

newsletter
on
intellectual
freedom



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ALA President's statement to Judiciary Committee

The following is the text of a public statement submitted to the Judiciary Committee of the U.S. Senate by ALA President Carla Hayden on the occasion of the Committee's hearing, "America after 9/11: Freedom Preserved or Freedom Lost?" held November 18. One of the focuses of the hearing was the implementation of the USA PATRIOT Act. Oral testimony was also presented by Bob Barr, Former United States Representative, Atlanta, GA; Viet Dinh, Professor, Georgetown University Law Center, Washington, D.C.; James Zogby, Arab American Institute, Washington, D.C.; James X. Dempsey, Center for Democracy and Technology, Washington, D.C.; Robert Cleary, Proskauer Rose, LLP, New York, NY; Nadine Strossen, President, American Civil Liberties Union, New York, NY; Muzaffar Chishti, Director, Migration Policy Institute at New York University School of Law, New York, NY.

The American Library Association affirms the responsibility of the leaders of the United States to protect and preserve the freedoms that are the foundation of our democracy, and we are committed to ensuring that our country is safe and secure. We believe, and we practice the belief, that the free flow of information and ideas are at the core of what we seek to protect, of what makes our country strong. Vibrant discussion and expression and the ability to research both broadly and deeply are what have made the United States a beacon of freedom and they are what keep us strong.

The ALA has long opposed efforts to censor, control, or oversee the information sought by the public, particularly in libraries. Privacy is essential to the exercise of free speech, free thought, and free association and lack of privacy and confidentiality chills users' choices, and can have the same effect as the suppression of ideas. The possibility of surveillance, whether direct or through access to records of speech, research and exploration, undermines a democratic society. Libraries are a critical force for promoting the free flow and unimpeded distribution of knowledge and information for individuals, institutions, and communities.

The American public has clearly conveyed, through the passage, in three states and 210 localities, of resolutions, ordinances or ballot initiatives protecting the civil liberties

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*Published by the ALA Intellectual Freedom Committee,
Nancy C. Kranich, Chair*

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FBI snoops on antiwar rallies

The Federal Bureau of Investigation has collected extensive information on the tactics, training and organization of antiwar demonstrators and has advised local law enforcement officials to report any suspicious activity at protests to its counterterrorism squads, according to interviews and a confidential bureau memorandum reported in the *New York Times*.

The memorandum, which the bureau sent to local law enforcement agencies in October in advance of antiwar demonstrations in Washington and San Francisco, detailed how protesters have sometimes used "training camps" to rehearse for demonstrations, the Internet to raise money and gas masks to defend against tear gas. The memorandum analyzed lawful activities like recruiting demonstrators, as well as illegal activities like using fake documentation to get into a secured site.

FBI officials said the intelligence-gathering effort was aimed at identifying anarchists and "extremist elements" plotting violence, not at monitoring the political speech of law-abiding protesters.

The initiative won the support from some local police, who view it as a critical way to maintain order at large-scale demonstrations. Indeed, some law enforcement officials said they believed the FBI's approach had helped to ensure that nationwide antiwar demonstrations in recent months, drawing hundreds of thousands of protesters, remained largely free of violence and disruption.

But some civil rights advocates and legal scholars said the monitoring program could signal a return to the abuses of the 1960s and 1970s, when J. Edgar Hoover was the FBI director and agents routinely spied on political protesters like the Rev. Dr. Martin Luther King Jr.

"The FBI is dangerously targeting Americans who are engaged in nothing more than lawful protest and dissent," said Anthony Romero, executive director of the American Civil Liberties Union. "The line between terrorism and legitimate civil disobedience is blurred, and I have a serious concern about whether we're going back to the days of Hoover."

Herman Schwartz, a constitutional law professor at American University who has written about FBI history, said collecting intelligence at demonstrations is probably legal. But he added: "As a matter of principle, it has a very serious chilling effect on peaceful demonstration. If you go around telling people, 'We're going to ferret out information on demonstrations,' that deters people. People don't want their names and pictures in FBI files."

The abuses of the Hoover era, which included efforts by the FBI to harass and discredit Hoover's political enemies under a program known as Cointelpro, led to tight restrictions on FBI investigations of political activities. Those restrictions were relaxed significantly last year, when Attorney General John Ashcroft issued guidelines giving agents authority to attend political rallies, mosques and any event "open to the public."

Ashcroft said the September 11 attacks made it essential that the FBI be allowed to investigate terrorism more aggressively. The bureau's recent strategy in policing demonstrations is an outgrowth of that policy, officials said.

"We're not concerned with individuals who are exercising their constitutional rights," one FBI official commented. "But it's obvious that there are individuals capable of violence at these events. We know that there are anarchists that are actively involved in trying to sabotage and commit acts of violence at these different events, and we also know that these large gatherings would be a prime target for terrorist groups."

Civil rights advocates, relying largely on anecdotal evidence, have complained for months that federal officials have surreptitiously sought to suppress the First Amendment rights of antiwar demonstrators. Critics of the Bush administration's Iraq policy, for instance, have sued the government to learn how their names ended up on a "no fly" list used to stop suspected terrorists from boarding planes. Civil rights advocates have accused federal and local authorities in Denver and Fresno, California, of spying on antiwar demonstrators or infiltrating planning meetings. And the New York Police Department this year questioned many of those arrested at demonstrations about their political affiliations, before halting the practice and expunging the data in the face of public criticism.

The FBI memorandum, however, appears to offer the first corroboration of a coordinated, nationwide effort to collect intelligence regarding demonstrations. Circulated on October 15, just ten days before many thousands gathered in Washington and San Francisco to protest the American occupation of Iraq, the memorandum noted that the bureau "possesses no information indicating that violent or terrorist activities are being planned as part of these protests" and that "most protests are peaceful events."

But it pointed to violence at protests against the International Monetary Fund and the World Bank as evidence of potential disruption. Law enforcement officials said in interviews that they had become particularly concerned about the ability of antigovernment groups to exploit demonstrations and promote a violent agenda.

"What a great opportunity for an act of terrorism, when all your resources are dedicated to some big event and you let your guard down," a law enforcement official involved in securing recent demonstrations said. "What would the public say if we didn't look for criminal activity and intelligence at these events?"

The memorandum urged local law enforcement officials "to be alert to these possible indicators of protest activity and report any potentially illegal acts" to counterterrorism task forces run by the FBI. It warned about an array of threats, including homemade bombs and the formation of human chains.

The memorandum discussed demonstrators' "innovative strategies," like the videotaping of arrests as a means of

“intimidation” against the police. And it noted that protesters “often use the Internet to recruit, raise funds and coordinate their activities prior to demonstrations.”

“Activists may also make use of training camps to rehearse tactics and counter-strategies for dealing with the police and to resolve any logistical issues,” the memorandum continued. It also noted that protesters may raise money to help pay for lawyers for those arrested.

FBI counterterrorism officials developed the intelligence cited in the memorandum through firsthand observation, informants, public sources like the Internet, and other methods, officials said. Officials said the FBI treats demonstrations no differently than other large-scale and vulnerable gatherings. The aim, they said, was not to monitor protesters but to gather intelligence.

Critics said they remained worried. “What the FBI regards as potential terrorism,” Romero said, “strikes me as civil disobedience.” Reported in: *New York Times*, November 23. □

Congress appears set to override FCC

Advocates of strict limits on ownership of television stations expressed confidence November 20 that Congressional negotiators would resist White House pressure to allow broadcast networks to buy more local stations. The previous day House and Senate negotiators agreed to block changes adopted by the Federal Communications Commission that allow the networks to buy stations that reach as many as 45 percent of the nation’s television viewers, up from 35 percent now.

The rebuff to the commission, backed by large majorities in both chambers, was added by conference negotiators to a \$285 billion omnibus spending bill intended to keep large portions of the federal government operating through next year. The White House has threatened to veto any bill that turns back the commission’s plan to ease ownership limits.

“We’ve been very public with our position, and that hasn’t changed,” said J. T. Young, a spokesman for the White House budget office, which said that the relaxed limits “more accurately reflect the changing media landscape.”

But supporters of the limits, including several Republicans, said they did not take the veto threat very seriously. President Bush has yet to veto a single piece of legislation and is considered unlikely to block a broad spending bill that keeps the government operating. Doing so could annoy members of Congress, who were hoping to recess for the rest of the year.

A senior Republican leadership aide said that Congressional leaders would know whether the White House was serious about vetoing the omnibus bill and that they had not received a strong signal of opposition. Senator Ted Stevens (R-AK) chairman of the Appropriations Committee, said that he and other opponents of the FCC’s plan might get a reproof from the White House but not a veto.

Gene Kimmelman, Washington director of the Consumers Union and an opponent of the relaxed limits, said Republican negotiators would not have agreed to the provision blocking the FCC plans without tacit administration consent.

“I believe this is finally it,” he said. “This signals that the White House has capitulated on this issue in the face of enormous bipartisan support for the lower ownership cap and an avalanche of public outrage about large media companies becoming even larger.”

In July, the House voted 400 to 21 to roll back the commission’s rule, supported by a coalition of liberal and conservative groups with concerns about network programming and the concentration of broadcast ownership. The Senate took a similar stand in September on a 55-to-40 vote.

Sen. Byron L. Dorgan (D-ND), a strong opponent of the commission’s action, said the willingness of negotiators to defy the administration demonstrated the depth of feeling on the issue around the country, which has made itself felt via mailrooms and switchboards across Capitol Hill. “Obviously, the administration completely misjudged the reaction of the American people to this move,” Dorgan said. “If they were out there talking to people, they would know about all the trash that people feel is coming over their transom through television sets and radios. People sense there isn’t much they can do about it because of the lack of localism in broadcasting.”

The conference agreement does not affect two other related rules issued by the FCC last summer, one that would relax limits on how many stations a broadcaster could own in a single market and another that would allow a broadcaster to own a dominant daily newspaper in the same local market. The Senate voted to roll back both of those rules, but the House did not, and negotiators included the limits on national ownership only in the conference report. Reported in: *New York Times*, November 21. □

Internet filters and public libraries report now available

Internet Filters and Public Libraries, by David L. Sobel, is a new First Report now available from the First Amendment Center at www.firstamendmentcenter.org. Sobel, general counsel of the Electronic Privacy Information Center, examines the effects of the U.S. Supreme Court’s June 2003 ruling in *U.S. v. American Library Association*, which declared the Children’s Internet Protection Act constitutional. CIPA mandates that libraries accepting federal funds install filtering software to block access to material that is “obscene,” “child pornography” or “harmful to minors.”

“Even as it recognized that ‘a filter set to block pornography may sometimes block other sites that present neither obscene nor pornographic material,’” Sobel writes, “the Court ruled that CIPA does not violate patrons’ First Amendment

rights. The Court's decision relied heavily on the 'ease' with which patrons may have filtering software disabled and the capacity of libraries to permanently unblock any erroneously blocked site," wrote Sobel. He foresees that the narrow focus of the high court's ruling "may set the stage for continuing controversy—and more litigation—as libraries across the country install filtering systems and respond to patron requests for access to blocked material." □

“digital divide” persists

While public schools have made huge improvements in providing computer and Internet access, minority and poor students lack computer access outside of regular school hours, according to two new reports released today by the National Center for Education Statistics in the U.S. Education Department's Institute of Education Sciences (IES).

“The pace of technological change is truly astounding and has left no area of our lives untouched, including schools,” said U.S. Secretary of Education Rod Paige. “These reports are good news and show how much progress has been made in connecting nearly every school in the nation to the Internet. But there are still big differences in home computer use that need to be addressed before we can declare the digital divide closed.

“We need to address the limited access to technology that many students have outside of school. There is much more we can do. Closing the digital divide will also help close the achievement gap that exists within our schools.”

