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Supreme Court upholds CIPA

A sharply divided Supreme Court ruled June 23 that Congress can force the nation's public libraries to equip computers with anti-pornography filters. The blocking technology, intended to keep smut from children, does not violate the First Amendment even though it shuts off some legitimate, informational Web sites, the court held.

The court said because libraries can disable the filters for any adult patrons who ask, the system is not too burdensome. The 5–4 ruling in *United States* v. *American Library Association* reinstated the Children's Internet Protection Act (CIPA) that said libraries must install filters or surrender certain federal money.

Since 1996, Congress has passed three laws to shield children from pornographic Internet sites. The first was struck down by the Supreme Court and the second was blocked by the court from taking effect. The first two laws dealt with regulations on Web site operators. The latest approach, in the 2000 law, mandated that public libraries put blocking technology on computers as a condition for receiving certain federal money. Libraries have received about $1 billion since 1999 in technologies subsidies, including tax money and telecommunications industry fees.

The government had argued that libraries don't have X-rated movies and magazines on their shelves and shouldn't have to offer access to pornography on their computers. Librarians and civil liberties groups had argued that filters are censorship and that they block valuable information. Filter operators must review millions of Web sites to decide which ones to block.

A three-judge federal panel in Pennsylvania ruled last year that CIPA was unconstitutional because it caused libraries to violate the First Amendment. The filtering programs block too much nonpornographic material, the panel found. The Supreme Court disagreed.

No single opinion spoke for the court. Writing for four justices, Chief Justice William H. Rehnquist said limitations on access to the Internet were, for library users, of no greater significance than limitations on access to books that librarians chose for whatever reason

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Nancy C. Kranich, Chair

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ALA responds to CIPA decision

The following is the text of a statement from ALA President Carla D. Hayden and the ALA Executive Board released on July 25.

The American Library Association (ALA) has a longstanding commitment to ensuring access to information for all. It advocates for a free and open information society and for equitable access to knowledge and information resources in all formats for all people.

In December 2000, Congress passed an appropriations bill that included a requirement that any library receiving federal E-Rate or Library Services and Technology Act (LSTA) funds would be required to filter all of its Internet terminals. Because filtering blocks access to constitutionally protected speech, the Children's Internet Protection Act (CIPA) provisions were challenged by ALA, and in May 2002, a district court in Philadelphia unanimously ruled that the requirement violated the First Amendment rights of library users. The government appealed this decision, and on June 23, 2003, the U.S. Supreme Court reversed the lower court decision (*United States* v. *American Library Ass'n., Inc.*). The Supreme Court ruled that the First Amendment does not prohibit Congress from forcing public libraries—as a condition of receiving federal funding—to use software filters to control what patrons and staff access online via library computers.

While ALA did not prevail in having the law declared unconstitutional, the association's efforts yielded important and tangible benefits to libraries and library users, in that the Justices also ruled that the law is constitutional only if the mandated filters can be readily disabled upon the request of adult library users. Users do not have to explain why they are making the request.

In the wake of the CIPA decision, the priorities of the association are to:

- Provide libraries with authoritative information regarding their choices and CIPA requirements, as they evaluate options and make decisions regarding the new legal requirements.
- Work to minimize the negative impact of CIPA on the users of libraries that decide to continue to receive federal funds and comply with the provisions of CIPA.
- Continue to seek to protect the First Amendment rights of library users, in accordance with policies established by the American Library Association.

In order to accomplish these goals, a variety of long and short-term efforts will be pursued by ALA, its committees, divisions and offices. These activities include:

- Providing information on options available to libraries, including the choice of either applying or not applying for federal funds subject to CIPA provisions,
- Providing up-to-date, accurate information on the Federal Communications Commission and the Institute for Museum and Library Services regulatory processes as the law is implemented by these agencies,
- Working to inform and affect the regulatory process to ensure that users receive unfiltered Internet access upon request through the disabling of filtering software,
- Working with libraries to ensure that Internet filter disabling is readily available to all adult library users as specified in the Supreme Court decision,
- Identifying technological options that place a minimum burden on libraries that receive federal funds subject to the CIPA requirements,
- Continuing to develop and promote alternatives to filtering, including the education of parents and children and the development of 'child-friendly' sites,
- Continuing to inform and educate the public and media about issues related to Internet filtering and safety in public libraries,
- Gathering and making available information and research on the impact of CIPA and filtering on libraries and library users, including information and research on filtering software and evaluative information for libraries selecting and using filtering software,
- Creating a Web-based resource of informational data and anecdotal stories on CIPA and its impact,
- Making the public aware of the negative impacts of CIPA, including imposing an unfunded Federal mandate on libraries, impeding the public's access to constitutionally protected material, and exacerbating the 'digital divide' by disproportionately affecting less affluent communities, minorities, children, and other disadvantaged groups,
- Monitoring and maintaining up-to-date information on any legal actions that arise as a result of CIPA, including any lawsuits filed against libraries, and
- Advocating with legislators to prevent further infringements upon the First Amendment rights of library users, including any additional federal and state filtering legislation, and, ultimately, to reverse existing infringements.

As the association moves forward with these activities, we will post information on the ALA Web site: www.ala.org/cipa. Working with the library community, we will continue to explore ways to minimize the impact of the CIPA decision on libraries and to advocate for the public's right to access constitutionally protected speech.

To begin this process, ALA President Carla D. Hayden is convening a meeting of key member leaders and staff to discuss implementation of the activities outlined above and to develop a more detailed plan for responding to the decision over the coming year. The meeting will be held on August 23, 2003, in Chicago. ☐

FCC issues order on CIPA implementation

On July 23, the Federal Communication Commission (FCC) adopted an order that updates regulations pertaining

Rep. Sanders's remarks to ALA Assembly

The following is the text of remarks by Rep. Bernie Sanders (IND-VT) to the Opening General Session of the American Library Association at the ALA Annual Conference in Toronto, Canada, June 21.

Good afternoon. Thank you very much for inviting me to be with you today, and let me begin by applauding the American Library Association and the Canadian Library Association for the outstanding effort you are making in the fight to protect civil liberties and basic constitutional rights. Our two countries owe all of you a very deep debt of gratitude.

As librarians, I know that there are many day-to-day concerns that you work on. In these tough financial times, how do we adequately fund libraries so that they can educate and inform the people in the way they should? How do we keep up with the explosion of technology that is affecting libraries? How do we pay librarians fair salaries so that we can attract the dedicated people that the profession needs? I know that all of these day-to-day issues keep you busy, which is why I am deeply moved that you have chosen to engage in a fight that you could have avoided and turned your back on. But you didn't. You have chosen to defend freedom in the deepest sense of the word, and are fighting to keep libraries as sanctuaries where every citizen can enter and learn and access information without fear that the government and Big Brother is looking over his or her shoulder.

Politicians and media people talk a whole lot about "freedom," but many of them don't really mean it. Frankly, it is not easy, not for me or for you, to listen to racists and anti-Semites and homophobes and people who detest democracy and civil liberties spout their ugly lines. But we understand that "freedom" is not just tolerating what is popular or what we like. It is allowing people to say what we don't like, what makes us cringe and what we may very well hate.

We defend "freedom" and are proud of what the First Amendment is about because we understand the fragility and delicate nature of ideas—that great discoveries sometimes come from fragments of ideas that are embraced by bold minds. That is why I introduced legislation to amend the USA PATRIOT Act. Neither you nor I nor the American people want to see a slow but sure chilling impact on intellectual curiosity. We do not want to see young people, or any person, hesitate to take out a book on politics, on religion, on history or science because someone in the government might think that the person reading that book might have terrorist tendencies.

We understand what happened to people like Galileo, Christopher Columbus, Susan B. Anthony, W.E.B. DuBois,

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to the Children's Internet Protection Act (CIPA) for libraries. This order was adopted to reflect the recent Supreme Court decision in *American Library Association Inc.* v. *United States,* issued on June 23.

According to the order:

- Libraries which are subject to CIPA must undertake efforts in Funding Year 2003 (the current year) AND be compliant by the start of Funding Year 2004, July 1, 2004, in order to receive discounts.
- Compliance is the enforcement of an Internet safety policy that includes the use of a technology protection measure, such as filtering software, blocking software, etc.
- Libraries that are not in compliance with CIPA this year (FY 2003) and will not be undertaking actions in order to be compliant by 2004 are not eligible for E-rate discounts on Internet access or internal connections in Funding Year 2003. However, they will not be required to return funds received during the period between July 1 and the effective date of the Order.
- As established in the original FCC rules, CIPA does not apply to E-rate discounts for any service classified by the E-rate program as telecommunications.
- CIPA certification will continue to be made on Form 486 filed with the SLD or Form 479 filed with consortia leaders. Drafts of revised forms are attached to the Order.
- If a library applicant HAS NOT yet filed a Form 486 or a Form 479, it is required to file a REVISED version of the appropriate form.
- If a library applicant HAS filed a Form 486 or Form 479, but is applying ONLY for telecommunications, no action is necessary.
- If a library HAS filed a Form 486 or Form 479 for an Internet access or internal connections application, it must re-file on the new Form 486 or Form 479 as appropriate.
- The deadline for filing Form 486 with the SLD REMAINS the later of either 120 days after the applicants service start date or 120 days after receipt of a Funding Commitment Decision Letter (FCDL).
- The deadline for filing a revised Form 479 with a consortium leader is 45 days from this Order's effective date.
- Consortia may include both compliant and non-compliant members, but only compliant members may receive discounts for Internet access or internal connections.
- For Funding Year 2003 only, consortia leaders needing to file Form 500 in order to adjust funding commitments must do so within 30 days of filing the revised Form 486. □

IFC report to ALA Council

Following is the text of the Intellectual Freedom Committee's report to the ALA Council delivered on June 25 at the ALA Annual Conference in Toronto, Canada, 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 CIPA lawsuit, privacy tools, ALA Meeting Rooms policy, IFLA Glasgow Declaration, and media concentration.

Children's Internet Protection Act (CIPA)

On Monday, June 23, in a 6-3 decision, the Supreme Court issued its opinion in the CIPA case. In a very narrow plurality decision, the Court reversed the ruling from the Third Circuit Court of Appeals and upheld the federal law.

Five justices agreed with the lower court that filtering software blocks access to a significant amount of constitutionally protected speech. Justices Stevens, Souter and Ginsburg dissented from the judgment on the ground that blocking software blocks access to an enormous amount of constitutionally protected speech. Justices Breyer and Kennedy, each of whom filed concurring opinions, joined only in the judgment of the plurality and not the opinion. They agreed with Justices Stevens, Souter and Ginsburg that filters block access to constitutionally protected speech.

Justices Breyer and Kennedy joined in the judgment that the law should be upheld only because the Court adopted Solicitor General Theodore B. Olson's interpretation of the statute that any adult could request the librarian to disable the filter and the librarian would do so. In addition, they agreed that the disabling function should be accomplished quickly and easily. Further, Justice Kennedy implied that it is incumbent on filtering companies to develop devices to disable filters easily and quickly. If these companies do not do this, the Justice implied library users may have a cause of action.

Although not what we hoped for, this decision provides us with an opportunity to shed some light on the filtering process, specifically, what is being filtered, according to what criteria, and by whom. We will work with OITP, other ALA units, major filtering companies, and librarians throughout the profession 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 will continue to support access to information by library users of all ages. Please continue to visit www.ala.org/cipa for the most up-to-date information.

Privacy

As reported at the Midwinter Meeting, the IFC is developing a Privacy Tool Kit, similar in style and purpose to the Libraries & the Internet Tool Kit, to assist librarians in protecting users' privacy. At the 2002 Annual Conference, Council adopted *Privacy: An Interpretation of the Library Bill of Rights*. Subsequently, the IFC drafted *Questions and Answers on Privacy*, distributed last summer and updated in January 2003, with additional updates coming soon. While these documents provide a framework for understanding privacy considerations in libraries, many ALA members have requested additional tools to help them develop the policies and procedures that their local libraries need now. After ALA's Midwinter Meeting, the committee began drafting text for the Privacy Tool Kit.

IFC's first effort toward a Tool Kit is *Guidelines for Developing a Library Privacy Policy*. The IFC urges libraries to develop and/or revise their confidentiality and privacy policies and procedures in order to protect confidential information from abuse and their organizations from liability and public relations problems. With technology changes, identity theft, and new laws, as well as increased law enforcement surveillance, libraries need to ensure that they:

- Limit the degree to which personally identifiable information is monitored, collected, disclosed, and distributed.
- Avoid creating unnecessary records.
- Avoid retaining records that are not needed for efficient operation of the library, including data-related logs, digital records, vendor-collected data, and system backups.
- Avoid library practices and procedures that place personally identifiable information on public view.

The Guidelines are based in part on what are known as the five "Fair Information Practice Principles." These five principles outline the rights of Notice, Choice, Access, Security, and Enforcement. At this conference, the IFC held an open hearing on these draft Guidelines for Developing a Library Privacy Policy. We encourage all ALA members to review the draft and contact the Office for Intellectual Freedom (oif@ala.org) to recommend changes and to let us know whether the document helped their libraries develop new policy language. The attached draft model policy document includes three sections:

- Guidelines for Developing a Library Privacy Policy
- Model Privacy Policy
- Conducting a Privacy Audit

A link to the draft Guidelines for Developing a Library Privacy Policy, prepared by the ALA Intellectual Freedom Committee (IFC), is also available at: www.ala.org or at tinyurl.com/f6ie.

Other sections of the Tool Kit still under development include:

- Federal and State Privacy Laws and Policies
- Court Orders
- Guidelines for Dealing with Law Enforcement Inquiries (available on the OIF Web site)

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FTRF report to ALA Council

The following is the text of the Freedom to Read Foundation's report to the ALA Council delivered on June 22 at the ALA Annual Conference in Toronto, Canada, by FTRF Treasurer June Pinnell-Stephens.

As Treasurer 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:* On March 5, 2003, the U.S. Supreme Court heard oral arguments in *United States* v. *American Library Association,* our lawsuit challenging the Children's Internet Protection Act (CIPA). Paul Smith of Jenner & Block argued on behalf of the ALA, urging the nine Justices to affirm the unanimous decision written by Chief Judge Edward R. Becker of the Third Circuit Court of Appeals, in which the court struck down CIPA. Theodore Olsen, the Solicitor General, argued on behalf of the United States government.

The questions posed by the Justices to both attorneys indicated that the court, as anticipated, is sharply divided on the case. We are now awaiting the Supreme Court's decision, which is likely to be handed down either tomorrow (June 23) or, possibly, on a specially announced decision day within the next week. We are expecting a close vote. [The decision was released on June 23 and upheld the act.]

The Foundation is still actively participating in raising funds for the CIPA lawsuit, and to date has donated $200,000 to the effort. We urge all ALA members to assist in raising the necessary funds for this most important litigation. To give online and for more information, visit ALA's CIPA Web site at www.ala.org/cipa.

The USA PATRIOT Act and Library Confidentiality

The Foundation continues to fight to protect libraries and library users from unreasonable government surveillance through litigation and legislation:

PATRIOT Act Litigation: *ACLU* v. *Department of Justice*: FTRF is one of four plaintiffs in this lawsuit filed under the Freedom of Information Act (FOIA). The suit asked the court to issue a preliminary injunction requiring the Department of Justice (DOJ) to disclose aggregate statistical data and other policy-level information that would allow a fuller understanding of the DOJ's implementation of the USA PATRIOT Act. In particular, the suit asked for information about the DOJ's use of the new powers granted under Section 215, which permits the FBI to obtain library and bookstore records without showing probable cause. After the DOJ claimed that the majority of the documents sought were classified, the plaintiffs filed a motion for summary judgment. The U.S. District Court dismissed the plaintiffs' claims on May 19, accepting the DOJ's assertion that the materials were properly classified. The plaintiffs are considering their next steps.

PATRIOT Act Legislation: H.R. 1157, "The Freedom to Read Protection Act of 2003," was introduced on March 6, 2003, by Representative Bernie Sanders (I-VT). The legislation exempts libraries and bookstores from the provisions of Section 215 of the USA PATRIOT Act. Currently, over 100 members of the House have signed on as co-sponsors, including twelve Republicans. Rep. Sanders was the Opening General Session speaker at this conference.

S. 1158, "The Library and Bookseller Protection Act of 2003," introduced by Senator Barbara Boxer (D-CA) on May 23, is similar to H.R. 1157. The bill requires law enforcement agents to show probable cause before obtaining a court order for library records. In addition, it excludes libraries from the legal definition of Internet Service Provider, making it more difficult to obtain library records through the use of a National Security Letter. The bill has been referred to committee.

In addition, FTRF is tracking H.R. 2429, "The Surveillance Oversight and Disclosure Act," a bill requiring the Department of Justice to report more fully on USA PATRIOT Act activities, including how library records are obtained and used. The bill was introduced on June 11, 2003, by Representatives Joseph M. Hoeffel (PA-D), Sam Farr (CA-D), and John Conyers (MI-D).

Litigation

In pursuit of its mission to preserve our right to read and receive information freely, the Foundation joins in *amicus* briefs that support parties fighting to defend those rights in court. Three of those cases have resulted in victories since the Foundation last reported to Council:

Interactive Digital Software Association v. *St. Louis County*: In a unanimous decision, the Eighth Circuit Court of Appeals overturned a St. Louis County, Missouri, ordinance forbidding the sale or rental of violent video games to minors, overruling federal District Court Judge Stephen Limbaugh's determination that video games were not protected expression under the First Amendment. Instead, the panel of judges adopted the views of the Seventh Circuit Court of Appeals in *AAMA* v. *Kendrick*, an opinion that overturned a similar ordinance passed by the city of Indianapolis. Concluding that video games "contain stories, imagery, age old themes of literature and messages, even an 'ideology,' just as books and movies do," the court ruled that video games are protected expression entitled to the full protection of the First Amendment. The court rejected the county's argument that it was entitled to aid parents in preserving children's well-being, finding that such desires did not give the county an unbridled license to regulate what minors read and view, particularly in light of the county's failure to provide any evidence that "violent" video games cause psychological harm to minors. The panel of judges directed the District Court to enter an injunction barring enforcement of the ordinance.

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report on PATRIOT Act alleges rights violations

A report by internal investigators at the Justice Department has identified dozens of recent cases in which department employees have been accused of serious civil rights and civil liberties violations involving enforcement of the sweeping federal antiterrorism law known as the USA PATRIOT Act.

The inspector general's report, which was presented to Congress in July, raised new concern among lawmakers about whether the Justice Department can police itself when its employees are accused of violating the rights of Muslim and Arab immigrants and others swept up in terrorism investigations under the 2001 law.

The report said that in the six-month period that ended on June 15, the inspector general's office had received 34 complaints of civil rights and civil liberties violations by department employees that it considered credible, including accusations that Muslim and Arab immigrants in federal detention centers had been beaten.

The accused workers are employed in several of the agencies that make up the Justice Department, with most of them assigned to the Bureau of Prisons, which oversees federal penitentiaries and detention centers.

The report said that credible accusations were also made against employees of the F.B.I., the Drug Enforcement Administration and the Immigration and Naturalization Service; most of the immigration agency was consolidated earlier this year into the Department of Homeland Security.

A spokeswoman for the Justice Department, Barbara Comstock, said the department "takes its obligations very seriously to protect civil rights and civil liberties, and the small number of credible allegations will be thoroughly investigated." Comstock noted that the department was continuing to review accusations made in a separate report by the inspector general, Glenn A. Fine, that found broader problems in the department's treatment of hundreds of illegal immigrants rounded up after the terrorist attacks of Sept. 11, 2001.

While most of the accusations in the report are still under investigation, the report said a handful had been substantiated, including those against a federal prison doctor who was reprimanded after reportedly telling an inmate during a physical examination that "if I was in charge, I would execute every one of you" because of "the crimes you all did." The report did not otherwise identify the doctor or name the federal detention center where he worked. The doctor, it said, had "allegedly treated other inmates in a cruel and unprofessional manner."

The report said that the inspector general's office was continuing to investigate a separate case in which about twenty inmates at a federal detention center, which was not identified, had accused a corrections officer of abusive behavior, including ordering a Muslim inmate to remove his shirt "so the officer could use it to shine his shoes."

In that case, the report said, the inspector general's office was able to obtain a statement from the officer admitting that he had verbally abused the Muslim inmate and that he had been "less than completely candid" with internal investigators from the Bureau of Prisons. The inspector general's office said it had also obtained a sworn statement from another prison worker confirming the inmates' accusations.

The report did not directly criticize the Bureau of Prisons for its handling of an earlier internal investigation of the officer, but the report noted that the earlier inquiry had been closed—and the accused officer initially cleared—without anyone interviewing the inmates or the officer.

