

newsletter  
on  
**intellectual**  
**freedom**



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## Harry Potter is most challenged fourth year in row

The best-selling Harry Potter series of children's books by J.K. Rowling tops the list of books most challenged in 2002, according to the American Library Association's (ALA) Office for Intellectual Freedom. The Potter series drew complaints from parents and others concerned about the books' focus on wizardry and magic.

The ALA Office for Intellectual Freedom received a total of 515 reports of challenges last year, a fifteen percent increase since 2001. A challenge is defined as a formal, written complaint, filed with a library or school, requesting that materials be removed because of content or appropriateness. The majority of challenges are reported by public libraries, schools and school libraries. According to Judith F. Krug, director of the Office for Intellectual Freedom, the number of challenges reflects only incidents reported, and for each challenge reported, four or five remain unreported.

The "Ten Most Challenged Books of 2002" reflect a wide variety of themes. The books, in order of most frequently challenged are:

- Harry Potter series, by J. K. Rowling, for its focus on wizardry and magic.
- Alice series, by Phyllis Reynolds Naylor, for being sexually explicit, using offensive language and being unsuited to age group.
- *The Chocolate War*, by Robert Cormier (the "Most Challenged" book of 1998), for using offensive language and being unsuited to age group.
- *I Know Why the Caged Bird Sings*, by Maya Angelou, for sexual content, racism, offensive language, violence and being unsuited to age group.
- *Taming the Star Runner*, by S.E. Hinton, for offensive language.
- *Captain Underpants*, by Dav Pilkey, for insensitivity and being unsuited to age group, as well as encouraging children to disobey authority.
- *The Adventures of Huckleberry Finn*, by Mark Twain, for racism, insensitivity and offensive language.
- *Bridge to Terabithia*, by Katherine Paterson, for offensive language, sexual content and Occult/Satanism.
- *Roll of Thunder, Hear My Cry*, by Mildred D. Taylor, for insensitivity, racism and offensive language.

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

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## IFC report to ALA Council

*The following is the text of the Intellectual Freedom Committee's report to the ALA Council, delivered at the ALA Midwinter Meeting in Philadelphia on January 29, 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 initiatives: the CIPA lawsuit, privacy-related issues, Meeting Room policy, and Outsourcing. Also included is information about other topics the IFC is monitoring, such as new trends in fee-for-service charges and deep linking, as well as updates on ongoing IFC projects.

### Issues

#### *Children's Internet Protection Act (CIPA)*

One year ago, the ALA Intellectual Freedom Committee reported to Council its confidence that ALA would prevail in its challenge to the Children's Internet Protection Act (CIPA) because we could illustrate what library users—and all Americans—stand to lose if librarians are forced to keep people and information apart, if local decisions are replaced by federal mandates, and if education and parenting are replaced by mechanical devices.

Subsequently, on May 31, the American Library Association (ALA) received a unanimous lower court ruling that CIPA is unconstitutional because the mandated use of filtering technology on all computers will result in blocked access to substantial amounts of constitutionally protected speech. The Court found that filters both overblock (block access to protected speech) and underblock (allow access to illegal or unconstitutional speech). The opinion was written by Chief Judge Edward R. Becker of the Third Circuit Court of Appeals and joined by U.S. District Court Judges John P. Fullam and Harvey Bartle, III.

The government appealed the Third Circuit's ruling, and arguments on CIPA will be heard Wednesday, March 5, 2003, by the Supreme Court.

According to the ALA Development Office, approximately \$1,160,000 has been raised in cash and pledges for the CIPA Legal Fund as of January 17, 2003. This figure includes donations from ALA, FTRF, 38 chapters, 9 divisions, and more than 4,000 individuals. It is estimated the suit will cost about \$1.7 million, so the IFC continues to urge all ALA members to become involved by making their annual contribution during 2003. Make checks payable to ALA and mail them to the ALA Development Office. You also may donate by credit card online at <https://cs.ala.org/cipa/>. For the latest information on CIPA, please visit our Web site at [www.ala.org/cipa](http://www.ala.org/cipa).

#### *Privacy—USA Patriot Act*

The Uniting and Strengthening America by Providing Adequate Tools Required to Intercept and Obstruct

Terrorism Act of 2001 ("USA Patriot Act") became law on October 26, 2001. The legislation originated with Attorney General John Ashcroft, who asked Congress for additional powers that he claimed were needed to fight terrorism in the wake of the events of September 11, 2001. Few amendments were made to Ashcroft's initial proposal to Congress, and the bill became law without any hearings or markup by a Congressional committee.

The Patriot Act amended over 15 federal statutes, including the laws governing criminal procedure, computer fraud and abuse, foreign intelligence, wiretapping, immigration, and the privacy of student records. These amendments expanded the authority of the Federal Bureau of Investigation (FBI) and law enforcement to gain access to business records, medical records, educational records, and library records, including stored electronic data and communications. It also expanded the laws governing wiretaps and "trap and trace" phone devices to Internet and electronic communications. These enhanced surveillance procedures pose the greatest challenge to privacy and confidentiality in the library.

The ALA Office for Intellectual Freedom has prepared information about the USA Patriot Act that was reviewed by legal counsel, and mounted at [www.ala.org/alaorg/oif/usapatriotact.html](http://www.ala.org/alaorg/oif/usapatriotact.html). This Web page includes links to various organizations and analyses of the Act, and additional information, including:

- Resolution Reaffirming the Principles of Intellectual Freedom in the Aftermath of Terrorist Attacks ([www.ala.org/alaorg/oif/reaffirmifprinciples.html](http://www.ala.org/alaorg/oif/reaffirmifprinciples.html));
- The USA Patriot Act in the Library ([www.ala.org/alaorg/oif/usapatriotlibrary.html](http://www.ala.org/alaorg/oif/usapatriotlibrary.html));
- Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff ([www.ala.org/alaorg/oif/guidelineslibrary.html](http://www.ala.org/alaorg/oif/guidelineslibrary.html)); and
- State Privacy Laws regarding Library Records ([www.ala.org/alaorg/oif/stateprivacylaws.html](http://www.ala.org/alaorg/oif/stateprivacylaws.html)).

If you or your library are served with a warrant issued under this law, you can seek legal advice concerning the warrant and request that the library's legal counsel be present during the actual search provided for by the warrant. If you do not have an attorney, you can obtain assistance from the Freedom to Read Foundation's legal counsel. Call the Office for Intellectual Freedom (1-800-545-2433, ext. 4223) and inform the staff that you need legal advice. Do not disclose the reason you need legal assistance. Do not inform OIF staff of the existence of the warrant. Just say, "I need to talk to an attorney." OIF staff will have an attorney return your call.

The American Library Association urges all libraries to adopt and implement patron privacy and record retention

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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 January 27 at the ALA Midwinter Meeting in Philadelphia, by FTRF President Gordon Conable.*

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

### CIPA Litigation

*American Library Association v. United States:* As you know, our lawsuit challenging the Children's Internet Protection Act (CIPA) resulted in a unanimous decision by the special three-judge panel that the CIPA statute violates the First Amendment and is facially unconstitutional. As anticipated, the government asked the U.S. Supreme Court to review the decision, written by Chief Judge Becker of the Third Circuit Court of Appeals on behalf of himself and U.S. District Judges Fullam and Bartle.

On November 12, 2002, the Supreme Court granted the government's petition, and ordered the parties to file briefs. The government's brief was filed on January 10, 2003. Counsel for the American Library Association and the Foundation are preparing a reply to be filed on February 10. Oral arguments will be heard on March 5.

The permanent injunction forbidding the FCC and LSTA from withholding funds from public libraries that choose not to install filters remains in place during the appeal. Public libraries, thus, are not required to install filters on their computers to receive funds from either agency.

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](http://www.ala.org/cipa).

### Privacy

Privacy is an increasingly important issue that the Freedom to Read Foundation has been attending to in recent months. The Foundation is pursuing litigation and tracking legislation addressing privacy and freedom from unreasonable government surveillance.

*ACLU v. Department of Justice*, filed on October 24, 2002, is a Freedom of Information Act lawsuit. FTRF is one of four plaintiffs seeking a court order requiring the Department of Justice (DOJ) to disclose aggregate statistical data and other policy information about the Department's implementation of the USA PATRIOT Act, including those portions which permit the FBI to obtain library and bookstore records without showing probable cause. On November 26, the court ordered the Department of Justice to disclose the relevant records it would turn over

to the plaintiffs by January 15, 2003. The DOJ turned over two hundred heavily redacted pages on January 16. Further steps are now under consideration.

President Bush signed H.R. 5005, The Homeland Security Act of 2002, on November 25. Among its many provisions is a statute allowing Internet service providers or any other provider of electronic communications to disclose the contents of an electronic communication to any federal, state, or local government entity if the provider believes "in good faith" that an emergency exists that poses a threat of death or physical injury. (This expands a provision of the PATRIOT Act that merely permitted disclosure to federal law enforcement agencies.) In addition, the new law allows the DOJ to install a "trap and trace" wiretap without a court order if there is an immediate threat to a national security interest or an ongoing attack against a protected computer or computer system.

### Litigation

The Foundation continues to enjoy success in its defense of our right to read and receive information freely. In each of the cases below, we have joined amicus briefs supporting that right:

*Interactive Digital Software Association v. St. Louis County:* This lawsuit challenges a St. Louis, Missouri, ordinance forbidding the sale or rental of violent video games to minors. Last April, a federal District Court upheld the ban, ruling that video games are not protected expression under the First Amendment, directly contradicting the Seventh Circuit Court of Appeals decision in *AAMA v. Kendrick*, which overturned a similar ordinance passed by the city of Indianapolis. The plaintiffs appealed the District Court decision to the Eighth Circuit Court of Appeals, and the Foundation joined an *amicus* brief opposing the ban. The parties are now waiting for the Eighth Circuit to schedule oral arguments.

The Ninth Circuit Court of Appeals heard oral arguments last month in *Yahoo! v. La Ligue Contre Le Racisme et L'Antisemitisme*, after defendants La Ligue Contre Le Racisme et L'Antisemitisme and the French Union of Jewish Students appealed the District Court's refusal to enforce a French court's order imposing fines on Yahoo! for hosting pages advertising Nazi and racist memorabilia. The District Court 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. FTRF supported Yahoo! at the district court level, and joined in another amicus brief supporting Yahoo!'s position on appeal. A decision is expected shortly.

*Ashcroft v. American Civil Liberties Union* (formerly *ACLU v. Reno*) (COPA): This lawsuit seeks to overturn the Children's Online Protection Act (COPA)—also known as CDA II—which restricts online materials deemed "harmful

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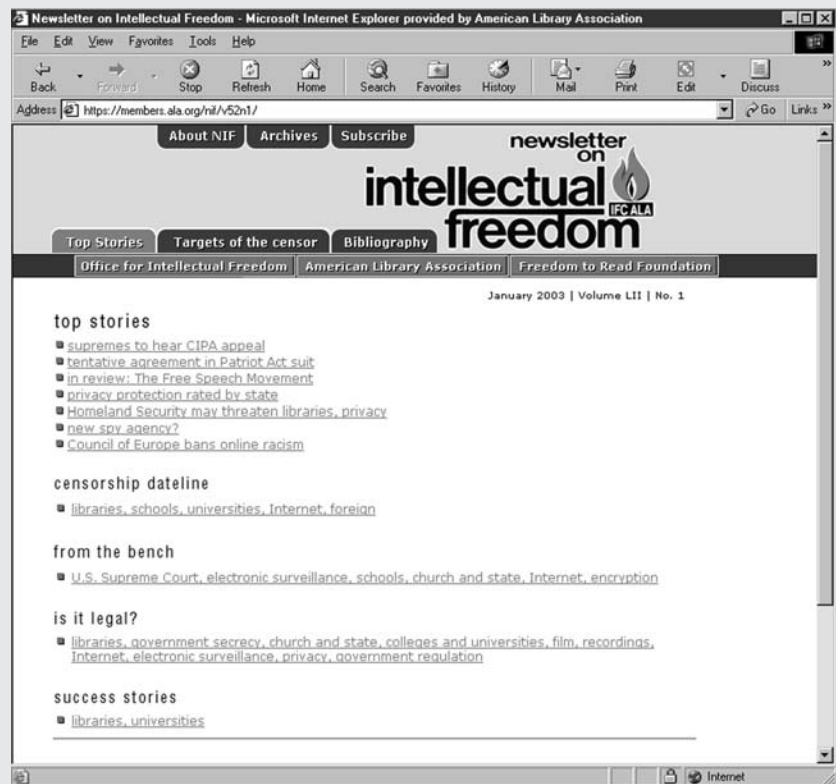
log on to

# newsletter on intellectual freedom *online*

*The Newsletter on Intellectual Freedom (NIF)*—the only journal that reports attempts to remove materials from school and library shelves across the country—is *the* source for the latest information on intellectual freedom issues. *NIF* is **now available both online and in print!**

To celebrate the launch of the online version, for this first year only, a \$50 subscription will entitle new and renewing subscribers to **both** the online and print editions.

The online version is available at [www.ala.org/nif](http://www.ala.org/nif). The *NIF* home page contains information on accessing the *Newsletter*, and links to technical support, an online subscription form, and the Office for Intellectual Freedom.



# [www.ala.org/nif](http://www.ala.org/nif)

Current institutional and personal subscribers were sent a letter explaining how to access the online version. If you did not receive a letter, or if you would like more information on how to subscribe to either the print or online version, please contact Nanette Perez at 1-800-545-2433, ext. 4223, or [nperez@ala.org](mailto:nperez@ala.org).

## big brother no longer a fiction, ACLU warns

The United States has now reached the point where a total “surveillance society” has become a realistic possibility, the American Civil Liberties Union warned in a report released January 15. “Many people still do not grasp that Big Brother surveillance is no longer the stuff of books and movies,” said Barry Steinhardt, Director of the ACLU’s Technology and Liberty Program and a co-author of the report.

“Given the capabilities of today’s technology, the only thing protecting us from a full-fledged surveillance society are the legal and political institutions we have inherited as Americans,” he added. “Unfortunately, the September 11 attacks have led some to embrace the fallacy that weakening the Constitution will strengthen America.”

The ACLU said that its report, *Bigger Monster, Weaker Chains: The Growth of an American Surveillance Society*, is an attempt to step back from the daily march of stories about new surveillance programs and technologies and survey the bigger picture. The report argues that even as surveillance capacity grows like a “monster” in our midst, the legal “chains” needed to restrain that monster are being weakened. The report cites not only new technology but also erosions in protections against government spying, the increasing amount of tracking being carried out by the private sector, and the growing intersection between the two.

“From government watch lists to secret wiretaps—Americans are unknowingly becoming targets of government surveillance,” said Dorothy Ehrlich, executive director of the ACLU of Northern California. “It is dangerous for a democracy that government power goes unchecked and for this reason it is imperative that our government be made accountable.”

A recent illustration of the danger, according to the ACLU report, is the Pentagon’s Total Information Awareness (TIA) program, which seeks to sift through a vast array of databases full of personal information in the hunt for terrorism. “Even if TIA never materializes in its current form,” Steinhardt said, “what this report shows is that the underlying trends are much bigger than any one program or any one controversial figure like John Poindexter.”

Steinhardt said that Americans haven’t yet felt the full potential of the new technology for invading privacy because of latent inefficiencies in how government and businesses handle information. “Database inefficiencies can’t be expected to protect our privacy forever,” said Steinhardt. “Eventually businesses and government agencies will settle on standards for tying together information, and gain the ability to monitor many of our activities—either directly through surveillance cameras, or indirectly by analyzing the information trails we leave behind us as we go through life.” Reported in: ACLU Press Release, January 15. □

## scientists debate censorship and security

Leading scientists began talks January 9 on whether and how to withhold publication of scientific information that could compromise national security.

The discussions at the National Academy of Sciences followed a raft of post-September 11 restrictions on research into some 64 substances that could be used in biological weapons. The discussions were also partly an effort to fend off potential government censorship or other steps to control unclassified research that the new domestic security law terms “sensitive.”

The talks were prompted by the hesitance of microbiologists to publish their full research in scientific journals out of concern that terrorists could use the information. While restrictions on research have long been a fact of life for chemists and nuclear physicists, they are new and not entirely welcome among microbiologists, who say data must be published so other scientists can verify the quality of the research by reproducing the results.

“We in the life sciences are in the process of losing some of our innocence,” said Stephen S. Morse of the Joseph L. Mailman School of Public Health at Columbia University. “Knowledge, often using very simple materials, is also the critical ingredient in making a biological weapons advance.”

The discussions brought together two communities that have often viewed each other with distrust, if not disdain: security experts and scientists. While some scientists contend that the best defense against biological weapons is robust research that is widely accessible, security specialists maintain that scientists are being naive at best, and reckless at worst.

“These two communities, if we do not start now with a constructive dialogue with each other, we’re going to turn this into a disaster,” said John J. Hamre, president of the Center for Strategic and International Studies, which sponsored the meeting along with the National Academy of Sciences. Dr. Hamre noted that the political climate in Washington and around the nation supported greater restrictions on science and civil liberties in the name of fighting terrorism. If scientists did not take the security concerns seriously, he said, politicians and policy makers with little understanding of science would step in with “blanket restrictions on science, not knowing what’s sensitive and what’s not sensitive.”

“For precious little security, we would have devastating effects for the conduct of science,” said Dr. Hamre, a former deputy secretary of defense.

John H. Marburger, director of the White House Office on Science and Technology Policy, noted that under a

*(continued on page 59)*

## administration to propose Internet monitoring

The Bush administration is planning to propose requiring Internet service providers to help build a centralized system to enable broad monitoring of the Internet and, potentially, surveillance of its users. The proposal is part of a final version of a report, "The National Strategy to Secure Cyberspace," set for release this year, according to several people who were briefed on the report. It is a component of the effort to increase national security after the September 11 attacks.

The President's Critical Infrastructure Protection Board is preparing the report. It is intended to create public and private cooperation to regulate and defend the national computer networks, not only from everyday hazards like viruses but also from terrorist attack. Ultimately, the report is intended to provide an Internet strategy for the new Department of Homeland Security.

Such a proposal, which would be subject to Congressional and regulatory approval, would be a technical challenge because the Internet has thousands of independent service providers, from garage operations to giant corporations like America Online, AT&T, Microsoft and Worldcom. The report does not detail specific operational requirements, locations for the centralized system or costs.

While the proposal is meant to gauge the overall state of the worldwide network, some officials of Internet companies who have been briefed on the proposal said they worry that such a system could be used to cross the indistinct border between broad monitoring and wiretap.

Stewart Baker, a Washington lawyer who represents some of the nation's largest Internet providers, said, "Internet service providers are concerned about the privacy implications of this as well as liability," since providing access to live feeds of network activity could be interpreted as a wiretap or as the "pen register" and "trap and trace" systems used on phones without a judicial order. Baker said the issue would need to be resolved before the proposal could move forward.

Tiffany Olson, the deputy chief of staff for the President's Critical Infrastructure Protection Board, said the proposal, which includes a national network operations center, was still in flux. She said the proposed methods did not necessarily require gathering data that would allow monitoring at an individual user level. But the need for a large-scale operations center is real, Olson said, because Internet service providers and security companies and other online companies only have a view of the part of the Internet that is under their control.

"We don't have anybody that is able to look at the entire picture," she said. "When something is happening, we don't know it's happening until it's too late." The government report was first released in draft form in September,

and described the monitoring center, but suggested it would likely be controlled by industry. The current draft sets the stage for the government to have a leadership role.

The new proposal is labeled in the report as an "early-warning center" that the board says is required to offer early detection of Internet-based attacks as well as defense against viruses and worms. But Internet service providers argue that its data-monitoring functions could be used to track the activities of individuals using the network.

An official with a major data services company who was briefed on several aspects of the government's plans said it was hard to see how such capabilities could be provided to government without the potential for real-time monitoring, even of individuals. "Part of monitoring the Internet and doing real-time analysis is to be able to track incidents while they are occurring," the official said.

The official compared the system to Carnivore, the Internet wiretap system used by the F.B.I., saying: "Am I analogizing this to Carnivore? Absolutely. But in fact, it's ten times worse. Carnivore was working on much smaller feeds and could not scale. This is looking at the whole Internet."

One former federal Internet security official cautioned against drawing conclusions from the information that is available so far about the Securing Cyberspace report's conclusions. Michael Vatis, the founding director of the National Critical Infrastructure Protection Center and now the director of the Institute for Security Technology Studies at Dartmouth, said it was common for proposals to be cast in the worst possible light before anything is actually known about the technology that will be used or the legal framework within which it will function. "You get a firestorm created before anybody knows what, concretely, is being proposed," Vatis said.

A technology that is deployed without the proper legal controls "could be used to violate privacy," he said, and should be considered carefully. But at the other end of the spectrum of reaction, Vatis warned, "You end up without technology that could be very useful to combat terrorism, information warfare or some other harmful act." Reported in: *New York Times*, December 20. □

## UN rights chief: "terror war infringing rights"

The U.N.'s human rights chief said December 17 that the U.S.-led "war on terror" was hurting human rights and exacerbating prejudices around the world. "The war on terrorism has had some damaging effects, I would suggest, on human rights standards across the world," United Nations High Commissioner for Human rights Sergio Vieira de Mello told a news conference in Helsinki, Finland.

Governments across the globe have invoked the “war on terror,” announced by President Bush after the September 11, 2001, attacks in the United States, to justify activities that de Mello said are damaging human rights in the industrialized and developing worlds. De Mello said he understood the need to provide security against attacks on civilians after September 11, but he said that the “war on terror” had aggravated existing prejudices.

The U.N. human rights chief echoed the worries expressed by his predecessor Mary Robinson in November about the rise in discrimination against Muslims. “Arabs and Muslims at large are experiencing increasing incidents of racial discrimination . . . Singling out, finger pointing and . . . even in some instances (violence),” he said. De Mello also said anti-Semitism was an issue that needed to be met head-on. Reported in: *Kansas City Star*, December 17. □

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(FTRF report . . . from page 50)

to minors.” In June 2000, the Third Circuit Court of Appeals barred enforcement of COPA, finding the law’s reliance on community standards to identify material that is harmful to minors in violation of the First Amendment. On May 13, 2002, the United States Supreme Court reversed that decision, upholding the law on the narrow grounds that the law’s reliance on community standards did not by itself render COPA unconstitutional. Because the Court believed the Third Circuit did not sufficiently address all of the First Amendment issues raised by COPA’s restrictions on Internet speech, the Supreme Court returned the lawsuit to the Third Circuit for a fuller consideration of those issues, while permitting the injunction barring enforcement of the law to remain in place.