The first report, “Internet Access in U.S. Public Schools and Classrooms: 1994–2002,” is an annual department survey conducted to report on the availability and use of technology in schools. Among its findings:

- In 1994, 3 percent of classrooms in U.S. public schools had access to the Internet; in the fall of 2002, 92 percent had Internet access; in 1994, 35 percent of schools had access; and in fall 2002, 99 percent had access.
- In 2002, the ratio of students to instructional computers with Internet access in public schools was 4.8 to 1, an improvement from the 12 to 1 ratio in 1998 when it was first measured.
- In 2002, the ratio of students to instructional computers with Internet access was higher in schools with the highest poverty concentration than in schools with the lowest. Despite this gap, in schools with the highest poverty concentration, the ratio improved from 6.8 students per computer in 2001 to 5.5 in 2002.
- In 2002, 53 percent of public schools with access to the Internet reported that they made computers available to students outside of regular hours (96 percent after school, 74 percent before school, 6 percent on weekends).
- Eighty-six percent of public schools reported that they had a Web site or Web page (75 percent in 2001).

- Eighty-seven percent of public schools with Internet access indicated that their school or school district had offered professional development to teachers in the schools to help them integrate the use of the Internet into the curriculum in the 12 months prior to the survey.
- Schools used various means to control student access to inappropriate material on the Internet. Ninety-six percent used blocking software, 91 percent reported that teachers monitored students' access, 82 percent had a written agreement that parents have to sign, 77 percent had contracts that the students had to sign, 41 percent had honor codes and 32 percent allowed access only to an intranet.

To access the report, visit <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2004011>.

The second report, “Computer and Internet Use by Children and Adolescents in 2001,” shows that computer and Internet access has become an important component of schoolwork, but that a digital divide still exists:

- Many children use technology to complete school work: 44 percent use computers and 42 percent use the Internet for their assignments.
- The digital divide still exists in homes: 41 percent of blacks and Hispanics use a computer at home compared to 77 percent of whites.
- Only 31 percent of students from families earning less than \$20,000 use computers at home, compared to 89 percent of those from families earning more than \$75,000.
- White students are more likely than black and Hispanic students to use home computers for completing school assignments (52 percent vs. 28 percent vs. 27 percent).
- However, racial and ethnic differences in the use of computers seem largely to be a function of home access. No significant differences in usage to complete homework assignments were detected between racial/ethnic groups who had computer access at home.

This report can be downloaded at <http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2004014>. □

NTIA releases report on filtering

On August 15, the National Telecommunications and Information Agency (NTIA) of the U.S. Department of Commerce released a report pursuant to section 1703 of the Children's Internet Protection Act (CIPA), evaluating the effectiveness of technology protection measures and safety policies used by educational institutions. The Act requested NTIA to evaluate whether the currently available Internet blocking or filtering technology protection measures and Internet safety policies adequately address the needs of educational institutions. CIPA also invited NTIA's recommendations to Congress on how to foster the development of technology protection measures that meet these needs.

NTIA's report concludes that the currently available technology measures have the capacity to meet most of the needs and concerns of educational institutions and makes the following recommendations: (1) technology vendors should offer training services to educational institutions on specific features of their products; and (2) expand CIPA's definition of "technology protection measures" to include additional technologies in order to encompass a wider array of technological measures to protect children from inappropriate content.

Following is the text of the report's Executive Summary:

In homes, schools, and libraries across the nation, the Internet has become a valuable and even critical tool for our children's success. Access to the Internet furnishes children with new resources with which to learn, new avenues for expression, and new skills to obtain quality jobs. Our children's access to the Internet, however, can put them in contact with inappropriate and potentially harmful material. Some children inadvertently confront pornography, indecent material, hate sites, and sites promoting violence, while other children actively seek out inappropriate content. Additionally, through participation in chat rooms and other interactive dialogues over the Internet, children can be vulnerable to online predators.

Parents and educators have access to a variety of tools that can help protect children from these dangers. In October 2000, Congress passed the Children's Internet Protection Act (CIPA), which requires schools and libraries that receive federal funds for discounted telecommunications, Internet access, or internal connections services to adopt an Internet safety policy and employ technological protections that block or filter certain visual depictions deemed obscene, pornographic, or harmful to minors. Congress also requested the Department of Commerce's National Telecommunications and Information Administration (NTIA) to (1) evaluate whether the technology measures currently available adequately address the needs of educational institutions, and (2) evaluate the development and effectiveness of local Internet safety policies. Congress also invited any recommendations from NTIA as to how to foster the development of measures that meet these needs. This report sets forth NTIA's public outreach, including comments received through a Request for Comment, its evaluation, and recommendations.

With respect to whether the technology measures currently available address the needs of educational institutions, the commenters identified the following needs of educational institutions:

- balancing the importance of allowing children to use the Internet with the importance of protecting children from inappropriate material;
- accessing online educational materials with a minimum level of relevant content being blocked;
- deciding on the local level how best to protect children from Internet dangers;
- understanding how to fully utilize Internet protection technology measures;

- considering a variety of technical, educational, and economic factors when selecting technology protection measures; and
- adopting an Internet safety strategy that includes technology, human monitoring, and education.

Based on a review of the comments, currently available technology measures have the capacity to meet most, if not all, of these needs and concerns. Accordingly, NTIA makes the following two recommendations to Congress on how to foster the use of technology protection measures to better meet the needs of educational institutions:

- Technology vendors should offer training services to educational institutions on the specific features of their products.
- CIPA's definition of "technology protection measure" should be expanded to include more than just blocking and filtering technology in order to encompass a vast array of current technological measures that protect children from inappropriate content.

Finally, commenters expressed a great deal of satisfaction regarding the development and effectiveness of Internet safety policies. Specifically, they praise the ability to customize these policies to address the concerns of individual communities. Based on the comments, NTIA has identified best practices for use in developing Internet safety policies.

in review

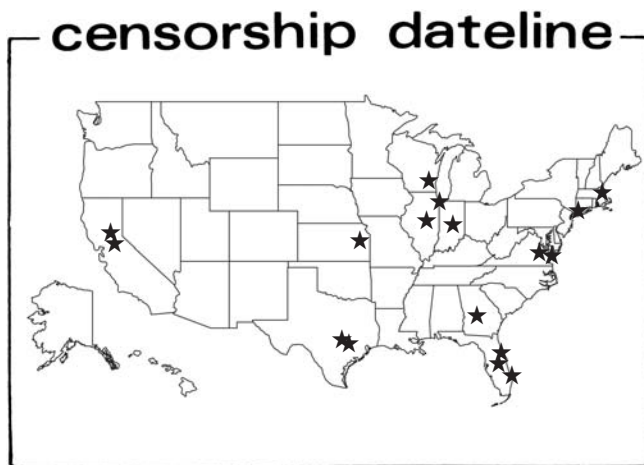
The War on the Bill of Rights and the Gathering Resistance. Nat Hentoff. Seven Stories Press, 2003. 176 p. \$18.00.

It is clear that Hentoff sees this moment of government inroads on civil liberties and unlikely coalitions of resistance as a pivotal point in American history. In his Epilogue, he quotes two hundred years of patriots on the need for each generation to recommit itself to liberty and says Ashcroft and Bush, "Unwittingly have become increasingly effective educators of more and more Americans in why—as William O. Douglas emphasized—"The conscience of this nation is the Constitution."

Hentoff's columns have also contributed to that education. Nevertheless, collected together, they are more repetitious than organized. The 35 short chapters, covering events through June 2003, rarely exceed four pages and their titles are really headlines. Because the chapters are more or less chronological, new developments cause Hentoff to revisit some issues several times. As a result, the index is a more effective guide to the contents than the table of contents. Though these factors will not make it easy going for students, having the material in one book will aid civil libertarians.

Historical precedents, current individuals and organizations, and lump-in-the-throat quotations are scattered throughout the book. Hentoff shows how the open-ended-

(continued on page 34)



libraries

Sacramento, California

Some books at Sacramento’s main library generated complaints that they appear to promote pedophilia. The books were temporarily removed from public view in early October.

The display was on the main library’s second floor. Four cases show old gay and lesbian paperback books from a private collection. There is no sign explaining what the display is or why it’s there. A staff member was disturbed by two of the books: *Never The Same Again*, which shows a man and a boy on the cover; and *To Want A Boy*, with a drawing implying an adult-child sexual relationship. “It is clearly in the eye of the beholder. It does not specifically say this is representative (of a) specific illegal act. So I would leave it to the beholder to make the decision as to what they believe is displaying in the display case,” said library director Anna Marie Gold.

The books came from the Lavender Library on 21st Street. “Since I was not involved in choosing the display of the books, I can’t answer the original intent of the individual who chose those materials,” Gold said.

Gold said the display did not condone illegal activity. “We have any number of materials here on murder, let’s say. I don’t think most people think libraries support murder in the community,” Gold said.

The head librarian at the main library decided to temporarily remove the two books in question for further review. Reported in: KCRAchannel.com, October 3.

Ocala, Florida

Marion County’s policy for handling library book challenges imploded October 28 under the weight of its own ambiguity. Citizen library advisers, faced with resolving two conflicts regarding controversial books, bogged down over the shortest word in the English language and ultimately acknowledged that the current method is too open-ended as to when such protests are fully resolved.

But the Marion County Public Library Advisory Board also concluded that it will have to stumble along under the poorly written version in handling those appeals—a decision that was deemed fair to the patrons who submitted the appeals but which may only add controversy to a politically charged issue.

At its monthly meeting, the board decided action was needed to prevent the number of book challenges from mushrooming. Panelists were in the process of hammering out the process for handling an appeal to the chief librarian’s precedent-setting decision to remove a book from the library because of its content. Midway through their discussion, they were handed a second protest, this time to a book that was retained in the library collection.

The first appeal involved *Eat Me*, an Australian best seller featuring the explicitly detailed sexual adventures of four 30-something women. Linda Jaivin’s debut novel explores feminism and gender politics through her protagonists often comical sexual exploits and fantasies, including many that involve food.

Library Director Julie Sieg yanked the book from the shelf in August, the first such occurrence in her ten-year tenure. She cited the library’s lack of a designated erotica collection and noted that *Eat Me* met only three of seventeen criteria used to evaluate books for acquisition.

The second book, *A Stone in My Hand*, is a children’s novel written for fifth-to eighth-graders. The author, Cathryn Clinton, offers a decidedly pro-Palestinian view of the conflict between Israel and the Palestinians during the late 1980s. The book relates a fictional account of an 11-year-old Palestinian girl’s struggle with the death of her father, ironically at the hands of a terrorist group, and her brother’s determination to join with the terrorists.

A patron requested that it be removed, saying it was unbalanced and anti-Israeli. Sieg declined and determined it would stay in the library’s collection. She gave it high marks in sixteen of the seventeen categories, according to her report to the patron.

Among other things, Sieg wrote that the topic is relevant and that “there appears to be a tendency in the American culture to favor the Israeli side of the conflict, and the opposing viewpoint is less accessible to us.”

Ocala resident Steve Klein appealed the decision. In his own letter, Klein wrote that “this book will help to further hatred of Jews, anti-Semitism, and hatred of Israel, on the part of children, the target audience.” Klein also argued that the Israelis are likened to the Nazis.

The emotion generated by Sieg’s recent rulings was clearly evident inside the tiny conference room where the

session was held. Board member Pat Strait called *A Stone in My Hand* a “very, very one-sided book” and noted that anti-Semitism reeks throughout it. She admitted she hadn’t read it all, but asserted one didn’t need to do so to draw that conclusion.

Jan Cameron, another board member, lashed out. “If we keep up this censorship we’re going to soon be burning books. . . . I don’t want the government in my life . . . and we’re telling people what they can read and what they can’t read,” Cameron said.

Two other members, however, said it wasn’t clear whether the board could do that. Norman Cates and John McKeever indicated that they read the library’s policy for handling challenges and needed a definition of the word “a.”

The policy specifies that “a patron” may appeal Sieg’s decisions regarding books. Both men said it was unclear whether that meant any patron could protest or if only the person who originally questioned a book had the right to object to Sieg’s findings.