The report was the second from the inspector general to focus on the way the Justice Department is carrying out the broad new surveillance and detention powers it gained under the PATRIOT Act, which was passed by Congress a month after the September 11 attacks.

In the first report, made public on June 2, Fine, whose job is to act as the department's internal watchdog, found that hundreds of illegal immigrants had been mistreated after they were detained following the attacks. That report found that many inmates languished in unduly harsh conditions for months, and that the department had made little effort to distinguish legitimate terrorist suspects from others picked up in roundups of illegal immigrants.

The first report brought widespread, bipartisan criticism of the Justice Department, which defended its conduct at the time, saying that it "made no apologies for finding every legal way possible to protect the American public from further attacks."

Comstock said the Justice Department had been sensitive to concerns about civil rights and civil liberties after the attacks, and had been aggressive in investigating more that 500 cases of complaints of ethnic "hate crimes" linked to backlash from the attacks.

"We've had 13 federal prosecutions of 18 defendants to date, with a 100 percent conviction rate," she said. "We have a very aggressive effort against post-9/11 discrimination."

"This report shows that we have only begun to scratch the surface with respect to the Justice Department's disregard of constitutional rights and civil liberties," Rep. John Conyers (D-MI) said in a statement. "I commend the inspector general for having the courage and independence to highlight the degree to which the administration's war on terror has misfired and harmed innocent victims with no ties to terror whatsoever."

The report draws no broad conclusions about the extent of abuses by Justice Department employees, although it suggests that the relatively small staff of the inspector general's office has been overwhelmed by accusations of abuse, many filed by Muslim or Arab inmates in federal detention centers. The inspector general said that from December 16 through June 15, his office received 1,073 complaints "suggesting a PATRIOT Act-related" abuse of civil rights or civil liberties.

The report suggested that hundreds of the accusations were easily dismissed as not credible or impossible to prove. But of the remainder, 272 were determined to fall within the inspector general's jurisdiction, with 34 raising "credible PATRIOT Act violations on their face."

In those 34 cases, it said, the accusations "ranged in seriousness from alleged beatings of immigration detainees to B.O.P. correctional officers allegedly verbally abusing inmates."

The report said two of the cases were referred to internal investigators at the Federal Bureau of Investigation because they involved bureau employees. In one case, the report said, the bureau investigated—and determined to be unsubstantiated—a complaint that an F.B.I. agent had "displayed aggressive, hostile and demeaning behavior while administering a pre-employment polygraph examination."

The report said the second case involved accusations from a naturalized citizen of Lebanese descent that the F.B.I. had invaded his home based on false information and wrongly accused him of possessing an AK-47 rifle. That case, it said, is still under investigation by the bureau. Reported in: *New York Times*, July 21. □

in review

The Words We Live By: Your Annotated Guide to the Constitution. Linda R. Monk. Hyperion. 2003. 288 p. $23.95.

Linda R. Monk accurately describes her analysis of the Constitution, *The Words We Live by*, with her subtitle, *Your Annotated Guide to the Constitution*. Except for a brief two-page introduction and a one-page conclusion, the text of the Constitution provides the organization of the book as she considers first the original document and then the 27 amendments. Readers can pick topics of interest or use the book as a reference work; the format does not require systematic reading.

Each section starts with the full text of the article or amendment with italics to indicate superseded parts. Monk then breaks the text into logical segments to add her explication. The format includes sidebars that provide quotations and definitions of terms. Frequent text boxes supplement the main analysis with extended quotes and additional commentary focused on a specific subject. Monk has selected a broad range of black-and-white illustrations including photographs, portraits and prints to illustrate her points.

As the topic of prime interest to readers of this *Newsletter*, I will provide a more detailed analysis of the section on the First Amendment. Though the First Amendment has less than fifty words, Monk devotes 24 pages, about 9% of the total text, to these most important rights. After a one-page introduction, she allocates about nine pages to religion, nine pages to freedom of speech, three pages to the freedom of the press, and two pages to the right of assembly. She includes the history of the various concepts, provides definitions of less common terms such as "symbolic speech" and "fighting words," and cites important Supreme Court cases to show the legal interpretation of disputed sections. I believe that she is successful in presenting views from multiple points on the political spectrum and in stressing the difficulty that the Supreme Court has often faced in deciding among competing constitutional principles.

The "dull" parts of the Constitution are treated accordingly. The 16th Amendment, Income Taxes, and the 26th Amendment, Suffrage for Young People, each has one page as befits the lack of controversy in these areas.

Monk does not explicitly identify her audience, but I concur with the Library of Congress decision to use the subdivision "Popular works." The readable text, the choice of attention-grabbing anecdotes, the heavy use of graphics, and the accessible format make this book suitable both for adults and teenagers. While I would not cite this text in a scholarly research paper, I confess that I not only enjoyed reading the book but also learned things I did not know before, such as the fact that "the U.S. flag salute during the 1930s involved an extended arm movement similar to the Nazi gesture of "Heil Hitler." (p. 134)

I have three concerns. First, the book may pose difficulties for readers with little knowledge of American history. Its basic non-chronological format, though the amendments obviously appear in chronological order, requires the reader to put Monk's points into historical context because Supreme Court decisions most often reflect the values of their time. Second, Monk might have described in greater detail the background and workings of the Constitutional Convention at the start of the book to help the reader better understand the importance of the Constitution as the first document of its kind. Finally, the book is completely centered on the United States with no attempt to compare the Constitution and the government it created with different systems elsewhere.

In her supplementary materials, Monk provides sources for her quotations in her "endnotes," a six page selected bibliography, and an extensive index as is appropriate for a quasi-reference work. As a librarian, I was also pleased to see that she thanks the staff of the Martha Washington Branch of the Fairfax County Library "who dealt with [her] literally hundreds of requests with professionalism and good cheer." (p. 8)

Overall, Monk's *The Words We Live By* is an entertaining introduction to the Constitution that imparts much factual information in a clear and concise fashion. Its format as a commentary on the text of the Constitution limits its usefulness as a history of constitutional thought but increases its value as a reference source. With its totally American focus, readers should consult other works for the importance of the Constitution within a global political context.—*Reviewed by Robert P. Holley, Professor, Library & Information Science Program, Wayne State University, Detroit, Mich.* □

schools

Oakland, California

Some teachers in Oakland are rallying behind two students who were interrogated by the Secret Service following remarks the teenagers made about the President during a class discussion. The incident has many people angry.

For years, the classroom has been the setting for the free expression of ideas, but in late April, certain ideas led to two students being taken out of class and grilled by the United States Secret Service. It happened at Oakland High School. The discussion was about the war in Iraq. Two students made comments about the President of the United States. While the exact wording is up for debate, the teacher didn't consider it mere criticism, but a direct threat and she called the Secret Service.

Teacher Cassie Lopez said, "They were so shaken up and afraid." Other teachers also came to the aid of the two students and cried foul. "I would start with the teacher, she made a poor judgement," Lopez said.

"What we're concerned about is academic freedom and that students have the right to free expression in the classroom," said teacher Larry Felson. Even worse, the teachers said, was that the students were grilled by federal agents without legal counsel or their parents present, just the principal.

"When one of the students asked, 'do we have to talk now? Can we be silent? Can we get legal counsel?' they were told, 'we own you, you don't have any legal rights,'" Felson charged.

"We don't want federal agents or police coming in our schools and interrogating our children at the whim of someone who has a hunch something might be wrong," Lopez added.

The union representing Oakland teachers requires that students be afforded legal counsel and parental guidance before they're interrogated by authorities. It's too late for the two involved in this incident, and teachers said it's something they'll carry with them for years.

"I tell you the looks on those children's faces. I don't know if they'll say anything about anything ever again. Is that what we want? I don't think we want that," said Lopez. Reported in: KRON-TV online, May 7.

colleges and universities

Macomb County, Michigan

A Macomb Community College English professor who's been at odds with his employer for several years was suspended again following a complaint by a female student. John Bonnell, 64, previously suspended by MCC for language used in class and for his public protests of the discipline, was suspended without pay for the summer term. The reason or reasons for the discipline were unclear.

Bonnell said he was disciplined for violating the "speech code" or harassment policy for his instruction related to a James Joyce short story that contains sexual innuendo. He said he could not provide specifics for fear of reprisal, and doesn't know all the reasons. "I don't know what the facts are," he said. "Some of the things I'm being disciplined for aren't in her (the student's) complaint."

MCC officials denied that Bonnell was suspended for having the students read the short story, "The Boarding House," or for "suggesting that the Joyce story, or any other story, contained sexual innuendo," the college said in a statement.

Bonnell, who teaches Western literature and English composition, lost $8,000 for the suspension from June 16 to August 16, he said. He presumably will return to teach at MCC in the fall.

The suspension is another chapter in the several-year saga pitting Bonnell against the college. Referred to as the "swearing professor" by some, Bonnell was issued a three-day suspension following a November 1998 complaint by a student that was investigated under its sexual harassment policy. The original suspension for language use was increased by MCC officials to one semester for his public protests of the suspension, which he claimed attacked his First Amendment right to free speech as well as academic freedom. Reported in: *Macomb Daily*, July 1.

Chapel Hill, North Carolina

Upset by what they called "pure liberal propaganda" that is both "sacrilegious" and "Christian bigotry," several Republican state legislators and incoming students at the University of North Carolina at Chapel Hill held a news conference July 9 at which they criticized the book chosen for the university's summer reading program.

The book, *Nickel and Dimed: On (Not) Getting By in America*, by Barbara Ehrenreich, was selected this spring with the idea that it "would be a relatively tame selection," said Dean L. Bresciani, the university's interim vice chancellor. Freshmen and transfer students are expected to read the book over the summer and be prepared to discuss it when they arrive on the campus.

Critics said last year's choice, *Approaching the Qur'an: The Early Revelations*, by Michael A. Sells, was so sympathetic to Islam that impressionable young students might be persuaded to convert.

"I don't think we were looking for controversial topics," said Bresciani, who was surprised by the reaction Ehrenreich's book provoked. "We were looking for a topic that would provide a basis for discussion."

But for the state lawmakers, the book is not an appropriate means to start a conversation with students. Rather, the book choices this year and last are part of a larger "pattern there about being anti-Christian," said State Sen. Austin M. Allran, a Republican.

"I am offended because I am a Christian and she [Ehrenreich] is an atheist," said Allran, who has not read the entire book but disagrees with what he has read. "I don't like the disparaging remarks made about Jesus. If I was there, I would sue the school for religious discrimination, and, in fact, I think someone needs to."

That happened last year, when three freshmen sued the university over its choice of the book by Sells. The federal lawsuit was filed on the students' behalf by the Family Policy Network, a Christian group based in Virginia. Courts later rejected the argument that the reading requirement violated the U.S. Constitution.

While Allran and the other legislators did not threaten to cut the university's state funds over the book selections, they do want changes. For example, Allran said the university should be less arrogant and should stop teaching "mass culture." Instead, he said, the summer-reading selections should come from the classics.

Bresciani, however, explained that the university doesn't assign classics for the summer reading program because students are expected to read those on their own. The program is not meant to teach the content of the books, he said, but to give students a forum for talking about contemporary issues.

"I think there is a misconception that the goal of the program is the book," Bresciani said. "But it's the critical evaluation that comes out of the discussion sessions that is the goal of the program." Reported in: *Chronicle of Higher Education* (online), July 11.

publishing

Akron, Ohio

Six national free expression groups demanded July 16 that the All-American Soap Box Derby cease efforts to censor a new history of the Derby, *Champions, Cheaters and Childhood Dreams: Memories of the All-American Soap Box Derby*, by Melanie Payne. In a letter to Roy Hartz, the chairman of the Derby's board of trustees, the groups charged that at least one Derby official had attempted to pressure the publisher of the book, the University of Akron Press, to make changes in its title and contents. In addition, Derby officials refused to permit the book to be sold at the national championship in Akron on July 26.

"One of the major purposes of the All-American Soap Box Derby is to demonstrate to young people the importance of 'the spirit of competition.' We urge the Derby to set an example for its contestants by demonstrating a tolerance for the competition of ideas," the letter said. It was signed by the American Booksellers Foundation for Free Expression, the Center for First Amendment Rights, Feminists for Free Expression, the Freedom to Read Foundation, the National Coalition Against Censorship, the Office for Intellectual Freedom of the American Library Association, and PEN American Center.

The controversy began in December when Derby officials learned that Payne's book would contain a discussion of cheating by a number of contestants over the years as well as other potentially unflattering information. Payne said that Robert Troyer, the Derby publicity director, told her that the Derby would no longer assist her and would not give her permission to use official photos of the event.

Later in the month, officials at the University of Akron Press learned that at least one Derby official had lobbied university officials in an effort to change the book. On December 13, the Press' editorial board adopted a resolution taking note of the efforts to censor *Champions, Cheaters and Childhood Dreams* and affirming its intention of publishing the manuscript without changes.

The Derby's efforts to interfere in the publication of *Champions, Cheaters and Childhood Dreams* continued. In a potentially crippling blow to the marketing plans for the book, Derby officials reportedly told Payne's publisher that it would not be allowed to rent a booth at Derby Downs, the site of the national championship, where it had hoped to sell the book. A Derby official reportedly attempted to prevent the sale of the book at an adjacent site as well. Reported in: ABFE Press Release, July 16.

art

Pilot Point, Texas

It was not what was inside Wes Miller's art gallery that had some residents of this North Texas town upset—it was

what was painted outside. Miller said he told an artist not to paint anything on the building that would get him in trouble. She painted a nude Eve on the side of his downtown gallery. But Miller had approved the design and even helped local artist Justine Wollaston paint the mural.

"I don't see anything wrong with it," he said.

However, Pilot Point police disagreed. Sgt. James Edland delivered a written notice to Miller in late July that the artwork violated Texas' law against distributing "harmful material" to a minor. Police gave Miller until August 20 to change the artwork or face criminal charges.

"We haven't filed any charges," Edland said. "We've just had some complaints."

It's not worth the fight, said Miller, who has owned Farmers and Merchants Art Gallery for 28 years in the town 40 miles north of Dallas. "I think of it as art on an art gallery wall," he said. "I don't feel it's my job to jeopardize my financial stability for the constitutional rights of the citizens of Pilot Point."

Miller said he and the artist discussed how to change the mural.

One of the ideas was a white stripe across the breasts with the black letters "CENSORED."

Wollaston, a professional artist for about ten years, met Miller through the city's Main Street organization. She said the mural depicts her interpretation of Eve at the moment she made the moral choice to partake of the apple and that only a few people had any problem with it.

But City Councilman Jay Melugin said the mural was disgusting. "I just don't like my children seeing it," he said. Reported in: *Denton Record-Chronicle*, July 25.

foreign

Surrey, British Columbia

A British Columbia school board has rejected three books depicting homosexual marriage from being used as a teaching resource in kindergarten and Grade 1 classes. The books banned by trustees at the Surrey School Board—*Asha's Mums*, *Belinda's Bouquet* and *One Dad, Two Dads, Brown Dads, Blue Dads*—all depict families with gay parents.

The board was forced to review the books after an initial ban on religious grounds was rejected by the Supreme Court of Canada. A judge told the trustees to re-evaluate the books using the same criteria they'd apply to other books.

But James Chamberlain, the teacher who first brought the books forward seven years ago, charged the books were banned based on "a variety of bizarre criteria." "They said that *Asha's Mums* was not an age-appropriate book," Chamberlain said. "They objected to the book because they said the teacher was not a positive role model in the book and that kids whose families objected to homosexuality in the book weren't portrayed equally with kids who thought that having two moms or two dads was OK."

"And they objected to all the books because they said that they didn't portray the negative side of homosexuality and that the books needed to be balanced to portray both sides of the issue," he added.

School trustees said the books' grammar, punctuation and depiction of men are also problematic. Chamberlain also argued that based on the given criteria, no other book in use in Surrey would be approved either. "I would be happy to bring forth three books about heterosexual families next year and see if the board applies the same scrutiny to them," he said, adding that Surrey is the only local board who banned the books.

Chamberlain said that by blocking the books from classrooms, the Surrey board is preventing teachers from applying the required curriculum. "The provincial curriculum requires that teachers teach about a variety of family models and that includes same-sex families."

But school trustees say five- and six-year-olds are too young to grasp the sexual issues that could arise around talk of gay parents. Chamberlain says he's taken some heat over his fight to teach the books, but overall, parents have been "overwhelmingly supportive." Reported in: CTV, June 13.

Haifa, Israel

The University of Haifa blocked a controversial academic conference in May leading some researchers to charge that the institution is violating academic freedom. The daylong conference was on the subject of the historiography of the 1948 war between Israel and the Palestinians. Israelis call this conflict the War of Independence and Palestinians call it al-Naqba, meaning "the catastrophe."

The meeting was organized by a group of scholars who are often termed "post-Zionists." Central among them is the historian Ilan Pappe, of the university's international-relations department. According to Pappe, when the participants arrived at the hall where the conference was scheduled to take place, the room was locked and security men were stationed outside.

In an e-mail account of the incident that Pappe sent to his colleagues at the university, he said that he had been instructed by the university's dean of social sciences, Aryeh Ratner, to cancel the conference. According to Pappe, Ratner said that the conference could not be held at the university because one of the scheduled speakers was Udi Adiv, who served a jail term in the 1970s and 1980s after being convicted of spying for Syria.

Another speaker was to be Teddy Katz, who claims that Israeli forces committed a massacre in 1948 in the Arab village of Tantura. Katz's master's thesis on this incident was approved, and then the approval was rescinded, in another controversy at the university.

Nechama Wintman, a spokeswoman for the university, would say only that Pappe had not been allowed to hold the conference because he had not complied with university procedures in organizing it. She said that university officials would not comment on the incident.

Pappe, an acerbic critic of Israel, has earned the ire of many of his colleagues, who claim that he has attacked them virulently in a variety of forums. Some of them have demanded his dismissal. Reactions among faculty members at Israeli universities have been mixed, with some praising the university for refusing to sponsor what was, in their view, a political event thinly disguised as an academic conference. Others have said that Israeli universities must be open to the expression of opinions, even if they are extreme and their spokesmen far outside the mainstream.

"The fact that Pappe did not include even one Zionist historian in the panel shows that he is the one who is afraid of an open discussion on the subject," said Tuvia Blumenthal, an economist at Ben-Gurion University of the Negev, who has locked horns with the post-Zionists at other conferences. Nevertheless, Blumenthal maintains, the university erred in preventing the conference from taking place.

"A couple of years ago Pappe was invited to give a seminar about al-Naqba at our university. It never occurred to me to ask the dean to cancel the seminar. Instead, I asked the chairperson to be a discussant, and expressed my views on the subject. I think that this is what historians at HU should have done," he explained. Reported in: *Chronicle of Higher Education* (online), May 27. ☐

(Rep. Sanders's remarks . . . from page 176)

Margaret Sanger, Oscar Wilde, Eugene Debs, Sigmund Freud, Wilhelm Reich, Martin Luther King, Jr.—people who have been jailed, people who have been burned at the stake, people who have had their books banned because they had the misfortune, if you like, of espousing ideas that were not quite ready for prime time, that were years ahead of being accepted by the period in which they lived.

We understand the enormous struggles that have had to take place, and the persecutions that have occurred, for those who advocated the commonly accepted principles today of workers' rights, religious freedom, the abolition of slavery, racial equality, women's rights, gay rights, public education, internationalism—and on and on it goes.

In the United States today there is a great concern about terrorism. Our country suffered a dastardly and horribly destructive attack on September 11, 2001—and there is no doubt in my mind that there are people on this earth who would like to attack us again. Is terrorism a serious problem? The answer is "yes." It is. Should the United States, Canada and the rest of the world do all that we can to protect innocent people from terrorist attacks? The answer, once again in my view, is "yes." But the question that we are struggling with in the United States today is: "Do we have to sacrifice our basic liberties and constitutional rights in order to protect ourselves from the threat of global terrorism?" And in my view, the answer to that question is a resounding "NO." With proper intelligence work, with effective law enforcement efforts, we can fight terrorism, protect the American people, and maintain the freedoms which make us a great nation—and that is what we must do.

The very good news that I bring to you today is that all across the United States more and more citizens, including thousands of librarians and booksellers, are speaking out against the extremely anti-democratic elements of the so-called USA PATRIOT Act—legislation that was hastily passed in the wake of the September 11 attack. According to the Bill of Rights Defense Committee, the umbrella organization which is helping communities across the United States better understand the implications of the PATRIOT Act, one hundred and twenty seven cities and towns have passed resolutions expressing concerns about the USA PATRIOT Act. Three state legislatures, Hawaii, Alaska and my own in the State of Vermont, have also taken positions on this issue. Many similar initiatives in other statehouses are also moving forward. All together, the number of citizens represented by these cities, towns and states is over sixteen million. This is an impressive number and one that is growing week by week.

