to Schultze, the tension created by these two forces provides what this democracy needs: a "tribal rhetoric" which will guard against the dangers of "technological mythology" while it affirms the value of faith and nurtures "the kind of public discourse that recognizes the historical and future value of religion for the common good (352)."

The early part of the book seeks to establish a grounding and structure for this theory. Frequently quoting historical observer Alexis de Toqueville, Schultze identifies five rhetorics which he says both theology and the media have come to share: conversion, which seeks to gain followers, or market; discernment, which allows religious tribes to identify and re-establish their uniqueness; communion, which binds people together in various ways; exile, which makes groups feel excluded and fight to have their own points of view acknowledged by the larger society; and praise, the language of hope and utopia. He meanders among the ways in which technology has been viewed as both good and evil by religious groups, ponders the ways in which mass media may be seen as having adopted theological thought, and discounts the notion that popular culture might adequately address the individual's need for moral and spiritual context in life.

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censorship dateline

libraries

Ocala, Florida

Two books, miles apart in content and style but similar in that they explore political topics through unorthodox and controversial means, ought to remain in the Marion County library, a citizens panel decided December 2. The county's Public Library Advisory Board recommended that Library Director Julie Sieg retain the novels *Eat Me*, an Australian sex romp, and *A Stone in My Hand*, a decidedly pro-Palestinian children's book, despite their provocative themes.

But the board's votes were only suggestions. Sieg, as prescribed in the county's convoluted policies, as the recommendation came after action had already been taken on the books, now must make the unusual determination to stick by her own findings. In the case of *Eat Me*, following the board's advice would cause Sieg to overturn her own precedent-setting decision to remove a book solely because of its content—a move that sparked allegations of censorship.

The emotion generated by the books was evident despite the tiny turnout. The ten-member board and four library staffers equaled the number of people in the audience, which largely included reporters and regular library watchers. In the first tally, the board voted 9–1 to derail a bid to remove *A Stone in My Hand*, a fictional account of an 11-year-old Palestinian girl's struggle with her brother's terrorist leanings during the Palestinian uprising in Gaza in the late 1980s.

Ocala resident Steve Klein had questioned the book, alleging it was anti-Semitic and would engender hatred of Jews among Marion County children. Sieg, per policies, investigated and rejected Klein's request. She believed the book was topical and offered a viewpoint that's not generally accessible.

At the meeting, Klein again denounced Cathryn Clinton's novel as inaccurate and filled with "flat-out lies" reminiscent of rhetoric on Jews under Adolf Hitler's Third Reich. For instance, he maintained that Israeli soldiers did not cut off water supplies, strip 5-year-old girls naked, or shoot into funeral processions, as the book depicts. Had they done so, the media would have been awash in those accounts, he argued.

"I'm not saying Israel is perfect," Klein acknowledged, "but do we want our county's library to encourage children to hate Jews and to hate Israel?"

Another speaker, Lionel Lokos, urged the board to support Klein, saying it was a "horrible, horrible thing to contemplate—that this can infiltrate the children of our population."

But those concerns were met by assertions that the book was not off base. Manal Fakhoury, a Palestinian, said not all Palestinians back the rebels, yet they have been living under fire and under occupation for years. She distributed the book to her children and friends. The conclusion: "It's just what we know. There's nothing different or unusual about it."

Many on the board concluded that the book was fiction, and as such gave the author certain leeway with the facts. Board member John McKeever told Klein that based on recently reported shootings of Palestinian children by Israeli soldiers, "I don't find these incidents as remote from reality as you do." Another panelist, Barbara Fitos, said she found the theme of a child struggling amid violence more universal, one as applicable to Northern Ireland as the Gaza Strip.

Board member Patricia Strait was the only one to vote to remove *A Stone in My Hand*, or at least relocate it from the children's section. She called it "craftily" written Palestinian propaganda and "an insightful attempt to brainwash our children."

That set the stage for the more controversial and emotionally charged book, *Eat Me*, which in August became the only volume ever removed from the library during Sieg's tenure. The book purports to explore feminism and gender politics through the graphic sex scenes of the protagonists, four 30-something Australian women. Many parts of the book describe food such as cucumbers, figs and sushi being related to body parts or as props in explicitly described sexual encounters.

Mary Lutes, a McIntosh resident who challenged Sieg's decision to ban the book, told the board to recall their own policy for building the library collection. Lutes argued those guidelines call for stocking the library shelves with a diverse collection, no matter how unorthodox, unpopular or unfashionable the author may be. She argued that works by the writer, Linda Jaivin, are popular in other parts of the world, and that having written on Asian and Australian politics and culture she couldn't be pigeonholed as a purveyor of smut.

Based on county policies and staff support, including replacing one copy after it was lost, the "conclusion is inescapable that the book should be retained."

But Ocala resident Margarite Cavanaugh disagreed. "The only things I learned from this book is that intelligent perverts who can turn a phrase can get published; women don't need men as long as there are vegetables; and we don't need libraries as long as we have adult book stores," she said.

Yet many on the board, some who admitted they would have never heard of *Eat Me* until someone wanted it removed from the library, seemed to have had their fill of the months-long controversy and the larger debate about possible book banning at the library.

"The failure is not in our system or in our policies. It is in us as patrons," board member Barbara West maintained, adding that she didn't want the government selecting books for her. "We have to assume the responsibility for the reading interests we reach for as patrons. If you encounter something that offends you leave it behind."

Ending, or at least limiting government's role in book selection struck a chord with other advisers. "Government is so intrusive in our private lives and I don't need them telling me what to read and what not to read," said member Jan Cameron. "It may not be for me and it may not be for you. But there is probably an audience out there that wants to read it."

On the other hand, member Norman Cates dismissed *Eat Me* as "pure pornography" with no redeeming social value and so little literary quality that it was unworthy to sit on the library shelf. And Strait, without elaborating, argued that censorship wasn't all bad and criticized the critics, adding that those who want to rid public buildings of the Ten Commandments and public schools of prayer are just as guilty of censoring others.

"We live with censorship every day, and thank God we do," she said. Otherwise, "we would be killing ourselves. We would be dog eat dog. This is a revolting, repulsive book that had no business in our library."

Cates and Strait, however were joined by McKeever on the losing end of the 7–3 vote to retain *Eat Me*. After the meeting, Sieg couldn't say when her decision about the books would be rendered. Reported in: *Ocala Star-Banner*, December 3.

Spring Hill, Florida

Ever since a family questioned whether it should be in elementary school libraries, the Judy Blume novel *Deenie* has become inaccessible to Hernando County students. That's despite district policy, which states any challenged instructional material under consideration "would remain available and in use unless otherwise directed by the superintendent or his designee."

Elaine Wooten, who heads the challenged materials review committee, claimed all available copies on October 10. Committee members needed to read the book before they could decide its fate, she said in e-mails to district media specialists. But the panel never had a full slate of participants, curriculum director Ken Pritz said, and it has not yet met.

The *St. Petersburg Times* challenged the district's plans to have the review conducted privately, and Circuit Judge Jack Springstead granted a temporary injunction against the meeting unless it was publicly advertised and residents were allowed to attend. The School Board settled the case, agreeing to open the session.

All the while, three school media specialists confirmed, the book remained checked out. "I have never seen that book again since I sent that book to a member of the committee," said Margaret Cushing of Spring Hill Elementary, where the debate began. "I haven't seen it and I haven't heard a word . . . That is one effective way of censoring, just take all the copies."

The turn of events bothered at least one School Board member. "The only reason for pulling it right away was if the committee was going to review it right away," board member Gail David said. "One parent has, for all practical purposes, decided the book won't be on the shelves."

Such a result wasn't even the parent's intent. Greg Trammel, who along with his wife questioned the novel because it spoke about masturbation, said he viewed the matter simply—they felt the book was inappropriate for their fourth-grade daughter, and they wanted better controls over the books that children take from the school library.

"We would have been very satisfied from the beginning if the book had a warning attached to it," Trammel said.

Spring Hill Elementary principal John DiRienzo recommended a similar action after a campus-level committee considered the book. He proposed in an October 28 memo that *Deenie* be placed behind the librarian's desk, where teachers and parents could request it, but students could not.

But once the complaint got to the district level, it took on a life of its own. "If (the district) had handled this with any sort of common sense, we wouldn't be where we are today," Trammel said.

School Board chair Sandra Nicholson said, "I don't have a problem with (removing the book) until the determination is made. Better safe than sorry." The committee had to read the story, anyway, she added, so it made sense to use the copies ready owned by the district.

In hindsight, it might have been better to put the books back into the schools once it became clear that the committee review would not take place for more than three months, according to board member Robert Wiggins. "Probably, when they took it out, they didn't know it would take this long," Wiggins said, adding that the process likely would be complete if the *Times* had not challenged it in court. "If the review is not going to take place some time this week, we should put it back on the shelf until we get this review in place." Reported in: *St. Petersburg Times*, December 19.

Ypsilanti, Michigan

The public comment period was over, but the residents crowding the Ypsilanti District Library board room refused to let the meeting move forward without some sort of vote on Internet filters.

"Let us know where you stand," demanded the Rev. Jimmy Walker, pastor of the Southside Baptist Tabernacle Church, as he addressed the board January 22 in a meeting that attracted about seventy residents, including local church leaders and Ypsilanti Township officials Brenda Stumbo, Karen Lovejoy Roe and Jean Hull Currie. What Walker received was a vote by library trustees that they will look into the matter.

Ypsilanti is one of a handful of libraries in Washtenaw and Livingston counties that do not use Internet filters. Among the libraries that do, several allow adult users to turn the filters off at will. None of the libraries record or track the Web sites their patrons visit.

Walker was one of several who pleaded—often emotionally—for the library board to add Internet filters to its computers so children would be protected from pornography and pedophiles. They presented the board with several hundred signatures of library district residents asking for the filters.

One resident at the meeting spoke against the filters, saying they amounted to censorship.

At first, the board members resisted the pressure, saying they had no intention of voting because the issue wasn't on their agenda. But the residents who filled the board room and spilled into the hallway repeatedly interrupted attempts to move to other business and demanded that someone should add the issue to the agenda. There was even a call from the back of the room for the board members to announce their names so residents could vote against them in the next election.

Library board President Linda Gurka demanded that the crowd settle down and stop yelling. "We're listening and we do hear what you are saying," Gurka said. "We're not putting it on the back burner."

The Internet filter debate became a national issue last year after the U.S. Supreme Court ruled that libraries receiving technology grants must install them, said Marcia Warner, president of the board of directors of the Michigan Library Association. The Ypsilanti library does not receive that money.

The filters became a hot issue in Ypsilanti when township officials asked the library board to install them and were told no. Township leaders then recruited area clergy and their supporters to force the library to take a stand.

Stumbo, the township clerk, and Roe, the township supervisor, were among the speakers during public comment period. Both also were among those who often cheered or applauded as the speakers made their case for filters, and both also urged the library board to vote. Afterward, Stumbo said she was disappointed that the library officials didn't immediately agree to install the filters.

The township and library boards, which are independently elected, have clashed on other issues, including the location of the new main library branch, but both sides said those issues are history.

Ypsilanti library officials have maintained that filters hinder user searches and that protections for minors are already in place through the library's strict computer-use policy. The policy includes a prohibition on visiting pornography sites. Library officials in Ypsilanti and elsewhere also argue that the filters don't work well enough.

"I agree that filters are a false sense of security and can block constitutionally protected materials," said Paul McCann, Dexter District Library director. But because the library doesn't have the staff to monitor Internet use by children, he said, the library chose to use the filters.

Manchester District Library Director Kate Pittsley said: "Filters that rely on keywords aren't an intelligent human being who can know what a Web page is about.

"The most dangerous thing for kids on the Internet is chat rooms and filters can't necessarily protect from that, so we don't allow chat from our computers as acceptable use," Pittsley said. "Having a no-chat policy does more to protect our kids from the Internet than a filter does."

All but one of the residents who spoke at the Ypsilanti library meeting asked for Internet filters. Mark Higbee was the exception, telling the board that filters do not protect children, parents do. "My wife and I oppose filters," he said. "It is censorship."

Pamela Glover said filters are not a fix, but will help protect children. She said she saw a youth accidentally looking at pornography on the library's computers a few months ago, and if filters were in place, the images would have been blocked. "Pornography is not something children should be looking at," she said.

Responding to the demands, library Trustee Sheveve Caudill, who signed the petition asking for the filters, moved to put the issue on the agenda. Trustee Suzanne Gray then offered a motion to consider the issue, which was approved with Caudill abstaining. Caudill later said she had hoped board members would take a stand on the issue, but

she described the vote as a step forward. "I am not looking for 100 percent protection," she said.

Gurka said the district's Internet committee continues evaluating all options and if it finds a good filtering system, will consider it.

Michigan law requires that libraries have an Internet policy to protect children ages 17 and under; and that policy can include filters or providing staff monitoring. Reported in: *Ann Arbor News*, January 23.

Marple, Pennsylvania

A one-man crusade to remove sexual instruction manuals from the shelves of the Marple Township library apparently gained some community support. A meeting to address the appropriateness of the titles—including *Sex Toys 101: A Playfully Uninhibited Guide*, by Rachel Venning—was called to order by Kathy Coll, founder and president of the Pro-Life Coalition, headquartered in Havertown.

"These books are absolutely horrific," she said. "The purpose of the meeting is to discuss concerns about the library making available books which are seriously objectionable in text and pictures due to sexually explicit material."

The volumes were brought to the attention of the commissioners in December by John Whoriskey of Glen Mills. Asked by his wife to find a title on the Atkins diet, he discovered it in the "new book" section adjacent to several recently purchased volumes on sexual instruction.

Whoriskey checked out seven books, which he subsequently showed to the Marple board of commissioners, local clergy and legislators. "They are all pornographic and there is no way they should be in a public library with my tax dollars," he said. "I am a father and a grandfather and thanks be to God they weren't there when my children were young."

The Marple Public Library, with more than 80,000 books and additional items in its adult and juvenile collections, serves as the public library for the township, an area resource center for the Delaware County Library System and a participant in the ACCESS Pennsylvania program. The collection development policy, revised in 1999, states materials are selected by various criteria such as purpose, subject matter, audience, timeliness and credibility of the author and/or publisher. Works are not excluded due to "frankness of expression, race, nationality, political, sexual orientation or religious views of the author."

The books in question, bought in the last eighteen months, were a result of the "weeding" conducted each year in diverse categories, said library Director Deborah Parsons. A portion of the $108,000 budgeted for book purchases in 2003 was earmarked to specifically target the sections on sexual instruction, computers and critical analysis of literature.

New books were acquired after consulting professional publications, which recommend volumes suitable for public libraries. The final purchasing decisions rested with the librarians responsible for the fiction and non-fiction sections, she added.

"One of the books mentioned, *The Joy of Gay Sex*, is considered to be the definitive book on the subject," said Parsons. "The books purchased are sexual instruction manuals for adults, not sex education books for children's consumption."

The library has a responsibility to obtain materials that present varied sides of certain issues and has an equal number of books on sexual abstinence, she added. As an area resource center, the Marple Public Library serves a larger community than the 25,000 citizens of the township and many of its materials are requested by other libraries. It has the highest circulation in the county and the new books have been checked out frequently.

Great Sex Tips, by Anne Hooper, has left the shelves ten times, while *The Illustrated Guide to Extended Massive Orgasm*, by Steve Bodansky, has been checked out five times.

"We have an obligation to present both sides of issues and have a process in place to follow if books are challenged," said Parsons. Whoriskey is aware of the procedure, but has chosen not to complete the form, he said. "I'm not about to read the books," he added. "I hope to get them taken out of the library but what I didn't want to do was go through them."

Coll, who said she saw the covers and made a cursory check of the contents, found the volumes "offensive to the max," adding she is investigating other ways in which the titles can be removed from the shelves. "It is very natural for our organization to fight pornography, as is it the antithesis of a life-supportive society," she said. "We are interested in making sure the community knows what is going on at the library." Reported in: *Delaware County Daily Times*, January 9.

schools

Bakersfield, California

The Kern High School District just might ban *The Bluest Eye* after all. At a January 12 board meeting, a trustee asked the board to consider removing Toni Morrison's novel from all classrooms. A second trustee also expressed grave reservations about the book's sexually explicit material.

After about 40 minutes of impassioned pleas from book supporters and detractors, board member Larry Starrh said he had read the book, several articles and letters discussing it, and decided it was not appropriate for the classroom.

"I would like to recommend that we overrule the super-

intendent," Starrh said. He asked district staff to place the item on the next meeting's agenda, most likely during the February 2 board meeting.

If the board does pull the book, it would be the first time in recent memory that the local high school district has enacted an outright ban on an already-approved book. It is also extremely rare for the board to overrule a superintendent, a district official said.

Superintendent Bill Hatcher had asked the board to approve his decision to keep the book in some classrooms. Three weeks earlier, Hatcher had decided the book was appropriate for some students—junior and senior Honors and Advanced Placement classes. He acted after a committee recommended it remain in use.

The Bluest Eye is about Pecola Breedlove, a young black girl who is raped and impregnated by her father. Pecola searches for the meaning of beauty and desperately wishes for blue eyes so that she can be admired. When her new baby dies, she goes crazy. It contains several graphic descriptions of sex, incest, pedophilia and rape.

"I can't with a clear conscience support the book," said trustee Sam Thomas. "This is not what I'd bring home to children and tell them to read." But Thomas also said he would not pull the novel from class reading lists. "What I support is not the book, but the process," he said.

East Bakersfield High School parents Sue and Fred Porter had asked board members to vote on the use of the novel in the classroom. But state law forbade trustees from voting during the meeting because they hadn't previously informed the public a vote would take place.

The controversy started about two months earlier when East High student Sarah Porter, 16, brought the novel home to her mother. She said the book made her uncomfortable, especially the talk of sex. "It wasn't the problem of talking about Pecola's rape by her father," Porter said. "It was the description of how his genitalia enlarged while he was raping her that I had a problem with."

Porter filed a complaint, initiating the district's review process.

She says she has three main problems with the novel: The book is obscene, according to a dictionary definition. "When you say that an illegal act such as pedophilia or incest is not repulsive or offensive to modesty, that's just not true," she said. The book may be great literature—and may not—but it's not appropriate for children. Teachers are not qualified to speak on incest and pedophilia. "We're gonna put this in our kids laps and we're not giving them any counseling for it?" she asked rhetorically.

But Superintendent Hatcher disagreed. On December 18, Hatcher announced that the book would not be banned outright but would be limited to juniors and seniors in selected classes. His decision actually affected few classes because the book wasn't taught often, Hatcher said. And the book would remain in school libraries.

Hatcher made his decision based on the recommendations of a committee of parents, teachers, counselors, ministers and librarians. The committee reported to Hatcher that the book is not obscene. "It is neither prurient nor titillating," the committee report reads. "More importantly, taken as a whole, it has serious literary value."

Hatcher and the committee did side with Porter's complaint on one point, however—to notify parents before a teacher uses the book, even in those classrooms that may still read it. Parents will receive a letter stating their child will be reading the book. If they choose, they can ask for an alternate assignment.

The same process has been followed fourteen times since 1969. No textbook, film or novel has ever been banned outright. Three books have been restricted to older students or to honors classes, as was *The Bluest Eye*.

Porter has formed a group of parents and others, called Citizens for Good School Books, to continue reviewing Kern High classroom novels "I hope that people see a parent who is concerned that all of the children in our high school district are given good quality literature to read. That is my goal."

But the Porters also filed a lawsuit against their daughter's English teacher on the grounds that assigning the novel constituted sexual harassment.

Faculty at California State University, Bakersfield, responded to the controversy and defended *The Bluest Eye*. The campus Academic Senate resolved to "support the decision made by Kern High School District Superintendent Hatcher and urge the members of the Kern High School District Board of Trustees to vote against banning *The Bluest Eye* from honors and advanced placement high school reading lists."

The Senate added that "as university faculty, we have an obligation to protect freedom and to guard against undue censorship. The complaint in question is an effort to ban *The Bluest Eye* from all high school classrooms, resulting in the censorship of a world-renowned and critically acclaimed literary work by Nobel laureate Toni Morrison." Reported in: *Bakersfield Californian*, January 13.

Modesto, California

A book banned and then unbanned from Modesto schools has gone back before the school board. Pamela LaChapell previously succeeded in having the district remove *Always Running: La Vida Loca, Gang Days in LA*, by Luis Rodriguez, from classroom use. Later, a teachers committee backed the book, and administrators reversed course. They said LaChapell or anyone else would have to go through the district's formal complaint process to have the book banned.

LaChapell has done that.

In *Always Running*, Rodriguez describes his teenage life in a Los Angeles gang in the 1970s. LaChapell objects to

the book's graphic sex and violence, saying they violate the moral and religious beliefs of many families.

In late October, she learned that a Beyer High School teacher had assigned the book to an 11th-grade English class. LaChapell's complaint led to the book's suspension pending review. A committee of English department heads decided the book should remain on the approved reading list, known as the Passport to Literature. Administrators said Melissa Cervantes could resume teaching the book if parents gave the OK.

But by that time, Cervantes' class had moved on to other readings according to teachers union representatives.

In response to LaChapell's formal complaint, administrators recommended that *Always Running* stay on the approved list. District policy states that parents may opt their children out of any assignment they find objectionable. But LaChapell argued that students might be embarrassed to ask not to read the book, and it might jeopardize their chances of receiving top grades.

