newsletter on intellectual freedom

IFC ALA

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supremes to hear CIPA appeal

The U.S. Supreme Court agreed November 12 to review Congress's latest effort to shield children from pornography on the Internet, a federal law that requires libraries to install filters on all computers providing Internet access to adults as well as to young patrons. A special three-judge federal court in Philadelphia ruled last spring that the Children's Internet Protection Act was unconstitutional because it induced public libraries to violate their patrons' First Amendment rights as a condition of receiving federal funds for Internet access. 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.

Once a library provided Internet access, the panel reasoned, it became a public forum, open to an unlimited number of speakers and topics, from which "speech whose content the library disfavors" could be excluded only under the most carefully limited circumstances. The court said that all available filters were "blunt instruments" that would suppress constitutionally protected speech by screening out legitimate sites.

"Given the crudeness of filtering technology, any technology protection measure mandated by CIPA will necessarily block access to a substantial amount of speech whose suppression serves no legitimate government interest," the judges wrote.

The three judges recommended less restrictive ways to control Internet use, like requiring parental consent before a minor is allowed to log on to an unfiltered computer or requiring a parent to be present while a child surfs the Net.

The lower court permanently enjoined the Federal Communications Commission (FCC) and the Institute of Museum and Library Services (IMLS) from withholding funds from public libraries that have chosen not to install blocking technology on all Internet-ready terminals. As a result, public libraries are not required to install filters on their computers in order to receive funds from either agency. The Justice Department filed its Supreme Court appeal less than one month later.

"The lower court decision provides a very firm foundation for our argument before the Supreme Court," said ALA Executive Director Keith Michael Fiels. "No mechanical device can replace guidance and education from parents, librarians and community members working together. Filters provide a false sense of security that children are protected

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tentative agreement in Patriot Act FOIA suit

The Justice Department agreed to tell the Freedom to Read Foundation (FTRF), the American Civil Liberties Union, and other organizations by January 15 which documents it would release about increased surveillance in the United States under the USA PATRIOT Act, passed in response to the September 11, 2001, terrorist attacks. Responding to a Freedom of Information Act suit brought by FTRF and other groups, the Justice Department also said it would supply a list of documents that it would keep confidential, citing national security concerns. The plaintiffs could challenge the decision to withhold any documents.

The agreement was reached November 26 before U.S. District Court Judge Ellen Segal Huvelle, who is hearing the case, which grew out of an August 21 request filed under the Freedom of Information Act. In a letter to the ACLU dated September 3, the Justice Department agreed to respond to the FOIA request speedily, acknowledging that the request concerned "a matter of widespread and exceptional media interest in which there exist possible questions about the government's integrity which affect public confidence." The FBI made similar promises. Yet neither agency disclosed any records in response to the request nor stated which records, if any, they were going to disclose.

On October 24, the ACLU, the FTRF, the American Booksellers Foundation for Free Expression, and the Electronic Privacy Information Center filed suit seeking to learn how many subpoenas had been issued to libraries, bookstores and newspapers under the USA Patriot Act. Some of the information also was previously sought by the House Judiciary Committee, which was initially rebuffed. Committee Chair Rep. James Sensenbrenner, Jr., (R–WI), said the committee had now received some of the information in classified form.

"Everyone wants to know—just how often is the government using its greatly expanded powers to gain information on our reading habits?" said FTRF Executive Director Judith F. Krug. "The Patriot Act allows law enforcement officials to search library records on a much lower level of judicial scrutiny. As a result, we're greatly concerned about the invasion of privacy of library users."

"Revealing how many subpoenas have been issued will not threaten national security. It will tell us how often the Justice Department is using the very broad power it received in the Patriot Act to monitor First Amendment-protected activity," ABFFE President Chris Finan said.

In addition to the number of bookstore and libraries subpoenas, the lawsuit sought information about how the Justice Department was employing its vastly expanded power to conduct searches and electronic surveillance. Under the Patriot Act, the FBI can obtain court orders to monitor anyone it thinks may have information relevant to a foreign intelligence investigation, including American citizens who are not suspected of engaging in criminal acts.

David Sobel, General Counsel to the Electronic Privacy Information Center, emphasized that the FOIA request does not seek any information that could compromise a terrorism investigation. "Much of the information that the Justice Department claims is classified consists of statistical information whose release could not possibly endanger national security or any other legitimate government interest," he said.

On November 14, the plaintiffs filed papers in court calling on the Justice Department to designate a specific date by which the information would be provided, noting that another federal judge set a deadline for the Energy Department to release documents and e-mails concerning Vice President Dick Cheney's energy task force.

Justice Department lawyer Anthony J. Coppolino said the government needed until mid-January because the request was being reviewed by several agencies. He said the government had produced 163 pages of information, but needed to check with the various agencies, including the Immigration and Naturalization Service, intelligence and the criminal division to see if the information could be released. Huvelle said the government was working toward meeting the ACLU's request.

"This is a matter of great public interest," Judge Huvelle said. "I am not unimpressed by the efforts of the government to comply. The government is moving heaven and earth to get what you want."

The ACLU asked the Justice Department for the number of times it has asked libraries or bookstores for lists of purchases or for the identities of those who have bought certain books; how many times law officials have entered people's homes without letting them know until later; how many times they have approved phone traces of people not accused of any crimes; and how many times they have investigated Americans for writing letters to newspapers, attending rallies or other First Amendment-protected activities. Reported in: *San Francisco Chronicle*, November 26. □

SUPPORT THE FREEDOM TO READ

in review

The Free Speech Movement: Reflections on Berkeley in the 1960s. Edited by Robert Cohen and Reginald E. Zelnik. Berkeley, Los Angeles and London: University of California Press, 2002. xvii + 618 p.

The history of free expression in the United States is most frequently presented as a legal narrative in which court decisions occupy center stage. From the landmark libel trial of John Peter Zenger in colonial times through the Vietnam-era Supreme Court ruling in the Pentagon Papers case, defense and extension of the protections offered by the First Amendment are usually portrayed as the work of visionary jurists like Holmes, Douglas, or Brennan, aided and abetted, of course, by courageous individual plaintiffs and defendants. But while the courts have sometimes taken the lead in opening new avenues of expression, as often as not the actions of mass political movements have more forcefully challenged limitations on free speech, with court decisions only subsequently codifying their gains.

Such was the case with the Free Speech Movement (FSM), which engulfed the University of California at Berkeley in the Fall of 1964. The FSM was the first of the great student rebellions of the 1960s and in many respects the most influential. Arising out of the civil rights agitation of the early 1960s, its goal was to establish the right of students to engage in political advocacy and to organize political actions—including illegal civil rights sit-ins—on campus, a right taken largely for granted today, but as late as 1964 perceived as almost shockingly radical, at least by California legislators and university administrators. Through its tactics of sit-in and building occupation and through the often inspired rhetoric of its New Left leaders, the FSM became the model for future student uprisings, but it also won important new political rights for students. Indeed, it is difficult to imagine the Supreme Court's ruling in *Tinker*, which famously declared that students do not forgo their constitutional rights "at the schoolhouse gate," had it not been for the victory of the FSM—and its faculty supporters—five years earlier.

But outside of a handful of its veterans, the FSM is little-remembered today, especially as a landmark in the progress of free expression. This thick yet absorbing collection of more than thirty memoirs and scholarly articles about the FSM should go far to remedy that. Put simply, *The Free Speech Movement* is one of the best books ever published about the student movement of the 1960s, but it is also an important contribution to the literature on the right to free expression. It includes essays by leaders and rank-and-file activists in the FSM and by Berkeley faculty, some of whom were active in support of the movement and others whose involvement was more peripheral. There are also accounts of the Bay Area civil rights movement of the early 1960s, out of which the FSM arose, of the movement's legal implications (most thoroughly by Berkeley constitutional scholar Robert Post), and of pivotal events in the movement's aftermath and in the subsequent life of its much beloved leader, the late Mario Savio, whose death in 1996 inspired the collection and to whose memory it is movingly dedicated.

The collection also includes a marginally self-critical defense of the university administration's handling of the crisis by former UC President Clark Kerr. Kerr remains something of a bete noire to most of the activists whose recollections fill these pages, and it is a tribute to the editors that they were able to include his essay, which advances a markedly different point of view than the other contributions. For Kerr, the story of the FSM is that of the victory of conciliation over confrontation. This is indeed free speech in action; all sides are represented. Although the FSM still awaits its definitive history, this book will remain the best single place to turn for information and analysis of its significance for years to come.

Studies of the 1960s have tended to lump the FSM together with the other student rebellions that it to some degree inspired, from the numerous upheavals at Berkeley itself through major rebellions at nearby San Francisco State as well as, at much further distance, Columbia, Harvard, and Cornell, to the epic national student strike that followed the killings at Kent State and Jackson State in 1970. In this context, the FSM appears primarily as a harbinger of radicalism and of the often hedonistic counter-culture with which Berkeley would soon become so identified. Those whose gaze is directed mainly at these later movements often see an intolerant streak and a self-righteousness that contrast sharply with the liberal values of free expression, and there has been a tendency to read these characteristics into the FSM as well or, instead, to see the FSM only in its contrast to these later, allegedly less constructive, movements.

It would surely be a distortion to downplay the FSM's radicalism, but to reduce its history to its role in the broader saga of the New Left would be an even greater distortion. As several contributions make clear, the FSM was in many respects basically a liberal movement. As editor Robert Cohen—who was just nine years old at the time of the FSM—demonstrates in a remarkable study of rank-and-file protesters, nearly eight hundred of whom were arrested in the occupation of Sproul Hall on December 2, 1964, most FSMers were motivated by values and concerns that were more liberal than extreme.

Working from a collection of affidavits prepared by the arrestees for their trial at the request of the judge, Cohen concludes that the "rank and file represented in these statements emerge not as a New Left army, with hundreds of youths thinking and marching in lockstep," as so many journalistic accounts of the time freely assumed, "but as a loose political coalition that included many liberals and a still more moderate minority." (231) In this light, he argues, "the view of a 'radical' FSM is not wrong, but it is incomplete. . . . The cam-

pus restrictions on free speech that initially sparked mass activism at Berkeley offended not only students affiliated with the left but those in the center and on the right and even those with no political affiliation at all" (228).

This view of the FSM as a predominantly liberal movement advancing traditional American goals of free political expression is confirmed by several other contributions, notably that of Professor David Hollinger, now a history professor at Berkeley but in 1964 a graduate student on the fringe of the movement. While recognizing that, for some students, the FSM began a near-anarchic rebellion against authority—this is the apparent vision of David Lance Goines's 1993 memoir of the movement—Hollinger stresses that for him and many others, the FSM "was always bound up with the relation of academic values to social justice" (181). Similarly, the late Henry Mayer, also a history graduate student in 1964, recalls how he was motivated to join the FSM by the clear contrast between Berkeley's paternalistic authoritarianism and the academic freedom he experienced as an undergraduate at the University of North Carolina. Hollinger and Mayer were graduate students on the movement's periphery, but Martin Roysher was one of its leading undergraduate militants. In his view, supporters of the FSM "truly believed they were being fundamentally patriotic . . . Pragmatism was the FSM's major key, and ideology a minor one" (146).

In his highly perceptive introduction to the volume, Cohen emphasizes the "many dimensions of the FSM" (7) and specifically contrasts the FSM and Savio with the rebellion at Columbia University in 1968 and its media-hyped "leader," Mark Rudd. He finds the comparison somewhat unfair and cautions against any simplistic contrast between a "good" early 'sixties and a "bad" later 'sixties, a distinction sometimes found in recent historiography.

The caution is important, but the contrast remains nonetheless. When I arrived in Berkeley to begin graduate school in the fall of 1969, in the wake of People's Park in Berkeley and my own experiences as a student militant at Columbia, the FSM already seemed to me almost as distant as the Peloponnesian War. Despite my activism, I was not even impressed to learn that my assigned adviser, Reginald Zelnik, one of the collection's editors, had been one of the FSM's most important—and, as an acting assistant professor in his first year, most courageous—faculty supporters, as his detailed memoir/study of the faculty's role in the conflict carefully documents. (Disclosure: Zelnik went on to direct my doctoral work and become my mentor; he remains a neighbor and good friend to this day.)

To me and other young militants of the next "generation" of student activists, the FSMers already seemed somewhat outdated, no more so in their advocacy of free expression, which increasingly ran counter to the dogma and often delusional militancy that were growing among us out of frustration with our failure to affect change in Vietnam as readily as had our predecessors at Berkeley and, by the late 1960s, even in the American South. To us, the FSM seemed already to be a very different movement from our own, an ancestor at best.

Or was it? Reading this volume today I am struck in fact by how much the FSM had in common with later student movements, especially with what happened to me at Columbia. National Public Radio correspondent Margot Adler writes movingly of her experience in the FSM as a young first-year student, quoting at length from a series of remarkable letters that she wrote at the time to her mother. Adler's gripping account of her participation in the occupation of Sproul Hall and subsequent arrest echoes virtually every experience and feeling that my wife and I had when we occupied Hamilton and Mathematics Halls at Columbia some four years later.

Indeed, it now seems to me that the Columbia rebellion and the FSM were not so different after all. If "alumni" of the Columbia events do not hold Rudd in the same esteem that FSMers hold Savio, it is more for his subsequent involvement in the faux-terrorist Weather Underground (which Rudd has forcefully criticized) than for his leadership at Columbia, which, while less eloquent, was in some critical respects not so different from Savio's, as Cohen acknowledges. And, as is revealed in the essay by Bettina Aptheker, the most prominent woman in the FSM leadership and its only avowed Communist, the FSM, like the Columbia strike, was a decidedly male-dominated movement. The advances associated with the emergence of feminism, prepared in many crucial ways by the student movement, nonetheless came after that movement subsided, a phenomenon more of the 1970s than the 1960s. (Of course, many feminists of the '70s had been students in the '60s.)

Like the demands of the FSM, our demands at Columbia—for an end to the University's construction of a gymnasium on public park land in Harlem, a symbol of Columbia's callousness to its African-American neighbors, and for an end to Columbia's participation in the Institute for Defense Analysis, a consortium of research universities providing analysis for the Defense Department—were by no means inconsistent with liberalism and were supported by many liberals and moderates on campus. And like the main demands of the FSM, our substantive demands were in the end met by the University, but, like the FSM, we failed to win full amnesty for those arrested, which like the FSM leaders we understood as directly tied to our freedom to continue organizing.

Moreover, if the FSM, despite its radical leadership, appealed to a majority of liberal and moderate supporters, this was also somewhat true of the Columbia revolt and many other student movements of the 1960s. If the Columbia strike leadership included a pseudo-Guevarist like Rudd, it also included Jerrold Nadler, who today represents

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privacy protection rated by state

California and Minnesota protect the privacy of their citizens better than any other states, while the federal government does a poor job, a study by *Privacy Journal* has found. Robert Ellis Smith, publisher of the monthly journal, said the two states have much in common in the commitment to privacy rights, though he ranked California marginally ahead.

"Both have a permanent office in state government looking after privacy," he said. "Both state supreme courts have reaffirmed the right to privacy. In California, the court has ruled that constitutional protections for privacy apply to private as well as government actions." Its legislature is continually "tweaking" privacy laws to stay on top of new intrusions.

"In Minnesota, the court has ruled that disclosure of private facts is a tort," Smith said. Moreover, Minnesota law applies to local governments as well as state government, and the state has the oldest established privacy office in the country, always fully staffed and financed. He said Minnesota also received credit for an effective lawsuit in which Attorney General Mike Hatch won large damages from banks for selling information to telemarketers.

Minnesota and California also were among the leaders in a 1999 version of the survey, which ranked states on whether they have privacy guarantees in their constitutions, laws protecting financial, medical, library and government files, and fair credit reporting laws stronger than federal legislation. States were given extra credit when their highest courts had strong records on privacy and receive deductions for antiprivacy actions by state agencies or legislatures.

The journal ranked states in five tiers. The other states in the top tier are Connecticut, Florida, Hawaii, Illinois, Massachusetts, New York, Washington and Wisconsin. The second tier, states considered "above average," includes Alaska, Arizona, Colorado, Georgia, Maine, Oklahoma, Rhode Island, Utah and Vermont. The third tier, states considered "below average," has Indiana, Louisiana, Maryland, Michigan, Montana, New Jersey, Nevada, Ohio, Oregon and Virginia. The fourth tier has nine states and the District of Columbia: Alabama, North Dakota, Nebraska, New Hampshire, New Mexico, Pennsylvania, South Carolina, Tennessee and West Virginia. The lowest tier includes Arkansas, Delaware, Idaho, Iowa, Kansas, Kentucky, Mississippi, Missouri, North Carolina, South Dakota, Texas and Wyoming.

Texas, ranked in 1999 as "not on the radar screen," improved its standing by enacting laws restricting the use of genetic information by insurance companies and employers, and the use of automatic dialers by telemarketers. It also joined several other states by requiring telemarketers not to call individuals who have entered their names on a state "do not call" list.

Smith said the federal government would have been ranked in the fourth tier of privacy protectors if it were a state. At the moment, he said, the federal government has no regulation for medical records privacy, and the regime scheduled to go into effect next year is "weak." As for a guarantee of financial privacy, he said "the federal system really doesn't have one."

Nor does the federal government provide any protection for the privacy of library records. "Most states do have laws that give great leverage to reject most requests" for information on users, though all have exceptions for formal law enforcement requests.

He said the U.S.A. Patriot Act had diminished privacy. "The antiterrorist legislation in significant ways made it easier for law enforcement to conduct electronic surveillance," he said. "I don't think they were gross invasions of privacy, but the changes have to be regarded as a net loss of privacy." Reported in: *New York Times*, October 20. □

Homeland Security Act may threaten libraries, privacy

Civil libertarians are warning that the homeland security bill passed November 19 by Congress, taken in context with already broadened surveillance powers and new database technology, represents an unprecedented threat to personal privacy, including the confidentiality of library records.

The new Homeland Security Department "is going to data-mine hundreds of millions of records of Americans to figure out who may or may not be a terrorist threat," said Jerry Berman, executive director of the Center for Democracy and Technology, a Washington, D.C., lobbying group. The law authorizes the new department to use computers to analyze information from intelligence, law enforcement, other government agencies and even private companies to troll for patterns that reveal terrorist plots.

The legislation also includes a provision that gives greater latitude to providers of Internet services—including libraries—to turn over information about their users if they believe an emergency situation exists.

The bill amends section 2702(b) of the United States Code to allow "a person or entity providing an electronic communication service to the public" to divulge the contents of a communication to government authorities "if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of communications relating to the emergency." Previously, such communications were protected by privacy measures.

The new law also requires the government entity that receives the information to report the disclosure within ninety days to the U.S. attorney general, who will submit a

report on all such cases to Congress one year after the bill's enactment.

Civil liberties groups, such as the Washington-based Electronic Privacy Information Center, have complained the bill's language allows Internet providers to turn over subscriber information to any government officials, not just investigators. U.S. companies have traditionally refused to act as agents for prosecutors without court-approved warrants, said Chris Hoofnagle, EPIC's legislative counsel. The provision was part of the Cyber Security Enhancement Act of 2002, passed by the House last summer but never reconsidered by the Senate.

Another part of the Homeland Security Act gives U.S. authorities new power to trace e-mails and other Internet traffic during cyber-attacks without first obtaining even perfunctory court approval. That could only happen during "an immediate threat to national security," or during an attack against a "protected computer." Prosecutors would need to obtain a judge's approval within 48 hours.

Experts have noted that U.S. law considers as "protected" nearly any computer logged onto the Internet. And civil liberties groups have frequently complained that obtaining permission from a judge is too easy for this type of e-mail tracing; if an investigator merely attests that the information is relevant to an ongoing investigation, a judge can't deny the request.

Defenders of the bill, which passed 90–9 in the Senate, say it balances public safety with privacy rights. "There's always a careful line between protecting privacy and maintaining security," said Brad Bennett, spokesman for Rep. Lamar Smith (R–TX), who originally introduced many of the cyber-security provisions that passed with the homeland security bill.

The law does call for a Homeland Security privacy officer and says that the databases it will create should comply with federal privacy protections.

Other cyber-security provisions are less controversial. One calls for government agencies to annually test their own computer security and to do a better job safeguarding their systems against hacker attacks. A lot of work remains undone in this area, according to a General Accounting Office investigation that exposes pervasive security weaknesses in all the largest federal agencies and departments.