And how has the Department of Justice responded to this? Barbara Comstock, a representative of the Department of Justice stated: "Some of the different ordinances that have passed throughout the country, about 45 percent of them, almost half, are either in cities in Vermont, very small populations, or in sort of college towns in California. It's in a lot of the usual enclaves where you might see nuclear-free zones or, you know, they probably passed resolutions against the war in Iraq."

Well, not quite. In addition to such cities as Baltimore, Minneapolis, Philadelphia, Detroit and Denver there is Blount County in eastern Tennessee. The *Kansas City Star* reported the following about the concerns that conservatives in this Tennessee county have with the PATRIOT Act: "At the urging of a local talk-radio host, Blount County commissioners recently adopted a lengthy resolution declaring the PATRIOT Act an unconstitutional infringement on 'God-given rights and liberties.' 'All of our elected officials are Republican, except for one,' said the commission's secretary, Rhonda Pitts, who described the populace as active churchgoers. 'It was a long meeting, after midnight, and this was the last item on the agenda.'"

In fact, we are making so much progress that Attorney General Ashcroft and the Department of Justice are becoming nervous, defensive and increasingly disingenuous. The *New York Times* reported on Friday that the Attorney General "called on the press and television today to dispel fears about the sweeping antiterrorism law known as the USA PATRIOT Act." Recently, the Director of the FBI, Robert Mueller, has also spoken out on this issue.

Mr. Ashcroft stated, and I quote: "The PATRIOT Act simply does not allow federal law enforcement free or

unfettered access to local libraries, bookstores or other businesses." Mr. Ashcroft, according to the *New York Times*, said that warrants issued under the PATRIOT Act had to be approved by a judge.

Well, let me take this opportunity to ask the press and television to help spread the truth about the USA PATRIOT Act. The truth about the USA PATRIOT Act, Mr. Ashcroft, is that this is an extremely dangerous piece of legislation that strikes at the heart of what freedom is about and, in fact, allows government agents, in unconstitutional ways, to snoop and spy on the American people and certainly does allow law enforcement agencies virtually unfettered access to libraries and bookstores.

Specifically, under Section 215 of the USA PATRIOT Act, the government can get a search warrant for "any tangible things" in a library or bookstore which can include books, records, papers, floppy disks, data tapes and computer hard drives. In other words, it allows the FBI to force library or bookstore staff to turn over library circulation records or book purchasing lists, Internet use records, and patron registration information.

Even worse, in order to get the warrant, the FBI only needs to claim that the information they are seeking is somehow connected to an investigation into international terrorism—something which the FBI is certainly engaged in. In my view, and the view of many legal experts across the country, this broad language allows the FBI to justify almost any search with virtually no probable cause.

Also, we should remember that this whole request for documents is done behind closed doors in a secret court called the Foreign Intelligence Surveillance Act or "FISA" court, with no lawyer representing those whose records are being searched. And the wording of the law is such that the judge reviewing the request by the FBI has no discretion to deny it. Section 215 of the PATRIOT Act turns the judiciary into a rubber stamp in this area.

Let's be clear. In the past, librarians and booksellers have been willing to assist law enforcement with their investigations when proper procedures and rules were followed. Before getting the warrants, however, the police would have to show evidence that a particular person's records were related to a criminal or terrorist investigation. Forty-eight states across the United States have laws on the books which protect the confidentiality of library records. But the PATRIOT Act overrides these laws. I agree with librarians and bookstore owners all across this country that we should not be giving the government the power to go on fishing expeditions by sifting through the borrowing or purchasing records of libraries or bookstores with such low standards of evidence and in a secret court proceeding.

And to make a bad situation worse, librarians or bookstore owners served with a search warrant issued by the FBI are forbidden by the USA PATRIOT Act from telling anyone that the search has been asked for by the government, that records have been given to the government, or that the library or bookstore is being monitored. Not only is breaking this "gag order" punishable by law, but the library cannot even inform a library patron that his or her records were turned over to the FBI or that they are part of an FBI investigation. The FBI says that under the law, booksellers and librarians can talk to a lawyer to help them process the subpoena but that's it—no one else is allowed to know.

Internet access for research, communication and learning, which in this day and age are so central to our lives, are also affected by the new law. With their warrant from the FISA court, under Section 215 the government can come into a library and take out the computer hard drives and search the sites that someone is visiting. All of this can happen without anyone being able to inform the patrons of the library.

As I mentioned earlier, the Department of Justice is becoming a bit defensive on this issue and, in response to widespread public concern, they are mounting a major media campaign to defend the USA PATRIOT Act. Here is what Mark Corallo, a Justice Department spokesman said in an article which appeared in the *Washington Post* on April 10. He said: "We're not going after the average American. We're only going after the bad guys. We respect the right to privacy. If you're not a terrorist or a spy, you have nothing to worry about."

What's the problem with that statement, and the philosophy behind that statement? The problem is that while all of us can agree that terrorists who blow up buildings and kill innocent people are, in fact, "bad guys," history shows us that it is not uncommon that the people who are investigated, harassed, and punished by the government are not only not "bad guys," they are sometimes very good guys or, at the least, absolutely innocent people. And the point here is that George Bush and John Ashcroft should not be in the position of arbitrarily determining who is a "bad guy." The law should be very explicit about who can be investigated and why. That is what we call government by law.

Let me briefly recite some examples in American history that I know you're familiar with to emphasize the point of why this should be the case.

During the period around World War I, thousands of people in the United States were arrested, and some were deported, not because they were violent people, but because they believed in trade unionism and workers' rights. That was their crime.

During World War II, many thousands of Japanese-Americans were thrown into special camps because the government thought they were "bad guys"—despite the fact that not one Japanese-American ever committed an act of sabotage.

During the McCarthy period of the 1950s, many lives were destroyed and many people lost their jobs because of the irrational and dishonest anti-communist attacks of the Senator from Wisconsin.

During the 1960s, agents of the U.S. government, including the F.B.I., investigated and attacked many people

whose major crime was that they believed in civil rights and opposed the war in Vietnam. Included in that number was Martin Luther King, Jr. whose phone was tapped and who was constantly followed by F.B.I. agents. In fact, the F.B.I. attempted to blackmail him by revealing information about his personal life, and suggested that the honorable thing to do would be to commit suicide.

It is today no secret that the long-time Director of the F.B.I., J. Edgar Hoover, had a massive record of files on the personal lives of thousands of Americans—including many elected officials. One of the files contained information about President John F. Kennedy.

During Watergate, of course, in the 1970s, the Attorney General of the United States, the man ultimately in charge of the F.B.I., went to jail for massive violations of the law—and for allowing government agents to trample on the constitutional rights of Americans.

And that is why we do not want to allow the F.B.I. and other government agencies to go on "fishing expeditions," and why we want the law to be very explicit about who can be investigated.

Now some may ask how the federal government is using this new power. Members of Congress, both Republicans and Democrats, are also interested in that question and have pressured the Justice Department for that information. The response they have received after months of badgering the department was inadequate. The Justice Department claimed most of the information regarding libraries and bookstores was "confidential," and could not be provided to Congress for the public to see. Last August, several national organizations filed a Freedom of Information Act request to get statistical and other information, such as how many times the government has used its expanded surveillance authority under the PATRIOT Act. Although some information was released this winter after months of court battles, the government still refuses to release to the public basic statistical information on how many times various sections of the PATRIOT Act have been used.

No one has a clear idea of how many times libraries have been visited and under what authorities. The Justice Department attempted to calm the librarians' and the public's fears by saying they had visited libraries 50 times in the last year. But when asked how many times they had visited the libraries using powers granted under the PATRIOT Act, they responded "it's classified." How is the Congress and the public supposed to make sure that these new powers are not being abused when we do not even know how often they are being invoked and the types of institutions that are being investigated? We have people in the Justice Department saying "Oh, the FBI would never waste their time in libraries or bookstores" and then other officials saying "libraries and bookstores should not be allowed to become safe havens for terrorists." This is on top of constant misstatements to the press regarding what powers the PATRIOT Act has granted the FBI in relation to libraries and bookstores, and denial of the hard fact that the PATRIOT Act severely lowered legal standards the FBI has to meet before gaining access to these private records.

And now let me say a few words about the legislation that I have introduced in Congress, H.R. 1157, the Freedom to Read Protection Act, to protect libraries, bookstores, and their patrons from Section 215 of the USA PATRIOT Act. Simply stated, this legislation will exempt libraries and bookstores from Section 215 of the USA PATRIOT Act, and will require far greater government accountability than at present. It will require that the government provides detailed reports to Congress so we can keep track of how governmental agencies are using their newly expanded powers.

This legislation is currently cosponsored by 118 bipartisan Members of Congress, and has been endorsed by the American Library Association, the American Booksellers Association, the Association of American Publishers, American Association of University Professors and more than 35 other organizations. In addition, 16 newspaper editorial boards including the *Los Angeles Times*, the *Detroit Free Press*, the *Nashville Tennessean*, the *Fort Worth Star Telegram*, the *Seattle Times*, and the *Honolulu Advertiser* have endorsed this legislation. Most importantly, though, it has been concerned librarians, booksellers, and citizens, who, through their grassroots work, have brought this issue to the attention of their communities, their representatives in Washington, and have turned this into a nationwide campaign that is growing everyday. To all of you here today that have been engaged in that effort, I'd like to say thank you.

Let me conclude by telling you what you already know. These are difficult times for our country and for the world. The economy is in trouble, and terrorism poses a real threat here and abroad. People are frightened and long for security. In times like this, it is incumbent upon every patriotic American who truly understands what this country is about, and what American freedom is supposed to mean, to stand as tall as we can to protect our basic constitutional rights. This will not be an easy fight, but let us promise each other that on our watch, the constitutional rights of this country will be preserved. ☐

VISIT THE *NEWSLETTER ON INTELLECTUAL FREEDOM* ONLINE AT WWW.ALA.ORG/NIF

U.S. Supreme Court

(Supreme Court upholds CIPA. . . from page 173)

not to acquire. Justices Sandra Day O'Connor, Clarence Thomas and Antonin Scalia signed the opinion.

Two other members of the majority, Justices Anthony M. Kennedy and Stephen G. Breyer, wrote separately to express constitutional concerns about the statute, and to suggest that it could be subject to a new First Amendment challenge if it proved unduly burdensome after it went into effect.

Justices Breyer and Kennedy joined in the judgment that the law should be upheld on the ground that the disabling provision of the statute can be applied without significant delay to adult library patrons, and without the need for the patron to provide a reason for the request to disable.

Justice Breyer made clear in his concurring opinion that he only joined the plurality's judgment because "[a]s the plurality points out, the Act allows libraries to permit any adult patron access to an 'overblocked' Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter."

Additionally, Justice Kennedy cautioned that "[i]f some libraries do not have the capacity to unblock specific Web sites or to disable the filter, or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge."

"There is no doubt, therefore," noted ALA attorney Theresa Chmara, "that libraries that refuse to disable filters at the request of an adult patron or that impose substantial burdens on a patron's ability to have the filter disabled risk an individual litigation in which the library will be a defendant."

All nine justices agreed that restricting children's access to pornographic material did not in itself pose a constitutional problem. Nor was there any dispute that available filters are blunt instruments that, by the use of key words, inevitably block more material than the statute contemplates.

The question was the extent to which this "overblocking" infringes the First Amendment rights of adult library users. Sexually explicit material that comes under the general heading of pornography has First Amendment protection, although obscenity and child pornography do not.

Several elements of the Children's Internet Protection Act served to make it different and constitutionally defensible, in the majority view. One was that the law operates as a condition on receiving federal money rather than a criminal prohibition.

"Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives," Chief Justice Rehnquist said.

The three dissenting justices, Ruth Bader Ginsburg, David H. Souter and John Paul Stevens, disputed the premises of Chief Justice Rehnquist's opinion.

"An abridgment 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 Stevens said.

Justice Souter said the proper analogy to blocking the Internet was not a failure to stock a particular book. "It is either to buying a book and then keeping it from adults lacking an acceptable 'purpose' or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults," he said. He and Justice Ginsburg said public libraries would violate the First Amendment if they blocked the Internet on their own initiative.

Internet access does not turn a library into a public forum, Chief Justice Rehnquist said, describing the Internet as an alternative tool for fulfilling libraries' traditional function of helping "research, learning and recreational pursuits."

The opinion appeared to take a narrower view of a "public forum" than the court has used in recent cases. The issue is significant as a matter of First Amendment doctrine, because the government can curtail speech in a public forum only for compelling reasons.

When the case was argued in March, Solicitor General Theodore B. Olson told the court that librarians would quickly unblock filters without requiring explanations or otherwise violating users' privacy. Even if that were not the case, Chief Justice Rehnquist said, "the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment."

In a published statement, ALA expressed disappointment with the ruling: "We are very disappointed in today's decision. Forcing Internet filters on all library computer users strikes at

the heart of user choice in libraries and at the libraries' mission of providing the broadest range of materials to diverse users. Today's Supreme Court decision forces libraries to choose between federal funding for technology improvements and censorship. Millions of library users will lose.

"We are disappointed the Court did not understand the difference between adults and children using library resources. This flies in the face of library practice of age-appropriate materials and legal precedent that adults must have access to the full range of health, political and social information. The public library is the number one access point for online information for those who do not have Internet access at home or work. We believe they must have equal access to the Information Superhighway.

"In light of this decision and the continued failure of filters, the American Library Association again calls for full disclosure of what sites filtering companies are blocking, who is deciding what is filtered and what criteria are being used. Findings of fact clearly show that filtering companies are not following legal definitions of "harmful to minors" and "obscenity." Their practices must change.

"To assist local libraries in their decision process, the ALA will seek this information from filtering companies, then evaluate and share the information with the thousands of libraries now being forced to forego funds or choose faulty filters. The American Library Association also will explain how various products work, criteria to consider in selecting a product and how to best use a given product in a public setting. Library users must be able to see what sites are being blocked and, if needed, be able to request the filter be disabled with the least intrusion into their privacy and the least burden on library service.

"The ALA will do everything possible to support the governing bodies of these local institutions as they struggle with this very difficult decision."

Ginnie Cooper, the executive director of the Brooklyn Public Library, said that she was disappointed, but that her library would work within the law. "The real goal is for the people who use the library to get what they want and need, and not be getting what they don't need," Cooper said. "We'll do our best to find, within this new rule, how it is that we can do that."

Some libraries may decide to forgo federal financing if the alternative is filtering, said Emily Sheketoff, executive director of the Washington office of the American Library Association. "Some library boards have already decided that they are not going to offer their library patrons second-rate information," she said. `They are going to make sure that their library patrons get access to the same quality of information that rich people get at home."

This is not a simple matter in a time of steep budget cuts, Sheketoff said, but noted that San Francisco library officials had already said they would refuse financing rather than add filters.

Judith Krug, Director of the ALA Office for Intellectual Freedom, and other opponents of the new law took solace in the way the Supreme Court interpreted the statute. They argued that the court had eased the law by holding that libraries could turn the software off and on readily for adults who ask to use unfiltered computers. The statute had said that a library patron had to show a "bona fide research purpose" for disabling the software.

"They are reinterpreting the law," Krug said, adding that if librarians have a relatively free hand in turning off the software for their patrons, "we can live with that."

"Filters don't work," said Maurice J. Freedman, director of the Westchester Library System in the suburbs of New York City and president of the American Library Association. "And they're not going to work any better because the Supreme Court says libraries have to install them."

Supporters of the bill and of the software, said, however, that the decision reinforced the idea that the software was good enough. "It validates the effectiveness and the usefulness of the technology," said David Burt, a spokesman for N2H2, a filtering software company, and a longtime antipornography activist. "I think they correctly recognize that the technology does have flaws—it's not perfect, it overblocks—but the flaws can be easily dealt with by turning it off."

Jerry Berman, president of the Center for Democracy and Technology, a high-tech policy group in Washington, D.C., said libraries should use their buying power. "I hope they turn this unwelcome decision into an opportunity to make filtering First Amendment-friendly," he said, including requiring companies to disclose sites they block and to make programs easy for librarians to turn off and on. Reported in: *New York Times*, June 23, 24.

The Supreme Court struck down a ban on gay sex June 26, ruling that the law was an unconstitutional violation of privacy. The 6-3 ruling reversed a ruling seventeen years ago that states could punish homosexuals for what such laws historically called deviant sex.

Laws forbidding homosexual sex, once universal, now are rare. Those on the books are rarely enforced but underpin other kinds of discrimination, lawyers for two Texas men had argued to the court. The men "are entitled to respect for their private lives," Justice Anthony Kennedy wrote. "The state cannot demean their existence or control their destiny by making their private sexual conduct a crime."

Justices John Paul Stevens, David Souter, Ruth Bader Ginsburg and Stephen Breyer agreed with Kennedy in full. Justice Sandra Day O'Connor agreed with the outcome of the case but not all of Kennedy's rationale. Chief Justice William H. Rehnquist and Justices Antonin Scalia and Clarence Thomas dissented.

"The court has largely signed on to the so-called homosexual agenda," Scalia wrote for the three. He took the unusual step of reading his dissent from the bench. "The court has taken sides in the culture war," Scalia said, adding that he has "nothing against homosexuals."

The two men at the heart of the case, John Geddes Lawrence and Tyron Garner, have retreated from public

excerpts from Supreme Court opinions in CIPA case

From the plurality opinion by Chief Justice William H. Rehnquist, joined by Justices Sandra Day O'Connor, Antonin Scalia, and Clarence Thomas:

Congress has wide latitude to attach conditions to the receipt of federal assistance in order to further its policy objectives. Congress may not "induce " the recipient "to engage in activities that would themselves be unconstitutional." . . .

We have held in two analogous contexts that the government has broad discretion to make content-based judgments in deciding what private speech to make available to the public. In *Arkansas Ed.Television Comm'n* v. *Forbes,* we held that public forum principles do not generally apply to a public television station's editorial judgments regarding the private speech it presents to its viewers. "[B]road rights of access for outside speakers would be antithetical, as a general rule, to the discretion that stations and their editorial staff must exercise to fulfill their journalistic purpose and statutory obligations." Recognizing a broad right of public access "would [also] risk implicating the courts in judgments that should be left to the exercise of journalistic discretion."

Similarly, in *National Endowment for Arts* v. *Finley,* we upheld an art funding program that required the National Endowment for the Arts (NEA) to use content-based criteria in making funding decisions. We explained that "[a]ny content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding." In particular, "[t]he very assumption of the NEA is that grants will be awarded according to the 'artistic worth of competing applicants,' and absolute neutrality is simply inconceivable." We expressly declined to apply forum analysis, reasoning that it would conflict with "NEA's mandate . . . to make esthetic judgments, and the inherently content-based 'excellence' threshold for NEA support."

The principles underlying *Forbes* and *Finley* also apply to a public library's exercise of judgment in selecting the material it provides to its patrons. Just as forum analysis and heightened judicial scrutiny are incompatible with the role of public television stations and the role of the NEA, they are also incompatible with the discretion that public libraries must have to fulfill their traditional missions.

Public library staffs necessarily consider content in making collection decisions and enjoy broad discretion in making them. The public forum principles on which the District Court relied are out of place in the context of this case. Internet access in public libraries is neither a "traditional " nor a "designated "public forum. . . .

A public library does not acquire Internet terminals in order to create a public forum for Web publishers to express themselves, any more than it collects books in order to provide a public forum for the authors of books to speak. It provides Internet access, not to "encourage a diversity of views from private speakers," but for the same reasons it offers other library resources: to facilitate

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view. They were each fined $200 and spent a night in jail for the misdemeanor sex charge in 1998.

The case began when a neighbor with a grudge faked a distress call to police, telling them that a man was "going crazy" in Lawrence's apartment. Police went to the apartment, pushed open the door and found the two men having anal sex.

As recently as 1960, every state had an anti-sodomy law. In 37 states, the statutes have been repealed by lawmakers or blocked by state courts. Of the 13 states with sodomy laws, four—Texas, Kansas, Oklahoma and Missouri—prohibit oral and anal sex between same-sex couples. The other nine ban consensual sodomy for everyone: Alabama, Florida, Idaho, Louisiana, Mississippi, North Carolina, South Carolina, Utah and Virginia. The high court ruling apparently invalidated those laws as well.

The Supreme Court was widely criticized seventeen years ago when it upheld an antisodomy law similar to Texas's. The ruling became a rallying point for gay activists. Of the nine justices who ruled on the 1986 case, only three remain on the court. Rehnquist was in the majority in that case—*Bowers* v. *Hardwick*—as was O'Connor. Stevens dissented.