Imogene Engebretsen, librarian at Johansen High School, brought *Always Running* before a state curriculum committee as part of an effort to add ethnically diverse authors to the state's collection. Rodriguez's book is so popular that nine of the ten copies at Johansen's library were stolen, Engebretsen said. A teacher has had the remaining copy checked out for the past year. "They really want to own it. It's meeting the needs of somebody," Engebretsen said. Reported in: *Modesto Bee*, December 14.

Sacramento, California

The Galt Joint Union Elementary School District board decided December 1 to ban a young adult novel from classrooms but keep it in middle school libraries. The district looked at the issue of whether to remove *Don't You Dare Read This, Mrs. Dunphrey*, a novel that chronicles the problems of a troubled teenager, as supplemental classroom reading after a parent complained. The book had been assigned in a seventh-grade English class.

Trustees voted 4–1 to stop the novel from being used for instructional purposes but will allow it to remain in libraries as long as students get parental permission to check it out. Trustee Susan Richardson cast the dissenting vote.

Superintendent Jeffrey Jennings said he did not feel the book was appropriate for seventh-graders. "We should be able to have some discretion as to what our kids have to read," he said.

The decision came after trustees voted 3–2 to reject the recommendations of a district committee that found the book appropriate for middle school students.

Trustees Ervin Hatzenbuhler, Donna Fluty and Tina Skinner voted against the committee's recommendations, while Richardson and trustee Donald Nottoli voted in favor.

The district committee made its recommendation at the November board meeting, along with a recommendation that notices be sent home about the book so parents who objected to it could request an alternative assignment for their children. Hatzenbuhler's absence left the board deadlocked 2-2 on the issue in November, forcing a return before the board.

The novel joined *Harry Potter and the Sorcerer's Stone* and Maya Angelou's *I Know Why The Caged Bird Sings* on a list of books that have raised concerns among parents in the area in recent years.

Don't You Dare Read This, which is an ALA Best Book for Young Adults, is about a fictional character named Tish Bonner, whose English teacher requires students to keep a journal. The teacher promises not to read entries that are labeled confidential, and Tish uses the journal to relate parental neglect, sexual harassment at an after-school job and other stresses she deals with. She eventually opens up to her teacher and gets help for herself and her younger brother.

The novel was a supplemental book that middle school teachers had assigned on and off for the past seven years without any parental complaints, Jennings said.

Parent Mark Madison objected to the language and content, including some sexual language. "This isn't a book that should be force-fed to young children," he said.

But parent Barbara Vanderveen said she was disappointed because she believes it will lead to other books being challenged and removed from classrooms. "I'm afraid about where it'll stop," she said. Reported in: *Sacramento Bee*, December 9.

Toronto, Canada

The principal of Northern Secondary School barred students from showing documentary films about the Middle East conflict following complaints from the Canadian Jewish Congress. The CJC said the films *Jenin, Jenin* and *Relentless: The Struggle for Peace in Israel* portray extreme viewpoints, and could incite ethnic intolerance at the school. Student leaders said they should be allowed to discuss all kinds of perspectives on issues, and that the documentaries would encourage debate. Reported in: toronto.cbc.ca, December 12.

Presque Isle, Maine

A seventh-grade social studies teacher in Presque Isle who said he was barred from teaching about non-Christian civilizations has sued his school district, claiming it violated his First Amendment right of free expression. Gary Cole, a teacher at Skyway Middle School, sued School Administrative District 1 in U.S. District Court in Bangor. Cole alleged that complaints by "a small group of fundamentalist Christian individuals" led to the creation of a curriculum "which never mentions religions other than Christianity and never teaches the history of civilizations other than Christian civilizations."

"He can't even teach the history of anti-Semitism (or the) history of ancient Greece," said Cole's lawyer, A.J. Greif of Bangor. "How can you explain the evolution of democracy in the Western world without talking about ancient Greece? He can't talk about all the influences of the Indian, Japanese or Chinese cultures."

Superintendent Gehrig Johnson said that he had not seen the lawsuit, but he noted that the curriculum had been "developed by teachers across the district and adopted by the SAD 1 School Committee.""Teachers are expected to follow the curriculum," he added.

Cole's lawsuit alleges that the curriculum infringes on "his students' First Amendment rights to the free flow of information within the classroom" and that it "constitutes an illegal establishment of religion in violation of the First Amendment."

Greif said that when Cole has gone outside the prescribed curriculum, he has been reprimanded and given warnings that he could lose his job. He said the district is imposing curricular choices upon the students that are framed by one particular religion in the community.

Cole had been teaching a broader curriculum at one point, but during the past several years, members of a church group "had been complaining and attempting to get the curriculum confined to a history of Christian civilization, not the civilization of the Eastern Hemisphere," the lawyer said.

Greif said Cole wasn't trying to teach anything unusual or anything that wasn't being taught in most seventh grades across the state. His lawsuit seeks injunctive relief to allow him to teach "the history of the entire Eastern Hemisphere, as appropriate."

Patrick Phillips, deputy commissioner of the Maine Department of Education, declined to comment on the specifics of the case but said school boards set the curriculum for each district and Maine's Learning Results "allow districts some degree of flexibility." They "give local districts the latitude to make choices and decisions about the content of instruction and curriculum that meet local needs," he said.

The state's academic standards stipulate that the history curriculum for grades 5 through 8 has pupils "identify the sequence of major events and people in the history of Maine, the United States, and selected world civilizations." Reported in: *Portland Press-Herald*, December 4.

colleges and universities

Pineville, Lousiana

A new textbook-review policy at a Baptist college in Pineville raised the ire of some professors and students, and other advocates of academic freedom. Louisiana College's Board of Trustees announced December 2 that all professors teaching courses this spring must have their textbook choices approved by their department heads as well as by the college's vice president for academic affairs.

"This new policy violates our academic freedom," Constance A. Douglas, a professor of English, said. "Students can't pursue truth unless they have the freedom to ask questions and to read literature that reflects all of human experience."

The new policy upholds a decision made in September by the college's president, William Rory Lee, to have two books removed from the college's bookstore. The books were previously used in a philosophy course taught by Douglas and Frederick Downing, a professor of religion. Lee ordered the books removed, he said, after a student and a board member complained that profane language in *The Road Less Traveled*, a self-help book by M. Scott Peck, and a love scene described in *A Lesson Before Dying*, a novel by Ernest Gaines, clashed with the Christian values espoused by the college.

Banning textbooks for use in college courses means that students are "getting the short end of the stick," said Jason R. Schwartz, a sophomore majoring in biology. The new policy, he said, might deprive students of studying books that would be valuable to their education. "It totally changes the academic excellence that is a staple here," he said.

"Establishing such a policy is basically inconsistent with generally accepted principles for academic freedom," said B. Robert Kreiser, a senior program officer with the American Association of University Professors. Constraining professors in their textbook choices "seems to be in contravention to the professed commitment to academic freedom" of the college itself, he added.

Fred A. Malone, chair of the board's academic-affairs committee, defended the textbook-review policy. He explained that by requiring faculty members to work with "more experienced" department heads in selecting their course texts, the policy strikes a "proper balance between academic freedom and academic responsibility."

"Academic freedom cannot be absolute in a Christian-college context," he said, noting that it was the board's intent to help ensure that the college "functions in harmony" with religious precepts set forth in the Baptist Faith and Message. That document contains doctrines adopted in 2000 by Baptist organizations nationwide, including the Louisiana Baptist Convention, an association of Baptist churches in the state.

The convention selects the 34 members of the college's board. Douglas and others said they suspect the new policy was driven by an increase in conservative members of the convention, who in turn appointed more-conservative trustees to the board. The trend mirrors an increase in the number of conservative members of the Southern Baptist Convention, the largest national Baptist organization in the United States.

Malone conceded that the new policy may have been spurred by the changing makeup of the board, but he would not say whether the board contains more conservatives now than in years past.

In recent years, several Baptist colleges have cut ties with state Baptist conventions over issues of control and governance. Lee said, however, that the relationship between Louisiana College and the state convention is strong. The Board of Trustees selected by the convention, he said, "has continually kept its focus both on academic quality and spiritual growth of the students of our institution." Reported in: *Chronicle of Higher Education*, December 4.

New York, New York

In October, a film student at New York University pitched an idea for her video-making class: a four-minute portrayal of the contrast between unbridled human lust and banal everyday behavior. Her professor approved. The student, Paula Carmicino, found two actor friends willing to have sex on camera in front of the class. The other students expressed their support. But then the professor thought he should double-check with the administration, which immediately pulled the plug on the project.

What's more, university officials said they would issue a written policy requiring student films and videos to follow the ratings guidelines of the Motion Picture Association of America, with nothing racier than R-rated fare allowed, according to Carmicino and her professor, Carlos de Jesus. The association says R-rated films may include "nudity within sensual scenes."

The matter raised a mini-tempest on campus. On December 3, the school newspaper, *The Washington Square News*, published a front-page article about it, as well as an editorial critical of the administration.

Carmicino and Professor de Jesus said the issue raises far-reaching questions of censorship and academic and artistic freedom. "This is where you unfold as a creative artist," Carmicino said. "You need people to bounce your ideas off of, or else you won't evolve as an artist." Carmicino is a junior in the film and television department at the university's Tisch School of the Arts.

Speaking on behalf of the university, Richard Pierce said the school had long had an unwritten policy that student films should follow industry standards and was now considering putting that policy in writing. He said N.Y.U. was considered very broad-minded on questions of artistic freedom, but had to draw the line at videotaping real sex before a class of students. He compared that to a filmmaker committing arson for a movie about firefighters.

"Someone give me a list of universities that allow sex acts in the classroom," Pierce said. "We're not going to be the first."

He also praised Carmicino as a "serious and valued" student. "The history of art is replete with examples of artists producing great art under limitations," he said.

Christopher Dunn, associate legal director of the New York Civil Liberties Union, said there was no First Amendment issue involved because the university is a private institution. But, he said, the decision ran counter to the tradition of academic freedom. "Students should be able to make films, write books or compose paintings without their university acting as a moral censor," he said.

Professor de Jesus said he supported the film from the start. "It did have redeeming values, and it was fine with me, especially having seen her previous work. She's a young woman with lots of integrity." But when he checked with the administration, he said, "All I kept hearing was, 'No, no, no, she can't do this.' "Carmicino said that she then withdrew the idea to avoid putting her professor on the spot.

In Carmicino's view, the university was censoring a work about how people censor their own behavior. She said her video, titled "Animal," was supposed to depict the contrast between public and private behavior: "The whole concept of it was to compare the normal behavior of people in their everyday lives versus the animalistic behavior that comes out when they are having sex."

She planned to intersperse 30-second clips of passionate sex with scenes of the couple engaged in more mundane activities, like watching television and reading a newspaper. Simulating the sex would have defeated her purpose, she said. "That's censoring the sex part. My thing is how we censor ourselves during the day when we're not having sex."

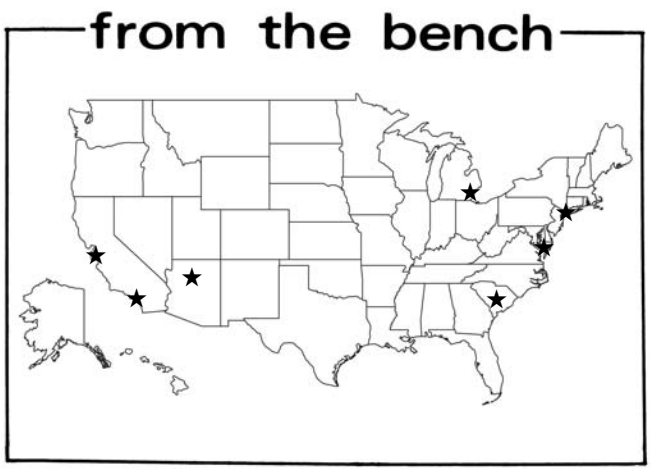
Pierce said that film and art students at the university frequently try to test limits. Administrators often have to apply sensible guidelines for provocative works, and rarely draw news media attention when they do so. Tisch students sympathetic to Ms. Carmicino's efforts made it clear that explicit content in classroom work was not unusual.

Vera Itkin, a sophomore, said that one film in a class contained graphic secondhand footage from a pornographic movie and that two scripts called for hard-core sex scenes, one with dead people.

Lisa Estrin, a sophomore, said she made a film showing simulated sex between two stuffed toys, Minnie Mouse and Lamb Chop.

Carmicino also has the support of her mother, Theresa Carmicino, a retired social worker in Shelby Township, Michigan, near Detroit, who said, "It's not subject matter I probably would like, but I think she had the right to represent herself the way she likes." Nor was the controversy a surprise. "Paula's always pushed buttons," her mother said, but she has always backed up her contrarian positions with sound reasoning.

(continued on page 76)



U.S. Supreme Court

A sharply divided Supreme Court upheld key features of the nation's new law intended to lessen the influence of money in politics, known as the McCain-Feingold Act after its two Senate sponsors, ruling December 10 that the government may ban unlimited donations to political parties. Those donations, called "soft money" and totaling hundreds of millions of dollars, had become a mainstay of modern political campaigns, used to rally voters to the polls and to pay for sharply worded television ads.

Congress may regulate campaign money to prevent the real or perceived corruption of political candidates, the court ruled in a 5–4 decision. That goal and most of the rules Congress drafted to meet it outweigh limitations on the free speech of candidates and others in politics, the majority said. At the same time, the court said the 2002 law will not stop the flow of campaign cash.

"We are under no illusion that (the law) will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day," Justices John Paul Stevens and Sandra Day O'Connor wrote for the majority.

The court also voted 5–4 to uphold restrictions on political ads in the weeks before an election. The television and radio ads often feature harsh attacks by one politician against another or by groups running commercials against candidates.

Rep. Marty Meehan (D-MA), a co-author of the law, called the decision a "major victory for American democracy." He acknowledged the law won't stop all forms of abuse in the system, but it ends the era when "special interest groups could control the national political parties and underwrite federal campaigns by writing unlimited checks."

The justices struck down only two provisions of the Bipartisan Campaign Reform Act—a ban on political contributions from those too young to vote and a limitation on some party spending that is independent of a particular candidate.

The law hasn't stopped the flow of big money, but it has changed its course. In the months since the law took effect, several partisan interest groups have popped up to collect corporate, union and unlimited individual donations to try to influence next year's elections, including several on the Democratic side focused on the presidential race.

Supporters of the new law said the donations from corporations, unions and wealthy individuals capitalized on a loophole in the existing, Watergate-era campaign money system.

"Soft money" is a catchall term for money that is not subject to existing federal caps on the amount individuals may give and which is outside the old law prohibiting corporations and labor unions from making direct campaign donations. Federal election regulators had allowed soft money donations outside those restrictions so long as the money went to pay for get-out-the-vote activities and other party building programs run by the political parties.

Soft money allowed the three national Democratic Party committees to match their GOP rivals nearly dollar-for-dollar on get-out-the-vote and issue ad resources in the 2002 election. The Democratic committees raised about $246 million in soft money in the last election cycle, compared with $250 million for the Republicans.

Supporters of the new law said that in practice, soft money was funneled to influence specific races for the House, Senate or the White House, and that donors, parties and candidates all knew it.

In addition to Stevens and O'Connor, Justices David Souter, Ruth Bader Ginsburg and Stephen Breyer signed the main opinion. Chief Justice William H. Rehnquist and Justices Antonin Scalia, Anthony Kennedy and Clarence Thomas dissented on most issues. Swing voter Kennedy struck a compromise on one portion of the law. He said he would vote to uphold a soft money ban only as it applies to federal candidates and officeholders.

The majority's ruling bars candidates for federal office, including incumbent members of Congress or an incumbent president, from raising soft money. The majority also barred the national political parties from raising this kind of

money, and said their affiliates in the individual states may not serve as conduits for soft money.

Without soft money, politicians and political parties may only take in donations that are already allowed in limited amounts, such as a private individual's small re-election donation to his or her local member of Congress. That means no more huge checks from wealthy donors, and no contributions from the treasuries of corporations or labor unions.

The Supreme Court's 300-page ruling on the 2002 campaign finance overhaul settles legal and constitutional challenges from both the political right and the left. Although the reform effort was passed by Congress and signed into law by President Bush, many politicians and others in the business of politics were leery of it.

The new rules have been in force during the early stages of preparation for the 2004 elections for president and Congress. The high court ruling means those rules remain largely untouched as the political season heats up.

A lower court panel of federal judges had issued its own, fractured ruling on the new law earlier this year, but the Supreme Court got the last word. The justices cut short their summer vacation to hear an extraordinary four hours of oral arguments on the issue in early September. The court's regular term began a month later.

The case marked the court's most detailed look in a generation at the complicated relationships among those who give and receive campaign cash. The case also presented a basic question about the wisdom of the government policing political give and take.

The court has given government an extensive role in the area on grounds that there is a fundamental national interest in rooting out corruption or even the appearance of it. That concern justifies limitations on the freedom of speech, the court has said. Reported in: Associated Press, December 10.

The Supreme Court stepped squarely into a momentous debate over national security and personal liberty January 9 by agreeing to consider the case of a man who has been held without charges by the United States military since he was captured in the fighting in Afghanistan. The justices agreed to hear the appeal of the captive, Yaser Esam Hamdi, who is believed to hold both American and Saudi citizenship and who is in a Navy brig in Charleston, South Carolina.

The Bush administration had urged the Supreme Court not to hear the Hamdi case, so the announcement represented a sharp rebuff to the president, Attorney General John Ashcroft and other architects of administration policy.

In agreeing to hear the case, probably in April, the justices decided in effect to subject the Bush's administration's antiterrorism policies to a close examination that could have consequences for decades to come. The administration has argued that the threat of terrorism justifies some tough measures in dealing with suspected enemies of the United States—holding such people without specific charges in some cases or denying them access to counsel if such tactics can prevent more attacks like those of September 11, 2001.

But some civil libertarians have expressed fears that in so doing the government, and the American people, may make mistakes that will be regretted many years from now, much as the internment of Japanese-Americans during World War II is today.

The justices' decision to take the Hamdi case appeared to increase the likelihood that they would also take another case that pits national security considerations against issues of personal freedom. That case comes from New York City, where the United States Court of Appeals for the Second Circuit ruled on December 18 that President Bush lacks the authority to detain indefinitely a United States citizen arrested on American soil on suspicion of terrorism simply by declaring him "an enemy combatant." The authorities say that suspect, José Padilla, plotted with Al Qaeda to detonate a so-called "dirty bomb" in the United States.

On January 7, the Bush administration reasserted its broad authority to declare an American citizen to be an enemy combatant, and it suggested that the justices hear the Hamdi and Padilla cases at the same time.

The government said in its brief that the Second Circuit ruling in the Padilla case was "fundamentally at odds" with court precedent on presidential powers, which the courts have historically given greater deference to in matters of national security. The decision "undermines the president's constitutional authority to protect the nation," Solicitor General Theodore B. Olson wrote.

The justices had already agreed to look at a another case involving detentions in the campaign against terrorism, decided on December 18 by the United States Court of Appeals for the Ninth Circuit, based in San Francisco. That court declared that the administration's policy of imprisoning some 660 noncitizens captured in the Afghan war on a naval base in Guantánamo Bay, Cuba, without access to United States legal protections was unconstitutional as well as a violation of international law.

The Hamdi case comes to the Supreme Court from the United States Court of Appeals for the Fourth Circuit, based in Richmond, Virginia. That tribunal, widely considered the most conservative federal appeals court, ruled in July that the president does have the authority to detain indefinitely as an enemy combatant a United States citizen captured on the battlefield and to deny him access to a lawyer.

Padilla, the defendant in the case from the Second Circuit, was arrested in the United States. He is a former Chicago gang member and has been held in the same brig as Hamdi. Reported in: *New York Times*, January 9.

The Supreme Court on January 12 turned down an appeal challenging the secrecy surrounding the arrest and detention of hundreds of people, nearly all Muslim men, in the weeks after the September 11, 2001, terrorist attacks.

excerpts from Supreme Court Ruling on McCain-Feingold law

The following are excerpts from the U.S. Supreme Court's ruling December 10 on the Bipartisan Campaign Reform Act, or BCRA, also known as the McCain-Feingold Act:

From the opinion by Justices John Paul Stevens and Sandra Day O'Connor, in upholding key parts of the campaign finance law:

Many years ago we observed that 'to say that Congress is without power to pass appropriate legislation to safeguard . . . an election from the improper use of money to influence the result is to deny to the nation in a vital particular the power of self protection.' We abide by that conviction in considering Congress' most recent effort to confine the ill effects of aggregated wealth on our political system. We are under no illusion that BCRA will be the last congressional statement on the matter. Money, like water, will always find an outlet. What problems will arise, and how Congress will respond, are concerns for another day. . . .

Just as troubling to a functioning democracy as classic quid pro quo corruption is the danger that officeholders will decide issues not on their merits or the desires of their constituencies, but according to the wishes of those who have made large financial contributions valued by the officeholder. Even if it occurs only occasionally, the potential for such undue influence is manifest. And unlike straight cash-for-votes transactions, such corruption is neither easily detected nor practical to criminalize. The best means of prevention is to identify and to remove the temptation.

From the dissent by Chief Justice William H. Rehnquist:

The court attempts to sidestep the unprecedented breadth of this regulation by stating that the 'close relationship between federal officeholders and the national parties' makes all donations to the national parties 'suspect.' But a close association with others, especially in the realm of political speech, is not a surrogate for corruption; it is one of our most treasured First Amendment rights. The court's willingness to impute corruption on the basis of a relationship greatly infringes associational rights and expands Congress' ability to regulate political speech. . .

No doubt Congress was convinced by the many abuses of the current system that something in this area must be done. Its response, however, was too blunt.