In August 2002, the parties again briefed the case for the Third Circuit, and the Foundation joined the Center for Democracy and Technology and filed a brief asking the court to find COPA unconstitutional for a second time. Oral arguments were heard on October 29, 2002. The parties are awaiting a decision from the court.

### State Internet Content Laws

The Foundation continues to participate in lawsuits challenging state laws that criminalize the distribution of materials deemed “harmful to minors” on the Internet. The newest lawsuit, *Southeast Booksellers v. Condon*, challenges an amendment to the South Carolina “harmful to minors” law that sweeps in visual matter communicated via the Internet. The lawsuit was filed on November 6, 2002. The plaintiffs are now preparing to file a motion for summary judgment.

In other such cases:

*Bookfriends, Inc. v. Taft*: Ohio has amended its “harmful to minors” law in response to the lawsuit filed by FTRF and

several other plaintiffs last May. The legislature’s action follows the issuance of a preliminary injunction last August forbidding the State of Ohio from enforcing its newly passed law that defined “harmful to juveniles” as any material that included violence, foul words, cruelty, and glorification of crime. The state had appealed that order to the Sixth Circuit Court of Appeals. The parties expect the Sixth Circuit to return the case to the trial court in light of the legislature’s action. FTRF and the plaintiffs will continue to challenge the law’s Internet provisions in the trial court.

*PSNet v. Chapman*: Attorneys for FTRF and other plaintiffs have filed a brief with the Fourth Circuit Court of Appeals, urging the court to uphold the U.S. District Court for the Western District of Virginia’s permanent injunction forbidding enforcement of Virginia’s Internet content law. The parties argued the case before that court on October 28, 2002. We are waiting for a decision from the court.

*ACLU v. Napolitano*: On February 19, 2002, the U.S. District Court in Arizona struck down Arizona’s new Internet content law after FTRF and several other plaintiffs challenged the constitutionality of Arizona’s revised law. The court has now issued a permanent injunction preventing enforcement of the law.

*ABFFE v. Dean*: Vermont legislators’ attempt to obviate the lawsuit filed by FTRF and other plaintiffs by rewriting and amending their Internet “harmful to minors” statute has failed. On April 19, 2002, the U.S. District Court in Brattleboro, Vermont, declared the law unconstitutional and entered a permanent injunction barring its enforcement. The State of Vermont appealed the decision to the Second Circuit Court of Appeals, which will hear oral arguments on February 6, 2003.

### Federal Legislation

Finally, a piece of legislation we were tracking has passed into law. On November 15, 2002, Congress approved H.R. 3833, “The Dot Kids Implementation and Efficiency Act of 2002,” a law that creates a “dot.kids” Internet subdomain under the top-level .us domain. The new subdomain will be operated by the private company Neustar and will exclude all material deemed “harmful to minors” and prohibit any links to material outside the .kids.us domain. □

**READ  
BANNED  
BOOKS**



## — censorship dateline



## schools

### Tampa, Florida

A fictional play about a deadly school shooting reached the finals of a district drama competition but it failed to win over King High School administrators who banned its performance before the student body. “There were so many people who wanted to come see it and were interested,” said Cristina Martin, the play’s student director and a senior at the school. “It kind of let us down.”

Administrators said the play—*Bang, Bang, You’re Dead*—was inappropriate for high school students.

“It was a sensitive subject, even in a situation where the moral of the story is a good one,” said David Steele, principal of King High School. Only a select group of teachers, parents and friends of the actors were permitted to attend a dress rehearsal.

Written by playwright William Mastrosimone, *Bang, Bang, You’re Dead* takes place in the head of an angry high school freshman who guns down five classmates in the school cafeteria. During the play, his victims visit him, “interrogating him on why and making him realize how he’s done something really, really horrible—how he’s ended their lives and his parents and his own,” said Kim Mattes Davis, drama teacher at King High School.

“The best thing about the play is that it presents this subject matter in a way it can be swallowed,” said Martin. “It’s all in a flashback, but you get to see the progression. This

kid is picked on. It is in no way a justification, but you can see two sides of the story.”

“For them to compete on a college campus judged by professionals is different than a high school setting,” said Steele, who had not seen the play but read the script twice before contacting school district officials and making his decision in December. “I feel like we came up with a reasonable solution,” he said.

Linda Cobbe, spokeswoman for Hillsborough County schools, said the play has been performed twice by Wharton and Riverview high schools. The drama by Mastrosimone, known nationally for his play and for the movie *Extremities*, has been performed nationwide and is often followed by community discussions on youth violence. The author, who wrote the play in 1999 in response to school shootings and a threat written on a blackboard at his son’s school, offers it for free on his Web site [www.bangbangyouredead.com](http://www.bangbangyouredead.com). “Showtime did a rendition of it not long ago,” Mattes Davis said. “It’s just pertinent today.”

Per the playwright’s stipulations “there is no gun on stage and no violence; it’s just the retelling of the story,” Mattes Davis said. “Honestly, the people who come to plays are more mature, anyway.”

Some student actors said they understood the administration’s hesitation. “I can identify with Dr. Steele,” said senior Chris Nielubowicz, who portrays the teen killer. “You never know. I understand that someone could see the play and get the wrong message, and it could be a spark for violence.”

Steele approved an invitation-only performance in the school’s auditorium that drew a crowd of about 100—a necessity because competition guidelines require an entry be performed before an audience. “I disagreed,” director Cristina Martin said of the schoolwide ban. “But at the same time, we have to respect our administrators; and they are letting us compete.” Reported in: *St. Petersburg Times*, January 17.

### Canton, Georgia

At the beginning of the school year, Dixie Outfitters T-shirts were all the rage at Cherokee High School. Girls seemed partial to one featuring the Confederate battle flag in the shape of a rose. Boys often wore styles that discreetly but unmistakably displayed Dixie Outfitters’ rebel emblem logo. But now the most popular Dixie Outfitters shirt at the school doesn’t feature a flag at all. It says: “Jesus and the Confederate Battle Flag: Banned From Our Schools But Forever in Our Hearts.” It became an instant favorite after school officials prohibited shirts featuring the battle flag in response to complaints from two African American families who found them intimidating and offensive.

The ban stirred old passions about Confederate symbols and their place in Southern history in this increasingly suburban high school, 40 miles northwest of Atlanta. Similar disputes over the flag are being played out more frequently in

school systems—and courtrooms—across the South and elsewhere, as a new generation’s fashion choices raise questions about where historical pride ends and racial insult begins.

Schools in states from Michigan to Alabama have banned the popular Dixie Outfitters shirts just as they might gang colors or miniskirts, saying they are disruptive to the school environment. The rebel flag’s modern association with white supremacists makes it a flashpoint for racial confrontation, school officials say.

“This isn’t an attempt to refute Southern heritage,” said Mike McGowan, a Cherokee County schools spokesman. “This is an issue of a disruption of the learning environment in one of our schools.”

Walter C. Butler Jr., president of the Georgia State Conference of the NAACP, said it is unreasonable to ask African Americans not to react to someone wearing the rebel flag. “To ask black people to respect a flag that was flown by people who wanted to totally subjugate and dehumanize you—that is totally unthinkable,” he said.

But the prohibitions against flag-themed clothing have prompted angry students, parents, Confederate-heritage groups and even the American Civil Liberties Union to respond with protests and lawsuits that argue that students’ First Amendment rights are being trampled in the name of political correctness.

“This is our heritage. Nobody should be upset with these shirts,” said Ree Simpson, a senior soccer player at Cherokee who says she owns eight Confederate-themed shirts. “During Hispanic Heritage Month, we had to go through having a kid on the intercom every day talking about their history. Do you think they allow that during Confederate History Month?”

Simpson said no one complains when African American students wear clothes made by FUBU, a black-owned company whose acronym means “For Us By Us.” Worse, she says, school officials have nothing to say when black students make the biting crack that the acronym also means “farmers used to beat us.” Similarly, she says, people assume that members of the school’s growing Latino population mean no harm when they wear T-shirts bearing the Mexican flag.

Simpson believes the rebel flag should be viewed the same way. The days when the banner was a symbol of racial hatred and oppression are long gone, she contends. Far from being an expression of hate, she says, her affection for the flag simply reflects Southern pride. “I’m a country girl. I can’t help it. I love the South,” she said. “If people want to call me a redneck, let them.”

It is a sentiment that is apparently widely shared at Cherokee, and beyond. The day after Cherokee Principal Bill Sebring announced the T-shirt ban on the school’s intercom this fall, more than a hundred students were either sent home or told to change clothes when they defiantly

wore the shirts to school. In the weeks that followed, angry parents and Confederate heritage groups organized flag-waving protests outside the school and at several school board meetings.

“All hell broke loose,” said Tom Roach, an attorney for the Cherokee County school system. When principals banned the shirts at other county high schools in the past, he said, “there was no public outcry. No complaints. No problems.”

But the Confederate flag was a particularly hot topic in Georgia this year. Gov. Roy Barnes was upset in his reelection bid in November in part because he successfully pushed for redesign of the Georgia state flag, which was formerly dominated by the Confederate battle emblem. On the new state banner, the emblem is reduced to a small icon. During the campaign, Barnes’s opponent, Sonny Perdue, called for a referendum on the new flag, a position that analysts say helped make him the state’s first elected Republican governor since Reconstruction.

Elsewhere in the South, civil rights groups have mobilized to remove the banner in recent years. Activists had it removed from atop the South Carolina statehouse and from other public places, saying it is an insult to African Americans and others who view it as a symbol of bigotry and state-sanctioned injustice. But that campaign has stirred a resentful backlash from groups that view it as an attack on their heritage.

“We’re not in a battle just for that flag, we’re in a battle to determine whether our Southern heritage and culture survives,” said Dan Coleman, public relations director for the Sons of Confederate Veterans, one of the groups that joined the protests at Cherokee High School.

The battle over Confederate-themed clothing has made its way to the courts, which generally have sided with school dress codes that prevent items that officials deem disruptive. In a 1969 decision, the U.S. Supreme Court ruled in *Tinker v. Des Moines Independent Community School District* that school officials could not prohibit students from wearing black armbands to protest the Vietnam War, but only because the court found that the armbands were not disturbing the school atmosphere.

By contrast, the U.S. Court of Appeals for the 6th Circuit last year revived a lawsuit by two Kentucky students suspended for wearing shirts featuring the Confederate flag. The court said the reasons for the suspension were vague and remanded the case to a lower court, where it was dismissed after the school district settled with the students.

Also, the U.S. Court of Appeals for the 3rd Circuit last fall sided with a Washington, N.J., student who challenged his school’s ban on a T-shirt displaying the word “redneck.” The student was suspended from Warren Hills Regional High School for wearing the shirt, which school officials said violated their ban on clothing that portrays racial

stereotypes. The school's vice principal said he took "redneck" to mean a violent, bigoted person.

But the court overturned the ban, saying the shirt was not proven to be disruptive. School officials, noting the school has a history of racial tensions, have promised to appeal the ruling to the Supreme Court.

"Since last year, we have gotten well over two hundred complaints about the banning of Confederate symbols in schools," said Kirk Lyons, lead counsel for the Southern Legal Resource Center, a North Carolina-based public-interest law firm that works to protect Confederate heritage and is in discussions with some families at Cherokee High School. He said the center is litigating six lawsuits and that dozens of others challenging Confederate clothing bans have been filed across the country.

As the controversy grows, Confederate-themed clothing has become more popular than ever. The owner of Georgia-based Dixie Outfitters says the firm sold a million T-shirts last year through the company's Web site and department stores across the South. Most of the shirts depict Southern scenes and symbols, often with the Confederate emblem.

"This is not your typical, in-your-face redneck type of shirt," said Dewey Barber, the firm's owner. "They are espousing the Southern way of life. We're proud of our heritage down here."

Barber said he is "troubled" that his shirts are frequently banned by school officials who view them as offensive. "You can have an Iraqi flag in school. You can have the Russian flag. You can have every flag but the Confederate flag. It is puzzling and disturbing," he said.

In an angry letter to Cherokee Principal Sebring posted on its Web site, Dixie Outfitters called the two families who complained about the shirts—but asked not to be identified publicly—"race baiters."

"Are you going to ban the American flag, if one or two people out of 1,800 find it offensive, because it had more to do with the slave trade than any other flag, including the battle flag?" the letter asks.

It is an argument made by many who do not understand why some people find the Confederate battle flag deeply offensive. "The Confederate flag itself is not racist," said Rick Simpson, Ree's father. "It was the American flag that brought slaves to this country."

David Ray, a Cherokee County contractor, said his son, Eric, has been punished with inschool suspensions a couple of times this year for defying a Confederate T-shirt ban at Etowah High, another Cherokee County school. He said he couldn't understand why the shirts are causing such a fuss. "Slavery ended almost 150 years ago," Ray said. "You might have some parents who still hold the slavery issue or black versus white deep in their hearts. But for the most part, I think, people are over that." However, Confederate emblems only began to appear on southern states'

flags in the 1950s and 1960s during the civil rights movement against segregation. Reported in: *Washington Post*, December 29.

### Lucedale, Mississippi

Despite impassioned pleas from two professionals, the George County School Board confirmed its decision January 21 to ban three books from the school system, including the John Steinbeck classic *Of Mice and Men*, because of profanity in them.

The five-man board, however, did vote to set up a committee "made up of a true representation of this county" to review concerns or complaints about supplementary books and materials used in the classroom. The school system already has a policy that any parent can veto supplementary books that teachers suggest if they don't feel the books are appropriate for their child.

"We are a small, Christian-oriented, Bible Belt community with strong religious convictions," board President Tim Welford said. "We believe that the majority of our community agrees with us."

Attorney Bob Shepard, who also has a degree in English, called *Of Mice and Men* and *The Things They Carried*, a novel by Tim O'Brien set in the Vietnam War, masterpieces and told the board it had made a serious mistake in banning all three books. The third is also a Vietnam novel, *Fallen Angels*, by Walter Dean Myers.

Shepard said the ban is un-American, would divide the community of 13,000, damage economic development with an anti-education message and spit in the face of teachers.

Jim Corley, a retired engineer, told the board he felt it acted too quickly, without enough thought. "The decision to restrict information should always be the last resort and not the first," he said. "I don't think a small group of people has the right to decide what my children will read."

Welford said the board isn't "saying publishers can't publish them (the books). We're just doing what we think is best for this school system."

The issue drew a crowd of about forty that stood at the back of the boardroom when the chairs were filled. Corley and Shepard drew applause.

Mississippi Attorney General Mike Moore, who attended the meeting on another matter, opted not to comment on the board's book ban, calling it an issue that's "just at the local level."

Outside the boardroom after the vote, Lucedale resident David Short told Shepard that the school board members acted from their heart. He said that he can't tell his daughter "not to cuss" and then let her read curse words in a book. Shepard replied: "What they did was set education back by not letting children get an education. It fundamentally undermines America." Reported in: *Gulfport Sun-Herald*, January 22.

## Albany, New York

Last June, after a parent caught them red-handed, New York State education officials promised to stop sanitizing literary excerpts on the state high school Regents exams. But a review of the most recent state exam, given in August, revealed that they did it again, this time altering Franz Kafka and sanitizing Aldous Huxley. Worse yet, a historian quoted on the exam believes that a test question based on his work has more than one correct answer. If he is right, it may mean that some high school students who failed the August test actually passed and could be eligible for a diploma.

In June, Jeanne Heifetz, the parent of a New York City senior, discovered that state education officials had been doctoring the literary reading samples on state tests to make sure nothing offensive was included. It didn't matter if it was Anton Chekhov or Isaac Bashevis Singer, state bureaucrats removed references to race, religion, ethnicity, sex, nudity and even alcohol. "Jews" and "gentiles" were excised from Singer. An Annie Dillard excerpt about growing up white in a black area was purged of racial references.

In exposing this tomfoolery, Heifetz, who has an English degree from Harvard, wanted people to see what she believes: that the standardized tests so many politicians now worship are hardly rigorous and actually undermine academic excellence.

There was an outcry from writers, academics and groups like the National Coalition Against Censorship, and state officials promised to end such practices. Not quite. Heifetz got a look at August's English exam. In new guidelines, the state promised complete paragraphs with no deletions, but an excerpt from Kafka (on the importance of literature) changes his words and removes the middle of a paragraph without using ellipses, in the process deleting mentions of God and suicide.

The new state guidelines promised not to sanitize, but a passage on people's conception of time from Aldous Huxley (a product of England's colonial era) deletes the paragraphs on how unpunctual "the Oriental" is.

But perhaps the most flagrant example of how standardized testing can lower academic standards (as a recent national study by Arizona State University reports) can be seen in the way New York officials butchered an excerpt from a PBS documentary on the influenza epidemic of 1918. Like any good historical work, the documentary on this epidemic, which killed half a million Americans, included numerous interviews with historians, novelists, medical experts and survivors, and quoted primary sources of the era. But the three-page passage read out loud to students on the state exam is edited to make it appear that there is only one speaker.

Though the new guidelines promised to identify the authors of any excerpts, the state does not identify the documentary's author, Ken Chowder. It does identify the nar-

ator, although incorrectly: the narrator was Linda Hunt, not David McCullough. As Heifetz said, any student who melded the words of a dozen people into one and then misidentified the narrator would surely be failed.

The state version cuts out the passages with the most harrowing and moving accounts of the epidemic, as when children played on piles of coffins stacked outside an undertaker's home. It removes virtually all references to government officials' mishandling the epidemic. It deletes the references to religious leaders like Billy Sunday, who promised that God would protect the virtuous, even as worshippers dropped dead at his services.

And Heifetz believes that one test question based on the influenza reading has three correct answers, not the single answer the state scoring sheet indicates. Question 2 says, "The speaker implies that the war effort affected the epidemic by: 1) increasing the chance of exposure." This is the answer the state wants, and it is correct, since the war forced soldiers into cramped troop ships, helping spread the disease. But Answer 2, "decreasing health care funds," also appears to be implied, since, as the excerpt points out, "practically every available doctor and nurse had been sent to Europe," leaving Americans at home badly underserved. And Answer 3, "restricting the flow of information," also seems plausible. As the excerpt indicates, President Woodrow Wilson had to make a very tough—and secret—decision to send reinforcements overseas on those troop ships, even though he knew many would be exposed to influenza and die.

In the world of make-or-break exams, one question scored incorrectly can make all the difference in a student's future. In Massachusetts, after a student discovered there was a second correct answer to a math question on the state test, 449 students who had failed were suddenly eligible for high school diplomas.

In an interview, James A. Kadamus, deputy New York education commissioner, disagreed with almost all these criticisms. He acknowledged that there should have been ellipses in the shortened Kafka quotation, but said it was O.K. to change Kafka's words inside the quotation marks since the exam noted that it was an "adapted quote." The Huxley and influenza passages were shortened for length, he said, not sensitivity. And because the influenza passage was read out loud to students, Kadamus said, it would have been too confusing to attribute the quotations to people who actually spoke them; the passage worked more smoothly, he said, as a single-person narration.

As for Question 2, he said that if someone like Heifetz repeatedly read the excerpt and thought about every little nuance, she might decide there was more than one correct answer, but that for students listening to the "overall flow" of the passage, No. 1 was clearly the best answer.

Dr. Alfred Crosby, a retired University of Texas professor who was featured in the PBS documentary and has writ-

ten the book *America's Forgotten Pandemic*. was offended by the state's single-speaker vision of the past. He said all three answers to Question 2 were implied in the state excerpt and said that if he were marked wrong for responding with Answers 2 or 3, he'd be angry. "That's the problem," he said, "with a multiple-choice test." Reported in: *New York Times*, January 8.

## Internet

### Washington, D.C.

Information on condom use, the relation between abortion and breast cancer and ways to reduce sex among teenagers has been removed from government Web sites, prompting critics to accuse the Department of Health and Human Services of censoring medical information in order to promote a philosophy of sexual abstinence.

Over the last year, the department has quietly expunged information on how using condoms protects against AIDS, how abortion does not increase the risk of breast cancer and how to run programs proven to reduce teenage sexual activity. The posting that found no link between abortion and breast cancer was removed from the department's Web site last June, after Representative Christopher H. Smith, a New Jersey Republican who is co-chairman of the House Pro-Life Caucus, wrote a letter of protest to Secretary Tommy Thompson calling the research cited by the National Cancer Institute "scientifically inaccurate and misleading to the public."

The removal of the information has set off protests from other members of Congress, mainly Democrats, and has prompted a number of liberal health advocacy groups to accuse the department of bowing to pressure from social conservatives.

The controversy began drawing attention in late October, when Representative Henry A. Waxman, the California Democrat, and other members of Congress wrote to Thompson protesting the removal of the material. Bill Pierce, the department's deputy assistant secretary for media affairs, said that in all three cases the removals were made so that material could be rewritten with newer scientific information. He also said the decisions to remove material had been made by the Centers for Disease Control and Prevention or the National Institutes of Health without any urging from the department's headquarters.

But in one case—the removal of information about condoms from a C.D.C. Web site—he was contradicting a C.D.C. official. That official, Dr. Ron Valdiserri, deputy director of the center's program for H.I.V., S.T.D. and TB Prevention, said October 31 that it was a joint C.D.C.-Health and Human Services decision. Asked about the contradiction, Pierce said it was a C.D.C. "decision to do it."

The department has previously been accused of subverting science to politics by purging advisory committees and choosing scientific experts with views on occupational health favorable to industry.

In an interview, Rep. Waxman said: "We're concerned that their decisions are being driven by ideology and not science, particularly those who want to stop sex education. It appears that those who want to urge abstinence-only as a policy, whether it's effective or not, don't want to suggest that other programs work, too."

One Republican congressman, Representative James C. Greenwood of Pennsylvania, joined Waxman and ten other Democrats, in writing Secretary Thompson July 9 to complain about the deletion of the breast cancer report.

The deletions have caused anger among some health activists. Gloria Feldt, president of the Planned Parenthood Federation of America, had a sharp criticism of H.H.S. She said: "They are gagging scientists and doctors. They are censoring medical and scientific facts. It's ideology and not medicine. The consequences to the health and well-being of American citizens are secondary to this administration."

James Wagoner, president of Advocates for Youth, a public health organization dealing with adolescent sexual health, objected to the removal of information on programs aimed at reducing sexual activity among teenagers, which was contained on the Web site of the National Center for Chronic Disease Prevention and Health Promotion, saying that there "seems to be a concerted effort to censor science and research that supports contraception in favor of 'abstinence-only until marriage' programs."