Among the main technology-related provisions, the legislation:

- Creates and analyzes a huge database of information from government and the private sector to look for terrorist threats.
- Establishes longer sentences for hackers who cause bodily harm, invade personal privacy, hack government computers or disrupt infrastructure.
- Widens the circumstances under which ISPs, libraries, etc. can voluntarily turn over information about Internet users without a warrant.
- Encourages critical infrastructure providers, such as power companies, to share security information with the government, and exempts this information from the Freedom of Information Act.
- Establishes an Office of Science and Technology within the Justice Department to provide law enforcement with recommendations and standards for high-tech tools.
- Creates a technology clearinghouse to encourage technological innovation for fighting terrorism.
- Requires federal agencies to self-assess and improve their information security measures for protecting all federal information and information systems.
- Creates "Net Guard," a high-tech National Guard to defend local Internet infrastructure from attacks.

Reported in: *San Francisco Chronicle*, November 20; Associated Press, November 19; *American Libraries* Online, November 25. □

new spy agency?

President Bush's top national security advisers have begun discussing the creation of a new, domestic intelligence agency that would take over responsibility for counterterrorism spying and analysis from the FBI, according to U.S. government officials and intelligence experts. The high-level debate reflects a widespread concern that the FBI has been unable to transform itself from a law enforcement agency into an intelligence-gathering unit able to detect and thwart terrorist plans in the United States. The FBI has admitted it has not yet completed the cultural sea change necessary to turn its agents into spies, but the creation of a new agency is firmly opposed by FBI Director Robert S. Mueller, III, who said he believes the bureau can do the job.

On Veterans Day, top national security officials gathered for two hours to discuss the issue in a meeting chaired by national security adviser Condoleezza Rice. White House Chief of Staff Andrew H. Card, Jr., Defense Secretary Donald H. Rumsfeld, CIA Director George J. Tenet, Attorney General John D. Ashcroft, Mueller and six others attended.

Homeland Security Director Tom Ridge was recently dispatched to London for a briefing on the fabled MI5, an agency empowered to collect and analyze intelligence within Britain, leaving law enforcement to the police. Similarly, if another agency were created in the United States, it would not replace the FBI but would have the primary role in gathering and analyzing intelligence about Americans and foreign nationals in the United States.

A Bush administration spokesman, who asked not to be named, said no conclusions were reached about a domestic

intelligence agency during the Veterans Day meeting. He said an MI5-style agency was just one option considered. The official, and other sources knowledgeable about the issue, said the White House first wants to launch the new Department of Homeland Security, which would include an intelligence analysis division. Any major change would come later, government sources said.

Some members of Congress have said they favor creating a domestic security agency and it is likely that legislative proposals will be offered during the next Congress. "We're either going to create a working, effective, substantial domestic intelligence unit in the FBI or create a new agency," said Sen. Richard C. Shelby (R–AL), ranking member of the Senate Select Committee on Intelligence. "The results are dismal to this point."

He said creating a whole new agency "would be a big-ticket item from everyone's standpoint. We have to think this out carefully." Reported in: *Washington Post*, November 19.

Council of Europe bans online racism

The Council of Europe has added a protocol to its landmark convention on cybercrime that requires future signatories to criminalize the use of the Internet to spread racist or xenophobic content. The U.S. is expected to opt out, citing constitutional rights to free expression, but for those who sign up next year, new laws will be backed up by cross-border powers to drive online racists off the web.

Agreed to by European ministers on November 7 and now open to signature by the Council's member states, the convention will formally require states to criminalize Internet racism. This covers the dissemination of racist and xenophobic material, threats and insult via computers. It also requires the criminalization of Internet content that supports the "denial, gross minimization, approval or justification of genocide or crimes against humanity, particularly those that occurred during the period 1940–45."

The convention also aims to improve international cooperation between criminal justice systems so that websites set up in other countries can be blocked.

Many European countries, such as Spain, Germany and France, already have existing laws outlawing Internet racism and holocaust denial. Publishing material likely to incite racial hatred is already illegal in the United Kingdom under the Public Order Act 1986.

A contact network, "operating round the clock and seven days a week," is being set up to provide European police forces with immediate assistance with their investigations. The protocol to the Convention makes a point of underlining the need to "respect" freedom of expression.

Websites judged 'illegal' may be arbitrarily shut down by Internet service providers fearful that they will be considered complicit in the crime by renting space to suspect groups. According to the Council, the ISPs will be protected by clauses requiring courts to prove that the offenses were committed "intentionally". But ISPs may still run the risk of prosecution if they are alerted to the activities of suspect groups and make the conscious decision not to disconnect them, even if they are merely waiting for a court to rule on the situation.

ISPs in Britain and elsewhere in Europe have banned websites from their servers based on no more than anonymous messages alleging 'possibly' libelous content. This kind of preemptive censorship is a much quicker and cheaper means to close down websites than via the courts.

The protocol poses difficulties for the United States, which constitutionally protects the free speech of groups, including racist ones. The chair of the Committee of Experts that led the protocol's drafting, Henrik Kaspersen, said provisions criminalizing the racist and xenophobic material online had to be added separately as a result of such objections. Some Council members believed the US should be pressed to sign the protocol. "If the USA refuses to sign, it must explain to the world why it refuses to cooperate on racism and why it wants to remain a haven for racist websites," said the Council parliamentary group's Legal Affairs Committee rapporteur, Ignasi Guardans, a Spanish MP.

Last year, a U.S. judge ruled that theYahoo! search site did not have to block French citizens' access to online sales of Nazi memorabilia, which is illegal in France. In that case, the judge determined that U.S. websites are subject to U.S. law only.

By some interpretations, the national laws that may emerge from the Convention protocol could be used to target sites that did no more than include hyperlinks to pages that contain 'offensive' content. And the protocol, once written into European states' laws, could legally entitle them to block European readers from accessing websites set up on servers in the U.S.

Google, the popular Internet search engine, has excluded more than a hundred Web sites from the French and German versions of its index under pressure from those nations' governments, a study recently found. The sites include many devoted to white supremacist philosophy and Nazism, with names like Jew Watch. Ben Edelman, who did the research, said "they are mostly pretty terrible pages."

Edelman wrote the study with Jonathan Zittrain, a co-director of the Berkman Center for Internet and Society at Harvard Law School. They said that the issue of Internet blocking and filtering raised questions about the ability of

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censorship dateline

libraries

Vidalia, Georgia

A federal judge will decide what has turned into a First Amendment dispute between *The Gay Guardian*, a regional gay newspaper, and the Ohoopee Regional Library System in Vidalia. The American Civil Liberties Union filed a federal lawsuit October 2 against the library system on behalf of the newspaper and its editor, Ronald Marcus. The suit was filed in U.S. District Court in Statesboro.

"I don't think a librarian should be able to impose censorship or restrict information based on her own Christian views," Marcus said. "When the government suppresses views that it disagrees with, we should all be upset—gay or straight. It is completely un-American."

The library system initially allowed *The Gay Guardian* to be displayed in its lobby, where other free literature from individuals and groups are allowed, the lawsuit said. But the library later barred the publication after receiving complaints about it. A librarian told a police officer called to intervene that "this was a religious issue, gays vs. Christians," the suit said. Since then, the library has removed all publications from the lobby area and is reviewing its display policy, said Dusty Gres, director of the library system. The only materials that remain available to the public are government forms, such as tax returns and HOPE scholarship applications, she said.

Gres said the library is not censoring *The Gay Guardian*, a 5-year-old publication with an estimated readership of 200,000 from southeast and central Georgia, Florida and South Carolina. "We don't believe we have violated any rights," she said, adding that the publication failed to follow appropriate library policies when putting the newspaper in the lobby.

But Gerry Weber, director of the ACLU's office in Atlanta, said the library is barring *The Gay Guardian* because it doesn't like what the publication has to say. "A library should be a place where free speech is supported," he said. Reported in: *Atlanta Journal-Constitution*, October 3.

Livingston, Montana

The Livingston school board voted 5–3 October 22 to remove *Rolling Stone* magazine from the Park High School library. The action came some six weeks after a review committee recommended requiring that students obtain written parental permission to read *Rolling Stone* at school. Park High School Principal Woody Jundt had objected to the magazine because, he said, it glorifies violence, illicit sex, and illegal drug use.

The board's decision to remove the magazine altogether came at the second of two public hearings about its appropriateness for the high-school collection. At both meetings, attendees were almost equally divided on the issue. "The school should complement, not supersede me. Requiring parental permission allows me to teach my children what I want," parent Tim Gable testified October 22.

"You're hearing from a majority of the people that they don't find this [magazine] acceptable," stated local minister Kelvin Hoover. "Many of the articles are contrary to the curriculum," concluded district trustee Jim Braley. Dissenting trustee Storrs Bishop, Jr., declared that the schools should teach students "how to think, not what to think." Reported in: *American Libraries* online, October 28.

North Platte, Nebraska

The American Civil Liberties Union of Nebraska has expressed concern over the plans of North Platte Public Library Director Cecilia Lawrence to install filtering software on all Internet workstations as of November 25. "No matter how small the town or county, no matter how liberal or conservative they may be, the personal beliefs of the people in that location do not trump the Bill of Rights," declared Tim Butz, executive director of the ACLU of Nebraska.

Lawrence wrote October 13 in her weekly *North Platte Telegraph* column that her decision was the result of three incidents involving inappropriate Internet use by library patrons; two involved the online harassment of children and the third entailed a patron viewing child pornography at the library. Acknowledging that "the technology to filter may never be perfect," Lawrence asserted, "in this case, something may be better than nothing in addressing growing community concerns over the library's Internet access."

The filters will be programmed to block sexually explicit sites as well as chat rooms and gambling and gaming URLs. Additionally, children's-area computers will filter out e-mail servers and sites that offer to host free home pages. Reported in: *American Libraries* online, October 21.

Waco, Texas

Some twenty people gathered October 28 outside the Waco office of Planned Parenthood to protest a year-old arrangement that has made the nonprofit's publications available systemwide at the four-branch Waco–McLennan County Library System. Rusty Thomas, of Elijah Ministries and Waco Right to Life, called the addition of the Planned Parenthood Cooperating Library Collection, which is housed at the organization's headquarters but available to county-library cardholders through interlibrary loan an "unholy alliance."

Anti-abortion activists argued that the deal, in which Planned Parenthood pays several hundred dollars per year to have its materials added to the public-library catalog, was the equivalent of adding an unauthorized library branch. "It isn't," insisted library commission Chair Betty Crook, adding, "The contract said it was specifically not to be a joint venture. There are no city employees working there. It's just a way residents can have access to some of those materials."

Contending that former library Director Pamela Bonnell contracted with Planned Parenthood without board input, Waco City Manager Kathy Rice stated that other potential links between the library and a nonprofit will require the approval of both the city council and trustees. Reported in: *American Libraries* online, November 4.

Fairfax, Virginia

A member of the Fairfax County group Parents Against Bad Books in Schools (PABBIS) filed challenges in October to eighteen books in the district's libraries. Each review will cost some $2,600, Fairfax school district Chief Information Officer Maribeth Luftglass said, bringing the overall price tag to almost $50,000.

Complainant Richard Ess also asked that no members of the American Library Association or the National Education Association serve on the reconsideration committees because both organizations "are officially against any attempts at removal of books from any school," according to the PABBIS Web site.

The challenged elementary-school titles are: *I Know Why the Caged Bird Sings*, by Maya Angelou, *Girl Goddess* and *Witch Baby*, by Francesca Lia Block, *The Rose and the Beast: Fairy Tales Retold*, by Block and Suza Scalora, *The Chocolate War* and *Tenderness*, by Robert Cormier, *Silver Pigs*, by Lindsey Davis, *Time for Dancing*, by Davida Hurwin, and *Fallen Angels*, by Walter Dean Myers.

In the middle schools, Ess sought removal of *How the Garcia Girls Lost Their Accents*, by Julia Alvarez, *I Was a Teenage Fairy*, by Francesca Lia Block, *The Perks of Being a Wallflower*, by Stephen Chbosky, *Shogun*, by James Clavell, *Heroes*, by Robert Cormier, *Growing Up Chicana/o*, by Tiffany Ana Lopez, *When I Was Puerto Rican*, by Esmeralda Santiago, *The Color Purple*, by Alice Walker, and *Thousand Pieces of Gold*, by Adeline Yen Mah.

Ess contended the books contain profanity and descriptions of drug abuse, sexually explicit conduct, and torture. PABBIS member Stan Barton cited similar reasons for challenging *Gates of Fire* earlier this year, but school officials declined to pull the title. Reported in: *American Libraries* online, November 11.

Oregon, Wisconsin

The mother of an 8th-grader at the Oregon Middle School is seeking the removal of the coming-of-age novel *Knocked Out by My Nunga-Nungas* from the school library. Linda Rutherford filed a formal complaint October 18, explaining that "I'm no prude, but this is smut."

The third in a series by Louise Rennison, *Knocked Out by My Nunga-Nungas* continues the diary entries of fictional 14-year-old Georgia, who writes quite frankly about her emerging sexuality. Rutherford, who read the book after her daughter brought it home, said she was particularly offended by a passage in which a boy was pulling on a girl's breast. Rennison defines nunga-nungas in the glossary as what "Ellen's brother calls them . . . because he says that if you get hold of a girl's breast and pull it out and then let it go—it goes nunga-nunga-nunga."

"This is fairly typical of the way I hear students talk in schools," Katrina Carr, a schools program specialist who works with a high-school student group to prevent sexual violence, said. She added, "But I'm surprised that this is a book in a middle school library."

A materials review committee will reconsider the book, Oregon School District Superintendent Linda Barrows revealed. Reported in: *American Libraries* online, October 28.

schools

Burtonsville, Maryland

A Montgomery County high school agreed to change the name of its fall play, "Ten Little Indians," after a local Indian activist complained that the title was offensive. Richard Regan, a Montgomery County resident and a Lumbee Cheraw Indian who spent a year trying to ban American Indian imagery from school sports teams in Maryland, complained in a letter to the principal of Paint Branch High School in Burtonsville that the play should be canceled because it is offensive to American Indians.

"We have no plans to pull production of the play, but we have changed the name," said Montgomery County schools spokeswoman Kate Harrison. "For this performance, the play will be called 'And Then There Were None.'" Harrison said the school system wanted to be "sensitive to the concerns and issues that were raised by Mr. Regan."

The play, adapted from a 1939 Agatha Christie mystery novel, involves ten strangers who meet in a summer cottage off the coast of England, called Indian Island, after receiving mysterious invitations from an unknown host. The characters in the play are killed in a way that mirrors the nursery rhyme of the same name, with a china statuette of an Indian removed from a mantelpiece after each killing. The complete nursery rhyme, which begins, "Ten little Indian boys went out to dine, one choked his little self and then there were nine," is printed in chapter 2 of the book.

"While people say the title has nothing to do with the play, I think you have to be careful because the implicit message of that [nursery rhyme] is that American Indians are expendable and invisible," said Regan, who also said he has never seen the play. Regan filed the complaint on his own, and not on behalf of the Maryland Commission on Indian Affairs, of which he is a member.

His complaint was not the first time the story's imagery has been called into question. The Agatha Christie book was originally titled *Ten Little Niggers*, as was the nursery rhyme it took the name from. The original title was deemed offensive in 1940 by American publisher Dodd, Mead & Co., who changed it to *And Then There Were None*, a line taken from the same nursery rhyme. The references in the book and the play were changed to Indians for American audiences, just as the nursery rhyme had evolved to include the same changes over the years.

The play, under its original title, opened in London in 1943. It was retitled "Ten Little Indians" for its U.S. debut at the Broadhurst Theatre in New York City in 1944. But as late as the 1960s, the play was still being performed under the original title in Europe.

The play is considered a standard in high schools and community theaters and was performed as "And Then There Were None" by the Washington Shakespeare Company in March 1997. Regan said he doesn't have much say over what private theater groups produce, but decided to take a stand when taxpayer dollars became involved in producing the play in a county school.

"I just felt this was something that didn't send a very strong diversity message," said Regan, who has three children in the Montgomery County school system. Regan said he believes that because the original title and imagery of the play were deemed offensive and changed, they should be again. And while he suspects his critics might dismiss his efforts as political correctness run amok, he believes he has staked out the moral high ground on this issue. "Somebody's got to watch the bank, and I think I've got them on this one," Regan said. "I may not be able to stop the production but maybe I've educated a few teachers and principals that before you do this you really need to do your research."

Regan, both on his own and as a member of the state Indian commission, led an attempt to get Maryland schools to discontinue the use of Indian names and imagery in sports teams. A separate attempt to impose an economic boycott on a Germantown youth sports league for using names like "Braves" and "Indians" was overturned by Maryland Gov. Parris N. Glendening in August 2001.

Regan's biggest success came in Montgomery County, where the school board voted to force Poolesville High School to abandon the nickname "Indians." But despite winning a non-binding resolution from the state Board of Education asking schools to review their policies with regard to Indian imagery, half of state schools that used them continue to do so. Reported in: *Washington Times*, November 12.

Portland, Oregon

Portland School Board member Derry Jackson wanted *The Adventures of Huckleberry Finn*, by Mark Twain, pulled from reading lists after an African-American student said he was offended by an ethnic slur used in the 1885 novel. On October 14, Jackson asked Portland Superintendent Jim Scherzinger to find out how widely the book was assigned and whether it should be read in literature classes across the city. The idea, however, had no support among fellow board members, who said the school board should not thrust itself into an issue involving one student.

Jackson countered that the board should adhere to its own strategic plan that promotes a culture of respect for all students. "I suggest that we take this matter serious," Jackson said. "Don't be quick to dismiss this as trivial." Board Chair Karla Wenzel then asked Scherzinger to pinpoint which schools use the book.

Jackson asked for the review of the novel after Lincoln High School junior Johnnie Williams, Jr., reported that he was uncomfortable reading the book in his American literature class. Williams, an African-American, said he was offended by the content of the book as a student in a predominantly white school. Of the 1,470 Lincoln students during the 2001–02 school year, 71, or about 5 percent, were African-American or black. White students made up 82 percent of the population that year, according to the Oregon Department of Education.

The school allowed Williams to read an alternative book about baseball legend Jackie Robinson. Williams' mother, Angela Scott, said she was concerned that teachers considered the book an important literary work but disregarded her son's feelings. She wanted the school to stop teaching it.

Lincoln Principal Peter Hamilton said he doesn't want to start banning books. In a memo to his staff earlier this month, Hamilton pointed out that English teachers have developed supplementary materials to teach the book. Some have taken African-American students aside privately to discuss the book and its content, he said.

Scott called that proof the book is offensive. "My question is: If you have to do all that, then why (read) the book?" she said. The book has been taught for years at Lincoln, and teachers said it serves as a meaningful tool to discuss the prickly topic of racism.

Huckleberry Finn, the story about a boy and his adventures with a runaway slave, is one of the most challenged books in the United States. The American Library Association, which compiles lists of books which have been challenged or banned because of sexual, religious or other content, says the book was the fifth-most challenged one in the decade between 1990 and 2000.

Lincoln senior Casey Roach read Twain's novel during her American literature class last year. Each mention of the ethnic slur was changed to "slave" when they read the book aloud, she said. The class also watched videos documenting how other schools had dealt with the controversy surrounding the book, she said. "I'm in love with Mark Twain," she said. "I think a lot of kids these days don't get a chance to read good literature."

In the wake of Jackson's efforts to remove the book, a movement of high school students began for its removal. Leaders of the Black Student Union at Franklin High School went to Lincoln High, urging students to sign petitions requesting the Portland School Board to review racial tensions in classrooms where the book is discussed. The student-led effort was steered by Charles McGee, a Franklin High junior. McGee read Mark Twain's novel as a sophomore. He said he liked the book but that many educators are insensitive to the discomfort African-American students feel reading the book.

"I know that all teachers in the district are not prepared for the conversations that might come out of reading that book," said McGee, president of Franklin's Black Student Union. "Until we let students voice how they feel on an everyday basis, the board and the community really don't know. We want them to listen." McGee said he collected more than two hundred signatures from students at Franklin, Grant, Jefferson and Lincoln high schools. Reported in: *Portland Oregonian,* October 17, 24.

Austin, Texas

Dozens of people gathered November 12 at the State Capitol in Austin to protest what they called the unfair influence of conservative groups over the state's textbook adoption process. The protesters, part of the Texas Freedom Network, a nonprofit group that calls itself a watchdog of the religious right, said an example of the influence was the removal of positive portrayals of Islam in the proposed textbooks after some people complained that it was "more propaganda."

"Good textbooks help me; censored and distorted ones hurt," Andrew Riggsby, an assistant professor at the University of Texas, said. Some people want to "wipe out facts they don't happen to care for," Professor Riggsby said. "That's not review; that's vandalism."