A long list of legal and medical groups joined gay rights and human rights supporters in backing the Texas men. Many friend-of-the-court briefs argued that times have changed since 1986, and that the court should catch up. At the time of the court's earlier ruling, 24 states

criminalized such behavior. States that have since repealed the laws include Georgia, where the 1986 case arose.

Texas defended its sodomy law as in keeping with the state's interest in protecting marriage and child-rearing. Homosexual sodomy, the state argued in legal papers, "has nothing to do with marriage or conception or parenthood and it is not on a par with these sacred choices."

The state had urged the court to draw a constitutional line "at the threshold of the marital bedroom." Although Texas itself did not make the argument, some of the state's supporters told the justices in friend-of-the-court filings that invalidating sodomy laws could take the court down the path

supremes give government clean sweep in First Amendment rulings

The following is a survey of the U.S. Supreme Court's First Amendment rulings in the session that ended on June 26, 2003.

In most of the seven First Amendment cases decided in the 2002-2003 term, free speech or association seemed to be secondary concerns behind other government interests. And in many cases, the Court seemed intent on setting limits on past trends that favored the First Amendment.

The bottom-line result meant defeat for the First Amendment claimant in all of the cases this past term—a pro-government sweep unprecedented in recent memory.

"We're seeing a new hesitation on the part of a Court that has been viewed as libertarian on the First Amendment," said Ronald Collins, a scholar with the First Amendment Center. "The First Amendment was put on hold this term."

On hold, but not in full-speed reverse, the consensus appears to be. While some of the losses stung, and could have unforeseen free-speech consequences—such as for the campaign-finance cases set for argument in September—there was no broad feeling among commentators that the high court had suddenly become inhospitable to the First Amendment. "It was not that awful," said Collins.

Washington, D.C., lawyer Ronald Klain also said "the First Amendment had a really lousy year." To him, the common thread in many of the cases was the Court's rejection of invoking the First Amendment "to resist laws of general applicability." In other words, the Court was less sympathetic than usual to First Amendment arguments made by those accused of violating laws that are not specifically aimed at repressing speech—such as laws against fraud, trespassing or drug use in prisons.

The Court's First Amendment docket for the term, strictly speaking, is not over. The campaign-finance cases, known collectively as *McConnell* v. *Federal Election Commission*, will be argued this term, on September 8—but the decision almost certainly will be handed down next term, which begins in early October.

If this term's trend extends to those cases, then the First Amendment objections to the law will have a hard time being heard above the government's claim that restrictions on campaign money are needed to curb corruption.

Here is a quick review of the Court's First Amendment decisions of the term, broken down into two categories. In the first, the First Amendment issue took a back seat to other government interests. In the second, the Court seemed intent on reining in or stopping the progress of a prior trend of court precedents. (Note: Some of the cases could fit in both categories.)

- *Eldred* v. *Ashcroft*. This 5-4 opinion rejected the view that Congress violated the First Amendment when it

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of allowing same-sex marriage. Reported in: *New York Times*, June 26.

The Supreme Court on June 26 dismissed a case against sneaker giant Nike, Inc., and whether free speech protections extend to corporate advertising. The court said it never should have taken on the dispute.

The action is not a ruling on the merits of Nike's claims, but it apparently means a California antiglobalization activist can continue a lawsuit against the company. Nike had argued that private individuals cannot use the courts to police what companies say about themselves.

The Nike case was the last announced for the current term. Six justices agreed to dismiss the case, and three said they would have ruled on it. The court issued a one-sentence, unsigned order dismissing the case. Justice John Paul Stevens explained some of the reasons in a separate opinion. Stevens said the court did not need to delve into the complex free speech issues raised by the case now.

"This case presents novel First Amendment questions because the speech at issue represents a blending of commercial speech and debate on issues of public importance," Stevens wrote for himself and Justices David Souter and Ruth Bader Ginsburg. Justices Sandra Day O'Connor, Anthony M. Kennedy and Stephen Breyer went on record saying the court could have resolved the case. Reported in: Associated Press, June 26.

The Supreme Court on June 2 issued its opinion in *Dastar Corp*. v. *Twentieth Century Fox Film Corp*., a case in which ALA participated as a "friend of the court" in support of Dastar Corporation. The Court ruled unanimously 8-0 (Justice Breyer did not participate in the case) in favor of Dastar, saying the company did not act illegally when it repackaged and distributed a television documentary which had entered the public domain.

The case involved Section 43(a) of the Lanham Act, a federal law which mainly has to do with trademark but was being used in this instance to apply to an alleged use and re-use of materials in the public domain.

In the 1950's, Twentieth Century Fox Film (Fox) had produced a television documentary on World War II. Fox did not renew the copyright and the film entered into the public domain. Dastar copied large chunks of the documentary, added some of its own footage, and distributed it as its own without attributing the source of some of the footage. Fox sued and

won in the appeals court, a ruling that the Supreme Court overturned in a decision that is significant for database protection specifically and for preserving the public domain in general.

Jonathan Band, ALA's outside counsel who wrote the *amicus* brief, explained that in its ruling in favor of Dastar, the Supreme Court focused on the meaning of the word "origin" in Section 43(a) of the Lanham Act, and concluded that the goods in question here—the videotapes—originated with Dastar, not Fox. The Court said that to treat the origin of communication products as the entity that created the underlying intellectual property "would create a species of mutant copyright law" that would impinge upon the "public's 'federal right to copy and to use' expired copyrights." Thus, Band stated, "The opinion sharply limits the ability of copyright holders to use Section 43(a) as a super-copyright law."

The Supreme Court also stated that if Congress wanted to create an addition to the copyright law, it would have to do so explicitly. Those who have been seeking database protection legislation in Congress might interpret this statement as authorizing it to enact database legislation. However, Band cautioned, the Court in its decision also noted the limits on Congress's intellectual property power—it may not create perpetual patent or copyright protection.

Joining ALA as signatories to an *amici curiae* (friends of the court) brief in February 2003 were the American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association.

The decision may, however, also generate yet a new round of discussions within the academic community on the tangential implications of what does or should constitute plagiarism. For example, with there no longer being an obligation to inform readers that one has liberally borrowed complete passages from another's work (provided the work is no longer protected by copyright), what except professional standards exist to guard against plagiarism? Reported in: ALA Washington Office Newsline, June 2.

church and state

Montgomery, Alabama

A federal appeals court ordered the chief justice of the Alabama Supreme Court July 1 to remove a monument engraved with the Ten Commandments from the rotunda of his courthouse. The United States Court of Appeals for the Eleventh Circuit, in Atlanta, concluded that the monument violates the First Amendment's prohibition on government establishment of religion.

The court was also unusually blunt in responding to the assertion by Chief Justice Roy S. Moore in court papers in the case that he does not recognize the authority of the federal court in this matter. The appeals court compared Chief Justice Moore to "those Southern governors who attempted to defy federal court orders during an earlier era," likening him to such state's rights proponents of segregation as Govs. George C. Wallace of Alabama and Ross Barnett of Mississippi. In the 1950's and 1960's, federal courts ordered them and other Southern officials not to interfere with school desegregation and protest marches.

"Any notion of high government officials being above the law did not save those governors from having to obey federal court orders," Judge Ed Carnes wrote for the appeals court, "and it will not save this chief justice from having to comply with the court order in this case."

The appeals court did not set a timetable for the removal of the monument. Chief Justice Moore's lawyer, Herbert W. Titus, said the case was not over. "We're not giving up," Mr. Titus said. "We are going to file a petition for review in the United States Supreme Court." Titus declined to say whether Chief Justice Moore would comply with the order to remove the monument if the Supreme Court declines to hear the case or affirms the order.

The appeals court's decision was unanimous, but Chief Judge J. L. Edmondson concurred only in the result, not the decision's reasoning. He did not explain why. Richard W. Story, a visiting district court judge from Atlanta, was the third member of the panel.

The 5,280-pound granite monument setting out the Ten Commandments was erected in August 2001 as the centerpiece of the rotunda of the Alabama State Judicial Building, which houses several state courts, the state's law library and the court system's administrative office. Three lawyers who found the monument offensive sued to have it removed. In November, Judge Myron H. Thompson of U.S. District Court in Montgomery ruled in their favor.

Chief Justice Moore has been closely associated with the Ten Commandments throughout his career on the Alabama bench. He hung a hand-carved plaque depicting the commandments in his courtroom when he was a circuit court judge in Gadsden, generating controversy and lawsuits. In 2000, he successfully campaigned for chief justice as the "Ten Commandments judge."

The appeals court noted that the excerpts from Exodus chiseled into the tablets are a Protestant version of the commandments. "Jewish, Catholic, Lutheran and Eastern Orthodox faiths use different parts of their holy texts as the authoritative Ten Commandments," the court said. "The point is that choosing which version of the Ten Commandments to display can have religious endorsement implications."

The appeals court made clear that it will not brook disobedience from Chief Justice Moore if its order is upheld. "We do expect that if he is unable to have the district court's order overturned through the usual appellate processes," Judge Carnes wrote, "when the time comes Chief Justice Moore will obey that order. If necessary, the court order will be enforced. The rule of law will prevail." Reported in: *New York Times*, July 2.

Internet

San Francisco, California

The U.S. Court of Appeals for the Ninth Circuit waded into cyberspace June 24 to set liability for Web site operators who put libelous information on the Internet. But defining "content provider" under the 1996 Communications Decency Act wasn't as easy as it might seem. In doing so, a divided court established a new test for judges to apply.

The case began when Tom Cremers, responsible for the security of countless priceless Rembrandts at the famed Dutch Rijksmuseum, received an intriguing e-mail in 1999 from a North Carolina handyman. The tipster, Robert Smith, said he'd done some work on a house occupied by a lawyer named Ellen Batzel. Smith claimed he overheard Batzel say she was the descendent of "one of Adolf Hitler's right-hand men," and furthermore, her walls were decorated with what looked to be old European paintings.

Cremers runs a Web site called Museum-Security.org, which tracks thefts of great artwork and tries to help find them. The site helps track down missing art by sending clips of e-mails, articles and other information to museum directors, law enforcement personnel and others who sign up for Cremers' listserv. Cremer posted the information provided by Smith on the site.

Batzel says she isn't a Nazi heir, but had clients in the art world, both in North Carolina and Los Angeles, where she now resides. She said Smith was retaliating for a contract dispute and was upset that she wouldn't pass his amateur screenplay around to her friends in Hollywood. She did have some valuable works of art, but since her house was being renovated they were wrapped in bubble wrap and kept in the garage.

"That's hardly where you put the Matisse and the Renoir," said her lawyer, Howard Friedman of Los Angeles' Friedman/Lieberman.

Batzel sued Cremers for libel. The decision by a divided 3-judge panel announced a new rule for those claims: Web site operators can be sued only for posting information that a reasonable person would have known wasn't intended for publication.

"There are facts that could have led Cremers reasonably to conclude that Smith sent him the information because he operated an Internet service," Judge Marsha Berzon wrote. The case was remanded to determine whether "a reasonable person in Cremer's position would conclude that the information was sent for Internet publication, or whether a triable issue is presented on that issue."

Berzon was joined by Senior Judge William Canby, Jr., while Judge Ronald Gould dissented.

"In my view, there is no immunity under the CDA if Cremers made a discretionary decision to distribute on the Internet defamatory information about another person, without any investigation whatsoever," Gould wrote. "If Cremers made a mistake, we should not hold that he made that mistake on the Internet."

The CDA bars suits against "providers and users of an interactive computer service" when that information is provided by another content provider. Without significantly altering or editing the Smith e-mail, Berzon wrote, Cremers could not properly be labeled a content provider.

As case law has developed over the CDA, courts have usually held that Internet service providers and bulletin board hosts cannot be sued for libel. The individual users, however, can. *Batzel* v. *Cremers* falls somewhere in the middle. Reported in: *The Recorder*, June 25.

Santa Clara, California

The California Supreme Court on June 30 upheld the right of a former Intel Corporation engineer to send e-mail blasts to former co-workers knocking Intel's employment practices. The Santa Clara-based chipmaker had contended Kourosh Kenneth Hamidi had committed a kind of electronic trespass by sending his e-mails via the Internet on six occasions over almost two years in the late 1990s to more than 30,000 Intel workers who used Intel's electronic mail system. The messages criticized Intel's employment practices, warned employees of the dangers those practices posed to their careers and suggested employees consider moving to other companies.

Hamidi breached no computer security barriers in order to communicate with Intel employees and offered to—and did—remove from his mailing list any recipient who so wished, the court said. The e-mails "caused neither physical damage nor functional disruption to the company's computers, nor did they at any time deprive Intel of the use of its computers," according to the court opinion. "The contents of the messages, however, caused discussion among employees and managers."

Intel's suit claimed that by communicating with its employees over the company's e-mail system, Hamidi committed the civil violation called trespass to chattels. A Sacramento trial court granted Intel's motion for summary judgment and enjoined Hamidi from any further mailings.

A divided Court of Appeal affirmed.

But the state Supreme Court decided the lower courts werewrong. "After reviewing the decisions analyzing unauthorized electronic contact with computer systems as potential trespasses to chattels, we conclude that under California law the tort does not encompass, and should not be extended to encompass, an electronic communication that neither damages the recipient computer system nor impairs its functioning. Such an electronic communication does not constitute an actionable trespass to personal property," the high court said.

"The consequential economic damage Intel claims to have suffered, i.e., loss of productivity caused by employees reading and reacting to Hamidi's messages and company efforts to block the messages, is not an injury to the company's interest in its computers—which worked as intended and were unharmed by the communications—any more than the personal distress caused by reading an unpleasant letter

would be an injury to the recipient's mailbox, or the loss of privacy caused by an intrusive telephone call would be an injury to the recipient's telephone equipment," the ruling declared. Reported in: *Silicon Valley/San Jose Business Journal*, June 30.

Washington, D.C.

The U.S. Court of Appeals for the District of Columbia Circuit refused June 4 to stay a federal judge's order requiring Verizon to reveal the names of two subscribers who each allegedly offered copyrighted songs over the Internet. Verizon has been fighting a request for the names from the Recording Industry Association of America.

The appeals-court order may have implications for colleges and universities. Some observers speculate that the recording industry will next seek to make colleges reveal the names of file-sharing students. The recording industry association has been bombarding colleges' network administrators with complaints about illegal file sharing, but so far those complaints have cited only the Internet addresses of the computers involved.

The recording industry sued Verizon to get the two subscribers' names, contending that the Digital Millennium Copyright Act gives copyright holders the right to learn the identity of anyone who shares copyrighted digital material illegally. In January and again in April, Judge John Bates of the U.S. District Court for the District of Columbia ruled in favor of the recording industry's claim.

Verizon challenged his rulings before the appeals court. Although it has not issued a decision in the case, that court's refusal to stay Judge Bates's ruling means that Verizon may have to turn over the names before the appeals process is completed.

"The Court of Appeals decision confirms our long-held position that music pirates must be held accountable for their actions, and not be allowed to hide behind the company that provides their Internet service," Cary Sherman, president of the recording-industry association, said in a statement. "The courts have repeatedly affirmed that the DMCA subpoena authority is constitutional, and does not threaten anyone's free speech or privacy rights."

Electronic-privacy advocates and some academic organizations had filed briefs saying that if the recording industry prevails in the case, "it will create a new, easy way to silence controversial speakers online." The industry's critics have also argued that the industry trade group has proven clumsy in its attempts to identify people who have downloaded copyrighted music. Library groups like the American Library Association and the Association of Research Libraries were among Verizon's supporters.

System administrators and technology-law experts at colleges and universities have watched the case closely. "There is some concern that if the RIAA position is sustained, a copyright owner could issue a request for the identity of hundreds of students, and that could cause some problems," said John C. Vaughn, the executive vice president of the Association of American Universities, which did not file a brief in the case.

Vaughn sits on a committee of higher-education administrators and entertainment officials that is working on solutions to the file-sharing dilemma.

He believes the recording industry will start asking for student names. What remains to be seen, he said, is whether the entertainment industry will distinguish between minor, everyday users of file-sharing programs and flagrant file-sharers—those who operate businesses or services based on sharing music and other media.

"What I would think unfortunate is if the RIAA's position is sustained, and that becomes the principal vehicle by which the RIAA and its companies try to go after all students at any level of use," he said.

Other observers, however, are skeptical that the outcome of the case will directly affect higher education. Rodney J. Petersen, the director of information-technology policy and planning at the University of Maryland at College Park, said that unlike Verizon, colleges and universities have generally been responsive to copyright complaints from the recording industry.

"I've never expected that the outcome of this decision will mean that we will suddenly start seeing numbers of subpoena requests coming in for the identifying information of users," he said.

In the past, officials at the recording industry have said they have no plans to use the case to seek the names of students, but they have not disavowed the option, either.

In April, the recording industry sued four students at three universities whom it accused of illegal file sharing and from whom it sought millions of dollars in damages. A month later, the suits were settled out of court when the students agreed to pay from $12,000 to $17,500 each. They did not admit any wrongdoing. Reported in: *Chronicle of Higher Education* (online), June 5.

West Palm Beach, Florida

The beauty queen and the cad both have Web sites. Katy Johnson, who was Miss Vermont in 1999 and Miss Vermont USA in 2001, uses her site to promote what she calls her "platform of character education." "She is founder of Say Nay Today and the Sobriety Society," the site says, "and her article 'ABC's of Abstinence' was featured in *Teen* magazine."

Tucker Max's site promotes something like the opposite of character education. It contains a form through which women can apply for a date with him, pictures of his former girlfriends and reports on what Max calls his "belligerence and debauchery."

Until a Florida judge issued an unusual order in May, Max's site also contained a long account of his relationship with Johnson, whom he portrayed, according to court papers, as vapid, promiscuous and an unlikely candidate for membership in the Sobriety Society. The order, entered by

Judge Diana Lewis of Circuit Court in West Palm Beach, forbids Max to write about Johnson. It has alarmed experts in First Amendment law, who say that such orders prohibiting future publication, prior restraints, are essentially unknown in American law. Moreover, they say, claims like Johnson's, for invasion of privacy, have almost never been considered enough to justify prior restraints.

Judge Lewis ruled on May 6, before Max was notified of the suit filed by Johnson and without holding a hearing. She told Max that he could not use "Katy" on his site. Nor could he use Johnson's last name, full name or the words "Miss Vermont." The judge also prohibited Max from "disclosing any stories, facts or information, notwithstanding its truth, about any intimate or sexual acts engaged in by" Johnson. That prohibition is not limited to his Web site. Finally, Judge Lewis ordered Max to sever the virtual remains of his relationship with Johnson. He is no longer allowed to link to her Web site. The page of Max's site that used to contain his rambling memoir now has only a reference to the court order.

In her lawsuit, Johnson maintained that Max had invaded her privacy by publishing accurate information about her and had used her name and picture for commercial purposes. Her lawyer, Michael I. Santucci of Fort Lauderdale, asked Judge Lewis to seal the court file in the case, a request on which she has not yet ruled, and to prohibit Max from talking about the suit, a request she rejected.

John C. Carey, a lawyer at Stroock & Stroock & Lavan in Miami, recently agreed to represent Max. Carey said he would ask Judge Lewis to withdraw her order and dismiss the case. "Katy Johnson holds herself out publicly, for her own commercial gain, as a champion of abstinence and a woman of virtue," Carey said. "The public has a legitimate interest in knowing whether or not her own behavior is consistent with the virtuous image that she publicly seeks to promote."

Both Johnson and Max sell T-shirts and the books they have written on their sites. Johnson's book is *True Beauty: A Sunny Face Means a Happy Heart*. Max's is *The Definitive Book of Pick-Up Lines*. That the sites are also used to make money should make no difference in whether Max may be forbidden to write about Johnson, said Gregg D. Thomas, an expert in First Amendment law at Holland & Knight in Tampa. "This is clearly a suppression of free speech," Thomas said of Judge Lewis's order.

Prior restraints based on invasion of privacy are unusual. "It has happened perishingly rarely," said Diane L. Zimmerman, a law professor at New York University and an expert in First Amendment and privacy law. "When it has happened, it has generated enormous controversy."

Professor Zimmerman noted the example of *Titicut Follies*, a documentary about patients in a mental hospital that was banned on privacy grounds in 1969 by Massachusetts's highest court. A judge lifted the ban in 1991.

The prohibition on linking to Johnson's site is "kooky," said Susan P. Crawford, who teaches Internet law at Cardozo School of Law at Yeshiva University. "To block the ability to link," Professor Crawford said, "is in effect to say her site is her own private property."