Terje Anderson of the National Association of People with AIDS, speaking of the deleted condom information, which was removed from the National Center for H.I.V., S.T.D. and TB Prevention Web site July 23, said, "Something doesn't need to disappear for a year and a half to be updated." The Web site said, in part: "Studies have shown that latex condoms are highly effective in preventing H.I.V. transmission."

Kitty Bina, a spokeswoman for the C.D.C. in Atlanta, said the revised version, which would explain that condoms did not always provide protection from other sexually transmitted diseases, had been sent to department headquarters for review.

The National Cancer Institute's removed document, "Abortion and Breast Cancer," said: "The current body of scientific evidence suggests that women who have had either induced or spontaneous abortion have the same risk as other women for developing breast cancer."

Dorie Hightower, a press officer at the National Cancer Institute, said: "We regularly review our fact sheets. We regularly update them for accuracy and scientific relevance. This was taken off the Web to review it for accuracy in July." She said that the review was to see if there had been other scientific studies. "There is supposed to be an interim statement that is going to be posted shortly," she said.

The C.D.C. Web site had also published information about intervention programs designed to discourage teenage sexual activity. Some mentioned abstinence, one mentioned condoms. Katharine Harvin, speaking for the C.D.C. in Atlanta, said the information was removed in June because some “communities and schools did not adopt packaged interventions, because some parts were disliked, or parts were liked and disliked.” Reported in: *New York Times*, November 26.

### **Ann Arbor, Michigan**

Teenagers who look to the Internet for health information as part of their “wired generation” birthright are blocked from many useful sites by antipornography filters that federal law requires on school and library computers, a new University of Michigan study has found. The filtering programs tend to block references to sex and sex-related terms, like “safe sex,” “condoms,” “abortion,” “jock itch,” “gay” and “lesbian.” Although the software can be adjusted to allow most health-related Web sites to get through, many schools and libraries ratchet up the software’s barriers to the highest settings, the report said.

“A little bit of filtering is O.K., but more isn’t necessarily better,” said Vicky Rideout, vice president of the Henry J. Kaiser Family Foundation, which produced the report, published in *The Journal of the American Medical Association*. “If they are set too high, they can be a serious obstacle to health information.”

The researchers found that filters set at the least restrictive level blocked an average of 1.4 percent of all health sites; at the most restrictive level, filters blocked nearly a quarter of all health sites. The amount of pornography blocked, however, was fairly consistent, going from 87 percent at the least restrictive level to 91 percent at the most restrictive settings.

The programs blocked a much higher percentage of health sites devoted to safe sex topics, however: 9 percent at the least restrictive level, and 50 percent at the most restrictive level. The blocked sites at high levels included *The Journal of the American Medical Association’s* site for women’s health and online information from the Food and Drug Administration about clinical trials.

To the researchers, that meant that a school or library that chooses a less restrictive setting for Internet filters can lose very little of the protective effect of the filters, while minimizing the tendency of all filters to overblock harmless and even valuable sites. The report was the first major study of the effectiveness of filters to appear in a peer-reviewed scientific journal, and the first to look at the efficacy of filters at various settings. Most previous studies have been produced by organizations with a strong point of view either favoring or opposing filters.

Opponents of filtering requirements said the study showed the clumsiness of the technology. “Filters are just

fine for parents to use at home,” said Judith F. Krug, director of the Office for Intellectual Freedom at the American Library Association. “They are not appropriate for institutions that might be the only place where kids can get this information. The importance of the First Amendment is that it provides us with the ability to govern ourselves, because it guarantees that you have the right to access information. Filters undercut that ability.”

Nancy Willard, an Oregon educator who has written student guides stressing personal responsibility in Internet surfing, called filtering a kind of censorship that, if performed by the schools directly, would be unconstitutional. “These filtering companies are protecting all information about what they are blocking as confidential trade secrets,” she said. “This is nothing more than stealth censorship.”

The study was conducted for the foundation by researchers at the University of Michigan, who tested six leading Internet filtering programs. The researchers searched for information on 24 health topics, including breast cancer and birth control, and also for pornographic terms. They repeated the tests at the least restrictive settings, in which only pornography was explicitly blocked, an intermediate setting which proscribed such topics as nudity and discrimination, and the most restrictive settings possible for each product.

The researchers then called twenty school districts and library systems around the United States to ask how they set their filters. Of those school systems, which teach about a half-million students over all, only one had set its filters at the least restrictive level. Reported in: *New York Times*, December 10.

## **foreign**

### **Beijing, China**

China has the most extensive Internet censorship in the world, regularly denying local users access to 19,000 Web sites that the government deems threatening, a study by Harvard Law School researchers found. The study, which tested access from multiple points in China over six months, found that Beijing blocked thousands of the most popular news, political and religious sites, along with selected entertainment and educational destinations. The researchers said censors sometimes punished people who sought forbidden information by temporarily making it hard for them to gain any access to the Internet.

Defying predictions that the Internet was inherently too diverse and malleable for state control, China has denied a vast majority of its 46 million Internet users access to information that it feels could weaken its authoritarian power. Beijing does so even as it allows Internet use for commercial, cultural, educational and entertainment purposes, which it views as essential in a globalized era.

Only the most determined and technologically savvy users can evade the filtering, and they do so at some personal risk, the study said. "If the purpose of such filtering is to influence what the average Chinese Internet user sees, success could be within grasp," said Jonathan Zittrain, a professor at the law school and a co-author of the study.

The study offers fresh evidence that the Internet may be proving easier to control than older forms of communication like telephones, facsimile machines or even letters. China can tap some telephones or faxes or read mail. But it cannot monitor every call, fax message and letter. The Internet, in contrast, has common checkpoints. All traffic passes through routers that make up the telecommunications backbone here. China blocks all access to many sites, and it has begun selectively filtering content in real time—even as viewers seek access to it—and deleting individual links or Web pages that it finds offensive.

By regularly testing access to 200,000 popular Web addresses, the researchers found that China blocked up to 50,000 sites at some point in the six-month period. Of those, the study found 19,000 sites that could not be reached from different places in China on multiple days.

Compared with Saudi Arabia, which the team studied earlier, China exercises far broader though sometimes shallower control. Beijing completely blocked access to the major sites on Tibet and Taiwan. A user who types "democracy China" into Google, the popular search engine, would find nearly all the top sites with those words out of reach. Google itself was blocked in September, although access is now restored.

Chinese users cannot often reach the sites run by Amnesty International or Human Rights Watch. China also does not allow users to connect to major Western religious sites. News media sites are also often blocked. Among those users had trouble reaching in the test period were National Public Radio, The *Los Angeles Times*, The *Washington Post* and *Time* magazine.

Though China claims a main justification for censorship is the proliferation of pornography, its blocking of such sites is less dogged. The study found that China blocked fewer than fifteen percent of the most popular sexually explicit sites. Saudi Arabia banned 86 percent of the list. Reported in: *New York Times*, December 4. □

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(*scientists debate . . . from page 50*)

Reagan-era directive, research that was not classified as secret when ordered by the government could not be classified retroactively. But citing a report by the Johns Hopkins Center for Civilian Biodefense Strategies, he said such "traditional regulatory approaches are not well suited to biosecurity concerns."

Dr. Marburger did not reveal any impending policy changes, but said, "Those concerns are public concerns, and to them the public deserves a rational and serious response from its government."

The discussions ran against the instincts of many scientists. Bruce Alberts, president of the National Academy of Sciences, stood before a picture of children gathered around a giant bust of Albert Einstein and recalled the society's founding mission: "to make science much more accessible to the nation and the world."

Since the September 11 attacks, new laws and regulations restrict who may work on 64 "select agents" that could be used to make biological weapons, barring students or scholars with a drug conviction or a history of mental illness and those from countries labeled sponsors of terrorism from participating in research. Universities and clinical and research laboratories have inventoried their select agents, with many of them urging researchers to destroy their stocks unless they were needed for current projects. Scientists found with such agents in violation of the law could face five years in prison.

Lewis Branscom, a Harvard professor who is advising the university on future work with select agents and other security issues, said he feared not so much a "frontal assault" on the First Amendment's freedom to speak and publish as "an elaborate web of controls that look and smell and taste like classification." Barring groups of people—certain foreigners, marijuana smokers or people with clinical depression, say, from the research, he said, "reminds me very much of the McCarthy days."

Ronald Atlas, president of the American Society of Microbiologists, noted that proposed regulations issued in December included prohibitions on certain avenues of experimentation, and said he was concerned by First Amendment issues. "Do you have a right of inquiry?" Dr. Atlas asked. "It's almost biblical: when God says, 'Thou shalt not eat of the Tree of Knowledge.'"

In the cold war, the United States faced a technologically advanced adversary, but today's threat from enemy nations and terrorists is more diffuse, with discoveries that appear benign sometimes providing the clues for weapons to spread disease. Outlining a hair-raising next generation of biological armaments, George Poste, chairman of the bioterrorism task force at the Defense Department, said, "I do not wish to see the coffins of my family, my children and grandchildren created as a consequence of the utter naivete, arrogance and hubris of people who cannot see there is a problem."

In all areas of science, more federal research dollars are coming with strings attached as the government tries to

keep sensitive information out of the hands of terrorists. Some federal agencies, for example, are pressing to review papers on certain topics and ban foreign researchers who have not been specially screened.

Universities are balking at new restrictions, and in some cases turning down lucrative contracts because they violate long-standing policies. “Those are deal-breaker issues for us,” said Paul Powell, who negotiates federal contracts for the Massachusetts Institute of Technology. MIT persuaded the Defense Department to drop wording from several contracts that would have allowed the military to block unclassified research before it was published, he said.

But the National Security Agency refused to budge from a requirement that any foreigners working on a planned project at MIT’s Artificial Intelligence Laboratory be approved by the government, Powell said, forcing the school to walk away from \$404,000.

About half of the graduate students in the physical sciences and engineering at U.S. universities come from abroad, and many schools have policies against treating them differently. Although still in the minority, the number of contracts carrying such restrictions has increased significantly since September 11, 2001. Some officials in academia worry about a trend toward more secrecy that jeopardizes researchers’ ability to verify and build on each others’ findings.

“The stakes are very high in working this out,” said former Air Force Secretary Sheila Widnall, now an aeronautics professor at MIT. Widnall led a faculty committee that opposed restrictions on unclassified research.

President Bush signed a law last summer prohibiting students from countries considered sponsors of terrorism from working with germs and toxins most likely to be used for bioterrorism. Meanwhile, researchers and scientific journals are debating whether—and how—they should censor themselves to safeguard information.

“The whole atmosphere under which we work was affected by September 11,” said Richard Seligman, who negotiates government contracts at the California Institute of Technology. For example, Caltech has agreed to allow the Army Research Laboratory to review a professor’s work on computer simulation before publication, Seligman said. The university made an exception to its rules “in the national interest,” he said.

Sometimes, restrictions crop up in studies that seem to be of no interest to terrorists. The Justice Department demanded the right to approve before publication a study on physical abuse of college women, said Robert Richardson, Cornell University’s vice provost for research. Cornell turned down the government money.

The White House and Defense Department are each studying whether new controls should be placed on a wide range of sensitive government information. It’s unclear

how universities might be affected by any changes. For now, there are no government-wide guidelines for deciding what unclassified research deserves closer scrutiny.

Marburger, the president’s science adviser, told the House Science Committee in October that science will have to adjust to heightened security. Foreign students are receiving closer scrutiny, Marburger said, because of “the possibility that we are training future terrorists.”

Traditionally, universities have held the position that any research not classified as secret could be published freely—a broad understanding that was formalized by President Reagan. The National Academies, chartered by Congress to advise the government on science, recently urged the administration to stick with that principle.

But exceptions existed before the attacks on New York and Washington. The Federal Aviation Administration, for example, had a long-standing requirement that research it financed be vetted to avoid revealing too much about security procedures. The month before the terrorist attacks, the Army Research Laboratory began requiring researchers it finances to get Army approval before publishing studies. After an outcry from schools, the Army softened the provision last summer to say that papers must be submitted in advance for review, but not for approval, said Robert Hardy, associate director of the Council on Governmental Relations, which represents universities. Both sides are still discussing the issue, said Melissa Bohan, an Army spokeswoman.

Reported in: *New York Times*, January 9; freedomforum.org, January 7. □

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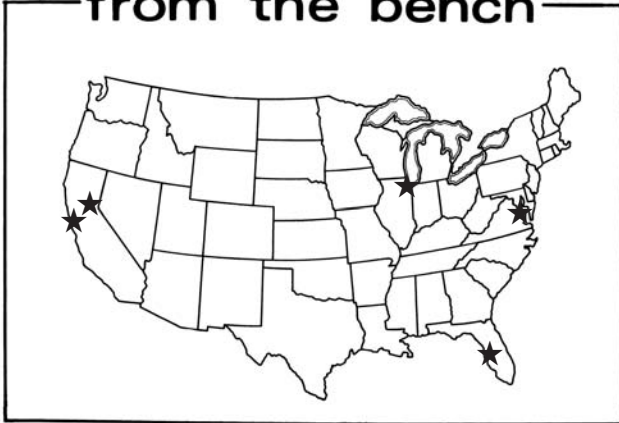
(*Harry Potter . . . from page 45*)

- *Julie of the Wolves*, by Julie Craighead George, for sexual content, offensive language, violence and being unsuited to age group.

Off the list this year, but on the list for several years past, are the *Goosebumps* and *Fear Street* series, by R. L. Stine, which were challenged for being too frightening for young people and depicting occult or “Satanic” themes; *It’s Perfectly Normal*, a sex education book by Robie Harris, for being too explicit, especially for children; *Of Mice and Men*, by John Steinbeck, for using offensive language and being unsuited to age group; *The Catcher in the Rye*, by J. D. Salinger, for offensive language and being unsuited to age group; *The Color Purple*, by Alice Walker, for sexual content and offensive language; *Fallen Angels*, by Walter Dean Myers, for offensive language and being unsuited to age group; and *Blood and Chocolate*, by Annette Curtis Klause, for being sexually explicit and unsuited to age group. Reported in: ALA Press Release, January 13. □



## from the bench



### U.S. Supreme Court

Arguments on the Children's Internet Protection Act (CIPA) were held Wednesday, March 5, 2003. In May, the American Library Association (ALA) received a unanimous lower court ruling that CIPA was unconstitutional. The opinion was written by Chief Judge Edward R. Becker of the U.S. Court of Appeals for the Third Circuit and joined by U.S. District Court Judges John P. Fullam and Harvey Bartle, III.

The three-judge panel held that CIPA was unconstitutional because the mandated use of filtering technology on all computers would result in blocked access to substantial amounts of constitutionally protected speech. The Court found that filters both overblock (block access to protected speech) and underblock (allow access to illegal or unconstitutional speech). Reported in: ALA Press Release, December 19.

In a decision disappointing to the library community, the U.S. Supreme Court on January 15 upheld, by a vote of 7 to 2, the constitutionality of the Sonny Bono Copyright Term Extension Act. The Act, passed by Congress in 1998, extended the copyright term for an additional twenty years, so a commercially-produced work is now governed by the provisions of copyright law for 95 years; for an individual's work, the term is "life of the author" plus 70 years.

In *Eldred v. Ashcroft*, the Court held that Congress acted within its authority under the Constitution's Copyright Clause when it expanded the term of protection. The Court said that it "was not at liberty to second-guess congress-

sional determinations and policy judgments of this order, however debatable or arguably unwise they may be." The Court also rejected arguments against the Act under the First Amendment. In doing so, Justice Ginsburg, writing for the majority, noted that the Copyright Act's "fair use" provision provides a "built-in" First Amendment accommodation. Two justices, Stevens and Breyer, filed separate dissenting opinions in which they expressed strong disagreement with the majority's holding.

The ruling, while not unexpected, was a blow to Internet publishers and others who wanted to make old books available online and use the likenesses of a Mickey Mouse cartoon and other old creations without paying high royalties. Hundreds of thousands of books, movies and songs were close to being released into the public domain when Congress extended the copyright.

A contrary ruling would have cost entertainment giants like The Walt Disney Co. and AOL Time Warner, Inc., hundreds of millions of dollars. AOL Time Warner had said that would threaten copyrights for such movies as *Casablanca*, *The Wizard of Oz* and *Gone with the Wind*. Also at risk of expiration was protection for the version of Mickey Mouse portrayed in Disney's earliest films, such as 1928's "Steamboat Willie." Congress passed the copyright law after heavy lobbying from companies with lucrative copyrights. During the argument in the case last October, some justices seemed bothered by the retroactive extension but they also were concerned about their standing to overturn it.

The Constitution allows Congress to give authors and inventors the exclusive right to their works for a "limited" time. Congress has repeatedly lengthened the terms of copyrights over the years. Copyrights lasted only 14 years in 1790. Reported in: *Washington Post*, January 15.

The question for the Supreme Court in an argument December 11 was whether a state may make it a crime to burn a cross without at the same time trampling on the protection that the First Amendment gives to symbolic expression. The case, concerning a 50-year-old Virginia law, raised tricky questions of First Amendment doctrine, and it was not clear how the court was inclined to decide it—until Justice Clarence Thomas spoke.

A burning cross was highly symbolic, Justice Thomas said, but it was symbolic only of something that deserved no constitutional protection: the "reign of terror" visited on black communities by the Ku Klux Klan for nearly a hundred years before Virginia passed the law that the Virginia Supreme Court declared unconstitutional a year ago.

A burning cross was "indeed, unlike any symbol in our society," Justice Thomas said. "There's no other purpose to the cross, no communication, no particular message," he continued. "It was intended to cause fear and to terrorize a population."

Justice Thomas addressed his comments to Michael R. Dreeben, a deputy solicitor general who was arguing in

support of Virginia's defense of its statute. But he did not have questions for Dreeben, who in any event agreed with him in nearly all respects. The threat of violence inherent in a burning cross "is not protected by the First Amendment" but is "prohibited conduct," Dreeben had just finished arguing.

Rather, Thomas appeared driven to make the basis for his own position unmistakably clear. "My fear is you are actually understating the symbolism of and effect of the burning cross," he said, adding: "I think what you're attempting to do is fit this into our jurisprudence rather than stating more clearly what the cross was intended to accomplish."

It was a gripping moment. Thomas speaks in a rich baritone that is all the more striking for being heard only rarely during the court's argument sessions. His intervention, consequently, was as unexpected as was the passion with which he expressed his view.

He referred to an opinion he wrote in 1995, concurring with the majority that the city of Columbus, Ohio, had no basis for refusing permission to the Klan to place a cross among other Christmastime displays in a downtown park that served as an open forum for religious expression. In that opinion, Justice Thomas said he was joining the decision despite his belief that the Klan's cross was not a form of religious expression but rather was "a symbol of white supremacy and a tool for the intimidation and harassment" of racial and religious minorities. There was a suggestion in his remarks that perhaps he regretted his effort in that case to meld his own views into the court's jurisprudence and, after eleven years on the court, no longer felt obliged to try.

During the brief minute or two that Justice Thomas spoke, about halfway through the hour-long argument, the other justices gave him rapt attention. Afterward, the court's mood appeared to have changed. While the justices had earlier appeared somewhat doubtful of the Virginia statute's constitutionality, they now appeared quite convinced that they could uphold it as consistent with the First Amendment.

Justice David H. Souter addressed Rodney A. Smolla, the lawyer for three men who were convicted under the cross-burning statute in two separate incidents. Smolla, a well-known First Amendment scholar at the University of Richmond, had just argued that the government could make it a crime to brandish a gun but not to burn a cross because a gun has physical properties that make it dangerous while the danger inherent in a burning cross comes from the ideas it symbolizes and not its physical properties.

That might have been a winning argument in 1820, Justice Souter said, "but how does your argument account for the fact that the cross has acquired potency at least akin to a gun?" Justice Souter called a burning cross "a kind of Pavlovian symbol, so that the person who sees it responds not to its message but out of fear." Justice Souter added that

"other symbols don't make you scared," suggesting that a burning cross might be "a separate category."

Smolla recalled the court's decision upholding a First Amendment right to burn an American flag. "You must concede," he said, that the cross itself "is one of the most powerful religious symbols in human history." As with burning the flag, the act of burning a cross involved "calling on that repository of meaning" to make a symbolic point, he said. Justice Ruth Bader Ginsburg objected that there was "a big difference" between the two acts. "The flag is a symbol of the government," she said, and it was inherent in the constitutional system that "anyone can attack the government." But burning a cross means "attacking people, threatening life and limb," she said.

The Virginia law prohibits burning a cross "with the intent of intimidating any person or group of persons." Smolla said it would be effective as well as constitutional to make threats and intimidation a crime without singling out a particularly threatening symbol.

"A burning torch and a burning cross—what's the difference?" he asked, evidently intending to emphasize the expressive nature of cross-burning. But Justice Anthony M. Kennedy found a different answer. "One hundred years of history," he said.

Smolla made the best of the moment. "Thank you, Justice Kennedy, and that 100 years of history is on the side of freedom of speech," he said.

William H. Hurd, Virginia's state solicitor, argued on behalf of the statute in *Virginia v. Black*, "We have not tried to suppress freedom of speech," he said. "All we've tried to do is protect freedom from fear." Reported in: *New York Times*, December 11.

A divided Supreme Court declined December 9 to jump into a free-speech dispute over advertising restrictions Florida put on dentists who want to promote their specialties. Justices Clarence Thomas and Ruth Bader Ginsburg said they were troubled by Florida's law. They said the court should clarify how far states can go in limiting ads of lawyers, doctors and other professionals. But none of the other justices joined them and at least four must agree before the court will hear a case.

Dr. Richard Borgner, a dentist in St. Petersburg, attended 400 hours of classes on implant dentistry, passed multiple exams and was certified by the American Academy of Implant Dentistry, an association of about 2,200 dentists. Under a three-year-old Florida law, any ad listing Borgner's certification also must say in capital or bold letters that the academy is not a "bona fide" organization according the Florida Dental Board. The law applies to several dental specialties, including cosmetic dentistry, with professional associations that are not accredited by the American Dental Association.

Jeffrey S. Sutton, the dentist's attorney, said the boards are legitimate and it's wrong to infer otherwise. The last

## **Eldred v. Ashcroft**

*The following are excerpts from the U.S. Supreme Court's January 15 opinions in Eldred v. Ashcroft, upholding the Copyright Term Extension Act of 1998, which added twenty years to all existing copyrights. The vote in the case was 7 to 2. Justice Ruth Bader Ginsburg wrote the majority opinion. Justices Stephen G. Breyer and John Paul Stevens dissented.*

### **From the Decision by Justice Ginsburg**

Congress's consistent historical practice of applying newly enacted copyright terms to future and existing copyrights reflects a judgment stated concisely by Representative Huntington at the time of the 1831 act: "Justice, policy and equity alike forbid" that an "author who had sold his work a week ago, be placed in a worse situation than the author who should sell his work the day after the passing of the act."