Peggy Venable, director of the conservative Citizens for a Sound Economy, said her group supported patriotism, democracy and free enterprise, as well as some of the proposed textbook changes. Venable also said she wanted all sides of issues to be covered in textbooks. For example, she said, her group's members disagree with books that do not discuss both views of global warming and instead become "activist workbooks."

The State Board of Education rejected an environmental science textbook last year after some people objected to its praise for the federal Endangered Species Act and its warning about global warming.

The education board was to decide on November 14 which social studies books Texas students will use over the next six years. For publishers, millions of dollars are at stake. Texas will spend $345 million on social studies and other books this year, and the books adopted are sold in dozens of other states. Reported in: *New York Times*, November 13.

universities

Stanford, California

Stanford Law School Dean Kathleen M. Sullivan said the head of the law school's public-interest programs had not adequately consulted with faculty members and administrators before offering Lynne Stewart the title of mentor. Although the dean did not object to allowing Stewart to speak on the campus, Sullivan announced November 12 that she had rescinded the mentorship title. The decision came just a day before Stewart was to participate in a student-sponsored conference and after she had already arrived in California. Mentors, who receive an honorarium and travel expenses, provide individual career-counseling sessions with students, along with group discussions.

Stewart is a New York-based lawyer who represented Sheikh Omar Abdel Rahman, the Muslim cleric convicted of plotting the 1993 World Trade Center bombing. She was arrested in April and charged with criminal conspiracy for allegedly helping her client spread his messages to an Egyptian-based terrorist group. She pleaded not guilty to the federal charges and was free on bond.

Stewart's case had been championed by defense lawyers who feared that the government's anti-terrorism

crackdown is making it hard for them to protect their clients against government abuses. She was a featured speaker at a standing-room-only forum sponsored by Stanford's public-interest law groups.

Stewart said that she was "upset and a little bit hurt" when she received a letter faxed to her hotel notifying her of the dean's decision. But she said she was heartened by the support of faculty members and students. Even though her title of mentor—and the pay that goes with it—was withdrawn, she spent all day meeting one-on-one with students, talking about issues such as the challenges of being a public-interest lawyer and handling politically unpopular cases.

Shahid A. Buttar, a third-year law student at Stanford, said he was "outraged" by the dean's decision, which he called "a vitriolic, knee-jerk response by an administration that's afraid of losing donations."

Many students who plan to pursue careers in public-interest law were eager to meet with a defense lawyer who "is in the cross hairs of Attorney General Ashcroft's war on terrorism," Buttar said. "We refuse to allow the administration to keep her from us. She has a lot to say, and we have a lot to learn from her."

Sullivan said the law school was in no way trying to censor a controversial speaker. "Stanford Law School welcomes discussion and promotes rigorous debate on difficult and controversial issues," she said in a statement. While the student-sponsored conference was an appropriate venue for Stewart as a speaker, "it has come to my attention that Ms. Stewart has expressed sympathy for and tacit endorsement of the use of directed violence to achieve social change," the dean's statement said. "Therefore I have decided that it is not appropriate to confer the title of David W. Mills Public Interest Mentor to Ms. Stewart, and have today issued a letter to Ms. Stewart rescinding the offer to serve in the capacity of mentor to our students during her visit." Reported in: *Chronicle of Higher Education* online, November 13.

Middletown, Connecticut

Douglas J. Bennet, president of Wesleyan University, was willing to tolerate the four-letter words chalked on the sidewalks around campus.

He was willing to tolerate the explicit descriptions of sexual acts. "Even when it was reported that various parts of my anatomy were displayed around campus, I never took it personally," Bennet, a 64-year-old historian, said. But when the sidewalk scribblings began to include vulgar references to specific faculty members he decided that enough was enough. In October, he declared an open-ended moratorium on a commonplace Wesleyan practice that many students prize: chalking.

For a decade, student groups have chalked anonymous messages on the sidewalks around the campus, often scrawling political statements intended to provoke debate, sometimes just leaving reminders about a coming concert or forum. For many gay students, in particular, declaring their sexual orientation in blue, red, green and yellow chalk has become a liberating rite of passage. While chalking is a popular form of communication at colleges across the country, it is so ingrained in the culture of this small, elite university that some students say it is the reason they chose Wesleyan.

"When I saw it, I said, 'Wow, this is amazing,' " said Matthew Montesano, 19, a sophomore, describing his first visit to the campus. "I didn't see anything like it at other schools. I just saw a bunch of people walking around in expensive clothes."

Not surprisingly, at a school that was recently hailed by *Mother Jones* magazine as the most activist campus in the country, the moratorium stirred intense debate at faculty meetings, in the student newspaper, on the blackboard the administration recently put up outside the campus center as an approved chalking site and in the occasional and now illicit chalkings.

Fifty-three faculty members and librarians signed a letter in support of the moratorium, while the faculty assembly voted 44 to 8 against it. The student assembly adopted a resolution in favor of the right to chalk, but with a condition: that chalkers have "an implicit responsibility to respect community standards."

Bennet sees the ban as an attempt to rein in the vulgarity and slurs that he said created a hostile environment. "Chalking, as practiced, undermines our sense of community and impedes substantive dialogue," Bennet, a former chief executive of National Public Radio, wrote in a campuswide e-mail message. There are, he wrote, "more constructive ways to communicate than chalking."

He asked the student assembly, along with administrators and faculty members, to research chalking policies at other colleges and universities and recommend reasonable forms in which chalking might resume. Some colleges designate specific quadrangles on campus for chalking; others require that all chalkings be signed.

At Swarthmore College, in Pennsylvania, last year, a chalking about oral sex led to controversy. A freshman who found the chalking obscene demanded that the college erase it. But the administration ruled the chalking was free speech and would have to simply wear away. At Williams College, in Williamstown, Massachusetts, where gay students traditionally chalk twice a year, the administration erased chalkings last spring that it considered obscene.

Those opposed to the moratorium at Wesleyan said it violated free speech rights and deprives students of an essential forum. "The whole point of free speech is that it doesn't matter what's said," said Montesano, the sophomore. "What matters is that it's said."

The explicit gay chalkings were intended to shock people into questioning their assumptions about gender and nonheterosexual sex, the students said. "Queer chalking reminds people that there's a lot more out there than they think there is—a lot more possibilities, a lot more kink, a lot more fun," said Gina Korzi, 19, a sophomore from Philadelphia.

Nicholas Myers, 19, a sophomore from Seattle, chalked messages for the first time last October with members of the Queer Alliance, a gay student group. It was the night before National Coming Out Day. "I wrote things that had made me cringe in high school," Myers said. "Things that I never thought I could say without being afraid of retaliation from the generally ignorant society around me. But, since I was at Wesleyan, I was able to write anything I wanted to, and have it be respected by my peers. I was able to bond with the people around me. You're out in a public area with lots of people around you reading these shocking things." It was, Myers said, "one of the most liberating experiences I have ever had."

But plenty of students, gay as well as straight, were not fans of the chalking that prompted the moratorium. "Chalking is out of control," Alexander Rich, the sports editor of the student newspaper, *The Wesleyan Argus*, wrote in a recent column.

Claire Potter, who directs the American studies program, is among the faculty members who oppose the moratorium. "There is no question they're vulgar," she said of the chalkings. "But there is a lot of pretty serious case law that obscenity is not excluded by the First Amendment, and that there is no right under the Constitution not to be offended." Reported in: *New York Times*, November 14.

Chicago, Illinois

Authorities at St. Xavier University suspended a tenured professor who sent an e-mail message to an Air Force Academy cadet calling the cadet a "disgrace to this country." St. Xavier president Richard A. Yanikoski said November 17 that Peter Kirstein, who has taught history and political science for 28 years, would be suspended from teaching for the rest of the semester. Yanikoski also said the university would be reviewing Kirstein's academic and teaching record.

Both Kirstein and the university issued public apologies for the blistering e-mail message that said U.S. military personnel were partly to blame for the September 11 terrorist attacks. But Yanikoski said further disciplinary action against Kirstein appeared both appropriate and necessary.

"He seemed quite literally to go off the deep end," Yanikoski said. "It is regrettable he said what he did."

Kirstein, an avowed pacifist, had been responding to an e-mail from Air Force cadet Robert Kurpiel asking for help to promote an academic forum at the academy. Kirstein's reply read, in part, "I am furious you would even think I would support you and your aggressive baby killing tactics of collateral damage."

The e-mail also compared Kurpiel to the snipers who terrorized the Washington area, and said that if he had a sense of honor he would resign from the military. Yanikoski said Kirstein's e-mail was not protected by academic freedom. Kurrpiel had asked for help promoting the Academic Assembly in February on "America's Challenges in an Unstable World: Balancing Security with Liberty." Reported in: *Chicago Tribune*, November 18.

Internet

Washington, D.C.

The American Library Association joined several other groups in opposition to a U.S. Department of Education policy to reorganize and/or remove key public Web pages the department said "does not reflect the priorities, philosophies, or goals of the present administration." In an October 25 letter to Secretary of Education Rod Paige, Emily Sheketoff, executive director of ALA's Washington Office, said the groups had concerns about removing access to research, data, and other digests of information that previously had been publicly available and questioned whether the content was being preserved or archived. She also emphasized the importance of including librarians and researchers in making decisions regarding public access.

Other groups joining in the effort were the National Education Association, the American Educational Research Association, and the National Knowledge Industry Association.

Meanwhile, ALA was unsuccessful in efforts to stop the Department of Energy from discontinuing the indexing service PubScience, a Web-based site launched in 1999 that was used by librarians and other information-industry users to access peer-reviewed journal articles. The site was discontinued November 4, and according to ALA's Washington Office, most references to its existence have disappeared due to Web site "reorganization." Reported in: *American Libraries* online, November 18.

foreign

Manchester, England

St. Jerome Publishing refused to sell a book it publishes to an Israeli university, as part of the company's

boycott of Israeli academic institutions. St. Jerome, an academic publisher specializing in translation studies, is owned by Mona Baker, a member of the faculty of the University of Manchester. In June, Baker dismissed two Israeli scholars from the boards of academic journals published by St. Jerome.

Mina Teicher, vice president for research at Bar-Ilan University, said the university had ordered a copy of an introductory translation-studies book called *The Map*, by Jenny Williams and Andrew Chestman. In response, the university received a letter from St. Jerome stating that, because of the actions of the Israeli government, the publisher could not supply the book to an Israeli institution.

Teicher said the university had responded with a letter stating it would no longer order books from St. Jerome. She said that the university had not encountered any similar action from any other publisher. "I hope this phenomenon does not spread," she added.

A representative of St. Jerome confirmed the press was not selling books to Israeli institutions, citing the academic boycott declared by some critics of Israel's military actions in the West Bank and Gaza Strip.

The university had ordered the book at the request of Miriam Shlesinger, who was dismissed by Baker from the editorial board of *The Translator: Studies in Intercultural Communication*. Shlesinger said she had obtained the book through other channels.

Chestman, co-author of the book and a member of the English department at the University of Helsinki, did not respond directly to an e-mail message asking him whether or not he agreed with his publisher's boycott policy. "I shall personally give a copy of the book to an Israeli colleague later this month," he wrote in reply. "But I condemn Israeli policy in Palestine." Reported in: *Chronicle of Higher Education*, October 31.

Moscow, Russia

It was not the most dramatic symbol of the end of the Cold War, but a momentous one nonetheless. In 1991, six days after the abortive putsch that signaled the end of the Soviet Union, President Boris N. Yeltsin issued a decree allowing Radio Free Europe/Radio Liberty to broadcast from Russia. On October 4, President Vladimir V. Putin annulled the decree.

The Kremlin said Putin's decision was purely technical and would not affect the work of the station, which was established by the United States during the cold war to broadcast unfiltered news and information, which some saw as propaganda. In Russia, however, purely technical matters rarely lack political undertones. To advocates of a free press, Putin's decision was stunning, raising the specter, they said, of still more Kremlin meddling in Russia's mass media.

"We are concerned because freedom of speech is deteriorating day by day in Russia," said Andrei V. Shary, who heads the network's Moscow bureau. "If Yeltsin's decree was a symbol in 1991, then the revoking of the decree by Putin is a symbol, too."

Yeltsin's decree gave the station the right to open permanent offices in Moscow and elsewhere across a newly independent Russia.

In a statement, Putin's administration said the revoking of Yeltsin's decree was simply an attempt to treat Radio Free Europe/Radio Liberty as it does all foreign news organizations. At the same time, however, the statement reiterated criticisms that Russian officials have leveled against the station for its coverage. It singled out the station's reporting on Chechnya, where Russia is mired in a civil war, and on Ukraine, a former Soviet republic. Earlier this year, the station began broadcasting Chechen-language reports into the Northern Caucasus.

The station has a license to broadcast until next year in Moscow. It was unclear whether the decision would have any effect on the possibility of renewal.

Sergei V. Yastrzhembsky, a spokesman for Putin, told the Interfax news agency that Foreign Minister Igor S. Ivanov had told Secretary of State Colin L. Powell of the decision by phone and that Secretary Powell had not objected.

Shary said he had received reassurances that the decision would not affect operations. But Aleksei K. Simonov, chair of the Glasnost Defense Foundation, a private group, saw a trend to control mass media under regulations adopted in 2000. "We are becoming a closed society," he said. Reported in: *New York Times*, October 5.

Riyadh, Saudi Arabia

Saudi Arabian censors banned the October 23 editions of the London-based newspaper *al Hayat* because it printed an open letter from 67 American intellectuals defending the U.S. campaign against terrorism and calling on Saudi intellectuals to denounce "militant jihadism" as un-Islamic. U.S. experts on Saudi affairs said the censorship of the letter was the latest reflection of a debate over the morality of terrorism that has rippled through intellectual circles in many Muslim countries—and caused consternation in some Arab governments—since the September 11, 2001, attacks on the World Trade Center and Pentagon.

In an exchange of open letters that won little attention in the United States but was widely reported abroad, a group of American theologians, philosophers and political scientists argued for eight months with counterparts in Europe and the Middle East over the moral basis for the Bush administration's "war on terrorism."

Among the figures on the U.S. side are Samuel P. Huntington of Harvard, Francis Fukuyama of Johns Hopkins and Daniel Patrick Moynihan of Syracuse University. Their first salvo, titled "What We're Fighting

For," was signed by 60 scholars and appeared in February as U.S. troops entered Afghanistan.

"There are times when waging war is not only morally permitted, but morally necessary, as a response to calamitous acts of violence, hatred and injustice. This is one of those times," the Americans wrote. A group of 103 German intellectuals responded in May. The Americans published a rebuttal in August, and the Germans wrote back in October, each time garnering heavy coverage in European newspapers.

"There are no universally valid values that allow one to justify one mass murder by another," the Germans wrote in their first missive. "The war of the 'alliance against terror' in Afghanistan is no 'just war'—an ill-starred historical concept that we do not accept—on the contrary, it flagrantly violates even the condition you cite, 'to protect the innocent from certain harm.'"

Meanwhile, 153 Saudi intellectuals also wrote a response. The American letter was heavily debated, and generally attacked, in the Egyptian and Lebanese press. It was discussed several times on the Qatar-based television station Al Jazeera, which has a huge following in the Arab world, as well as on other radio and television stations across the Middle East.

"The depth of the reaction has been really surprising," said Hassan Mneimneh, a director of the Iraq Research and Documentation Project at Harvard. "An intellectual who is not aware of this debate is hard to find anywhere in the Arab world, from Kuwait to Morocco and Yemen to Syria."

With few exceptions, the public responses to "What We're Fighting For" have been extremely negative. But just below the surface, said Carl Gershman, president of the National Endowment for Democracy, Arab commentators have appeared "really rather flattered that here is a distinguished group of American intellectuals willing to put forward a case on level turf, to say 'This is what we believe, and we want to discuss it with you.' "

Arab governments have been another matter. "The Saudi government doesn't like this debate, particularly because the people who wrote the Saudi response are mostly Wahhabi conservatives and fundamentalists," said Ali Al-Ahmed, director of the Saudi Institute, a Virginia-based nonprofit organization that promotes democracy and civil society in Saudi Arabia. "They don't want the dialogue, and I think the reason is they don't want non-government elements to have a voice internationally."

The response in May from 153 Saudis, "How We Can Coexist," said Islam forbids violence against innocent civilians but also suggested that injustices in U.S. foreign policy were the root cause of the September 11 attacks. The American rebuttal objected strenuously to this message. "We ask you sincerely to reconsider the tendency . . . to blame everyone but your own leaders and your own society for the problems that your society faces," it said.

Mamoun Fandy, a former professor at the National Defense University who is an expert on Saudi fundamentalism, said secular Saudis had previously criticized the response from the Saudi religious conservatives. "You have to fault the American intellectuals for cutting the Saudi liberals out of the equation and making it a conservative-to-conservative debate," he said. "It's God's boys on both sides of the Atlantic." Reported in: *Washington Post*, October 24. □

(Council of Europe . . . from page 8)

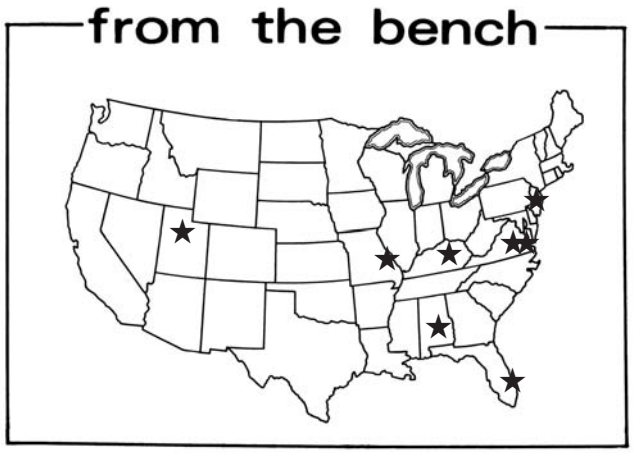
governments to censor the Internet. Government efforts to filter or block Internet traffic are on the rise, and include recent attempts by France, still in court, to force Yahoo to remove auctions featuring Nazi memorabilia. Google was also blocked in September by China, which diverted queries for Google to other sites the government deemed friendlier.

Edelman said the blocking efforts sometimes seemed out of date; at least one Scandinavian site devoted to white supremacy has changed its focus since being blocked and is now a Chinese-language site dedicated to legal questions, he said.

Edelman and Professor Zittrain, who published their report at cyber.law.harvard.edu/filtering, asked volunteers to help them compare the Google directories in various countries to discover other examples of filtering. Google said it removed sites "that may conflict with local laws" from the German and French versions of its index "to avoid legal liability," and that it did so case by case, after receiving notices or complaints from "partners, users, government agencies, and the like," taking action only after careful consideration.

The company said this was a common practice among search engines and "has no effect on the results presented on other Google sites."

Silent blocking leaves Google users with no indication of what information is being withheld, Professor Zittrain said, adding: "People don't know what they don't know. This is like terra incognita right now," he said. "There are not settled norms and practices for how Google should be dealing with these requests. This is the moment to try to frame a consistent set of practices that make sense, rather than doing it by the seat of the pants." Reported in: *Index on Censorship*, November 11; *New York Times*, October 25. □



U.S. Supreme Court

(supremes. . . from page 1)

when they are not, but education provides children with the skills to safely and effectively navigate the Internet for a lifetime of learning and enjoyment."

Plaintiffs in the suit include libraries, library users, state library associations and the Freedom to Read Foundation. People for the American Way is serving as supporting counsel for the ALA challenge. The American Civil Liberties Union (ACLU) also filed a similar challenge, and the two cases were consolidated by the district court.

"Although Congress continues to propose legislation to protect children, all of these laws have been shown to seriously burden the right of adults to access protected speech on the Internet. They're all flawed," said Ann Beeson, an attorney for the American Civil Liberties Union.

The Supreme Court's acceptance of the Bush administration's appeal of that ruling was no surprise; in passing the law last year, Congress anticipated an immediate legal challenge and provided for a fast-track appeal to the Supreme Court by the losing side.

The law was challenged by a coalition of libraries, library users and Web sites. The plaintiffs chose to sue in Philadelphia because federal judges there had been receptive to challenges to Congress's earlier efforts to limit minors' access to sexually explicit online information, including the Communications Decency Act and the Child Online Protection Act.

The state of Texas had asked the Supreme Court to uphold the law. "Parents should not be afraid to send their children to the library, either because they might be exposed to such materials or because the library's free, filterless computers might attract people with a propensity to victimize children," wrote Texas Attorney General John Cornyn, who was elected to the U.S. Senate in November.