But board member Barbara Fitos countered that “a,” in that sense, meant any. That was the only way to get broad-based public comment on such decisions.

The board then debated who had the final say over whether a book stays or goes. The policy states that the library board will review the appeal and subsequent ruling and at the end of the process take a roll call vote that amounts to a written recommendation to be submitted to Sieg, the county administrator and the complaining patron.

“It doesn’t say what happens after that,” board chair Terry Blaes noted. “The policy is not clear and leaves everything hanging.” Sieg suggested that meant the decision to keep or scuttle a book belonged to her and County Administrator Pat Howard. But Brian Creekbaum, a regular board watcher and leader of a group who fought to keep another controversial book in the library a few years ago, balked. This was the first time anyone mentioned the county administrator should be involved and argued that policy should be interpreted to mean the final choice belongs to the board.

“There has to be some venue for patrons affected by these decisions. This board is the only venue any patron has for airing complaints,” he said.

Former board member Eddie MacCausland shot back that removing books could only be called censorship if such books were not available anywhere else in the community. “It’s not censorship but common sense and bringing a sense of morality into the community.”

The board agreed to address the two books in question at a meeting in December. They will embark on rewriting the challenge policy after January 1. Reported in: *Ocala Star Banner*, October 29.

Spring Hill, Florida

A 30-year-old novel by popular children’s author Judy Blume could be stripped from Hernando County school libraries. Officials at Spring Hill Elementary School already

have removed *Deenie* from circulation after a parent complained about passages that talk frankly about masturbation. The book chronicles the life of a seventh-grade girl dealing with curvature of the spine.

“What she read isn’t bad,” said mom Jerri Trammell, who complained to Spring Hill principal John DiRienzo. “I just don’t want her to learn about it from Judy Blume.”

Trammell said her daughter brought the book home as part of the school’s Accelerated Reader program, which includes tests. Her daughter read the passages aloud, stunning Trammell.

“It gave a very detailed description of it, as well as a discussion,” Trammell said. “I feel that subject is not appropriate in any form in an elementary school.”

Margaret Cushing, the school’s media specialist, said she recently reordered the book, which is rated a “best book” by the American Library Association. “I would not have let anyone under fourth grade check it out,” Cushing said. “I would not have censored the book, but I would have led their attention somewhere else.”

When she read passages aloud to the school’s media advisory committee, though, Cushing could tell “the pulse of that committee was that book should not have been on the shelf.”

Unable to resolve the issue at the school, Spring Hill Elementary administrators sent the question of whether *Deenie* should remain to a county-level committee comprised of a curriculum specialist, an administrator, two teachers, a parent, a student, a community member, and a staff member from the public library system. That committee will recommend action to the superintendent, who in turn will advise the school board, which has the final say under a policy adopted in 1998.

Board chair John Druzbeck said he was pleased the district policy, created after a challenge to *I Know Why the Caged Bird Sings*, was being followed. “That’s the right thing to do,” Druzbeck said.

Blume, the author of 25 books, said she was surprised and upset after learning of the challenge. “It’s been a while since I heard anything [negative] about *Deenie*,” she said. “I’ve had so many wonderful letters about *Deenie* recently. We’re probably going to make a movie about *Deenie*. It just really got to me this time.”

A board member of the National Coalition Against Censorship, Blume expressed dismay with people who would rather take away materials than discuss tough issues with their children. “You take a book away from a child—it’s, well, why? You need to explain why,” she said. “It isn’t a book about masturbation. It’s a book about parental expectations.”

Over the years, Blume has been one of the most challenged authors in the country, along with Stephen King and, more recently, J. K. Rowling. An elementary school in Charlotte, North Carolina, challenged *Deenie* in 1996. The Gwinnett County, Georgia, school district, banned the novel from its elementary schools in 1985. On her Web site, Blume noted the book has been banned more than any of her other works.

"I hope for the kids that reason prevails," Blume said, "and books are not pulled out of schools because certain adults are frightened."

Trammell, meanwhile, said she has read five more Blume books after completing *Deenie* and is considering asking for the removal of two others. Reported in: *St. Petersburg Times*, October 14.

Crawford County, Georgia

Two popular books that dealt with sex, reckless driving, and murder alarmed parent Katie Jones so much that in September she demanded their removal from the Crawford County Middle School library. She won, at least for now.

Extreme Elvin, by Chris Lynch, and *Double Date*, by R. L. Stine, deal with the often complex issues teenagers confront. They are now off limits to students. The books will continue to stay off the shelves until at least December when board members finalize a library book policy, said Crawford County school board chair Patrice Walker. After that, a new committee will review the books' contents and decide whether they will be permanently banned.

"We've had to back up and figure out what to do," said Walker. "All we're trying to do is make sure that everything available to our students is appropriate."

A month after Jones raised her concerns, the Crawford County Board of Education approved a draft of its library policy. The policy allows parents to challenge books and other instructional materials by filing out a form from the school, which is then reviewed by the school's media committee. If no decision is made at that level or a parent is dissatisfied, the decision can be appealed to the system-wide media committee, then to the school board. Reported in: *Macon Telegraph*, October 17.

Fort Bend County, Texas

Acting before a materials-review committee had completed its deliberations, the director of the Fort Bend County Libraries ordered the relocation of the sex-education books *It's Perfectly Normal* and *It's So Amazing* from the young-adult to the adult section of the library. Carol Brown made her decision in mid-October, a week after informing concerned county commissioners that she could not take action regarding library materials before the materials-review process had run its course as stipulated by library policies.

Library spokesperson Joyce Kennerly acknowledged that the committee had begun its work before the library received a written complaint about the Robie Harris books.

Bob Hebert, who serves as judge of the county Commissioner's Court, told Brown shortly before she announced the books' relocation that the library's four-year-old materials-review policy was invalid because commissioners had never approved it, even though the library board had. However, Kennerly emphasized, Hebert never specifically asked Brown to relocate the books.

Challenged by an unidentified Sugar Land resident, the same titles were recently moved to the restricted section of the Fort Bend School District's media centers after resident Lisa Jobe sent an e-mail to Superintendent Betty Baitland. Jobe became concerned about the books' content after reading about the protracted controversy in Montgomery County, Texas. When an informal complaint did not produce similar results, the Spirit of Freedom Republican Women's Club petitioned Hebert to have the titles moved because they contain "frontal nudity [and] discussion of homosexual relationships and abortion." Reported in: *American Libraries* online, October 27.

Houston, Texas

Some parents are upset with the Harris County Public Library. There is a library Web site that is geared towards teens; the question is whether it's sex education or hard-core smut.

Susan Addington is a Girl Scout troop leader who got word from scout headquarters about a new addition on the Harris County Public Library Web site called Teens Know. It's supposed to serve as a health education tool. "And I thought before I passed it on to the girls that I should check it out myself," she says. "And I would have been horrified if I had passed it on before I checked it out."

Horrified, she said, because inside the section on life and then sexuality there's a link to the question-and-answer site Go Ask Alice.

"It was just filthy," says Addington. "It was nasty, distasteful. It was things that I've never seen as a 41-year-old adult."

The site talks about various forms of sex including violence, sex with animals and discussions about foreign objects and other explicit material.

"I think the answers to the questions are very straightforward and very factual," library director Cathy Park said. She stressed that the library's mission is to provide various viewpoints to customers—not to withhold information. Whether material is suitable or not for children, "That's really a parental decision."

"I want it gone," demanded Addington.

While Park stood behind the Web site, she did say that a committee had been formed to study the issue to see if the county should continue to provide the material online. Reported in: www.khou.com, November 19.

Williamsburg, Virginia

Although what he did could draw a \$1,000 fine, John Callahan stands by his actions. Callahan frequently goes to the Williamsburg Library to catch up on the news, and he occasionally browses the magazine rack. One day in mid-November, the cover of one in particular jumped out.

"It was right at eye level," Callahan said, referring to the national gay and lesbian newsmagazine *The Advocate*.

The cover of the November 11 edition featured a young white man and a black man, both bare-chested, engaging in a kiss. Their mouths don't quite touch. It may have been a spoof of "the kiss" by Madonna and Britney Spears.

"I thought of my grandchildren, and I thought of impressionable teenagers, so I took the cover off," Callahan said. He ripped it off and took it home in disgust.

A self-described liberal who served in the Marine Corps during World War II and is now retired, Callahan said people, including gays, should have the freedom to be whoever they want. But he doesn't think his tax dollars should go to support a magazine that, in his eyes, is "too much."

"As a taxpayer, I think it's terrible," Callahan said. "They don't put *Playboy* in the library because it's considered immoral and indecent."

In response, library director John Moorman said he's concerned that tearing off the cover is a Class 1 misdemeanor. "Defacing library materials is not the proper way to handle this," Moorman said. "People need to be more tolerant."

Vandalism of library materials is nothing new, but Moorman said this was the first time that someone had defaced *The Advocate* since the library began carrying it in January 2001. Moorman said the library subscribed to the magazine after receiving many requests from members of the community.

"We represent all the taxpayers," he said. "We are a community organization, and we serve the whole community. Moorman has carved out a reputation as a free speech proponent. He resisted installing filtering software on the library's Internet computers because he believes supervision by parents trumps censorship by institutions.

Barry Trott, the library's adult services manager, said it's not uncommon for magazines to spice up the cover to attract readers.

On the same magazine rack as *The Advocate* sits the November issue of *Cosmopolitan* featuring a buxom Britney Spears. Down a little farther, a scantily clad Jessica Simpson is shown holding a vacuum cleaner on the cover of *Rolling Stone*.

"There is going to be something in the library that is offensive to everyone in the community, including me," Moorman continued.

With the new issue of *The Advocate* on display, library staff has taped a warning sign in bright orange informing people that they face a fine if they rip a cover off.

"I just didn't feel that they needed to brandish it," Callahan said. "It just rubbed me the wrong way." Reported in: *Virginia Gazette*, November 19.

schools

Palm Beach, Florida

Jill Leskow is proud that her 11-year-old son likes to read, but when he brought home a catalog from school with the book title *When Dad Killed Mom* on its cover she was

stunned. "I was totally shocked to discover this on the front," Leskow said. "I know some parents just give their children the money to order the books and don't check over the book lists."

The novel, written by Julius Lester and described in *Publishers Weekly* as a "taut psychological mystery," is told in the voices of an eighth-grade daughter and younger brother who must cope with their mother's death and subsequent murder trial of their father. "My mother is dead. Dad killed her," opens the book, which includes a subplot of the daughter's awakening sexuality in the midst of the turmoil caused by the murder.

Leskow, whose son is a sixth-grader at Polo Park Middle School, said that kind of intrigue is too much for preteens.

The 216-page novel, which is recommended for grades nine and up by the *School Library Journal*, was included in a Scholastic, Inc., catalog of books students can purchase. The catalog was distributed in the language arts class of Leskow's son.

When Dad Killed Mom has received rave reviews on Amazon.com, but it is not on the district's recommended reading list or in school libraries, said spokesman Nat Harrington. Administrators don't scrutinize book catalogs distributed to students as they do materials in school libraries because children don't have free access to books in the catalog. Also, the district has a long relationship with Scholastic and has not received previous complaints about books in its catalog, Harrington said.

"It's a contemporary issue and one that more and more of our students are facing in their daily lives," Harrington said about the topics explored in *When Dad Killed Mom*.

Not in Leskow's household, she said. "My son knows nobody this has happened to."

Harrington said the school district must be careful not to censor books, but it also doesn't want inappropriate material being made available to students. "It's a balancing act we are trying to strike here," he said. "We don't want to get into the act of censoring materials that parents can decide whether to buy or not." Reported in: *Palm Beach Post*, November 10.

Chicago, Illinois

The Laramie Project was performed in only two Northwest Suburban High School District 214 buildings October 23 but the controversial "docu-drama" also ended up taking center stage inside the school board's chambers. In an unusually emotionally charged meeting, parents and other residents questioned the appropriateness of the play. They criticized what they called a pro-gay agenda and urged the board to stop any further *Laramie* productions.