While a prior restraint may not be warranted, legal experts said, Johnson's invasion-of-privacy claim, so long as it seeks only money, may be justified. But that, too, raises difficult issues, Professor Zimmerman said. "If you're telling people they can't talk about something like this," she said of Max's memoir, "you're also telling them they can't talk about their own lives." Reported in: *New York Times*, June 2.

student press

University Park, Illinois

A federal appeals court will reconsider an April ruling that college newspapers have far greater free-speech rights than high-school newspapers do. The ruling, in a case involving Governors State University, was made by a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit. But the full court granted a motion by the university to throw out that decision, and all of the judges will now hear the case.

At issue in the case is whether a 1988 Supreme Court decision that allowed high-school administrators to review and censor student publications applies to student newspapers at public colleges. In that case, *Hazelwood School District* v. *Kuhlmeier*, the Supreme Court ruled that high-school journalists did not enjoy the same First Amendment protections as adults.

The Governors State case began when editors at the student newspaper, *The Innovator*, sued a dean after she ordered the newspaper's printer not to print the paper until its content was reviewed by a university official. But the dean argued, with the backing of the Illinois attorney general, that the case should be thrown out because the university has the authority to make such requests.

Advocates for student journalists are watching the case closely, and some say they are concerned about the court's decision to revisit the case. "It's disappointing, certainly, because it was such a strong decision supporting student press freedom," said Mark Goodman, executive director of the Student Press Law Center, a nonprofit group that has given legal help to the student editors who are plaintiffs in the case. "In my mind, it rarely means something good when a court agrees to rehear a case." Reported in: *Chronicle of Higher Education* (online), July 1.

terrorism

New York, New York

On July 22, a federal judge dismissed charges that lawyer Lynne F. Stewart supported terrorism by helping an imprisoned

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terrorism

Ann Arbor, Michigan

On July 30, the American Civil Liberties Union and six Muslim groups brought the first constitutional challenge to the sweeping antiterrorism legislation passed after the September 11 attacks, arguing that the law gives federal agents virtually unchecked authority to spy on Americans. The lawsuit, filed in federal court in Michigan, seeks to have a major section of the law, the USA PATRIOT Act, declared unconstitutional on the grounds that it violates the privacy, due process and free speech rights of Americans.

"We think the Constitution is really on our side," Ann Beeson, the civil liberties union's chief lawyer in the suit, said. "There are basically no limits to the amount of information the F.B.I. can get now—library book records, medical records, hotel records, charitable contributions—the list goes on and on, and it's the secrecy of the whole operation that is really troublesome."

Justice Department officials said they planned to review the lawsuit and had no immediate comment on it. The department issued a statement saying that the expanded law enforcement powers granted in the part of the act under attack, Section 215, had proved to be essential tools in fighting terrorists.

"The PATRIOT Act was a long overdue measure to close gaping holes in the government's ability, responsibly and lawfully, to collect vital intelligence information on criminal terrorists to protect our citizens from savage attacks such as those which occurred on September 11, 2001," Barbara Comstock, a representative of the department, said.

Civil liberties advocates and Justice Department officials said the suit, which names as defendants Attorney General John Ashcroft and Robert S. Mueller, III, the F.B.I. director, was the first to challenge the constitutionality of the law. Congress passed the measure overwhelmingly six weeks after the September 11 attacks in response to complaints from law enforcement officials that their pursuit of terror suspects was hampered by outdated and ill-conceived restrictions.

The lawsuit came after months of increasingly sharp political debate in Washington and around the country over the act. In May, Democrats beat back a move to extend the law past 2005, and in July, the House voted 309 to 118 to scale back a "sneak and peak" provision in the law that allows the authorities to conduct searches and seizures without immediately notifying the target of the investigation.

Among the plaintiffs is a group of Muslims affiliated with a mosque in Ann Arbor, who maintain that they have been unfairly questioned and singled out by the F.B.I, and that some associates have been imprisoned and deported But the plaintiffs acknowledged in the lawsuit that because of the secrecy provisions built into the PATRIOT Act, they "have no way to know with certainty" that the F.B.I. has used its expanded surveillance powers against them. Reported in: *New York Times*, July 31.

Internet

Hollywood, California

The Recording Industry Association of America announced June 25 that it will start gathering evidence to prepare lawsuits against individuals who offer "substantial amounts" of copyrighted music over networks, raising the specter of more college students being sued by the industry. The group said thousands of lawsuits could be filed, beginning as early as mid-August.

To amass evidence of illegal file sharing, the trade group will use software that scans public directories of users of peer-to-peer networks. The software finds the Internet addresses of those who offer to freely distribute music files. The association plans to then identify the music distributors' Internet service providers, and issue subpoenas demanding that they reveal the distributors' names.

"The law is clear, and the message to those who are distributing substantial quantities of music online should be equally clear," said Cary Sherman, president of the recording-industry group. "This activity is illegal. You are not anonymous when you do it, and engaging in it can have real consequences."

Sherman said his group was not specifically targeting college students, but anyone who distributes large amounts of copyrighted music. "Could that include college students?" he asked. "Sure."

Sheldon E. Steinbach, vice president of the American Council on Education, applauded the association's announcement. "How else are students going to get the message that what they're doing is in violation of the law?"

In April, recording companies sued four college students, accusing them of operating illegal file-sharing programs on campus networks. The lawsuits were settled out of court, with the students agreeing to pay amounts ranging from $12,000 to $17,500 to the music industry over several years and to shut down their file-sharing systems. One of the students, Jesse Jordan, who will be a sophomore this fall at Rensselaer Polytechnic Institute, recouped his entire $12,000 fine when people read about his plight on the Internet and sent in donations.

In June, the U.S. Court of Appeals for the District of Columbia Circuit refused to block a subpoena from the recording group that forced Verizon Communications, Inc., to hand over the names of subscribers who allegedly had offered copyrighted songs over the Internet (see page 000).

In addition to fighting illegal file-sharing in court, the recording industry is stepping up efforts to entice consumers to buy music online, rather than download it for free. At a meeting June 26 in New York City—in the office of Bertelsmann Music Group—college officials, music publishers, online music service companies, and representatives of five major recording studios began negotiating the details of a proposal to allow colleges and/or individual college students to pay a fee and gain access to music online.

The idea already is endorsed by Graham B. Spanier, president of Pennsylvania State University at University Park, who is co-chair of a committee on file sharing made up of college administrators and entertainment industry representatives.

"We're not trying to have a one-size-fits-all solution. What we're trying to do is find what works best for colleges as they see it, and as online-service music companies see it," Sherman said. "Let a thousand flowers bloom." Reported in: *Chronicle of Higher Education* (online), June 26.

schools

Jacksonville, Arkansas

A teenager disciplined by his school district for talking about being gay will get $25,000, an apology from school officials and his disciplinary record cleared. Thomas McLaughlin, 14, of Jacksonville settled his lawsuit July 17 against the Pulaski County Special School District, which disciplined him for speaking to his junior high classmates about his sexual orientation.

"I'm really glad that this is all over," McLaughlin said. "No more students should have to go through what I did."

In a statement issued through his secretary, Superintendent Don Henderson said the school district was satisfied with the settlement. The American Civil Liberties Union filed the lawsuit in April, alleging teachers disciplined McLaughlin for his remarks as well as preached to him from the Bible and told his parents that he was gay. Before the lawsuit was filed, the district wrote the ACLU saying that McLaughlin's discussions disrupted the learning process and argued that it was appropriate to discipline him.

A general condition of the settlement requires that the school district not disclose a student's sexual orientation or punish a student for talking about his or her sexual orientation outside the classroom. The ACLU hopes other schools will learn from the suit, said Rita Sklar, who directs the ACLU in Arkansas.

"Public schools aren't above the Constitution," she said, "and they can't get away with silencing gay students and violating their rights." Reported in: Associated Press, July 18.

colleges and universities

Glendora, California

A day before Citrus College was to appear in court to defend its speech code against a student's claim that it violated his First Amendment rights, the California community college repealed its code, ending the litigation. The decision signaled the first victory for the Foundation for Individual Rights in Education (FIRE) in its new campaign to do away with such codes at public universities.

Christopher Stevens, a 20-year-old student at Citrus College, had teamed up with FIRE, a nonprofit foundation devoted to free speech on college campuses, for legal support after he said the college refused to let him conduct a "pro-America rally" outside of designated free-speech zones unless he did so as part of a registered club.

Stevens and FIRE contended that it was unconstitutional for the college to confine protests and rallies to the free-speech areas, which FIRE representatives said were on the fringes of the campus. They filed a lawsuit against the college May 20.

Michelle C. Small, director of publications and student recruitment at Citrus College, said that the main free-speech zone is in the middle of the campus, in the main quad. She said that even though no particular event had prompted the college to adopt the free-speech-zone policies, they went into effect a year ago to protect students who wanted to continue going to class, uninterrupted, in the event a large-scale protest took place. Nonetheless, on June 5, a day before the initial court appearance in the case, the college rescinded the speech-related policies that Stevens and FIRE were calling into question. Small said that a college commission would look at the policies in the fall when students and faculty members returned to the campus. The commission will then create a board to evaluate whether the policies should be dispensed with or revised.

"I think we were surprised when the suit was filed," Small said. "I think that it's good though, if there are concerns, to evaluate what you are doing."

FIRE began its campaign in April in a lawsuit filed against Shippensburg University of Pennsylvania. The group's strategy is to sue public colleges across the country until it has ensured solid rulings against speech codes in each of the twelve federal appellate circuits. Reported in: *Chronicle of Higher Education* (online), June 12.

New Orleans, Louisiana

The University of New Orleans violated the free-speech and due-process rights of a Messianic Jew when it prevented her from distributing a religious pamphlet last fall on the campus, according to a lawsuit filed July 28. The suit asserts that the state university prohibited Michelle Beadle, a New Orleans resident and missionary, from circulating the pamphlet, "You Can Say Anything . . . Almost!" because it contains the phrase "Jews should believe in Jesus."

The university contends that the phrase could be offensive to some people on the campus, said Stuart J. Roth, senior counsel at the American Center for Law and Justice, an advocacy group in Virginia Beach that is representing Beadle.

"This is clearly a case of prior restraint," Roth said. The U.S. Constitution permits the university officials to regulate the time, place, and manner of Beadle's public speech, he contended, but the officials may not discriminate based on the content of that speech. "The fact that an individual may disagree with the content of a form of speech can't be grounds for denying distributions," he said. "The First Amendment protects speech that is offensive because everyone can find something that is offensive in everyone's speech or message."

Roth said the university's policy not only requires that all literature be subject to prior review, but also lacks clear guidelines on what material may be distributed. Moreover, he said, the university allows no appeals of such decisions, which are left up to one administrator. Roth added that the American Center had filed similar lawsuits in the past and had worked with universities and colleges to make their policies conform with the law. Reported in: *Chronicle of Higher Education* (online), August 1.

Columbus, Ohio

Students who participate in riots or other disturbances will be immediately expelled from state-supported colleges in Ohio for a year and will be ineligible for state financial aid for two years under state legislation enacted in June. Although supporters of the measure say it will help prevent riots like those that have erupted after college sporting events, some students and state officials worry that it could be used to punish students who gather for peaceful reasons, such as political protests.

The new policy was signed into law by Gov. Bob Taft, a Republican, as part of the state budget. The punishments would affect students enrolled at state-supported colleges who are convicted of aggravated riot, disorderly conduct, or failure to disperse, provided that the violations occurred "within the proximate area where four or more others are acting" in a similar fashion.

One opponent of the law, State Sen. Robert F. Hagan, a Democrat, said he worried that it could be applied to nearly any large gathering of students. "I'm not defending riots, but I'm defending peaceful assembly," he said. "I'm defending the right of freedom of speech, and I'm defending the right of people to do that without being arbitrarily harassed by their government." He added that the police could easily define "failure to disperse" as simply not clearing an area quickly enough or could enforce it on people who were simply watching a protest.

Officials at Ohio State University said they were still unfamiliar with the law and were scrambling to determine its potential impact. Some 45 people were arrested last fall, when a riot broke out after the university's football team defeated the University of Michigan to win a berth in the national-championship game. "We need time to study what the implications will be," said Bill Hall, vice president for student affairs.

But he said that the law could serve as one tool to help the university curb riots. "The majority of our students, faculty, and staff are frustrated with these few individuals that continue to come into the area and continue to cause trouble in the university district. They're asking that we take the strongest possible stance with respect to these violators."

However, Hall said, the university is already punishing rioters. "I think we've taken the harshest possible steps—we have suspended students anywhere from two quarters up to a year and a half to two years in length," he added. One possible concern, he said, is that the new law could limit colleges' flexibility in responding to disturbances.

As to whether the law could be used to punish student activists, Hall said: "I'm not prepared to comment on that point yet at this point in time. I've got to do some more homework." Reported in: *Chronicle of Higher Education* (online), July 1.

broadcasting

Washington, D.C.

The House of Representatives overwhelmingly passed legislation July 23 to block a new rule supported by the Bush administration that would permit the nation's largest television networks to grow bigger by owning more stations. The vote, which was 400 to 21, set the stage for a rare confrontation between the Republican-controlled Congress and the White House, because there is strong support in the Senate for similar measures, which seek to roll back a June decision by the Federal Communications Commission to raise the limit on the number of television stations a network can own.

The F.C.C. has ruled that a single company can own television stations reaching 45 percent of the nation's households, but the House measure would return the ownership cap to 35 percent.

Only a few weeks earlier, support for the F.C.C.'s move by House Republican leaders had been expected to counter the Senate uprising. But many House members from both parties evidently took note of the vocal resistance to the F.C.C. action by many members of the public and a broad spectrum of conservative and liberal lobbying groups—from the National Rifle Association to the National Organization for Women.

The House rebuke of the F.C.C. was embedded in a spending bill. The White House, which threatened to veto the bill if the network provision remains in it, sought to play down the lopsided size of the vote. Claire Buchan, a White House representative said that presidential advisers had recommended approval of the legislation so that it could proceed to a House-Senate conference committee where the network ownership provision might be stripped out.

If, as is becoming more likely, the provision survives in final legislation, President Bush will face a difficult political predicament. He could carry out his veto threat and alienate some of his traditional constituents, which include several conservative organizations opposed to a number of new rules adopted by the F.C.C. Or, he could sign the legislation, abandon the networks and undercut his own advisers who have recommended that he reject the legislation.

A number of Republicans said privately that they were surprised that the president would be willing to expend significant political capital over the issue; others said the White House felt compelled to defend the decisions of a regulatory agency whose leaders it had appointed.

Judging political sentiment from the vote, a veto could be easily overridden in the House, and perhaps in the Senate, where there is also broad support for repealing some of the F.C.C.'s new media rules. Five weeks earlier, the Senate Commerce Committee adopted a provision similar to the one the House passed. The Senate committee passed the provision by voice vote after a wide majority of Democrats and Republicans on the committee expressed support for it.

At the time of that vote, network executives and top aides to Michael K. Powell, the F.C.C. chair and architect of the new rules, predicted that the effort to overturn the rules would die in the House because its leadership had supported them. The vote, a clear repudiation of Powell, suggested that he miscalculated the widespread opposition to the new rules.

One of the main sponsors of the Senate provision, Sen. Ted Stevens (R-AK) chairs the Senate Appropriations Committee, and other Senate supporters of reversing the rules include Trent Lott (R-MS) and Ernest F. Hollings (D-SC), the ranking Democrat on both the Senate Commerce Committee and the Appropriations subcommittee that oversees the F.C.C.'s budget. Senate officials said they expected that a measure to roll back the F.C.C.'s decision would reach the floor soon after the Senate returned from its summer recess in September.

Supporters of the effort to overrule the F.C.C. said the House action demonstrated that the leadership in the House, as well as the White House, had lost control over the legislation. "The House has now repudiated the F.C.C.'s attempted giveaway of the public airways to national media giants based in New York and L.A.," said Representative David R. Obey (D-WI), author of the network ownership provision in the bill. "I hope the administration is listening and will fix its flawed policy, so citizens can get accurate, free-flowing information—the lifeblood of democracy."

After the vote, Stephen Friedman, the president's top economic adviser, dismissed the assertion by the legislation's backers that further media consolidation would reduce the diversity of voices on the airwaves. He said that if all four networks reached 45 percent of the nation's homes, that would demonstrate that there is competition in the media market.

Asked in a brief telephone interview how the administration might be able to turn the tide in Congress, he said, "I think we try to educate the members and make the case." He also conceded that he was not a media specialist and that he was only beginning to understand the political forces at play. "The politics I'm still getting an education on," he said.

A number of Democratic presidential contenders, meanwhile, criticized the rules and the consolidation in the media industry. They include Howard Dean, the former Vermont governor; Senator John Edwards; Senator John Kerry; and Representative Dennis J. Kucinich.

But traditional allies of the administration, most notably a coalition of religious and conservative groups, have also joined liberal organizations in attacking the new rules. The religious and conservative organizations have said they fear the growth of the media may reduce their access to the airwaves. They also blame the networks for programming that they say is increasingly violent and indecent. The coalition includes the Parents Television Council, the United States Conference of Catholic Bishops, Consumers Union, the Writers Guild of America and the Leadership Conference on Civil Rights.

The concern over the growth of media conglomerates transcends traditional party lines in part because of the personal experiences of many politicians. Congressional aides say lawmakers fear they could suffer political problems if there are too few media outlets in their home districts, making it more difficult for them to convey their messages to their constituents and increasing the influence of the remaining newspapers and stations.

Powell and the networks have responded with the assertion that without some regulatory relief for the networks, free over-the-air television could be eliminated. The networks say they need to find new ways to raise revenues to support expensive programming like the Olympic Games and the Super Bowl, and owning more stations will give them the money to do so.

Powell, who had been largely silent during the Congressional debate, issued a statement defending the F.C.C.'s rules. "Our democracy is strong," he said, saying that critics have overlooked the various ways the public receives information besides broadcast television. "It would be irresponsible to ignore the diversity of viewpoints provided by cable, satellite and the Internet."

Network executives agreed. They have been unhappy that the commission under Powell did not relax the rules even further and have suggested they may bring a lawsuit to challenge even the new rules. "NBC was disappointed, and today's action by the House was a huge step backwards in giving broadcasters the regulatory relief needed to compete with cable," Shannon Jacobs, an NBC representative, said.

There are also signs that investors are nervous about the possible reimposition of the old rules. Stock prices of several of the parent companies of the networks—General Electric, Owner of NBC; Viacom, owner of CBS; and the News Corporation, which owns Fox—have declined slightly from their highs in early-to-mid June, around the time of the approval of the new regulations. The broader market indexes, including media stocks more generally, continued to rise through mid-July.

The F.C.C.'s rule change had touched off deep divisions within the broadcasting industry. The networks' local affiliate stations and smaller owners of broadcast stations had sought to keep the cap at 35 percent, saying they feared that any further growth in the networks' power would be detrimental to viewers in a variety of ways: homogenizing entertainment, discouraging local news coverage in favor of national broadcasts, and reducing the commercial leverage of the local stations to offer independent programming.

The networks' stakes in the fight was evident as their lobbyists desperately attempted to defeat the House measure. Congressional aides said that lobbyists for the News Corporation helped to circulate a one-sentence petition, endorsed by House leaders, saying that the undersigned members would vote to sustain a presidential veto. Attached to the memo, the aides said, was a set of policy "talking points" on the merits of the new rule that had been prepared by lobbyists from CBS's owner, Viacom, and the Walt Disney Company, parent of ABC. Reported in: *New York Times*, July 23.

flag burning

Washington, D.C.

The Republican-controlled House of Representatives understands that these are good times for Old Glory, as Americans respond to the threat of terrorism and the war in Iraq. So on June 4, when the House considered a perennial legislative favorite—a constitutional amendment that would give Congress the power to bar desecration of the American flag—it came as no surprise that the measure passed handily, 300 to 125.

This was the fifth time the House had passed the measure. But it has always died in the Senate, where opponents, mainly Democrats, argue that it would infringe on the First Amendment. Now the question is whether the surge of patriotism will overcome those objections and carry the measure to passage.

The White House backs the bill, and proponents say it has support from the legislatures of all fifty states. If ever there were a chance to outlaw burning the flag, they say, this is it. But with the Senate majority leader, Bill Frist, focused on pressing matters like a Medicare prescription drug benefit, the amendment may not come up for a Senate vote until next year. So its backers were unwilling to make any predictions.

"It's always an uphill battle," said the amendment's Senate sponsor, Orrin G. Hatch of Utah, the Judiciary Committee chair. "But we're hoping we can get it done this year. Well, maybe not this year, but probably next year."