U.S. Solicitor General Theodore Olson said the lower court panel's ruling hurts Congress's effort to ensure that money spent "for educational and other purposes does not facilitate access to the enormous amount of illegal and harmful pornography on the Internet."

The case presented a number of intriguing issues. Unlike the first two laws, which were prohibitions with criminal penalties intended to punish distributors of pornography over the Internet, the Children's Internet Protection Act was structured as a condition on the receipt of federal money, which libraries were theoretically free to reject. The government distributed more than $200 million a year in subsidies and grants to help libraries make the Internet available to the public. Over the past four years, more than $255.5 million had been disbursed to more than 5,000 public libraries through the federal E-rate program, which provided discounts on telecommunications and Internet-related technologies. The Library Services Technology Act (via the IMLS) had distributed more than $883 million to libraries nationwide since 1998. Since 1996, when the E-rate went into effect, the number of libraries connected to the Internet had increased from fewer than half to nearly all.

Paul M. Smith, an attorney for ALA, said more than fourteen million people use libraries for Internet access. The CIPA restriction "takes a meat ax approach to an area that requires far more sensitive tools," he argued.

The fact that federal spending had in some sense turned libraries into the government's voluntary partners did not resolve the constitutional issue, because the Supreme Court's precedents, including a decision in 2001 striking down limits on advocacy by lawyers paid by the Legal Services Corporation, had established that the government cannot attach "unconstitutional conditions" to the receipt of its money. So the government must defend the law in basic First Amendment terms.

The main argument in the administration's appeal, *United States* v. *American Library Association*, was that the lower court was fundamentally mistaken in framing the issue as one of speech in a public forum and in viewing libraries as surrogates for the First Amendment interests of their patrons. The appeal argued that the Philadelphia court instead should have relied on a series of Supreme Court precedents under which "the government has broad discretion to decide

whether material is sufficiently worthwhile to involve the government in providing it."

The notion that by limiting Internet access on the basis of content a library could violate users' free speech rights was "unsettling," the government's brief says. Some libraries decided to filter the Internet before the law was passed, an action the lower court's analysis suggests was unconstitutional.

"A library's decision not to provide such material through its own computers is a collection decision, not a restraint on private speech," the government's brief contended, adding that the "contrary view would lead to the remarkable conclusion that public libraries engage in prior restraints when they fail to provide pornographic magazines or XXX videos to their patrons."

In their brief, the American Library Association and the other challengers to the law told the court that the record compiled in the lower court showed that, given the "rapid growth and dynamic nature of the Internet," filtering software now available was "inherently incapable" of making reliable distinctions among Web sites. A library trying to follow the law "would end up blocking access to vast amounts of protected speech," they argued.

The law required libraries to block access to obscene material and child pornography and to block minors' access to material "harmful to minors," a phrase given a definition that includes graphic sexual depictions that are "patently offensive" and lacking in "serious literary, artistic, political, or scientific value as to minors." Adults who found such material blocked could request access, but there was debate about how specific the request must be and the burden that requirement presented. Reported in: *New York Times*, November 13; Associated Press, November 12.

The Supreme Court opened its fall term on Monday, October 7, with the fewest First Amendment cases on its docket in recent memory. Only two cases among the three dozen or so the Court had already agreed to consider—*Eldred* v. *Ashcroft* and *Virginia* v. *Black*—directly dealt with the First Amendment. A handful of others indirectly implicated speech or freedom-of-information issues. But before the term ends, the justices were expected to add to their docket more blockbuster First Amendment cases that could turn the term into a major one in the development of free-speech jurisprudence. Cases involving campaign-finance reform, commercial speech, Internet censorship, openness for alleged terrorist deportation hearings, and even the free-speech rights of tattoo artists, were already on their way to the high court as it began its 2002–03 term.

The First Amendment case that was argued the earliest this term had also gotten the most attention: *Eldred* v. *Ashcroft*, which was argued before the justices October 9. It challenged the Sonny Bono Copyright Term Extension Act of 1998, which extended existing and future copyrights by twenty years.

Much had been written about how the bill was passed at the behest of Disney, whose mainstay characters—the likes of Mickey Mouse and Donald Duck—were about to lose their copyright protection and pass into the public domain, thereby costing Disney billions in annual revenue. But the law was challenged by individuals, including Eric Eldred, who were less interested in cartoon characters than in acquiring classic written works for inclusion in the growing digital archives and libraries that populate the Internet. The copyright extension, they said, violated their right to free expression.

But the main constitutional battleground in the case was over the Constitution's copyright clause, which gave Congress the power to protect creative works with copyrights "for limited times." Eldred's lawyer, Lawrence Lessig, argued strenuously that the latest extension, which for existing works means a copyright for 95 years, was really no limit at all.

"Nobody has ever attacked the extension of copyright before," said Lionel Sobel, editor of the *Entertainment Law Review* . He said the Internet had pumped up the demand for images that are now protected. "Now we have thousands of people who want to create a Web site and would like to have ready access to a whole library of materials," Sobel said.

The Copyright Term Extension Act (CTEA) of 1998 was sponsored by the late Rep. Sonny Bono and quickly became known as the "Mickey Mouse Extension Act" because of aggressive lobbying by Disney, whose earliest representations of its squeaky-voiced mascot were set to pass into the public domain in 2003.

The impact of the law extended far beyond corporations. Small music publishers, orchestras and even church choirs that can't afford to pay high royalties to perform some pieces said they would suffer by having to wait an additional twenty years for copyrights to expire. Compositions such as Gershwin's "Rhapsody in Blue," which would have passed into the public domain in 1998, now are protected until at least 2018. Books by Ernest Hemingway and F. Scott Fitzgerald also were due to become public property.

Lessig claimed Congress acted unconstitutionally by extending copyright protection eleven times over the past forty years. The plaintiffs contended the Constitution grants Congress the right to grant copyright protection for a limited time and that the Founding Fathers intended for copyrights to expire so works could enter the public domain and spark new creative efforts to update them.

The plaintiffs also claimed that by extending copyright protection retroactively, Congress has in effect made copyright perpetual, largely in response to corporate pressure.

The government and groups representing movie studios and record labels argued that the Constitution gave Congress, not the courts, the job of balancing the needs of copyright holders and the public, especially in the face of new technology. Backers of the extension also argued that

the Internet and digital reproduction of movies and music threatened the economic viability of creating those works, thus requiring greater protection.

"This is essentially a dispute about policy dressed up as a Constitutional question," the Walt Disney Co. said in a statement. "Eldred is simply trying to second-guess what Congress has already decided, and we believe the Supreme Court should reject (Eldred's) attempt."

The First Amendment argument is somewhat secondary to the copyright-clause issue, according to many commentators. But if the justices get to the free-expression argument, it could open a new period of First Amendment scrutiny for copyright law. And that, some feared, could undermine the purposes of copyright, which, by its nature, imposed some limits on expression.

First Amendment lawyer Floyd Abrams, in a brief filed in the *Eldred* case for the Songwriters of America, cautioned that subjecting copyright law to even middle-level or intermediate First Amendment scrutiny would "call into question the validity of all copyright law." Under intermediate scrutiny, copyright law would have to be shown to advance important government interests and not to overly burden speech.

The appeals court that ruled in *Eldred* concluded that the Supreme Court had already shut the door on subjecting copyrights to First Amendment scrutiny. The U.S. Court of Appeals for the D.C. Circuit cited a 1985 case, *Harper & Row Publishers* v. *Nation Enterprises*, in which the Supreme Court called copyright an "engine of free expression." But the high court also said that copyright law already embodied First Amendment values by denying copyrights to facts or ideas and giving them only to an author's form of expression. That dichotomy, according to the D.C. Circuit, led to the conclusion that "copyrights are categorically immune from challenges under the First Amendment." It upheld the Sonny Bono law.

In support of the challengers' case, the five major national library associations and ten other groups submitted an amici curiae (friend of the court) brief last May 20 asking the Supreme Court to rule that the extended term of protection for copyrighted works was unconstitutional.

In addition to showing how the law exceeded the "limited times" of protection authorized by the Constitution's Copyright Clause, the brief highlighted the importance of the public domain and the harm that flowed from keeping works almost perpetually locked up.

Joining the brief of the American Library Association, American Association of Law Libraries, Association of Research Libraries, Medical Library Association, and Special Libraries Association were the following organizations: American Historical Association, Art Libraries Society of North America, Association for Recorded Sound Collections, Council on Library and Information Resources, International Association of Jazz Record Collectors, Midwest Archives Conference, Music Library Association, National Council on Public History, Society for American Music, and Society of American Archivists.

At oral argument, the justices expressed skepticism that copyright law and the First Amendment could be closely entwined. "This would be quite a new proposition," said Justice Sandra Day O'Connor.

Justices also said that throwing out the CTEA could affect the validity of past copyright extensions and the 1976 Copyright Act, which anchors current copyright law. "The chaos that would ensue would be horrendous," said Justice Stephen Breyer.

But the justices seemed more open to arguments regarding the "limited time" clause. Justice Breyer wondered whether allowing Congress to extend copyright terms whenever it chose could defeat the purpose of the copyright clause itself. "Isn't there no difference between this and a permanent copyright?" he asked.

Justice Antonin Scalia agreed, suggesting that allowing unlimited extensions makes the term "limited" in the copyright clause meaningless.

U.S. Solicitor General Theodore Olson defended the CTEA as necessary to repel piracy and create incentives for copyright holders. When justices pressed Olson to explain why Congress should not be limited to extend copyright terms to just future works, Olson said the Constitution requires that Congress—not the courts—make that call.

"We're living in an era where piracy is a significant problem," Olson said. He added that the law also puts U.S. copyright holders on par with the European Union, which recently extended its copyright terms. Reported in: freedomforum.org, October 4, 7; Wired News, October 9.

In the second First Amendment case before the Court, *Virginia* v. *Black*, the justices will revisit a virulent form of expression: cross-burning. At issue is a Virginia law that bans cross-burning in public places or on someone else's property "with the intent of intimidating any person or group of persons." The law also added that burning of a cross is itself "prima facie evidence of an intent to intimidate." Ten years ago, in *R.A.V.* v. *City of St. Paul*, the Court struck down a local ordinance that similarly singled out burning crosses and swastikas in a law that made it a crime to display symbols that would arouse racial, ethnic or religious anger. The Supreme Court agreed the St. Paul ordinance was a form of viewpoint and content discrimination that violated the First Amendment.

The state of Virginia said its law is different from the law struck down in *R.A.V.*, because it is content-neutral. "It is not limited to disfavored subjects or particular victims," Virginia State Solicitor William Hurd argues in the state's brief. "Rather, it applies to anyone who burns a cross with the intent to intimidate anyone for any reason."

But University of Richmond law professor Rodney Smolla countered that by singling out cross-burning, the

Virginia law did discriminate on the basis of content and viewpoint. "If the government is permitted to select one symbol for banishment from public discourse, there are few limiting principles to prevent it from selecting others," Smolla writes. "And it is but a short step from the banning of offending symbols such as burning crosses or burning flags to the banning of offending words."

Smolla represented three defendants arrested in two incidents of cross-burning—one at a Ku Klux Klan rally in 1998, and the other in the back yard of an African-American in Virginia Beach.

In a brief filed by the Thomas Jefferson Center for the Protection of Free Expression, Robert O'Neil said the law should be struck down because it restricts protected speech, even "for the worthiest of purposes." Reported in: freedomforum.org, October 4.

The Supreme Court refused October 15 to settle a free-speech skirmish over the Confederate battle flag, which the federal government all but bans from national cemeteries out of worry that it is racially divisive.

The court had been asked if a descendant of a Confederate soldier may fly the flag daily at a Maryland Civil War cemetery. Justices refused without comment to consider the issue. A federal judge had rejected the government's argument that the flag could provoke racial controversy or demands for counter-demonstrations, but two federal appeals courts backed the government policy.

The Veteran's Administration flies the American flag continuously at Point Lookout Confederate Cemetery, and allows frequent private displays of some other flags, including the familiar black and white "POW/MIA" flag. The Confederate flag, however, may fly only two days a year.

Patrick J. Griffin, a former leader of the Sons of Confederate Veterans, went to court after cemetery administrators turned down his request to fly what he described as a historically accurate Confederate battle flag. The flag was intended to memorialize the fact that all of the approximately 3,300 soldiers buried at Point Lookout served the Confederate army, Griffin said. The national cemetery, near the Chesapeake Bay in southern Maryland, holds remains of soldiers who died at one of the largest prison camps maintained by the North during the Civil War.

The Veterans' Administration allows the Confederate flag to fly at cemeteries containing Confederate dead on Memorial Day and on Confederate Memorial Day, which is recognized in some Southern states. A cemetery employee flew the battle flag without permission at Point Lookout for about four years until it was removed in 1998. Griffin then unsuccessfully sought to set up his own flagpole, which would be privately funded and maintained.

Griffin claimed the flag policy violated the First Amendment right to free speech, and the case went to trial in 2000. A government lawyer was blunt in defending the cemetery policy. "Many people perceive the Confederate battle flag as a symbol of racial discrimination," Justice Department attorney W. Scott Simpson said. "There can be no doubt that display of the Confederate battle flag would be perceived as the government's endorsement of that flag."

U.S. District Judge William M. Nickerson disagreed. "The context of the display militates against any potential that a prohibited message of racial intolerance could be inferred," he wrote. The judge approved Griffin's request to fly the battle flag, separate from the U.S. flag and on a shorter pole.

The U.S. Court of Appeals for the Fourth Circuit in Richmond, Virginia, and the Washington-based U.S Court of Appeals for the Federal Circuit examined separate parts of Griffin's case, and both courts found that the government had sufficient reason to limit the flag display. The government's own message that the Point Lookout dead were being honored "as Americans" might be confused by display of the Confederate flag, the Fourth Circuit said. The Veteran's Administration also was justified in wanting to prevent counter-demonstrations and demands for other potentially controversial displays, that appeals court said.

Ruling on the broader question of whether the flag policy was unconstitutional for all 119 national cemeteries, the Federal Circuit said the Veteran's Administration could decide for itself what displays are compatible with the solemn atmosphere of a national cemetery.

"It follows that the government must have greater discretion to decide what speech is permissible in national cemeteries than in those (locations) which serve no such patriotic purpose for the government," that court wrote. Reported in: *Minneapolis Star-Tribune*, October 16.

electronic surveillance

Washington, D.C.

The Bush administration won approval November 18 for wider use of surveillance against terror and espionage suspects when a federal appeals court declared that such surveillance does not violate the Constitution. The ruling by a three-judge panel sitting as the Foreign Intelligence Surveillance Court of Review upheld the argument of the Justice Department that a lower court was wrong to deny it the authority to expand wiretapping and other surveillance—especially in view of what happened on September 11, 2001.

The three-judge panel appointed by Chief Justice William H. Rehnquist noted, among other things, that the standard of evidence required to open a wiretap for national security purposes is generally much lower than that needed for domestic criminal cases.

The ruling overturned one last May by the highly secret Foreign Intelligence Surveillance Court, which considers wiretap requests in terror and espionage cases. In the May

ruling, the surveillance court unanimously rejected a request from the Bush administration to break down many barriers to cooperation between criminal prosecutors at the Justice Department and counterintelligence agents at the Federal Bureau of Investigation. That procedural "wall" was intended in part to prevent intrusions into privacy and civil rights in the name of national security.

In appealing that ruling, the Justice Department argued that it need not always be blocked by that wall in view of new authority that it was granted in an antiterrorism bill enacted by Congress after the September 11 attacks.

The appeals court accepted much of the Justice Department's position. The tribunal said it recognized the bedrock importance of the Fourth Amendment against unreasonable searches and seizures and emphasized that it was not ready "to jettison Fourth Amendment requirements in the interest of national security." But the appeals panel went on to say that it also recognized the validity and importance of the Foreign Intelligence Surveillance Act of 1978, which imposed a formal court process on wiretaps in national security investigations.

The general purpose of the 1978 law, "to protect the nation against terrorists and espionage threats directed by foreign powers, has from its outset been distinguishable from 'ordinary crime control,'" the appeals court wrote. "After the events of September 11, 2001, though, it is hard to imagine greater emergencies facing Americans than those experienced on that date."

The American Civil Liberties Union was among the organizations arguing against the expanded surveillance powers. Jameel Jaffer, an ACLU lawyer, expressed disappointment with the ruling, which he said suggested that the surveillance court "exists only to rubber-stamp government decisions."

The appeals court said that in cases of terrorism or espionage a broad approach was warranted. "Effective counterintelligence, as we have learned, requires the wholehearted cooperation of all the government's personnel who can be brought to the task," the appeals court wrote. "A standard which punishes such cooperation could well be thought dangerous to national security."

Attorney General John Ashcroft said the ruling would help in the pursuit of terrorists without subjecting law-abiding people to intrusions. "We have no desire whatsoever to in any way erode or undermine Constitutional liberties," Ashcroft said. It was not immediately clear whether the ruling would be appealed to the Supreme Court.

Examining the language in the 1978 law, and later comments by members of Congress, the appeals court said it seemed clear that both the Senate and House intended that the so-called wall between intelligence gathering and criminal prosecution should not always be insurmountable. The court cited comments by Senator Dianne Feinstein (D–CA), who said last fall that there could easily be cases "where the subject of the surveillance is both a potential source of valuable intelligence and the potential target of a criminal prosecution. Many of the individuals involved in supporting the September 11 attacks may well fall into both of these categories," Senator Feinstein said.

The decision was issued by Judges Ralph B. Guy, Jr., a semiretired member of the United States Court of Appeals for the Sixth Circuit in Cincinnati; Edward Leavy, a semiretired member of the Court of Appeals for the Ninth Circuit, in San Francisco, and Laurence Hirsch Silberman, a semiretired member of the Court of Appeals for the District of Columbia Circuit. Reported in: *New York Times*, November 18.

schools

Warren Hills, New Jersey

A rural New Jersey school district was wrong to suspend a high school student because he wore a T-shirt with redneck humor, a federal appeals court ruled. In a 2–1 decision issued October 1, the U.S. Court of Appeals for the Third Circuit ruled the ban by the Warren Hills Regional School District was unconstitutional because there had been no previous problems involving the T-shirt at the school.

The district adopted an anti-harassment and intimidation policy last year after several months of racial tension at the high school. The policy most notably banned the display of the Confederate flag on school grounds or at school events. However, the court ruled the district overstepped its bounds when it banned the T-shirt because it contained the word "redneck."

"Defendants have not, on this record, established that the shirt might genuinely threaten disruption or, indeed, that it violated any of the particular provisions of the harassment policy," the court wrote.

Thomas Sypniewski Jr., 19, challenged the ban after he was suspended for three days and lost parking privileges at the school for wearing the shirt that bore comedian Jeff Foxworthy's "Top 10 Reasons You Might Be a Redneck Sports Fan."

"The T-shirt is fairly representative of Foxworthy's 'country' humor," wrote Judge Anthony J. Scirica. Some might see wearing the Foxworthy shirt "as a veiled celebration of bigotry. But there is no evidence that 'redneck' had or has such a meaning in the Warren Hills schools," Scirica added. Also, the district's racial harassment policy, adopted last year, went too far in banning speech that may create "ill will."

"The focus of this phrase is entirely on the reaction of listeners. But by itself, an idea's generating ill will is not a sufficient basis for suppressing its expression," Scirica explained. That phrase must be stricken from the policy,

ruled Scirica and U.S. District Judge Robert J. Ward, of New York. Circuit Judge Max Rosenn, of Wilkes-Barre, Pa., the lone dissenter, disagreed on both counts.

"It is essentially a policy obviously designed to curb student racial misbehavior, prejudice and hatred and to encourage civility and respect for the rights of other students. Nothing in it prohibits or discourages protected freedom of speech," Rosenn declared Sypniewski said he was happy with the ruling but declined further comment. He graduated from the school last year. His attorney, Gerald Walpin, said the decision means the Warren County district will have to rewrite its anti-harassment policy.

"I think this is a victory for the First Amendment," Walpin said. James Broscious, the district's attorney, said the ruling puts school officials in a tough position. "You have to wait until something happens then deal with it," Broscious said. "When you're in a school setting you can't wait." Reported in: Associated Press, October 4; *Philadelphia News*, October 4.

church and state

Montgomery, Alabama

A Ten Commandments monument in the rotunda of Alabama's judicial building violated the Constitution's ban on government promotion of religion, a federal judge ruled November 18. U.S. District Court Judge Myron Thompson gave Alabama Chief Justice Roy Moore, who had the 5,300-pound granite monument installed in the state building, thirty days to remove it.