The play was spurred by the 1998 murder of Matthew Shepard, an openly gay man living in Laramie, Wyoming, and based on interviews collected in the year after the crime. It uses monologues to deliver a documentary-type drama.

"While we can all agree that it's not OK to be cruel to people, it's not OK to promote a sexually deviant, destructive, immoral lifestyle for our minor children," said George

Toth, a parent of two Prospect High teens. “Of that I am intolerant.”

On the other side of the coin, some bashed a survey paid for by opponents of the play, saying they were called on the phone and asked slanted questions about their salary, their stance on gay issues and whether they go to church. One mom said her 16-year-old son was the one who answered the phone and was asked the probing questions.

The debate reached a point where school board president Bob Zimmanck had to slam down his gavel and order two residents to stop arguing.

Laramie was staged at both John Hersey and Prospect Highs, and the directors say it goes beyond homosexuality to teach tolerance of all people—fat, skinny, nerdy, white, black. Teen actors say the play has changed the way they think.

The school board also has supported the play, with some members reading it and others saying they look forward to watching the production. But some parents charged the play sanitizes Shepard’s lifestyle—he had the HIV virus and went often to bars—and the crime is only profiled because it fits a political agenda. They also accused schools of pushing a pro-gay agenda with *Laramie* and other activities, like gay-straight clubs and surveys allegedly taken by some teens to measure homophobia.

“Are these behaviors we wish to celebrate?” asked parent Bruce Tincknell, citing figures suggesting gay men are more likely to have AIDS. “I’m sorry, but I can’t comprehend this.”

A Buffalo Grove High director wanted to stage *Laramie* last year, but was told by the school’s then-principal, Carter Burns, he couldn’t. Rolling Meadows High brought in the *Laramie* cast from Naperville North High to do the play. Reported in: *Daily Herald*, October 24.

Normal, Illinois

Unit 5 school board members heard arguments October 8 for and against John Steinbeck’s *Of Mice and Men*, with the majority of speakers asking for the novel to be removed from a sophomore literature class. Three Normal Community High School students who already had studied the book, however, said it “offers insight into a difficult period in America’s past.”

Connie Tripp, who lodged one of two complaints against the book, said it contains racial slurs, profanity, and violence. She said the book does not represent traditional values, is culturally insensitive, and conflicts with a board policy regarding educational materials. Tripp’s daughter, Kayla Napue, is a sophomore at Normal Community High School. Napue, who is black, said she felt degraded by the novel and spent several weeks in the library while it was being studied in class.

An alternative book, Steinbeck’s *The Pearl*, was offered but rejected by the family. “A lot of kids were supportive, and it was not just African-Americans,” said Napue, who said she has not yet received an assignment to make up for what she missed.

Tripp, Napue and others called for *Of Mice and Men* and other books, including *To Kill a Mockingbird* and *The Adventures of Huckleberry Finn*, to be removed. Several said one of the class’s stated goals—to “understand the African-American struggle for freedom as revealed by American writers”—can be met by reading other novels.

“Just because nothing is said about it doesn’t mean it’s OK,” one man said. “What ever happened to ‘Not in Our Town’?”

The other complaint, which raised similar issues, was lodged at Normal Community West High School. Bruce Boswell, Unit 5 executive director of secondary education, said two committees formed in response have not yet finalized their separate responses. He expected that to happen the week of October 13.

The local branch of the National Association for the Advancement of Colored People said the organization’s position is “not to ban or censor selected titles or materials.” But education Chair Sue Cain said the definition of classical literature must be redefined. She said blacks are portrayed as victims either saved or oppressed by whites in books written from the white-male, Western European perspective. “While these stories may contain a part of the African-American struggle, they by themselves are incomplete and become offensive if the story is not also told by those who have actually experienced this struggle,” said Cain, who offered a list of possible books that could be included in the curriculum.

Calli Grimes, one of three white students who spoke in favor of the book, said she respectfully disagreed with those who called for its removal. The three students said they believed the book should not be removed for all students and noted that alternatives are available. “I feel very passionately about the book and its impact on me as a student,” said Grimes, explaining that the language made her angry and is meant to be analyzed. “The language promotes change.” Reported in: pantagraph, com, October 9.

Indianapolis, Indiana

Concerns about a book’s profanity have prompted Franklin Central High School to ban it after it had been assigned to more than 200 students this fall. The book, *Fallen Angels*, is a fictional tale of a soldier’s experience in the Vietnam War. Principal Kevin Koers decided to ban the book after two students and a parent complained about its foul language.

“They just simply said, ‘Mr. Koers, look at this. We’d get in trouble if we said this in school.’ And I said, ‘That’s exactly right; you would,’” Koers said. He compared the ban to restrictions under the school’s movie policy. Teachers are allowed to show movies rated PG, but movies with ratings of PG-13 and beyond are not permitted.

“I think it’s an excellent book, I really do,” Koers said. “However, I think that [because of] the content, if it were a movie, it would be PG-13—maybe more—for the graphicness of it. Our policy at school is that a PG movie is acceptable, so I thought we were over the limits.”

The book was assigned in English classes for sophomores. Now, instead of *Fallen Angels*, students will be asked to read another sometimes controversial book, *To Kill a Mockingbird*, which is a story about racial injustice in Alabama in the 1930s. Both books made the American Library Association's list of hundred most frequently challenged books from 1990–2000.

Parents of Franklin Central students offered mixed reaction to Koers' decision about *Fallen Angels*. "I think it's naive to think that these kids aren't using this language every day in the hallways [and] every day in the classroom," parent Pam Nickell said.

Parent Rebecca Harkleroad said the ban was the right thing to do. "I don't think there is any need to use that kind of profanity in their literature," Harkleroad said. Reported in: *IndyChannel.com*, November 10.

Lawrence, Kansas

Most people attending the October 30 high school football game between Baldwin and Perry-Lecompton High Schools were probably there to cheer the teams. But four Baldwin High School students had another purpose: protesting a book banning.

Lynne Lanners, a Baldwin High School sophomore, and three fellow students handed out copies of Robert Cormier's *We All Fall Down* at Liston Stadium in Baldwin to protest the school board's October 27 decision to keep the banned book out of classrooms.

"Basically we are just protesting the banning of the book out of [Supt. Jim] White's classrooms, because it is in conflict with school board policy," Lanners said.

The banning had been a controversy in the district since September, when White ordered the book pulled from a freshman English class taught by Joyce Tallman. White received two complaints from parents about the book, which deals with alcoholism and violence, among other things, and includes strong language.

The controversy got fresh legs after the school board voted to re-establish a committee charged with evaluating the book. The committee originally was formed after complaints that White unilaterally jerked the book from the classroom. But five days after its creation, the committee was disbanded by the school board—it said the district's policy on dealing with challenged material or books was not clear enough. The board reversed itself and reinstated the review committee. But the board did not allow the book to be reintroduced into the class—despite its stated policy that challenged books are to be made available until the evaluation process is complete.

Currently, there is only one copy of the book in the school's library. The 4-3 vote against allowing the book back in class while it is evaluated angered many parents and students. "Our problem is that an individual can take a book out of the classroom" without a formal review or evaluation process, Lanners said.

A group of Baldwin parents, including Betty Bullock, whose son graduated in 2001, also took action. The group contacted the American Civil Liberties Union to see if it would consider handling the case. "At this point in time we've filed a complaint," Bullock said. "They [the ACLU] reviewed it and are definitely interested."

Bullock said the parents believed White and the school board misinterpreted the district's policy and incorrectly kept the book from the classroom.

Jana Jorn, a Baldwin High librarian and book review committee member, said she understood the parent's concerns. "The clear intent of the policy is that no one person should be able to take material out of the classroom," Jorn said.

The protest at the football game was the first by students, though some have attended the school board meetings to oppose the book banning. The protest had the support of school board member Stacy Cohen.

"I totally believe in freedom of speech," Cohen said. "Decisions are getting made about the students without their input."

Lanners and three other students passed out twenty-nine copies of the book, which parents ordered over the Internet, before the game and during the first half. "We support the use of *We All Fall Down* because it is realistic about the issues students face today," Lanners said. "In doing this, we hope to continue to raise awareness of the book."

Book review committee member David Wagner, father of a Baldwin High freshman, read the book but said he didn't find it offensive. He said he has not read the original complaint filed against the book, but he hoped that in the next thirty days—the time the board has to review the book—a meaningful decision could be reached. Reported in: *Lawrence Journal-World*, October 30.

Massapequa, New York

As counselors might say, 15-year-old Charlie faces some adjustment problems in his first year of high school. At parties, older friends offer Charlie beer, though he doesn't much like the taste. Back at school, a bigger kid threatens to give Charlie a "swirlie." That, you may know, if you've kept up with the news of high-school hazings on Long Island, is what happens when a victim's head gets dunked in a toilet, making his or her hair swirl.

Indeed, many of Charlie's adventures would be familiar to suburban teenagers, including his fumbblings with drugs and sex. Maybe this helps explain why the novel about Charlie's fictitious life, *The Perks of Being a Wallflower*, has sold 300,000 copies. It also explains why this four-year-old book, though recommended for adolescents by the American Library Association, has become a target in schools and libraries.

"It kind of shocked me," said Elizabeth Rickard, a senior at Massapequa High School. She was assigned the novel as part of an elective sociology course. She was flipping through the book when she came upon a page that stopped her cold.

The page describes a house party, where Charlie sees two other teens having oral sex. Rickard is no fanatic; she liked the teacher who assigned the book. Nonetheless, the teen was upset enough that she showed the book to her mother, Jackie Rickard.

"I'm glad she came forward, and I wish more kids would," the mother said. "Just because a public school says it's required doesn't mean that it's appropriate material."

The mother's concern was not so much with the book's effect on her own daughter, as with its more general impact. As it happened, Elizabeth had transferred out of Massapequa High about a week before she even glanced at the book and enrolled in a small Christian school nearby. She switched schools, she said, because she felt increasingly uncomfortable with the teenage party scene—particularly the drinking—and decided a change might do her good.

That didn't put the book issue to rest, however. Reading the novel had convinced Jackie Rickard that parents need to be more aware of books assigned in schools. So she and her husband went to Massapequa High to register their concerns.

The response was quick. School officials declared that *Perks* hadn't been approved as required reading, and told the teacher, Jennifer Pesato, to use a sociology textbook instead. A school letter went out to parents, offering refunds to anyone who had purchased the novel.

"I was a little disappointed the teacher took a little detour," said Susan Woodbury, the Massapequa district's executive curriculum director. "I think she did this in very good faith, in trying to get the kids hooked on an issue. But I'm not sure it was relevant for a sociology class."

Elsewhere, *Perks* also has been pulled from classrooms and library shelves, in response to parent complaints. It's happened in Massachusetts, Ohio and Virginia. Stephen Chbosky, a Brooklyn resident who wrote *Perks* as his first novel, thinks the book's opponents miss the point.

Perks, he said, is about teens who ultimately find their way in life.

Chbosky gets lots of appreciative e-mail messages from adolescent readers, two of whom said the book saved them from suicide. "If that doesn't send a positive message, I don't know what does," he said.

Then, too, adolescent novels such as *Perks* may help promote literacy. At Hofstra University, a training course for secondary teachers includes the novel among a half-dozen books recommended as effective in getting teens to read. Pesato took the course two years ago.

Jeanne Henry, the associate professor in charge of the course, was pained by the Massapequa incident. While Pesato has not commented publicly on the incident, both Henry and another Hofstra faculty member said they would be willing to appear at Massapequa High in the book's defense.

"In my view, efforts to block use of this book are censorship," said the second professor, Alan Singer, who has helped train Pesato and considers her a model teacher. "They're being done to appease religious extremists, and

they send a threatening message to teachers and do a disservice to the students of Massapequa High School." Reported in: *Newsday*, October 13.