"Since 1790, it has indeed been Congress's policy that the author of yesterday's work should not get a lesser reward than the author of tomorrow's work just because Congress passed a statute lengthening the term today." The C.T.E.A. follows this historical practice by keeping the duration provisions of the 1976 act largely in place and simply adding

twenty years to each of them. Guided by text history and precedent, we cannot agree with petitioners' submission that extending the duration of existing copyrights is categorically beyond Congress's authority under the copyright clause. . . .

Satisfied that the C.T.E.A. complies with the "limited times" prescription, we turn now to whether it is a rational exercise of the legislative authority conferred by the copyright clause. On that point, we defer substantially to Congress. "It is Congress that has been assigned the task of defining the scope of the limited monopoly that should be granted to authors . . . in order to give the public appropriate access to their work product."

The C.T.E.A. reflects judgments of a kind Congress typically makes, judgments we cannot dismiss as outside the legislature's domain. . . . In sum, we find that the C.T.E.A. is a rational enactment; we are not at liberty to second guess Congressional determinations and policy judgments of this order, however debatable or arguably unwise they may be. Accordingly, we cannot conclude that the C.T.E.A., which continues the unbroken Congressional practice of treating future and existing copyrights in parity for term extension

*(continued on page 86)*

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time the Supreme Court took up the issue of disclaimers in ads, it ruled that Florida could not try to bar lawyers from advertising that they also were licensed as certified public accountants. Since that decision, other "courts continue to treat the advertisement of professional credentials as a form of second-class speech," Sutton told justices in court papers.

The case offered the court a chance to give more protection to commercial speech, which is covered by the First Amendment unless it is false or misleading. The court has said before that the government can limit commercial speech that is not misleading only if there's a substantial interest in doing so and the restrictions will correct problems. Justices Thomas and Ginsburg said Florida's law would make residents more confused by ads.

"This case presents an excellent opportunity to clarify some oft-recurring issues in the First Amendment treatment of commercial speech," Justice Thomas wrote. Attorney Barry Richard, representing the Florida Board of Dentistry, said in court papers that with the ad disclaimer, people would think that the specialty status in an ad was endorsed by the state. He said surveys taken in Florida backed up that concern. The case was *Borgner v. Florida Board of Dentistry*. Reported in: *Washington Post*, December 9.

The Supreme Court grappled December 4 with whether to allow federal racketeering and extortion laws—intended to combat organized crime and corruption—to be used to punish anti-abortion protesters. The case raised free-speech concerns for other types of protesters.

The justices were told that the First Amendment rights of all groups are at stake in the case, a follow-up to a decision by the court nine years ago that anti-abortion groups and demonstrators could be sued in a private lawsuit, under a racketeering law, by abortion clinics. The lawyer for the clinics and an abortion rights group argued that the punishments are needed to stop violent protests.

The Bush administration sided in part with the clinics and said demonstrators could be sued for blocking business at clinics. "The First Amendment is not an issue in this case," Solicitor General Theodore Olson told the court.

"There's always a First Amendment implication in a protest case," Justice Anthony M. Kennedy responded.

The Supreme Court heard appeals from Operation Rescue, anti-abortion leader Joseph Scheidler and others who were ordered to pay damages to abortion clinics and barred from interfering with their businesses for ten years. The punishments were under the 32-year-old Racketeer Influenced and Corrupt Organizations Act, known as RICO, and the Hobbs Act, a 1946 law aimed at crushing organized crime.

The groups were sued by the National Organization for Women and abortion clinics in Milwaukee and Wilmington, Delaware, over what they described as violent tactics. Lower courts found that the protesters illegally blocked clinic entrances, menaced doctors, patients and clinic staff, and destroyed equipment during a 15-year campaign to limit or stop abortions at several clinics. They were ordered to pay \$257,780 in damages.

## Scalia attacks church-state rulings

Justice Antonin Scalia of the United States Supreme Court said January 12 that the courts had gone overboard in keeping God out of government.

Justice Scalia, speaking at a religious event, said the constitutional wall between church and state had been misinterpreted by the Supreme Court and lower courts. As an example, he pointed to a ruling last year in California that barred students from saying the Pledge of Allegiance with the phrase "one nation under God." That appeals court decision has not taken effect, pending further consideration by the same court, but the Supreme Court could eventually be asked to review the case.

Justice Scalia, the main speaker at an event for Religious Freedom Day, said that past rulings by his own court gave the judges in the Pledge of Allegiance case "some plausible support" to reach their conclusion. The justice, however, said he believed such decisions should be made legislatively, not by courts.

The rally-style event drew a lone protester, who silently held a sign promoting the separation of church and state. "The sign back here which says 'Get religion out of government,' can be imposed on the whole country,"

*(continued on page 87)*

"It wasn't smacking people around. It was just not letting people in (to the clinics)," Justice Antonin Scalia said of the protests. Justice Sandra Day O'Connor seemed to disagree.

"We're not talking about conduct that's lawful here," O'Connor said. "To paint the picture we're talking about just pure speech is not the case." Scheidler said if the Supreme Court overturns a decision against the protesters, it will be a victory for the anti-abortion movement and will ensure that groups of all types can demonstrate without risk of RICO prosecution. "One of the most beautiful things about this country is we can protest our grievances. That is a trademark of America," Scheidler said.

Dozens of organizations and individuals have chosen sides. Actor Martin Sheen, People for the Ethical Treatment of Animals and four states are among supporters of the protesters, because of First Amendment concerns. On the other side are nine states, several prosecutor groups, abortion clinic bombing victim Emily Lyons, and others.

"Those who plant bombs or use clubs, fists, violent blockades, or nefarious means to express their dissent . . . are criminals who should be punished as criminals, however sincere their beliefs," the court was told in a filing on behalf of Lyons, a clinic nurse injured in Birmingham, Alabama, in a 1998 bombing unrelated to this case.

Justices must differentiate between protected political activity and that which is illegal. The ruling is expected before next summer. The cases are *Scheidler v. National Organization for Women*, and *Operation Rescue v. National Organization for Women*. Reported in: *New York Times*, December 4.

Accepting its most important case in years on the free speech rights of companies, the Supreme Court agreed January 10 to review a California decision holding Nike, Inc., potentially liable for damages for any false or misleading statements it makes in defense of its overseas business practices.

The California Supreme Court's 4-to-3 decision last May reinstated a private citizen's suit against Nike under California's unfair trade practice and false advertising law. The decision alarmed companies throughout the country for its expansive definition of "commercial speech," which under the United States Supreme Court's precedents can be subject to government regulation of the sort that the First Amendment would ordinarily prohibit.

Because the case has not yet gone to trial in the California courts, the factual basis for the allegations against Nike made by the plaintiff, Marc Kasky, has not been established. Kasky has alleged that Nike, in press releases, various publications and on its own Web site, has made false and misleading statements describing the working conditions in its overseas factories where its athletic shoes are made. He seeks a court order requiring Nike to disgorge its California profits attributable to these statements. Under the California law, truth is not a defense to a charge of business fraud if the challenged statements are misleading in context.

Ordinarily, the Supreme Court would not accept an appeal in a case in which there has been no trial or final resolution in the lower courts. So the grant of review at this point in the case, *Nike, Inc. v. Kasky*, indicated the justices' assessment of the importance of the legal issue, regardless of the facts or procedural posture.

Both sides agree that if Nike's statements were regarded as political rather than commercial speech, they would be "immune from state regulation" and there would be no case, as Kasky's lawyers conceded in the California Supreme Court. So the case turns on the definition of commercial speech and how that definition should apply to corporate expression that while clearly self-interested, is not advertising in the conventional sense and that addresses issues of broad societal interest.

Nike has maintained throughout the case that it is speaking as a participant in a wide-ranging debate about the effects of globalization, and that it should no more face liability for what it says in that context than a politician, editorial writer or any other participant in the debate.

Kasky maintains in response that the statements he is challenging were made simply "for the commercial purpose

of selling shoes,” as he told the Supreme Court in opposing Nike’s appeal. Nike’s purpose, he said, “was to maintain and increase its sales and profits by appealing to consumers opposed to inhumane manufacturing practices,” and as such should have no higher constitutional standing than ordinary advertising. Reported in: *New York Times*, January 10.

Justice Sandra Day O’Connor temporarily blocked a lower court’s ruling in favor of a former computer-engineering student at Purdue University who published online a program that unscrambles encrypted DVDs. The action suspended a recent decision by the California Supreme Court, which ruled in November that the student, Matthew Pavlovich, could not be sued in California for publishing the program because he is not a resident of the state and because his postings did not specifically seek to harm California businesses.

But the DVD Copy Control Association, the California organization that had sued Pavlovich, appealed on December 26 to Justice O’Connor for a stay, a legal order suspending the decision. Justice O’Connor, who is the justice designated to receive such appeals from California and other parts of the ninth federal judicial circuit, granted a temporary stay the same day.

The original lawsuit, filed in California Superior Court in Santa Clara County, accused Pavlovich and several dozen other defendants of harming the movie, computer, and electronic industries in California in violation of copyright and trade-secret laws because the Web sites the defendants operated had posted or linked to the code, which deciphers the DVD “content-scrambling system.” The encryption system is designed to limit the copying of DVDs.

Pavlovich’s backers include the Student Press Law Center, which defends students’ free-speech rights. Officials of the organization argued that if the DVD association won the case, students everywhere would be reluctant to publish on the Internet because they could be sued by companies or organizations in distant states.

The trial court and an appeals court rejected Pavlovich’s argument that he was immune from suit in California, but the California Supreme Court agreed with him, noting that he did not live in the state and had not “intentionally targeted California.”

Earlier in December, the DVD association failed to persuade the California Supreme Court to reconsider its ruling in the case. Although the court’s original ruling was 4 to 3, the vote against reconsidering the decision was 6 to 1.

Robert Lystad, a media lawyer in Washington, said the California Supreme Court’s decision was consistent with two other recent court decisions on the issue of which courts have jurisdiction over individuals for their online postings. In July, the Minnesota Supreme Court ruled that an Alabama scholar could not enforce a libel ruling from her state after a Minnesota scholar criticized her in an online newsgroup. On December 13, the U.S. Court of

Appeals for the Fourth Circuit ruled that two Connecticut newspapers could not be sued in Virginia over their online postings.

The decisions make the legal-jurisdiction rules for online activity consistent with the rules for legal jurisdiction more generally, Lystad said. “The Internet does not change the world, at least where personal jurisdiction is involved.”

By contrast, Australia’s High Court decided in December that a Melbourne businessman can sue New York-based Dow Jones & Company in the Australian courts for defamation over its characterization of him in the October 2002 issue of *Barron’s* magazine, which appeared online as well as in print. Pavlovich’s lawyer called that decision “outrageous” and “out of the norm” for how nations have approached legal issues relating to online content. Reported in: *Chronicle of Higher Education* online, January 2.

## church and state

### Sacramento, California

A federal appeals panel in San Francisco ruled December 5 that the atheist father who challenged the Pledge of Allegiance on behalf of his daughter had a right to bring the case. In its ruling, the panel reaffirmed its view that allowing schoolchildren to hear the words “under God” in the pledge amounts to “unconstitutional indoctrination.” The action cleared the way for a possible reconsideration by the full appellate court, the United States Court of Appeals for the Ninth Circuit, of the panel’s June decision that the phrase “under God” in the pledge violates the First Amendment.

The three-judge panel held that Michael A. Newdow of Sacramento, who filed the suit on behalf of himself and his 8-year-old daughter, may proceed with it over the objection of the girl’s mother, Sandra Banning, of Elk Grove, who has sole legal custody and has described herself as a Christian.

In September, a family court judge in Sacramento, James Mize, ordered Newdow not to argue the federal case on his daughter’s behalf. Yesterday’s decision concerned whether he could proceed on his own behalf. The federal court held that Newdow and other parents who have lost custody of their children “maintain the right to expose and educate their children to their individual religious views, even if those religious views contradict those of the custodial parent or offend her.”

The two judges in the original majority, Alfred T. Goodwin and Stephen Reinhardt, added that Newdow’s interest was particularly strong given the issues in the case. “While Newdow cannot expect the entire community surrounding his daughter to participate in, let alone agree with, his choice of atheism and his daughter’s exposure to his

views,” the two judges wrote, “he can expect to be free from the government’s endorsing a particular view of religion and unconstitutionally indoctrinating his impressionable young daughter on a daily basis.”

Judge Ferdinand F. Fernandez, who dissented in June, declined to join this aspect of the decision.

The case gained wide attention in June with the ruling that Newdow’s daughter should not be subjected to the phrase “under God” being recited in her public elementary classroom. The Constitution, the court said, prohibited public schools or other governmental bodies from endorsing religion.

A day after the ruling—after Congress and President Bush condemned it—the judges delayed the decision’s effect. In addition to California, the ruling would have barred the recitation of the Pledge of Allegiance in eight other states the appeals court covers: Alaska, Arizona, Hawaii, Idaho, Montana, Nevada, Oregon and Washington. Reported in: *New York Times*, December 5.

## university

### Tampa, Florida

A federal judge declined December 16 to grant to the University of South Florida a declaratory judgment that the university’s plan to fire Sami Al-Arian, a tenured professor with alleged links to terrorism, did not violate his First Amendment right to free speech. In its motion for a declaratory judgment, filed in August, the university alleged that the professor had raised money for terrorist groups, had helped bring terrorists into the country, and had founded organizations that sponsor terrorism. Al-Arian has denied all of those allegations in the past.

The university’s motion also asserted that the professor had violated the collective-bargaining agreement in effect between the university and the faculty. The university stated its intention to terminate him and informed the court that it expected Al-Arian to then sue the university, alleging violations of his free-speech rights.

Al-Arian, a Palestinian refugee who came to the United States in 1975, has been at South Florida, where he is a computer-science professor, for sixteen years, and has been on paid leave since last January. He claims the university is trying to fire him because of his political views.

Judge Susan C. Bucklew of the U.S. District Court in Tampa, essentially ruled that such a motion by the university was premature, that the university is asking the court to “fast forward past the final step of the Dispute-resolution process.” Judge Bucklew said that according to the bargaining agreement, both parties must enter into arbitration, and one generally may not turn to litigation to bypass arbitration. The judge said that an arbiter might find that the ter-

rorism allegations against Al-Arian were unfounded, or that even if founded were not cause for firing him. In either case, she said, the university could not legally terminate him. If an arbiter were to decide there was cause for firing the professor, Al-Arian still might not sue the university, so a decision at this point on his First Amendment rights would be premature.

Michael Reich, a University of South Florida spokesman, said the university was considering all of its options, which include appealing the decision, firing Al-Arian anyway, or reinstating him. “The University of South Florida filed the motion for declaratory judgment to ensure that the proposed action would not violate Dr. Al-Arian’s rights. We do not believe that terminating him would violate his rights, but this was an effort to make absolutely sure. We will take this ruling into consideration, explore our options, then determine how to proceed,” he said.

Roy Weatherford, a philosophy professor and president of the South Florida chapter of the United Faculty of Florida, said that the decision didn’t accomplish anything. “We’re back where we started a couple hundred thousand dollars ago,” he said. He said his chapter has not been supporting Al-Arian’s political views, but has been defending his rights and the concept of academic freedom. He said that experts have indicated to him that if Al-Arian were fired and arbitration ensued, that Al-Arian would come out on top. Reported in: *Chronicle of Higher Education* online, December 17.

## Internet

### Melbourne, Australia

The Australian High Court ruled December 10 that a local businessman could bring a libel action against Dow Jones & Company in a local court, a decision that reignited publishers’ fears that posting material on Web sites could leave them open to libel prosecution in any country with Internet access.

A string of decisions like the one from Australia could ultimately end up restricting Internet communication, lawyers for a group of American and Australian publishers said. The fear, they said, is that the laws of the most censorious and autocratic governments could then be applied to material originating in countries with strong legal protections for speech and debate.

The Australian ruling—the first by the highest court in any nation in which the Internet is in widespread use—held that Joseph Gutnick of Melbourne could sue *Barron’s* and its corporate parent, Dow Jones, in Gutnick’s home state, Victoria, where the libel laws are quite strict.

Victoria “is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the publications of which he complains were comprehensible by readers,” the opinion by four of the seven justices stated. The other three justices concurred in their own separate opinions.

The court reasoned that in the Internet era, libel occurs in the jurisdiction where articles are read, not where a publisher places material on an Internet server. Dow Jones lawyers said that several hundred people in Victoria use the Web site where the article was posted.

In the *Barron's* article from October 2000, the reporter, Bill Alpert, wrote in part: "Some of Gutnick's business dealings with religious charities raise uncomfortable questions. A *Barron's* investigation found that several charities traded heavily in stocks promoted by Gutnick. Although the charities profited, other investors were left with heavy losses." The article continued: "In addition, Gutnick has had dealings with Nachum Goldberg, who is currently serving five years in an Australian prison for tax evasion that involved charities."

Gutnick said that the decision would re-establish the principle "that the Net is no different than the regular newspaper." He added: "You have to be careful what you write."

David Schulz, a lawyer for a group of publishers and Internet companies that intervened in the case—a group including Amazon.com; Yahoo!; The Associated Press; CNN; The New York Times Company; and News, Ltd., Rupert Murdoch's Australian company—said: "In a nutshell, what the court said was that there is nothing wrong with an Australian court hauling Dow Jones into Australia to go to court." He added: "If that becomes the law of the Internet, the problem isn't that individuals will be suing all over the world—though that is a problem. The problem is that rogue governments like Zimbabwe will pass laws that will effectively shut down the Internet."

Earlier this year, prosecutors in Zimbabwe brought criminal charges of "publishing a falsehood" against a reporter for *The Guardian* in Britain. He had written an article repeating another newspaper's charge that the suspected murderers of a young mother had ties to the party of President Robert Mugabe. The article was available in Zimbabwe only via the Internet. The reporter was acquitted, but then deported.

The Australian High Court ruling included a concurring opinion from Justice Michael Kirby, who wrote, "Apart from anything else, the costs and practicalities of bringing proceedings against a foreign publisher will usually be a sufficient impediment to discourage even the most intrepid of litigants." But he said that the ruling left some questions unanswered and that the issues involved "appear to warrant national legislative attention and to require international discussion in a forum as global as the Internet itself."

The Australian ruling came as lawyers in the United States awaited a ruling on a similar issue from the United States Court of Appeals for the Fourth Circuit. A prison warden in southern Virginia has brought suit there against two Connecticut newspapers, contending that he was defamed by articles concerning the treatment of Connecticut prisoners who are currently serving their sentences in Virginia jails. Few if any copies of the newspapers, *The Hartford*

*Courant* and *The New Haven Advocate*, are circulated in Virginia, but their Web sites are accessible there. Reported in: *New York Times*, December 11.

### San Francisco, California

An order barring the cross-Atlantic enforcement of a French court's order against Yahoo!, Inc. hit rough waters December 3 at the U.S. Court of Appeals for the Ninth Circuit. A three-judge panel was clearly uncomfortable with several issues stemming from Yahoo!'s decision to challenge—in the United States rather than France—a French judge's order that the Internet company block French citizens' access to online auctions of Nazi memorabilia.

"All the French court's saying is, 'Whatever you do, don't impact France,'" Senior Judge Warren Ferguson said. "See? That's called homeland security."

Two French civil rights groups, La Ligue Contre le Racisme et l'Antisemitisme and L'Union des Etudiants Juifs de France, successfully sued Yahoo! in French court, obtaining an order that potentially affected the operation of Yahoo!'s U.S. Internet servers. Yahoo! sued the groups in federal court, winning a ruling from U.S. District Court Judge Jeremy Fogel of the Northern District of California that the order is an unenforceable infringement on the company's First Amendment rights. If Yahoo! had failed to comply with the order, it could have faced fines of \$13,000 a day. Yahoo! has removed Nazi materials from its servers based in France.

For the most part, arguments in the case centered on whether a cease-and-desist letter and subsequent service of process through U.S. marshals in the Northern District created a forum for Yahoo! to challenge the order in Silicon Valley, rather than France. Both the letter and the service of process came prior to the French court's decision. A lawyer for the two groups, Richard Jones of Coudert Brothers, said Yahoo! engaged in international forum shopping and that no effort to enforce the French order was ever made.

"Our position is that the exercise of legal right should not be penalized by making it the basis of a lawsuit in a foreign country," Jones said.

Yahoo! attorney Robert Vanderet said jurisdiction was proper here because the French order "requires Yahoo! to re-engineer its servers in this forum," and "requires conduct to occur." Yahoo! is located in Sunnyvale, California.

Senior Judge Melvin Brunetti seemed willing to at least entertain the idea that a service of process invokes U.S. jurisdiction. "They are now interfering with the constitutional rights of that U.S. company," he asked Jones. "Why doesn't that start the jurisdictional argument?"

"It's . . . based on the theoretical claim of a future challenge to rights," Jones replied. The meatier legal argument—whether a foreign government can restrict the speech of a U.S. subject whose speech is published simultaneously in the United States and abroad—has captured international atten-

tion. The jurisdictional issue, important though it may be, may give the panel a way out of a case it seemed to struggle with.

"I don't understand how we analyze this," Brunetti asked Jones at one point. "[Yahoo!'s servers] are not doing anything at all to you. They're just sitting in the United States."

On this point, the panel seemed divided. Ferguson seemed to lean toward deference to the French court, Brunetti was skeptical, and Judge A. Wallace Tashima offered few clues to his position. Unusually quiet for an oral argument, Tashima did indicate he thought it didn't matter where the servers were located. "They could be in India!" he exclaimed at one point.

But the location of the servers did seem important to Brunetti, as it is to the dozen public interest groups that joined to file an *amicus curiae* brief in the case. "If French law can be enforced here, Yahoo! could likewise be required to block access to information that 'sabotages national unity' in China, undermines 'religious harmony and public morals' in Singapore, offends 'the social, cultural, political, media, economic and religious values' of Saudi Arabia, fosters 'pro-Israeli speech' in Syria, facilitates viewing unrated or inappropriately rated Web sites in Australia, or makes available information 'offensive to public morality' in Italy—just to name a few examples," the groups wrote. "Under such a regime, U.S. courts would become vehicles for enforcing foreign speech restrictions on U.S. speakers."