"This court holds that the evidence is overwhelming and the law is clear that the chief justice violated the Establishment Clause," wrote Judge Thompson in a crackling opinion. The monument is "nothing less than an obtrusive year-round religious display intended to proselytize on behalf of a particular religion, the chief justice's religion."

"The only way to miss the religious or nonsecular appearance of the monument would be to walk through the Alabama State Judicial Building with one's eyes closed," Judge Thompson wrote. He said the display was much different from other displays of the Ten Commandments, including one at the United States Supreme Court, which is incorporated with other symbols.

The roots of the case go back to 1992, when Justice Moore was appointed a judge in Etowah County, in northwestern Alabama. One of his first acts was to hang a homemade rosewood plaque of the Ten Commandments in his courtroom. Three years later, the ACLU sued. The first judge ordered Judge Moore to take it down. Judge Moore refused. Then Gov. Fob James, Jr., vowed to send in the National Guard to protect Judge Moore's plaque.

Judge Moore became a cause célèbre, sending his name recognition into a realm that few other judges ever enjoy. He emerged a contender for chief justice of the State Supreme Court and won easily in November 2000.

The next August, early one morning, he sneaked the cube monument, paid for by an evangelical group, into the court building. He did not tell any of the eight other justices. A Montgomery lawyer, Stephen R. Glassroth, who is Jewish, then sued.

"It offends me going to work everyday and coming face to face with that symbol, which says to me that the state endorses Judge Moore's version of the Judeo-Christian God above all others," Glassroth said.

Moore testified during the trial that the commandments are the moral foundation of American law. He said the monument acknowledges God, but does not force anyone to follow his conservative Christian religious beliefs.

"This is a question of whether the politically powerful can impose their views on others," Southern Poverty Law Center attorney Danielle Lipow argued during the trial before Thompson.

Moore testified he decided to locate a monument to the Ten Commandments in the building several months after he was elected chief justice in November 2000. The monument, which features the King James Bible version of the Ten Commandments sitting on top of a granite block, is one of the first things visitors see upon entering the building.

An appeal was expected. Neither Moore nor his lead attorney, Stephen Melchior, had any immediate comment on the ruling. An assistant to Melchior said they were reserving comment until they had read the opinion.

"The basic issue is whether we will still be able to acknowledge God under the First Amendment, or whether we will not be able to acknowledge God," Moore testified.

Rev. Barry W. Lynn, executive director of Americans United for Separation of Church and State, called the ruling a setback for "Moore's religious crusade."

"It's high time Moore learned that the source of U.S. law is the constitution and not the Bible," Lynn said. Lynn's organization, along with the Southern Poverty Law Center in Montgomery and the American Civil Liberties Union represented three attorneys who objected to the monument.

One of Moore's supporters, Alabama Christian Coalition President John Giles, said he believes there may be a backlash against the ruling in Alabama, a Bible Belt state in which Moore won easily two years ago. "I am afraid the judge's order putting a thirty-day limit on removal of the monument will lead to an uprising of citizens protesting removal of that monument," Giles said.

Moore installed the monument after the building closed on the night of July 31, 2001, without telling any other justices. But he did tell television evangelist D. James Kennedy, who had a crew from his Coral Ridge, Florida, ministry film the installation and offered videotapes of it for a donation of $19. Moore has appeared numerous times on Kennedy's nationally syndicated religious television show.

Reported in: Associated Press, November 18; *New York Times*, November 19.

Frankfort, Kentucky

A federal appeals court ruled October 9 that a law adopted by the Kentucky legislature in 2000 requiring the erection of a Ten Commandments monument outside the Capitol in Frankfort is unconstitutional. The 2–1 decision by a panel of the U.S. Court of Appeals for the Sixth Circuit upheld a lower court ruling that the monument was an unconstitutional endorsement of religion.

In his majority opinion, Chief Judge Boyce Martin said the words atop the monument—''I am the Lord thy God''—undercut the state's claim that the display is secular. ''The graphic emphasis on those first lines is rather hard to square with the proposition that the monument expresses no particular religious preference,'' Martin wrote.

The monument law was challenged by the American Civil Liberties Union of Kentucky. ''The court has once again upheld the fundamental American value of religious freedom,'' said Jeff Vessels, state ACLU executive director.

Sen. Albert Robinson (R–London), the original sponsor of the Ten Commandments measure, blamed the ruling on ''liberal judges'' and said he was working on a display plan that he believed would be constitutional. The 6-foot-2 granite monument was originally erected in 1971 after it was donated to the state by the Fraternal Order of Eagles. It was removed in the 1980s for a construction project and has been in storage. The push to restore it followed local efforts to post Ten Commandments displays in schools and courthouses. As passed, the law called for making the monument part of a larger ''cultural and historical display'' that would include other items, including monuments to former officials and veterans.

Some legislators argued the monument isn't religious because the Ten Commandments was the ''precedent'' legal code for American laws. But the appeals court rejected that. Martin said lawmakers overlooked the impact of other codes such as the Magna Carta. He also said the size of the monument would make it appear the state not only endorsed religion but believed it to be highly important.

In a dissent, Judge Alice M. Batchelder said the case wasn't ripe for review since the monument had not been erected. Reported in: *Louisville Courier-Journal*, October 10.

Salt Lake City, Utah

The Mormon church cannot restrict free speech on the sidewalks that run through its plaza on the city's Main Street, the U.S. Court of Appeals for the Tenth Circuit in Denver ruled October 8. The court held that the sidewalks are a traditional public forum and restrictions on free speech on those sidewalks are unconstitutional. The sidewalks that used to line the former block of Main Street currently are open to pedestrians but not to free speech.

"The city cannot create a 'First Amendment-free zone.' Their attempt to do so must fail," said the unanimous ruling by a three-judge panel of the court.

The dispute arose after The Church of Jesus Christ of Latter-day Saints imposed rules restricting protests, demonstrations and other activities on the one-block stretch of Main Street in Salt Lake City it bought from the city. Reported in: *Billings Gazette*, October 10.

Internet

Miami, Florida

A federal judge in Miami dismissed a suit October 18 that sought to apply the Americans with Disabilities Act's anti-discrimination provisions to business web sites. U.S. District Court Judge Patricia A. Seitz dismissed the lawsuit filed by Access Now that alleged that Southwest Airlines' website violated the ADA because it was not accessible to the blind.

Access Now, a Florida nonprofit group that advocates accessibility for the handicapped, sued Southwest in June. The suit claimed that Southwest's site excluded the blind in violation of the ADA. Access Now filed suit to get Southwest to make its site compatible with readers for the blind, and to establish that business sites need to be accessible to the blind.

The crux of the suit was whether the right defined within ADA prohibiting discrimination in places of public accommodation extends to "cyberspace." Judge Seitz ruled that a Web site is not a place of public accommodation. "[T]o fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure," she wrote. Her ruling states that web sites are not a "place of public accommodation" as defined in the ADA.

The ADA was signed into law in 1990, years before the Web became a significant tool for E-business. ADA defines twelve specific types of public accommodations, all of which are physical facilities. Because of this, Judge Seitz wrote, "courts must follow the law as written and wait for Congress to adopt or revise legislatively-defined standards that apply to those rights. Here, to fall within the scope of the ADA as presently drafted, a public accommodation must be a physical, concrete structure. To expand the ADA to cover 'virtual' spaces would be to create new rights without well-defined standards."

The ruling also argued that there are no well-defined, generally accepted standards for makes sites accessible. While the World Wide Web Consortium has created Web Content Accessibility Guidelines, Judge Seitz noted that the guidelines were dated, failed to provide specific information about browser support, and were not a generally accepted authority on accessibility guidelines. In addition, the ruling

scolded Southwest and the plaintiffs for not cooperating to find a mutually acceptable solution. Judge Seitz wrote that it is unfortunate that Access Now did not proactively discuss with Southwest ways to improve the accessibility of the site. She also took Southwest to task, writing "It is especially surprising that Southwest, a company which prides itself on its customer relations, has not voluntarily seized the opportunity to employ all available technologies to expand accessibility to its Web site."

For many E-businesses, this ruling may remove any sense of urgency about making web sites accessible. The ruling states clearly that the ADA doesn't apply to the Web. It also questions whether there is any standard for what an accessible site is, and suggests that it's up to Congress to decide.

Even though this case has been dismissed, it's clear that more suits are coming. Access Now has already filed suit against American Airlines, claiming their site violates the ADA. Many sites are making changes to improve their accessibility in order to avoid these sort of suits. While it may take years for the law to catch up with the web, companies can use the W3C guidelines now to make it easier for the handicapped to use their sites.

Critics of the ADA applauded the ruling, saying that any other decision could have had a devastating effect on millions of Internet sites—both commercial and non-commercial. "Is there a difference between sites with an obvious financial nexus and those that don't?" asked Walter Olson, a senior fellow at the Manhattan Institute and editor of overlawyered.com. "What if I sell a T-shirt on my site? If I do, it seems to me that I may have plunged over the abyss into the e-commerce realm. If someone can't use the T-shirt since they can't get on to my Web site or their body shape is wrong for the T-shirt, I could be in big trouble."

"The judge ruled correctly," said Andrew Langer, manager for regulatory policy at the National Federation of Independent Business. "The ADA is supposed to help people who are disabled in truly egregious circumstances, to help them live a normal life. One should not have a cause of action to change everything about someone's business practices to make it simple to do things."

The U.S. House of Representatives has held a hearing on whether the ADA should apply to private Internet sites, but Congress has not chosen to amend the original act to clarify the issue. In a 1996 letter to Congress, the Clinton administration suggested that the ADA could apply to private businesses with an Internet presence.

At a February 2000 hearing, a board member of the National Federation of the Blind asked Congress to expand the ADA. "I urge this subcommittee to affirm the importance of access to this new world we're entering and to differentiate between the real-world needs of blind people and the hypothetical and yet-unproved burden placed on small businesses being required to ensure access," the board member said.

The Southwest lawsuit was not the first seeking to force a Web site to adopt accessibility technology. In 1999, the National Federation of the Blind sued America Online, claiming it discriminated against the blind because its system was not accessible to them. The federation later dropped the lawsuit when AOL agreed to make its software compatible with devices designed for visually impaired users. Reported in: www.webauthors.org, October 30. news.com, October 21.

St. Louis, Missouri

A federal appeals court on November 18 overturned a lower-court ruling requiring police officers to be physically present when executing a search warrant at an Internet service provider. The U.S. Court of Appeals for the Eighth Circuit in St. Louis overturned a district court ruling in a Minnesota case regarding a search warrant faxed to Yahoo Inc.'s Santa Clara, California offices in a child pornography investigation.

The defendant in the Minnesota case had argued his rights under the Fourth Amendment to the U.S. Constitution regarding unreasonable search and seizure had been violated because the search for items listed in the warrant had been conducted by a civilian Yahoo! employee. The Minnesota district court in that case ruled law enforcement officers should be present at all such searches.

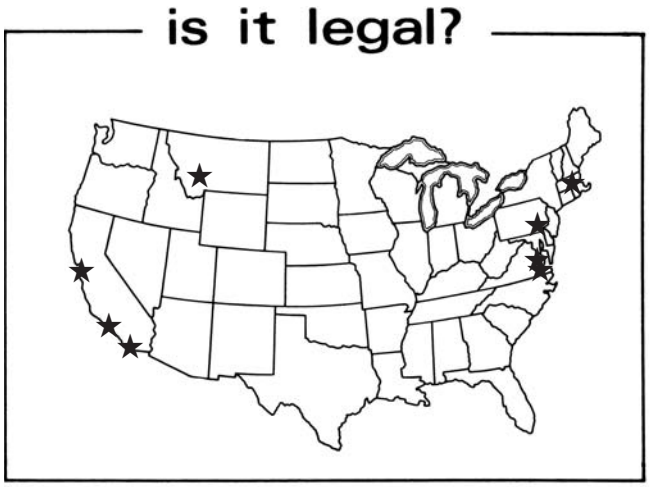
Attorney Jonathan Band, a partner at Morrison and Foerster in Washington who represented Yahoo! and others in the case, said the appellate court found "the Fourth Amendment does not establish a hard-and-fast physical presence requirement.''

Yahoo! and others had argued in papers filed with the Eighth Circuit earlier this year that the ruling could fill their offices with police officers executing warrants. The group had argued that a dozen or more law enforcement officers could be on their premises at any given time enforcing warrants, if the lower-court ruling were allowed to stand. Reported in: *San Jose Mercury-News*, November 18.

Richmond, Virginia

The Virginia Supreme Court has ruled against America Online (AOL) in its latest effort to protect the anonymity of one of its subscribers, in a case that could shape how free speech is perceived online. The ruling against AOL came November 1 as part of a nearly two-year-old case filed by electronics design and manufacturing company Nam Tai Electronics, alleging that 51 unknown individuals had committed libel, trade libel and violations of California's unfair business practices statutes by posting defamatory messages about the company's publicly traded stock on an Internet message board.

(continued on page 35)



libraries

Berkeley, California

Attached to each staff phone in the Berkeley Public Library is a dark pink laminated card advising employees on how to handle subpoenas. "If a person comes to you to serve a subpoena on the library, say that you are not in a position to act on it," the card reads. "Do not attempt to give them the information they are looking for."

Librarians in Berkeley and across the country are increasingly concerned that federal agents will use the USA Patriot Act to demand patron circulation records and Internet logs. FBI agents seized two computers from a Delray Beach, Florida, library because some of the September 11 hijackers were believed to have used public computers to communicate.

"I believe in privacy, but if we know that someone has committed a crime, we're not going to sit by and not say anything," said Kathleen Hensman, a reference librarian who remembered talking to the hijackers in the summer of 2001. "I would do it again, Patriot Act or not."

In California, more than a dozen librarians said they are worried that the FBI's expanded surveillance powers will have a chilling effect on how people perceive and use the library, where anonymity is rigorously defended. "We've discussed the Patriot Act in detail," said Karen Rollin Duffy, the city librarian in Santa Clara. "Our stance has always been that we want to protect patron privacy. But we are reviewing our practices. What records do we keep, and are we keeping them for too long?"

Justice Department officials said librarians are overreacting. But some libraries and bookstores are now thinking twice about records that they once kept as a matter of course. At Bell's Books in Palo Alto, information about the Patriot Act was posted at the store's cash register.

"This is not a situation where the FBI can walk into a library and say 'Give us all your records,'" said Mark Corallo, a department spokesman. "It can only be used if the person is under investigation for possibly being linked to terrorism, and the FBI has to go to great lengths to get a warrant from a judge."

Some Bay Area libraries have conducted "privacy audits" of their computer systems and files. Others keep fewer records than before the Patriot Act was passed, and a few make sure to erase the caches on hard drives or regularly shred computer use sign-up sheets.

"Many of us are concerned about this," said Linda Wood, director of the Alameda County Public Library. "What people read and view from library collections has always been confidential. We want people to feel secure that Big Brother is not watching over them."

Congress passed the USA Patriot Act in October 2001, shortly after the September 11 attacks. Section 215 allows federal agents to get a search warrant to examine certain "business records" as part of terrorism investigations, and that can include records from public libraries and bookstores. FBI agents can obtain a warrant from a judge for library or bookstore records of anyone thought to be involved in a terrorist plot. Once contacted, librarians are forbidden to discuss the investigation, which has made it impossible to determine how widely Section 215 has been used.

Andrew Black of the FBI's San Francisco office said he was not aware of any Bay Area libraries that have been asked to turn over records. "It's a very rare circumstance where this is used, and there are multiple levels of review," said Black.

In December 2001, the University of Illinois surveyed 1,502 libraries across the country. Of the 1, 020 which responded, eighty-five libraries, many of them near urban areas, said that they had been asked by law enforcement officials for information about patrons related to September 11. The anonymous survey methods made it impossible to tell which libraries were contacted.

The Berkeley Public Library already has been contacted by the government. Immediately after September 11, the library received a call from the Air Force warning that someone apparently used a library computer to hack into the Travis Air Force Base in Fairfield, California, according to Jackie Griffin, the library director.

"We were pressed very hard to say who had used the computer, but I told them that California law says that those records are private and I can't give them out without a subpoena," Griffin said. "But this was all before the Patriot Act. We would have been in a whole different world if the Patriot Act had been in place."

"We're watching cautiously," said Susan Fuller, director of the Santa Clara County Library. "California has strong privacy laws that protect patron information, but the Patriot Act could override state law. We take seriously our role as a neutral information provider without the government looking over our shoulder." Reported in: *San Jose Mercury-News*, October 20.

government secrecy

Livermore, California

Scientists at Lawrence Livermore National Laboratory are under orders from the Department of Energy to evade public inquiries concerning Iraqi weapons of mass destruction, the threat of catastrophic terrorism, and related issues. "Respond with 'no comment' to all requests from the news media or other non-governmental organizations," instructed Livermore Lab Director Michael R. Anastasio in a September 13 memorandum to the Lab's Associate Directors.

Even official requests for information from members of Congress, their staffs, or other executive branch agencies are to be deflected for "coordination" with the Department of Energy Office of Intelligence. "Many Laboratory employees are known by name or personally to reporters, consultants, and Congressional staffers and thus may receive direct inquiries," Dr. Anastasio wrote. "Please caution your employees to be vigilant in referring all such inquiries . . . and to be rigorous in refraining from comment even in 'informal' or 'confidential' situations."

The practical effect of the clampdown is to exclude Livermore scientists from "uncoordinated" participation in unclassified public discussion and debate over Iraqi nuclear weapons. They are already precluded from disclosing classified information. Yet the importance of such expert participation in public debate was illustrated by the recent dispute over the significance of Iraqi efforts to acquire 60,000 "high strength aluminum tubes." In an October 7 speech, President Bush cited the attempted Iraqi purchase of the aluminum tubes as "evidence . . . that Iraq is reconstituting its nuclear weapons program." That assertion is rejected by many DOE scientists and other experts, who argue that the tubes could have other, non-nuclear applications. Reported in: *Secrecy News*, October 15.

Washington, D.C.

Attorney General John D. Ashcroft told Congress that "rigorous investigation" coupled with "vigorous enforcement" of current criminal laws—not new secrecy legislation—was the best way to combat leaks of classified information. In a report required by the fiscal 2002 intelligence authorization bill, Ashcroft said an interagency study of current laws and leaks of classified information had determined that "current statutes provide a legal basis to prosecute those who engage in unauthorized disclosures, if they can be identified."

A new law, the attorney general went on, "could enhance our investigative efforts" but it was "unclear" how much that legislation would improve the government's ability "to identify those who engage in unauthorized disclosures of classified information or [deter] such activity."

Only once in the past fifty years had anyone been convicted of leaking classified information when espionage was not involved, Ashcroft noted. Rather than a new law, he called for a unified administration-wide effort to meet the problem, saying "we must entertain new approaches to deter, identify and punish those who engage in the practice."

In 2000, Congress passed legislation written by Sen. Richard C. Shelby (R–AL), then chair of the Senate Select Committee on Intelligence, that broadened the law to cover any leaked classified information even if espionage was not involved. After a lobbying effort by civil liberties groups and the media, which argued that it would chill the press's ability to collect information from government officials, then-President Bill Clinton vetoed the measure.

When President Bush took office, Shelby reintroduced the amendment but ultimately agreed to a White House request for a study of the need for a new law. The study involved the Justice, Defense, State and Energy departments and the CIA. While emphasizing that leaks cause "serious damage . . . to intelligence sources and methods, military operations and to the nation," Ashcroft said they must be combated "through aggressive administrative enforcement of current requirements, rigorous investigation of unauthorized disclosures, and vigorous enforcement of the criminal laws that make such disclosures a federal crime."

Scott Armstrong, founder of the National Security Archive, who helped put together a panel of government and non-government people to discuss the problems created by leaked information, said the group's discussions helped shape the Ashcroft study and helped develop ways the media could avoid disclosing truly damaging secrets while still publishing important information. "I'm gratified," Armstrong said, "that the attorney general realized that getting a sweeping statute would hurt the media, and instead decided to focus on the sources of leaks in the first place." Reported in: *Washington Post*, October 23.

Washington, D.C.

The Bush administration's failure to narrowly define the types of scientific research that need to be classified threatens all scientific research and may itself compromise national security, according to a statement released by the presidents of the National Academies October 18.

While the presidents—Bruce Alberts, of the National Academy of Sciences; William A. Wulf, of the National

Academy of Engineering; and Harvey V. Fineberg, of the Institute of Medicine—acknowledged in the statement that "restrictions are clearly needed to safeguard strategic secrets," they added that the balance between a free flow of information and security concerns is only thwarted by the vague definitions set forth by the Bush administration.