Evansville, Wisconsin

Parents, teachers and students passionately and, at times, angrily took sides November 10 over the inclusion of a novel on a reading list for eighth-graders. About 150 people attended the Evansville School Board's meeting at the Evansville High School auditorium. On one side were parents objecting to *Stuck in Neutral*, by Terry Trueman, a short novel they said contains inappropriate levels of profanity, sexual imagery, and violence for their children.

On the other side were parents, as well as teachers and students, supporting Kimberly Stieber-White, J. C. McKenna Middle School's eighth-grade composition and literature teacher, and her decision to add the novel to the class reading list. Stieber-White said she chose the book because it teaches tolerance for people with disabilities, a required theme of study in her curriculum.

The hero is a teenage boy severely disabled by cerebral palsy. At one point, the hero's brother beats up two boys who were taunting the disabled boy, douses them with gasoline and tries to set them on fire.

Leading the protest is parent Christie McKittrick, who has called the book indecent. McKittrick and her husband, Tom McKittrick, have a son in eighth grade at J. C. McKenna Middle School. He was homeschooled last year.

"In choosing this book, I think the interest of parents were laid aside," said Christie McKittrick, who believes parents should have more control over what their children learn at school. She said that even though parts of the book were appropriate, the indecent parts made it an inappropriate choice.

The author, who has a 24-year-old developmentally disabled son, sent a statement that was read by Stieber-White: "I wrote *Stuck in Neutral* to give voice to kids like my son Sheehan, kids who have no voice, and to create in kids' peers and classmates a change in attitude toward special needs' teens," Trueman wrote.

Several eighth-graders from the middle school spoke in favor of the book. Ninety-four out of 120 eighth-graders in the school signed a petition supporting the book, said Kayla Nelson, an eighth-grader who signed the petition.

"Just because we are young people doesn't necessarily mean that we can't handle learning the reality that life brings upon all of us," said Nikki Faulkner, an eighth-grader from Evansville.

Principal Jerry Roth supported Stieber-White's choice.

In late October, district Superintendent Heidi Carvin denied Christie McKittrick's request to remove the book from the school's curriculum, saying it was appropriate for students of that age and because an alternative selection had been provided. The McKittricks appealed to the school board. Reported in: *Wisconsin State Journal*, November 11.

student press

Boston, Massachusetts

Boston College officials are seeking to add provisions to a routine office-lease agreement with a student newspaper that would give the Roman Catholic institution a more powerful voice in the publication's business and editorial operations. Among other directives, the college has proposed banning cigarette and alcohol advertising and forcing the paper to create an advisory board that includes at least one administrator.

Editors of the weekly newspaper, *The Heights*, rejected many of the proposals in a letter to Cheryl Presley, the college's vice president for student affairs. They argued that the new terms would compromise the newspaper's independence and would violate their right to free expression.

Negotiations are still under way, and both sides say they still hope to reach a compromise. But Nancy E. Reardon, a senior who is the newspaper's editor in chief, said that members of the Editorial Board had decided that they would refuse to sign the lease unless at least some of the new language was removed. And Jack Dunn, director of public affairs at Boston College, said that some of the terms, such as the advertising restrictions, are "nonnegotiable."

Outside observers were surprised at the college's tactics. Mark Goodman, executive director of the Student Press Law Center, a nonprofit group, said that the college's proposals are "unprecedented."

"No self-respecting institution would even present these arguments," he said. The most troubling part of the plan, he said, is asking the newspaper to establish an advisory board that would give college administrators direct involvement with the paper.

In the letter to Presley, the editors argued that the proposal "would dismantle the wall of separation between *The Heights* and the administration."

Dunn responded that the students were mischaracterizing the college's terms. "There is no desire on behalf of the university to control the content of one of three student newspapers on campus," he said. Referring to meetings between administrators and editors, he said that "we clearly stated that the intention was to create a liaison between the dean of student development and *The Heights* newspaper so that there could be some formal mechanism to have some informal discussions."

Reardon said that such communication already takes place regularly.

As for the proposed ban on cigarette and alcohol ads, Dunn said it grew in part out of frustration with the newspaper's decision this fall to run an advertisement for a local bar featuring "gratuitous, sexually explicit" content that drew complaints from parents, alumni, and administrators.

Reardon said she had heard "no uproar" about the ad, which she said depicted a woman "who had some cleavage showing" and was "nothing more bawdy than what you would see in an underwear ad."

One content restriction has long been in place in the newspaper's lease. Since 1978, the lease has banned the paper from running ads advocating abortion. Reardon said that editors accept the abortion-ad ban but are uncomfortable with the newly proposed restrictions, which they fear could lead to a "slippery slope" of control by the college.

The proposed lease also calls for the paper to provide discounted advertising rates to recognized student organizations, to develop an ethics policy, to establish a board of directors, to hire an ombudsman, and to make sure its editors "fully comply" with the university's student-conduct codes. The editors say that they are working to do some of those things already, but that they are uncomfortable having them dictated by a lease. They also note that the ad-related provisions would deprive them of needed revenue. Reported in: *Chronicle of Higher Education* online, November 26.

Hampton, Virginia

The American Society of Newspaper Editors (ASNE) retracted a \$55,000 grant to Virginia's Hampton University November 11, after the university administration shut down a student newspaper that did not give front-page precedent to a letter the administration wanted there. The letter, written by Provost and Acting President JoAnn Haysbert, explained the steps Hampton took in the wake of more than a hundred health violations in the school's cafeteria.

The *Hampton Script* published Haysbert's letter on the third page of its October 22 edition, while running a story about the cafeteria passing a recent city health inspection on the front page.

Peter Bhatia, president of ASNE and executive editor of *The Oregonian*, thought the grant was undeserved after the administration seized the newspaper. "Confiscation of the newspaper is, in our view, an affront to the First Amendment, and to the principles of free expression and free press," he said. "I think it's important, whether it's a college or anyone, that people understand the important freedoms our Constitution guarantees us, such as the freedom of press."

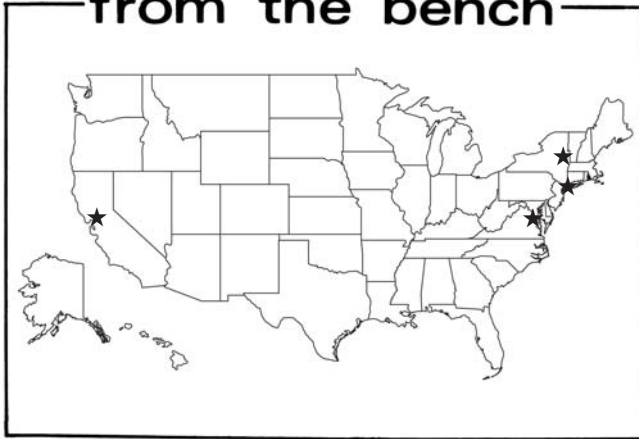
Bhatia wrote a letter to Haysbert canceling the grant, identifying the reason as a First Amendment violation by Hampton's administration that he believed was shown by Haysbert's decision to confiscate copies of the October 22 issue of the *Hampton Script*.

"ASNE is devoted to a clear and important agenda of working to make sure people appreciate why and how we have those freedoms, and what they represent in society," Bhatia said. "It's ultimately about the First Amendment—everyone should be concerned."

ASNE's grant was intended to establish a High School Journalism Institute at Hampton's Scripps Howard School of Journalism and Communication next fall. "The institute is a summer program we run that trains high school teachers in teaching journalism," Bhatia said. "This coming summer will be our fourth summer of the program."

(continued on page 29)

from the bench



U.S. Supreme Court

The U.S. Supreme Court once again agreed to hear arguments on the constitutionality of the Child Online Protection Act (COPA). This will be the second time since its passage by Congress in 1998 that the act has been reviewed by the High Court.

COPA has been constantly challenged by a broad coalition of First Amendment groups and has never been enforced. Shortly after its passage, the ACLU filed suit against the act in a Philadelphia federal court, which granted an injunction blocking the law from going into effect anywhere in the country.

In 2000, the U.S. Court of Appeals for the Third Circuit in Philadelphia declared COPA unconstitutional, finding that its community standards provision was too broad, especially as it relates to materials available over the Internet. The Supreme Court ruled in May 2002 that community standards can be applied to the Internet, but rather than completely overturning the Third Circuit, the justices remanded the case back to the court. This past March, the appeals court again found the act to be too broad, saying that the act was likely to prevent adults from seeing constitutionally protected materials sent over the Internet.

The news that the Supreme Court will hear the appeal came as no surprise to groups opposed to COPA. "It was inevitable," said Emily Whitfield of the ACLU, which will be arguing the case before the court. Chris Finan, president of the American Booksellers Foundation for Free

Expression, said the new hearing means that the constitutionality of COPA "will be decided on the issues we had always hoped for; that the act violates the First Amendment rights of adults by limiting their access to non-obscene materials over the Web." The original ruling by both the appeals court and the Supreme Court centered around the issue of community standards.

Congress passed COPA after the Communications Decency Act was declared unconstitutional. COPA would impose criminal and civil penalties on commercial Web sites for posting materials deemed harmful to minors. Whitfield said the ACLU would likely use the June decision by the Supreme Court that upheld the Children's Internet Protection Act in arguing against COPA. In that decision, the justices found that the government could require libraries that receive federal funding to attach filters to their Web connections in order to block material considered harmful to minors. While the ACLU opposed that decision, the ruling does imply that there are means available to prevent minors from seeing objectionable materials without imposing fines on Internet providers, Whitfield said. "It's a less restrictive alternative," she said. Reported in: *Publishers Weekly*, October 20.

The Supreme Court added the Pledge of Allegiance to the docket for its new term October 14, agreeing to consider whether public schools violate the Constitution by requiring teachers to lead their classes in pledging allegiance to the flag of "one Nation under God."

The justices, who begin their daily session with heads bowed as the marshal intones "God save the United States and this honorable court," accepted a case that like the affirmative-action and gay-rights cases of the last term places the court at the center of a heated public controversy.

The case is an appeal by a California school district of a decision that has been the subject of an intense national debate since the United States Court of Appeals for the Ninth Circuit, in San Francisco, issued it sixteen months earlier. The Federal District Court in Sacramento initially dismissed a lawsuit brought by an atheist, Michael A. Newdow, who said he did not want his daughter exposed daily in her elementary school classroom to "a ritual proclaiming that there is a God." The Ninth Circuit overturned that decision, first ruling in June 2002 that the words "under God," added by federal statute in 1954, made the pledge itself unconstitutional.

In an amended opinion, the court narrowed its ruling by confining it to the public school context, invalidating school policies that require teachers to lead willing students in the pledge. Ever since a Supreme Court decision on behalf of Jehovah's Witnesses in 1943, public schools may not compel students to recite the pledge. The Supreme Court indicated that it would address only the recitation of the pledge in public schools, not its constitutionality as a general matter.

The Supreme Court's action had several unusual elements that could have an impact on the eventual outcome. One was the decision by Justice Antonin Scalia not to participate in the case, an evident if unacknowledged response

to a “suggestion for recusal of Justice Scalia” that Newdow sent to the court in September. Newdow cited news reports of remarks the justice made at an event in Fredericksburg, Virginia, last January that was co-sponsored by the Knights of Columbus, the Catholic organization that a half-century ago played a leading role in persuading Congress to add “under God” to the pledge.

According to the reports, Justice Scalia’s speech at “Religious Freedom Day” pointed to the Ninth Circuit’s decision in this case as an example of how courts were misinterpreting the Constitution to “exclude God from the public forums and from political life.”

Newdow, who is a lawyer and medical doctor who has represented himself in the litigation, told the court that the remarks indicated that Justice Scalia was not just expressing general views on the Constitution but had formed a conclusion about the case itself, providing grounds for disqualification. The code of judicial conduct and a federal law that incorporates it both provide that judges “shall disqualify” themselves in cases where their “impartiality might reasonably be questioned.”

While these provisions do not technically apply to Supreme Court justices, the justices adhere to them and recuse themselves from cases with which they have connections through stock holdings or personal associations. It is extremely unusual, however, for a recusal to be sought or granted on the basis of a public statement of opinion on the legal controversy before the court.