From the dissent by Justice Antonin Scalia:

This is a sad day for the freedom of speech. Who could have imagined that the same court which, within the past four years, has sternly disapproved of restriction upon such

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Without comment, the court let stand a ruling by a federal appeals court that had accepted the Bush administration's rationale for refusing to disclose either the identities of those it arrested, most of whom have since been deported for immigration violations unrelated to terrorism, or the circumstances of the arrests.

A complete list of the names "would give terrorist organizations a composite picture of the government investigation," a panel of the United States Court of Appeals for the District of Columbia Circuit said in a 2-1 ruling last June. "The judiciary owes some measure of deference to the executive in cases implicating national security," the majority said.

The dissenting judge, David S. Tatel, said the majority had "converted deference into acquiescence" by accepting a categorical secrecy policy without requiring the government to show why the names of those who had been cleared of terrorist connections could not be made public. Of the nearly thousand people arrested, the government eventually released the names of 129 against whom it brought criminal charges.

The Supreme Court's action brought an end to one of the biggest court cases related to the September 11 attacks. Even though the justices gave no reason for declining to take the appeal, the development was undoubtedly a welcome one for the administration after several recent judicial setbacks.

The case the court turned down had in fact been the occasion for one of those judicial setbacks when a federal district judge, Gladys Kessler, ruled in August 2002 in response to a Freedom of Information Act suit brought by a coalition of civil liberties groups that the government had to disclose most of the names. This was the ruling that the appeals court overturned nearly a year later.

The lawsuit filed in October 2001 by the 22-member coalition, which included the Center for National Security Studies, the American Civil Liberties Union, Amnesty International USA and the Council of American Islamic Relations, cited the Freedom of Information Act as well as the First Amendment. The group sought the names of the people and those of the lawyers representing them, the dates and circumstances of each arrest, any criminal charges filed and the basis for keeping the records of each case under seal.

In response to the lawsuit, the government invoked an exemption provided by the Freedom of Information Act for

"law enforcement records," arguing that the plaintiffs were seeking investigatory material that would not be made available even in routine cases. The plaintiffs argued that to the contrary, much of the information they wanted was routinely available on police blotters and was necessary for an informed public evaluation of the administration's policies.

In their Supreme Court appeal the plaintiffs said that "times of crisis and fear demand vigilance from citizens and their courts to assure that the countermeasures adopted by the executive are consistent with our fundamental values and constitutional principles." The brief said the court should grant review "to ensure that even after September 11, the judiciary will continue to fulfill its constitutional and statutory obligation to provide meaningful review of the exercise of executive power."

Kate Martin, director of the Center for National Security Studies, said the issues in the case remained important despite the release of most of those who had been arrested. Martin said the appeals court had given its blessing to "a secrecy regime in which arrests are off the public docket, people are held in secret, deported in secret, and two and a half years later, we still don't know the names."

The Supreme Court declined last year to hear a challenge to the closed-door deportation hearings that the government used for many of the same people. The administration at the time made a similar argument, that information about whom the government had selected for deportation could provide a "mosaic" that would reveal to watching terrorists what investigators knew and did not know.

Attorney General John Ashcroft said that he was "pleased that the court let stand a decision that clearly outlined the danger of giving terrorists a virtual road map to our investigation that could have allowed them to chart a potentially deadly detour around our efforts." Reported in: *New York Times*, January 13.

Urged by the Bush administration to curb the growing recourse to United States courts as forums for international human rights cases, the Supreme Court agreed December 1 to review the use of a once-obscure 18th-century law as the jurisdictional basis for such lawsuits.

The sudden popularity of the law, the Alien Tort Statute, enacted in 1789 as part of the first Judiciary Act to open the federal courts to foreign ambassadors and the new nation's trading partners, has been a source of growing concern to multinational corporations. A case brought by residents of Myanmar, charging the Unocal Corporation with human rights violations there, is before the federal appeals court in San Francisco.

The case the justices accepted is somewhat atypical because it concerns actions by the government rather than solely by parties that have no official connection to the United States. Nonetheless, the case squarely presents the basic questions common to the full range of suits under the Alien Tort Statute: whether the law provides a basis for a federal court damage suit for violations of the "law of nations," and how to decide what sorts of legal injuries meet that definition.

Without further defining its terms, the statute provides that the federal district courts "shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States."

The court will decide two related appeals growing out of the 1990 abduction of a Mexican doctor who was under indictment by a federal grand jury in the torture and murder of a federal narcotics agent in Guadalajara, Mexico. A Mexican police officer, acting at the behest of the Drug Enforcement Administration, helped kidnap the suspect, Humberto Alvarez-Machain, in his Guadalajara office and take him to California for trial. After the doctor was acquitted, he brought two lawsuits, one against the United States and federal agents for false arrest and one against his Mexican kidnapper, Jose Francisco Sosa, under the Alien Tort Statute for violating international law. In Federal District Court in Los Angeles, he won a $25,000 judgment against Sosa. The court dismissed the case against the United States, which was brought under a separate law, the Federal Tort Claims Act, a commonly used law that gives the federal courts jurisdiction to hear damage suits against the government.

The United States Court of Appeals for the Ninth Circuit, in San Francisco, upheld the award against Sosa and reinstated the case against the United States. Both defendants appealed separately to the Supreme Court, which will hear both cases in a single argument in April.

The government's appeal raises the specific question of whether an individual arrested in a foreign country can sue the government for false arrest despite the fact that the Federal Tort Claims Act explicitly excludes "any claim arising in a foreign country."

Of the two cases, the Sosa appeal on the meaning of the Alien Tort Statute will undoubtedly attract most of the interest. Solicitor General Theodore B. Olson filed a brief urging the court to grant the Sosa case along with the government's own case. The Ninth Circuit's broad interpretation of the Alien Tort Statute, the solicitor general told the court, was "untenable" and "fraught with foreign policy implications and the potential for interference with the exercise of constitutional responsibilities by the political branches."

The Sosa case also drew a strongly worded brief from a coalition of business interests, including the National Foreign Trade Council and the United States Chamber of Commerce. They said the growing use of the law "has become a serious impediment to U.S. companies investing abroad."

In addition to the Unocal case, which accuses the company of using forced labor and cooperating with the mili-

tary government's brutal policies while building the Yadana Gas Pipeline Project, alien tort statute cases have been filed against the Exxon Mobil Corporation on behalf of Indonesian villagers; against the Chevron Corporation on behalf of Nigerians; and against twenty-three corporations accused of aiding the apartheid government in South Africa.

In their brief opposing review of the Ninth Circuit's decision, lawyers for Dr. Alvarez-Machain assert that the government's concerns about the separation of powers are overblown.

"What is at stake in this case is the rule of law," they told the court: "Basic principles dating back to the Magna Carta, enshrined in our Constitution, and recognized in international human rights law, prohibit this kind of abuse of official authority, and there can be little doubt that the decision below was right in finding abuse on these facts."

For two centuries, the Alien Tort Statute received little attention, and much about its origins—and even its name—is obscure. It is sometimes called the Alien Tort Act or the Alien Tort Claim Act. A 1980 decision by the federal appeals court in New York allowed a Paraguayan family to sue a Paraguayan police official in Federal District Court in Brooklyn for a kidnapping and murder that occurred in Paraguay and gave the old law a new visibility. It was not until the mid-1990s that the law was used to sue corporations.

The administration's basic argument is that the law provides jurisdiction in a general sense but conveys no specific rights that can be enforced by a private lawsuit. The lawsuits on behalf of those being detained by the United States at Guantánamo Bay, Cuba, included allegations under the Alien Tort Statute, but that question is not before the Supreme Court in the detainees' appeals that the justices accepted three weeks ago. Reported in: *New York Times*, December 2.

An argument by religious conservatives in a church-state case they embraced as a vehicle for expanding their recent Supreme Court victories met resistance from a deeply divided court December 2. A majority of the justices expressed concern about the implications of requiring states to subsidize religious training if they choose to provide college scholarships for other kinds of study.

The court heard arguments on the validity of Washington State's Promise Scholarship Program, which makes awards on the basis of academic merit and financial need to students who attend accredited colleges in the state, including those with religious affiliations, but excludes students pursuing degrees in theology.

A federal appeals court, ruling in a lawsuit brought by a student who would have qualified for the scholarship had he not chosen a major in pastoral ministry, found the exclusion to be an unconstitutional burden on the free exercise of religion. Washington State's appeal of that ruling has produced a Supreme Court case of potentially landmark dimensions, raising the profound question of whether, and under what circumstances, the government can carve religion out of general programs of services and benefits.

The justices devoted much of the lively hourlong argument to probing for just what the consequences might be on issues like school voucher programs if they agreed with the appeals court. The two justices most often in the middle of the court's church-state debates, Sandra Day O'Connor and Anthony M. Kennedy, sought assurances that neither the student's lawyer, Jay A. Sekulow, nor Solicitor General Theodore B. Olson, arguing for the Bush administration as a "friend of the court" on the student's behalf, was willing to provide—that a decision to strike down the Washington program could stop there.

By the end, a clear majority of five or even six justices appeared unconvinced that a limiting principle would be available if they accepted the broad argument that the Constitution mandates equality in awarding government benefits to religious and nonreligious activities alike.

The limitation in Washington's scholarship program is required under the state Constitution's strict separation of church and state. Narda Pierce, the state's solicitor general, described the state Constitution as protecting "the freedom of conscience of all its citizens" by "not compelling its citizens to provide enforced public funds to support the promotion of religious beliefs with which they may or may not agree."

Washington is one of 37 states to forbid the public financing of religious instruction. Many such provisions mirror a failed federal constitutional amendment known as the Blaine Amendment, proposed in 1875 and widely regarded today as an expression of the anti-Catholic sentiment of the day. But despite briefs urging them to regard the state provisions as the illegitimate expressions of religious bias, the justices expressed little interest in the past and great concern about the future.

"The implications of this case are breathtaking," Justice Stephen G. Breyer observed at one point to Solicitor General Olson, who called the Washington program "the plainest form of religious discrimination."

Although the issue was not mentioned directly, the administration's religion-based initiative would benefit immeasurably from a decision to uphold the ruling by the United States Court of Appeals for the Ninth Circuit. Not only would it be permissible to channel federal money through religion-based service organizations, but some version of the administration's program might be seen as constitutionally mandatory.

"If your side wins," Justice Breyer told the solicitor general, "every program, not just educational programs, but nursing programs, hospital programs, social welfare programs, contracting programs throughout the governments" would all be subject to the argument "that they cannot be purely secular, that they must fund all religions who want to do the same thing."

Different religious groups "may get into fights with each other about billions and billions of dollars," Justice Breyer continued.

Describing the Washington program, Olson said that "the clear and unmistakable message is that religion and preparation for a career in the ministry is disfavored and discouraged." He added, "the person who wants to believe in God or wants to have a position of religious leadership is the one that's singled out for discriminatory treatment."

His argument met an unexpectedly skeptical response from Justice O'Connor, who said: "Well, but of course, there's been a couple of centuries of practice in this country of not funding religious instruction by tax money." She added, "I mean, that's as old as the country itself, isn't it?"

Olson replied: "Well, yes it is. But there is the other tradition that is as old as the country itself, the free exercise component of the religion clauses, which this court has said repeatedly mandates neutrality."

At times, Justice O'Connor appeared to doubt that the state's denial of a scholarship for religious study amounted to an unconstitutional burden in the first place. "How does this violate the student's right to free exercise of religion?" she asked Sekulow, the student's lawyer. "Maybe it's more expensive to go to school, but why does that violate his free exercise of religion?"

Throughout the argument, both Justice O'Connor and Justice Kennedy worried aloud that a decision striking down the Washington program would have the effect of compelling any state that offered tuition vouchers in a "school choice" program to include religious schools, regardless of whether the state wanted such an inclusive program.

"Can they refrain from making that program available for use in religious schools?" Justice O'Connor asked Sekulow.

"I would think not," replied Sekulow, chief counsel of the American Center for Law and Justice, a legal organization founded by the Rev. Pat Robertson.

"So what you are urging here would have a major impact then, would it not, on voucher programs," Justice O'Connor said.

A decision by the court in June 2002 upheld a tuition voucher program in Cleveland that provides for participation by parochial schools and that was challenged as an unconstitutional "establishment" of religion. That decision raised, but did not answer, the further question of whether religious schools *had* to be included in such programs, which have spread more slowly than their proponents had hoped, in part because of the existence of state prohibitions like Washington's.

Justice Ruth Bader Ginsburg asked Sekulow a question that she described as "really what the case turns on." Is there "any space," she asked, "between what a state is permitted to fund under the Establishment Clause and what it must fund under the Free Exercise Clause and, if so, what fills that space?"

For example, she continued, could a state decide to subsidize the training of doctors, lawyers, architects, and members of all other professions except the clergy?

Not unless the state could show a compelling interest for making such a distinction, Sekulow replied.

For his part, Justice Kennedy seemed to be looking for a way to avoid the broader issue by finding the Washington program to be invalid on grounds that would not carry the same broad implications. Why could the program not be invalidated on the ground that it placed a burden on a student's "religious conscience," he asked, by forcing students to choose secular majors if they wanted the scholarship money?

But Justice David H. Souter suggested that a ruling on that basis would not avoid implications for the voucher question. If tuition vouchers were available only for nonreligious schools, he said, the argument could be made "that the religious student must somehow surrender a conscientious belief" and enroll in a secular school to use the voucher.

Joshua Davey, the student whose lawsuit led to this case, continued his religious studies at Northwest College, which is affiliated with the Assemblies of God. He did not, however, become a minister. He is now a student at Harvard Law School. Reported in: *New York Times*, December 3.

On January 13, the high court set an argument date of March 24 for one of the term's most closely watched cases, on the constitutionality of the recitation of the Pledge of Allegiance in public school classrooms. The court also granted permission to Sandra L. Banning, the mother of the 9-year-old child at the center of the case, to file an *amicus curiae* brief supporting the pledge.

The girl's father, Michael A. Newdow, an atheist, brought the lawsuit arguing that the inclusion of the phrase "under God" in the pledge harmed his daughter and, derivatively, himself. A lawyer, he will argue his own case.

Newdow refused to allow Banning, whom he never married, to file her own brief, necessitating a request by her lawyer, Kenneth W. Starr, to the court for permission. In the brief, she argued that as a "committed Christian" and the custodial parent, she wanted her daughter to recite the pledge and objected to Newdow's pursuit through this case of "his own private agenda of imposing certain beliefs on the nation's schoolchildren." Reported in: *New York Times*, January 13.

Without comment, the court on January 13 rejected a First Amendment challenge to a 1991 federal law that prohibits the transmission of unsolicited commercial advertisements over fax machines, or "junk faxes."

The case grew out of a case brought by the Missouri attorney general's office charging two companies with violating the law, the Telephone Consumer Protection Act.

After the U.S. District Court in St. Louis declared the law unconstitutional, the federal government joined Missouri in defending it. On appeal, the United States Court of Appeals for the Eighth Circuit upheld the law as an acceptable regulation of commercial speech. Reported In: *New York Times*, January 13.

The Supreme Court said December 15 that it would hear arguments from the Bush administration about why it should not be required to turn over information about Vice President Dick Cheney's energy task force.

The administration is fighting a lawsuit brought by Judicial Watch, a conservative legal group based in Washington, and the Sierra Club, which are trying to find out if Cheney's task force was influenced by participants from the energy industry who were also political allies of the administration. The panel issued a report four months after President Bush took office that favored opening more public lands to oil and gas drilling and proposed a range of other steps supported by industry. The case has become a major legal test of how accountable the administration should be.

By agreeing to hear the case, the Supreme Court will review the decision of an appeals court, which said last July that there was no basis for the Bush administration to ask the appeals court to block a lower court's ruling that required the disclosure of information.

The trial judge, Emmet G. Sullivan, had ruled earlier that the Sierra Club and Judicial Watch might be entitled to a limited amount of information about the meetings Cheney and his aides had with the energy industry while formulating the White House's energy plan. The White House had asserted that Judge Sullivan's request would be an improper intrusion into the executive branch. Reported in: *New York Times*, December 15.

schools

Ann Arbor, Michigan

Three federal judges in Michigan have ruled that school districts violated the free speech rights of students. On December 12, U.S. District Court Judge Gerald E. Rosen said the Ann Arbor School District acted improperly in the case of a Roman Catholic student who wanted to express her views on homosexuality. The case is "about tolerance of different, perhaps, 'politically incorrect' viewpoints in the public schools," Rosen wrote.

At the 2,700-student Ann Arbor Pioneer High School, students held a Diversity Week in March 2002 that included discussions on race, religion and sexual orientation. One panel organized by the Gay/Straight Alliance included six religious leaders and was titled "Religion and Homosexuality." The panel was arranged with the belief the leaders supported the view that religion and homosexuality aren't inconsistent—and that all were "welcoming and affirming" of gay rights.

Betsy Hansen, a member of Pioneers for Christ, asked that an alternative viewpoint be added to the panel: that in her view, the Bible teaches that homosexuality is a sin. The district refused. A faculty adviser, Sunnie Korzdorfer, sent organizers an e-mail saying the school might face legal action if they kept another viewpoint off the panel.

"They have a legal right to say that homosexuality is not a valid lifestyle. That is the bottom line," she wrote. "I am treading on shallow ground here, as I do not want to get sued."

Hansen was then offered a chance to make a two-minute speech at an assembly. School officials read a draft of the speech and said she couldn't read a section that criticized Diversity Week. "I completely and whole-heartedly support racial diversity, but I can't accept religious and sexual ideas or actions that are wrong," she wrote, in the section that was deleted by school officials.

Hansen and her mother filed suit against the district in July 2002.

Rosen said the district's decision to "censor" Hansen's speech was discrimination and violated her First Amendment and Fourteenth Amendment equal protection rights. Ann Arbor Public Schools "discriminated against Betsy Hansen on the basis of both message and religion, denying her the right to deliver her own message while at the same time affording the (Gay/Straight Alliance) the right to deliver its own religious message," Rosen ruled.

But one teacher at the school, Parker Pennington, told the student newspaper that "allowing adults hostile to homosexuality on that panel would be like inviting white supremacists on a race panel." Because of Hansen's suit, the district canceled Diversity Week this year.

In October, U.S. District Court Judge Patrick Duggan declared the Dearborn Public Schools' decision to prohibit a student from wearing a T-shirt that called President Bush an "International Terrorist" was unconstitutional.

U.S. District Judge David Lawson also struck down a 1999 Michigan law that directs punishment for any student found to have committed a "verbal assault" against a fellow student or school staffer. A Mount Pleasant student was suspended for reading a critical commentary of his school's tardy policy in the cafeteria.

Although he upheld the suspension because the student personally attacked a teacher, he said students had the right to criticize district policies. Reported in: *Detroit News*, December 15.

war on terror

Los Angeles, California

For the first time, a federal judge has struck down part of the sweeping antiterrorism law known as the USA PATRIOT Act, joining other courts that have challenged integral parts of the Bush administration's campaign against terrorism. In Los Angeles, U.S. District Court Judge Audrey B. Collins said in a decision made public January 26 that a provision in the law banning certain types of support for terrorist groups was so vague that it risked running afoul of the First Amendment.

Civil liberties advocates hailed the decision as an important victory in efforts to rein in what they regard as legal abuses in the government's antiterrorism initiatives. The Justice Department defended the law as a crucial tool in the fight against terrorists and promised to review the Los Angeles ruling.

At issue was a provision in the act, passed by Congress after the attacks of September 11, 2001, that expanded previous antiterrorism law to prohibit anyone from providing "expert advice or assistance" to known terrorist groups. The measure was part of a broader set of prohibitions that the administration has relied heavily on in prosecuting people in Lackawanna, N.Y., Portland, Oregon, Detroit and elsewhere accused of providing money, training, Internet services and other "material support" to terrorist groups.

In Los Angeles, several humanitarian groups that work with Kurdish refugees in Turkey and Tamil residents of Sri Lanka had sued the government, arguing in a lawsuit that the antiterrorism act was so ill defined that they had stopped writing political material and helping organize peace conferences for fear they would be prosecuted.

Judge Collins agreed that the ban on providing advice and assistance to terrorists was "impermissibly vague" and blocked the Justice Department from enforcing it against the plaintiffs.

"The USA PATRIOT Act places no limitation on the type of expert advice and assistance which is prohibited, and instead bans the provision of all expert advice and assistance regardless of its nature," Judge Collins wrote. As a result, the law could be construed to include "unequivocally pure speech and advocacy protected by the First Amendment," wrote the judge, who was appointed to the bench by President Bill Clinton.

At the same time, however, Judge Collins sided with the government in rejecting some of the plaintiffs' arguments, and she declined to grant a nationwide injunction against the Justice Department.

Even so, lawyers for the humanitarian groups said they were heartened by the ruling. It came seven weeks after many of the same plaintiffs won a ruling in a separate but related case before a federal appeals court in San Francisco. That court, the United States Court of Appeals for the Ninth Circuit, found that a 1996 antiterrorism law prohibiting anyone from providing training or personnel for terrorist groups was too vague to pass constitutional muster. In recent months, other courts have also challenged the administration's designation of enemy combatants and other aspects of the campaign against terrorism, but the Los Angeles decision was the first by a federal judge to strike down any portion of the PATRIOT Act.

"The critical thing here is that this is the first demonstration that courts will not allow Congress in the name of fighting terrorism to ignore our constitutional rights," said Nancy Chang, a senior lawyer with the Center for Constitutional Rights, the New York-based organization that brought the lawsuit against the Justice Department on behalf of the humanitarian groups. "By using a broad and vague definition of terrorism, that has a chilling effect on free speech."