In particular, they said the administration's category of "sensitive but unclassified" information needs to be clarified because it could be a hurdle to scientific progress. "Experience shows that vague criteria of this kind generate deep uncertainties among both scientists and officials responsible for enforcing regulations," the statement said. "The inevitable effect is to stifle scientific creativity and to weaken national security."

The presidents' statement was the latest in a series of critical responses to this category from academics. Scientists have voiced their disapproval of the classification since Andrew H. Card, Jr., the White House chief of staff, first issued a statement on March 19 advising government agencies to be extra cautious and give special consideration to "sensitive but unclassified information." Various university officials told the U.S. House of Representatives Committee on Science in October that the government should trust the ability of scientists to decide what information and research should be publicly available.

After an academy report on agricultural bioterrorism was noticeably censored, prominent scientists expressed concern that further reports issued by the National Academies might be unnecessarily altered, which would inhibit the sharing of knowledge and exchange of ideas among scientists.

As an alternative to the administration's current definition, the presidents recommended that policy makers collaborate with scientists to develop guidelines for handling potentially sensitive research, and said that "a continuing, meaningful dialogue needs to begin—one that produces a true collaboration for the many decisions that need to be made." Reported in: *Chronicle of Higher Education* online, October 21.

church and state

Washington, D.C.

A Jewish group has sued the federal agency that runs AmeriCorps and other national-service programs, alleging that the agency was violating its charter and the First Amendment by having some program participants teach religion in private, religious secondary schools. The Corporation for National and Community Service, which oversees AmeriCorps, denied the charges.

The American Jewish Congress filed the suit October 3 in federal district court in Washington. The group wanted the court to prohibit those participants that teach religion in private religious schools from receiving the $4,725 in federal financial aid the government paid upon completion of the program. The organization also wanted the court to bar AmeriCorps from paying for any religious training its participants received from partner programs. The lawsuit named three programs in particular: the Alliance for Catholic Education; the Catholic Network of Volunteer Service; and the Nebraska Volunteer Service Commission.

Under AmeriCorps, state agencies seleced nonprofit groups for participants to help. All three of the organizations named in the suit work with AmeriCorps. As an example, the association pointed to the Alliance for Catholic Education, whose participants taught in Roman Catholic schools while working toward a master's degree in education. The alliance required participants to live in small communities bound together by Christian values. According to the alliance's Web site, the program offered "a variety of opportunities for spiritual growth," including attending prayer services and daily Mass. "An important goal of the program is to provide ACE participants with the tools to become reflective professional educators and people of faith," the Web site states.

Leslie Lenkowsky, chief executive officer of the Corporation for National and Community Service, defended his agency's practices. "We are confident that all of our programs meet Constitutional and other legal standards," he said.

AmeriCorp's charter stated that participants are barred from "engaging in religious instruction, conducting worship services, providing instruction as part of a program that includes mandatory religious instruction or worship, constructing or operating facilities devoted to religious instruction or worship, maintaining facilities primarily or inherently devoted to religious instruction or worship, or engaging in any form of religious proselytization."

Roughly 6,000 AmeriCorps participants last year worked with faith-based service organizations, said Michael J. Meneer, executive director of AmeriCorps Alums, Inc., the national-alumni association for program participants. Meneer said that in the seven years he has worked with AmeriCorps as a participant and an administrator, he has never met any AmeriCorps member who taught religion or received religious instruction. Many organizations "walk the fine line" between working with faith-based organizations and proselytizing, he said.

American Jewish Congress Legal Director Marc Stern said he learned about the perceived conflict when he participated in a panel discussion on a cable-television show with Harris Wofford, who served as the chief executive officer of the corporation from October 1995 to January 2001. In the discussion, Stern said, Wofford bragged that AmeriCorps participants had been teaching religion in religious schools "for years."

Since then, the group has tried unsuccessfully to reach an amicable agreement with the corporation, Stern said, and so

it filed the lawsuit. The corporation hasn't given a reason why it won't agree to the suggested changes, he said. The group doesn't mind AmeriCorps members teaching secular subjects in religious schools, just the teaching of religion. Reported in: *Chronicle of Higher Education* online, October 7.

Dillon, Montana

A Virginia law firm filed suit October 7 seeking an order that would require the Dillon elementary school district to allow an evangelist to present a motivational speech during school hours. The Rutherford Institute filed suit in federal court in Billings seeking a temporary restraining order on behalf of Jaroy Carpenter. Carpenter is a contract employee of radio talk show host and evangelist Dawson McAllister.

Carpenter's motivational talk to middle schoolers was offered and accepted by the Dillon District 10 board at its regular meeting in September. Carpenter's invitation to address the assembly was rescinded later by the board following a five-hour emergency meeting after concerns about the talk surfaced in the local newspaper. The board's decision followed legal advice presented to it from both local and state authorities.

Since that meeting, the Dillon Ministerial Association agreed to host Carpenter's talk, "Excuses, Excuses, Excuses," at a Dillon movie theater. The school district will allow students with permission slips to attend the off-campus event.

But lawyers for the Rutherford Institute said the school district is reacting to "unsubstantiated fears" of violating constitutional law. They say the board's actions have violated Carpenter's constitutional rights of free speech, free exercise of religion and his right to equal protection of the laws. The suit sought to require the board to stick with its initial invitation and allow Carpenter to speak to the middle school students. The suit said Carpenter is a former teacher and has made more than two hundred secular presentations at school assemblies across the country and has never addressed religion during those events or sought to proselytize those in attendance.

After the Dillon school board made its decision, ten other schools that had agreed to hold the assemblies rescinded their invitations. "By withdrawing its invitation to address a public school assembly simply because Jaroy Carpenter is religious or happens to be associated with a religious ministry, this school district is essentially saying that religious persons—be they ministers, priests or community members—must be kept off campus even though they have valuable insights and experiences to share with schoolchildren on subjects other than religion," said John W. Whitehead, president of The Rutherford Institute. "This is religious discrimination and contrary to the values of inclusion and community involvement that Americans hold dear."

According to the suit, the Dillon school district has invited other groups with religious associations to perform on school property. The singing group "The Standards" performed and spoke to Dillon students, and included an invitation to a later rally, the suit said. "It was common knowledge in Dillon, Montana, that 'The Standards' were associated with the Church of Jesus Christ of Latter-day Saints," said the suit. School officials said the group wasn't brought to town through a religious organization, but rather the Southwest Montana Arts Council. Reported in: *Montana Standard*, October 8.

colleges and universities

San Diego, California

A new Web site allows students nationwide to anonymously accuse their professors—who are named—of political bias. Some of those professors called the site "silly" and "cowardly." The site, NoIndoctrination.org, which was announced in late November, was started by Luann Wright two years after her son took a writing course at the University of California at San Diego that she found objectionable.

"All the essays they had to read were race-related and I thought that was a little odd for a writing course," said Wright, a former high-school science teacher who now designs science curricula. She also disliked a reference to men as "phallocrats" in one of the essays.

Linda Brodkey, a professor of literature at the university, designed the course in question, though she did not teach the class that Wright's son took. "We tried very hard to make a course that would introduce students to the range of issues they are expected to form opinions about," Brodkey said. The course did not endorse one particular opinion over another on any issue, she said.

Brodkey was involved in a similar controversy more than a decade ago at the University of Texas at Austin. A writing course she helped revise was deemed to have a liberal bias by some critics, including the National Association of Scholars.

Wright's Web site allows students to rate the perceived level of bias in a professor's lecture, reading list, and class discussions as "noticeable," "objectionable," or "extreme." It also permits students to post accusations anonymously, a practice Wright defends because identifying students would invite retaliation from professors, she said. Professors can write rebuttals to students' accusations, though so far only one has been posted. That statement was from Geoffrey Schneider, a professor of economics at Bucknell University. In his rebuttal, he called the student's accusation of bias "a typical comment by a hyper-sensitive conservative without a fundamental grasp of the material."

Another professor listed on the site, Theodore J. Lowi, a professor of government at Cornell University, said he had

no plans to post a rebuttal. "I won't dignify it with a response if they don't identify themselves," he said. The posting accuses Lowi of "subtle liberal evangelism."

Robert D. Crutchfield, a professor of sociology at the University of Washington, is accused by an anonymous student of "thoroughly indoctrinating" students in his "Introduction to the Sociology of Deviance" course. According to the student, the professor believes that criminals must be rehabilitated rather than punished—a mischaracterization, according to Crutchfield. "What embarrasses me is that this student so completely misunderstood what I was teaching on these topics," he said. He said he does not plan to respond on the site.

Nearly all of the postings complained about a pro-liberal bias among professors. But Wright, who calls herself "as middle-of-the-road as you can get" politically, said she is against bias of any kind. "I would be just as appalled if a professor were describing abortion as baby killing," she said. Wright added that unlike the Web site Campus Watch, which lists professors that it believes have an anti-Israel bias, her site is not concerned with a professor's research. "I'm worried about what goes on in the classroom," she said. "I feel we're doing our students a grave disservice when we have this sort of education where students take a writing course that is really more of a social-programming course."

Wright said her site is not affiliated with any other organization and is supported by donations.

One posting accuses Cecilia Rao, who is listed as a professor at Barnard College, of putting too much emphasis on "the plight of the low-income family" in a course called "Poverty and Income Distribution." But according to a college spokeswoman, no one by that name teaches at Barnard and the course does not exist. Reported in: *Chronicle of Higher Education* online, November 26.

Washington, D.C.

A letter that the Federal Bureau of Investigation sent colleges requesting certain information about their foreign students prompted the Association of American College Registrars and Admissions Officers to remind colleges what data they do and do not have to give to federal investigators. In a statement on its Web site, the association argued that the FBI is violating a federal law that protects student privacy by asking institutions to give out information that legally requires a court order.

The FBI contended, however, that it is doing a necessary job within legal limits. "What we're doing is consistent with the law," said Paul Bresson of the bureau. "There is nothing that prohibits us from asking for this kind of information."

Under the Family Educational Rights and Privacy Act, or FERPA, institutions have the right to decide for themselves what information is available without a court order, said Shelley Rodgers, associate director of public relations and communications at the registrars' association. Colleges also must give students the right to decide whether they want any of their information to be made available.

Colleges believe they are in a bind because they want to cooperate with law enforcement, but have to follow the federal privacy law, said Rodgers. "They've tied our hands because they have framed their request in a way we can't respond." The FBI believed it was asking for publicly available information that does not require a court order, said Bresson. "We're expecting whatever they're willing to give us," he said. The agency realizes that each institution can decide how much to reveal, he said, and that academic institutions also have lawyers whose advice they can follow.

The November 4 letter asked institutions for help in the fight against terrorism by assisting the FBI to identify counterintelligence agents and terrorists. To do that, the agency wanted institutions to supply information about their foreign students, specifically "names, addresses, telephone numbers, citizenship information, places of birth, dates of birth, and any foreign contact information" for the past two years.

The letter specifically mentioned the federal privacy law when it stated that the law "does not prohibit an educational institution from releasing a student's place of birth, citizenship, or foreign-contact information." The letter also noted that the USA Patriot Act "has further granted educational institutions authority to release information to the federal government for use in combating terrorism."

The letter "interprets the law in a way we've never seen it interpreted before" in the 28-year history of FERPA, said Rodgers. The letter assumed that the FBI could request information on citizenship and foreign addresses that would normally require a court order to release, she said. It also interpreted the USA Patriot Act in a way that would allow the FBI to acquire that data without a court order—which the Patriot Act currently requires, she said.

Becky Timmons, director of government relations at the American Council on Education, agreed. "The letter is noteworthy for what it leaves out," she said. More bluntly, she added, "The FBI is trying to do what the USA Patriot Act prevents and FERPA has long prevented."

Timmons worked on the educational-rights provisions in the Patriot Act, which include privacy protection for students. Specifically, she said, federal law prohibits law-enforcement officials from collecting information about large classes of people according to gender, nationality, or race, if the data are not needed for an investigation into a particular incident or crime.

In its statement, the registrars' association reminded its 10,000 members that any release of restricted information, without a student's consent, requires a subpoena. It also suggested that all officials on a particular campus should coordinate all on-campus contact with law-enforcement officials to ensure that privacy laws are followed. Reported in: *Chronicle of Higher Education* online, November 26.

Amherst, Massachusetts

Professors at the University of Massachusetts at Amherst were upset about the university's role in the Federal Bureau of Investigation's questioning of an Iraqi-born professor for his reportedly anti-American opinions. A campus police officer, working with FBI agents, questioned M.J. Alhabeeb, a professor of resource economics, in late October. They said they were following up on a tip, and the questioning lasted about five minutes. Alhabeeb, now an American citizen, said in an interview that he rarely discusses politics or foreign policy and that the agent told him the tip came from somebody connected to the university's public-access cable-television station, where he serves on the board.

"To me, personally, it was no big deal," said Alhabeeb. "What bothers me is that the monitoring should not be directed toward anyone because of their name or their color or their ethnic background."

But after other professors learned of the questioning of Alhabeeb, they were especially concerned about the university's connection to the FBI. Barbara Pitoniak, a university spokeswoman, confirmed that Barry Flanders, a UMass police detective, had been working with the FBI's Joint Terrorism Task Force. "He is first and foremost a university employee, and the campus's police needs come first," she said.

Pitoniak said she did not know what percentage of the detective's time is spent with the FBI, and when he is working with the bureau, he reports directly to the FBI, not to the university's police chief. She added that such multi-jurisdictional task forces are not unique and that university police officers have participated in others, such as groups investigating drug offenses.

Dan Clawson, a sociology professor who organized a meeting of about 75 professors to discuss the issue, said faculty were wary about close ties between the FBI and the university. "There is a campus employee being paid by the university, doing we don't know what, monitored by no one on campus, and engaged in activities that can have the effect of chilling freedom of speech and freedom of inquiry." Reported in: *Chronicle of Higher Education* online, November 26.

Williamsburg, Virginia

Officials at the College of William and Mary admitted in October that they were wrong to remove a poster hung on campus by a student who wanted to publicize the details of her alleged rape by another student. William and Mary officials initially said the poster, hung by Samantha Collins, a sophomore, violated a federal law that prohibits colleges and universities from disclosing information related to students without their permission. But a 1998 amendment to the Family Educational Rights and Privacy Act (FERPA) said if students are accused of a violent crime or a nonforcible sex offense in campus disciplinary hearings, the results of such hearings can be released.

A nonprofit victim advocacy group, Security on Campus, explained the law to college officials and asked them to allow Collins to rehang her poster. "After reviewing the new information we received, it no longer appears that the posting would create a liability for the college," said W. Samuel Sadler, vice president for student affairs, in a written statement released by Security on Campus.

Collins said she was raped as a freshman after passing out during a fraternity party on campus in October 2001. Collins did not press criminal charges, but did bring charges under the campus judicial system. She said a disciplinary committee held a hearing the following month and placed the student on "contingent dismissal," meaning he was ordered to leave campus and told he could not apply to re-enroll until October 4, 2002. Collins said she saw her poster—which identified her and the man she said raped her—as a way to draw attention to a university sexual-assault policy that she finds unfair.

"I decided that . . . the first day this student could request re-entry, I would hang up a big poster identifying both him and myself, and telling about what had happened," Collins said. "I feel that it is one thing to hear a hypothetical story about rape. It is much more influential, however, when there are names attached to it."

She put up the poster—with a heading that said "Campus Rape" in red letters—in the college's University Center, which houses the student union, the evening of October 3. Before noon the next day, it had been removed. Sadler said that taking down Collins's poster "was never about her not being allowed to speak her mind." The university, he said, was merely following the advice of its legal counsel. He said the university would not remove Collins's poster if she put it up again. Reported in: *Chronicle of Higher Education* online, October 14.

film

Los Angeles, California

A group of barbers and beauticians sued the Revs. Jesse Jackson and Al Sharpton, claiming the activists' remarks about the movie *Barbershop* drove away customers. The suit was filed October 28 by the National Association of Cosmetologists. It accused Jackson and Sharpton of intentional infliction of emotional distress, fraud, and negligence stemming from their demand for apologies from MGM, which produced the comedy.

The activists had called for scenes deriding Dr. Martin Luther King, Jr., and Rosa Parks to be removed from the film, starring Ice Cube and Cedric the Entertainer. MGM refused to cut the scenes. The association, which claims to represent 50,000 barbers and beauticians, said Jackson and Sharpton misrepresented themselves as spokesmen for the group.

James Stern, chief executive of the group, said Sharpton's threat to boycott the film and other remarks created a nega-

tive public sentiment about the profession, resulting in a loss of business. "By threatening to boycott MGM studios, they put a black eye to our subject matter of barbers and cosmetologists in the state of California," Stern said.

Tracy Rice, a spokeswoman for Jackson's Rainbow/PUSH coalition, said the organization hadn't seen the lawsuit. She called it a nuisance suit and predicted it would be thrown out of court. "The First Amendment protects artistic expression just as it protects Rev. Jackson's right to express his opinion," she said.

In the scene in question, a barber jokes about King's alleged promiscuity. He also says Parks wasn't the first person to refuse to give up her bus seat but was given credit because she was connected to the National Association for the Advancement of Colored People. Reported in: Associated Press, October 29.

recordings

Washington, D.C.

Sen. Joseph I. Lieberman (D–CT) and Rep. Billy Tauzin (R–LA) have renewed a push for recording companies to toughen labeling standards on sexually explicit and violent lyrics. But the music industry is in no rush to comply. Lieberman and Tauzin, chair of the House Energy and Commerce Committee, want the recording industry to go beyond the current advisory system, which says, "Parental Advisory, Explicit Content." They want a warning system that says exactly what is explicit about the content. Does the music, for example, contain strong language? Is there sexual or violent content, or both? Then parents can decide up front if they want their children listening to certain CD's.

So far only BMG, a division of Bertelsmann, has agreed to meet their demands. In July, the company began putting parental advisory stickers on its CD's when they contain strong sexual or violent content. Competitors said it is easy for BMG to comply because it has few stars who test the limits of taste. The energy committee gave the other recording companies until November 1 to say if they plan to follow BMG's lead. The companies are the Universal Music Group, Sony Music Entertainment and the Warner Music Group.

For the recording companies, the timing is poor. CD sales are in decline, causing widespread concern and leaving the industry reluctant to adopt a labeling system that could scare customers—or, rather, the parents of customers. Already, some large retail outlets, like Wal-Mart and K-mart, do not carry CD's with sexually explicit lyrics. The industry is also increasingly concerned about pirated music. The Recording Industry Association of America has asked Congress to help regulate Internet piracy.

But Ken Johnson, a spokesman for the Energy and Commerce Committee and Tauzin, warned that lawmakers were prepared to force the industry's hand by exchanging help in combating Internet piracy for developing a new parental advisory system. "Clearly the music industry is caught between a rock and a hard place," Johnson said. "They have to decide how many album sales they are going to lose because of warning labels and how many they lose because of Internet piracy. At some point, the pendulum is going to swing toward the parents."

Russell Simmons, the rap impresario and chair of the hip-hop Summit Action Network, upbraided elected officials for using their bully pulpit to push a political agenda. "These are a bunch of people trying to make a name for themselves in politics," Simmons said. "BMG changed its warning system to pacify the politicians, and I think it was wrong. I think it's a move toward censorship, which is un-American."

Hilary Rosen, chair and chief executive of the recording industry association, said a new warning system was unnecessary because a large number of adolescents and teenagers no longer bought their music in stores. They simply go to the Internet and download it. She said that most parents do not know how to access these sites.

"There is no labeling on the Internet," Rosen said. "If anyone is going to express concern that's what it should be about."

BMG decided to develop its own warning system to avoid having its hand forced by Congress. But it has some of the least offensive acts in the industry, unlike the Universal Music Group, which has Eminem and Ludacris. BMG has put stickers on just a few new releases since July, including "Lord Willin' " by the hip-hop group Clipse.

The parental advisory issue leaped to the forefront two years ago after the Federal Trade Commission issued a report that criticized the entertainment industry for failing to provide parents and consumers with sufficient details about content. The study did not single out any type of music. After the criticism, the motion picture and electronic game industries stopped aiming at children with advertising for R-rated movies and games rated for mature audiences.

The current record warning—"Parental Advisory: Explicit Content"was created in 1985 after a hard-fought effort by Tipper Gore, the wife of Al Gore, who was then a senator from Tennessee. But elected officials have complained that the current system is too broad and gives parents too little information. Further, it rarely, if ever, extends to print ads and television. Reported in: *New York Times*, October 21.

Internet

Washington, D.C.