Much has changed in the Senate since the last time the bill was considered there, in March 2000. There are ten new senators, eight of them Republicans. Some, like John Cornyn of Texas, Norm Coleman of Minnesota and Saxby Chambliss of Georgia, said today that they would support the amendment. Others, like Lamar Alexander of Tennessee, were more circumspect. "What flag amendment?" Alexander said. "I haven't seen one yet."

The measure, which requires a two-thirds majority in each house and ratification by three-fourths of the states, is intended to circumvent two Supreme Court rulings. In 1989, the court struck down a Texas law prohibiting flag burning. Congress responded with federal legislation. But in 1990, by a 5-to-4 vote, the justices overturned that measure, too.

The amendment's chief sponsor, Representative Randy Cunningham (R-CA) complained that the court had reversed "200 years of tradition." He added, "I'm not proposing this, but in the Civil War it was a penalty of death to desecrate the flag."

The House debate was marked by fiery exchanges over whether there should be limits on freedom of speech, and whether opposition to the amendment was unpatriotic. One opponent, Representative Alcee L. Hastings (D-FL) thundered, "All of us are superpatriots in the sense that we provide service for our country, each in our way!"

Lawmakers fought as well over whether it would be wise to alter the Constitution for a problem that, after all, is virtually nonexistent. "We're amending the Constitution for a noncrisis," said Representative Ron Paul of Texas, one of eleven Republicans voting against the bill. "How many cases have we seen? I've seen it on television a few times in the last year, but it was done on foreign soil, by foreigners who have become angry at us over our policies."

In fact, it was done in Seattle this summer by a few of some 400 demonstrators protesting a training seminar there by the Law Enforcement Intelligence Unit, a coalition of

local and federal police agencies. Still, there have been just a hundred cases or so of flag burning in the United States since the 1960's, according to David White, executive director of the National Flag Foundation, a Pittsburgh-based group that takes no position on the amendment, instead promoting education as a way to counter desecration of the flag.

For all the battling, there is one instance in which flag burning is accepted by all. If a flag is old and tattered, White noted, the proper way to dispose of it is to burn it, "in a dignified manner." The rules are detailed, he said, in the Flag Code, guidelines for flag etiquette that were adopted by many patriotic organizations in 1923 and passed by Congress in 1942. "Isn't that ironic?" White asked. Reported in: *New York Times*, June 4.

etc.

Washington, D.C.

The National Head Start Association (NHSA) filed suit June 11 in U.S. District Court for the District of Columbia seeking to overturn a Bush Administration effort to chill the First Amendment free-speech rights of 51,681 Head Start teachers and more than 870,000 parent volunteers who have serious concerns about a controversial White House plan now pending before the U.S. House to dismantle the Head Start program serving one million at-risk children across America.

The civil lawsuit was brought on behalf of NHSA and its approximately 1,100 members (which receive and administer Head Start funds) and the parents and staff of those organizations. The motion for preliminary injunction asks the district court to enjoin any action related to a May 8, 2003, letter from a U.S. Department of Health and Human Services (HHS) official warning all local Head Start staff and parent/volunteers of possible civil and criminal penalties if they speak out against an extremely controversial Bush Administration proposal to gut the Head Start program.

The NHSA lawsuit states: "The Administration has proposed new Head Start legislation that would, if enacted, result in a major new role for States and diminish the rights now enjoyed by Head Start grantees and the parents of Head Start children. Although the Head Start program is well-known, specific knowledge of how the program works is largely confined to those who administer or participate in such programs—parents, staff and outside volunteers. In code that is easily decipherable by Head Start grantees, the Hill letter threatens such individuals with loss of grant funding and even criminal sanctions for expressing their views on the proposed legislation. As a result, parents, staff and volunteers who ordinarily would speak out are being silenced. It is essential that this Court put a quick end to the Hill letter's unlawful suppression of speech."

The lawsuit also contains the following passage: "Such a threat necessarily has a chilling impact on the non-profit Head Start community. Funds or resources of non-profit grantees not already committed to Head Start or other similar efforts are sparse to non-existent. Many cannot even afford to hire counsel to advise them on the Hill letter, much less to defend them should any sanctions be brought by HHS. Because of this, the Hill letter has made parents and staffs of non-profit Head Start grantees afraid to communicate their opinions concerning the proposed legislation, to Congress or elsewhere."

Commenting on the lawsuit, NHSA President Sarah Greene said: "What does this Administration have to fear from free and open public debate about its plan to destroy the Head Start program? Head Start has been around for nearly four decades. No previous Administration has seen fit to slap Head Start instructors and parent/volunteers in the mouth with the threat of possible criminal penalties if they use their free-speech rights to urge Congress to preserve the program that they love and know better than anyone else in America. I am saddened that we have to take this legal action today, but the reality is that the White House does not want to hear from the Head Start community. It did not consult us when it crafted the plan to dismantle Head Start. It failed to meet with us when its proposal was translated into legislation on Capitol Hill. The Bush Administration's callous attempt to terrify Head Start staff and volunteers into silence with the prospect of possible jail time as it seeks to ram its controversial proposal through Congress is mind-boggling. For Congress to legislate major changes without receiving the views of those most involved in and affected by the possible changes would be both irresponsible and a real defeat for First Amendment rights."

Edward T. Waters, managing partner, Feldesman Tucker Leifer Fidell LLP and outside counsel for NHSA, commented: "The legal problems with the Bush Administration letter are both obvious and severe. The letter exceeds the boundaries of any conceivably applicable statute or regulation as to the actions it prevents and the sanctions it threatens. In so doing, it unlawfully chills the free expression of political speech by a grantee or parent or staff with its/their own money or on its/their own time. Reported in: www.nhsa.org, June 11. ☐

READ BANNED BOOKS

schools

Riverside, California

First, Super Diaper Baby triumphed over the evil Deputy Doo Doo. On June 12, the storybook character defeated critics who wanted him banned from the Riverside Unified School District. In a five to two vote, a seven-member committee of teachers, parents and administrators rejected a request to remove Dav Pilkey's *The Adventures of Super Diaper Baby* from its libraries and classrooms.

Pam Santi, a Riverside grandmother, filed the complaint because of the book's "inappropriate" scatological storyline. She described the committee's decision as unwise and said she was considering appealing.

"A lot of parents and teachers have no clue what's in this book," said Santi, who complained to the district after she spotted her second-grade grandson drawing Deputy Doo Doo. He read the book at his school, John F. Kennedy Elementary.

Written and illustrated in a comic-book style, the story follows Super Diaper Baby's accidental swig of super-power juice and the flying infant's battle with Deputy Doo Doo, a villainous piece of excrement. The 125-page book brims with toilet talk, purposely misspelled words and, critics say, an overall disregard for authority. It is part of Pilkey's best-selling Captain Underpants series.

Last year, Captain Underpants books was the sixth most frequently challenged book according to the American Library Association. The Harry Potter series ranked first. In a prepared statement, Scholastic, publisher of Captain Underpants, defended the series, noting that it has won several awards and that hundreds of letters are received each week from parents and teachers praising the books "for transforming (children) into eager readers." Reported in: *Los Angeles Times*, June 14. ☐

AAUP rebukes University of South Florida

The American Association of University Professors on June 14 accused the University of South Florida of "grave departures from association-supported standards" in firing Sami Al-Arian, a professor indicted on charges of aiding Palestinian terrorists. The association stopped short of formally condemning South Florida, but its action drew a strong response from Judy L. Genshaft, the university's president.

"I cannot fathom how the AAUP can look at the same set of facts we looked at and come to the conclusion to condemn us for terminating Dr. Al-Arian," Genshaft said. "The criminal courts still have their job to do, but USF has found Dr. Al-Arian used his university position to support terrorism."

A professor of computer engineering, Al-Arian was indicted in February on federal charges of racketeering and conspiracy to raise money for Palestinian Islamic Jihad, an organization that the U.S. Department of Justice says is responsible for more than 100 murders in Israel and Israeli-occupied territories.

According to the indictment, Al-Arian used the university and two nonprofit organizations, the World Islamic Studies Enterprise and the Islamic Committee for Palestine, to raise money for Palestinian Islamic Jihad, and had discussions with members of that group and of Hamas, another militant Islamic group that has carried out attacks in Israel.

In October 2001, the university placed Al-Arian on paid leave, citing concerns for his safety. Last August, South Florida asked U.S. District Court Judge Susan C. Bucklew to rule that by being involved with the Palestinian groups, Al-Arian had violated the faculty's collective-bargaining agreement and thus could be fired. In January, the judge denied the request, which sought what is known as a declaratory judgment, saying that the university was trying to circumvent the standard arbitration process.

However, shortly after the charges were filed, Genshaft went ahead and fired Al-Arian, saying he had used the university for "improper, noneducational purposes."

That provoked concerns from the AAUP, and the association's Committee A on Academic Freedom and Tenure accused the university of suspending Al-Arian "without demonstrable cause," by suing him to obtain a declaratory

judgment to justify the dismissal, and by then dismissing him without affording him a pre-termination hearing.

Genshaft said, "It is important to keep in mind that this is just the perspective of one advocacy group. USF will continue to grow and develop into an even stronger national research university." Reported in: *Chronicle of Higher Education* (online), ☐

support for basic freedoms returning to pre-9/11 levels

Americans' support for their First Amendment freedoms—shaken by the events of September 11, 2001—appears to be returning to pre-9/11 levels, according to the annual State of the First Amendment survey, conducted by the First Amendment Center in collaboration with *American Journalism Review* magazine.

"Two years after the terrorist attacks in New York and Washington, D.C., our nation appears to have caught its breath—and regained some perspective," said Ken Paulson, executive director of the First Amendment Center. "A sense that freedom was an obstacle in the war on terrorism was reflected last year in our annual survey. While reaction to fear is largely reflexive, the passage of time allows us to be reflective. The 2003 survey shows public support of First Amendment freedoms may be returning to pre-9/11 levels," Paulson said.

The State of the First Amendment 2003 survey appeared in the August 1 issue of *American Journalism Review*. Among the key findings of this year's survey:

- About 60% of respondents indicated overall support for First Amendment freedoms, while 34% said the First Amendment goes too far.
- 52% said media ownership by fewer corporations has meant a decreased number of viewpoints available to the public; 53% said the quality of information also has suffered.
- Almost eight in ten respondents said owners exert substantial influence over news organizations' newsgathering and reporting decisions. Only 4% said they believed there is no tampering with story selection or play.
- 54% favored maintaining limits on how many radio, television and newspaper outlets may be owned by a single company, but 50% opposed any increased regulation.
- 65% favored the policy of "embedding" U.S. journalists into individual combat units; 68% said the news media did an excellent or good job in covering the war in Iraq.
- 48% said they believe Americans have too little access to information about the federal government's efforts to combat terrorism—up from 40% last year.
- About 55% of those surveyed opposed a constitutional amendment to ban flag-burning, up from 51% in 2002.

The annual State of the First Amendment survey, conducted since 1997 by the Center for Survey Research & Analysis at the University of Connecticut, examines public attitudes toward freedom of speech, press, religion and the rights of assembly and petition. The survey was done this year in partnership with *American Journalism Review* magazine. The national survey of 1,000 respondents was conducted by telephone between June 3 and June 15, 2003. The sampling error is plus-or-minus 3%. Reported in: First Amendment Center (online), July 31. ☐

(excerpts from Supreme Court. . . from page 189)

research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality. As Congress recognized, "[t]he Internet is simply another method for making information available in a school or library." It is "no more than a technological extension of the book stack."

The District Court disagreed because, whereas a library reviews and affirmatively chooses to acquire every book in its collection, it does not review every Web site that it makes available. Based on this distinction, the court reasoned that a public library enjoys less discretion in deciding which Internet materials to make available than in making book selections. We do not find this distinction constitutionally relevant. A library's failure to make quality-based judgments about all the material it furnishes from the Web does not somehow taint the judgments it does make. A library's need to exercise judgment in making collection decisions depends on its traditional role in identifying suitable and worthwhile material; it is no less entitled to play that role when it collects material from the Internet than when it collects material from any other source. Most libraries already exclude pornography from their print collections because they deem it inappropriate for inclusion. We do not subject these decisions to heightened scrutiny; it would make little sense to treat libraries' judgments to block online pornography any differently, when these judgments are made for just the same reason. . . .

Like the District Court, the dissents fault the tendency of filtering software to "overblock "-that is, to erroneously block access to constitutionally protected speech that falls outside the categories that software users intend to block. Due to the software's limitations, "[m]any erroneously blocked [Web] pages contain content that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'" Assuming that such erroneous blocking presents constitutional difficulties, any such concerns are dispelled by the ease with which patrons may have the filtering software disabled. When a patron encounters a blocked site, he need only ask a librarian to unblock it or (at least in the case of

adults) disable the filter. . . . The District Court viewed unblocking and disabling as inadequate because some patrons may be too embarrassed to request them. But the Constitution does not guarantee the right to acquire information at a public library without any risk of embarrassment. . . .

The E-rate and LSTA programs were intended to help public libraries fulfill their traditional role of obtaining material of requisite and appropriate quality for educational and informational purposes. Congress may certainly insist that these "public funds be spent for the purposes for which they were authorized." Especially because public libraries have traditionally excluded pornographic material from their other collections, Congress could reasonably impose a parallel limitation on its Internet assistance programs. As the use of filtering software helps to carry out these programs, it is a permissible condition. . .

Because public libraries' use of Internet filtering software does not violate their patrons' First Amendment rights, CIPA does not induce libraries to violate the Constitution, and is a valid exercise of Congress' spending power. Nor does CIPA impose an unconstitutional condition on public libraries. Therefore, the judgment of the District Court for the Eastern District of Pennsylvania is *Reversed.*

From the concurring opinion by Justice Anthony M. Kennedy

If, on the request of an adult user, a librarian will unblock filtered material or disable the Internet software filter without significant delay, there is little to this case. The Government represents this is indeed the fact. . . .

If some libraries do not have the capacity to unblock specific Web sites or to disable the filter or if it is shown that an adult user's election to view constitutionally protected Internet material is burdened in some other substantial way, that would be the subject for an as-applied challenge, not the facial challenge made in this case. . . .

The interest in protecting young library users from material inappropriate for minors is legitimate, and even compelling, as all Members of the Court appear to agree. Given this interest, and the failure to show that the ability of adult library users to have access to the material is burdened in any significant degree, the statute is not unconstitutional on its face. For these reasons, I concur in the judgment of the Court.

From the concurring opinion of Justice Stephen Breyer

. . . In determining whether the statute's conditions consequently violate the First Amendment, the plurality first finds the "public forum "doctrine inapplicable, and then holds that the statutory provisions are constitutional. I agree with both determinations. But I reach the plurality's ultimate conclusion in a different way. In ascertaining whether the statutory provisions are constitutional, I would apply a form of heightened scrutiny, examining the statutory requirements in question with special care. The Act directly restricts the public's receipt of information. And it does so through limitations imposed by outside bodies (here Congress) upon two critically important sources of information—the Internet as accessed via public libraries. For that reason, we should not examine the statute's constitutionality as if it raised no special First Amendment concern—as if, like tax or economic regulation, the First Amendment demanded only a "rational basis " for imposing a restriction. Nor should we accept the Government's suggestion that a presumption in favor of the statute's constitutionality applies.

At the same time, in my view, the First Amendment does not here demand application of the most limiting constitutional approach—that of "strict scrutiny." The statutory restriction in question is, in essence, a kind of "selection " restriction (a kind of editing). It affects the kinds and amount of materials that the library can present to its patrons. And libraries often properly engage in the selection of materials, either as a matter of necessity (*i.e.,* due to the scarcity of resources)or by design (*i.e.,* in accordance with collection development policies). To apply "strict scrutiny " to the "selection " of a library's collection (whether carried out by public libraries themselves or by other community bodies with a traditional legal right to engage in that function) would unreasonably interfere with the discretion necessary to create, maintain, or select a library's "collection " (broadly defined to include all the information the library makes available). That is to say, "strict scrutiny" implies too limiting and rigid a test for me to believe that the First Amendment requires it in this context.

Instead, I would examine the constitutionality of the Act's restrictions here as the Court has examined speech-related restrictions in other contexts where circumstances call for heightened, but not "strict," scrutiny—where, for example, complex, competing constitutional interests are potentially at issue or speech-related harm is potentially justified by unusually strong governmental interests. Typically the key question in such instances is one of proper fit.

In such cases the Court has asked whether the harm to speech-related interests is disproportionate in light of both the justifications and the potential alternatives. It has considered the legitimacy of the statute's objective, the extent to which the statute will tend to achieve that objective, whether there are other, less restrictive ways of achieving that objective, and ultimately whether the statute works speech-related harm that, in relation to that objective, is out of proportion. . . .

The Act's restrictions satisfy these constitutional demands. The Act seeks to restrict access to obscenity, child pornography, and, in respect to access by minors, material that is comparably harmful. These objectives are "legitimate," and indeed often "compelling." . . .

At the same time, the Act contains an important exception that limits the speech-related harm that "overblocking" might cause. As the plurality points out, the Act allows libraries to

permit any adult patron access to an "overblocked" Web site; the adult patron need only ask a librarian to unblock the specific Web site or, alternatively, ask the librarian, "Please disable the entire filter." The Act does impose upon the patron the burden of making this request. But it is difficult to see how that burden (or any delay associated with compliance) could prove more onerous than traditional library practices associated with segregating library materials in, say, closed stacks, or with interlibrary lending practices that require patrons to make requests that are not anonymous and to wait while the librarian obtains the desired materials from elsewhere. . . .

Given the comparatively small burden that the Act imposes upon the library patron seeking legitimate Internet materials, I cannot say that any speech-related harm that the Act may cause is disproportionate when considered in relation to the Act's legitimate objectives. I therefore agree with the plurality that the statute does not violate the First Amendment, and I concur in the judgment.

From the dissent by Justice Stevens

I agree with the plurality that it is neither inappropriate nor unconstitutional for a local library to experiment with filtering software as a means of curtailing children's access to Internet Web sites displaying sexually explicit images. I also agree with the plurality that the 7% of public libraries that decided to use such software on *all* of their Internet terminals in 2000 did not act unlawfully. Whether it is constitutional for the Congress of the United States to impose that requirement on the other 93%, however, raises a vastly different question. Rather than allowing local decisionmakers to tailor their responses to local problems, the Children's Internet Protection Act (CIPA) operates as a blunt nationwide restraint on adult access to "an enormous amount of valuable information" that individual librarians cannot possibly review. Most of that information is constitutionally protected speech. In my view, this restraint is unconstitutional. . . .

The effect of the overblocking is the functional equivalent of a host of individual decisions excluding hundreds of thousands of individual constitutionally protected messages from Internet terminals located in public libraries throughout the Nation. Neither the interest in suppressing unlawful speech nor the interest in protecting children from access to harmful materials justifies this overly broad restriction on adult access to protected speech. "The Government may not suppress lawful speech as the means to suppress unlawful speech." . . .

. . . The plurality does not reject any of those findings [about problems inherent in blocking software]. Instead, "[a]ssuming that such erroneous blocking presents constitutional difficulties," it relies on the Solicitor General's assurance that the statute permits individual librarians to disable filtering mechanisms whenever a patron so requests. In my judgment, that assurance does not cure the constitutional infirmity in the statute.

Until a blocked site or group of sites is unblocked, a patron is unlikely to know what is being hidden and therefore whether there is any point in asking for the filter to be removed. It is as though the statute required a significant part of every library's reading materials to be kept in unmarked, locked rooms or cabinets, which could be opened only in response to specific requests. Some curious readers would in time obtain access to the hidden materials, but many would not. Inevitably, the interest of the authors of those works in reaching the widest possible audience would be abridged. Moreover, because the procedures that different libraries are likely to adopt to respond to unblocking requests will no doubt vary, it is impossible to measure the aggregate effect of the statute on patrons' access to blocked sites. Unless we assume that the statute is a mere symbolic gesture, we must conclude that it will create a significant prior restraint on adult access to protected speech. A law that prohibits reading without official consent, like a law that prohibits speaking without consent, "constitutes a dramatic departure from our national heritage and constitutional tradition." . . .

A federal statute penalizing a library for failing to install filtering software on every one of its Internet-accessible computers would unquestionably violate th[e First] Amendment. I think it equally clear that the First Amendment protects libraries from being denied funds for refusing to comply with an identical rule. An abridgment of speech by means of a threatened denial of benefits can be just as pernicious as an abridgment by means of a threatened penalty. . . .

This Court should not permit federal funds to be used to enforce this kind of broad restriction of First Amendment rights, particularly when such a restriction is unnecessary to accomplish Congress' stated goal. The abridgment of speech is equally obnoxious whether a rule like this one is enforced by a threat of penalties or by a threat to withhold a benefit. I would affirm the judgment of the District Court.