The Justice Department, which already sought a review of the related decision in San Francisco, also plans to review Judge Collins's ruling to decide whether it should be appealed, officials said. Administration officials have made clear that they consider the PATRIOT Act to be an integral part of their efforts to identify, track and disrupt terrorist activities.

Indeed, President Bush, in his State of the Union message, urged Congress to renew parts of the act that are scheduled to expire in 2005 (see page 37). But the administration may face a tough sell in Congress, with a growing number of lawmakers from both parties questioning whether the government's expanded powers in dozens of areas of law enforcement have infringed on civil liberties. In largely symbolic votes, more than 230 communities nationwide have raised formal objections to the law.

Mark Corallo, speaking for the Justice Department, said in a statement that the language banning expert advice or assistance to terrorists represented only "a modest enhancement" of previous law. "By targeting those who provide material support by providing expert advice or assistance," Corallo said, "the law made clear that Americans are threatened as much by the person who teaches a terrorist to build a bomb as by the one who pushes the button." Reported in: *New York Times*, January 27.

San Francisco, California

A federal appeals court panel ruled December 3 that crucial parts of an antiterrorism law were unconstitutional because the law, which the Bush administration relies on heavily, risks ensnaring innocent humanitarians. The ruling from the U.S. Court of Appeals for the Ninth Circuit, in San Francisco, threw into doubt reliance on parts of a 1996 law that make it a crime to provide material support to groups designated as terrorist.

Since the September 11, 2001, attacks, the ban has become a favorite weapon for the Justice Department in a

host of cases, including the prosecutions of John Walker Lindh, who fought with the Taliban against the United States in Afghanistan; Lynne F. Stewart, the defense lawyer accused of helping a client who was a terrorist in prison pass messages to terrorist associates; and terror suspects in Detroit, Lackawanna, N.Y., and Portland, Oregon.

But the famously liberal Ninth Circuit held that two important sections of the law were unconstitutional. Ruling in a case involving two groups that perform humanitarian and advocacy work on behalf of Kurds in Turkey and Tamils in Sri Lanka, a panel of the Ninth Circuit ruled that the law failed to require clearly that a suspect knowingly provided support to a terrorist organization. As a result, the law poses "a danger of sweeping in its ambit moral innocents," the judges said.

The ruling came from Judges Harry Pregerson, Sidney R. Thomas and Johnnie B. Rawlinson, with the latter dissenting on the question of whether the law violated due process rights.

Under the government's interpretation, the court found, a person who sends a check to an orphanage in Sri Lanka run by a banned group or "a woman who buys cookies from a bake sale outside of her grocery store to support displaced Kurdish refugees" could face a lengthy prison sentence for supporting terrorists.

In addition, the court affirmed a preliminary ruling issued before September 11 finding that the ban on providing "training" or "personnel" for terrorist groups was unconstitutionally vague and could deter protected free speech. The court said efforts by the Justice Department to narrow the definition of those terms had fallen short, and it blocked the government from enforcing the provisions.

The Justice Department declined to comment. "We are studying the ruling," a spokesman, Bryan Sierra, said, "and there's nothing more we can say at this time."

David Cole, a lawyer with the Center for Constitutional Rights who represented the humanitarian groups in the case, predicted that the Justice Department, because it has so much invested in the law on material support, would almost certainly appeal the decision to the Supreme Court if the Ninth Circuit refuses to reconsider it. Cole said the decision sent an important message to groups worried about the law.

"The government's reading of this statute," he said, "is extremely broad, and it has had an extreme chilling effect on anyone who is interested in providing humanitarian aid where there might be a designated terrorist organization involved." Reported in: *New York Times*, December 3.

San Francisco, California; New York, New York

Bush administration tactics in the campaign against terrorism suffered a pair of setbacks December 18 in two federal appeals courts thousands of miles apart. An appellate court in San Francisco ruled that prisoners held at the Guantánamo Bay naval base in Cuba should have access to lawyers and the American court system. Hours earlier, an appellate court in Manhattan ruled that President Bush does not have the power to detain as an enemy combatant a United States citizen who was seized on American soil and to deny him a lawyer.

Both decisions, by three-judge panels from the Court of Appeals for the Ninth Circuit, in San Francisco, and from the Court of Appeals for the Second Circuit, in Manhattan, were by 2-to-1 margins.

The Justice Department said it would seek a stay of the Manhattan ruling as government lawyers consider whether to appeal to the full Second Circuit or try to go directly to the Supreme Court. The White House spokesman, Scott McClellan, called the ruling "troubling and flawed" and "really inconsistent with the clear constitutional authority of the president and his responsibility."

There was no immediate administration reaction to the San Francisco ruling, but an appeal to the full Ninth Circuit or to the Supreme Court is very likely.

Taken together, the decisions amounted to a day of stinging judicial defeats for the administration, which also had experienced several recent embarrassing episodes in its approach to fighting terrorism. The decisions constituted the latest chapters in a constitutional drama that has been playing out since the terror attacks of September 11, 2001.

The Second Circuit panel rejected the administration's treatment of Jose Padilla, who is accused of plotting to set off a radioactive "dirty bomb." The Ninth Circuit rejected the administration's arguments that because the 660 men being held at Guantánamo were picked up overseas on suspicion of terrorism and being held on foreign soil, they might be held indefinitely, without charges or trial.

"We share the desire of all Americans to ensure that the executive enjoys the necessary power and flexibility to prevent future terrorist attacks," Judge Stephen Reinhardt wrote for the Ninth Circuit majority, ruling on a suit brought by a California relative of a Libyan being held in Cuba. "However," Judge Reinhardt continued, "even in times of national emergency—indeed, particularly in such times—it is the obligation of the judicial branch to ensure the preservation of our constitutional values and to prevent the executive branch from running roughshod over the rights of citizens and aliens alike." He was joined in his ruling by Judge Milton I. Shadur.

At one point, the majority decision amounted to a rebuke. "In our view," the decision said, "the government's position is inconsistent with fundamental tenets of American jurisprudence and raises most serious questions under international law."

But the dissenting Ninth Circuit judge, Susan P. Graber, argued that a 1950 Supreme Court decision makes it clear that an enemy alien detained overseas by the American military does not have standing in American civilian courts.

In the Second Circuit case, the issue was somewhat

different, since it deals with an American citizen held on American soil.

Padilla, a convert to Islam, was arrested in 2002 at O'Hare International Airport near Chicago on his return from Pakistan after extensive travel in the Middle East. Attorney General John Ashcroft drew worldwide attention soon after when he said the government believed that Padilla, who has a long criminal record as a gang member in Chicago, had been planning to explode a bomb that would use conventional explosives to disperse radioactive particles over a wide area.

Subsequently designated an "enemy combatant" by the government, Padilla was briefly held in Manhattan before being sent to a Navy brig in Charleston, South Carolina, where he has been denied access to a lawyer and held incommunicado ever since—treatment that the Second Circuit panel said was wrong despite the fact that the government had ample reason to charge Padilla.

"As this court sits only a short distance from where the World Trade Center once stood, we are as keenly aware as anyone of the threat Al Qaeda poses to our country and of the responsibilities the president and law enforcement officials bear for protecting the nation," Judges Barrington D. Parker, Jr., and Rosemary S. Pooler declared. "But presidential authority does not exist in a vacuum, and this case involves not whether those responsibilities should be aggressively pursued, but whether the president is obligated, in the circumstances presented here, to share them with Congress."

Alluding to the constitutional import of the Padilla case, the majority wrote: "Where, as here, the president's power as commander in chief of the armed forces and the domestic rule of law intersect, we conclude that clear Congressional authorization is required for detentions of American citizens on American soil."

The ruling did not mean that Padilla will go free, even if it is sustained on appeal. The two judges said, rather, that Defense Secretary Donald H. Rumsfeld should release Padilla from military custody within thirty days, after which he could be prosecuted in civilian courts or held as a material witness.

"Under any scenario, Padilla will be entitled to the constitutional protections extended to other citizens," the appellate court majority wrote, a clear reference to access to counsel.

In dissent, Judge Richard C. Wesley wrote, "In my view, the president as commander in chief has the inherent authority to thwart acts of belligerency at home or abroad that would do harm to United States citizens." At another point, Judge Wesley said the majority had failed to cite constitutional precedent for the notion that Congress is given "exclusive constitutional authority to determine how our military forces will deal with the acts of a belligerent on American soil. There is no well-traveled road delineating the respective constitutional powers and limitations in this regard," Judge Wesley wrote.

The administration has encountered several embarrassing episodes related to the campaign against terrorism. A federal judge in Virginia ruled that the government could not seek the death penalty against Zacarias Moussaoui, the only person charged in connection with the September 11 attacks. That ruling is being appealed.

The administration has also been criticized at home and abroad for its handling of detainees at the Guantánamo naval base in Cuba. And most recently, the government's case against Capt. James J. Yee, a former Muslim chaplain at Guantánamo, has seemed unsteady, as prosecutors have had trouble sustaining charges that he may have been guilty of security violations.

Padilla is the only American who has been taken into custody on American soil and declared an "enemy combatant." While the Second Circuit majority said it had no conclusion on his guilt or innocence, it pointedly noted that "the government had ample cause to suspect Padilla of involvement in a terrorist plot."

The dissenter, Judge Wesley, contended that the Congressional resolution passed shortly after September 11, 2001, gave President Bush all the authority he needed to hold Padilla as an enemy combatant, his American citizenship notwithstanding. The judge rejected any suggestion that the resolution was a broadside attack on basic constitutional rights.

"The president is not free to detain U.S. citizens who are merely sympathetic to Al Qaeda," Judge Wesley said. "Nor is he broadly empowered to detain citizens based on their ethnic heritage. Rather, the joint resolution is a specific and direct mandate from Congress to stop Al Qaeda from killing or harming Americans here or abroad."

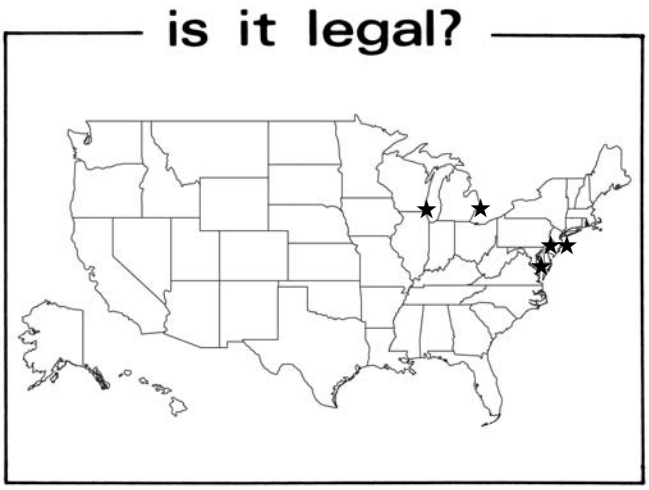
The words of the majorities and dissenters in the two cases made it abundantly clear that the issues do not concern just the separate, sometimes conflicting powers of the president and Congress, but something perhaps even more fundamental—the delicate balance between personal freedoms and the security of the nation, especially in wartime. Reported in: *New York Times*, December 18.

Internet

Washington, D.C.

A federal appeals court December 18 ruled that Internet account providers do not have to give record companies the names of computer users who share songs online, dealing a sharp blow to the industry's efforts to crack down on illegal copying of digital music. The ruling threw out two lower-court decisions that gave the Recording Industry

(continued on page 80)



library

Chicago, Illinois

The Cook Memorial Public Library board's ethics policy is being blasted by two library trustees who say the document stifles free speech. Board allies Jack L. Martin and Tom Forester, who regularly clash with other members, voted in late January against renewing the guidelines. They said the policy can be used to improperly control board members' actions and opinions or to punish trustees who speak out against board decisions.

"It's a tyranny of the majority," Forester said. "A library is supposed to stand for free speech. This denigrates it."

Martin called the policy a gag order. "I've got a constitutional right to say whatever I want," said Martin, the board's vice president. "I don't need to be told what to think. I can think for myself."

Board President Ed Abderholden and four other members voted for the policy, enough to pass it. He denied that the rules suppress board members' rights.

"Nowhere in this resolution does it limit trustees' right to free speech," Abderholden said. "It is the hope of the ethics statement that all trustees will act with civility to fellow trustees and respect the board's decisions."

The three-page policy, which was enacted in 1998 and is scheduled to be renewed every two years, is formally called "A Resolution Governing the Responsibilities of Trustees of the Cook Memorial Public Library." It establishes rules for trustee behavior at meetings and generally in public.

Among the rules in Cook Memorial's policy are standards instructing board members to: represent all citizens honestly and equally; avoid conflicts of interest; attend board and committee meetings; and represent the library in a positive and supportive manner at all times. "I think the ethics statement lays out an expected code of conduct, not just for library trustees, but for any public official," said Cook Memorial board member Linda Lucke. "It tells us how to conduct ourselves in a professional manner."

Martin, however, thinks some of the guidelines go too far. He especially objects to a point that says trustees should support the library's collection development policy, which governs what materials the library stocks, and guarantees patrons access to those items. Martin maintains that Cook Memorial's collection policy should be stricter, and said his "no" vote on the ethics policy reflected that concern. He also objected to the community development policy being singled out in the ethics rules as a policy to be upheld.

"Why do we singularly take that policy?" Martin said. "I think the board has an obligation to support all of the library's policies, period."

Forester's opposition focuses on a line that requires board members to abide by majority decisions even if they disagree with the rulings. Occasionally in the minority on board votes, Forester believes trustees should be allowed to espouse their opinions regardless of whether they are popular.

"You shouldn't blindly follow the majority," Forester said. "You should stand for what you believe."

Although the ethics policy does not include options for punitive action for rules violations, Forester fears board members could use the document as a political weapon to punish other trustees. He cited the board's 2003 public censure of Martin, which included accusations of misconduct, as an example of how the policy can be used for such purposes.

"Everybody is for ethics. That's a no-brainer," Forester said. "(But) I don't think this adds to ethics at all." Reported in: *Daily Herald*, January 26.

schools

Oceanport, New Jersey

In a case that challenges the right to freedom of speech, a 15-year-old boy is suing the Oceanport School District. Ryan Dwyer said officials at Maple Place Middle School disciplined him because of material on his personal Web site. Although Dwyer shut down the site, the teen said he was suspended for a week, removed from the school baseball team and barred from going on a class trip.

Dwyer is no longer a student at Maple Place but on December 18 his family filed a lawsuit against the board of education seeking an apology and unspecified monetary damages. According to the lawsuit, Dwyer created the site at home and never used school facilities to edit or access it. Lawyers representing Dwyer say the district never identified what rule or law the teen broke.

The Web site was launched in April. It greeted users with, "Welcome to the Anti-Maple Place—Your Friendly Environment," and said: "This page is dedicated to showing students why their school isn't what it's cracked up to be. You may be shocked at what you find on this site." Dwyer said students were allowed to post opinions, but profanity was prohibited and no threats were allowed to be made. Reported in: News12 New Jersey, December 18.

church and state

Grand Canyon, Arizona

How old is the Grand Canyon? Most scientists agree with the version that rangers at Grand Canyon National Park tell visitors—that the 10-mile wide chasm in northern Arizona was carved by the Colorado River 5 million to 6 million years ago. Now, however, a book in the park's bookstores tells another story. On sale since last summer, *Grand Canyon: A Different View*, by veteran Colorado River guide Tom Vail, asserts that the Grand Canyon was formed by the Old Testament flood, the one Noah's Ark survived, and can be no older than a few thousand years.

The book includes essays from creationists and theologians. In the introduction, Vail wrote, "For years, as a Colorado River guide I told people how the Grand Canyon was formed over the evolutionary time scale of millions of years. Then I met the Lord. Now, I have a different view of the Canyon, which according to a biblical time scale, can't possibly be more than a few thousand years old."

Reaction to the book has been sharply divided. The American Geological Institute and seven geo-science organizations sent letters to the park and to agency officials calling for the book to be removed. In part to appease some outraged Grand Canyon employees, the book was moved from the natural sciences section to the inspirational reading section of park bookstores.

"I've had reactions from the staff all over the board on it," said park Deputy Supt. Kate Cannon. "There were certainly people on the interpretive staff that were upset by it. Respect of visitors' views is imperative, but we do urge our interpreters to give scientifically correct information."

Park Service spokesman David Barna, who is based in Washington, said each park determined which products were sold in its bookstores and gift shops. The creationist book at the Grand Canyon was unanimously approved by a new-product review panel of park and gift shop personnel.

But the book's status at the park is still in question. Grand Canyon's superintendent, Joe Alston, has sought guidance from Park Service headquarters in Washington. Meanwhile, the book has sold out and is being reordered.

The flap at the Grand Canyon highlights what officials say is a dilemma for the national park system: how to respect visitors' spiritual views that may contradict the agency's accepted scientific presentations and maintain the division of church and state.

"We struggle. Creationism versus science is a big issue at some places," said Deanne Adams, the Park Service's chief of interpretation for the Pacific Region. Adams said the questions came up most often at Western parks where geology was often highlighted. She singled out John Day Fossil Beds Monument in Oregon as a place where scientifically determined dates have been challenged.

"We like to acknowledge that there are different viewpoints, but we have to stick with the science. That's our training," Adams said. She said there was no federal guideline for how to answer religious inquiries. "Every fundamentalist or Christian group has a take on how they interpret the Bible. They are entitled to believe whatever they believe. It's not our job to change their minds."

Last summer, the Park Service ordered the reinstatement of three plaques bearing Bible verses that had been erected at Grand Canyon National Park in 1970 by a group called the Evangelical Sisterhood of Mary. Alston called for their removal last summer after a complaint by the American Civil Liberties Union.

Park Service Deputy Director Donald Murphy, who once ran the California State Parks Department, ordered the brass plaques returned and sent the group a letter apologizing for "any intrusion." The plaques are affixed to buildings at Hermits Rest, Lookout Studio and Desert View Tower, all popular tourist stops along the South Rim. They quote verses from the Book of Psalms, including "Sing to God, sing praises to His name, lift up a song to Him who rides upon the clouds. His name is the Lord, exult before Him!"

Barna said Murphy overruled the Grand Canyon superintendent because he and the agency's regional attorney were not sufficiently versed in constitutional law. "We contend that our superintendent knows a lot about wilderness protection but not enough about separation of church and state," Barna said.

To halt the removal of a cross placed in the Mojave National Preserve almost 70 years ago to commemorate World War I veterans, a Republican lawmaker from California proposed swapping the land it sits on with a private group. At the Lincoln Memorial, an eight-minute film that shows historical events at the memorial, including demonstrations for civil rights, abortion rights and gay rights, is being revised by the Park Service to add four minutes of more politically neutral events.

While the Park Service says these are unrelated incidents, reflecting no overarching political policy, a national alliance of public environmental workers says the efforts are evidence of a new program of "faith-based parks" promoted by the Bush administration with the strong support of conservative groups.

The apparent trend, the alliance says, has resulted in a willingness by Republican appointees now in senior positions in the Park Service to resolve disputes by protecting religious or conservative content, even in the face of arguments that the establishment clause of the First Amendment, which safeguards the separation of church and state, is being violated.

"The Bush administration appears to be sponsoring a program of faith-based parks," said Jeff Ruch, executive director of the nonprofit alliance, Public Employees for Environmental Responsibility. "Any time a question arises, the professionals and lawyers are reversed and being told to respect the displays of religious symbols. We believe the actions by these officials violate their oath of office to defend the Constitution."

"What this shows," said Ruch, "is that Christian fundamentalists and morally conservative groups have a special entree with the decision makers at the Park Service and the White House."

Barna denied that decisions made in these recent cases reflected political motives, insisting that political appointees have sought advice from career employees in resolving problems. "These are a few unrelated issues that have been put together just to criticize this administration," said Barna, who has worked for the Park Service for eight years.

Even so, in all but the case involving the cross, a senior political appointee at the Park Service has influenced the resolution of the dispute, fueling at least the impression that political considerations could have played a part in the decision.

The film at the Lincoln Memorial has been shown for nearly a decade. But because so many of the events held there have been large protests sponsored by liberal groups, they tend to dominate the presentation. Last year, Barna said, several conservative groups complained that the film reflected "a leftist political agenda," leading to a decision by Fran P. Mainella, the Park Service's director, to order the film lengthened to include events like the gulf war victory parade in 1991 and tape of every president since the memorial opened in 1922.

A dispute over the Mojave Desert cross arose when a former Park Service employee, Frank Buono, objected to the presence of a religious symbol on federal land. After Buono and the ACLU tried repeatedly to have it taken down, Congress passed a measure in December 2000, sponsored by Representative Jerry Lewis, a 13-term Republican from California, that prohibited spending money on its removal. A year later, the cross was designated a National Memorial, giving it federal protection.

Buono then sued the Park Service and won, with a federal judge in Riverside, California, ordering the government to remove the cross. Rather than comply, the Park Service appealed.

With the case now before the U.S. Court of Appeals for the Ninth Circuit, Rep. Lewis succeeded in getting a provision into the 2004 defense appropriations bill that could resolve the dispute by trading the acre around the cross for land owned by a private veterans group in Barstow, California.

The government now claims that the land transfer, which could take several years, makes the litigation moot. Not so, say Buono's lawyers, who argue that the designation of the cross as a memorial keeps it in federal hands—and should keep the court case alive.