Congress approved legislation November 15 designed to seal off a G-rated "neighborhood" for kids on the World

Wide Web. The Senate and the House of Representatives passed a final version of the Dot-Kids Implementation and Efficiency Act, which calls for the creation of a dot-kids domain within America's dot-us addressing space.

Sen. Byron Dorgan (D–N.D.), who co-sponsored the bill in the Senate, said a dot-kids domain would provide a "step forward for parents. Everyone who's a parent appreciates the difficulty of supervising their children on the Internet. This is a tool for parents," Dorgan said. "We're not censoring anything. We're just going to try to provide a domain that's safe for children."

The Senate altered the House language after NeuStar Inc., the company that would be responsible for operating dot-kids, said that running the domain could cost too much money and effort. The new language would grant NeuStar an extra two years on its four-year contract to operate dot-us if it upholds its dot-kids obligations. The legislation also would allow NeuStar to throw its hat into the ring when the government re-bids the dot-us contract.

The changes represent a potentially lucrative set of extensions for NeuStar if it abides by its contractual obligations. NeuStar's primary responsibility is to police the new domain, ensuring that Web sites bearing kids.us addresses abide by the child-friendly standards established by Congress.

"We think this has created a more fair approach to the kids.us space. It's definitely legislation we think we can work with," NeuStar Director of Business Development James Casey said.

NeuStar holds the government contract to run dot-us. Like dot-uk in England and dot-jp in Japan, dot-us is America's sovereign Internet domain, existing alongside dot-com, dot-net and dot-org in the Internet's global addressing system. Because of the Internet's hierarchical nature, domain name owners can easily use their addresses as "second-level" Internet domains. Since the U.S. government has reserved the address kids.us, it can assign a virtually infinite number of names within that address.

The dot-kids legislation represents a step back from an earlier proposal calling for the creation of a stand-alone dot-kids suffix to be included alongside dot-com, dot-net and dot-org in the Internet's Domain Name System (DNS). The U.S. Commerce Department and the Internet Corporation for Assigned Names and Numbers (ICANN) — the entities that share responsibility for the DNS—criticized that proposal, prompting the proposed compromise.

The bill now says that a Web site with a kids.us address cannot post hyperlinks to locations outside of the kids.us domain. It also prohibits chat and instant messaging features, except in cases where a site operator can guarantee the features adhere to kid-friendly standards developed for the domain. Reported in: *Washington Post*, November 15.

Philadelphia, Pennsylvania

The U.S. Court of Appeals for the Third Circuit in Philadelphia heard arguments for the second time October 29 in a lawsuit challenging the Child Online Protection Act (COPA). The appeals court had originally overturned the 1998 law, but last May, the supreme court ruled it was not ready to hear the challenge to COPA and sent it back to Philadelphia for additional proceedings. The high court, however, left in place a preliminary injunction prohibiting enforcement of the law.

During 45 minutes of oral arguments the three-judge panel seemed inclined to strike down the law again, an attorney for the American Civil Liberties Union said. "We thought the arguments went very well, and we're confident that the judges will keep the preliminary injunction against COPA in place," said Ann Beeson, an ACLU staff attorney who is arguing the case on behalf of Web publishers.

The reason the Supreme Court gave for its unusual decision was that during the first round, the Philadelphia court had not considered the problem of community standards on a borderless Internet carefully enough. COPA restricts commercial Web publishers from allowing minors access to sexually explicit material that has no scientific, literary, artistic or political value and that is offensive to local "community standards."

Hence, the Philadelphia judges had written in their June 2000 decision, COPA is overly broad because it requires Web publishers serving numerous communities to develop a system "whereby any material that might be deemed harmful by the most puritan of communities in any state is shielded."

In their ruling in May, the Supreme Court justices puzzled over whether COPA's reliance on "contemporary community standards" does in fact violate the First Amendment's guarantee of free speech—and what, exactly, the community standards concept means when applied to the global Internet.

Can a sex site hosted in Las Vegas or San Francisco be prosecuted by a U.S. Attorney in a far more conservative jurisdiction—in, say, Tennessee? Supreme Court Justice Clarence Thomas, who wrote the plurality opinion, saw no problems with the idea. "If a publisher chooses to send its material into a particular community, this Court's jurisprudence teaches that it is the publisher's responsibility to abide by that community's standards. The publisher's burden does not change simply because it decides to distribute its material to every community in the nation," he wrote.

While other justices may not have agreed outright with Thomas, they still seemed worried that if they determined COPA was unconstitutional because of the community standards argument put forth by the Philadelphia court, the

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library

Montgomery County, Texas

Montgomery County Library System Director Jerilynn Williams took the advice of a materials review committee November 19 and ordered the reinstatement of two sex-education books by Robie H. Harris to their original places on the shelves of the library. *It's Perfectly Normal*, recommended for ages ten and up, was returned to the adult section, in which all young-adult titles are intermingled; *It's So Amazing*, written for children age seven and above, went back on the nonfiction juvenile shelves.

The review committee served for the first time in reconstituted form—doubled in size so five citizen reviewers could serve alongside five librarians, an expansion motivated in the first place by the community fracas over the titles. "They have reconfirmed that the library should have a wide range of information," Williams said. The books were pulled from the shelves in August and September when the Republican Leadership Council (RLC), a conservative Christian group, asked Montgomery County Commissioners Court to remove the titles because it said they were pro-homosexual and sexually explicit. Jeff Van Fleet of the RLC said, "Right now, we have to abide by that decision."

The book removal set off an intense debate in the county, with a petition drive mounted by a group called Mainstream Montgomery County against any attempt to ban the books. It spilled over into a library bond election, which sought $10 million to build three new library facilities in Montgomery, New Caney and The Woodlands that supporters accused the RLC of trying to scuttle by creating a book-banning smokescreen. The bond issue narrowly passed two weeks before the books were restored.

Karyl Palmisano, founder of Mainstream Montgomery County, said she will continue to fight the inclusion of citizens on library boards that select books. "The books did not meet any legislative standard of either obscenity or pornography," Palmisano said. "It also was not the responsibility of Commissioners Court to circumvent the procedures in place nor to remove the books. I hope the next time we have a concern, they will follow the proper procedures."

The RLC's Van Fleet said his organization was disappointed over the decision and that it planned to return to the Commissioners Court to discuss hundreds of other titles of concern in the library system. The library has already received three new challenges, among them a complaint against *Erotic Innocence: The Culture of Child Molesting*, by James Kincaid. "These are just three of hundreds of books we have found in our libraries helping to lay the groundwork for a culture of child molesters and homosexuals," Van Fleet said. Reported in: *American Libraries* Online, November 25; *Houston Chronicle*, November 19.

universities

San Diego, California

The University of California at San Diego has withdrawn demands that a student group, the Che Cafe Collective, remove from its Web page Internet links to sites of suspected terrorist organizations. But the university still wants the student group to stop hosting a Web page, called BURN, that is within the "ucsd.edu" Internet domain and that supports one of the suspected terrorist organizations. Che Cafe, a left-leaning student group, has not indicated whether it will comply.

In October, the university sent a letter ordering the group to remove from its Web site an Internet link to the site of a Colombian rebel organization called the Fuerzas Armadas Revolucionarias de Colombia, or FARC. The rebel group is listed by the U.S. State Department as an international terrorist organization. The university was concerned that allowing the student group to maintain the link would violate the USA Patriot Act, which forbids providing "material support or resources" to a "foreign terrorist organization." Under the act, material support is defined as currency, lodging, training, or communications equipment, among other things.

Che Cafe responded that it was not providing "material support or resources," but merely offering an Internet link so that others could learn about the Colombian organization, a service that the student group maintains should be considered free speech. The American Association of

University Professors, the American Civil Liberties Union, and other organizations sent a letter to the university supporting the student group.

"Americans have a right to inform themselves about any group, no matter how abhorrent its positions," the letter states. "Acts in furtherance of terrorism are prohibited; speech about it is not."

Joseph W. Watson, the university's vice chancellor for student affairs, said the university agreed with the students that they had a right to maintain the Internet link. "Linking, obviously, is protected as free speech under the First Amendment," he said. "We went too far in mentioning linking." But the university asked that Che Cafe not use the "ucsd.edu" domain name when linking to the site of another suspected terrorist organization, the Kurdistan Workers Party, or PKK, a Marxist-Leninist group trying to establish an independent state in southeastern Turkey.

So far, the student group has not taken down the BURN page. Maintaining the site on the university's computer server isn't a violation of federal law, Watson said, but of university policy. University resources, he said, shouldn't be used to promote terrorist organizations. "What we're most concerned about is anything that implies, implicitly or explicitly, that this has anything to do with UCSD," Watson said. Reported in: *Chronicle of Higher Education* online, October 10.

Cambridge, Massachusetts

Citing concerns about freedom of speech, Harvard University's English department renewed an invitation to the Irish poet Tom Paulin to give a lecture, just a week after he was disinvited for expressing strongly anti-Israeli views. The new invitation, approved in a vote November 19, drew sharply differing responses from faculty members and students at Harvard, which has been troubled by heated debates and demonstrations about Israel in the past year. Some expressed relief, saying the university had crossed the line by disinviting a poet because of his political views. Others were outraged and said the decision would lead to renewed protests.

"I hope that those who choose to attend the planned reading will respect the rights of those who wish to hear the speaker," Harvard's president, Lawrence H. Summers, said in a statement.

Paulin's invitation was rescinded November 12 after students, faculty members and alumni expressed outrage about comments he made to an Egyptian newspaper in April. He said Brooklyn-born Jews who had settled in the West Bank "should be shot dead," adding, "I think they are Nazis, racists; I feel nothing but hatred for them." Paulin has said that his views have been distorted and that he does not support attacks on Israeli citizens under any circumstances.

Summers released an approving statement after the invitation was rescinded. But the decision to disinvite Paulin prompted a rebuke from three professors at Harvard Law School: Alan M. Dershowitz, Laurence H. Tribe and Charles Fried. In a joint letter published in *The Harvard Crimson*, they wrote that rescinding the invitation simply because it would be divisive was a "truly dangerous" precedent.

Faculty members at Harvard expressed a variety of responses to the English department's decision. "The purpose of a university is to see a variety of points of view," said Patrick Cavanagh, a psychology professor who signed a petition calling for Harvard to divest from companies doing business in Israel. "Here's a man who's a wonderful poet, and if his politics are more controversial, that's really beside the point."

Jay M. Harris, a professor of Jewish studies, called the invitation unconscionable. "Nobody is stopping him from exercising his First Amendment rights," he said. "But an invitation from Harvard is different. We wouldn't invite David Duke to speak."

For some, Paulin's political statements are complicated by his history of linking literature and politics. Paulin, who grew up in Belfast, has criticized the poet Philip Larkin as racist, and in a review several years ago wrote approvingly of a book that criticized T. S. Eliot as anti-Semitic. For some of Paulin's defenders, remarks like that prove that his rhetorical attacks on Israel are not anti-Semitic. Others say Paulin had simply invoked a standard that could and should be used against him.

"You can't say both things at the same time without there being a paradox," said Rita Goldberg, a lecturer on literature at Harvard, referring to Paulin's earlier critiques of anti-Semitism and his comments about Israel. Reported in: *New York Times*, November 21. □

(in review . . . from page 5)

Columbia's district in the U.S. Congress but was then a delegate to the Strike Committee from the West Side Democratic Club. If one critical theme of '60s history is the fracturing of liberalism, the paradox should be noted that in the student movement radicals and liberals often worked well in coalition, using the tactics of the former to sometimes achieve goals embraced more characteristically (if often belatedly) by the latter.

I might also note here that my class at Columbia produced another member of the U.S. Congress, conservative Republican Senator Judd Gregg of New Hampshire, who began his political career as a leader of the so-called Majority Coalition of conservative students who vocally and militantly organized to oppose the student unrest. The absence of such a group in the FSM is an important contrast—the FSM coalition included the Young Republicans for Goldwater, whose right to organize on campus was also restricted—although as several accounts here make clear

there certainly were students hostile to the movement. That they apparently did not organize—despite the fact that many were already participants in organized activity through the fraternity/sorority system—poses an interesting problem for the historian and it is one of this collection's few weaknesses that this is not directly addressed.

One other distinction between the Columbia strike and the FSM was in their attitudes toward the issue of educational reform. In both movements, dissatisfaction with the kind of education students were receiving in the newly emerging "multiversity," to use Clark Kerr's famous term, seems to have been an important motivating element. At Berkeley, it was the radicals who were most attracted to this issue. Liberal and moderate students were, it seems, by and large content with their education and more concerned about establishing political rights on campus and supporting civil rights in society as a whole. At Columbia, however, it was the more moderate elements who split from the overall Strike Committee to form Students for a Restructured University, whose aim, like that of some radicals in the FSM, was to use the unrest to impel reconsideration and reform of educational practices. At Columbia, it was the radicals who disdained such efforts to achieve what had come to be known as "student power" as meaningless attempts to improve the status of an already privileged group. In both institutions, however, educational reform efforts were largely unsuccessful, as the article by Julie Reuben attests for the FSM, although in both cases some faculty were roused by the rebellions to devote more attention to undergraduate education.

One thing is clear, however. It was the genius of Mario Savio to simultaneously speak both to concerns about society and concerns about the university and education, most famously in the speech that elevated him to legend, where he spoke of "a time when the operation of the machine becomes so odious, makes you so sick at heart that you can't take part . . . and you've got to make it stop." Although the FSM proclaimed itself a movement based less on leadership than participation, which according to political scientist and FSM veteran Jeff Lustig made it emblematic of the vision of a New (post-Leninist) Left, the focus of many of the essays here inevitably is on Savio's leadership role.

A deeply troubled and thoughtful man, Savio stands out as simultaneously symbolic of and unique to his time, and it is quite possible that the FSM might not have succeeded at all without him, which is what Zelnik suggests in his contribution to a section of brief tributes that concludes the book. After the FSM, Savio largely avoided visible political activism, although in his final months, he was roused to action once again when, as a nontenured lecturer at Sonoma State University, he led opposition to a new student fee proposed by the university administration, a battle he won posthumously. This "second act" is ably recounted by Sonoma professor Jonah Raskin, who is appropriately enough also a veteran of the Columbia events.

It is important to recognize that this volume might not have been so successful had it not been for Steven Silberstein, who worked in the University Library during the FSM and was one of the movement's many sympathizers. He went on to invent some of the software libraries now use to keep track of their collections. After Savio's death, Silberstein donated $3.5 million to the University to fund a Free Speech Movement Cafe in the undergraduate Moffitt Library, an endowment for humanities and social science books in Savio's memory, and an FSM archive, which the editors and authors have mined here to great advantage.

The link between the FSM and libraries is, of course, not accidental, since it may well be that nowhere is the tradition of free expression embodied in the FSM more celebrated and defended than in our nation's libraries. For this reason alone, every academic, public, and many school libraries, as well, should have this book in their collections.

"The right to conduct political activity on campus is so commonplace today that we forget it was secured at Berkeley only when the University tried to ban it and the FSM won it back in a three-month protest" (140), writes Martin Roysher. That protest has much to teach, even today. "If any single lesson emerges from this volume," writes Berkeley History Professor Leon Litwack in his preface, "it is an acknowledgment of the underlying fragility of our freedoms and of the risk of losing them if we depend on administrators, governments, or the courts to protect them. . . . History, it has been said, teaches us that it is not the rebels, it is not the curious, it is not the dissident, who endanger a democratic society but rather the unthinking, the unquestioning, the docile, obedient, silent and indifferent (xvi–xvii)."

That is indeed the main lesson of the FSM and of this important and welcome book.—*Reviewed by Henry Reichman, Associate Editor, Newsletter on Intellectual Freedom, and Professor of History, California State University, Hayward* □

(from the bench . . . from page 24)

One of the individuals was revealed to be an AOL subscriber, and Nam Tai acquired a subpoena requesting that the world's largest Internet service provider (ISP) hand over the person's identity. AOL filed a motion to quash the subpoena, however, contending that the disclosure would "infringe upon the well-established First Amendment right to speak anonymously."

The California court handling the case denied the motion, and Dulles, Va.-based AOL appealed the ruling to the Virginia Supreme Court. The court's decision to uphold the lower court's ruling is significant in that the ISP's home state decided not to get involved in what could be a sticky free speech issue, experts said.

An AOL representative said the company was disappointed with the decision. "We feel very strongly that there

are critical, important First Amendment issues at stake in this case," said Nicholas Graham.

David Sobel, general counsel at the Electronic Privacy Information Center (EPIC), said the Virginia Supreme Court had "punted on a very controversial issue" by upholding the California court's ruling. If AOL is eventually forced to turn over the identity of its subscriber, Sobel said that the move could have a potential chilling effect on how users view free speech online.

AOL was given ten days to ask the Virginia Supreme Court to reconsider its opinion and if the request is denied, the case could be appealed to the U.S. Supreme Court. Reported in: Infoworld, November 5.

Richmond, Virginia

A federal judge has ruled that law enforcement officials went too far when they tried to use evidence gathered by a known hacker to convict someone of possessing child pornography. The decision, handed down in early November, is believed to be the first to say that hacking into an Internet-connected home PC without a warrant violates the Fourth Amendment, which prohibits unreasonable searches and seizures.

"This makes it clear that law enforcement needs a search warrant to do this," said Orin Kerr, an associate professor at George Washington University Law School. Kerr said the ruling was the first of its kind.

The Virginia judge suppressed evidence of child porn possession after the defendant's lawyers argued the evidence had been illegally obtained by a hacker whose methods had received approval from law enforcement officials. The decision came out of a case in which a hacker uploaded a file to a child porn newsgroup that made it possible to track who downloaded files from the service. The uploaded file contained the SubSeven virus, which the hacker used to remotely search people's computers for porn. The hacker then played the role of a cybervigilante, sending anonymous tips to law enforcement officials alerting them to child porn files the hacker had found on people's PCs.

In one case, the hacker tipped off officials in Alabama about a doctor in that state who had downloaded files from the newsgroup. The doctor was eventually sentenced to seventeen years in prison. The hacker later contacted the same officials about a Virginia man who the hacker suspected was involved with child porn. The Alabama officials told the FBI of the hacker's suspicions. The bureau, through the Alabama officials, encouraged the hacker to send more information. Based on that further data, U.S. attorneys and state prosecutors filed numerous charges against the Virginia man, William Adderson Jarrett, related to creating and receiving child porn.

Jarrett pleaded guilty. However, his attorneys also argued that the FBI had violated Jarrett's Fourth Amendment rights when they retrieved the information, via the hacker, without a warrant. The judge agreed with that assertion, ruling that the evidence could not be used in court because the FBI had approved of hacking as a means of obtaining it, a move that violates protections against unreasonable search and seizure.

"By requesting that (the hacker) send the information," the judge's ruling said, "the FBI indicated its approval of whatever methods (the hacker) had used to obtain the information."

The decision put Jarrett's guilty plea on hold. Although U.S. prosecutors are likely to appeal the ruling, the case could be a cautionary tale for agencies that try to use hackers as an arm of law enforcement without first obtaining a warrant. The ruling also could open the door for other defendants to use similar arguments in their cases. Reported in: News.com, November 14.

encryption

San Francisco, California

The California Supreme Court ruled November 25 that a movie-industry group could not bring a lawsuit in the state's courts against Matthew Pavlovich, a former computer-engineering student who published online a code to unscramble encrypted DVD's. The court's 4–3 decision held that California does not have jurisdiction over the case because Pavlovich is not a resident of the state and because his postings did not specifically seek to harm California businesses.

The decision was hailed by the Student Press Law Center, which defends students' free-speech rights and which had filed a brief in support of Pavlovich. Officials of the organization had worried that if the movie industry 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.

"For college students, it's especially important," said Mark Goodman, executive director of the center. "They don't have the resources to defend themselves thousands of miles away."

But the court's ruling was tempered by the justices' statement that the movie-industry group probably could pursue a lawsuit against Pavlovich in Texas or Indiana. Pavlovich lives in Texas, and at the time of his Web postings, in October 1999, he was a student at Purdue University in Indiana.

"Mr. Pavlovich may still face the music—just not in California," wrote Associate Justice Janice R. Brown for the majority. Supporting her decision were Associate Justices Joyce L. Kennard, Kathryn M. Werdegar, and Carlos R. Moreno.

The court's ruling overturned a decision by the California Court of Appeal for the Sixth Appellate District, in San Jose,

which had held in August 2001 that California had jurisdiction over the case. That earlier ruling was a victory for the DVD Copy Control Association, the movie industry group that sued Pavlovich and dozens of others in December 1999.