Another unusual aspect of the court’s order was the suggestion that at the end of the day, this case might not be suitable for decision. The court instructed the parties to discuss whether Newdow has standing to challenge the policy of his 9-year-old daughter’s public school district, Elk Grove Unified School District, near Sacramento. The girl’s mother, who has custody and to whom Newdow was never married, does not object to her daughter reciting the pledge. Reported in: *New York Times*, October 14.

Setting the stage for a historic clash between presidential and judicial authority in a time of military conflict, the Supreme Court agreed November 10 to decide whether prisoners at the United States naval base at Guantánamo Bay, Cuba, are entitled to access to civilian courts to challenge their open-ended detention.

The court said it would resolve only the jurisdictional question of whether the federal courts can hear such a challenge and not, at this stage, whether these detentions are in fact unconstitutional. Even so, the action was an unmistakable rebuff of the Bush administration’s insistence that the detainees’ status was a question “constitutionally committed to the executive branch” and not the business of the federal courts, as Solicitor General Theodore B. Olson argued in opposition to Supreme Court review.

In accepting the cases, the court moved from the sidelines to the center of the debate over whether the administration’s response to the terrorist attacks of September 11, 2001,

reflects an appropriate balance between national security and individual liberty.

While the court does not indicate why it grants review in a particular case, the justices might well have been persuaded that no matter what the ultimate answer to the question of whether judicial review is even available, they are the ones who have to provide it.

“It is for the courts and not the executive to determine whether executive action is subject to judicial review,” the appeal filed on behalf of twelve Kuwaitis told the court.

The two appeals the court accepted were filed on behalf of sixteen detainees, the Kuwaitis in one group and two Britons and two Australians in the other, all seized in Afghanistan and Pakistan during United States-led operations against the Taliban in late 2001 and early 2002. They have all been held for more than 18 months without formal charges or access to any forum in which they can contest the validity of their detention.

The men assert that they were not fighters either for the Taliban or for Al Qaeda; most say they were humanitarian volunteers who were captured by bounty hunters.

The two separate lawsuits, seeking a federal court hearing on the validity of the open-ended detention, were combined by the Federal District Court in Washington. That court then ruled, in a decision affirmed in March by the United States Court of Appeals for the District of Columbia Circuit, that on the basis of a World War II-era Supreme Court precedent, the federal courts lack jurisdiction over the military detention of foreigners outside United States territory.

The applicability of that 1950 decision, *Johnson v. Eisentrager*, is at the heart of the dispute before the Supreme Court. One central issue is the status of the naval base at Guantánamo Bay, which while indisputably a part of Cuban territory has been administered by the United States under a 1903 lease that grants it many of the attributes of sovereignty and uses the phrase “complete jurisdiction and control.”

By contrast, the *Eisentrager* decision denied judicial review to German intelligence agents who were captured in wartime China and were being held in Germany after conviction as war criminals by military tribunals.

How to characterize Guantánamo Bay is of such importance because it is clear that noncitizens do have certain constitutional rights if they are within United States territory. On the other hand, the court has frequently invoked the *Eisentrager* precedent, even out of its wartime military context, to stand for the proposition that outside the territorial reach of the United States, aliens have no such rights.

The brief filed for the Britons and Australians by the Center for Constitutional Rights, a liberal public interest law firm in New York, told the court that “we alone exercise power at Guantánamo Bay” and that the base should therefore be treated for jurisdictional purposes as part of the United States. In the administration’s view, not only is that conclusion incorrect but it is not one the court is free to make. The determination of sovereignty over a particular territory is

“not a question on which a court may second-guess the political branches,” Solicitor General Olson said in his brief.

The Supreme Court, by contrast, said it intended to decide the jurisdiction of the courts to hear challenges to “the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at the Guantánamo Bay Naval Base, Cuba.” The court’s question incorporated no assumption about whether the base was or was not “outside the sovereign territory of the United States.”

Pamela S. Falk, a professor of international law at the City University of New York, recalled that when she first visited the Guantánamo base ten years ago, she did not have to clear United States customs on her return flight to Fort Lauderdale, an indication that she was not considered to have left the United States at any time during her journey.

But when she visited again in July and returned by way of Puerto Rico, she had to clear customs there, reflecting a policy change that she said should not deprive the Supreme Court of the opportunity to decide “the fundamental question of the rights of anyone being held in U.S. custody.”

If the justices decide that the federal courts do have jurisdiction, the cases will go back to district court in the first instance for a decision on the merits of the detainees’ claims. Reported in: *New York Times*, November 10.

The Supreme Court refused November 3 to enter the long-running fight over an enormous monument depicting the Ten Commandments and the renegade judge who wants to keep it on display in an Alabama courthouse. The court quietly rejected appeals from suspended Alabama Chief Justice Roy Moore, who had argued that the monument properly acknowledges “God as the source of the community morality so essential to a self-governing society.”

Moore was suspended as chief justice for defying a federal court order to remove the monument. He went on trial before the Alabama Court of the Judiciary on November 12 to face judicial ethics charges for his refusal to comply with the order. The Court removed Moore from office.

The Supreme Court’s action was not a ruling on the thorny question of whether the Ten Commandments may be displayed in government buildings or in the public square. It merely reflects the high court’s unwillingness to hear the appeal. Lower courts have splintered on the issue, allowing depictions of the Ten Commandments in some instances and not in others.

Moore challenged the high court to settle the question once and for all, and accused the justices of ducking their responsibility to clarify murky questions about the constitutional principle of separation of church and state.

Two years ago, the high court divided bitterly over whether to hear another case testing whether a different Ten Commandments monument could be displayed outside a civic building. The court opted at that time not to hear that case, but four justices nonetheless staked out a position on the issue.

The three most conservative justices said they found nothing wrong with display of that monument outside the building housing local courts and prosecutors in Elkhart, Indiana. The setting reflected the cultural, historical and legal significance of the commandments, Chief Justice William H. Rehnquist wrote for himself and Justices Antonin Scalia and Clarence Thomas.

The monument “simply reflects the Ten Commandments’ role in the development of our legal system,” Rehnquist wrote for the three. He noted that “a carving of Moses holding the Ten Commandments, surrounded by representations of other historical legal figures, adorns the frieze on the south wall of our courtroom.”

At the opposite ideological end of the court, Justice John Paul Stevens wrote that the words “I am the Lord thy God,” in the first line of the Elkhart monument’s inscription are “rather hard to square with the proposition that the monument expresses no particular religious preference,” Stevens wrote then.

In the Alabama case, lower federal courts ruled that Moore violated the Constitution’s ban on government promotion of religion by placing the 5,300-pound granite monument in the rotunda of the state Judicial Building. In two appeals to the Supreme Court, Moore argued that lower federal courts do not have authority over a state’s chief justice. In August, the Alabama monument was wheeled to an out-of-the-way storage room. Two weeks of protests by Moore’s supporters followed. Demonstrators carried the cause to the sidewalk outside the Supreme Court, with one protester dressed as Moses and carrying cardboard tablets. Reported in: *Salon.com*, November 3.

The Supreme Court refused November 3 to block a lawsuit over a magazine’s critical safety reports about the Suzuki Samurai, a defeat for news organizations that wanted the court to clarify protections for journalists who warn about dangers from products. The court declined without comment to consider whether the lawsuit against the publisher of *Consumer Reports* magazine should be stopped. The magazine had labeled the Samurai unacceptable in 1988 because of potential rollovers.

Consumers Union, which reports on the safety of products ranging from child safety seats to lawn mowers, argued that a lower court ruling in its case will silence journalists who have information about dangerous products but fear costly lawsuits. Suzuki Motor Corp. says the magazine set out to discredit the inexpensive sport utility vehicles, known affectionately by some owners as “little mud bugs,” to make headlines and money.

A divided panel of the U.S. Court of Appeals for the Ninth Circuit said that Suzuki should have a chance to argue to a jury that the magazine rigged the testing of the vehicle and acted maliciously to damage Suzuki’s reputation. The Supreme Court refused to review that decision.

The case asked whether judges should independently review evidence in libel cases before trial, stopping expensive

proceedings if there is insufficient proof that a false statement was made with actual malice. News groups had urged the court to review the case, arguing that the public has been protected over the years by reports on the dangers of smoking and fast food, among others.

Without court intervention, “virtually any product evaluation is at risk and this valuable journalistic genre is seriously compromised,” the groups told the court in a filing.

The Samurai was first sold in the United States in the mid-1980s but sales plunged after the 1988 magazine report and other news accounts of possible dangers. The 1995 model was its last.

Carter Phillips, one of the Washington attorneys representing the carmaker, said that *Consumer Reports* employees designed their road tests to get the Samurai to tip, and cheered when the vehicle did so. He said the magazine then used its reports to make money, in fund raising and subscription drives. Suzuki did not sue after the original report, but it did claim “product disparagement” in a 1996 lawsuit in California.

Jim Guest, president of Consumers Union, said the Supreme Court did not address the merits of the case. “But we believe it hurts consumers to let the Ninth Circuit ruling stand with its chilling effect on those who report about safety and health,” he said.

Suzuki’s managing counsel, George F. Ball, said the court’s action “supports the principle that the First Amendment protects honest reporting, but it does not protect publishers from a jury trial where there is evidence that the publisher knowingly deceived its readers.” Reported in: Associated Press, November 3.

A student-run newspaper asked the U.S. Supreme Court September 29 to overturn a Florida court decision that restricts access to autopsy photos—a case stemming from the death of Dale Earnhardt in 2001. The publisher of the independent *Florida Alligator* contends that a law that was passed after the star driver’s death and bars public access to the records is unconstitutional.

In July, Florida’s Supreme Court declined to review a decision by an appeals court that upheld a trial court’s ruling. Attorney Tom Julin said the publisher, Campus Communications, believes the trial court violated the First Amendment because it declined the newspaper’s request to review the photos.

“*The Alligator* was trying to get the records to find out if NASCAR was telling the truth. The trial court said that was not a good enough reason.” Julin said.

The Alligator and other papers asked for the autopsy photos as questions arose over how Earnhardt died and whether better safety equipment might have saved him. They also objected to the way the new law restricted access to what had been public records.

Proponents said the measure protects families from seeing their relative’s autopsy photos published or posted on the Internet. Under the 2001 law, those who view or copy autopsy photos without authorization can be fined \$5,000.

An attorney for Earnhardt’s widow, Teresa Earnhardt, said he expected Campus Communications’ request, but thought the U.S. Supreme Court would back Florida court rulings on the law. “The state of Florida and the Florida courts have always been generous on open records and the First Amendment,” but they agree that autopsy photos should remain private, he said. Reported in: *Washington Post*, September 29.

telemarketing

Washington, D.C.

A federal appeals court let the Federal Trade Commission enforce its do-not-call program against telemarketers October 7 while the agency appeals a judge’s ruling that declared the rule unconstitutional. The appeals court ruling freed the commission to fine telemarketers up to \$11,000 for each violation as it appeals a recent decision by Judge Edward W. Nottingham of the U.S. District Court in Denver that struck down the list that has registered more than 51 million phone numbers. The commission can now coordinate enforcement with the Federal Communications Commission, which issued a similar rule.

The U.S. Court of Appeals for the Tenth Circuit in Denver said that the FTC would probably succeed in overturning Judge Nottingham’s ruling. The judge said last month that blocking calls by commercial telemarketers violated their free-speech guarantees because they were unfairly singled out by a rule that exempted charitable solicitors and political campaigns.

“The preponderant source of the problem of invasion of privacy and abusive calls are commercial calls, which are covered by the FTC rule,” the three-judge appeals panel said in a 24-page opinion. “The FTC’s justifications of preventing abusive and coercive sales practices and protecting privacy are substantial governmental interests.”

The appeals court suspended Judge Nottingham’s September 29 order that had barred the commission from forcing telemarketers not to dial the telephone numbers that consumers had placed on its registry.