Religion and geology are intertwined in many parks and monuments dotted with shrines and various sites sacred to Native Americans, who are often afforded special access to worship. Nor are spiritual references absent. Indeed, viewed from the Grand Canyon's popular Bright Angel Trail are rock formations named by 19th century explorers after Hindu deities such as Vishnu.

Some scholars say they have no objection to books that offer religious interpretations of the parks, provided they are not marketed as science. Historian Stephen J. Pyne, whose book *How the Canyon Became Grand* is also on sale in the park's bookstores, said he did not mind if Vail's book was sold at the park, as long as it was not displayed in the science section. "I have not read the book, but I'm familiar with the genre," Pyne said. "I think the Park Service would be remiss if it did not explain that there is not an agreed-upon story about the canyon, that there are conflicting stories. But science assumes it was not formed by a great flood or divine intervention. What this creationists group is looking for is some sort of validation by the Park Service. There's an agenda there."

Not so, says an official of the organization that published Vail's book, the Institute for Creation Research. Steven Austin, who heads ICR's geology department, said he worked with Vail on the book. Like Vail, Austin believes the oldest parts of the gorge are no older than 10,000 years.

"We have a secular presentation at the Grand Canyon, and we don't want to suppress other ways of thinking," Austin said. "But there needs to be room for more than one interpretation. It is appropriate to discuss theology, to express a creationist view. As long as all sides are presented, I don't see any problem with it."

George Billingsley, a geologist with the U.S. Geological Survey, has been studying the Grand Canyon for 36 years. He said scientists had never agreed about the exact age of the canyon, although most concurred that the oldest formations were nearly 2 billion years old. A scientific sympo-

sium held in 2000 to resolve the question of how the canyon was formed dissolved into acrimony and adjourned without consensus, he said.

As for the creationist theory, Billingsley said: "If someone presented that theory to me, I'd say, you've got to have proof. You have to have some kind of mechanism to show what you say happened. I don't know how to argue with someone like that. But as far as putting the book in the bookstore, that's fine. That's the freedoms we have. Everyone has to make up their own mind. You could put a book in there that says alien beings created the canyon. The more ideas you have out, the better." Reported in: *Los Angeles Times*, January 7; *New York Times*, January 18.

access to information

Washington, D.C.

A coalition of news and legal organizations is seeking public access to information about a post–September 11 detention case now before the Supreme Court that has been handled with unusual secrecy both there and in the lower federal courts. The case, which the justices have not yet agreed to review, is an appeal filed by the Federal Public Defender's office in Miami on behalf of Mohamed Kamel Bellahouel, an Algerian-born resident of South Florida and one of more than 1,000 Arab men swept up and imprisoned following the terrorist attacks of 2001.

Because all the lower-court records, including the actual decisions, are sealed, there is little public information about the case, *M.K.B.* v. *Warden*. It was filed at the Supreme Court in June using only Bellahouel's initials.

A brief filed at the court January 5 by the Reporters Committee for Freedom of the Press on behalf of 23 media organizations and other groups, including the American Immigration Lawyers Association, requests the court's permission to intervene in the case. If granted, the unusual request would give the organizations—which include *The New York Times*, *The Washington Post* and CNN—the status of parties, with a direct stake in the outcome, rather than simply "friends of the court." Their brief tells the court that they would then argue that all information about the case should be made public except for material that is classified or "truly required for national security purposes'.'

Much of the information available comes from a series of articles in *The Miami Daily Business Review*, which learned about the case in March when it was pending before the United States Court of Appeals for the Eleventh Circuit, in Atlanta. The clerk's office of the appeals court inadvertently and briefly listed the case on a public docket. Previously, not even the existence of the case had been made public.

The publicly available version of the Supreme Court petition omits many details, including even the identities of the lower courts, and includes blank pages. The justices received complete versions.

After Solicitor General Theodore B. Olson told the court that the government would have no response to the petition, the court directed the government to respond.

Bellahouel worked as a waiter in a restaurant in Delray Beach, Florida, that the Federal Bureau of Investigation says was patronized by at least two September 11 hijackers, Mohamed Atta and Marwan al-Shehhi. During his five-month imprisonment at the Krome Detention Center in Miami, Bellahouel was taken to Alexandria, Virginia, to testify before the grand jury that was investigating Zacarias Moussaoui.

The government has not charged Bellahouel with any terrorism-related crimes and apparently does not regard him as a threat. He has been free on a $10,000 immigration bond since March 2002 and faces possible deportation for having overstayed the student visa on which he entered the country to attend Florida Atlantic University in 1996. His wife is a United States citizen.

While in custody, Bellahouel sought release through a petition for a writ of habeas corpus filed in U.S. District Court in Miami. Judge Paul C. Huck closed all proceedings in the case, which was never listed on the court's public docket. The Eleventh Circuit then maintained the secrecy, holding an argument behind closed doors last March 5 and issuing its decision under seal on March 31.

For that reason, the substance of the case remains publicly unknown. The question that Kathleen M. Williams and Paul M. Rashkind of the Federal Public Defender's office in Miami have brought to the Supreme Court, at least in the public part of their filing, is whether the lower courts "failed to comply with the court's common-law and First Amendment jurisprudence governing public access to court filings and proceedings" by cloaking the entire case in secrecy without justifying the need to do so.

"Although the right to access is not absolute, the right of the public to litigate its entitlement to access must be absolute if the public is to have means to effect its right of access," the petition asserts.

The Reporters Committee's request to intervene asserts that the media organizations' "strong First Amendment interests may not be adequately represented" by Bellahouel because, given his immigration situation, he may be motivated to settle the case rather than press the public-access argument. Reported in: *New York Times*, January 5.

freedom to demonstrate

Washington, D.C.

When President Bush travels around the United States, the Secret Service visits the location ahead of time and orders local police to set up "free speech zones" or "protest

zones," where people opposed to Bush policies (and sometimes sign-carrying supporters) are quarantined. These zones routinely succeed in keeping protesters out of presidential sight and outside the view of media covering the event.

When Bush went to the Pittsburgh area on Labor Day 2002, 65-year-old retired steel worker Bill Neel was there to greet him with a sign proclaiming, "The Bush family must surely love the poor, they made so many of us." The local police, at the Secret Service's behest, set up a "designated free-speech zone" on a baseball field surrounded by a chain-link fence a third of a mile from the location of Bush's speech. The police cleared the path of the motorcade of all critical signs, but folks with pro-Bush signs were permitted to line the president's path.

Neel refused to go to the designated area and was arrested for disorderly conduct; the police also confiscated his sign. Neel later commented, "As far as I'm concerned, the whole country is a free-speech zone. If the Bush administration has its way, anyone who criticizes them will be out of sight and out of mind."

At Neel's trial, police Detective John Ianachione testified that the

Secret Service told local police to confine "people that were there making a statement pretty much against the president and his views" in a so-called free-speech area.

Paul Wolf, one of the top officials in the Allegheny County Police

Department, said that the Secret Service "come in and do a site survey, and say, 'Here's a place where the people can be, and we'd like to have any protesters put in a place that is able to be secured.' "

Pennsylvania District Judge Shirley Rowe Trkula threw out the disorderly conduct charge against Neel, declaring, "I believe this is America. Whatever happened to 'I don't agree with you, but I'll defend to the death your right to say it'?"

Similar suppressions have occurred during Bush visits to Florida. A recent *St. Petersburg Times* editorial noted, "At a Bush rally at Legends Field in 2001, three demonstrators—two of whom were grandmothers—were arrested for holding up small handwritten protest signs outside the designated zone. And last year, seven protesters were arrested when Bush came to a rally at the USF Sun Dome. They had refused to be cordoned off into a protest zone hundreds of yards from the entrance to the Dome."

One of the arrested protesters was a 62-year-old man holding up a sign, "War is good business. Invest your sons." The seven were charged with trespassing, "obstructing without violence and disorderly conduct."

Police have repressed protesters during several Bush visits to the St. Louis area as well. When Bush visited on January 22, 150 people carrying signs were shunted far away from the main action and effectively quarantined. Denise Lieberman of the American Civil Liberties Union of Eastern Missouri commented, "No one could see them from the street. In addition, the media were not allowed to talk to them. The police would not allow any media inside the protest area and wouldn't allow any of the protesters out of the protest zone to talk to the media."

When Bush stopped by a Boeing plant to talk to workers, Christine Mains and her 5-year-old daughter disobeyed orders to move to a small protest area far from the action. Police arrested Mains and took her and her crying daughter away in separate squad cars.

The Justice Department also prosecuted Brett Bursey, who was arrested for holding a "No War for Oil" sign at a Bush visit to Columbia, South Carolina. Local police, acting under Secret Service orders, established a "free-speech zone" half a mile from where Bush would speak. Bursey was standing amid hundreds of people carrying signs praising the president. Police told Bursey to remove himself to the "free-speech zone." Bursey refused and was arrested. Bursey said that he asked the police officer if "it was the content of my sign, and he said, 'Yes, sir, it's the content of your sign that's the problem.' " Bursey stated that he had already moved 200 yards from where Bush was supposed to speak. He later complained, "The problem was, the restricted area kept moving. It was wherever I happened to be standing."

Bursey was charged with trespassing. Five months later, the charge was dropped because South Carolina law prohibits arresting people for trespassing on public property. But the Justice Department—in the person of U.S. Attorney Strom Thurmond, Jr.—quickly jumped in, charging Bursey with violating a rarely enforced federal law regarding "entering a restricted area around the president of the United States."

Bursey was convicted (see page 81) and faces a six-month jail sentence and a $5,000 fine. Federal Magistrate Bristow Marchant denied Bursey's request for a jury trial because his violation is categorized as a petty offense. Some observers believe that the feds are seeking to set a precedent in a conservative state such as South Carolina that could then be used against protesters nationwide.

Bursey's trial took place on Nov. 12 and 13. His lawyers sought the Secret Service documents they believed would lay out the official policies on restricting critical speech at presidential visits. The Bush administration sought to block all access to the documents, but Marchant ruled that the lawyers could have limited access. Bursey sought to subpoena Attorney General John Ashcroft and presidential adviser Karl Rove to testify. Bursey lawyer Lewis Pitts declared, "We intend to find out from Mr. Ashcroft why and how the decision to prosecute Mr. Bursey was reached." The magistrate refused, however, to enforce the subpoenas. Secret Service agent Holly Abel testified at the trial that Bursey was told to move to the "free-speech zone" but refused to cooperate.

The feds have offered some bizarre rationales for hog-tying protesters. Secret Service agent Brian Marr explained to National Public Radio, "These individuals may be so involved with trying to shout their support or nonsupport that inadvertently they may walk out into the motorcade route and be injured. And that is really the reason why we set these places up, so we can make sure that they have the right of free speech, but, two, we want to be sure that they are able to go home at the end of the evening and not be injured in any way." Except for having their constitutional rights shredded.

The ACLU, along with several other organizations, is suing the Secret Service for what it charges is a pattern and practice of suppressing protesters at Bush events in Arizona, California, Connecticut, Michigan, New Jersey, New Mexico, Texas and elsewhere. The ACLU's Witold Walczak said of the protesters, "The individuals we are talking about didn't pose a security threat; they posed a political threat."

The Secret Service is duty-bound to protect the president. But opponents of the policy argue that it is ludicrous to presume that would-be terrorists are lunkheaded enough to carry anti-Bush signs when carrying pro-Bush signs would give them much closer access. And even a policy of removing all people carrying signs—as has happened in some demonstrations—is pointless because potential attackers would simply avoid carrying signs. Assuming that terrorists are as unimaginative and predictable as the average federal bureaucrat is not a recipe for presidential longevity.

The Bush administration's anti-protester bias proved embarrassing for two American allies with long traditions of raucous free speech, resulting in some of the most repressive restrictions in memory in free countries. When Bush visited Australia in October, *Sydney Morning Herald* columnist Mark Riley observed, "The basic right of freedom of speech will adopt a new interpretation during the Canberra visits this week by George Bush and his Chinese counterpart, Hu Jintao. Protesters will be free to speak as much as they like just as long as they can't be heard." Demonstrators were shunted to an area away from the Federal Parliament building and prohibited from using any public address system in the area.

For Bush's recent visit to London, the White House demanded that British police ban all protest marches, close down the center of the city and impose a "virtual three-day shutdown of central London in a bid to foil disruption of the visit by anti-war protesters," according to Britain's *Evening Standard*. But instead of a "free-speech zone," the Bush administration demanded an "exclusion zone" to protect Bush from protesters' messages.

Such unprecedented restrictions did not inhibit Bush from portraying himself as a champion of freedom during his visit. In a speech at Whitehall November 19, Bush hyped the "forward strategy of freedom" and declared, "We seek the advance of freedom and the peace that freedom brings."

Attempts to suppress protesters become more disturbing in light of the Homeland Security Department's recommendation that local police departments view critics of the war on terrorism as potential terrorists.

In a May terrorist advisory, the Homeland Security Department warned local law enforcement agencies to keep an eye on anyone who "expressed dislike of attitudes and decisions of the U.S. government." If police vigorously followed this advice, millions of Americans could be added to the official lists of suspected terrorists.

Protesters have claimed that police have assaulted them during demonstrations in New York, Washington and elsewhere. One of the most violent government responses to an antiwar protest occurred when local police and the federally funded California Anti-Terrorism Task Force fired rubber bullets and tear gas at peaceful protesters and innocent bystanders at the Port of Oakland, injuring a number of people.

When the police attack sparked a geyser of media criticism, Mike van Winkle, speaking for the California Anti-Terrorism Information Center, told the *Oakland Tribune*, "You can make an easy kind of a link that, if you have a protest group protesting a war where the cause that's being fought against is international terrorism, you might have terrorism at that protest. You can almost argue that a protest against that is a terrorist act."

Van Winkle justified classifying protesters as terrorists: "I've heard terrorism described as anything that is violent or has an economic impact, and shutting down a port certainly would have some economic impact. Terrorism isn't just bombs going off and killing people."

Such aggressive tactics become more ominous in light of the Bush administration's advocacy, in its Patriot II draft legislation, of nullifying all judicial consent decrees restricting state and local police from spying on those groups who may oppose government policies.

On May 30, 2002, Attorney General John Ashcroft effectively abolished restrictions on FBI surveillance of Americans' everyday lives first imposed in 1976. One FBI internal newsletter encouraged FBI agents to conduct more interviews with antiwar activists "for plenty of reasons, chief of which it will enhance the paranoia endemic in such circles and will further service to get the point across that there is an FBI agent behind every mailbox."

The FBI took a shotgun approach toward protesters partly because of the FBI's "belief that dissident speech and association should be prevented because they were incipient steps toward the possible ultimate commission of an act which might be criminal," according to a Senate report.

On November 23, news broke that the FBI was actively conducting surveillance of antiwar demonstrators, supposedly

to "blunt potential violence by extremist elements," according to a Reuters interview with a federal law enforcement official. Given the FBI's expansive definition of "potential violence" in the past, this is a net that could catch almost any group or individual who falls into official disfavor. Reported in: *American Conservative*, December 15; *San Francisco Chronicle*, January 4.

privacy and surveillance

Washington, D.C.

President George W. Bush has quietly signed into law a measure that gives the FBI increased surveillance powers and dramatically expands the reach of the USA PATRIOT Act. The Intelligence Authorization Act for Fiscal Year 2004 grants the FBI unprecedented power to obtain records from financial institutions without requiring permission from a judge. Under the law, the FBI does not need to seek a court order to access such records, nor does it need to prove just cause.

Previously, under the PATRIOT Act, the FBI had to submit subpoena requests to a federal judge. Intelligence agencies and the Treasury Department, however, could obtain some financial data from banks, credit unions and other financial institutions without a court order or grand jury subpoena if they had the approval of a senior government official.

The new law, however, lets the FBI acquire these records through an administrative procedure whereby an FBI field agent simply drafts a so-called national security letter stating the information is relevant to a national security investigation. And the law broadens the definition of "financial institution" to include such businesses as insurance companies, travel agencies, real estate agents, stockbrokers, the U.S. Postal Service and even jewelry stores, casinos and car dealerships.

The law also prohibits subpoenaed businesses from revealing to anyone, including customers who may be under investigation, that the government has requested records of their transactions.

Bush signed the bill on December 13, a Saturday, which was the same day the U.S. military captured Saddam Hussein. Some columnists and bloggers have accused the president of signing the legislation on a weekend, when news organizations traditionally operate with a reduced staff, to avoid public scrutiny and criticism. Any attention that might have been given the bill, they say, was supplanted by a White House announcement the next day about Hussein's capture.

James Dempsey, executive director of the Center for Democracy & Technology, didn't see any significance to the timing of Bush's signing. The 2004 fiscal year began October 1 and the Senate and House passed the final version of the act in November. He said there was pressure to pass the legislation to free up intelligence spending.

However, Dempsey called the inclusion of the financial provision "an intentional end-run" by the administration to expand the administration's power without proper review. Critics like Dempsey say the government is trying to pass legislation that was shot down prior to the U.S. invasion of Iraq, when the Bush administration drafted plans to expand the powers of the PATRIOT Act.

The so-called PATRIOT Act II, as the press dubbed it, was written by the Justice Department. The Center for Public Integrity discovered it last year and exposed the document, initiating a public outcry that forced the government to back down on its plans. But critics say the government didn't abandon its goals after the uproar; it simply extracted the most controversial provisions from PATRIOT Act II and slipped them surreptitiously into other bills, such as the Intelligence Authorization Act, to avoid raising alarm.

Dempsey said the Intelligence Authorization Act is a favorite vehicle of politicians for expanding government powers without careful scrutiny. The bill, because of its sensitive nature, is generally drafted in relative secrecy and approved without extensive debate because it is viewed as a "must-pass" piece of legislation. The act provides funding for intelligence agencies.

"It's hard for the average member to vote against it," said Dempsey, "so it makes the perfect vehicle for getting what you want without too much fuss."

The provision granting increased power was little more than a single line of the legislation. But Dempsey said it was written in such a cryptic manner that no one noticed its significance until it was too late.

"We were the first to notice it outside of Congress," he said, "but we only noticed it in September after it had already passed in the House."

Rep. Porter Goss (R-FL), chair of the House Intelligence Committee that reviewed the bill, introduced the legislation into the House last year on June 11, where it passed two weeks later by a vote of 410-9. The Senate passed the bill by unanimous consent in July before it went to conference. Goss told the House last year that he believed the financial institution provision in the bill brought the intelligence community up to date with the reality of the financial industry.

"This bill will allow those tracking terrorists and spies to 'follow the money' more effectively and thereby protect the people of the United States more effectively," he said.

But Rep. Betty McCollum (D-MN), who opposed the legislation, told the House, "It is clear the Republican leadership and the administration would rather expand on the USA PATRIOT Act through deception and secrecy than debate such provisions in an open forum."

McCollum voted in favor of the legislation in the House

in June before she and other legislators realized the significance of the provision. She opposed the final conference report in November. A conference report reconciles differences of opinion between the two legislative bodies and represents the final wording of a bill before it goes to the president for signature.

A number of other representatives expressed concern that the financial provision was slipped into the Intelligence Act at the eleventh hour with no time for public debate and against objections from members the Senate Judiciary Committee, which normally has jurisdiction over the FBI. Sen. Patrick Leahy (D-VT), the minority leader of the Senate Judiciary Committee, along with five other members of the Judiciary Committee, sent a letter to the Intelligence Committee requesting that their committee be given time to review the bill. But the provision had already passed by the time their letter went out.

"In our fight to protect America and our people, to make our world a safer place, we must never turn our backs on our freedoms," said Rep. C.L. "Butch" Otter (R-ID) in a November press release. "Expanding the use of administrative subpoenas and threatening our system of checks and balances is a step in the wrong direction."

Otter also voted in favor of the bill in the House in June but, like McCollum, he opposed the final conference report in November once the significance of the provision was clear.

Charlie Mitchell, legislative counsel for the American Civil Liberties Union, said many legislators failed to recognize the significance of the legislation until it was too late. But he said the fact that fifteen Republicans and over a hundred Democrats voted against the conference report indicated that, had there been more time, there probably would have been sufficient opposition to remove the provision.

"To have that many people vote against it, based on just that one provision without discussion beforehand, signifies there is strong opposition to new PATRIOT Act II powers," Mitchell said. He said legislators are now on the lookout for other PATRIOT Act II provisions being tucked into new legislation.

"All things considered, this was a loss for civil liberties," he said. But on a brighter note, "this was the only provision of PATRIOT II that made it through this year. Members are hearing from their constituents. I really think we have the ability to stop much of this PATRIOT Act II legislation in the future." Reported in: Wired News, January 6.

Washington, D.C.

A second airline has acknowledged releasing information on its passengers for an experiment to determine if the government could "mine" the data to spot terrorists. The carrier, Northwest Airlines, confirmed that it gave NASA data on passengers who flew during several months in 2001. The airline's action came to light through Freedom of Information Act requests made to the Transportation Security Administration and NASA by the Electronic Privacy Information Center, a Washington-based privacy-rights group.

The information Northwest turned over to the government appears to involve more than 10 million passengers, said David L. Sobel, the general counsel for the privacy group. "It's now the second major privacy violation by a U.S. airline in response to government requests for information," Sobel said. "There has been resistance on the part of the airlines to openly support these efforts in recognition of passenger concerns, so it is troubling to see this information secretly shared with the government."

Sobel said his group planned to file a complaint with the Department of Transportation requesting an investigation into the airline's actions. It also plans to file a lawsuit against the National Aeronautics and Space Administration to seek more information about the agency's secret project.