The original lawsuit, filed in Superior Court in Santa Clara County, accused the 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," or CSS. The encryption system is designed to limit the copying of DVD's.

Pavlovich, however, countered that the state courts could not try the case because he didn't live in California and had no commercial interest in the state. The trial court and the Court of Appeal rejected that argument, but the Supreme Court narrowly agreed with Pavlovich. In the majority opinion, Justice Brown wrote that the evidence failed to show that Pavlovich "intentionally targeted California." She also noted that Pavlovich "never worked in California" and that he "owned no property in California, maintained no bank accounts in California, and had no telephone listings in California."

In a dissenting opinion, Associate Justice Marvin R. Baxter said that it would be "constitutionally fair and reasonable" for California to assert jurisdiction over the case. Joining Justice Baxter's dissent were Chief Justice Ronald M. George and Associate Justice Ming W. Chin.

Robert G. Sugarman, a lawyer for the DVD Copy Control Association, said the association was considering appealing to the U.S. Supreme Court or filing separate lawsuits in the states where the defendant lives.

Allonn E. Levy, a San Jose lawyer representing Pavlovich, praised the court's decision. "The Supreme Court's ruling will ensure that the existence of innovation, Web-based technical dialogue, and open-source development will not be stifled by mass-litigation efforts brought by international conglomerates." Reported in: *Chronicle of Higher Education* online, November 26. □

(is it legal? . . . from page 32)

decision could imperil many existing obscenity laws, which rely on similar language.

The American Library Association's Freedom to Read Foundation filed an amicus brief for the plaintiffs in September 1999. Reported in: News.com, October 30.

Pittsburgh, Pennsylvania

In a case that could have free speech ramifications for the Internet, the American Civil Liberties Union asked the Pennsylvania Supreme Court October 1 to protect the anonymity of cyberspace critics of public officials. In a legal brief appealing an Allegheny County court ruling in a defamation case, the national and Pittsburgh offices of the ACLU asked the court to require plaintiffs in such lawsuits to prove they have suffered economic harm before they can learn the identities of their critics.

"The importance of anonymous speech can't be overstated," said Witold Walczak, Pittsburgh ACLU executive director and one of the attorneys for the defendant, who is known as "John Doe" to protect his identity. "All you need to do is look at all the important political and literary documents published pseudonymously, whether it was Thomas Paine's 'Common Sense' or 'The Federalist Papers' or Mark Twain. Unless the freedom to criticize anonymously is safeguarded, a vital democratizing element of the Internet will be lost."

Thousands of similar cases have been filed across the country in an effort to unmask cyber critics but the Pittsburgh-based case is the first to make it as far as a state Supreme Court. "We're definitely on track to make law," Walczak said. "The question is whether it will be good or bad."

The case, now more than three years old, centers on the attempts by Pennsylvania Superior Court Judge Joan Orie Melvin to learn the identity of "GrantStreet99," a cyberspace critic of city and county officials. Melvin sued the anonymous Web gossip after he posted a comment online alleging she had been involved in "misconduct" in lobbying then-Gov. Tom Ridge to appoint a local attorney to a county court judicial vacancy. Melvin has denied intervening with Ridge's office on behalf of anyone seeking a judicial appointment.

After the criticisms of Melvin were posted, she complained to Internet service provider America Online, which shut down the GrantStreet99 site. The author then relocated to a computer company based in Canada. Since the end of 1999, the site ceased to be updated and finally vanished from the Internet.

Melvin didn't succeed in her first attempt to unmask GrantStreet99 when a defamation lawsuit filed in AOL's home state of Virginia was dismissed with the help of the Virginia ACLU. In November 2000, an Allegheny County Common Pleas Court judge ruled Melvin had the right to learn her critic's name. The ACLU appealed to the Pennsylvania Superior Court. That court's ruling that the order was not appealable was in turn appealed by the ACLU to the state Supreme Court, which agreed to review the case. Reported in: *Pittsburgh Post-Gazette*, October 2.

Richmond, Virginia

A three-judge panel of the U.S. Court of Appeals for the Fourth Circuit heard arguments October 28 in Virginia's appeal of last year's court ruling that overturned a 1999 law criminalizing the "knowing display" of any material online

that is deemed harmful to minors. "All we ask with this law is that commercial pornographers take reasonable measures to shield children from these materials," State Solicitor General William Hurd asserted, suggesting that requiring a credit-card number as proof of age would be "the electronic equivalent of putting the pornographic magazine behind the counter."

Plaintiff attorney Thomas W. Kirby responded that businesses whose clients rely on maintaining their privacy, such as a sex-counseling clinic for people with disabilities, would lose customers if credit cards were required to access sexually explicit information.

Asking what options the state had to shield children from objectionable material, Judge Paul V. Niemeyer said, "Have we abandoned our ability to do that just because we have an Internet? We have a need for segregating information so adults can see it and children can't."

The American Library Association's Freedom to Read Foundation is one of sixteen plaintiffs in the case. Reported in: *American Libraries* online, November 4.

electronic surveillance

Washington, D.C.

The FBI illegally videotaped suspects, improperly recorded telephone calls and intercepted e-mails without court permission in more than a dozen secret terrorism and intelligence investigations, according to an internal memorandum obtained by a member of Congress. The errors in the first three months of 2000 were considered so egregious that FBI officials in Washington launched a wholesale review of the agency's use of secret wiretaps and searches, and warned FBI field agents to do a better job of adhering to court orders, according to documents.

The newly disclosed incidents, recounted in a memo provided by the FBI to Rep. William D. Delahunt (D–MA), were the latest in a series of FBI mistakes to come to light in connection with the Foreign Intelligence Surveillance Act (FISA), which allows investigators to obtain warrants from a secret court in espionage and counterterrorism cases. The FISA program is at the center of efforts by the Justice Department since the September 11, 2001, attacks to aggressively monitor suspected terrorists, but past FBI blunders have hindered the reforms. Earlier this year, the secret FISA court, in refusing a request by the Justice Department for broader powers in seeking such warrants, publicly admonished the FBI for misrepresenting facts on more than 75 occasions.

In another instance, also in 2000, technical problems with the FBI's e-mail intercept program, formerly known as Carnivor,e resulted in the capture of communications from people not under investigation.

In the latest case, FBI officials issued an internal memorandum on April 21, 2000, warning of a sudden surge in errors by field agents in administering secret wiretaps obtained under FISA. Among the incidents cited was a case in which telephone conversations continued to be recorded even after the cell phone had been transferred to a party not under investigation, and another case in which e-mails were monitored after court permission to do so had been withdrawn.

FBI officials characterized the incidents as mistakes attributed in part to communication problems between FBI headquarters and the field, and that some agents were disciplined as a result. New procedures dramatically reduced the rate of mistakes, officials said. "The chance of making a mistake back at that time was far greater than today," said M.E. "Spike" Bowman, FBI deputy general counsel for national security, who estimated an average of ten errors out of about a thousand new warrants are reported annually. "This was extremely serious to us, and we went over everything with a fine-tooth comb. . . . FISA is a secret proceeding, and it hardly ever comes to public attention, so it's very important to us that we maintain credibility and confidence."

But Delahunt, a House Judiciary Committee member who requested information about the errors after the Carnivore problems were disclosed in media reports earlier this year, said the incidents underscored the possibility that the FISA process is being abused by law enforcement.

"If it was unintentional, it demonstrates an incredible level of incompetence," Delahunt said. Lawmakers last year granted the FBI and Justice greater latitude in using such warrants as part of the antiterrorism USA Patriot Act, but they built in provisions that would require Congress to renew the extra surveillance powers in 2005. Delahunt said the April 2000 memo, which was not disclosed to lawmakers while they were debating the Patriot Act, could cause him and other lawmakers to reconsider extending the new powers.

Sen. Patrick J. Leahy (D–VT), chair of the Senate Judiciary Committee, said Congress should be assured that the problems have been corrected before it grants broader powers to Justice and the FBI. "Honest mistakes happen in law enforcement, but the extent, variety and seriousness of the violations recounted in this FBI memo show again that the secret FISA process breeds sloppiness unless there's adequate oversight," Leahy said. Reported in: *Washington Post*, October 9.

privacy

Washington, D.C.

Without dissent, the U.S. House of Representatives passed legislation October 7 to require federal agencies to review the effects on personal privacy of any new regulations they propose and to let individuals go to court to attack those reviews as inadequate.

The bill, originally sponsored by Representative Bob Barr (R–GA) and co-sponsored by Representative Jerrold Nadler (D–NY), was supported by a wide ideological range

of interest groups from the American Civil Liberties Union to the National Rifle Association. Representative F. James Sensenbrenner, the Wisconsin Republican who heads the House Judiciary Committee, said the passage of the bill would "reaffirm our fidelity to the fundamental civil liberties cherished by all Americans."

It was unclear whether the measure would be considered in the Senate this year, where legislation to control the use of personal information gathered by the Internet has been stalled because of objections by Senator Trent Lott of Mississippi, the minority leader. But this bill, because it does not threaten any private industry whose political action committees help members win re-election, may prove more attractive to senators who want to connect with growing privacy concerns in the electorate.

The Bush administration has not taken a position on the bill. Barr said that he hoped that the White House would not oppose it. He said his bill was "a small step. For a president who said he is a privacy hawk," Barr added, "this is a perfect first step." Reported in: *New York Times*, October 7.

Washington, D.C.

The Pentagon is constructing a computer system that could create a vast electronic dragnet, searching for personal information as part of the hunt for terrorists around the globe—including in the United States. As the director of the effort, Vice Adm. John M. Poindexter, described the system in Pentagon documents and in speeches, it will provide intelligence analysts and law enforcement officials with instant access to information from Internet mail and calling records to credit card and banking transactions and travel documents, without a search warrant.

Historically, military and intelligence agencies have not been permitted to spy on Americans without extraordinary legal authorization. But Admiral Poindexter, the former national security adviser in the Reagan administration, has argued that the government needs broad new powers to process, store and mine billions of minute details of electronic life in the United States.

Admiral Poindexter, who described the plan in public documents and speeches but declined to be interviewed, said the government needs to "break down the stovepipes" that separate commercial and government databases, allowing teams of intelligence agency analysts to hunt for hidden patterns of activity with powerful computers.

"We must become much more efficient and more clever in the ways we find new sources of data, mine information from the new and old, generate information, make it available for analysis, convert it to knowledge, and create actionable options," he said in a speech in California earlier this year.

Admiral Poindexter quietly returned to the government in January to take charge of the Office of Information Awareness at the Defense Advanced Research Projects Agency, known as Darpa. The office is responsible for developing new surveillance technologies in the wake of the September 11 attacks. In order to deploy such a system, known as Total Information Awareness, new legislation would be needed, some of which was proposed by the Bush administration in the Homeland Security Act. That legislation amended the Privacy Act of 1974, which was intended to limit what government agencies could do with private information.

The possibility that the system might be deployed domestically to let intelligence officials look into commercial transactions worries civil liberties proponents. "This could be the perfect storm for civil liberties in America," said Marc Rotenberg, director of the Electronic Privacy Information Center in Washington. "The vehicle is the Homeland Security Act, the technology is Darpa and the agency is the FI. The outcome is a system of national surveillance of the American public."

An F.B.I. official said the bureau had preliminary discussions with the Pentagon about the project but that no final decision had been made about what information the FBI might add to the system. A spokesman for the White House Office of Homeland Security, Gordon Johndroe, said officials in the office were not familiar with the computer project and he declined to discuss concerns raised by the project's critics without knowing more about it.

Some members of a panel of computer scientists and policy experts who were asked by the Pentagon to review the privacy implications this summer said terrorists might find ways to avoid detection and that the system might be easily abused. "A lot of my colleagues are uncomfortable about this and worry about the potential uses that this technology might be put, if not by this administration, then by a future one," said Barbara Simon, a computer scientist who is past president of the Association of Computing Machinery. "Once you've got it in place, you can't control it."

Other technology policy experts dispute that assessment and support Admiral Poindexter's position that linking of databases is necessary to track potential enemies operating inside the United States.

"They're conceptualizing the problem in the way we've suggested it needs to be understood," said Philip Zelikow, a historian who is executive director of the Markle Foundation task force on National Security in the Information Age. "They have a pretty good vision of the need to make the tradeoffs in favor of more sharing and openness."

If deployed, civil libertarians argue, the computer system would rapidly bring a surveillance state. They assert that potential terrorists would soon learn how to avoid detection in any case. The new system will rely on a set of computer-based pattern recognition techniques known as "data mining," a set of statistical techniques used by scientists as well as by marketers searching for potential customers. The system would permit a team of intelligence

analysts to gather and view information from databases, pursue links between individuals and groups, respond to automatic alerts, and share information efficiently, all from their individual computers.

The project calls for the development of a prototype based on test data that would be deployed at the Army Intelligence and Security Command at Fort Belvoir, Virginia. Officials would not say when the system would be put into operation. The system is one of a number of projects now under way inside the government to lash together both commercial and government data to hunt for patterns of terrorist activities.

"What we are doing is developing technologies and a prototype system to revolutionize the ability of the United States to detect, classify and identify foreign terrorists, and decipher their plans, and thereby enable the U.S. to take timely action to successfully pre-empt and defeat terrorist acts," said Jan Walker, of the defense research agency.

Before taking the position at the Pentagon, Admiral Poindexter, who was convicted in 1990 for his role in the Iran-contra affair, had worked as a contractor on one of the projects he now controls. Admiral Poindexter's conviction was reversed in 1991 by a federal appeals court because he had been granted immunity for his testimony before Congress about the case. Reported in: *New York Times*, November 9.

government regulation

Washington, D.C.

After losing a series of court decisions that found it in violation of the First Amendment's guarantee of freedom of speech, the Food and Drug Administration has begun a wide-ranging review of regulations that control what the makers of drugs, supplements, food and cosmetics can say about their products. At issue is the delicate balance between a company's right to communicate with its customers and the food and drug agency's mandate to protect the public.

But the court decisions, which included a stinging rebuke from the Supreme Court in April, have prompted the agency to ask whether it may, at times, have gone too far in its insistence that it decides when scientific truth has been established and what companies can say. At issue are regulations governing everything from what a drug company can print on a T-shirt to what a sales representative can say in the privacy of a doctor's office. No one is advocating that false or inaccurate claims be permitted. But agency officials are asking questions like whether they can continue to prevent food companies from making health claims for their products and whether they can continue to insist that drug advertising include a full accounting of side effects and conditions that may make the drug inadvisable.

The review began with a notice in *The Federal Register* on May 16 inviting interested parties to comment on "First Amendment issues." Hundreds replied, with wish lists, cries of alarm, hefty documents from drug company lawyers and notes from consumers who want the agency to take all shackles off the supplement industry. The comment period ended on September 13, and those who wish to respond to comments had until October 28. Over the next months, the agency will review the comments and decide what changes, if any, to propose in its regulations. It also expects to get a new commissioner, Dr. Mark B. McClellan, who was nominated by President Bush in late September. "No decision will be made without his involvement and approval," said Daniel Troy, the agency's chief counsel.

The review is not just an academic exercise, warns Dr. David A. Kessler, who was the agency's commissioner from 1990 to 1997. "It represents a frontal attack on the fundamental responsibilities of the agency under the Food, Drug and Cosmetic Act," said Dr. Kessler, who is now the dean of Yale's School of Medicine. "I have great concerns that this is simply an attempt to deregulate while doing it in the name of the First Amendment."

Others said the review is long overdue. Jonathan Emord, a lawyer who sued the F.D.A. on behalf of the First Amendment rights of supplement manufacturers and won, says the agency has long been treading on shaky legal ground. "We are advocating that the F.D.A. undergo a change in regulatory mind-set, a First Amendment sensitivity training," Emord said. "They take the position that science must be interpreted for the public and given to them piecemeal when the regulators decide it is proven. That role of being a gatekeeper is precisely what the First Amendment was designed to prevent." Until now, the agency's position has been that it decides what companies can say and how they can say it. Its mission of protecting the public health, the agency argued, gives it broad authority to regulate commercial speech. But Troy said recent court rulings have given the agency pause.

On April 29, the Supreme Court bluntly informed the agency that it was being overly paternalistic. The question before the court was whether pharmacies that made specialized mixtures of prescription drugs could advertise or promote their products. Troy, arguing for the F.D.A., said that if pharmacies were allowed to do so, they would essentially be selling prescription drugs without demonstrating safety and efficacy.

"Why spend the millions of dollars to come through our approval process?" Troy asked. "It's our fundamental power to approve drugs before they come on the market." But the Supreme Court said that restricting free speech should be a last resort, writing, "We have previously rejected the notion that the government has an interest in preventing the dissemination of truthful commercial infor-

mation in order to prevent members of the public from making bad decisions with the information."

Two other rulings by lower courts rebuked the agency on similar grounds. In 1998, the U.S. District Court for the District of Columbia overturned F.D.A. regulations preventing companies from freely distributing information about unapproved uses for approved drugs and devices. (The agency's challengers were represented by Mr. Troy, a constitutional lawyer who was in private practice before coming to the F.D.A. in 2001.) The court said it was not enough for the agency to argue that it was protecting the public. "To the extent that the F.D.A. is endeavoring to keep information from physicians out of concern that they will misuse that information," the court said, "the regulation is wholly and completely unsupportable." The decision was vacated on appeal.

Another ruling, in 1999, involved the F.D.A.'s refusal to allow dietary supplement makers to put four health claims on their labels. The agency said the claims failed its test of "significant scientific agreement." But the United States Court of Appeals for the District of Columbia Circuit held that the First Amendment requires a "preference for disclosure over outright suppression."

With this background, Troy remarked, "some have said that it would be almost legal malpractice if we did not think about the implications of the First Amendment decisions that came down recently." He added, "As a lawyer, my job is to prevent the agency from being sued, and losing."

In comments to the F.D.A., many companies said regulations were needed to protect the public health, but asked that some of the current ones be relaxed. Dr. Rhona Applebaum, executive vice president for scientific and regulatory affairs at the National Food Processors Association, described agency regulations as "command and control." Dr. Applebaum added: "The way it stands now, any type of implied disease benefit, the agency throws it into our faces: 'No, you can't do it. You need a new drug approval.' We're saying no way, not if the information we are providing is substantiated by science."

For example, Dr. Applebaum said, many studies suggest that dietary calcium is associated with lower blood pressure. But the F.D.A. does not find the evidence conclusive. Food manufacturers would be happy to put in disclaimers, she said. "You could say, 'While inconclusive, new research seems to indicate . . .' or 'Preliminary evidence suggests that calcium promotes healthy blood pressure.' But right now we can't say it."

Manufacturers of drugs and medical devices requested more leeway in distributing articles on new uses of their products. Once a drug or medical device is approved for one use, doctors can use it for any other purpose, at their discretion. But the F.D.A. says that if a company distributes articles on unapproved uses of a product, that is tantamount to promoting it.

Boston Scientific, which makes medical devices, questioned those regulations. Tony Blank, the company's manager of corporate regulatory affairs, said the company could not even provide a published paper on the risks of using one of its devices in an unapproved way. "When it becomes most concerning is when the information the company wants to provide has additional warnings to protect the patient," Blank said.

Dr. Kessler, the former F.D.A. commissioner, said that such arguments may sound reasonable, but added that articles may be technically accurate but not true. "Let's say there are one hundred studies on a drug and one of those studies says the drug has an effect on cancer," Dr. Kessler said. "Ninety-nine studies show the drug does not have such effects. It is an accurate statement that a study has found that the drug affects tumors. But it is not true."

That is why, Dr. Kessler said, the F.D.A. insists on evaluating all the relevant scientific data. It is the reason for its regulations on what can be on food and drug labels, what companies can say about drugs and medical devices that are not yet approved for marketing, what they can say about unapproved uses for their products and what they can say when they advertise drugs to consumers.

The concern that the statements be true, not just accurate, he said, is why the agency "requires companies and the agency to look at all the data and base their statements not on whether something is technically accurate but whether it is supported by the weight of the evidence."

Some, like David Vladeck, a lawyer who heads the litigation group for Public Citizen, a consumer advocacy group, said that there are real questions here, but that does not mean the answer is to deregulate. "Given the resources that the agency and the industry have devoted to this issue, I would be astonished if nothing comes of it," Vladeck said. "I know Dan Troy. He's a bright and engaging guy. But he's not just spinning his wheels."

Troy said he was merely opening to the public what might otherwise be a private discussion within the agency. "The irony is, some who criticize us for doing it are in favor of public participation," he said. "The further irony is, it is not as if these questions would go away if we didn't ask them. We would just have to wrestle with them within the agency." Reported in: *New York Times*, October 15. □

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