Brunetti picked up on that argument. "Can each government impose restrictions on every other country relative to their domestic servers?" Brunetti asked.

But Jones said at one point that upholding Fogel's order would prevent the vindication of rights abroad, "and how can that not be offensive to the sovereignty of France?" In order to comply with the French order without removing the offensive auctions from its U.S. servers, Yahoo! would have to block French users from accessing certain Web pages. That proposition is dubious, according to experts who have commented on the case.

Yahoo!'s decision to defend itself by going on the offensive and invoking its constitutional rights in a U.S. court, rather than appeal the French order, also caused the judges no small amount of consternation. "For some reason you abandoned that appeal," Ferguson said. "And now you're coming to America and saying 'Help me.'" By the end of the argument, even Brunetti seemed to be searching for a way out. "Why isn't this an [international] treaty issue?" he asked. Reported in: *The Recorder*, December 4.

### Washington, D.C.

A provider of Internet connections must turn over the identity of a user suspected of illegally trading music files, a federal judge ruled January 21 in a closely watched online privacy case. The Recording Industry Association of

America, the trade group that represents the major music labels, had demanded the information from Verizon Communications, Inc., after the RIAA had monitored the activities of a Verizon Online subscriber extensively using the KaZaA file-sharing service. The music industry has been waging legal war on such services, arguing that they allow computer users to violate copyright law by downloading and trading songs with each other without paying for them.

The RIAA could only identify the user by a numeric Internet address on Verizon's network, and served Verizon with a subpoena demanding the user's identity under provisions of the 1998 Digital Millennium Copyright Act. Verizon refused, arguing that Internet service providers are only required to provide such information if the offending material is stored on its network, not if it is merely the vehicle for transmission.

But U.S. District Court Judge John D. Bates in Washington ruled that the 1998 copyright act specifies an ability of copyright holders to demand the identities of those suspected infringing on copyrights. "Verizon's assertions to the contrary are refuted by the structure and language of the DMCA," Bates wrote.

Cary Sherman, president of the RIAA, hailed the decision and said that "we look forward to contacting the account holder whose identity we were seeking so we can let them know that what they are doing is illegal." Sarah Deutsch, Verizon's associate general counsel, said the company would appeal.

"We're still studying the decision," she said, "but we think the court was wrong." She said if the decision were to stand, it would have a chilling effect on consumers and Internet service providers. Reported in: *Washington Post*, January 21.

## press freedom

### The Hague, Netherlands

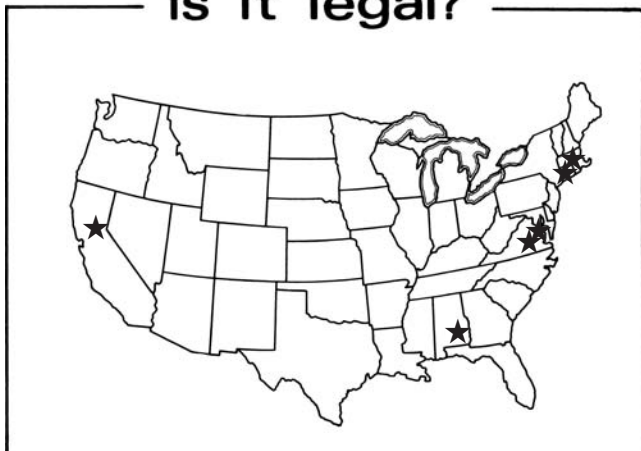
A wall of bulletproof glass divides observers from participants in the courtrooms of the International Tribunal for the Former Yugoslavia. The news media section is on the outside looking in. But some journalists who covered the Balkan wars have willingly crossed over to take the stand, saying they have a moral duty to bear witness in the first war crimes trials since Nuremberg. Others have agonized and declined to testify. Citing professional principles like impartiality and the watchdog role of the news media, they have said participation would jeopardize the very news gathering that brought these crimes to light.

Suddenly this year, for the first time, tribunal prosecutors would not take no for an answer. In June, at their insis-

(continued on page 82)



## is it legal?



## church and state

### Montgomery, Alabama

Alabama Chief Justice Roy Moore filed notice December 10 in federal court that he will appeal a judge's order that he remove a monument to the Ten Commandments from the rotunda of the Alabama Judicial Building. "Federal district courts have no jurisdiction or authority to prohibit the acknowledgment of God that is specifically recognized in the Constitution of Alabama," Moore said in a statement announcing the appeal.

"For a federal court to say we cannot acknowledge God contradicts our history and our law," Moore continued.

U.S. District Court Judge Myron Thompson's order found the monument violated the U.S. Constitution's ban against government establishment of religion and gave Moore thirty days to remove it. One of Moore's attorneys, Phillip Jauregui, said part of the chief justice's appeal would be based on the argument that Thompson did not have jurisdiction. But an attorney for the Southern Poverty Law Center, Richard Cohen, said plaintiffs would win again on appeal.

"I think what we heard today echoed of George Wallace," Cohen said. "He said the federal courts have no authority to order him to do anything Alabama law doesn't require him to do. Whatever views Moore has about this, federal law is supreme."

Moore moved the monument into the rotunda in the middle of the night on July 31, 2001, with a film crew from Coral Ridge Ministries documenting the event. Moore, a conservative Christian, attracted national attention as a cir-

cuit judge in Gadsden when he refused to remove a wooden Ten Commandments display from a courtroom wall. During his campaign for chief justice, Moore was often referred to as "The Ten Commandments judge." A lawsuit was filed in October 2001 by the Southern Poverty Law Center, Americans United for Separation of Church and State and the American Civil Liberties Union on behalf of three Alabama lawyers who said the monument violated the constitution.

During a weeklong trial in October, Moore testified that he believes the Ten Commandments to be the foundation of American law. He said he installed the monument, which also included quotations from historical figures, partly because of his concern that the country has suffered a moral decline over the past 40 or 50 years as a result of federal court rulings, including those against prayer in public schools. Reported in: *Washington Post*, December 10.

### Washington, D.C.

President Bush is enacting by executive fiat key pieces of his divisive "faith-based initiative," including one that lets federal contractors use religious favoritism in their hiring. Hoping to involve churches and religious organizations more deeply in government efforts to address social ills, Bush signed executive orders December 12 aimed at giving those groups a leg up in the competition for federal money, White House spokesman Ari Fleischer said. He announced the changes in a speech to religious and charitable leaders.

The president began pushing the issue on Capitol Hill in his second week in office but ran into a fierce debate over how religious groups could get government money without running afoul of the constitutional separation of church and state. He was successful in the House but the Senate wouldn't give him even a watered-down version that mainly increased tax breaks for charitable giving. Though he faces a more friendly Republican-controlled Congress next year, Bush decided to forge ahead on his own.

By far the most contentious of the changes is Bush's executive order informing federal agencies that religious organizations refusing to hire people of different faiths can still win contracts. He did not have the authority, however, to make that policy clear in the federal grant-making process.

Additionally, new regulations unveiled in December from the Department of Health and Human Services and Department of Housing and Urban Development also preserve the right of religious groups providing certain government-financed services to hire based on religion.

Bush's directive told federal agencies to make sure religious groups are treated equally with others in all respects, said the officials, who spoke on condition of anonymity. Federal contractors also can no longer be denied federal money for displaying religious icons, such as a cross or a menorah.

“The president believes that people in America who have been left behind deserve every shot at making it in America and believes that these barriers serve as an impediment to people making it,” Fleischer said.

The hiring issue was one of the central disputes as lawmakers considered Bush’s proposals. Civil rights law bars discrimination on the basis of religion, but constitutional problems arise when government money is involved. “It is simply wrong for federal contractors to discard the resumes of people with names that sound ‘too Jewish’ or ‘too Muslim’ when hiring substance abuse counselors and other professionals with government money,” National Jewish Democratic Council Executive Director Ira N. Forman said.

“Bush is giving his official blessing to publicly funded religious discrimination,” said Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State.

Bush’s aim is to give religious groups as fair a shake as any others, and similar regulations governing private groups providing government-funded welfare-to-work services have functioned without problems since 1996, responded Jim Towey, the director of the White House office of faith-based and community initiatives. Also, the executive order restates that organizations cannot use federal funds to preach a particular faith, worship or provide religious instruction, Towey noted.

“The wall he wants to tear down is the wall that separates the poor from effective programs,” Towey said. “He opposes the funding of religion—always has. This initiative is about better care for the poor.”

Behind the president’s push to expand the role of churches in addressing poverty, hunger, homelessness and drug abuse is his belief that they can be more effective than other groups in helping the needy. His administration—fueled by religious conservatives who form Bush’s political base—contends that religious groups face unfair barriers. White House officials cited as an example Iowa’s Victory Center Rescue Mission, which was threatened with losing \$100,000 in federal money because its governing board wasn’t secular enough. The officials also pointed to the Metropolitan Council on Jewish Poverty in New York, which was told it could not apply for a federal grant because the word “Jewish” was part of its name. Reported in: *Chicago Tribune*, December 12.

#### **Washington, D.C.**

The Bush administration’s campaign to merge church and state continued in late January when it announced plans to allow federal housing money to be used to erect buildings in which religious services occur. Spending taxpayer money to build religious structures is a radical move, and one that defies long-established constitutional precedents.

The Department of Housing and Urban Development has issued a proposed rule that would allow federal aid to

be used to buy, build and rehabilitate houses of worship that are used for both religious and non-religious functions. Taxpayer money could be spent to build parts of a church, synagogue or mosque that are used for approved social service functions, such as counseling programs for the poor. Private money would still have to be spent on those portions of the building that are used for religious activity.

The proposed rule is a reversal of current policies, which generally disallow religious groups from applying for building and rehabilitation funds. If properly administered, it would create a cumbersome process in which government officials would be required to monitor the areas taxpayers paid for, to ensure that no religious activities occur there. It is far more likely that many religious groups would feel free to use the building as they chose, as long as social services were provided somewhere. That would violate the core constitutional principle that the government cannot spend money to promote religion. Reported in: *New York Times*, January 28.

#### **Washington, D.C.**

The United States Postal Service has agreed to place a framed copy of the national motto “In God We Trust” in each of its 38,000 post offices. This decision came after American Family Association member Frank Williamson said his donated framed posters of the motto were ordered to be removed from post office lobbies in Montgomery, Willis and Dobbin, Texas.

As soon as the posters came down, Williamson began writing letters of protest to lawmakers and postal authorities. Shortly afterward, Williamson received word from authorities in Washington that the U.S. Postal Service has designed its own poster depicting the national motto and would cover the cost to distribute it to every post office in the country.

The new poster is designed to look like a large stamp with the drawing of the Statue of Liberty in the middle and the motto printed above the crown. “The U.S. Postal Service decided to design the poster after researching Williamson’s complaint and discovering that the U.S. House of Representatives had adopted a resolution two years ago that supported putting the motto in every public building possible,” said David Lewin, postal spokesman in Houston.

Donald Wildmon, chair of American Family Association, started a national crusade to place copies of the motto in public classrooms and government buildings in 2000. “We have distributed over 400,000 posters since the campaign started, with tens of thousands now hanging on public classroom walls, in city halls and other public buildings because of individual citizens like Mr. Williamson.” He said at least fifteen states have legal statutes requiring or strongly recommending public display of the motto. Reported in: *afa.net*, December 6.

## **Chesterfield County, Virginia**

Wiccan Priestess Cyndi Simpson sued the Chesterfield County Board of Supervisors December 6 for refusing to let her volunteer to lead prayer at one of the board's meetings. Simpson, who has been a witch of the Wicca religion for about six years, claims the board is violating her constitutional rights. The suit, filed in U.S. District Court, is backed by the American Civil Liberties Union of Virginia and Americans United for Separation of Church and State. It asks for a court order requiring the board to allow Simpson "and members of other minority religions in Chesterfield County" to deliver prayers at meetings on a basis equal with other clergy, or to cut out praying altogether.

"Government officials do not have the right to discriminate when it comes to religion," said the Rev. Barry W. Lynn, executive director of the church-state separation group. "The county supervisors shouldn't be sponsoring prayers at all, but when they do, they certainly can't play favorites."

Supervisor Kelly E. Miller, the board chairman and a lawyer, said that he had read Simpson's lawsuit and believes the county's practices are valid. "I think legally we're on solid ground, based on my conversations with the county attorney and my understanding of the Constitution," Miller said. "Their agenda is to get us out of the religion business altogether."

Last year, Simpson asked the county to add her name to the list of clergy who have volunteered to give the meeting invocations. County Attorney Steven L. Micas replied by letter, refusing her. He wrote that the board's "nonsectarian invocations are traditionally made to a divinity that is consistent with the Judeo-Christian tradition. . . . Based upon our review of Wicca, it is neo-pagan and invokes polytheistic, pre-Christian deities."

According to Simpson and several Wiccan Internet sites, Wicca is a peaceful, life-affirming and nature-based religion that focuses on the seasons and what they bring to people's lives. It has many variations among its followers—some traditions are practiced only by women—but one core belief is recognition of divinity in feminine forms. According to the lawsuit, since 2000 all the religious leaders who gave an invocation at Chesterfield board meetings have been Christian except for one, a rabbi who joined two Christian ministers in January 2000.

Also, after the September 11 terrorist attacks, a member of the Islamic Center of Virginia was invited to join in a prayer at the September 26, 2001, board meeting. The lawsuit alleges that, by its practice of inviting almost exclusively Christian clergy and by refusing Simpson, the board violates the establishment clause of the First Amendment.

"I think we have a right to do that," Miller said. "Of course, I'm Christian and I support the Christian theology. I make no apology for that."

The lawsuit alleged that refusing Simpson a place on the list of volunteer clerics discriminated against her on the

basis of her religion and violated her right to free speech, both in violation of the First Amendment. The lawsuit also contended that Simpson's right to equal protection under the Fourteenth Amendment had been violated because she was being treated differently from other members of the clergy.

Kent Willis, executive director of the Virginia ACLU, said Simpson's situation "demonstrates why state and religion should always remain separate. As the framers of the Constitution understood from their own experiences, when the state uses its vast power to sponsor a religious activity, it will always make losers of some faiths and winners of others," Willis said. "And that jeopardizes religious freedom." Reported in: *Richmond Times-Dispatch*, December 8.

## **universities**

### **Amherst, Massachusetts**

Citing concerns about free speech on campus, the American Civil Liberties Union of Massachusetts on December 9 filed a Freedom of Information Act request seeking details on government surveillance of college professors and students nationwide.

"We are concerned that an FBI presence on college campuses could have a chilling effect on the free speech of students, professors and other university employees and we are seeking more information about the extent of this program both in Massachusetts and nationwide," said John Reinstein, Legal Director of the ACLU of Massachusetts.

The request was prompted by recent disclosures that a police officer at the University of Massachusetts-Amherst campus was recruited by the Federal Bureau of Investigation to spend several days a week working exclusively for its Anti-Terrorism Task Force. The arrangement came to light after FBI agents, apparently acting on the basis of information provided by the campus officer, questioned a faculty member and an organizer for a campus union. The faculty member is of Iraqi descent and the union organizer is from Sri Lanka.

Neither university employee who was interviewed by the FBI is suspected of any wrongdoing, but both were questioned about their political views and organizational affiliations, and the Iraqi professor was asked about his loyalty to the United States.

The questioning of the employees and the news of the FBI presence on campus roiled the Amherst community. Concerns about academic freedom were aired at a university forum titled, "The FBI and Terror." Attorney Bill Newman, director of the ACLU's Western Massachusetts office and a speaker at the forum, said his group did not object to investigations of credible reports of suspicious activity. But, he said, "the FBI should not be investigating

people based on their political views, particularly on a college campus.”

“The presence of the FBI on a college campus can have an enormous chilling effect on students and faculty,” he added. “We need to know what the FBI is doing on our nation’s campuses.”

In its FOIA request, the ACLU asked for information that would allow it “to assess the nature and scope of FBI activities at U.S. colleges and universities,” including records about the enlistment of campus security officers to serve the interests of the FBI, any guidelines or documents about the questioning of students and faculty, and the name of every university campus security or police officer recruited after September 11, 2001, who is now working under the direction and control of the FBI. Federal law requires that the FBI respond to the request within ten days. Reported in: ACLU Press Release, December 12.

## Internet

### Sacramento, California

Ken Hamidi lost his job at Intel Corp. after a long fight over a workers compensation claim, but he did not go quietly. The engineer formed a support group for current and past Intel workers. He then sent six waves of e-mails critical of the company’s labor practices to thousands of the firm’s employees. Eventually, the giant chip maker obtained a court order preventing Hamidi from “trespassing” on the company’s e-mail system. The ruling, on appeal before the California Supreme Court, sparked a loud outcry from dozens of civil libertarians but won plaudits from industry experts.

The outcome of the battle, pitting private property rights against free speech, will help determine whether the Internet is a public forum regardless of the ownership of the servers and computers that make up the world wide system. The decision is expected to be a milestone in the still-emerging field of cyber law. Because California has so much high-tech industry, many of the rulings on Internet law have come in California cases. It was one of the first states to regulate commercial e-mail, or spam.

Hamidi’s case breaks new ground because his messages expressed personal views, which the First Amendment generally prevents the government from censoring. “We look at the Internet as a public resource, but that does not have to be true,” said Jennifer Granick, director of the Center for Internet and Society at Stanford University.

If the trespass ruling stands, “it means any Internet provider can become a gatekeeper and keep out e-mail it doesn’t like because of its political content,” said Ann Brick of the American Civil Liberties Union Foundation of Northern California.

But the U.S. Chamber of Commerce and other business groups said in a brief in the case that courts must assure “American businesses that e-mail is a tool worth having in the workplace, rather than a time bomb waiting to explode.”

No one has free-speech rights on private property that is not generally open to the public, said University of Chicago law professor Richard A. Epstein, who was selected by Intel to represent other industries in the case. “There is no First Amendment right to go into the lobby of Intel to speak to its employees, and if he can’t use the lobby, why can he use the equipment,” which in this case is Intel’s server, asked Epstein.

Hamidi began working for Intel in Folsom, California, in 1986. He said he loved his job, and believed he would spend the rest of his career with Intel. Hamidi filed for workers’ compensation in 1992 after suffering a back injury in an automobile accident while returning from a conference. He began gulping down Vicodin for pain, couldn’t sleep and was depressed, he said. He eventually asked for workers’ compensation for his depression too, contending it stemmed from his chronic back pain. Intel finally gave him a three-month medical leave, he said, but stopped paying for his medical treatments the day the leave started.

“They picked on the wrong guy,” Hamidi said over lunch in Sacramento, where he works as a compliance representative for a state agency. “They could not bring me to my knees.” During his protracted struggle, Hamidi described having to wait for months and to drive long distances to see doctors specified by Intel. The firm videotaped him changing a tire after it had been slashed and used the videotape against him, he said.

Intel fired Hamidi in 1995 for failing to return to work after a medical leave. A state workers’ compensation appeals board eventually ruled against Hamidi on his psychiatric claim. The appeals board found that his depression did not stem from his back injury and that he had exaggerated his problems to his doctors.

Hamidi credits the formation of FACE-Intel, a support group and Web site, with turning his life around. He said he has saved jobs at Intel by counseling employees not to file for workers’ compensation and has prevented suicides. Focusing on others’ problems distracted him from his own and gave him a voice, he said.

Annual review time is very close, “warned one of six e-mails Hamidi sent over a two-year period. “Unfortunately many of you . . . will be terminated. . . . We can help.”

In another e-mail to Intel, Hamidi wrote: “If you are on redeployment, it is highly likely that you are targeted for termination and there will not be any jobs available for you. . . . NEVER, EVER believe there is something wrong with you. Based on testimonies of numerous Intel victims, there is life after Intel that is rewarding.”

When Intel took Hamidi to Sacramento County Superior Court in 1998 to stop his e-mails, the out-of-work engineer

could not afford a lawyer and initially represented himself. His six e-mails had been sent in bunches that ranged from 8,000 to 35,000 at a time, meaning that Intel employees received an average of one e-mail from Hamidi every four months. His case attracted the attention of legal scholars only after a Court of Appeal in Sacramento upheld the injunction last December, ruling 2 to 1 that he was committing "trespass to chattels."

Chattel is private property other than real estate, and for decades courts have held that someone can be liable for such a wrong only if the property was damaged or temporarily taken away from the owner. A simple analogy is this: "If I kicked your dog, it would not be actionable unless the dog was hurt," said UC Berkeley law professor Stephen Barnett, who teaches tort law.

Intel's computer system was not damaged, nor was there even any evidence that Hamidi's messages slowed the company's e-mail service. But the company said Hamidi's e-mail had distracted employees, reduced morale, forced managers to spend time reassuring workers that their jobs were safe and required technical employees to work on efforts to block future e-mail from Hamidi.

The state Supreme Court agreed to hear the case, which means it will be the first state high court to rule on the legal theory of "trespass to chattels" as applied to the Internet. Because of the case's potential impact, many in the legal community have rushed to embrace Hamidi's case. The ACLU, a labor group, 41 law professors and other civil libertarian and Internet activist groups agreed to weigh in on Hamidi's behalf.

No court would have issued an injunction based on trespass if Hamidi had sent his messages through the U.S. Postal Service, and e-mail should not be any different, Hamidi's attorney maintains. "We're not talking about commercial advertising here. This is a gentleman trying to disseminate a message of important public concern to people who want to hear it."

"You cannot have a situation where anything, even the movement of electrons, constitutes trespass," he said. "The court needs to put a stop to this madness."

Critics of the early rulings in the Intel case say courts should insist that companies deal with the Hamidis of the world by bringing nuisance or defamation cases against them. Under those legal theories, Hamidi probably would have fared better, analysts said.

The ACLU has asked the court to apply the trespass doctrine only in cases in which there is physical damage or impairment to the computers or the company server. If a barrage of e-mail caused computers to crash or slow down, the company would have a claim against the sender, they said. But if the content of the message is at issue, free speech guarantees protect it, the ACLU's Brick wrote. In Hamidi's case, the content was the issue because Intel would not have objected if the messages had been laudatory, she said.

The United States Chamber of Commerce contends that the case is about a vengeful former employee trying to destroy a corporation that fired him for incompetence. "If this court permits Hamidi's conduct to continue unchecked in the absence of criminal and civil penalties, American businesses may choose to curb technological development and e-mail privileges in the workplace," wrote Mark Theodore, who is representing the U.S. and California chambers in the case.