In September 2003, a smaller carrier, JetBlue, said it had given information on passengers to a company that works under contract for the Defense Department. The contractor matched the data to other available information to determine the passengers' Social Security numbers and other information. The disclosure was heavily criticized by privacy advocates, and JetBlue later apologized to its customers.

At the time of JetBlue's apology, Northwest officials publicly stated that their airline, the nation's fourth-largest, would not divulge information on its passengers. "We do not provide that type of information to anyone," Kurt Ebenhoch, a spokesman for Northwest, told *The New York Times* in a story published on September 23.

On January 17, Ebenhoch said he had no comment about whether Northwest had portrayed itself accurately in September. Asked what period was covered by the passenger records that Northwest gave NASA, Ebenhoch said he would not say because that might violate Northwest's security precautions.

The company said in a statement: "Our privacy policy commits Northwest not to sell passenger information to third parties for marketing purposes. This situation was entirely different, as we were providing the data to a government agency to conduct specific scientific research related to aviation security and we were confident that the privacy of passenger information would be maintained."

Researchers at NASA's Ames Laboratory had hoped to use data to find unusual travel patterns as clues to terrorists' identities. A laboratory official, David R. Morse, said that researchers at the facility, at Moffett Field near San Jose, California, "only ever looked at one days' worth of data."

"They were looking to see if they could develop algorithms that were useful for security," Morse said. "They decided it wasn't a technology that was going to be useful."

In the wake of the Jet Blue controversy, government

officials became concerned about their use of passenger data. In an e-mail message sent on September 23, in which the government said it was returning the data to the airline, a NASA official told a Northwest executive that "our data mining for aviation security project" had not received financing for fiscal year 2003.

"My interpretation is that NASA management decided that they did not want to continue working with passenger data in order to avoid creating the appearance that we are violating people's privacy," the NASA official wrote. In the e-mail message, the official also mentioned "the problems that JetBlue is now having after providing passenger data for a project similar to ours."

Since the Jet Blue controversy, the airlines and the government have been arguing over a related problem, a program that the government is trying to establish called Computer Assisted Passenger Pre-Screening, or Capps 2, which is supposed to identify about 5 percent of passengers that require closer scrutiny. Reported in: *New York Times*, January 18.

broadcasting

Washington, D.C.

Media companies will be able to own television stations that reach 39 percent of the American viewing public under the big spending bill approved January 22 by Congress. The Federal Communications Commission had voted to allow the companies to reach 45 percent of viewers, but Congress then voted to keep the current 35 percent limit. Under a veto threat from President Bush, lawmakers agreed to the 39 percent cap. The bill also takes the power to change the cap away from the FCC.

The 39 percent limit allows two media giants—Viacom, Inc., owner of CBS and UPN, and News Corp., owner of Fox—to keep all their television stations. Through mergers and acquisitions, both had exceeded the 35 percent cap. Viacom and News Corp. spent a combined $5.5 million on lobbying between January 1, 2002, and June 30, 2003, and $2.3 million on campaign contributions for the 2002 and 2004 elections.

Bush has received more in campaign donations from the broadcast industry than any other federal candidate since January 1, 2003. He took in $158,450—more than 10 percent of the industry's $1.4 million in donations for the 2004 campaign, according to the Center for Responsive Politics, a nonpartisan research group.

There also is a legal battle over media ownership rules.

A federal appeals court in Philadelphia temporarily blocked the higher cap and suspended other FCC-adopted ownership changes, including rules making it easier for companies to own newspapers and broadcast stations in the same community.

Opponents of the higher cap said they regretted Congress's action but would work with lawmakers to overturn the FCC's other media ownership rules. Reported in: *Boston Globe*, January 23.

Washington, D.C.

The Federal Communications Commission (FCC) proposed a $755,000 fine against Clear Channel Communications January 27 for a sexually explicit radio show aired on four stations, the second-highest such fine ever proposed. The FCC, whose chair recently urged that penalties be increased for indecent programming, said the stations—all in Florida—aired various episodes of "Bubba the Love Sponge" a total of 26 times. The commission proposed fining Clear Channel the maximum $27,500 for each time the episode ran, or $715,000. Clear Channel also was fined $40,000 because of record-keeping violations at the stations.

In response, Clear Channel called for an industry task force to develop clear indecency standards for radio, television, cable and satellite networks. "We believe the time has come for every sector of the media to join together and develop consistent standards that are in tune with local community values," said Mark Mays, president of the company. "Our audiences deserve nothing less."

The FCC also announced that it wanted to fine KRON Channel 4 in San Francisco the maximum $27,500 for broadcasting indecent material on its morning news program. During an interview with performers of the "Puppetry of the Penis," who wore capes but nothing else, one of the actors exposed himself. The FCC said the station should have expected that such a display could have occurred and should have taken steps to prevent it. It would be just the second fine leveled against a television broadcast for indecency.

"I hope this step today represents the beginning of a commitment to consider each indecency complaint seriously, and to recognize that indecency on our airwaves is not limited to the radio," FCC Commissioner Kevin Martin said.

The largest fine ever for indecency was $1.7 million paid by Infinity Broadcasting in 1995. Also, the FCC last October proposed fining Infinity $357,000 for a radio segment on the "Opie and Anthony" show in which a couple was said to be having sex in New York's St. Patrick's Cathedral.

The head of Clear Channel Radio said his broadcasts are not meant to be indecent. "We work hard every day to entertain, not offend our listeners," said John Hogan. "None of us defend or encourage indecent content; it's simply not part of our corporate culture."

The latest fines came a day before a congressional hearing on obscenity prompted by the FCC enforcement bureau's decision not to fine rock star Bono for an expletive

uttered on NBC during the Golden Globe Awards show last year. The lead singer of the Irish rock group U2 said, "This is really, really, f------ brilliant." The bureau said Bono's comments were not indecent or obscene because of the way the word was used. FCC Chair Michael Powell asked his fellow commissioners to overturn the decision. In addition, legislation has been introduced in the House to prohibit broadcasters from airing eight specific words or phrases, including the word uttered by Bono.

Powell also urged Congress to approve a tenfold increase in the maximum fine of $27,500 per incident. He said the current fine is not large enough to dissuade huge broadcasters from airing objectionable programming. Rep. Fred Upton (R-MI), chair of the House telecommunications subcommittee holding the hearing, introduced legislation to boost the fines.

Under FCC rules and federal law, radio stations and over-the-air television channels cannot air obscene material at any time, and cannot air indecent material between 6 A.M. and 10 P.M. The FCC defines obscene material as describing sexual conduct "in a patently offensive way" and lacking "serious literary, artistic, political or scientific value." Indecent material is not as offensive but still contains references to sex or excretions. Reported in: *San Francisco Chronicle*, January 27.

Internet

Philadelphia, Pennsylvania

A federal judge in Philadelphia heard a challenge January 6 to a controversial state law that has led to more than 1 million innocuous Web sites being accidentally blocked. Although the law is only a Pennsylvania state statute, it has an international reach. When the Pennsylvania attorney general used it to force MCI to ban access to some sites with suspected child pornography, the company said it had no choice but to block those Internet addresses for all of its North American subscribers.

Two nonprofit groups, the Center for Democracy and Technology (CDT) and the American Civil Liberties Union (ACLU), filed suit against Pennsylvania in September. Their lawsuit claims that the state law's "secret censorship orders" have led to more than 1 million Web sites blocked, nearly all featuring legal material.

"The reason we're looking at this law is that it was at one point seen as a model law by several different states," said Ari Schwartz, CDT's associate director. "We were concerned that this would spread and become a model for blocking content." CDT sent one of its lawyers to testify against a similar proposal in the Maryland House of Delegates last March and says Oklahoma and some national legislative groups have considered the same approach.

CDT and ACLU lawyers asked U.S. District Court Judge Jan DuBois to declare the law unconstitutional and bar Pennsylvania from invoking it again.

Immediately after being sued in September, Pennsylvania Attorney General Mike Fisher agreed to stop sending additional secret orders while the case was in progress. In December, Fisher resigned to become a federal appeals court judge, and Gerald Pappert replaced him as the state's acting attorney general.

Sean Connolly, speaking for the attorney general, called the lawsuit's claim of 1 million sites blocked "an exaggeration. . .If a million legitimate sites were being blocked, we think we would have heard about that."

"We will defend the state law against this challenge," Connolly said. "This is a law passed by the general assembly to protect children. We believe it has worked in Pennsylvania, and we're prepared to defend it."

Fisher had sent at least 500 letters to Internet service providers, ordering them to cordon off specific child porn sites. In an October deposition, America Online said one letter from Fisher led to the blocking of 400,000 unrelated Web sites and that a second led to blocking tens of thousands of Web sites About.com hosts. In another deposition the same month, a Verizon Communications executive said one letter from Fisher led to "upward of 500,000" Web sites being blocked.

The reason so many legitimate sites were blocked is due to the way the Internet is designed. The original version of the Hypertext Transfer Protocol (HTTP) required each Web site to have its own Internet address, which maps domain names to numeric values. In response to an apparent shortage of addresses, HTTP 1.1 in 1999 permitted each Internet address to host an arbitrary number of Web domains.

That practice of address sharing means that one censorship order can affect thousands of other innocuous Web sites. A February 2003 study from Harvard University's Berkman Center for *Internet & Society* suggested that Yahoo! hosted 74,000 Web sites at one address; Tucows used one address for 68,000 domains; and Namezero.com pointed 56,000 domains to one address. "More than 85 percent of active domain names are found to share their Web servers with one or more additional domains," the study said.

In a brief it filed last month, Pennsylvania said the ACLU and CDT do not have any reason to sue and asked DuBois to throw out the case. The notices do not "intentionally restrain any constitutionally protected speech," the state said. "ISPs can disable access to child pornography items likely to be identified in defendants' notices without disabling access to any significant amount of legitimate speech."

"A URL is neither a person nor a real forum nor a limited commodity," Pennsylvania said. "It is a little string of

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success stories

school

Oviedo, Florida

An award-winning novel that depicts the harsh life of a black family during segregation will remain a part of the school curriculum, the Seminole County School Board decided January 27. Teachers who use *Roll of Thunder, Hear My Cry* in class will attend training sessions, however, to help them present the novel with sensitivity to middleschool students, the board agreed in a unanimous vote.

The book, set in 1930s Mississippi, contains scenes of racial violence and racial slurs.

Board members said they understood the concerns of a black couple who found the book inappropriate for their 13-year-old son. But they decided the well-written novel, with its historically accurate descriptions, was a worthwhile classroom read.

"Students need to know our history," board member Jeanne Morris said.

Debra and Thomas Drake wanted the book used in class only with parental permission. After the vote, Debra Drake said she thought the novel was as controversial as sex education materials and should be handled the same way—given to students only after parents had signed permission slips. Teacher training won't help, she said.

The Drakes said the novel's depictions of black life were too difficult for middle-school students to hear or understand. Their son's class at Chiles Middle School, a predominately white school near Oviedo, started reading it early in the school year, and it left the teenager sad and embarrassed, the family said.

"It hurt my child to sit in a class and hear the word nigger," Debra Drake said. "You could never know what it has done to the black race of people," she told the all-white board. "It's meant to do good, but in the hands of the very young and immature, it's a bad thing," Drake added.

The book by Mildred D. Taylor, who is black, depicts the life of a black family living in rural Mississippi. The narrator is a 9-year-old girl who describes her ill-equipped, segregated school, her fury at being insulted by whites and her terror at watching "night men" attempt to lynch a teenager.

First published in 1976, the novel won the Newbery Medal, the top prize in children's literature, in 1977. It is one of a series of books Taylor has written fictionalizing her own family's experiences in the days before the civil-rights movement.

Parent Mike Westley told the board that both his children read the book in class and were touched by it, though it described an "ugly part of our history," he said. "It was emotional and moving for our kids," said Westley, who is white. "You have a book that's doing that for kids. You don't want to pull it out."

This was the first time the novel, or any other, has been challenged officially in Seminole, at least as far as any current administrators can remember. *Roll of Thunder, Hear My Cry* isn't new to such controversies, however. Nationwide, the book faces at least a few challenges every year, mostly from black parents who don't like the language, said Beverley Becker, associate director of the American Library Association's Office for Intellectual Freedom. In 2002, it even made ALA's list of "Most Frequently Challenged Books," ranking No. 9.

Chiles' principal offered to let the Drakes' son read another book, but the family wanted a countywide ban. Late last year, the Drakes took their case to a committee of district administrators, which decided the book should remain part of the curriculum. The Drakes appealed that decision to the School Board.

Written comments from Chiles seventh-graders who read the novel bolstered administrators' convictions about the book, said Ron Pinnell, the district administrator who oversees middle schools. "I think the students' comments are powerful," Pinnell said. "They convinced me that they got the message."

Students wrote that they liked the book because it was an exciting and dramatic story and also because it depicted a strong black family that didn't give up. They also seemed to take away lessons on tolerance. "I learned about the hardships that black people went through back then," one student wrote. "It really made me upset to see how they were treated."

But the parts of the book that 13-year-old Thomas Drake read made him feel embarrassed and sad, his mother said. "Racism is something we've talked to our son about. We're not ignorant to it. Neither is he," she said. "It's not like he's not aware but to say this is something they're going to study, I've got a problem with that."

"As a parent, I understand not wanting a child to hear painful words," Taylor wrote in an introduction to the twenty-fifth anniversary edition of the novel. "But also as a parent I do not understand trying to prevent a child from learning about a history that is part of America." Taylor's novels are based on stories her father and other relatives told her. "I must be true to the stories told," she wrote. Reported in: *Orlando Sentinel*, January 26, 28. □

(censorship dateline . . . from page 54)

An official at another school said he had nev er heard of a requirement that student films adhere to industry ratings. "We as a matter of creative course do not censor," said Joe Wallenstein, the director of physical production at the University of Southern California's School of Cinema/Television. While nudity is plentiful in student projects, he said the school has never been confronted with an extremely graphic sexual scene, adding that it was unlikely such a scene would be allowed.

In the end, Carmicino made another video for her class. It consisted of two characters having a conversation in which every word was bleeped out. "She did a beautiful piece," Professor de Jesus said. "I said to the class, 'You see what you can come up with when you feel really passionately about a subject?'" Reported in: *New York Times*, December 4.

political art

Eureka, California

An award-winning drawing blaming President Bush for the September 11 terrorist attacks was pulled from a small-town exhibit over "insurance issues" after a businessman withdrew his $300 prize and called the piece a form of "hate speech."

Artist Chuck Bowden's drawing, "The Tactics of Tyrants Are Always Transparent," won second place in the Redwood Art Association's annual fall exhibit, held in Eureka, California. In the 11-inch-by-14-inch drawing, a crown and halo-topped Bush stands on a grave, his hand dripping with blood as bodies fall to the ground from the World Trade Center towers in the distance. Bowden called it a tribute to those who lost their lives in New York and he acknowledged the piece was meant to place blame for the attacks squarely on the shoulders of the president.

But the work upset at least one sponsor. After Bowden's piece was deemed the second place winner by the lone judge, it was quietly bubble-wrapped and stuffed into a closet while 193 other works were prepared for the exhibit's public opening.

"They shouldn't call it 'open to art,'" Bowden said of the contest's original call for entries. "They should call it, 'open to Republican art' or 'open to closed-minded art.'"

An anonymous donor gave $300 in cash to replace the rescinded gift certificate award and Bowden politely accepted. But for the 45-year-old artist, it wasn't simply about the money, it was about the freedom to artistically express unpopular views.

"For local business owners to try to stagnate artistic expression according to their political interpretation of how life should be is not such a good idea," Bowden said.

Paul Bareis is the frame shop owner who withdrew his $300 gift certificate. He defended his right to not have his business endorse Bowden's prize-winning entry, which he deemed "hate speech."

"You've got to stand up and fight for what you believe in and I think that's what our president's doing and that's what I'm doing," Bareis said. "That conspiracy stuff is bunk." Artist Robert Hudson was the sole judge for the Eureka exhibit.

David Ploss, president of the Redwood Art Association, insisted that Bowden's work was not censored. He said the decision to pull the piece from the display was a matter of dollars and cents. "It did not get displayed because of insurance issues. It had nothing to do with the content of the work," Ploss said. Bowden priced his work at $35,000, far exceeding the average cost of the other 193 works on display, which were covered by a total insurance policy of $142,485, according to the Humboldt Arts Council.

Ploss said the association asked Bowden for an appraisal of his art's worth, or receipts from prior sales of similarly priced art. Bowden produced neither and Ploss said the financial risk of showing the work became too great.

Bowden plans to show the drawing at another local venue. Reported in: Associated Press, December 11.

foreign

Bagdad, Iraq

They buried Abdul Latif Mayah January 20 and with him, many academics' hopes for intellectual freedom in the new Iraq.

Gunned down only twelve hours after advocating direct

elections on an Arab television talk show, Mayah was the fourth professor from Baghdad's Mustansiriya University to be killed in the last eight months, his death the latest in a series of academic slayings in post-Hussein Iraq.

"His assassination is part of a plan in this country, targeting any intellectual in this country, any free voice," said Salam Rais, one of Mayah's students. "He is the martyr of the free world."

Many academics acknowledged that the killers had succeeded in their campaign of intimidation. "After the assassination of Dr. Abdul Latif, we feel that all of us are targeted," said Ahmed Arrawi, a colleague of Mayah. He said he and other academics would think twice before making controversial statements.

Professors and hundreds of students, many of them sobbing, joined Mayah's funeral march as his coffin was carried through the campus of the university where he was director of the Institute for Arab World Research and Studies. Mourners beat their heads and howled in despair, chanting, "There is no God but Allah."

Mayah's wife held aloft a weathered photograph of her gray-haired husband and wailed to his coffin: "You are a martyr! Your coffin is covered with the flag of our country!"

Attacks on Iraqi professors strike at one of this war-torn country's last remaining symbols of pride. Its university system was the envy of the Arab world in the 1950s and '60s. Despite nearly three decades of repression by Saddam Hussein, higher education here is still viewed with great respect.

"In the same way that the ransacking of the [National] Museum went to the heart of many Arabs, this will hit them in the same way," said Rachel Bronson, an analyst at the Council on Foreign Relations in New York. "It just adds to this sense of helplessness and hopelessness."

Students and colleagues said Mayah was an enthusiastic teacher whose seminars often extended off campus. He used his own money to buy computers for his classroom. After Hussein's ouster, he grabbed the family gun to fend off looters at the university. He insisted that classes continue during the war and after, and gave his finals on schedule.

Despite Mayah's impromptu stint as an armed campus guard, he spoke of the need for peaceful, deliberate government. One of his favorite sayings, colleagues said, was "Let the language of the gun die forever, and let us follow the language of democracy." He spoke optimistically about Iraq's future, but in recent weeks had been troubled by the continuing disorder.

Mayah, whose friends said he was 54, was a longtime pro-democracy activist who had been jailed by Hussein after calling for elections in 1996. He had received anonymous death threats for several weeks, friends and family said, and began traveling with a bodyguard. As he drove to work January 19, his Mitsubishi sedan was stopped by unidentified men. Mayah, the bodyguard and a colleague were ordered out of the vehicle. The gunmen opened fire only on Mayah, and he died at the scene. One local media report said he was shot 32 times.

The night before he was slain, Mayah was a guest on a talk show on the Al Jazeera channel, where he supported a call by Grand Ayatollah Ali Sistani, Iraq's leading Shiite Muslim cleric, for free elections by June 30, when the U.S. is scheduled to return sovereignty to Iraq. In calling for quick elections, Mayah was opposing the United States, which has proposed a caucus system to choose the country's new leaders.

Mayah, a Shiite and a former low-level member of Hussein's Baath Party, "was supporting Sistani," said Jabber Habib, a political scientist at Baghdad University. "Had he not supported Sistani, he would have been killed by the other side." Habib, a prominent commentator, said Mayah's slaying has made him reconsider his own regular television appearances.

The killings of the three other Mustansiriya professors came amid anonymous notes left on campus warning members of the outlawed Baath Party that they faced execution. In the northern city of Mosul this month, the dean of a local university's political science department was slain, an attack seen as the work of Baathists against someone they viewed as a collaborator in the U.S.-led occupation. Some Iraqis say there was no obvious motive behind the killing of another academic, an engineering professor, in Basra last year. Reported in: *Los Angeles Times*, January 21.

Moscow, Russia

Russia's Ministry of Education has decided to remove its seal of approval from a high school textbook that encouraged students to research and discuss controversial topics in Russia's history. After a decade of unprecedented openness, the pendulum now appears to be swinging back toward a new conservative ideology in the nation's schools.

"President Vladimir Putin is an authoritarian ruler bent on establishing a new dictatorship in Russia. President Vladimir Putin is a democrat at heart whose structural reforms are paving the way for Russia to emerge as a liberal democracy. Present your evidence and discuss."

That, in essence, is the assignment which Igor Dolutskii's textbook poses to Russian students about to graduate from high school. It is an assignment considered so objectionable that the Russian Ministry of Education's council of experts recommended the book's removal from the classroom. The ministry confirmed the decision and formally withdrew its stamp of approval from the text. Unless the decision is reversed, Igor Dolutskii's *National History, 20th Century*, which has served as a textbook for half-a-million students across Russia over the past ten years, will be permanently shelved.

"Critics consider my textbook to be Russophobic, that it undercuts the collectivist values of the Russian people, that it inculcates individualist, Western values that are alien to the Russian people, that it blackens the history of a great country, that [World War II]—as I show it—is painted in too dark a color," Dolutskii said. "Critics were especially vexed that the second front is constantly mentioned, that the allies who fought against Hitler starting in 1939 are mentioned."