The ruling is “an important victory for American consumers,” the chair of the commission, Timothy J. Muris, said in a statement. “We believe the rule fully satisfies the requirements of the U.S. Constitution, and we will proceed to implement and enforce the do not call registry.”

After Judge Nottingham’s decision, the FCC said it would enforce its own do-not-call rule that was not covered by the decision. The FCC unsuccessfully asked a telemarketing group to turn over the FTC’s list of consumers who objected to receiving the calls. The telemarketers instead said they would voluntarily comply with the program while the case is under appeal.

In September, the same three appeals court judges had refused to block the FCC’s enforcement. Judge Nottingham had barred the FTC from sharing the names on the do-not-call

list with the FCC, making it more difficult to enforce the program. Reported in: *New York Times*, October 8.

press freedom

Washington, D.C.

A federal judge has ordered five reporters, including two from the *New York Times*, to disclose the confidential sources they used in preparing articles about Dr. Wen Ho Lee, the former scientist at the nuclear weapons laboratory in Los Alamos, New Mexico. The judge, Thomas Penfield Jackson of U.S. District Court in Washington, D.C., ordered the reporters to disclose their sources' names and provide Dr. Lee's lawyers with notes and other materials compiled in their newsgathering.

Judge Jackson ruled that First Amendment protections that shield journalists from government interference were outweighed in this specific case by the need of Dr. Lee's lawyers to provide evidence of government leaks in their suit against the government. The judge did not give a deadline for compliance.

Dr. Lee, a former scientist at Los Alamos National Laboratory, is suing the Energy and Justice Departments for reportedly providing reporters confidential information about him, including federal agents' suspicions that he stole nuclear secrets from his workplace.

Dr. Lee was indicted on 59 felony counts in 1999, but after he spent nearly nine months in solitary confinement, no evidence of espionage emerged. He was released after pleading guilty to one felony count of mishandling nuclear weapons data. In ruling on that case, U.S. District Court Judge James A. Parker of Albuquerque said the case had "embarrassed our entire nation."

A spokeswoman for the *Times*, Catherine J. Mathis, said the newspaper would appeal. The reporters for the *Times*, Jeff Gerth and James Risen, were named in the order, along with Robert Drogin of the *Los Angeles Times*, H. Josef Hebert of The Associated Press and Pierre Thomas of CNN, who moved to ABC.

"We believe," Mathis said, "that the confidentiality of sources is critical to our ability to provide the public with important news."

Several federal officials, including former Energy Secretary Bill Richardson, who is now governor of New Mexico, have said in depositions that they do not recall divulging information about Dr. Lee to reporters. Other officials have denied leaking the information.

Dave Tomlin, assistant general counsel of the AP, said his organization was still deciding whether to appeal.

"Before the First Amendment lets you compel reporters to reveal sources," Tomlin said, "we think you have to do more than get a small handful of government officials to shrug their shoulders and claim they don't know or can't remember." Reported in: *New York Times*, October 14.

libel

San Francisco, California

A state appellate court in San Francisco sent shock waves through cyberspace by ruling that in some instances, Internet service providers like America Online and Yahoo! can be held legally responsible for an online smear by someone using their service. The three-member panel of the state Court of Appeal agreed to take another look at the ruling, the first by a California court on the question of ISP liability, but such reviews seldom change the results. An appeal to the state Supreme Court seems virtually certain, and the case could even wind up in the U.S. Supreme Court, which frequently steps in to resolve disagreements between lower courts.

Previously, courts nationwide had agreed that the only one who could be sued for trashing someone's reputation online was the person who posted the message, usually an elusive figure and an unlikely candidate for a fruitful damage suit. But on October 15, the appellate court panel in a 3-0 ruling said that if an ISP knew, or had reason to know, that the message was libelous, and failed to halt its publication, it should be held responsible for its contents, just like a bookstore or library that continues distributing a book after a libel notice.

The ruling is a potential boon to the targets of malicious messages posted in electronic chat rooms and bulletin board systems with far-flung readership. But it has appalled powerful ISPs and civil liberties groups, who warn that the ruling could undermine the Internet as a forum for freewheeling discussion.

"Free speech is the loser," said Ann Brick, an American Civil Liberties Union lawyer. "All kinds of messages that someone objects to are going to be taken off the Internet, not because they're defamatory but because (ISPs) are afraid of guessing wrong."

Rather than sorting through voluminous libel claims or risking lawsuits, some ISP's will probably "shut down certain forums of communication," said Patrick Carome, a Washington lawyer who has represented AOL in similar cases.

Supporters of the ruling said the current system—shielding ISPs from liability while denying redress to victims—is both unfair and a misinterpretation of the 1996 federal Internet law. "Total immunity (for ISPs) doesn't seem to adequately weigh the injury to the defamation victim," said Susan Freiwald, a University of San Francisco law professor and author of a law review article on the issue. "If you're in a position to prevent a harm, and if you exacerbate the harm by not preventing it, then you should act" or be held responsible.

The case before the court, from Alameda County, did not involve a conventional Internet service provider, but instead focused on the responsibility of a person who took allegedly defamatory messages from a third party and distributed them to online "newsgroups."

The plaintiffs, physicians who have campaigned against alleged health care quackery, say they were libeled by

hundreds of messages that Ilena Rosenthal, an advocate of alternative medicine, got from another source and posted between 1999 and 2001. One message allegedly accused one doctor, Terry Polevoy, of stalking a radio announcer in Canada, where Polevoy lives. Polevoy said he told Rosenthal the message was false and demanded its withdrawal, but she repeated it in 32 messages to additional newsgroups.

Superior Court Judge James Richman dismissed the physicians' suit against Rosenthal in June 2001, saying the federal Communications Decency Act of 1996 bars lawsuits against an intermediary—whether an individual or an ISP—who distributes online an allegedly defamatory statement from another source. Even if Rosenthal knew that Polevoy was being falsely accused of a crime, Richman said, she could not be sued for spreading the message.

The 1996 law says that a provider or user of an interactive computer service, like an Internet chat room or newsgroup, will not be considered the “publisher or speaker” of information provided by someone else. The key ruling on its meaning was issued in 1997 by a federal appeals court in Richmond, Virginia, which said the law granted immunity to ISPs.

That suit was filed by Kenneth Zeran, who received death threats after an unidentified subscriber to an AOL bulletin board falsely gave his phone number as a contact for T-shirts mocking the 1995 bombing of the Oklahoma City federal building. The court said Zeran's suit against AOL—which allegedly brushed off his complaints—was barred because Congress sought to preserve the “vibrant and competitive market” of Internet speech by protecting ISPs from litigation.

The Zeran decision, though not legally binding elsewhere, has guided every court in the nation that considered a similar suit until the San Francisco appellate panel flatly rejected it in a ruling reinstating Polevoy's suit. Although the federal law refused to equate an ISP or other intermediary with the originator of a libelous message, the appellate court said the law did not rule out their liability, under traditional legal principles, for distributing harmful material after notice that it was libelous.

“Congress intended to encourage ISPs to monitor the content on the Internet, but if ISPs are granted absolute immunity for disseminating

third-party defamatory material, then ISPs will not bother to screen their content at all because they will never be subject to liability,” said Presiding Justice J. Anthony Kline in the 3-0 ruling.

But Carome, AOL's lawyer, said the court's reasoning was backward. If notice of libelous content put an ISP on the hook for a lawsuit, he said, “some providers would choose to keep themselves totally unaware of any content in their service.”

The ruling creates an impossible burden for ISPs, said Cindy Cohn, a lawyer with the Electronic Frontier Foundation, which promotes free speech on line. “It's not part of their job duties to referee disputes and sort out what's

defamatory,” she said. “In order to protect themselves, they'll take down speech” after receiving a complaint.

Polevoy's lawyer, Christopher Grell, said those who criticize the decision are being one-sided. “I don't think they've focused on the importance of someone's good name and the extent to which it can be damaged on the Internet,” he said. Reported in: *San Francisco Chronicle*, November 13.

Albany, New York

The New York Supreme Court granted summary judgment for defendants and dismissed a libel suit against the author and publisher of *Primary Colors*, a novel based on the first presidential campaign of Bill Clinton. A woman claimed that her reputation was damaged by the suggestion in the novel that she had a sexual encounter with Bill Clinton during his 1992 presidential campaign. In a case that could have implications for future suits involving online fantasy role-playing games, the trial court held that a work of fiction should not be held to the same standard as that of a work of nonfiction. While the publication of a factual statement about an individual that is both false and defamatory could give rise to a libel claim, “the description of the fictional character must be so closely akin to the real person claiming to be defamed that a reader of the book, knowing the real person, would have no difficulty linking the two.” Applying this higher standard, the court found that Daria Carter-Clark failed to show that a reasonable person could attribute the conduct and characteristics of a fictional character in *Primary Colors* to Carter-Clark such that her reputation was damaged. Reported in: cyberlaw.stanford.edu.

illegal detention

New York, New York

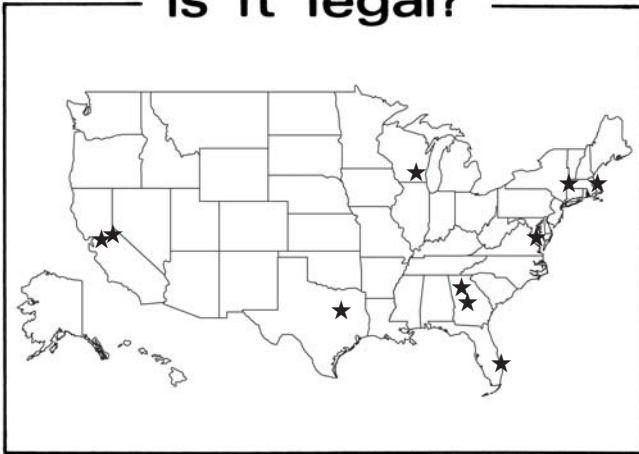
Two federal appeals court judges were hostile to the Bush administration's position November 17 as the government argued that the requirements of the anti-terror effort meant that the president could indefinitely detain an American who was arrested in this country as an “enemy combatant” and deny him contact with his lawyer.

“As terrible as 9/11 was, it didn't repeal the Constitution” one judge, Rosemary S. Pooler, said.

The judges made their comments as a three-judge panel of the United States Court of Appeals for the Second Circuit, in Manhattan, began considering the case of Jose Padilla, an American arrested last year at O'Hare International Airport near Chicago. The case drew worldwide attention when Attorney General John Ashcroft announced in June 2002 that the government believed that Padilla was planning to explode a radiological “dirty bomb” in the United States.

(continued on page 30)

is it legal?



libraries

San Francisco, California

The Electronic Frontier Foundation (EFF) sent a letter October 2 to the San Francisco Public Library Commission (SFPLC) warning of privacy concerns in the use of radio frequency identification (RFID) tagging of library books.

The SFPLC is considering a budget for RFID technology for the library system starting in 2004 with implementation starting in 2005. Under the plan, San Francisco libraries would place a computerized chip in library books and other materials to facilitate tracking of the books through the library system as well as on loans to patrons. Library staff, as well as potentially other persons, could use RFID sensor devices to determine the location, title, and potentially other information about the library materials.

“RFID technology raises great privacy concerns because insecure RFID tags permit inventorying of people’s possessions and tracking of people via their possessions,” explained EFF Senior Staff Attorney Lee Tien in the letter. “Libraries have long been very protective of library patron privacy given that surveillance of reading and borrowing records chills the exercise of First Amendment rights.”

EFF recommended that the SFPLC “postpone adoption of RFID technology pending further study and research into its privacy implications and cost-effectiveness.” Reported in: EFF Press Release, October 2.

Madison, Wisconsin

Public libraries would be required to tell parents of children under 16 what books, CDs, videotapes, and other library materials their children check out, under a bill approved by the Wisconsin Legislature November 4.

With few exceptions, libraries now are prohibited from disclosing any records that indicate the identity of individuals who borrow library materials or use library services. The measure would allow parents who request it to obtain records that document their children’s library use.