When the court barred him from sending e-mails to Intel employees, Hamidi rented a horse and buggy and delivered leaflets to Intel's headquarters. Another time he went to Intel on horseback. Hamidi runs his support group out of his home office in a working-class neighborhood north of Sacramento. He has two computers, an array of office equipment and a book of press clippings. "Did you know I was 'Disgruntled Employee of the Year' in 1997?" he asked with a grin. An Internet magazine gave him the title.

"They cannot force me into submission," Hamidi said. "If I have been wronged, I will stand up and say, 'You have wronged me.' That is my constitutional right." Reported in: *Los Angeles Times*, December 4.

## government secrecy

### Washington, D.C.

The Bush administration has put a much tighter lid than recent presidents on government proceedings and the public release of information, exhibiting a penchant for secrecy that has been striking to historians, legal experts and lawmakers of both parties.

Some of the Bush policies, like closing previously public court proceedings, were prompted by the September 11 terrorist attacks and are part of the administration's drive for greater domestic security. Others, like Vice President Dick Cheney's battle to keep records of his energy task force secret, reflect an administration that arrived in Washington determined to strengthen the authority of the executive branch, senior administration officials say.

Some of the changes have sparked a passionate public debate and excited political controversy. But other measures taken by the Bush administration to enforce greater government secrecy have received relatively little attention, masking the proportions of what dozens of experts described in recent interviews as a sea change in government openness.

A telling example came in late 2001 when Attorney General John Ashcroft announced the new policy on the Freedom of Information Act, a move that attracted relatively little public attention. Although the new policy for dealing with the 1966 statute that has opened millions of pages of government records to scholars, reporters and the public was

announced after September 11, it had been planned well before the attacks. The Ashcroft directive encouraged federal agencies to reject requests for documents if there was any legal basis to do so, promising that the Justice Department would defend them in court. It was a stark reversal of the policy set eight years earlier, when the Clinton administration told agencies to make records available whenever they could, even if the law provided a reason not to, so long as there was no “foreseeable harm” from the release.

Generally speaking, said Alan Brinkley, a Columbia University historian, while secrecy has been increasingly attractive to recent administrations, “this administration has taken it to a new level.” Its “instinct is to release nothing,” Professor Brinkley said, adding that this was not necessarily because there were particular embarrassing secrets to hide, but “they are just worried about what’s in there that they don’t know about.”

The Bush administration contends that it is not trying to make government less open. Ari Fleischer, the president’s press secretary, said, “The bottom line remains the president is dedicated to an open government, a responsive government, while he fully exercises the authority of the executive branch.”

Secrecy is almost impossible to quantify, but there are some revealing measures. In the year that ended on September 30, 2001, most of which came during the Bush presidency, 260,978 documents were classified, up 18 percent from the previous year. And since September 11, three new agencies were given the power to stamp documents as “Secret”—the Environmental Protection Agency, the Department of Agriculture and the Department of Health and Human Services.

In Congress, where objections to secrecy usually come from the party opposed to the president, the complaints are bipartisan. Senator Patrick J. Leahy, the Vermont Democrat first elected in 1974, said, “Since I’ve been here, I have never known an administration that is more difficult to get information from.” Senator Charles E. Grassley, Republican of Iowa, said things were getting worse, and “it seems like in the last month or two I’ve been running into more and more stonewalls.”

Cheney says the Bush policies have sought to restore the proper powers of the executive branch. Explaining the fight to control the task force records to ABC News last January, he said that over more than three decades: “I have repeatedly seen an erosion of the powers and the ability of the president of the United States to do his job. We saw it in the War Powers Act, we saw it in the Anti-Impoundment Act. We’ve seen it in cases like this before, where it’s demanded that the presidents cough up and compromise on important principles. One of the things that I feel an obligation on, and I know the president does, too, because we talked about it, is to pass on our offices in better shape than we found them to our successors.”

President Bush has made similar comments. But the more relevant history may have been in Texas, where Bush, as governor, was also reluctant to make government records public. Confronted with a deadline to curb air pollution, he convened a private task force to propose solutions and resisted efforts to make its deliberations public. When he left office, he sent his papers not to the Texas State Library in Austin, but to his father’s presidential library at College Station. That library was unable to cope with demands for access, and the papers have since been sent to the state library.

One argument underlies many of the administration’s steps: that presidents need confidential and frank advice and that they cannot get it if the advice becomes public, cited by Cheney in reference to the task force and by Alberto R. Gonzales, the White House counsel, in explaining the administration’s decision to delay the release of President Ronald Reagan’s papers.

Some administration arguments are more closely focused on security. Ashcroft has said that releasing the names of people held for immigration offenses could give Al Qaeda “a road map” showing which agents had been arrested. Secretary of Defense Donald H. Rumsfeld, who has threatened action against Pentagon officials who discuss military operations with reporters, said before troops at the Army’s Special Operation Command on November 21, 2001, “I don’t think the American people do want to know anything that’s going to cause the death of any one of these enormously talented and dedicated and courageous people that are here today.”

The critics argue more generally. Former Senator Daniel Patrick Moynihan, Democrat of New York, argued that secrecy does more harm than good. The Central Intelligence Agency’s exaggerated estimates of Soviet economic strength, for example, would have stopped influencing United States policy, Moynihan said, if they had been published and any correspondent in Moscow could have laughed at them.

“Secrecy is a formula for inefficient decision-making,” Moynihan said, and plays to the instincts of self-importance of the bureaucracy. Mary Graham, a scholar at the Brookings Institution and the John F. Kennedy School of Government at Harvard, saw two major risks in this administration’s level of secrecy. “What are often being couched as temporary emergency orders are in fact what we are going to live with for twenty years, just as we lived with the cold war restrictions for years after it was over,” Graham said. “We make policy by crisis, and we particularly make secrecy policy by crisis.”

Moreover, she said, it ignores the value of openness, which “creates public pressure for improvement.” When risk analyses of chemical plants were available on the Internet, she said, people could pressure companies to do better, or move away.

Fleischer contends that there is no secrecy problem. "I make the case that we are more accessible and open than many previous administrations—given how many times [Secretary of State Colin L.] Powell, Rumsfeld and Ashcroft have briefed," he said. Asked if there was anyone in the administration who was a consistent advocate of openness, who argued that secrecy hurt as well as helped, Fleischer said President Bush was that person. He said that was exemplified by the fact that while "the president reserved the authority to try people under military tribunals, nobody has been tried under military tribunals."

The Bush administration's first major policy move to enforce greater secrecy could affect how its own history is written. On March 23, 2001, Mr. Gonzales, the White House counsel, ordered the National Archives not to release to the public 68,000 pages of records from Ronald Reagan's presidency that scholars had requested and archivists had determined posed no threat to national security or personal privacy. Under the Presidential Records Act of 1978, the documents were to become available after January 20, 2001, twelve years after Reagan left office. Reagan's administration was the first covered by the 1978 law.

The directive, which also covered the papers of Reagan's vice president and the president's father, George Bush, was to last ninety days. When Gonzales extended the sealing period for an additional ninety days, historians like Hugh Davis Graham of Vanderbilt University attacked the delays, saying they were designed to prevent embarrassment and would nullify the records law's presumption of public access to those documents.

On November 1, 2001, President Bush issued an even more sweeping order under which former presidents and vice presidents like his father, or representatives designated by them or by their surviving families, could bar release of documents by claiming one of a variety of privileges: "military, diplomatic, or national security secrets, presidential communications, legal advice, legal work or the deliberative processes of the president and the president's advisers," according to the order.

Before the order, the Archivist of the United States could reject a former president's claim of privilege. Now he cannot. The order was promptly attacked in court and on Capitol Hill. Scott L. Nelson of the Public Interest Litigation Group sued on behalf of historians and reporters, maintaining that the new order allowed unlimited delays in releasing documents and created new privileges to bar release.

House Republicans were among the order's sharpest critics. Representative Steve Horn of California called a hearing within a few days, and Representative Doug Ose, another Californian, said the order "undercuts the public's right to be fully informed about how its government operated in the past." The order, Horn said, improperly "gives the former and incumbent presidents veto power over the release of the records."

On December 20, the White House sought to silence the complaints by announcing that nearly all the 68,000 pages of the Reagan records were being released. Legislation introduced to undo the order never made it to the House floor, where leaders had no interest in embarrassing the president. And a lawsuit challenging the order languishes in U.S. District Court before Judge Colleen Kollar-Kotelly.

Historians remain angry. Robert Dallek, a biographer of Lyndon B. Johnson and John F. Kennedy, said, "This order of Bush, we feel it's a disgrace—what it means is if this policy applies, they can hold presidential documents close to the vest in perpetuity, the way Lincoln's papers were held by the family until 1947."

The administration's most publicized fight over secrecy, and its biggest victory to date, has come over its efforts to keep the investigative arm of Congress from gaining access to records of the energy task force led by Vice President Cheney. This fight is only the showiest of many battles between the Bush administration and members of Congress over information. Such skirmishes happen in every administration. But not only are they especially frequent now, but also many of the loudest Congressional complaints come from the president's own party, from Republicans like Senator Grassley and Representative Dan Burton of Indiana.

The vice president framed the fight as being less about what the papers sought by the General Accounting Office might show than over power—what Congress could demand and how it could get it or what essential prerogatives the executive branch could maintain, especially its ability to get confidential advice. And he welcomed the battle. In an interview the day before the suit was filed, he said. "It ought to be resolved in a court, unless you're willing to compromise on a basic fundamental principle, which we're not." And on December 9, Judge John D. Bates of U.S. District Court ruled for the vice president.

Judge Bates ruled that David M. Walker, who as comptroller general heads the General Accounting Office, had not suffered any personal injury, nor had he been injured as an agent of Congress and, therefore, the suit could not be considered. An appeal is all but certain to be filed, but for the time being, the administration clearly has a victory.

"Vice President Cheney's cover-up will apparently continue for the foreseeable future," said Representative John D. Dingell, the Michigan Democrat who pressed Walker to act, hoping to find evidence of special interest favoritism for Republican donors in the Cheney documents.

There have been other bitter fights over disclosure between the White House and the Congress. While the Democrats controlled the Senate Environment and Public Works Committee, the chairman, James M. Jeffords, Independent of Vermont, repeatedly threatened last year to subpoena the Environmental Protection Agency for documents explaining the scientific basis and potential impact of

its proposed air pollution rule changes requiring aging power plants to install new pollution controls when their facilities are modernized. Jeffords, who never got around to issuing the subpoena, argued that the administration had broken its promises of cooperation.

Representative F. James Sensenbrenner, the Wisconsin Republican who chairs the House Judiciary Committee, was infuriated last August when the Justice Department said it would send answers to some of his questions about how it was using the USA Patriot Act to the more pliant Intelligence Committee, which was not interested. Sensenbrenner threatened to issue a subpoena or “blow a fuse.”

Sen. Grassley, the incoming chair of the Finance Committee, said administration obstruction required him to go and personally question government officials working on Medicare fraud cases, instead of sending his staff. But his new chairmanship and the Treasury confirmations before it may give him a lever. He said he told a White House aide of his problems and asked, “How can I get a presidential nominee through if I have to be spending my time doing things my investigators could be doing?”

Legal policy is where the administration’s desire to maintain secrecy has excited the most controversy. Since the first few days after the September 11 attacks, the federal government has insisted on a rare degree of secrecy about the individuals it has arrested and detained. The immigration hearings held for hundreds of people caught in sweeps after the bombings have been closed to relatives, the news media and the public. The names of those detained by the Immigration and Naturalization Service have been kept secret, along with details of their arrests, although on December 12 the Justice Department told The Associated Press there had been 765 of them, of whom only 6 were still in custody.

A few dozen individuals have been held as material witnesses, after the Justice Department persuaded federal judges that they had information about terrorism and might flee if released. Neither their names nor the total number of them have been made public. The administration also has kept a tight lid on the identities of the military detainees being held at Guantánamo, Cuba. But in considering how to deal with them, in military tribunals, the government has moved away from secrecy. When Bush directed the Defense Department in November 2001 to set up military tribunals to try noncitizens suspected of terrorism, one reason cited was the ability to hold those proceedings in secret, to protect intelligence and to reduce risks to judges and jurors. But when the rules were announced in March, they said “the accused shall be afforded a trial open to the public (except proceedings closed by the presiding officer).”

While the government’s policy in the immigration cases has suffered some judicial setbacks, appeals and stays have allowed it to remain in effect. Fundamentally, the government has argued against opening hearings by contending that they would make available to terrorists a mosaic of facts

that a sophisticated enemy could use to build a road map of the investigation, to know what the government knew or did not know, and thus to escape or execute new attacks.

That argument was also made in the main case involving releasing the names of those detained, where the government also maintains that the Freedom of Information Act’s right to privacy would be violated by a release of the names.

Legal scholars have objected particularly to the decision to close all the immigration hearings, rather than parts of them. Stephen A. Schulhofer, a professor at New York University Law School, said there was already a legal provision for closing a hearing when a judge was shown the necessity. The “road map” explanation seemed implausible, Schulhofer said, because the detainees had a right to make phone calls, in which “a real terrorist could alert cohorts who would not have known he was detained.”

At a recent seminar at Georgetown University Law School, Assistant Attorney General Michael Chertoff said protecting privacy was the main reason for suppressing the names. Representative Barney Frank, Democrat of Massachusetts, dismissed that rationale, asking Chertoff, “How can you even say that with a straight face?”

So far, the government has won challenges to the detention of material witnesses. On releasing the names, it lost in a U.S. District Court but appeared to have impressed two of the three appeals court judges who heard the case in November.

On the question of a blanket closing of “special interest” immigration hearings, an appeals court in Cincinnati ruled against the government in August and one in Philadelphia ruled in its favor in October. The Supreme Court is likely to be faced with choosing between them.

Immediately after the September 11 terrorist attacks, governments at all levels feared that information they made publicly available could be useful to terrorists, and began to curtail access, a trend the Bush administration encouraged. The first of the strictures on information resulting from September 11 were described by Graham, the Brookings and Kennedy School scholar, in her book, *Democracy by Disclosure*. “Officials quickly dismantled user-friendly disclosure systems on government Web sites,” she wrote. “They censored information designed to tell community residents about risks from nearby chemical factories; maps that identified the location of pipelines carrying oil, gas and hazardous substances; and reports about risks associated with nuclear power plants.”

Many of those withdrawals mirrored efforts industry had been making for quite a few years, arguing that the public did not really need the information. Some information has been removed from public gaze entirely. James Neal, the Columbia University librarian, said that officials of libraries like his around the country that serve as depositories for federal information “have some concern about the

*(continued on page 84)*



## — success stories —



### **schools**

#### **Moscow, Russia**

Russian school pupils will continue to be able to read about Harry Potter's adventures, after an attempt to have the books banned was rejected. A Slavic cultural organization had alleged that the stories about magic and wizards could draw students into Satanism. But on December 31, the prosecutor's office in Moscow, which had investigated the claim, said that it would not be taking forward the allegations.

A representative of the prosecutor's office said that it had considered a claim that the Harry Potter stories instilled "religious extremism and prompted students to join religious organizations of Satanist followers." But "the probe revealed that there were no grounds for a criminal case."

J. K. Rowling's novels have become popular in Russia, as they have in many countries around the world. Reported in: BBC News, December 31.

### **universities**

#### **Berkeley, California**

University of California, Berkeley Chancellor Robert Berdahl reversed a decision to censor a fund-raising appeal for the Emma Goldman Papers Project. The decision was applauded in a formal statement by anti-censorship groups including the National Coalition Against Censorship, the

American Booksellers Foundation for Free Expression, the Electronic Frontier Foundation, and the ACLU of Northern California.

David Greene, executive director of the First Amendment Project in Oakland, CA, said, "Censorship of political expression is not acceptable in any setting. Yet a University has a special obligation to ensure that its students and faculty are free to express and explore the whole spectrum of ideas and ideologies."

Svetlana Mintcheva, arts advocacy project coordinator at the National Coalition Against Censorship, noted that the controversy over the censoring of the fund-raising appeal has additional resonance in the present political atmosphere. "The freedom to express dissenting political opinions needs to be protected with exceptional vigilance in times of political urgency when civil liberties begin to appear as a luxury we cannot afford."

For the past two decades, the university has housed Goldman's papers. The anarchist and feminist was imprisoned and then deported to Russia in 1919 for encouraging opposition to the draft during World War I. She died in 1940.

In December, university officials censored a fund-raising letter from the Emma Goldman Papers Project because it included quotations from Goldman they believed were too politically charged, especially because the country was preparing for a possible war in Iraq. The letter included a quotation of Goldman's from 1902, when she told her fellow free-speech defenders that "we shall soon be obliged to meet in cellars, or in darkened rooms with closed doors, and speak in whispers lest our next door neighbors should hear that free-born citizens dare not speak in the open."

It also included a quotation from her monthly magazine in 1915: "In the face of this approaching disaster, it behooves men and women not yet overcome by war madness to raise their voice of protest, to call the attention of the people to the crime and outrage which are about to be perpetrated on them."

Robert M. Price, Berkeley's associate vice chancellor for research, said that "it wasn't from nowhere that these quotes randomly happened to fall on the page." Candace S. Falk, the director of the project, "was making a political point, and that is inappropriate in an official university solicitation," he said. Price edited the letter, removing the two quotations.

But Falk argued that the letter, which was meant to go to 3,000 people who had supported the project in the past, was not an official university request. About 400 of the edited letters were sent in December, but the rest were not because Falk believed the edited version was "weak." She agreed that the quotes were not chosen randomly.

"I definitely did choose them because they did seem relevant," she said. "There's a value in knowing what people thought a hundred years ago. But it was not a direct statement about war in Iraq."

The entire incident had a silver lining for the Goldman project. The story became public January 14. By that afternoon, \$3,000 in donations had already poured in. Falk fielded calls from several reporters, and the chancellor issued a statement which vindicated her position.

Chancellor Berdahl, said: “The question that has arisen was not originally seen as a free-speech issue, but as a question by the associate vice chancellor over what was appropriate in a fund-raising letter. I can understand how others might view it differently, and in retrospect, had we to do it over, we would have done it differently.”

Marie Felde, a university spokeswoman, said that if the chancellor had made the decision, “the direct quotes would have been left in.”

“It’s the chancellor’s view that the quotes were perfectly appropriate,” she said.

Falk called the chancellor’s response “wonderful,” adding that she appreciated his “courageous and principled support of our position.” Reported in: *Chronicle of Higher Education* online, January 15.

### **Chapel Hill, North Carolina**

The University of North Carolina-Chapel Hill (UNC) reversed its threatened withdrawal of recognition and benefits from a student group, the InterVarsity Christian Fellowship (IVCF). IVCF had been ordered not to use its religious beliefs as criteria for the selection of its own leaders. On December 30, 2002, the Foundation for Individual Rights in Education (FIRE) drew public attention to the decision. On December 31, UNC Chancellor James Moeser announced that IVCF would not be punished for organizing around its beliefs.

“We are pleased with UNC’s decision, which bodes well for the constitutional and moral rights of UNC’s students,” said Alan Charles Kors, president of FIRE. “The swiftness of this victory emphasizes the profound truth of what Justice Louis Brandeis observed so well: ‘Sunlight is the best disinfectant.’”

On December 10, Jonathan E. Curtis, assistant director for student activities and organizations at UNC, wrote to IVCF, stating that UNC objected to a provision in the IVCF constitution “that Officers must subscribe in writing and without reservation to Christian doctrine.” Curtis told IVCF to “modify the wording of your charter or I will have no choice but to revoke your University recognition.”

FIRE wrote to Chancellor Moeser, explaining why UNC’s threat was injurious to authentic liberty: “To insist that a religious student organization not discriminate on issues of faith and on matters of voluntary association that flow from its practice of its faith—to insist, in short, that a Christian organization not be Christian—not only deprives the individual members of that organization of their rights under the free exercise clause of the First Amendment, but also imposes upon them an ideology alien to their con-

science, in violation of the First Amendment. [IVCF] has as much right to freedom of expression as the conveners of the discussions of the Koran at UNC-Chapel Hill had to their First Amendment rights.”

FIRE also cited Supreme Court decisions that explicitly prohibit institutions and agents of the state such as public universities from forcing a group to admit an unwanted person or from requiring that a group express allegiance to a particular orthodoxy.

“While the University continues to seek to ensure that our facilities and resources are not used in any way that fosters illegal discrimination, we also wish to uphold the principles of freedom of expression,” Chancellor Moeser said in a statement. “Thus I have asked our staff to allow IVCF to continue to operate as an official recognized student organization.”

“Of course, UNC’s restoration of essential rights to IVCF, which should be the rights of all expressive student groups, adds rather than detracts from the true diversity of its campus,” Kors noted. Reported in: FIRE press release, January 7.

## **privacy**

### **Washington, D.C.**

The Senate voted January 23 to bar deployment of a Pentagon project to search for terrorists by scanning information in Internet mail and in the commercial databases of health, financial and travel companies here and abroad. The curbs on the project, called the Total Information Awareness Program, were adopted without debate and by unanimous consent as part of a package of amendments to an omnibus spending bill. House leaders had no immediate comment on the surprise action, which will almost certainly go to a House-Senate conference. Neither did the White House or the Defense Department.

Senator Ron Wyden, the Oregon Democrat who proposed the amendment, said after the vote that it passed so easily because dismayed Republican senators had told him that “this is about the most far-reaching government surveillance proposal we have ever heard about.” He said the amendment means “there will be concrete checks on the government’s ability to snoop on law-abiding Americans.”

Under the legislation, research and development of the system would have to halt within sixty days of enactment of the bill unless the Defense Department submitted a detailed report about the program, including its costs, goals, impact on privacy and civil liberties and prospects for success in stopping terrorists. The research could also continue if President Bush certified to Congress that the report could not be provided or that a halt “would endanger the national security of the United States.”

The limits on deploying, or using, the system are stricter. While it could be used to support lawful military and for-

eign intelligence operations, it could not be used in this country until Congress had passed new legislation specifically authorizing its use.

The Wyden amendment also included a statement that Congress believed “the Total Information Awareness programs should not be used to develop technologies for use in conducting intelligence activities or law enforcement activities against United States persons without appropriate consultation with Congress or without clear adherence to the principle to protect civil liberty and privacy.”

The program is being developed by the Defense Advanced Research Projects Agency, a high-tech unit that played a major role in the creation of the Internet. It is headed by John M. Poindexter, a retired rear admiral who was convicted of lying to Congress about the Iran-contra scandal but subsequently cleared on the grounds that he had been granted immunity for his testimony.