Dolutskii said he fears the ministry officials are taking their cue from President Vladimir Putin, who, in a meeting with historians last year, said textbooks for schools and universities should not take up divisive political issues but instead foster in Russia's young people "a feeling of pride" for their homeland.

Yelena Zinina, head of the Education Ministry's textbook-publishing department, said that Dolutskii's book does precisely the opposite. "The textbook elicits contempt, natural contempt for our past and for the Russian people," she said.

Dolutskii countered that he is a patriot but he believes Russia will be better served by a generation of well-informed critical thinkers than docile, happy drones. His textbook reflects this philosophy by presenting the available evidence on important moments in Russia's modern history, asking students to debate the issue and defend their position—whatever it is.

"I have been working in schools for a quarter-century and I have always worked like this. And I see that it's very effective," Dolutskii said. "It's one thing to come out and tell students, 'This is how the [Russian] Civil War developed, this side was in the right.' It's another matter altogether to say: 'Here's the Civil War. There were Reds, Whites, Greens. . .. And now let's look to see who was right.' And to the horror of everyone, it turns out that one side was right, and the other side was also right. And yet in another class, the students prove to me that everyone was wrong in the conflict. So you understand?"

The point is that in history, there are no right answers, said Dolutskii—only different interpretations. He readily admits that many teachers find it difficult to accept this approach. "Many teachers are opposed to my book. It's hard to work with it because there is a purely methodological problem," he said. "There are no ready-made answers, as our president would like. He wants ready-made answers but they are not in my book. I propose searching for the answer to questions I pose. This is what we call an 'open textbook.' There can be very different answers to the questions posed, just as with the latest edition, which has become this stumbling block for me and has led to all this criticism."

In the ten years it has been used in schools, Dolutskii's textbook has weathered criticism from several quarters, as he explained: "During its ten-year history, the textbook has constantly met with opposition. There was opposition from several fronts. Until 1996, in the ministry, the opposition came from those you could call Communist ideologues, who were horrified by some facts but couldn't do much because there was a process of relative liberalization taking place across the country. After 1996, opposition began from those in the ministry, in the council of experts, who openly favored a state ideology filled with pseudo-Orthodox, pseudo-nationalist content."

That camp now seems to have gained the upper hand, strengthened by Putin's call for patriotic education. For such critics, the textbook's sorest point appears to be the last chapter of its latest edition, which includes the question about Putin's style of governance as well as controversial details of Russia's two recent wars in Chechnya.

"Naturally, in connection with this, the last, 45th, chapter about modern Russia, where there are two Chechen wars, where it is written that Chechen villages were destroyed using multiple-rocket launchers, with a rise in the president's approval rating afterwards, etc.—the mention of Putin, it seems to me, is one of those details that served as the straw that broke the camel's back after many years of publishing this book. The textbook has been published, after all, since 1993. That's how I see the situation," Dolutskii said.

The 45th chapter, Dolutskii noted, first appeared in 2001 and caused little debate at the time. The Education Ministry that same year renewed its stamp of approval for the book. It was only after a visit to the 2003 Moscow Book Fair by former Kremlin chief of staff Aleksandr Voloshin and Media Minister Mikhail Lesin—who personally requested their own copies of the textbook from the publisher—that events took an ominous turn.

"Since that time, since September, things have appeared which can only be called denunciatory letters—in the Russian tradition. These denunciatory letters are anonymous tracts or print-outs from the Internet, reviews from unknown magazines. Two weeks ago, the ministry sent these messages to my publisher, saying, 'Look, we have been receiving criticism about this book.' There were, in total, three or four letters," Dolutskii said.

Although the text will not be banned, the revocation of its approval means that no state-run schools will be permitted to buy it.

At the Ministry of Education, Yelena Zinina denied that Igor Dolutskii's *National History, 20th Century*, has fallen victim to a Kremlin-inspired purge. She said the ministry independently reviewed all history textbooks this year and found Dolutskii's to be particularly unbalanced and inappropriate on an entire host of topics, from its treatment of World War II and the role of the former NKVD secret police at the front to the actions of Russian soldiers in the most recent Chechen war.

Zinina did not explain why the ministry found no objec-

tion to the same edition just two years before, preferring instead to quote President Putin: "I have looked at the textbook and it does indeed contain things that are improper. Here one can only agree with Putin, who said that a textbook is not an arena for political battles. Here, modern and ancient history must be presented in a balanced fashion."

The Russian Education Ministry said there are plenty of other historians up to the task of presenting Russia's history in a manner that is at once inspiring and patriotic without being unbalanced. It is a task that has faced Russian historians in the past. As an old joke has it: "The future is assured, it's the past that keeps changing." Reported in: rferl.org, December 10.

Moscow, Russia

The print run of the book *FSB: Blowing Up Russia* has been confiscated by Russian law-enforcement agencies as material evidence in a case against Aleksandr Litvinenko and Yuriy Felshtinskiy, who allegedly disclosed state secrets in the book and in another work, *LPG: the Lubyanka Criminal Group*. Aleksandr Podrabinek, editor-in-chief of Prima news agency, said that he was called as a witness. "They told me that the books had been confiscated as material evidence and that the Federal Security Service would seize them everywhere as soon as it finds them."

Over 4,000 copies of *FSB: Blowing Up Russia*, printed in Latvia, were confiscated by security and police officers en route to Moscow December 29. Prima agency, which ordered the books, was planning to sell them in bookshops.

Podrabinek refused to answer the investigator's questions about the terms of the book deal. After that, he was warned about the responsibility for refusing to testify and the possibility that the prosecutor's office could open a criminal case against him. During his conversation with an investigator, Podrabinek conveyed a message from Litvinenko, in which the latter agreed to be interrogated by Russian officials if the questioning takes place in London. "It is possible in principle, but the investigator refused to discuss the matter," he added. Reported in: Ekho Moskvy radio, January 28.

Stockholm, Sweden

Israel's ambassador to Sweden said January 24 that he had physically attacked an art exhibit at a Stockholm museum because it "glorified suicide bombers." The incident a day earlier created a diplomatic flap between the countries.

The ambassador, Zvi Mazel, was among several hundred guests invited to the Museum of National Antiquities in Stockholm for an exhibit linked to a coming international conference on genocide sponsored by Sweden. Israel is one of the scheduled participants. The piece that enraged the ambassador, "Snow White and the Madness of Truth," was in the museum's courtyard and featured a large basin filled with red fluid. A boat floated on top carrying a photo of a smiling Hanadi Jaradat, a woman who became a suicide bomber, killing 22 people in an October 4 attack on a restaurant in Haifa. The work was created by Dror Feiler, an expatriate Israeli artist living in Sweden, and his Swedish wife, Gunilla Skold Feiler.

"When I saw it, I became a bit emotional," Mazel said in a telephone interview from Stockholm. "There was the terrorist, wearing her perfect makeup and floating on the blood of my people." He said he ripped out electrical wires lighting the exhibit and tossed a spotlight into the basin.

Mazel said Feiler accused him of "practicing censorship."

"I told him: `This is not a work of art. This is an expression of hatred for the Israeli people. This has glorified suicide bombers.' "

After heated discussions with Feiler and others, the ambassador was escorted out of the exhibit. He was summoned to meet Swedish government officials.

"We want to give him a chance to explain himself," Anna Larsson, of Sweden's Foreign Ministry, said. "We feel that it is unacceptable for him to destroy art in this way."

In Israel, the Foreign Ministry said that the Swedish government had pledged not to link the genocide conference to the Middle East conflict. Israel was reconsidering its participation.

Mazel, who has served in his post for a little over a year, said he has faced considerable anger directed at Israel during his time in Sweden. "There is a hostile ambience in this country that is orchestrated by the press and the extreme left," he said. But he said Prime Minister Goran Persson "has very good intentions with this conference."

Feiler said that during his exchange with the Israeli ambassador, Mazel said "he was ashamed that I was a Jew."

"We see this as an offensive assault on our right to express our thoughts and feelings," Feiler said. Feiler is a member of Jews for Israeli-Palestinian Peace, a group based in Stockholm that opposes the Israeli occupation in the West Bank and Gaza Strip. Mrs. Feiler told a Swedish newspaper, that the work was not intended as "a glorification of the suicide bomber." Instead, she said, "I wanted to show how incomprehensible it is that a mother of two—who is a lawyer no less—can do such a thing," apparently conflating the Haifa bomber with an attack carried out by another Palestinian woman.

Israeli officials have called the Swedish ambassador in Israel to protest the exhibit, said Jonathan Peled, a spokesman for the Israeli Foreign Ministry. "We think this kind of exhibit condones terrorism against Israeli civilians," he said. The museum director, Kristian Berg, said he did not consider the exhibit to be offensive, and it was again on display. Reported in: *New York Times*, January 28. □

(from the bench . . . from page 64)

Association of America (RIAA) the right to subpoena the names of thousands of suspected users of file-sharing software programs without first filing lawsuits.

The association sued 382 people and warned 398 others in a widely publicized campaign to scare the estimated 60 million U.S. music swappers, and the parents of those who are teens, into giving up the practice and buying songs instead. The association settled with 220 defendants—some for thousands of dollars—while 1,054 swappers signed "amnesty letters" vowing to erase their song files and promising never to steal music again.

Consumer advocates and Internet providers hailed the ruling as an affirmation of privacy rights for Internet users in the face of a mass attack by a single industry. The recording association said it would not be deterred from protecting the business of its members and promised additional lawsuits, saying it would seek the names in a more time-consuming way.

The RIAA contended that it was entitled to expedited subpoenas issued by court clerks, rather than judges, under a 1998 law designed to protect copyrighted works in the digital age. Although industry sleuths could track down the numerical Internet address of someone using file-sharing software, they could not take legal action without getting names and physical addresses of the swappers from their Internet access providers.

But the subpoenas were fought by Verizon Communications, Inc.'s online division, which provides Internet access to 2.1 million consumers. The company was forced to begin turning over names in April after a lower-court judge ruled against it. Verizon argued that the privacy and safety of its customers would be compromised if the subpoenas were not issued by judges, who first review their validity. The company also argued that the Digital Millennium Copyright Act prohibits Internet providers from being held responsible for what moves across their networks.

The law, the company said, only requires network owners to remove illegal material from their central computers. When consumers use file-sharing, or peer-to-peer, services, the songs they trade reside on their personal computers.

A three-judge panel of the U.S. Court of Appeals for the D.C. Circuit agreed unanimously. "Verizon cannot remove or disable one user's access to infringing material resident on another user's computer because Verizon does not control the content on its subscribers' computers," said the ruling, written by Chief Judge Douglas H. Ginsburg.

Perhaps more damaging for the recording industry, and for the movie and software industries, whose works also are traded online, the court declared firmly that the law was not designed to account for file-sharing technology. It is up to Congress to fix that if it chooses, the court ruled.

"We are not unsympathetic either to the RIAA's concern regarding the widespread infringement of its members' copyrights, or to the need for legal tools to protect those rights," Ginsburg wrote. "It is not the province of the courts, however, to rewrite the DMCA in order to make it fit a new and unforeseen Internet architecture, no matter how damaging that development has been to the music industry or threatens . . . the motion picture and software industries."

Cary Sherman, president of the RIAA and a former Verizon lawyer, said his organization had not decided if it will appeal the ruling to the U.S. Supreme Court or ask Congress to change the DMCA. Sen. Orrin G. Hatch (R-UT), chair of the Senate Judiciary Committee and a musician, said he would push Congress to streamline the subpoena process.

Sherman said his group would file a first wave of "John Doe" lawsuits in January. Such suits are filed when the identity of the defendant is unknown. If a judge deems the suits valid, subpoenas to get the names and addresses of those using file-sharing software would be issued to Internet service providers, which have vowed to honor them.

"We think they can have the same deterrent by following the standard legal process," said Sarah B. Deutsch, Verizon's associate general counsel. "They wanted to have an expedited process, even if it trampled on user privacy and safety."

Less certain is the fate of an unknown number of people whose names already have been turned over to the RIAA by Internet service providers. The RIAA has declined to say how many subpoenas it served; Verizon estimates it at about 4,000.

The RIAA could use the names as the basis for lawsuits, but the defendants might be able to argue that their names were obtained through subpoenas now ruled unlawful. "That one could keep lawyers happy for a long time," said Peter P. Swire, an Ohio State University law professor who helped Verizon with its case.

But legal experts said that those who had already settled were unlikely to be able to recoup any payments to the RIAA. And Sherman warned against anyone trying. "If anybody tried to claim that a settlement or pending litigation is somehow tainted by the process by which their name was provided, it would simply encourage us to file a new lawsuit and get exactly the same information in another way," Sherman said. "At that point, the settlement figure would be that much higher because of additional legal expenses."

Still, Tim Davis, a New York artist and a lecturer at Yale University, said he intends to try. Davis was one of the first song swappers targeted by the RIAA, and settled for $7,000 on the advice of his lawyers. "I would do anything it takes to get the money back," said Davis, who said he downloaded only 300 songs. "My hope is there could be a class-action suit of the people who did settle."

The ruling came as legal alternatives to file sharing were gaining ground. Apple Computer, Inc.'s iTunes, the top-selling legal online music store, announced that it had sold 25 million songs since its rollout in April. Similar services have sprung up in iTunes's wake, while use of file sharing appears to be dropping. Reported in: *Washington Post*, December 19.

freedom to demonstrate

New York, New York

A federal appeals court panel in Manhattan ruled January 20 that a state law banning the wearing of masks at public gatherings is constitutional, a decision that reversed a lower court's ruling in favor of Ku Klux Klansmen who were barred from wearing masks at a 1999 event.

The lower court's ruling, by Judge Harold Baer, Jr., of U.S. District Court in Manhattan, had found that the city enforced the mask law selectively against the Church of the American Knights of the Ku Klux Klan. The American Knights had argued that anonymous expression was a protected right, and that the hooded masks linked members to Klan history and were expressive of certain beliefs.

In the January decision, a three-judge panel ruled that "New York's antimask statute does not, however, bar members of the American Knights from wearing a uniform expressive of their relationship to the Klan. The statute only proscribes mask wearing."

The judges, Dennis G. Jacobs, Jose A. Cabranes, and Sonia Sotomayor, continued, in the decision written by Judge Cabranes: "The masks that the American Knights seek to wear in public demonstrations does not convey a message independently of the robe and hood. That is, since the robe and hood alone clearly serve to identify the American Knights with the Klan, we conclude that the mask does not communicate any message that the robe and the hood do not. The expressive force of the mask is, therefore, redundant."

The decision ended a case that had been meandering through the court system since 1999, when the American Knights applied for a parade permit from the Police Department and were denied it on the basis of the anti-mask law. In October 1999, the American Knights sought a preliminary injunction to force the Police Department to allow its members to wear masks wile demonstrating. Judge Baer issued an injunction. But the following day, an appeals court panel stayed part of the order. The Klansmen demonstrated on October 23, 1999, as planned, but without masks.

After the demonstration, the American Knights went back to court, seeking declaratory relief and a permanent injunction. They were denied a permanent injunction, but were granted a favorable judgment on First Amendment grounds. But Judge Cabranes wrote: "A witness to a rally where demonstrators were wearing the robes and hoods of the traditional Klan would not somehow be more likely to understand that association if the demonstrators were also wearing masks. The American Knights offers no evidence or argument to the contrary."

The American Civil Liberties Union represented the Klan from the outset of the case and was disappointed at the outcome yesterday, an official with the group said.

"Our societal commitment to free speech is often tested by the claims of unpopular groups and those who convey offensive ideas," said Arthur Eisenberg, the legal director of the ACLU. "This case presented such a test. Judge Baer courageously recognized the group's First Amendment rights in this case and we are surprised that the Court of Appeals did not affirm."

The issue, at its core, Judge Cabranes wrote, did not involve the First Amendment. He wrote that the court rejected the view "that the First Amendment is implicated every time a law makes someone—including a member of a politically unpopular group—less willing to exercise his or her free speech rights."

He continued: "While the First Amendment protects the rights of citizens to express their viewpoints, however unpopular, it does not guarantee ideal conditions for doing so, since the individual's right to free speech must always be balanced against the state's interest in safety, and its right to regulate conduct that it legitimately considers potentially dangerous." Reported in: *New York Times*, January 21.

Columbia, South Carolina

When a South Carolina federal judge convicted Columbia protester Brett Bursey in January, the judge sidestepped Bursey's larger complaint that President Bush is chilling free speech rights. U.S. Magistrate Bristow Marchant made a narrow ruling that Bursey was protesting illegally within the president's restricted safety zone during an October 24, 2002, Columbia political rally, said USC law professors Eldon Wedlock and Richard Seamon.

"He avoided the issue," Wedlock said of Marchant's decision.

In an eleven-page ruling, the judge made two brief references that government must protect the First Amendment as well as the president. In finding against Bursey, the judge wrote: "In this age of suicide bombers, . . . the Secret Service's concern with allowing unscreened persons to stand in such close proximity to . . . the president of the United States is not just understandable, but manifestly reasonable."

Bursey and his legal team attempted to put on trial actions by Bush's Secret Service agents to segregate dissenters from others during presidential stops. Marchant would not allow that. The case would be tried on its own facts, he said.

The Secret Service denies it discriminates. It designates presidential protection zones based on security risks at each location, the agency testified.

The American Civil Liberties Union, which has sued the Secret Service over the practice, alleges the agency has prompted police to violate the Bill of Rights in at least twelve states. Bursey's case was not part of the suit, but the ACLU cites it as an example of free-speech violations.

After Bursey was fined $500 and spared a jail sentence, he said, "The Bush administration has an all-out assault on protest." The 55-year-old Bursey, a former '60s radical with a long history of civil disobedience, said he planned to appeal.

Judge Marchant would not allow Bursey's legal team to introduce evidence of arrests in other states, including a retired steelworker in Pennsylvania, grandmothers in Florida or a Michigan student. All refused to stay in government-designated "demonstration zones" during Bush appearances.

The law professors agree Marchant's ruling was well grounded in law—police testified they told Bursey he was too close to Bush during the political rally at Columbia Metropolitan Airport. Police instructed Bursey and other protesters to go to a demonstration zone about a half-mile from where Bush addressed supporters in Doolittle hangar. Only Bursey refused, though he and a half dozen protesters who testified during the November trial said there was no such zone.

Prosecutor John Barton did not buy Bursey's constitutional argument. "He's no hero for First Amendment free speech rights," Barton said after the verdict. "He's a criminal."

Still, Bursey's free speech defense drew strong reactions from as far away as Seattle. Backers characterized Bursey as a modern Nathan Hale. Detractors called Bursey "a liberal maggot."

Seamon, the constitutional law professor, and Common Cause director John Crangle agree that Bush's practice threatens the First Amendment. And conservative political commentator Pat Buchanan's *The American Conservative* magazine published a December article titled: "The administration quarantines dissent."

Seamon said, "It's disturbing when you hear these same complaints coming from the left and the right."

The magazine article cites the Labor Day 2002 arrest of 65-year-old former Pennsylvania steelworker Bill Neel. His sign for the president read: "The Bush family must surely love the poor, they made so many of us." Neel refused to move one-third of a mile to a designated demonstration zone inside a chain-link fence. He was charged with disorderly conduct.

District Judge Shirley Rowe Trkula dismissed the charge and scolded police. "I believe this is America," Trkula said. "Whatever happened to, 'I don't agree with you, but I'll defend to the death your right to say it?' "

Bursey's arrest was different from that and other cases. He was charged under a rarely used federal law. Most protesters are arrested on state and local charges. The 1971 law allows the Secret Service to create protection zones around the chief executive and other high government officials. Violating that zone carries a penalty of up to six months in prison and a $5,000 fine. Bursey was inside Bush's restricted area that autumn day.

Bursey contends his First Amendment rights were trampled because police would not tell him the boundaries of the restricted area. Bursey twice moved farther from the hangar where Bush spoke, but police insisted that protesters go only to the demonstration area, Bursey testified.

Bursey and the other dissenters had signs opposing Bush's plan to attack Iraq that were attached to wooden sticks. Secret Service agents consider those potential weapons. But no one alleged Bursey intended to hurt the president. Bursey carried a "No more war for oil" sign. Signs backing GOP candidates were staked in the ground, testimony showed. Bursey's legal team said his prosecution was another Bush administration attempt to mute criticism. They called it selective prosecution. The judge disagreed, but Seamon wonders.

"I can't help but think that it (the charge) was brought to set an example," said Seamon, once a U.S. Justice Department appellate lawyer.

U.S. Attorney Strom Thurmond, Jr., appointed by Bush in November 2001, brought the charge five months after Bursey's arrest. Reported in: *The State*, January 11. □

(excerpts from Supreme Court Ruling . . . from page 57)

inconsequential forms of expression as virtual child pornography, tobacco advertising, dissemination of illegally intercepted communications, and sexually explicit cable programming, would smile with favor upon a law that cuts to the heart of what the First Amendment is meant to protect: the right to criticize the government. . .

The first instinct of power is the retention of power, and, under a Constitution that requires periodic elections, that is best achieved by the suppression of election-time speech. We have witnessed merely the second scene of Act I of what promises to be a lengthy tragedy.

From the dissent by Justice Clarence Thomas:

The chilling endpoint of the Court's reasoning is not difficult to foresee: outright regulation of the press. . . Media corporations are influential. There is little doubt that the editorials and commentary they run can affect elections. Nor is there any doubt that media companies often wish to

influence elections. One would think that the *New York Times* fervently hopes that its endorsement of presidential candidates will actually influence people. What is to stop a future Congress from determining that the press is 'too influential,' and that the 'appearance of corruption' is significant when the media organizations endorse candidates or run 'slanted' or 'biased' news stories in favor of candidates or parties?