From the dissent by Justice David Souter, joined by Justice Ruth Bader Ginsburg

. . . we are here to review a statute, and the unblocking provisions simply cannot be construed, even for constitutional avoidance purposes, to say that a library must unblock upon adult request, no conditions imposed and no questions asked. First, the statute says only that a library "may " unblock, not that it must. In addition ,it allows unblocking only for a "bona fide research or other lawful purposes," and if the "lawful purposes" criterion means anything that would not subsume and render the "bona fide research" criterion superfluous, it must impose some limit on eligibility for unblocking. There is therefore necessarily some restriction, which is surely made more onerous by the uncertainty of its terms and the generosity of its discretion to library staffs in deciding who gets complete Internet access and who does not.

We therefore have to take the statute on the understanding that adults will be denied access to a substantial amount

of nonobscene material harmful to children but lawful for adult examination, and a substantial quantity of text and pictures harmful to no one. As the plurality concedes, this is the inevitable consequence of the indiscriminate behavior of current filtering mechanisms, which screen out material to an extent known only by the manufacturers of the blocking software. . . .

The question for me, then, is whether a local library could itself constitutionally impose these restrictions on the content otherwise available to an adult patron through an Internet connection, at a library terminal provided for public use. The answer is no. A library that chose to block an adult's Internet access to material harmful to children (and whatever else the undiscriminating filter might interrupt) would be imposing a content-based restriction on communication of material in the library's control that an adult could otherwise lawfully see. This would simply be censorship. True, the censorship would not necessarily extend to every adult, for an intending Internet user might convince a librarian that he was a true researcher or had a "lawful purpose" to obtain everything the library's terminal could provide. But as to those who did not qualify for discretionary unblocking, the censorship would be complete and, like all censorship by an agency of the Government, presumptively invalid owing to strict scrutiny in implementing the Free Speech Clause of the First Amendment. . . .

. . . Internet blocking here defies comparison to the process of acquisition. Whereas traditional scarcity of money and space require a library to make choices about what to acquire, and the choice to be made is whether or not to spend the money to acquire something, blocking is the subject of a choice made after the money for Internet access has been spent or committed. Since it makes no difference to the cost of Internet access whether an adult calls up material harmful for children or the Articles of Confederation, blocking (on facts like these) is not necessitated by scarcity of either money or space. In the instance of the Internet, what the library acquires is electronic access, and the choice to block is a choice to limit access that has already been acquired. Thus, deciding against buying a book means there is no book (unless a loan can be obtained), but blocking the Internet is merely blocking access purchased in its entirety and subject to unblocking if the librarian agrees. The proper analogy therefore is not to passing up a book that might have been bought; it is either to buying a book and then keeping it from adults lacking an acceptable "purpose," or to buying an encyclopedia and then cutting out pages with anything thought to be unsuitable for all adults. . . .

Thus, there is no preacquisition scarcity rationale to save library Internet blocking from treatment as censorship, and no support for it in the historical development of library practice. To these two reasons to treat blocking differently from a decision declining to buy a book, a third must be added. Quite simply, we can smell a rat when a library blocks material already in its control, just as we do when a library removes books from its shelves for reasons having nothing to do with wear and tear, obsolescence, or lack of demand. Content-based blocking and removal tell us something that mere absence from the shelves does not. . . .

There is no good reason, then, to treat blocking of adult enquiry as anything different from the censorship it presumptively is. For this reason, I would hold in accordance with conventional strict scrutiny that a library's practice of blocking would violate an adult patron's First and Fourteenth Amendment right to be free of Internet censorship, when unjustified (as here) by any legitimate interest in screening children from harmful material. On that ground, the Act's blocking requirement in its current breadth calls for unconstitutional action by a library recipient, and is itself unconstitutional. ☐

(supremes give government clean sweep . . . from page 190)

extended copyright protection to existing works by twenty years. Internet publishers said the extension restricted the growth of public domain materials online. But those concerns took a back seat to the Court's view that the Constitution gives Congress broad power to set the contours of copyright protection—especially when the First Amendment claim at issue was not very weighty. "The First Amendment securely protects the freedom to make—or decline to make—one's own speech; it bears less heavily when speakers assert the right to make other people's speeches," Justice Ruth Bader Ginsburg wrote for the majority.

- *Federal Election Commission* v. *Beaumont*. By a 7-2 vote, the Court embraced the traditional justification for restricting campaign money: restricting the power of big corporations to influence and corrupt the political system—even when, as in this case, the corporations are not-for-profit advocacy groups. "Any attack on the federal prohibition," Justice David Souter wrote, "goes against the current of a century of congressional efforts to curb corporations' potentially deleterious influences on federal elections." Nonprofit status does not make corporations any less powerful or potentially corrupting, he said—citing organizations like AARP and the National Rifle Association. Again, it was a case of First Amendment concerns taking a back seat to other government interests deemed more important.
- *Nike* v. *Kasky*. After months of buildup as a potential landmark commercial-speech case, the appeal involving Nike's defense of its global labor policies was dismissed by the Supreme Court just before it adjourned for the summer. It stemmed from a suit brought by consumer activist Marc Kasky, who invoked California laws against fraudulent advertising. Nike countered that its statements and op-eds deserved to be treated as political

speech, not advertising. The Court's dismissal—probably motivated by procedural flaws—has the effect of allowing the case against Nike to proceed in California courts, so it was counted as a loss for the First Amendment. The Court also was, in effect, making a judgment that the First Amendment issue was not so urgent or paramount that it had to be decided in advance of a final judgment in the California courts. But several justices, in writings that accompanied the dismissal, sent signals that Nike's First Amendment argument had merit.

- *Virginia* v. *Hicks*. Again giving priority to other government interests, the Court said in this case that the city of Richmond could make the streets and sidewalks of a housing project off-limits to unauthorized people to curb drugs and other crime in the area. Kevin Hicks, a visitor who was arrested, claimed his rights of association and free speech were violated. But a unanimous high court said Hicks, who was purportedly delivering diapers to his child in the housing project, was not engaged in any First Amendment-protected activity. The ruling may have reined in the scope of the Court's "overbreadth doctrine," which has traditionally allowed those First Amendment challenges to be made by people who were not themselves prosecuted for speech-related activities.
- *Overton* v. *Bazzetta*. It was unsurprising that the Court unanimously placed the interest of prison discipline and order higher than the First Amendment rights of inmates in this case. A group of Michigan inmates had objected to new restrictions on non-contact visits by relatives and minors, saying the rules restricted their rights to family associations. "The very object of imprisonment is confinement," Justice Anthony M. Kennedy wrote. "Many of the liberties and privileges enjoyed by other citizens must be surrendered by the prisoner." The regulations merely had to be rationally related to penological interests, wrote Kennedy, and the ones at issue met that standard in the Court's view.
- *Madigan* v. *Telemarketing Associates*. In a series of rulings in the 1980s, the Court ruled that because of the First Amendment, states could not dictate to charities what percentage of donations they had to fork over to professional fund-raisers. The Illinois Supreme Court took those rulings a step further, finding that as a result of that principle, a high fund-raising fee could not form the basis of a fraud prosecution against a charitable group or its fund-raiser. The U.S. Supreme Court said that conclusion did not follow from its earlier rulings—even as it embraced the prior line of cases. "The First Amendment protects the right to engage in charitable solicitation," Ginsburg wrote. "But the First Amendment does not shield fraud." Fund-raisers and charitable organizations said they could live with the ruling.
- *United States* v. *American Library Association*. In its prior cases evaluating congressional attempts to restrict Internet pornography, the Court had embraced the Internet's role as a First Amendment medium of the highest order. But in this library case, the Court appeared to signal that its love affair with the Internet had its limits. At issue was the Children's Internet Protection Act, which said that public libraries receiving federal funds for Internet and computer access would have to use blocking software to ensure that minors do not have access to pornography. Since the software often also blocks First Amendment-protected speech, the library association claimed the law violated free-speech rights. The Court, by a 6-3 vote, said the blocking requirement was valid—especially as a string attached to federal funds. The blow of the ruling was softened by the fact that several justices said that if libraries did not allow adult patrons to have the software removed in individual cases, those patrons could return to court with a First Amendment challenge.
- *Virginia* v. *Black*. The Court's usual tolerance for highly unpopular speech finally reached its limit in this case involving a ban on cross-burning with the intent to intimidate. The 5-4 ruling upholding Virginia's cross-burning law may have just created a "category of one" with few consequences outside cross-burning statutes. It also offered a partial victory to the First Amendment side, striking down a part of the Virginia law that allowed the simple fact of burning a cross to create the presumption that it was done with the necessary intent to intimidate. Most justices agreed that the presumption violated the First Amendment and that government should have to prove intimidating intent if it is to prosecute cross-burners. In dissent, Justice Clarence Thomas, a usually strong First Amendment advocate, said the First Amendment was not even involved in the case. "This statute prohibits only conduct, not expression," wrote Thomas. "Just as one cannot burn down someone's house to make a political point and then seek refuge in the First Amendment, those who hate cannot terrorize and intimidate to make their point." Reported in: First Amendment Center Online, July 7. ☐

(from the bench. . . from page 194)

sheik direct terrorist operations in Egypt. But the judge let stand lesser charges that she lied to and defrauded the federal government. Stewart was accused of helping Sheik Omar Abdel Rahman, who was convicted of plotting to blow up New York landmarks, by helping him to pass messages to the Islamic Group, a terrorist group he once led. The charges were announced in April 2002 by Attorney General John Ashcroft, who called the case the first use of a new rule that allows the Bureau of Prisons to monitor conversations between lawyers and inmates who are threats to commit "future acts of violence or terrorism."

In his ruling, Judge John G. Koeltl of the United States District Court called the terrorism counts against Stewart and a translator unconstitutionally vague. The judge said the antiterrorism statute could not apply to a lawyer doing her job.

"The government fails to explain how a lawyer, acting as an agent of her client" who is an alleged leader of a terrorist organization "could avoid being subject to criminal prosecution as a 'quasi-employee,' " said Judge Koeltl, who was appointed by President Bill Clinton in 1994.

The charges that remain accuse Stewart of making false statements and conspiring to defraud the government through what prosecutors say was her broken promise not to be a conduit for Abdel Rahman. Stewart, who has defended such unpopular clients as members of the Weather Underground and the mob informer Salvatore Gravano, suggested in a 1995 interview that violence and revolution were sometimes necessary to right the economic and racial wrongs of America's capitalist system.

She called the ruling "a great relief," and addressed its broader implications. "It augurs well for things returning to a normalcy where the judges and courts are able to take a good look at what the government is doing, and consider what it's doing and stand up for the judicial branch and for justice," she said.

Prosecutors said they were exploring possibilities of an appeal. "We continue to believe that the statute prohibiting material support of terrorism is constitutional, and we are reviewing our appellate options," said a spokesman for James B. Comey, the United States attorney in Manhattan.

Stewart was indicted in April 2002 after visits she and a translator, Mohammed Yousry, made to the Minnesota prison where Rahman, a blind cleric, is serving a life sentence. Prosecutors said that in May 2000, she distracted prison guards during a visit with her client while Yousry took instructions from him that were later passed on to the Islamic Group in Egypt. Abdel Rahman's instructions included a message to his followers in Egypt that they should no longer honor a halt in terrorist activities that began after a 1997 attack in Luxor, Egypt, that killed 62 people, including 58 foreign tourists. The Islamic Group claimed responsibility for the attack.

Stewart has denounced the charges since her arraignment, when she said on the courthouse steps, "They've arrested the lawyer and the interpreter. How much further? Are you going to arrest the lady who cleans the sheik's cell?" Her lawyer, Michael E. Tigar, argued in motions that the antiterrorism statute violates the First Amendment. "It endangers the rights of people, lawyers, journalists and citizens to assert certain political views," he said.

The charges carried a 15-year sentence. The prosecution, in court papers filed in March, called Stewart "an indispensable and active facilitator of the terrorist communication network," and compared her to a "bank robbery co-conspirator who has the job of distracting security guards while others take money from the tellers, or a lookout guarding a drug dealer's corner."

Stewart rejected the claims as "so broad that you can sweep anybody under its rug. A conduit of communication? How could you not be if you're taking phone calls from your client?"

Abdel Rahman is subject to strict security rules imposed by the government on him and certain other prisoners who are considered to pose continuing threats of violence. Stewart signed a form in May 2000 agreeing to the rules before a visit, and the government charged her in the indictment with not complying with them. Stewart said she hoped those charges would be dismissed "as a factual matter" after the hearing next month.

The case brought widespread attention because of Stewart's notoriety as an outspoken lawyer, and because of its possible implications for lawyers representing clients accused of terrorist links. "We tried to mount a real defense and organize as many people as possible," she said, "to understand that what was at stake here was the ability of defense counsel to fully represent and make decisions concerning political clients." Reported in: *New York Times*, July 23.

television

New York, New York

The filmmaker Spike Lee won a preliminary injunction June 12 that kept Viacom, Inc., from changing the name of its TNN Network to Spike TV. Justice Walter Tolub of Manhattan State Supreme Court granted Lee's request, though he ordered him to post a $500,000 bond. If Lee does not win a permanent injunction barring the name change, he will have to pay Viacom's legal expenses and other costs, the judge said.

"In addition to the name Spike, there are other indicia that defendants sought to exploit Mr. Lee's persona, most notably Mr. Lee's reputation for irreverence and aggressiveness," Judge Tolub said in his ruling.

Viacom announced the name change April 15 to build on an audience that is already about 65 percent male. Lee claims Spike TV refers to him and says he does not want his name used because the channel will feature lowbrow programs. Reported in: *New York Times*, June 13.

video games

Seattle, Washington

In a preliminary order, a federal judge in Seattle on July 10 emphatically blocked Washington's law restricting some violent video games just weeks before it was to take

effect, calling it a violation of the First Amendment. But the state Attorney General's Office said it was determined to seek a full hearing, before the same judge, on the constitutionality of the violent-video game law, House Bill 1009.

The law had been set to go into effect July 27. After the ruling, it is dead unless it is declared constitutional. No date has been set for the full hearing before U.S. District Court Judge Robert Lasnik, who said that letting the law go into effect pending that hearing would cause "irreparable harm."

Because the law runs counter to court rulings barring similar city and county laws, Washington's case—called *Video Software Dealers Assn.* v. *Maleng*—may draw attention from other states considering such laws and from civil libertarians. As written, the law imposes a fine of up to $500 on anyone who rents or sells to someone 17 or younger video or computer games in which the player kills or injures "a human form who is depicted ... as a public law enforcement officer."

The association of video makers and retailers sued in early June to invalidate the law. Lasnik held a hearing and issued a preliminary injunction preventing it from taking effect. In his nine-page opinion, Lasnik warned state lawmakers that they face "an uphill struggle to overcome serious questions raised by the plaintiffs." He added, though, that any hearing before him on the issue will be "full and fair."

Lasnik ruled that video games are protected by the First Amendment, so that any restrictions imposed on them must be as narrow as possible to accomplish a permissible objective. But, he said, "plaintiffs have raised serious questions regarding defendants' ability to show that the limitations imposed by the act are the least restrictive, or even that they will, in fact, alleviate the supposed threat in a direct and material way."

The law's intention is to curb hostile, anti-social behavior in youth and to foster respect for law enforcers. But "it is unlikely the state can show its chosen remedy will alleviate the identified problem," Lasnik wrote.

He also criticized the law as too narrow, in regulating only violence to law enforcers, and only in video games. At the same time, he said, the law is too broad, for example, restricting access to "heroic struggles against corrupt regimes" in which good cops have gone bad.

Two federal appeals courts elsewhere have unanimously struck down legislative attempts to impose regulations on video games, which will make defending the Washington law even more difficult, he said.

But assistant attorney general Jeff Even said the state won't abandon the statute or urge the Legislature to modify it. "Obviously, we've got to take a shot at defending the law," he said. "The people of the state are entitled to their day in court." Even said his office will focus on building a record supporting the Legislature's intentions and methods. Reported in: *Seattle Post-Intelligencer*, July 11.

abortion

Tallahassee, Florida

The Florida Supreme Court on July 10 struck down a law requiring minors seeking abortions to notify their parents first. The court, in a 5-to-1 decision, held that the law violated the minors' right to privacy. The Florida law, enacted in 1999 but never enforced, required minors to give parents 48 hours' notice of their decisions. In the alternative, minors could try to convince a judge that they were mature enough to decide for themselves or, if that failed, that the abortion was nevertheless in their best interest.

The court decided the case under Florida's Constitution, which is one of the handful of state constitutions with an explicit right-to-privacy clause. Applying the federal Constitution, the United States Supreme Court has upheld similar notification requirements.

In enacting the notification law, the Florida Legislature said that "the capacity to become pregnant and the capacity for mature judgment concerning the wisdom of an abortion are not necessarily related."

The decision relied heavily on a 1989 decision by the State Supreme Court that struck down a law that had called for not only parental notification but also parental consent. "Our decision today," Justice Leander J. Shaw wrote, on behalf of himself and three other judges, "in no way interferes with a parent's right to participate in the decision-making process or a minor's right to consult with her parents. Just the opposite. Under our decision, parent and minor are free to do as they wish in this regard, without government interference."

Justice R. Fred Lewis, who said he concurred in the decision only because he considered himself bound by the 1989 decision on parental consent, said Justice Shaw's statement "is extraordinarily simplistic, naive, and contrary to logic."

"Without notice and knowledge of the facts," Justice Lewis wrote, "parents are effectively totally excluded from the process in this judicial equation."

Justice Charles T. Wells dissented outright. "The community, acting through the state, has an exceedingly compelling interest in having parents parent their children," Justice Wells wrote. "How can a parent be expected to act responsibly without notice?"

Justice Shaw noted that abortion was a relatively safe surgical procedure and quoted the analysis of the trial judge, who first struck down the law, with approval. Reported in: *New York Times*, July 11.

etc.

New York, New York

A federal judge in Manhattan ruled June 24 that the First Amendment rights of a police officer and two firefighters

were violated by city officials when they dismissed the three men for wearing blackface on a float in the Labor Day parade in 1998 in Broad Channel, Queens. The judge, John E. Sprizzo of U.S. District Court, rejected former Mayor Rudolph W. Giuliani's explanation for endorsing the men's firings, a fear of civil unrest. The judge concluded instead that the men were fired "in response to the content of their speech, and for reasons of public perception and the political impact expected to flow" from it.

Lawyers for the three men had argued that Mayor Giuliani had orchestrated the firings because he had been widely criticized for racial insensitivity, particularly for the way the Police Department handled the so-called Million Youth March in Harlem, which occurred just days before.

Judge Sprizzo said city officials' statements of concern about disruption were inconsistent with their later handling of the four officers involved in the 1999 shooting of Amadou Diallo. Despite "the obvious disruption the Diallo incident was causing within the city, particularly in minority communities," the judge wrote, Mr. Giuliani fully supported the reinstatement of those officers.

The judge's ruling did not immediately reinstate the former officer, Joseph Locurto, and the two former firefighters, Jonathan Walters and Robert Steiner. The judge separated the liability and remedy phases of the trial, and will now hear arguments on the plaintiffs' demand for reinstatement and damages.

Judge Sprizzo's ruling was roundly criticized by Giuliani, who said that "the judge is way off base. I think that the decision is bizarre," he continued. "The city and the mayor have to have the discretion to remove people in uniform who display significant racial bias."

Giuliani, who testified in January that he quickly called for the men's firings because he did not want public uncertainty about how he felt, said that to the extent there was any "political component" to his decision, "it's not any kind of partisan political component."

"It's how it affects the citizens of the city," he said, "and how do they feel about a police department or a fire department that permits its members to make fun of a racial crime."

Mayor Michael R. Bloomberg said that the men's behavior "was a disgrace, and totally inappropriate for city employees." Jonathan Pines, a lawyer with the corporation counsel's office, said the administration believed that the city had acted properly, and planned to appeal when the decision becomes final.

The men's lawyers praised the ruling. Christopher Dunn, associate legal director of the New York Civil Liberties Union, which represented Locurto, said, "It's certainly a strong First Amendment decision, and I think it's also remarkable in its condemnation of the way Mr. Giuliani handled himself."

Marvyn M. Kornberg, a lawyer for Steiner, said, "When you read the entire decision, you can only come to one conclusion, and that is that the judge did not believe Giuliani."

In his 53-page ruling, Judge Sprizzo found that the men's actions, no matter how inappropriate, "constituted speech on a matter of public concern." Dunn said such a finding means that a public employee may be fired only if the government can show that the potential for disruption outweighs the First Amendment interests.

The men rode on a float called "Black to the Future: Broad Channel 2098." One of the firefighters, Walters, reenacted the killing of James Byrd, Jr., a black man who was dragged to his death behind a pickup truck in Texas the previous June. At the time, Mayor Giuliani said of Locurto, "The only way this guy gets back on the police force is if the Supreme Court of the United States tells us to put him back."