Admiral Poindexter described the program’s goals in a California speech last year when he said “we must become much more efficient and more clever in the ways we find new sources of data, mine information from the new and the old, generate information, make it available for analysis, convert it to knowledge and create actionable options.”

As soon as the existence of the project was disclosed last November, it drew intense criticism from civil libertarians on the left and the right, ranging from the American Civil Liberties Union to the Free Congress Foundation and the Eagle Forum.

Even without extensive debate, the measure was weighed across the political spectrum of the Senate. No senator sought to block it by withholding the unanimous consent its passage required. So Senator Ted Stevens of Alaska, the Republican who heads the Appropriations Committee, almost casually slid it into a package of minor amendments to the spending bill.

The one Republican who had put his name on the measure as a co-sponsor, Senator Charles E. Grassley of Iowa, issued a statement afterwards saying, “Our amendment should make sure that the T.I.A. program strikes the very careful balance that is needed to protect civil liberties while at the same time protecting Americans against terrorists.”

A Democratic co-sponsor, Senator Dianne Feinstein of California, struck a similar note. She issued a statement saying the measure “fences in the program to prevent it from being used to invade Americans’ privacy and civil liberties but does so without impeding our military and intelligence efforts.”

Senator Wyden also stressed accountability, saying the vote showed “the Senate isn’t going to let the program just grow without tough oversight.” He said the reporting requirement “puts some real pressure on them” and “Congress will no longer be in the dark.” Reported in: *New York Times*, January 23.

## film

### Santiago, Chile

For nearly thirty years, it has been illegal in Chile to exhibit or view the Bernardo Bertolucci film *Last Tango in Paris*. The same prohibition has also been applied to Woody Allen’s *Everything You Ever Wanted to Know about Sex*, Ingmar Bergman’s *Smiles of a Summer Night* and hundreds of other motion pictures. Now that peculiar situation has ended. After enduring ridicule for its attitudes and being chastised by human rights organizations for suppressing free expression, this nation of 15 million people is finally ending a censorship system that has kept some of the world’s most popular and admired movies from being shown publicly.

“This is a new step in favor of personal liberties and the dignity of the individual,” President Ricardo Lagos said in signing the bill which repealed the censorship. It went into effect on January 1, just in time for the peak Southern Hemisphere summer movie season, and theaters and film societies lined up to be the first to show forbidden works.

Though its embrace of laissez-faire economic policies suggests a certain libertarian inclination, Chile is probably the most socially conservative nation in Latin America, in large part because the Roman Catholic Church is even more powerful than in neighboring countries. Divorce is prohibited, for instance, and abortion is forbidden even to save a woman’s life.

“We have lived too much time with the Opus Dei all over us, dominated by obscurantism,” the Chilean film director Orlando Lubbert told a local newspaper. “It is time to come out of our shell.” Opus Dei is a conservative Catholic lay group.

Since the censorship board began more than 75 years ago, 1,092 movies have been banned. Most, to judge by their titles, are simply pornographic, but films by directors including Federico Fellini, Pier Paolo Pasolini, Pedro Almodóvar and Oliver Stone also have been banned. During the right-wing military dictatorship of Gen. Augusto Pinochet, from 1973 to 1990, military officers routinely banned or ordered huge cuts in any movie that aroused their ire or suspicion.

At one point, even a movie as innocuous as *Fiddler on the Roof* was prohibited, on the ground that too many of its characters were Russians. But the military censors were especially alarmed by politically charged movies like *Missing*, about the disappearance of an American citizen in Chile during the coup that brought General Pinochet to power, or Stone’s *Salvador*.

More recently, censors also banned movies that they considered blasphemous, ranging from the Monty Python comedy *The Life of Brian* to Martin Scorsese’s *The Last Temptation of Christ*.

Approval of the law does not mean the end of the censorship council. Instead, the board will now assign one of four ratings to movies and, in a move that has caused controversy, its membership is to be increased from 12 to 21,

with psychologists, film directors and critics entering in place of army officers and judges.

During congressional debate of the changes, a conservative legislator argued that it was imperative the military remain represented on the board, given the number of war movies that would be screened. That led an opponent to reply that in view of the even larger number of films with sexual themes, the same logic would seem to demand that a prostitute be appointed. Reported in: *New York Times*, December 13. □

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*(IFC report . . . from page 47)*

policies that affirm that “the collection of personally identifiable information should only be a matter of routine or policy when necessary for the fulfillment of the mission of the library” (*ALA’s Privacy: An Interpretation of the Library Bill of Rights*).

#### *Resolution on the USA Patriot Act and Related Measures That Infringe on the Rights of Library Users*

Before the Midwinter Meeting, the Committee on Legislation (COL) prepared a draft resolution addressing its concerns about the USA Patriot Act. IFC shares many of the same concerns. COL invited IFC to cosponsor the resolution after IFC shared its comments and suggestions. IFC agreed unanimously.

#### *Questions and Answers on Privacy and Confidentiality*

On June 19, 2002, the ALA Council adopted *Privacy: An Interpretation of the Library Bill of Rights*. Since then, the IFC Privacy Subcommittee has continued to work on its “Questions and Answers on Privacy and Confidentiality,” mounted on the OIF Web site at [www.ala.org/alaorg/oif/privacyqanda.html](http://www.ala.org/alaorg/oif/privacyqanda.html). After updating the Q&A prior to this Midwinter Meeting, the subcommittee has now completed its first two major tasks: this Q&A and the Privacy Interpretation. The Privacy Subcommittee is a standing subcommittee of the IFC and will continue to work on a variety of issues of concern to ALA members (see “Background on ALA Privacy Actions” below).

#### *Privacy Toolkit*

The IFC is developing a Privacy Toolkit in recognition of the dire need to assist libraries and librarians in coping with threats to privacy. The Toolkit will be similar in style and purpose to the Libraries & the Internet Toolkit. Members of COL and the Public Awareness Committee (PAC) have agreed to help complete this task.

#### *Background on ALA Privacy Actions*

ALA has many policies, guidelines, and Web sites to assist librarians in preserving privacy and confidentiality for library users:

- *Library Bill of Rights* (1948, amended 1961, 1980, reaffirmed 1996; [www.ala.org/work/freedom/lbr.html](http://www.ala.org/work/freedom/lbr.html))
- *Freedom to Read Statement* (1953; rev. 1972, 1991, 2000; [www.ala.org/alaorg/oif/freeread.html](http://www.ala.org/alaorg/oif/freeread.html))
- *Policy on Confidentiality of Library Records* (1971; rev. 1975, 1986; [www.ala.org/alaorg/oif/pol\\_conf.html](http://www.ala.org/alaorg/oif/pol_conf.html))
- *Suggested Procedures for Implementing Policy on Confidentiality of Library Records* (1983; rev. 1988; [www.ala.org/alaorg/oif/sugpolcn.html](http://www.ala.org/alaorg/oif/sugpolcn.html))
- *Freedom to View Statement* (1990; [www.ala.org/alaorg/oif/freedomtoview.html](http://www.ala.org/alaorg/oif/freedomtoview.html))
- *Policy Concerning Confidentiality of Personally Identifiable Information about Library Users* (1991; [www.ala.org/alaorg/oif/pol\\_user.html](http://www.ala.org/alaorg/oif/pol_user.html))
- *Code of Ethics* (1995; [www.ala.org/alaorg/oif/ethics.html](http://www.ala.org/alaorg/oif/ethics.html))
- *Access to Electronic Information, Services, and Networks* (1996; [www.ala.org/alaorg/oif/electacc.html](http://www.ala.org/alaorg/oif/electacc.html))
- *Questions and Answers: Access to Electronic Information, Services, and Networks* (1997, rev. 2000; [www.ala.org/alaorg/oif/oif\\_q&a.html](http://www.ala.org/alaorg/oif/oif_q&a.html))
- *Libraries: An American Value* (1999; [www.ala.org/alaorg/oif/lib\\_val.html](http://www.ala.org/alaorg/oif/lib_val.html))
- *Privacy: An Interpretation of the Library Bill of Rights* (2002; [www.ala.org/alaorg/oif/privacyinterpretation.html](http://www.ala.org/alaorg/oif/privacyinterpretation.html))
- *Privacy Resources for Librarians, Library Users, and Families* (last updated 2002; [www.ala.org/alaorg/oif/privacyresources.html](http://www.ala.org/alaorg/oif/privacyresources.html))
- *The USA Patriot Act in the Library* (last updated 2002; [www.ala.org/alaorg/oif/usapatriotlibrary.html](http://www.ala.org/alaorg/oif/usapatriotlibrary.html))
- *Confidentiality and Coping with Law Enforcement Inquiries: Guidelines for the Library and its Staff* (last updated 2002; [www.ala.org/alaorg/oif/guidelineslibrary.html](http://www.ala.org/alaorg/oif/guidelineslibrary.html))
- *FBI in Your Library* (last updated 2002; [www.ala.org/alaorg/oif/fbiinyourlibrary.html](http://www.ala.org/alaorg/oif/fbiinyourlibrary.html))
- *State Privacy Laws regarding Library Records* (last updated 2002; [www.ala.org/alaorg/oif/stateprivacylaws.html](http://www.ala.org/alaorg/oif/stateprivacylaws.html))
- *Terrorism Information and Prevention System (TIPS)* (last revised 2002; [www.ala.org/alaorg/oif/tips.html](http://www.ala.org/alaorg/oif/tips.html))
- *Questions and Answers on Privacy and Confidentiality* (2003; [www.ala.org/alaorg/oif/privacyqanda.html](http://www.ala.org/alaorg/oif/privacyqanda.html))
- *Privacy and Confidentiality* (last updated 2003; [www.ala.org/alaorg/oif/privacy.html](http://www.ala.org/alaorg/oif/privacy.html))

In 1999, ALA Council resolved that the Library and Information Technology Association be asked to examine the impact of new technologies on patron privacy and the confidentiality of electronic records. The Task Force on Privacy and Confidentiality in the Electronic Environment was formed at the 1999 ALA Midwinter Meeting with broad participation from across ALA. In July 2000, ALA Council approved the Final Report of the Task Force on Privacy and Confidentiality in the Electronic Environment (Council

Document #62) and referred it to the Intellectual Freedom Committee for review. The recommendations contained therein were:

- That ALA revise its policy statements related to *Confidentiality of Library Records* (rev. 1986), and *Concerning Confidentiality of Personally Identifiable Information About Library Users* (1991), in order to specifically and appropriately incorporate Internet privacy; and
- That ALA develop model privacy policies, instructional materials, and privacy “best practices” documents for libraries; and
- That ALA urge that all libraries adopt a privacy statement on Web pages and post privacy policies in the library that cover the issues of privacy in Internet use as accessed through the library’s services.

At its 2001 spring meeting, the committee decided that fully dealing with the issues raised by the Council referral called for developing an Interpretation of the *Library Bill of Rights* on privacy. Initial work began on a draft Interpretation at that time and continued through the 2001 Annual Conference and the Committee’s 2001 fall meeting. In its deliberations, the committee thought carefully about the implications of 9/11 on privacy issues. The committee sought to develop the Interpretation for lasting impact, knowing this issue was of importance to libraries prior to those events and has enduring importance for those who rely on libraries. ALA Council adopted *Privacy: An Interpretation of the Library Bill of Rights* on June 19, 2002, at the ALA Annual Conference in Atlanta, Georgia.

The committee also developed a tool for libraries to use with their communities to help address many specific questions related to local procedure and implementation: “Questions and Answers on Privacy and Confidentiality” ([www.ala.org/alaorg/oif/privacyqanda.html](http://www.ala.org/alaorg/oif/privacyqanda.html)). The committee completed the Q&A prior to this Midwinter Meeting; it is available for pick up this morning with the Council documents.

In addition, the committee, through its standing Subcommittee on Privacy, compiled “Privacy Activism, News, and Software Tools” for *American Libraries* (Nov. 2002, p. 48) and “Current Citations on Civil Liberties and Privacy Rights after Sept. 11, 2001,” published in *IFRT Report*, Winter 2003 ([www.nd.edu/~jarcher/ifrt/home.html](http://www.nd.edu/~jarcher/ifrt/home.html)).

By the 2003 Annual Conference in Toronto, the subcommittee will work to establish liaison relationships within ALA—specifically, the COL Ad Hoc Privacy Task Force, LITA, OITP, and PLA Library Confidentiality ICC—and will request that IFC Youth Services division representatives report to IFC on children and youth privacy-related items that the committee should have on its Annual Conference agenda. In addition, the committee will begin discussing privacy rights for staff and will

attempt to partner with LAMA and other divisions to investigate this issue, with the goal of creating a Q&A on this topic.

The subcommittee will assist the ALA Office for Intellectual Freedom in conducting an ALA privacy audit with the hope that ALA’s experience will serve as a model as to how libraries could do the same and could lead to training programs for libraries preparing to do the same. In addition, the subcommittee will encourage IFC to plan future privacy-related programs, and to seek more avenues on privacy topics (e.g., articles, bibliographies, Web pages).

Finally, if the Total Information Awareness (TIA) program has not completely died by our 2003 Annual Conference in Toronto, the committee will consider introducing a resolution calling for an assessment of TIA’s potential impact on libraries, and urging Congressional oversight.

#### *Meeting Room Guidelines*

The IFC is reviewing ALA’s Meeting Room policy in light of recent incidents, including those involving the white-supremacist group World Church of the Creator. IFC will review *Meeting Rooms: An Interpretation of the Library Bill of Rights* ([www.ala.org/alaorg/oif/meet\\_rms.html](http://www.ala.org/alaorg/oif/meet_rms.html)); develop a Q&A; and seek member input about experience and concern in the field.

#### *Outsourcing Task Force*

At the 1999 Midwinter Meeting, the ALA Council asked the IFC to review the report of the ALA Outsourcing Task Force, and determine appropriate action. After reviewing that report, the IFC drafted a checklist ([www.ala.org/alaorg/oif/outsourcing.html](http://www.ala.org/alaorg/oif/outsourcing.html)), which focuses on intellectual freedom issues that should be addressed when outsourcing. Other ALA units also have developed outsourcing procedures and checklists. The IFC invited these other units to join a task force to begin discussing how best to develop one ALA outsourcing resource. After discussing various ways to approach this, the task force asked OIF staff to draft an outsourcing toolkit for review before the 2003 Midwinter Meeting. The task force also discussed the draft toolkit at this Midwinter Meeting (“Outsourcing and Privatization in Libraries”; [www.ala.org/alaorg/oif/outsourcing.html](http://www.ala.org/alaorg/oif/outsourcing.html)) and decided to publicize and maintain this site. Because it completed its task, the task force disbanded.

#### *Charging Rental Fees in Libraries*

IFC members are concerned about a growing trend to charge rental fees for library materials. Such charges violate at least two ALA policies: 53. Intellectual Freedom, 53.1.14, “The American Library Association opposes the charging of user fees for the provision of information by all libraries and information services that receive their major support from public funds”; and 61. Library Services for

the Poor, 61.1 Policy Objectives, "The American Library Association shall implement these objectives by: 1) Promoting the removal of all barriers to library and information services, particularly fees and overdue charges."

The IFC will monitor developments to determine whether further ALA actions are necessary.

#### *Deep Linking*

OIF has created a deep linking Web page at [www.ala.org/alaorg/oif/deepinking.html](http://www.ala.org/alaorg/oif/deepinking.html). Deep linking was on the IFC agenda at this Midwinter Meeting; the committee considers it an important issue to continue monitoring.

#### *Resolutions from the ALA Committee on Legislation*

IFC cosponsored the Resolution on the USA Patriot Act and Related Measures that Infringe on the Rights of Library Users. In addition, IFC endorses COL's Ad Hoc Government Information Subcommittee's Resolution on Withdrawn Electronic Government Information.

#### **Projects**

##### *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 has scheduled institutes in Washington, D.C. (February 27–28, 2003) and Chicago, IL (May 12–13, 2003), and will soon announce dates and locations for a west coast institute and other future regional institutes. We urge members to promote this Institute to library lawyers. For more information about upcoming Lawyers for Libraries events, please contact OIF at [lawyers@ala.org](mailto:lawyers@ala.org) or 1-800-545-2433, ext. 4226.

##### *Intellectual Freedom in Library Schools*

OIF has a longstanding interest in providing librarians and others with education programs related to intellectual freedom. In the winter of 2001, IFC members Barbara Jones and Pat Scales mailed a survey to all library school admissions officers, asking whether intellectual freedom concepts are taught in library schools. Since then, the committee has reviewed preliminary data obtained from this survey and is considering how to proceed with a follow-up study.

##### *Sixth Edition of the Intellectual Freedom Manual*

The sixth edition of the Intellectual Freedom Manual, published in October 2001, continues to sell well. It has received uniformly favorable reviews and OIF has received favorable comments for referencing existing pages on the ALA Web site, including all ALA intellectual freedom policies, statements, and guidelines on the OIF Web site. To keep

the new print edition to a manageable length, it was decided to mount some historical and other material on the OIF Web site at [www.ala.org/alaorg/oif/intellectualfreedommanual.html](http://www.ala.org/alaorg/oif/intellectualfreedommanual.html).

In closing, the Intellectual Freedom Committee would like to thank the Division and Chapter Intellectual Freedom Committees, the Intellectual Freedom Round Table, the various unit liaisons, and Judith Krug, OIF director, and staff, for their commitment, assistance, and hard work. □

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*(from the bench . . . from page 68)*

tence, the court tried to compel the testimony of Jonathan Randal, a retired correspondent for *The Washington Post* who had covered the Balkan war. He appealed the ruling, backed by 34 news organizations, and on December 11, the tribunal's appeals court set aside the subpoena. This was the first time a modern war-crimes court defined and upheld limited legal protection for war correspondents, stating that compelling their testimony could endanger their lives and the freedom of the press.

The case reveals just how much traditional concepts of the war correspondent have changed. A new convergence between wars of terror and demands for justice without borders has caught veteran reporters without clear rules. And the debate, which is likely to continue and expand in the shadow of the new International Criminal Court, exposes a trans-Atlantic divide over their responsibilities.

"Reporters gave the tribunals their road map and more," said Roy W. Gutman, who won a Pulitzer Prize in 1993 for path-breaking coverage from Bosnia for *Newsday* and later resisted pressure to testify. He called the Randal decision "a vindication" for journalists who took that position, and urged the permanent international court, which still has no rules on reporters' testimony, to adopt it.

What tribunal investigators have typically sought from reporters is not eyewitness accounts of atrocities, which few would deny them, but legal links in a chain of evidence to prove that accused officials had what prosecutors call "command and control responsibility" for what happened on the killing fields. What is at stake is the glue of news reporting: a border pass, a tour of a camp, an interview.

The Hague tribunals, created by the United Nations Security Council to handle war crimes in the former Yugoslavia and in Rwanda, did give United Nations peacekeepers and International Red Cross workers considerable protection from being subpoenaed as witnesses, on the theory that they needed neutrality and independence to do their work and not become targets of retaliation. The tribunals' first prosecutor, the South African jurist Richard Goldstone, maintains that the same protections should have been extended to war reporters from the start.

"I certainly would never have forced a journalist to give evidence unless it was absolutely necessary, crucially important evidence, and there was no other way of getting it," Justice Goldstone said, citing the same criteria that Randal and his supporters sought in the appeal.

The decision set a less stringent standard: the evidence must be "of direct and important value in determining a core issue in the case" and "cannot reasonably be obtained elsewhere." But how that ruling will be applied remained uncertain. Indeed, prosecutors are considering trying to subpoena Randal again. The current chief prosecutor, Carla Del Ponte, had insisted that Randal submit to defense lawyers' cross-examination about an article he wrote in 1993 or face up to seven years in jail and a large fine.

"American journalists tend to see the tribunal's subpoena power as a threat to First Amendment freedoms," said Diane F. Orentlicher, a law professor at American University in Washington. "Many European journalists see testimony before the tribunal as an extension of the journalistic enterprise."

With few exceptions, the reporters who have resisted testifying in The Hague are Americans. Those who took the stand early and wrote proudly about it are British, like Ed Vulliamy, a prize-winning correspondent for *The Guardian*, who testified in three trials. Journalists, he wrote, could now have "an impact beyond mere 'reporting.'"

"We are entering a new world that seeks not only to report the legacy of tyrants and mass murderers, but to call them to account," he wrote. "My belief is that we must do our professional duty to our papers and public, and our moral and legal duty to this new enterprise."

But his American colleagues were appalled when Vulliamy handed over his notebooks at the order of the court and was grilled for days by a defense lawyer who culled the names and phone numbers of Vulliamy's contacts from the margins.

"Prosecutors get to read our stories; that's it," declared Jonathan Landay, a former Balkan war correspondent now working for Knight-Ridder in Washington, who echoed news media lawyers chary of establishing bad precedents.

Many Europeans, working in a tradition of politically affiliated newspapers and of reporting steeped in opinion, seem genuinely baffled by the American handwringing. Few support a refusal to testify that does not turn narrowly on protecting a confidential source, the one standard held sacred on both sides of the Atlantic. Instead they focus on American concerns that correspondents who testify may endanger themselves and their colleagues, and treat such refusals as failures of nerve. In a typical comment, one of Randal's own London-based lawyers, Mark Stephens, told *The Guardian* that the willingness to testify despite potential dangers was peculiarly English because "there's this stiff upper lip" among the British.

Randal, who covered wars for 45 years, said that, on the contrary, British colleagues seemed eager to grandstand. "Our social utility is to cover the news," he said.

There is also the divisive question of the testimony's impact. "Journalism has never prevented war crimes from being committed," Emir Suljagic, a correspondent for *Dani*, the Bosnian weekly, said during a break in the trial of Slobodan Milosevic, the former president of Yugoslavia. "A court might."

American reporters, even those most sympathetic to the whole enterprise of international law, tend to turn that formula on its head. "The laws always come after the atrocities," Gutman said. "The court is one way to try to stop crimes of war. But journalism is another way, because we have the capability of putting an embarrassing spotlight on what's happening. To my mind, we're a co-equal branch with the tribunal."

Such a view strikes some British journalists as pretentious. Jacky Rowland, a BBC correspondent, appeared as a witness in Milosevic's trial and gleefully covered her own cross-examination. She dismissed complaints from four retired editors that her testifying tainted the BBC's reputation for independence, possibly imperiling its correspondents. "Life is dangerous for journalists, anyway," she said. Reported in: *New York Times*, December 14.