From the dissent by Justice Anthony M. Kennedy:

The First Amendment underwrites the freedom to experiment and to create in the realm of thought and speech. Citizens must be free to use new forms, and new forums, for the expression of ideas. The civic discourse belongs to the people and Government may not prescribe the means used to conduct it. The First Amendment commands that Congress 'shall make no law . . . abridging the freedom of speech.' The command cannot be read to allow Congress to provide for the imprisonment of those who attempt to establish new political parties and alter the civic discourse. . . . The Court, upholding multiple laws that suppress both spontaneous and concerted speech, leaves us less free than before. Today's decision breaks faith with our tradition of robust and unfettered debate. □

(is it legal? . . . from page 74)

letters and numbers that acts as a superficial label. URLs are infinite in quantity. Even complete retirement of one will not diminish speech. Speech can always find another URL, and probably (one) pretty close to the out-of-commission string. The new URL will be in the same cyberspace, accessible in the same physical places, as the retired URL."

The Pennsylvania state law in question, which took effect in 2002, permits the attorney general to seek a court order that forces ISPs to block access to the Internet Protocol address of sites that are suspected of featuring child pornography. Instead of relying on a formal order, Fisher instead sent out hundreds of "informal" notices that direct Internet providers to block access to suspected child porn.

Two CDT and ACLU witnesses, Laura Blain, Webmaster for the Pennsylvania Alliance for Democracy, and Mitchell Marcus, a professor of computer science at the University of Pennsylvania, testified against the law. Blain described how two of her clients, a community recreation center and a school, found their Web sites blocked by an order the attorney general's office sent to Dallas, Pennsylvania-based Epix Internet services.

"We believe the attorney general could contact the Web host directly and get the content taken down from the entire Internet as opposed to one ISP's customers," CDT attorney John Morris said. "We believe there's a proven successful method that is far more effective without risking any innocent, blocked sites." Reported in: news.com, January 6.

copyright

Philadelphia, Pennsylvania

Last fall, a group of civic-minded students at Swarthmore College received a sobering lesson in the future of political protest. They had come into possession of some 15,000 e-mail messages and memos—presumably leaked or stolen—from Diebold Election Systems, the largest maker of electronic voting machines in the country. The memos featured Diebold employees' candid discussion of flaws in the company's software and warnings that the computer network was poorly protected from hackers. In light of the chaotic 2000 presidential election, the Swarthmore students decided that this information shouldn't be kept from the public. Like aspiring Daniel Ellsbergs with their would-be Pentagon Papers, they posted the files on the Internet, declaring the act a form of electronic whistle-blowing.

Unfortunately for the students, their actions ran afoul of the 1998 Digital Millennium Copyright Act (DMCA), one of several recent laws that regulate intellectual property and are quietly reshaping the culture. Designed to protect copyrighted material on the Web, the act makes it possible for an Internet service provider to be liable for the material posted by its users—an extraordinary burden that providers of phone service, by contrast, do not share. Under the law, if an aggrieved party (Diebold, say) threatens to sue an Internet service provider over the content of a subscriber's Web site, the provider can avoid liability simply by removing the offending material. Since the mere threat of a lawsuit is usually enough to scare most providers into submission, the law effectively gives private parties veto power over much of the information published online—as the Swarthmore students would soon learn.

Not long after the students posted the memos, Diebold sent letters to Swarthmore charging the students with copyright infringement and demanding that the material be removed from the students' Web page, which was hosted on the college's server. Swarthmore complied. The question of whether the students were within their rights to post the memos was essentially moot: thanks to the Digital Millennium Copyright Act, their speech could be silenced without the benefit of actual lawsuits, public hearings, judges or other niceties of due process.

After persistent challenges by the students—and a considerable amount of negative publicity for Diebold—in November the company agreed not to sue. To the delight of the students' supporters, the memos are now back on their Web site. But to proponents of free speech on the Internet, the story remains a chilling one.

Siva Vaidhyanathan, a media scholar at New York University, calls anecdotes like this "copyright horror stories," and there have been a growing number of them over the past few years. Once a dry and seemingly mechanical area of the American legal system, intellectual property law can now be found at the center of major disputes in the arts, sciences and—as in the Diebold case—politics. Recent cases have involved everything from attempts to force the Girl Scouts to pay royalties for singing songs around campfires to the infringement suit brought by the estate of Margaret Mitchell against the publishers of Alice Randall's book *The Wind Done Gone* (which tells the story of Mitchell's *Gone With the Wind* from a slave's perspective) to corporations like Celera Genomics filing for patents for human genes.

The most publicized development came in September, when the Recording Industry Association of America began suing music downloaders for copyright infringement, reaching out-of-court settlements for thousands of dollars with defendants as young as 12. And in November, a group of independent film producers went to court to fight a ban, imposed this year by the Motion Picture Association of America, on sending DVD's to those who vote for annual film awards.

Not long ago, the Internet's ability to provide instant, inexpensive and perfect copies of text, sound and images was heralded with the phrase "information wants to be free." Yet the implications of this freedom have frightened some creators—particularly those in the recording, publishing and movie industries—who argue that the greater ease of copying and distribution increases the need for more stringent intellectual property laws. The movie and music industries have succeeded in lobbying lawmakers to allow them to tighten their grips on their creations by lengthening copyright terms. The law also has extended the scope of copyright protection, creating what critics have called a "paracopyright," which prohibits not only duplicating protected material but in some cases even gaining access to it in the first place.

In addition to the Digital Millennium Copyright Act, the most significant piece of new legislation is the 1998 Copyright Term Extension Act, which added 20 years of protection to past and present copyrighted works and was upheld by the Supreme Court a year ago.

In response to these developments, a protest movement is forming, made up of lawyers, scholars and activists who fear that bolstering copyright protection in the name of foiling "piracy" will have disastrous consequences for society—hindering the ability to experiment and create and eroding our democratic freedoms. This group of reformers, which Lawrence Lessig, a professor at Stanford Law School, calls the "free culture movement," might also be thought of as the "Copy Left" (to borrow a term originally used by software programmers to signal that their product bore fewer than the usual amount of copyright restrictions). Lawyers and professors at the nation's top universities and law schools, the members of the Copy Left aren't wild-eyed radicals opposed to the use of copyright, though they do object fiercely to the way copyright has been distorted by recent legislation and manipulated by companies like Diebold. Nor do they share a coherent political ideology. What they do share is a fear that the United States is becoming less free and ultimately less creative.

While the American copyright system was designed to encourage innovation, it is now, they contend, being used to squelch it. They see themselves as fighting for a traditional understanding of intellectual property in the face of a radical effort to turn copyright law into a tool for hoarding ideas. "The notion that intellectual property rights should never expire, and works never enter the public domain—this is the truly fanatical and unconstitutional position," says Jonathan Zittrain, a co-founder of the Berkman Center for Internet and Society at Harvard Law School, the intellectual hub of the Copy Left.

Thinkers like Lessig and Zittrain promote a vision of a world in which copyright law gives individual creators the exclusive right to profit from their intellectual property for a brief, limited period—thus providing an incentive to create while still allowing successive generations of creators to draw freely on earlier ideas. They stress that borrowing and collaboration are essential components of all creation and caution against being seduced by the romantic myth of "the author": the lone garret-dwelling poet, creating masterpieces out of thin air.

"No one writes from nothing," says Yochai Benkler, a professor at Yale Law School. "We all take the world as it is and use it, remix it."

In opposition to the cultural commons stands the "permission culture," an epithet the Copy Left uses to describe the world it fears our current copyright law is creating. Whereas you used to own the CD or book you purchased, in the permission culture it is more likely that you'll lease (or "license") a song, video or e-book, and even then only under restrictive conditions: read your e-book, but don't copy and paste any selections; listen to music on your MP3 player, but don't burn it onto a CD or transfer it to your stereo. The Copy Left sees innovations like iTunes, Apple's popular online music store, as the first step toward a society in which much of the cultural activity that we currently take for granted—reading an encyclopedia in the public library, selling a geometry textbook to a friend, copying a song for a sibling—will be rerouted through a system of

micropayments in return for which the rights to ever smaller pieces of our culture are doled out.

"Sooner or later," predicts Miriam Nisbet, the legislative counsel for the American Library Association, "you'll get to the point where you say, 'Well, I guess that 25 cents isn't too much to pay for this sentence,' and then there's no hope and no going back."

"We are at a moment in our history at which the terms of freedom and justice are up for grabs," Benkler says. He notes that each major innovation in the history of communications—the printing press, radio, telephone—was followed by a brief period of openness before the rules of its usage were determined and alternatives eliminated. "The Internet," he says, "is in that space right now."

America has always had an ambivalent attitude toward the notion of intellectual property. Thomas Jefferson, for one, considered copyright a necessary evil: he favored providing just enough incentive to create, nothing more, and thereafter allowing ideas to flow freely as nature intended. "If nature has made any one thing less susceptible than all others of exclusive property," he wrote, "it is the action of the thinking power called an idea, which an individual may exclusively possess as long as he keeps it to himself; but the moment it is divulged, it forces itself into the possession of everyone." His conception of copyright was enshrined in Article 1, Section 8 of the Constitution, which gives Congress the authority to "promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries."

But Jefferson's vision has not fared well. As the country's economy developed from agrarian to industrial to "information," ideas took on greater importance, and the demand increased for stronger copyright laws. In 1790, copyright protection lasted for 14 years and could be renewed just once before the work entered the public domain. Between 1831 and 1909, the maximum term was increased from 28 to 56 years. Today, copyright protection for individuals lasts for 70 years after the death of the author; for corporations, it's 95 years after publication.

Over the past three decades, the flow of material entering the public domain has slowed to a trickle: in 1973, according to Lessig, more than 85 percent of copyright owners chose not to renew their copyrights, allowing their ideas to become common coin; since the 1998 Copyright Term Extension Act lengthened present and past copyrights for an additional 20 years, little material will enter the public domain any time soon.

What also troubles the Copy Left, however, are the unintended consequences of seemingly innocuous tweaks in copyright legislation. In particular, two laws that were passed years before the creation of the Internet helped set the stage for today's copyright bonanza. Before the 1909 Copyright Act, copyright was construed as the exclusive right to "publish" a creation; but the 1909 law changed the wording to prohibit others from "copying" one's creation—a seemingly minor change that thereafter linked copyright protection to the copying technology of the day, whether that was the pen, the photocopy machine, the VCR or the Internet. In 1976, a revision to the law dispensed with the requirement of formally registering or renewing a copyright in order to comply with international copyright standards. Henceforth, everything—from e-mail messages to doodles on a napkin—was automatically copyrighted the moment it was "fixed in a tangible medium."

The true significance of these two laws didn't become apparent until the arrival of the Internet, when every work became automatically protected by copyright and every use of a work via the Internet constituted a new copy. "Nobody realized that eliminating those requirements would create a nightmare of uncertainty and confusion about what content is available to use," Lessig explains, "which is a crucial question now that the Internet is the way we gain access to so much content. It was a kind of oil spill in the free culture."

Lessig is one of the most prominent and eloquent defenders of the Copy Left's belief that copyright law should return to its Jeffersonian roots. "We are invoking ideas that should be central to the American tradition, such as that a free society is richer than a control society," he says.

"But in the cultural sphere, big media wants to build a new Soviet empire where you need permission from the central party to do anything." He complains that Americans have been reduced to "an Oliver Twist–like position," in which they have to ask, "Please, sir, may I?" every time we want to use something under copyright—and then only if we are fortunate enough to have the assistance of a high-priced lawyer.

In October 2002, Lessig argued before the Supreme Court in *Eldred* v. *Ashcroft*, which concerned a challenge to the Copyright Term Extension Act. On behalf of the plaintiffs, Lessig argued that perpetually extending the term of copyright was a violation of the Constitution's requirement that copyright exist for "a limited time." The court responded that although perhaps unwise on policy grounds, granting such extensions was within Congress's power. It was a major setback for the Copy Left. Given the *Eldred* decision, there is nothing to stop a future Congress from extending copyright's term again and again.

Jane Ginsburg, a professor at Columbia Law School who specializes in copyright law, fears that in the Copy Left's rush to secure the public domain, it gives short shrift to the author. A self-described "copyright enthusiast," Ginsburg considers the author the moral center of copyright law and questions equating copyright control with corporate greed. "Copyright cannot be understood merely as a grudgingly tolerated way station on the road to the public

domain," she writes in a recent article titled "The Concept of Authorship in Comparative Copyright Law." "Because copyright arises out of the act of creating a work, authors have moral claims that neither corporate intermediaries nor consumer end-users can (straightfacedly) assert."

Ginsburg and others embrace many elements of the "permission society" demonized by the Copy Left and cite developments like the iTunes store as a sign of greater consumer choice and freedom. In his book, *Copyright's Highway*, Paul Goldstein, a professor at Stanford Law School, writes that "the logic of property rights dictates their extension into every corner in which people derive enjoyment and value from literary and artistic works." He characterizes the permission society as a "celestial jukebox" in which access to every creation—music, literature, movies, art—is available to anyone for a price.

But the Copy Left is convinced that there is a better way for the entertainment industry to adapt to the Internet age while still paying its artists their due. William Fisher, director of the Berkman Center, has spent the last three years devising an alternative compensation system that would enable the entertainment industry to restructure its business model without resorting to cumbersome micropayments. He has worked out a modified version of the system that artists' advocacy groups currently use to make sure that composers are paid when their music is performed or recorded. According to Fisher's plan, all works capable of being transmitted online would be registered with a central office (whether government or independent is unclear). The central office would then monitor how frequently a work is used and compensate the creators on that basis. The money would come from a tax on various content-related devices, like DVD burners, blank CD's or digital recorders. It is a brave proposal in a political culture that is allergic to taxes and uncomfortable with complex solutions. Still, if his numbers do indeed add up, Fisher's proposal might be the best thing that ever happened to the cultural commons: the creators would be paid, while every individual would have unlimited access to every cultural creation. Reported in: *New York Times Magazine*, January 25.

harmful to minors

Detroit, Michigan

A coalition of booksellers, librarians, publishers and magazine distributors filed a federal lawsuit January 6 challenging the constitutionality of a new Michigan law that makes it a crime to allow a minor to examine a book that is "harmful to minors."

"This law would drastically alter the character of bookstores," Chris Finan, president of the American Booksellers Foundation for Free Expression (ABFFE), said. "Today, bookstores are open, welcoming places that invite their customers to browse and explore the wide range of works that are available to them. This law threatens the freedom to browse freely."

It is already illegal to sell "harmful" material to minors in Michigan and most other states. But the new Michigan law goes beyond the law of any other state by requiring booksellers to prevent any possibility that a minor can examine "harmful" works, including novels and works of non-fiction that do not contain pictures. Violations are punishable by up to two years in jail and a fine of up to $10,000. The measure was signed into law by Governor Jennifer Granholm on November 5 and went into effect on January 1.

Finan said the new law is unconstitutional because it would make it difficult for adults and older minors to obtain books, magazines and music that they have a First Amendment right to purchase. "If booksellers can be sent to jail for two years because a kid picks up the wrong book, they will have no choice but to protect themselves by rigidly restricting what their customers can see," he said.

Booksellers will either have to segregate "harmful" material in an "adults only" section or to wrap it in plastic. In addition, they will be forced to impose these restrictions on books and other materials that are "harmful" to the youngest minors, including romance novels, works relating to sexual education and health, photography and art books, and classic literary texts.

In addition to ABFFE, the plaintiffs are the Freedom to Read Foundation, the Great Lakes Booksellers Association, six bookstores, the Association of American Publishers, the Comic Book Legal Defense Fund, and the International Periodical Distributors Association. Reported in: ABFFE Press Release, January 7. □

(Bush wants PATRIOT Act renewed . . . from page 37)

After Bush's speech, ABC News asked Kerry whether he would keep the law intact. Kerry replied: "I think there are good parts to it and bad parts to it."

Fellow Democrat Howard Dean took a similarly cautious stand, saying in a letter to MoveOn.org PAC members that he would seek to repeal only "parts" of the PATRIOT Act and not the entire law.

Many portions of the PATRIOT Act have no expiration date. One part makes it much easier for police to learn the identities of a target's e-mail correspondents and Web pages visited; another permits police to learn information about an Internet subscriber, such as credit card or bank account numbers and temporarily assigned network addresses, without seeking a judge's approval first. The section that permits "sneak and peek" warrants, which authorize surreptitious searches of homes and businesses, also does not expire. Reported in: News.com, January 20. □

(ACLU files complaint . . . from page 45)

Detained After September 11, details the ACLU's involvement in the issue and tells the story of many of those imprisoned and deported. Reported in: ACLU Press Release, January 29. □

historians defend free discussion of foreign policy

On January 10, 2004, the Business Meeting of the American Historical Association unanimously approved the following resolution, which was proposed by Historians Against the War (HAW):

"In view of current efforts to restrict free speech in the name of national security, the American Historical Association affirms the sanctity of rights guaranteed by the First Amendment, the decisive importance of unfettered discussion to the pursuit of historical knowledge, the necessity for open debate of US foreign policy and other public issues in order to safeguard the health of democracy and of our profession, and the need for open access to government records and archives.

HAW decided to submit the resolution last fall. At a meeting held on January 9, which was attended by forty historians, the group debated other measures they could take. Some wanted HAW to advocate stronger, more radical proposals. But these efforts were overwhelmingly defeated. Reported in: History News Network, January 11. □

(in review . . . from page 46)

A fair amount of attention is devoted to examining historical, social and political developments through specific examples: a variety of Christian publications are explored, as well as the evolution of broadcasting and the Internet, detailing the struggles of religious tribes for their own space in the marketplace of ideas.

Some of the most intriguing thoughts expressed in the book revolve around the concepts of evil and "civil sin." Schultze discusses the idea that the American media and popular culture create a theology which is embodied in dastardly characters of both fiction and docudrama, wherein the anti-hero is so thoroughly bad that his or her annihilation brings a kind of salvation. However, he sees such popular constructs as needing shaping and interpretation by religious tribes: "Popular theology—the quasi-religious myths perpetuated by the media—needs the restraints of religious traditions and guidance from communities of critical religious discourse. Without these influences, popular theology will tend to be the product merely of the market for popular culture and will over time subvert historic faiths (223)." At times, it is unclear whether or not the author thinks that there is any thought or culture which is truly non-religious, as when he attributes journalists' commitment to objectivity and accuracy to Scottish realism (5). However, ultimately he believes that popular culture and religious groups have a symbiotic relationship: "In an odd case of mutual dependence, the media need Christianity's sense of hope and progress, while mass-mediated portrayals of evil can remind Christian tribes that the human race is indeed fallen" (225).

In the final analysis, this symbiosis is seen as a good thing. Religion informs, guides, but does not ultimately dictate mass media. Schultze posits: "In America the tension between religious tribalism and mass-mediated consensus is probably good for society. Religious pluralism potentially provides a wide range of tribal views of the nature of evil, but no religious norm is institutionally or sociologically forced upon society (255)." This latter contention seems of crucial importance to the author's thesis and to the subject of censorship, because the role of religious groups in American media is portrayed as more process than dictate. *Reviewed by: Melora Ranney Norman, Outreach Coordinator, Maine State Library.* □

intellectual freedom bibliography

Compiled by Beverley C. Becker, Associate Director, Office of Intellectual Freedom.

Abraham, Laurie. "Anatomy of a Whistle Blower." *Mother Jones*, vol. 29, no. 1, January/February 2004, p. 60.

Greider, William. "Comment: Paul O'Neill, Truth-Teller." *The Nation*, vol. 278, No. 5, February 9, 2004, p. 5.

Gurwitt, Rob. "Defender of the Free World." *Mother Jones*, vol. 29, no. 1, January/February 2004, p. 22.

Harkovitch, Michael, Amanda Hirst, and Jennifer Loomis. "Intellectual Freedom in Belief and Practice." *Public Libraries*, vol. 42, no. 6, November/December 2003, p. 367.

Hentoff, Nat. "A U.S. Librarian Defends Castro." *Village Voice*, vol. 49, no. 1, January 7–13, 2004, p. 22.

_____. "Bill Moyers—Practicing Dissent." *Village Voice*, vol. 49, no. 2, January 14-20, 2004, p. 24.

_____. "Criminalizing Librarians." *Village Voice*, vol. 48, no. 52, December 24-30, 2003, p. 18.

_____. "First Amendment Treats for the Rich." *Village Voice*, vol. 49, no. 3, January 21–27, 2004, p. 26.

_____. "In Castro's Gulag—Librarians." *Village Voice*, vol. 48, no. 51, December 17–23, 2003, p. 24.

_____. "J. Edgar Hoover Back at the 'New' FBI." *Village Voice*, vol. 48, no. 50, December 10–16, 2003, p. 30.

Index on Censorship, vol. 33, no. 1, January 2004.

Kranich, Nancy. "Why Filters Won't Protect Children or Adults." *Library Administration & Management*, vol. 18, no. 1, Winter 2004, p. 14.

Lingeman, Richard. "Comment: Lenny from Heaven." *The Nation*, vol. 278, no. 3, January 26, 2004, p. 22.

Mires, Diane. "Censorship and the Freedom to Read." *PNLA Quarterly*, vol. 63, No. 3, Spring 2003, p. 15.

Saunders, Kevin. *Saving Our Children from the First Amendment*. New York: New York University Press, 2003.

Trinkaus-Randall, Gregor. "The USA PATRIOT Act: Archival Implications." *Archival Outlook*, November/December 2003, p. 12.

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