Judge Sprizzo, citing Giuliani's statements and his trial testimony, concluded that he decided to fire the men in September, days after the incident. The city argued that the mayor was only expressing his personal views and that Police Commissioner Howard Safir and Fire Commissioner Thomas Von Essen decided independently to fire the men only after each had a departmental hearing. Reported in: *New York Times*, June 25.

New York, New York

Al Goldstein, the blustering pornographic publisher, may be one of the most passionate defenders of free speech in the land. But he was not complaining too much July 18 after a court ruled that remarks made at his trial last year "exceeded the bounds of propriety." That's because the comments were made by the assistant Brooklyn district attorney prosecuting Goldstein. Accordingly, an appellate panel of the State Supreme Court unanimously overturned Goldstein's conviction on charges that he had harassed his former assistant by leaving vicious phone messages at her home and sending her unflattering depictions of her that had appeared in his magazine, *Screw*, and on his cable television show, "Midnight Blue."

While unprintable language flowed freely at the trial, the panel ruled that the most significant linguistic transgression was committed by the prosecutor, David B. Cetron, in his closing remarks, when he repeatedly used a three-letter word—"lie"—in reference to the defense.

More than forty times in his half-hour summation, Goldstein's lawyers pointed out, Cetron told jurors that Goldstein or his lawyers had lied or that the aggrieved former assistant, Jennifer Lozinski, was telling the truth. He said, for example, that when Goldstein said that Lozinski was involved in a conspiracy against him, "that was a lie," and that Lozinski had "told the truth, unlike the defendant."

Prosecutors may point out inconsistencies in the defense's case, courts have held, but they are supposed to let juries draw their own conclusions. "While no single remark was so outrageous as to warrant a new trial in and of itself," the appeals judges wrote, "the cumulative effect of the People's summation deprived defendant of a fair trial."

Goldstein was convicted of five misdemeanor charges of harassment and sentenced to sixty days in jail. He served six days before posting bail.

Goldstein's longtime appeals lawyer, Herald Price Fahringer, said that Cetron had committed a cardinal blunder. "If you're going to list the wrongs a prosecutor has to avoid in final argument to the jury," he said, "it's right up at the top. It's making himself into a witness, which he has no right to do."

Goldstein said that Cetron had walked right into his trap. "Whenever I get prosecuted," he said, "I end up making it so personal that the prosecutor ends up going too far because they're blinded by hatred for me." During the trial, he published pornographic photo collages incorporating the image of Cetron's boss, District Attorney Charles J. Hynes. He also wrote an editorial, cited by Cetron during the trial, exhorting terrorists to fly planes into Hynes's office.

A spokesman for the district attorney's office, Jerry Schmetterer, declined to comment on whether Goldstein would be retried. The decision was not a slam dunk for the 67-year-old defendant. Goldstein had vowed to have New York's harassment law itself struck down as unconstitutionally broad and vague, but the judges rejected his argument. Reported in: *New York Times*, July 19. □

(FTRF report . . . from page 178)

Counts v. *Cedarville*: A student and her parents initiated this lawsuit after the Cedarville, Arkansas, school board voted to remove the Harry Potter books from the school library's open stacks and to require students to obtain a parent's written permission before borrowing the books. The school board acted following a parent's complaint that the series encourages children to disrespect adults and to believe in witchcraft. FTRF filed an *amicus* brief in support of the plaintiffs' motion for summary judgment. On April 23, Judge Jimm L. Hendren granted the motion, ordering the school board to return the books to the school library's open shelves. The school board voted not to appeal the decision.

Ashcroft v. *American Civil Liberties Union* (formerly *ACLU* v. *Reno*) (COPA): The Third Circuit Court of Appeals once again considered the constitutionality of the Children's Online Protection Act (COPA) after the Supreme Court returned the case to it after holding that the law's reliance on community standards did not by itself render COPA unconstitutional. The Foundation joined the Center for Democracy and Technology and other groups to file an *amicus* brief arguing that COPA's restrictions on Internet content violate the First Amendment. On March 6, the Third Circuit found the law unconstitutional for a second time. It is anticipated that the government will appeal the decision to the Supreme Court.

The Foundation is also involved in the following lawsuits:

United States v. *Irwin Schiff, et al.*: The Foundation filed an *amicus curiae* brief in this lawsuit after the 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*. FTRF's brief opposed the court's prior restraint of Mr. Schiff's book. On June 17, a federal judge in Las Vegas upheld the restraining order. Mr. Schiff and the ACLU of Nevada will appeal the ruling to the Ninth Circuit Court of Appeals.

Yahoo! v. *La Ligue Contre Le Racisme et L'Antisemitisme* remains pending before the Ninth Circuit Court of Appeals after the French court dismissed its order imposing fines on Yahoo! for hosting Web pages containing auctions of Nazi and racist memorabilia. The lawsuit was filed after La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students sought to enforce an earlier order by the French court imposing fines against Yahoo! for hosting the pages. 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, and the French organizations appealed that ruling. FTRF has supported Yahoo! throughout the litigation, filing *amicus* briefs with both the trial and appellate courts.

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:

Bookfriends, Inc. v. *Taft*: The State of Ohio responded to the lawsuit filed by FTRF and other plaintiffs by amending its definition of "harmful to juveniles" after the district court issued a preliminary injunction forbidding the state from enforcing its newly passed law. The case is before the Sixth Circuit Court of Appeals, which took it up after the state appealed the district court's initial order finding the law unconstitutional. The plaintiffs have asked the Sixth Circuit to return the case to the district court for a determination of the constitutionality of the law's remaining Internet provisions.

PSINet v. *Chapman*: Attorneys for FTRF and other plaintiffs argued this case before the Fourth Circuit Court of Appeals on June 2, encouraging the court to uphold the permanent injunction forbidding enforcement of Virginia's Internet content law. We are awaiting a decision from the court.

ACLU v. *Napolitano*: After a federal district court struck down Arizona's new Internet content law and entered a permanent injunction barring its enforcement, the state appealed the court's decision to the Ninth Circuit Court of Appeals. Subsequently, the Arizona legislature began drafting an amended version of the statutes and briefing on the appeal was deferred. Meetings are planned with the appellate court to set a scheduling order.

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 February 6, the Second Circuit heard oral argument from the parties. We are awaiting the court's decision.

Federal Legislation

On April 29, President Bush signed "The Prosecutorial Remedies and Other Tools to end the Exploitation of Children Act" (PROTECT Act) into law. The PROTECT Act replaces those parts of the Child Pornography Prevention Act (CPPA) struck down by the U.S. Supreme Court last spring in *Ashcroft* v. *ACLU*. The new law criminalizes the creation of any "visual depiction that is a digital image, computer image, or computer-generated image of, or that is indistinguishable from an image of, a minor engaging in specified sexually explicit conduct" and requires the defendant to prove, as an affirmative defense, that the image is a computer creation or only used adults to create the image. FTRF will monitor enforcement of the law.

Roll of Honor Award

This year's Roll of Honor Award is presented to our extraordinary attorney, Theresa Chmara, General Counsel of the Freedom to Read Foundation and partner with the law firm of Jenner & Block in Washington, D.C. Chmara joined the Foundation's legal team in the early 1990s and became FTRF General Counsel in 2000. In that time, she has represented the First Amendment interests of innumerable librarians and library users. She was a key member of the legal team that helped to win the case of *ALA* v. *Department of Justice,* which overturned portions of the Communications Decency Act, and led the team that has guided the Children's Internet Protection Act case to the U.S. Supreme Court. She is the lead faculty member of ALA's ongoing Lawyers for Libraries training institutes, and serves on the board of the American Booksellers Foundation for Free Expression. She has also given invaluable legal assistance to libraries and librarians facing attempts to ban books, visits from law enforcement, demands to censor the Internet, and countless other challenges. She is a true professional and a joy to work with. We are thrilled to present her with the Freedom to Read Foundation's highest honor. ☐

(IFC report . . . from page 177)

- Privacy Procedures
- Privacy Communications
- Bibliography

ALA Meeting Room Policy

Recent incidents, including those involving a white-supremacist group, prompted the IFC to review ALA's *Meeting Rooms: An Interpretation of the Library Bill of Rights*. An IFC subcommittee also reviewed and discussed problems libraries face regarding meeting room use, policies and procedures, and considered recent case law. Following this process, the IFC determined that the ALA policy remains a strong statement of professional commitment that needs no changes. Nevertheless, the IFC wanted to hear if other ALA members had concerns or questions about the policy. The committee hosted an open forum at the ALA Annual Conference in Toronto on June 21, and concluded that members' input about their experiences with library meeting room policies and procedures reaffirmed IFC's determination that a revision to this policy is unnecessary at this time.

Lawyers for Libraries

Lawyers for Libraries, an ongoing project of OIF, is creating a network of attorneys involved in, or concerned with, the defense of the freedom to read and the application of constitutional law to library policies, principles, and problems.

OIF conducted two very successful institutes in the last few months, one in Washington, D.C., and the other in Chicago, IL; a third is scheduled for San Francisco (October 16-17, 2003). Additional institutes will be announced soon. Topics discussed include the USA PATRIOT Act, Internet filtering, meeting room and display area policies, and how to defend against the censoring of library materials.

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

Council Actions

IFLA Glasgow Declaration

On August 19, 2002, the Council of the International Federation of Library Associations and Institutions (IFLA) adopted The Glasgow Declaration on Libraries, Information Services and Intellectual Freedom. The committee unanimously voted to endorse this declaration and urges Council to adopt it. Therefore, the IFC moves adoption of the IFLA document: *The Glasgow Declaration on Libraries, Information Services and Intellectual Freedom.* [Adopted unanimously by the ALA Council.]

FCC Rules on Media Ownership

The IFC placed the issue of the FCC Media Ownership rules on its Annual Conference agenda in order to consider its impact on diversity of ideas and access to information in local libraries. We were delighted after several Council members introduced a resolution on the Council e-list on this issue and invited them to join our discussion about both current and future ALA actions related to media diversity. The committee reviewed and revised the Council members' resolution, incorporating text about ALA policy (i.e. the *Library Bill of Rights*), and highlighting how media ownership affects libraries and free expression in local communities. The IFC also will establish a subcommittee to study the impact of media consolidation on libraries and recommend appropriate actions.

The IFC moves adoption of Resolution on New Federal Communications Commission (FCC) Rules and Media Concentration. [Adopted by the ALA Council.]

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. ☐

Resolution on New Federal Communications Commission (FCC) Rules and Media Concentration

WHEREAS, freedom of expression and diversity of opinion are essential to democracy, and

WHEREAS, these intellectual freedom principles are the bedrock of American librarianship, and

WHEREAS, the *Library Bill of Rights* states: "Libraries should provide materials and information presenting all points of view on current and historical issues," and

WHEREAS, America's libraries are essential to the collection, preservation, and provision of local information and history to their communities, and

WHEREAS, the mandate of the Federal Communications Commission (FCC) is to foster diversity, localism, and competition in the U.S. broadcast system, and

WHEREAS, the FCC on June 2, 2003, voted 3-2 to change its rules on media ownership to allow a company (1) to own television stations that can reach a higher percentage of the national audience (2) to increase the number of stations it owns in a given area, and (3) to allow a company to own television stations and newspapers in the same market, and

WHEREAS, the FCC's action removes safeguards against undue concentration of media ownership, inevitably reducing the number of independent voices and decreasing the amount of locally produced and locally relevant news and programming, and

WHEREAS, concentration of media ownership and production diminishes libraries' ability to provide a wide range of views and information, and

WHEREAS, without a diversity of opinion, the ability of libraries to provide materials and information presenting all points of view on current and historical issues to their communities is diminished, therefore be it

RESOLVED, that the American Library Association (ALA) deplores the action of the Federal Communications Commission (FCC) of June 2, 2003, and voices in the strongest possible terms opposition to these changes in the media ownership rules that encourage further concentration of the media, and be it further

RESOLVED, that ALA supports Congressional legislation to void the FCC's regulatory action, including S.1046, the "Preservation of Localism, Program Diversity, and Competition in Television Broadcast Act of 2003,"and supports Congressional efforts to reduce media concentration in the United States, and be it further

RESOLVED, That this resolution be forwarded to the Federal Communications Commission, to Members of both Houses of Congress, and to others as appropriate. [Adopted by ALA Council, June 25, 2003.] ☐

The Glasgow Declaration on Libraries, Information Services and Intellectual Freedom

Meeting in Glasgow on the occasion of the 75th anniversary of its formation, the International Federation of Library Associations and Institutions (IFLA) declares that:

IFLA proclaims the fundamental right of human beings both to access and to express information without restriction.

IFLA and its worldwide membership support, defend and promote intellectual freedom as expressed in the United Nations Universal Declaration of Human Rights. This intellectual freedom encompasses the wealth of human knowledge, opinion, creative thought and intellectual activity.

IFLA asserts that a commitment to intellectual freedom is a core responsibility of the library and information profession worldwide, expressed through codes of ethics and demonstrated through practice.

IFLA affirms that:

- Libraries and information services provide access to information, ideas and works of imagination in any medium and regardless of frontiers. They serve as gateways to knowledge, thought and culture, offering essential support for independent decision-making, cultural development, research and lifelong learning by both individuals and groups.

- Libraries and information services contribute to the development and maintenance of intellectual freedom and help to safeguard democratic values and universal civil rights. Consequently, they are committed to offering their clients access to relevant resources and services without restriction and to opposing any form of censorship.
- Libraries and information services shall acquire, preserve and make available the widest variety of materials, reflecting the plurality and diversity of society. The selection and availability of library materials and services shall be governed by professional considerations and not by political, moral and religious views.
- Libraries and information services shall make materials, facilities and services equally accessible to all users. There shall be no discrimination for any reason including race, national or ethnic origin, gender or sexual preference, age, disability, religion, or political beliefs.
- Libraries and information services shall protect each user's right to privacy and confidentiality with respect to information sought or received and resources consulted, borrowed, acquired or transmitted.

IFLA therefore calls upon libraries and information services and their staff to uphold and promote the principles of intellectual freedom and to provide uninhibited access to information.—This Declaration was prepared by IFLA/FAIFE. Approved by the Governing Board of IFLA March 27, 2002, The Hague, Netherlands. Proclaimed by the Council of IFLA August 19, 2002, Glasgow, Scotland. Endorsed by the ALA Council, June 25, 2003. ☐

Resolution on the Terrorism Information Awareness Program

The following resolution was adopted by the Council of the American Library Association on June 25, 2003 at the ALA National Conference in Toronto, Canada.

WHEREAS, The American Library Association's Policy on Governmental Intimidation opposes any use of governmental prerogatives that lead to the intimidation of the individual or the citizenry from the exercise of free expression; and

WHEREAS, The ALA Interpretation on Privacy describes the impact of freedom of inquiry on privacy or when privacy is compromised; and

WHEREAS, In matters of national security and the preservation of our nation, the concept of Terrorism Information Awareness, (formerly called Total Information Awareness) as defined by the Defense Advanced Research Projects Administration (DARPA), may be used in making key national security decisions; and

Scary Stories (Series) ● Daddy's Roommate ● I Know Why the Caged Bird Sings ● The Chocolate War ● The Adventures of Huckleberry ... Potter (Series) ● Forever ● ... s) ● Heather Has Two Mom... The Catcher in the Rye ● The ... Goosebumps (Series) ● A ... Purple ● Sex ● Earth's Children (Series) ● The Great Gilly Hopkins ● A Wrinkle in Time ● Go Ask Alice ● Fallen Angels ● In the Night

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WHEREAS, It is the responsibility of the federal government to protect its citizens from government sanctioned invasion of privacy; and

WHEREAS, Personally identifiable information compiled in a database by a government agency should be governed by the Privacy Act; and

WHEREAS, The Terrorism Information Awareness Program (TIAP) has the potential to build a large database of personally identifiable information; now, therefore, be it

RESOLVED, That the American Library Association urges the Congress of the United States to take action to terminate the Terrorism Information Awareness Program; and, be it further

RESOLVED, That the American Library Association urges the Defense Advanced Research Projects Administration (DARPA) to comply with all provisions of the Privacy Act; and, be it further

RESOLVED, That copies of this resolution be transmitted to the President of the United States, the Vice-President of the United States, the appropriate committees of the United States Congress, the Secretary of Defense, and other entities as appropriate. ☐

Resolution on Security and Access to Government Information

The following resolution was adopted by the Council of the American Library Association on June 25, 2003 at the ALA National Conference in Toronto, Canada.

WHEREAS, Open and unfettered access to information created and held by the government is a prerequisite for a free and democratic society, and

WHEREAS, Access to information needs to be balanced with the need to live in a secure environment; and

WHEREAS, Accountability of government to the people must be assured while considering security concerns; and

WHEREAS, The Department of Homeland Security has proposed regulations (RIN1601-AA 14) regarding the receipt, care, and storage of protected "Critical Infrastructure Information" (CII); and

WHEREAS, The proposed regulations provide a broader authority than authorized by Congress in Section 214 of the Homeland Security Act, including extending protected status to CII provided to all Federal agencies; and

WHEREAS, The proposed regulations provide for "protected" status for all submitted corporate information rather than relying on a prescribed criteria and guidelines for protection; and

WHEREAS, The proposed regulations in a number of cases do not provide adequate definitions and this allows for broad discretion resulting in possibly unintended restrictions on access to information; and

WHEREAS, The proposed regulations do not provide adequate discretionary powers to state and local governments for disclosure of information in order to respond to emergencies affecting the life and safety of large numbers of people; and

WHEREAS, The proposed regulations do not provide adequate protection for "whistleblowers" acting with reasonable belief of concern; and

WHEREAS, The Homeland Security Act mandates a new category of "Sensitive Homeland Security Information" that requires adequate definition and public input; now, therefore be it

RESOLVED, That the American Library Association encourages the Department of Homeland Security to formulate its rules regarding Critical Infrastructure Information (CII) and Sensitive Homeland Security Information (SHSI) within the legislative intent of Congress; and, be it further

RESOLVED, That ALA urges the development of regulations pertaining to SHSI with adequate public notice and input; and, be it further

RESOLVED, That ALA encourages appropriate Congressional committees and the Office of Management and Budget to provide strong oversight to rules concerning CII and SHSI during this time of increased security concerns; and, be it further

RESOLVED, That ALA communicate its concerns to appropriate committees and members of Congress, the Director of the Office of Management and Budget, and the Secretary of the Department of Homeland Security. ☐

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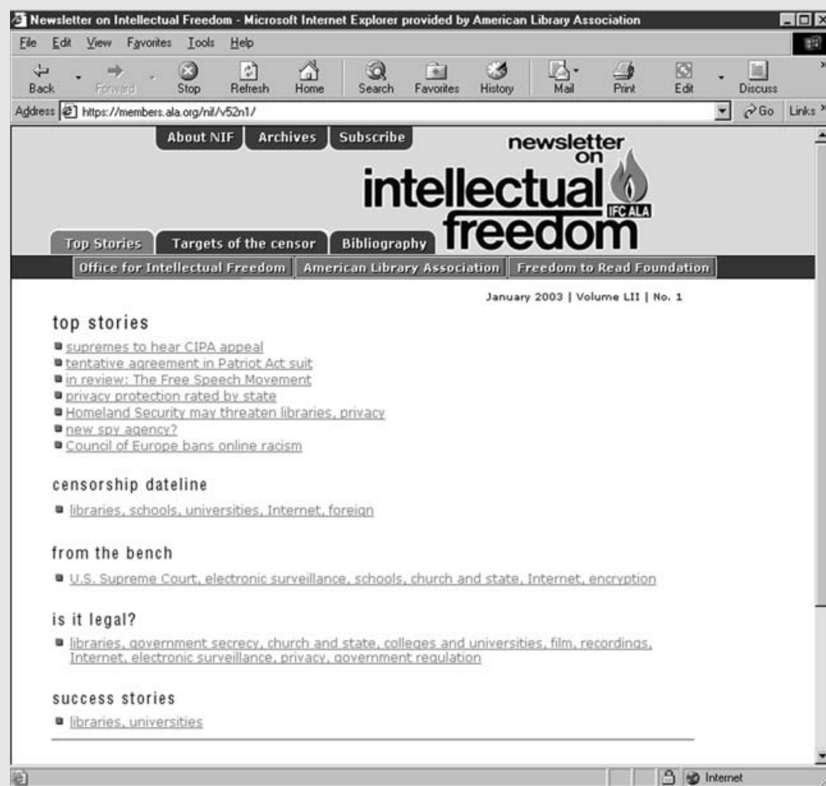

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