## privacy

### Chicago, Illinois

A federal judge in Chicago has ordered a group of individuals and video companies to pay more than \$500 million to 46 athletes who were filmed in college without their knowledge by cameras hidden in locker rooms and showers. Each of the athletes was awarded a total of \$11 million—\$10 million in punitive damages and \$1 million in compensatory damages—by Judge Charles P. Kocoras of the U.S. District Court of Northern Illinois. The defendants also were ordered to pay court costs and lawyers' fees in a judgment that amounted to \$506,045,795.82.

The defendants were ordered to surrender all the videotapes and any images produced from them. They also were ordered to permanently refrain from selling, advertising and distributing the tapes, which were made during the 1990's and sold on the Internet, carrying titles like "Straight Off the Mat" and "Voyeur Time."

Calling the judgment a significant victory for the victimized and embarrassed athletes, Cindy Fluxgold, a Chicago lawyer who represented them, said the tapes had been sold as pornography. "They clearly were trying to appeal to people watching these films for sexual satisfaction," Fluxgold said of the defendants. She added that the judgment was "a clear statement by the court that the wild, wild Web is going to

have to follow the rule of law.”

It was her hope that the ruling would spur national legislation to make it illegal to film people in private places like bathrooms or locker rooms, or to take videos that show beneath women’s skirts, without their knowledge or consent, Fluxgold said. Some states like Illinois have passed such privacy laws, she said, but “a good number of states don’t have laws.”

“We’re hoping this might send a message to the bad guys and to the law enforcement community and to Congress that we need to move further in this area,” Fluxgold said.

The judgment, handed down November 25, was levied against companies and individuals based in Florida and California. The individual defendants were identified as Daniel Franco, George Jachem and R. D. Couture. The companies named were Franco Productions, Rodco, Hidvideo, Hidvideo-Atlas Video Release, AMO Video, Atlas Video and Gamport/Earthlink. Attempts to reach the defendants were unsuccessful.

Some of the companies still exist, although the defendants and their lawyers never appeared to contest the athletes’ lawsuit, which was filed in 1999, Fluxgold said. While she does not expect that her clients will ever collect the full damages, she said she hoped to track down “every penny” of the defendants’ assets in an attempt to secure property and garnish wages. Money, though, was not the athletes’ priority, she said.

“It was to close these people down and try to put Pandora back in its box,” Fluxgold said. “The only way the court can send a strong message to the bad guys is to say, ‘We’re going to hit you where it hurts: the pocketbook.’”

While the lawsuit involved 46 plaintiffs, primarily wrestlers and football players, the tapes showed 500 to 1,000 athletes, many of whom have not been identified, Fluxgold said. Most, if not all, have completed their college careers by now at places like Northwestern, Illinois, Illinois State, Eastern Illinois, Indiana, Penn, Iowa State and Michigan State.

The tapes were made in several ways. A camera was hidden in a gym bag and left on a locker room bench, pointing toward the showers. Someone carrying a concealed camera in a gym bag walked through a locker room. Wrestlers were filmed at weigh-ins, during which they were naked.

Roger Chandler, a former Big Ten champion wrestler at Indiana and currently an assistant wrestling coach at Michigan State, said in an interview that he was a plaintiff in the case. He had been filmed surreptitiously during a 1995 competition at Northwestern, he said, but did not learn of the incident until three years later, when he was informed by his former high school coach, whose own son had been videotaped.

“I was shellshocked when I first found out,” Chandler said. “Your initial reaction is you want to get these people off the streets. I have no tolerance for that type of thing.” Security has been tightened in locker rooms and weigh-in

areas at wrestling competitions in recent years, Chandler said. Even so, he added, “You’re always looking over your shoulder now.”

“Previously, you just assumed you had privacy,” Chandler said. “Now you don’t assume that anymore.” Reported in: *New York Times*, December 5. □

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*(is it legal? . . . from page 76)*

requests to withdraw materials from those collections.” Perhaps even more important, Neal said, was that “we also do not know what materials are not getting distributed.”

Some material that has been removed from Web sites is still available, although obviously to fewer people, in government reading rooms. The chemical factory risk management plans cited by Graham are no longer available through the Internet, said Stephanie Bell, a spokeswoman for the Environmental Protection Agency. But individuals can look at up to ten of them and take notes (but not photocopies) in 55 government reading rooms around the country, Bell said. There is at least one reading room in every state except Maine, Nebraska, North Carolina, South Dakota, Vermont and Wyoming.

Last March, the Defense Department issued a draft regulation concerning possible limits on publication of unclassified research it finances and sharp restrictions on access by foreign citizens to such data and research facilities. This prompted some concerted resistance from scientists. Bruce Alberts, a biochemist who heads the National Research Council and the National Academy of Sciences, told the academy’s annual meeting on April 29: “I am worried about a movement to restrict publication that has been proceeding quietly but quickly in Washington. Some of the plans being proposed could severely hamper the U.S. research enterprise and decrease national security. It is being suggested that every manuscript resulting from work supported by federal funds be cleared by a federal project officer before being published, with serious penalties for violations. Another rule could prevent any foreign national from working on a broad range of projects.”

Even though the department withdrew its proposal and officials say there has been no decision on whether to try again, the scientists say they are still worried. The new Ashcroft directive on Freedom of Information requests also has begun to be felt. A veteran Justice Department official said he believed that fewer discretionary disclosures were being made throughout the government because “as a matter of policy, we are not advocating the making of discretionary disclosures.”

Delays are one clear reality. The General Accounting Office reported last fall that “while the number of requests



received appears to be leveling off, backlogs of pending requests governmentwide are growing, indicating that agencies are falling behind in processing requests.”

To Thomas Blanton, who helps to run the National Security Archive, which collects and posts documents gained through the Freedom of Information Act, that is a clear effect of the Ashcroft order. “What these signals from on high do in a bureaucracy, they don’t really change the standards,” Blanton said, “but they put molasses or sand in the gears.” Reported in: *New York Times*, January 3.

### **Washington, D.C.**

Citing a shortage of money, the Bureau of Labor Statistics will stop publishing information about factory closings across the country, a decision that some state officials and labor leaders protested. The monthly Labor Department analysis, known as the Mass Layoffs Statistics report, detailed where workplaces with more than fifty employees closed and what kinds of workers were affected.

“We have finite resources,” said Mason M. Bishop, deputy assistant secretary for the Labor Department’s Employment and Training Administration, which has been paying about \$6.6 million a year for the BLS report.

The department made the announcement on Christmas Eve, as a note on its November—and final—report. The report said U.S. employers initiated 2,150 mass layoffs in November, with workers in manufacturing most affected. About 240,000 workers lost their jobs, it said.

Bishop said that the Labor Department had only \$30 million for its dislocated-worker demonstration project, and that it could no longer afford the report. “We believe we need to be funding programs that get people back to work,” he said.

Some state officials, who help compile data for the report, criticized the decision. They said the monthly reports helped them steer unemployed people to jobs in new industries. “In the current recession, MLS data have increased in value and are being followed and evaluated more closely,” Catherine B. Leapheart, president of the National Association of State Work Force Agencies, wrote in a letter to Labor Secretary Elaine L. Chao. “The states have come to rely on this information as an economic indicator and a tool for operational decisions on service delivery and funding allocations for dislocated-worker programs.”

State officials around the country said they were surprised and unhappy to hear the report was canceled. “In these times when the economy is in transition, knowing what’s going on and who it’s going on to, is critical,” said Harry E. Payne, Jr., chair of the North Carolina Employment Security Commission. “It’s an axiom of human nature that you focus on what you can measure. Now they are taking away a measure.”

“To give it up is just awful,” said Beverly Gumola of the Illinois Department of Employment Security. State officials use the data to determine “which occupations are going kaput,” she said. Christine L. Owens, director of

public policy for the AFL-CIO, whose member unions have been hard hit by the loss of manufacturing jobs, said eliminating the report is an example of a “let-them-eat-cake approach” by the Bush administration. Reported in: *Washington Post*, January 1.

## **privacy**

### **Washington, D.C.**

Americans traveling abroad would have to give the government detailed personal information before leaving or returning under an antiterrorism rule that the Immigration and Naturalization Service proposed January 4. The rule would force airlines and shipping companies to collect and submit to the government the name, birth date, sex, passport number, home country and address of every passenger and crew member. The intent is to provide the authorities with more complete information about who enters and leaves the United States.

Currently, air and shipping lines are not required to provide such information to the government about Americans. The proposed rule would make it mandatory for carriers to supply the information about American citizens and noncitizens, immigration officials said. Much of the information is already collected from people entering the country in an arrangement in which 80 percent of commercial carriers voluntarily give personal information about their passengers to the immigration service, the officials said. The added information would be collected while the aircraft or vessel was en route to the United States and electronically transmitted to immigration officials on the ground at the port of entry.

The rule also would require carriers to provide information about people who are leaving the United States within 48 hours after the departure of their flight or vessel, the officials said.

The rule would take effect after a 30-day comment period. It would apply to passengers and crew members on airlines, cargo flights, cruise ships and other vessels. The information would be electronically checked against watch lists and databases of people suspected of being involved in terrorism or other criminal activity. The changes are part of a border security bill passed overwhelmingly by Congress and signed into law by President Bush on May 14, 2001. The law increases the number of immigration inspectors and investigators, and heightens the scrutiny of visa applications from countries listed as sponsors of terrorism. The F.B.I. and the Central Intelligence Agency would have to increase information sharing with the State Department, which issues visas. The government will meld certain databases of law enforcement and intelligence agencies, to help screen visa applicants and foreigners entering the United States.

The American Civil Liberties Union said the new information storehouse must not be used as the basis for a national identification system. In monitoring foreign visitors, the civil rights group said, the government must not compromise Americans' privacy rights or harass people who "look foreign" or are members of racial minorities.

Civil liberties advocates were alarmed at some early proposals, including one that might have made noncitizens carry identification documents. Those ideas were dropped after bipartisan negotiations. Reported in: *New York Times*, January 4.

## lawyer

### New York, New York

Lawyers for Lynne F. Stewart, a New York lawyer charged with supporting terrorism, asked a federal judge January 10 to dismiss the indictment against her, saying the acts she is accused of are "pure speech" protected by the First Amendment.

Stewart was charged last year with helping a client, an imprisoned Egyptian sheik who was convicted of plotting to blow up New York landmarks, pass messages to a terrorist group, the Islamic Group, that he once led in Egypt. The government says that one message from the sheik, Omar Abdel Rahman, instructed followers to no longer abide by a cease-fire in terrorist activities.

Stewart's lawyers say that while the government may have the right to restrict the speech of certain prisoners, matters are quite different, "when a lawyer such as Ms. Stewart—or a newspaper reporter or anyone else—finds out her client's political views on any given subject and truthfully reports those views to the world."

The lawyers also said there was no evidence Stewart intended to incite violence by Abdel Rahman's supporters by publicizing his words. Prosecutors had no comment on the filing, and Stewart's lead lawyer, Michael E. Tigar, would not comment beyond the brief.

But the document, filed in U.S. District Court in Manhattan and running more than a hundred pages, offers a broad defense of the roles of lawyers in representing controversial clients. It also contains a sharp attack on strict security rules imposed by the government on Abdel Rahman and certain other prisoners, which bar them from communicating with virtually anyone but their lawyers.

Stewart's lawyers asked for a hearing on the rules' legality, and argued that applying the rules to lawyers like Stewart was "particularly troublesome, given the attorney's role in our judicial system." If the charges against her are not dismissed, the brief says, Stewart should be tried separately from her co-defendants, who include two men charged with inciting violence. Reported in: *New York Times*, January 11. □

(*Eldred v. Ashcroft* . . . from page 63)

purposes, is an impermissible exercise of Congress's power under the copyright clause. . . .

More forcibly, petitioners contend that the C.T.E.A.'s extension of existing copyrights does not "promote the progress of science" as contemplated by the preambular language of the copyright clause.

To sustain this objection, petitioners do not argue that the clause's preamble is an independently enforceable limit on Congress's power. Petitioners acknowledge that "the preamble of the copyright clause is not a substantive limit on Congress's legislative power."

Rather, they maintain that the preambular language identifies the sole end to which Congress may legislate; accordingly, they conclude, the meaning of "limited times" must be "determined in light of that specified end." The C.T.E.A.'s extension of existing copyrights categorically fails to "promote the progress of science," petitioners argue, because it does not stimulate the creation of new works but merely adds value to works already created.

As petitioners point out, we have described the copyright clause as "both a grant of power and a limitation," and have said that "the primary objective of copyright" is "to promote the progress of science." The "constitutional command," we have recognized, is that Congress, to the extent it enacts copyright laws at all, create a "system" that promotes the progress of science.

We have also stressed, however, that it is generally for Congress, not the courts, to decide how best to pursue the copyright clause's objectives. . . .

On the issue of copyright duration, Congress, from the start, has routinely applied new definitions or adjustments of the copyright term to both future works and existing works not yet in the public domain. Such consistent Congressional practice is entitled to "very great weight, and when it is remembered that the rights thus established have not been disputed during a period of over two centuries, it is almost conclusive." Indeed, "this court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our government and framers of our Constitution were actively participating in public affairs, acquiesced in for a long term of years, fixes the construction to be given the Constitution's provisions."

Congress's unbroken practice since the founding generation thus overwhelms petitioners' argument that the C.T.E.A.'s extension of existing copyrights fails per se to "promote the progress of science. . . ."

The C.T.E.A., in contrast, does not oblige anyone to reproduce another's speech against the carrier's will. Instead, it protects authors' original expression from unrestricted exploitation. Protection of that order does not raise the free speech concerns present when the government compels or burdens the communication of particular facts or ideas. . . .

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. To the extent such assertions raise First Amendment concerns, copyright’s built-in free speech safeguards are generally adequate to address them. We recognize that the D.C. circuit spoke too broadly when it declared copyrights “categorically immune from challenges under the First Amendment.” But when, as in this case, Congress has not altered the traditional contours of copyright protection, further First Amendment scrutiny is unnecessary.

As we read the framers’ instruction, the copyright clause empowers Congress to determine the intellectual property regimes that, overall, in that body’s judgment, will serve the ends of the clause. Congress may “implement the stated purpose of the framers by selecting the policy which in its judgment best effectuates the constitutional aim.” Beneath the facade of their inventive constitutional interpretation, petitioners forcefully urge that Congress pursued very bad policy in prescribing the C.T.E.A.’s long terms. The wisdom of Congress’s action, however, is not within our province to second guess. Satisfied that the legislation before us remains inside the domain the Constitution assigns to the first branch, we affirm the judgment of the court of appeals.

#### **From the Dissent by Justice Breyer**

The economic effect of this 20-year extension, the longest blanket extension since the nation’s founding, is to make the copyright term not limited, but virtually perpetual. Its primary legal effect is to grant the extended term not to authors, but to their heirs, estates or corporate successors. And most importantly, its practical effect is not to promote, but to inhibit, the progress of “science”—by which word the framers meant learning or knowledge.

The majority believes these conclusions rest upon practical judgments that at most suggest the statute is unwise, not that it is unconstitutional. Legal distinctions, however, are often matters of degree. And in this case the failings of degree are so serious that they amount to failings of constitutional kind. Although the copyright clause grants broad legislative power to Congress, that grant has limits. And in my view this statute falls outside them. . . .

The extra royalty payments will not come from thin air. Rather, they ultimately come from those who wish to read or see or hear those classic books or films or recordings that have survived. Even the \$500,000 that United Airlines has had to pay for the right to play George Gershwin’s 1924 classic “Rhapsody in Blue” represents a cost of doing business, potentially reflected in the ticket prices of those who fly.

#### **From the Dissent by Justice Stevens**

Congress set in place a federal structure governing certain types of intellectual property for the new republic. That Congress exercised its unquestionable constitutional

authority to create a new federal system securing rights for authors and inventors in 1790 does not provide support for the proposition that Congress can extend pre-existing federal protections retroactively.

Respondent places great weight on this first Congressional action, arguing that it proves that “Congress thus unquestionably understood that it had authority to apply a new, more favorable copyright term to existing works.”

That understanding, however, is not relevant to the question presented by this case—whether “Congress has the power under the copyright clause to extend retroactively the term of existing copyrights?” Precisely put, the question presented by this case does not even implicate the 1790 act, for that act created, rather than extended, copyright protection. That this law applied to works already in existence says nothing about the first Congress’s conception of their power to extend this newly created federal right. . . .

By failing to protect the public interest in free access to the products of inventive and artistic genius—indeed, by virtually ignoring the central purpose of the copyright-patent clause—the court has quitclaimed to Congress its principal responsibility in this area of the law.

Fairly read, the court has stated that Congress’s actions under the copyright-patent clause are, for all intents and purposes, judicially unreviewable. That result cannot be squared with the basic tenets of our constitutional structure. It is not hyperbole to recall the trenchant words of Chief Justice John Marshall: “It is emphatically the province and duty of the judicial department to say what the law is.” □

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*(Scalia . . . from page 64)*

Justice Scalia said. “I have no problem with that philosophy being adopted democratically. If the gentleman holding the sign would persuade all of you of that, then we could eliminate ‘under God’ from the Pledge of Allegiance. That could be democratically done.”

The rest of the crowd repeatedly cheered Justice Scalia, whose son Paul is a priest at a nearby Roman Catholic church. Several hundred people joined him in singing “God Bless America” after a brief Knights of Columbus Parade through downtown.

Justice Scalia used the event to repeat criticisms that the Constitution is being interpreted liberally. “It is a Constitution that morphs while you look at it like Plasticman,” he said.

Though the Constitution says the government cannot establish or promote religion, Justice Scalia said, the framers had not intended for God to be stripped from public life. “That is contrary to our whole tradition,” he said, mentioning as examples the words ‘in God we trust’ that appear on currency, presidential Thanksgiving proclamations, Congressional chaplains and tax exemption for places of worship. Reported in: *New York Times*, January 12. □

# intellectual freedom bibliography

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

- Aufderheide, Pat. "Music for the Masses." *In These Times*, vol. 27, no. 6, February 17, 2003, p. 41.
- Carr, C. "Dow v. Thing: A Free-Speech Infringement That's Worse than Censorship." *Village Voice*, vol. 48, no. 4, January 22–28, 2003, p. 49.
- Cheltnain, Sam and Michael Wildasin. "First Amendment Schools. . . : An Experiment with Democratic Freedoms." *Insights on Law and Society*, vol. 3, no. 1, Fall 2002, p. 13.
- Clark, Jessica. "An Uphill Battle: Lawrence Lessig explains how the corporate obsession with intellectual property threatens our scientific and creative future." *In These Times*, vol. 27, no. 6, February 17, 2003, p. 38.
- . "Illegal Art: Freedom of Expression in the Corporate Age." *In These Times*, vol. 27, no. 6, February 17, 2003, p. 37.
- Cole, David, and others. "New Democracy Forum: Their Liberties: Our Security." *Boston Review*, vol. 27, no. 6, December 2002/January 2003, p. 4.
- Franklin, John. "Taking Up the Challenge: Safeguarding the Shelves of School Libraries." *Education Update*, vol. 44, no. 8, December 2002, p. 1.
- Garnar, Martin. "Intellectual Freedom." *Colorado Libraries*, vol. 28, no. 3, Fall 2002.
- Goldstein, Richard. "Persecuting Pee Wee: A Child-Porn Case that Threatens Us All." *Village Voice*, vol. 48, no. 3, January 15–21, 2003, p. 42.
- Harer, John B. and Jeanne Harrell. *People for and Against Restricted or Unrestricted Expression*. Westport, Conn: Greenwood Press, 2002.
- Hentoff, Nat. "A Citizen Shorn of All Rights: A Case Vital to Future Americans, Too." *Village Voice*, vol. 48, no. 1, January 1–7, 2003, p. 23.
- . "Crossing Swords with General Ashcroft: Where Is Our Bill of Rights Defense Committee." *Village Voice*, vol. 47, no. 52, December 25–31, 2002, p. 26.
- . "The Death of Operation TIPS: Volunteer Spying Corps Dismissed." *Village Voice*, vol. 47, no. 51, December 18–24, 2002, p. 25.
- . "We'll All Be Under Surveillance: Computers Will Say What We Are." *Village Voice*, vol. 47, no. 50, December 11–17, 2002, p. 26.
- Lee, Chisun. "Privacy Meets Public Saftey: A 'Pragmatic Progressive' Emerges from Queens." *Village Voice*, vol. 48, no. 2, January 8–14, 2003, p. 23.
- Lindorff, Dave. "Don't Tread Them: Cities move to protect the Bill of Rights." *In These Times*, vol. 27, no. 3, January 6, 2003, p. 6.
- Knowles, Joe. "The Pirates of Hollywood." *In These Times*, vol. 27, no. 6, February 17, 2003, p. 40.
- McLeod, Kembrew. "Freedom of Expression™." *In These Times*, vol. 27, no. 6, February 17, 2003, p. 43.
- Minow, Mary and Tomas A. Lipinski. *The Library's Legal Answer Book*. Chicago: American Library Association, 2003.
- Pipkin, Gloria and ReLeah Cossett Lent. *At the Schoolhouse Gate: Lessons in Intellectual Freedom*. Portsmouth, NH: Heinemann, 2002.
- Pollitt, Katha. "Subject to Debate: They Know When You Are Sleeping." *The Nation*, vol. 276, no. 3, January 27, 2003, p. 9.
- Rosen, Jeffrey. "Security Check: How to Stop Big Brother." *The New Republic*, vol. 227, No. 25, December 16, 2002, p. 11.
- Schimmel, David. "Legal Miseducation? The Bill of Rights and the School Curriculum." *Insights on Law and Society*, vol. 3, no. 1, Fall 2002, p. 10.
- Shapiro, Andrew L. "Comment: Copyright Monopolies." *The Nation*, vol. 276, no. 6, p. 6.
- Shapiro, Bruce. "Comment: Censorship 101." *The Nation*, vol. 275, no. 22, December 23, 2002, p. 6.
- Smith, Ted D. "Security versus Freedom of Information: An Enduring Conflict in Federal Information Policy." *OLA Quarterly*, vol. 8, no. 4, Winter 2002, p. 2.
- Strand, Palma J. "Forced to Bowl Alone?" review of *Downsizing Democracy: How America Sidelined Its Citizens and Privatized Its Public*, by Matthew A. Crenson and Benjamin Ginsberg. *The Nation*, vol. 276, no. 5, February 10, 2003, p. 25. Student Press Law Center. *Report*, vol. 24, no. 1, Winter 2002–03.
- Unruh, Heidi Rolland. "Choosing Partners: Church and State Working Together." *Christian Century*, vol. 119, no. 25, December 4–17, 2002, p. 8.