“We’re saying it’s a parental right,” said Rep. Sheryl Albers (R-Reedsburg), the author of the bill.

But Rep. Marlin Schneider (D-Wisconsin Rapids), who used Assembly procedural rules to block final approval of the bill, said he thought the measure was terrible public policy. “It’s a major invasion of the right of privacy of children,” he said. “Children need to understand their rights are protected, and if government won’t protect their rights nobody will.”

Albers said the issue of parental access to library records was raised after two of her constituents received an overdue book notice from their local library for an item checked out by one of their children. The couple were told by library staff that they couldn’t tell the parents the name of the overdue book. Albers said that incident raised another question about whether parents should have the right to find out what kinds of books and other library materials their children are borrowing. She said parents need “to be able to find out what their children are looking at.”

Sen. Joseph Leibham (R-Sheboygan), the Senate sponsor of the measure, said it seemed odd to him that under current law parents could not obtain records of the materials their children are using from public libraries. “This bill provides parents the opportunity to be informed and involved in the lives of their teenage children,” he said.

In the Senate, Sen. Fred Risser (D-Madison) said children should be encouraged to be inquisitive, to use public libraries to learn more about any subject they’re interested in, including some issues they may be unable or unwilling to discuss with their parents. “I think we should encourage kids to use libraries, encourage their minds to be open to new ideas,” Risser said. “I don’t know why we should have the public libraries be an investigative arm for parents.”

But for Amy Van Weelden of Sussex, the legislation makes sense. “I think it’s a pretty good idea,” said the mother of three children 11 and younger. “I pretty much censor what my kids bring home, anyway.” Van Weelden said such a check would not be an invasion of privacy. “Not in a kid that young, no,” she said while visiting the Pauline Haass Public Library. “I’m sure some teenagers might not think of it that way.”

At the Waukesha Public Library, Samuel Van Eerden, a 14-year-old from Mukwonago, said that his parents should have access to his library records. “Definitely, they have a right to what their kids are checking out,” Van Eerden said. “They’re our parents.”

Jane Ameel, director of Waukesha Public Library, doesn't see it as a black-and-white matter, however. "It's a real complicated issue. . . . We expect each parent to decide what's appropriate for his or her child, and we don't get involved with that. It's each family making its own decisions. On the other hand, libraries and librarians value information, and people's access, unfettered, to information. As librarians, we have all seen many, many times in our career children looking for what most of us would feel is appropriate information for a young person growing up, (children) who are uncomfortable because they want confidentiality."

The State Bar of Wisconsin opposed changing the law to require disclosure of library records to parents, arguing that there are many children who feel that they cannot turn to their parents or guardians for information on topics such as drug and alcohol abuse, sexuality and sexual abuse. "Should a young boy or girl that is being victimized by a parent or guardian now be victimized again by the disclosure of library records that may jeopardize their safety?" the bar association said in a memo to legislators.

The state Department of Public Instruction had recommended changing the bill to apply only to those under than 14, said Richard Grobschmidt, who heads the agency's libraries, technology and community learning division. "At that age we felt children should have the freedom of mind and access to information," he said.

Grobschmidt said that instead of changing state law, each library should be allowed to set its own policy on disclosure of records.

Paul Nelson, director of the Middleton Public Library and chair of the legislative committee of the Wisconsin Library Association, said the association recommended a lower age and that disclosure be allowed only if library materials are lost or overdue. Nelson said he did not believe parental access to library records was a major issue for library officials. Problems arise most often when books are overdue, he said.

"We've been able to deal with this very well at the local level so far," he said. "This is a local issue, and library boards should be able to set their own policies. Reported in: *Milwaukee Journal-Sentinel*, November 4.

schools

Atlanta, Georgia

The Fulton County school system has temporarily rescinded the expulsion of a Roswell High School freshman who wrote a fictional tale in her private journal about a student who dreams she kills a teacher. School officials said at a news conference October 24 that they would allow Rachel Boim to return to Roswell High School until the school board hears more about the incident. School system official Susan Hale said Acting Superintendent Mike Vanairsdale will personally review the case.

Boim was expelled after a closed, three-hour hearing conducted October 22 by a Fulton County school system official. Hale said the expulsion was for "inappropriate writings that describe the threat of bodily harm toward a school employee."

"Anytime the safety and security of our students and staff are put into question, we investigate the situation and, if warranted, take serious action," Hale said. "After reviewing the evidence, the hearing officer felt expulsion was an appropriate disciplinary response."

The hearing included testimony from Rachel's parents, Georgia's poet laureate and an editor of *Five Points*, a literary magazine published by Georgia State University. They all testified that the girl's story was nothing more than a work of fiction in a journal filled with drawings, coloring, poems, and other creative expression.

Poet Laureate David Bottoms, who was contacted by the family for help in defending Rachel's writing, said that he tried to convince the hearing officer that the journal entry was a narrative that grew out of creative thought. "In my opinion, based on my experience as a writer and with more than twenty years of teaching creative writing, this piece of work is clearly an imaginative piece, a piece of fiction—totally non-threatening," Bottoms said, recounting the statement he made at the hearing.

The journal entry describes a student, who is unnamed, having a dream while asleep in class. In the dream, the student shoots a teacher and then runs out of the classroom, only to be killed by a security guard. After that, the school bell rings and the student having the dream wakes up, picks up her books, and walks to another classroom.

The journal does not name a specific teacher, according to Rachel's parents, who described their daughter as a gifted writer and not someone with violent intentions. The family and Bottoms said the suspension was another example of Georgia school officials failing to use common sense when applying "zero-tolerance" policies. Three years ago, Cobb County school officials suspended a sixth-grader from Garrett Middle School for breaking the school's zero-tolerance weapons policy by having a Tweety Bird wallet with a 10-inch keychain. Cobb officials said chains were prohibited under the weapons policy, and the girl was given the maximum punishment: a two-week suspension.

David Boim said his daughter often carries her personal journal and did not have it in class as part of an assignment when it was confiscated October 7. Art teacher Travis Carr took the journal during the class because Rachel was passing it to a classmate, Boim said. Carr kept the journal overnight, and the next day Rachel was taken from her second-period class by school police and her parents were summoned to the school.

Rachel is an honors student in biology, French, and English literature, her parents said. She is the captain of her crew team and a voracious reader, they added. She comes from a family of writers. Her sister edits the Roswell High School literary magazine, and her mother, Kimberly, is a

former journalist and has taught literature at Chattahoochee Technical School.

“I think Rachel has been treated unfairly,” her father said. “I believe the school system is asking her to cede her Fourth Amendment right, her First Amendment right and her right to due process. Basically, the school system is saying they decide what is an appropriate topic to write about and what is an inappropriate topic.”

He said the family moved to Roswell from Colorado three years ago. Because they lived in suburban Denver at the time, the Boims often talked at home about the 1999 Columbine High School massacre, in which two students used pipe bombs and gunfire to kill twelve classmates and a teacher before killing themselves.

“Thomas Wolfe, Faulkner, all wrote about the South because that was their experience,” Boim said. “Students today are very aware of the violence around them. The shootings in school, we all hear about that and they affect children. Creative writers, or people who create art, write about what’s happening in their society.”

Rachel’s journal, one of many, contains a whole range of musings, he said—some dark and disturbing. Others her father described as “springlike” and “very fluffy kind of stuff.” The story that prompted her suspension was in a section titled “Dreams.”

“She writes about death and pain,” Boim said. “But we’re also talking about a kid who is a vegetarian because she can’t stand the thought of animals being killed. Her writing reflects a full gamut of emotions. . . . We’re not saying this shouldn’t have been brought to our attention. But the decision was made to expel Rachel without any understanding of the fact that this was just a story.” Reported in: *Atlanta Journal-Constitution*, October 24.

Gwinnett County, Georgia

Two Brookwood High School students have filed a federal lawsuit against administrators in the Gwinnett County Public School system for suspending them over criticisms of a teacher they posted on a Web site.

The American Civil Liberties Union Foundation of Georgia and two Decatur lawyers filed the suit in U.S. District Court in Atlanta on behalf of Brookwood seniors Lloyd Goldsmith, Jr., and Edward Alexander Morgan and their fathers. Gwinnett Schools Superintendent J. Alvin Wilbanks and principal Jane Stegall were named as defendants.

Goldsmith and Morgan were suspended in March after the two made postings on an off-campus Web site created by another student as “an outlet to provide students, teachers and parents at Brookwood High School or other citizens a place to vent and post comments concerning a particular [Brookwood] teacher . . . with whom many students were experiencing frustration and difficulty,” said the lawsuit, which was filed August 22.

The lawsuit also said the site included criticisms of the teacher, including “some hypothetical scenarios which visualized some fictional acts,” but “did not contain any direct threats or expressions of any intent to commit any violent acts.”

But Gwinnett Schools attorney Vicki Sweeny said at a disciplinary hearing, the students admitted to making the treats and apologized for them. “These were very violent, dehumanizing and degrading threats. This was not just, ‘I hate my teacher,’” Sweeny said. “We don’t think First Amendment rights protects vile threats like these were.” The lawsuit did not name the teacher.

In March, an unnamed student reported the Web site’s existence to a Brookwood high teacher, and the school later suspended Goldsmith and Morgan, citing a policy that students shall not abuse, threaten, intimidate or assault any school employee. Goldsmith was suspended until January 7, 2004. Morgan was suspended for ten days, with twenty hours community service. After Goldsmith’s parents threatened legal action, the school amended its decision and allowed him to return to school April 17, the lawsuit said. He also was told to perform forty hours community service.

System representative Sloan Roach said the district stood by its decision to suspend the students. “These students were disciplined for making direct threats against a named school employee,” Roach said. “Gwinnett County Public Schools is responsible for doing what’s in the best interest of its students and staff to ensure a safe teaching and learning environment. The action taken against these students was consistent with that responsibility.”

The lawsuit is in addition to another case in which Gwinnett students were suspended for Web postings involving their school. On October 3, two Trickum Middle School students were suspended for running a Web site with racial slurs and threats about other students. Reported in: *Gwinnett Daily Post*, October 28.

parody and satire

Dallas, Texas

The Freedom to Read Foundation and the Association of American Publishers along with thirteen other First Amendment groups went into court in Texas November 5 to defend the right of Americans to make fun of public officials through political satire and parody without fear of being sued for defamation. In a case before the Texas Supreme Court that is attracting national attention, the groups joined in a friend-of-the-court brief asserting the constitutional right of Americans to use “comic exaggeration to draw attention to “misuse of authority.”

The case is a defamation action brought against the *Dallas Observer*, an alternative newsweekly, and its parent company, New Times, Inc., as a result of the publication of a

fictitious article satirizing the way in which two local elected officials enforced a school violence “zero-tolerance” policy by jailing a 13-year old student for writing a school-assigned Halloween essay. In October 1999, six months after the shootings at Columbine, a 13-year-old 7th grader was jailed for five days in Denton County (north of Dallas) for writing a homework-related Halloween essay in which he discussed the shooting of two students and a teacher.

In the wake of the highly publicized incident, the *Dallas Observer* published a satiric article entitled “Stop the Madness,” reporting that a 6-year old had been arrested during story-time after writing a book report based on *Where the Wild Things Are* that contained “cannibalism, fanaticism, and “disorderly conduct.” The mock news article contained outrageous fictional quotes from several real people, including then-Governor George W. Bush, a representative of the ACLU, the county district attorney Bruce Isaacks, and juvenile court judge Darlene Whitten. The piece drew criticism from some members of the public, who apparently believed it to be a true news story rather than a satire.

Isaacks and Whitten sued for defamation. Both the trial court and the Texas Court of Appeals refused to throw the case out, finding there to be issues for the jury as to whether a “reasonable person” would believe the story to be true and whether the defendants acted with “actual malice” in publishing it.

The *amicus* brief points out that “beyond the absurd proposition that a six-year-old girl could be arrested for anything, much less writing a book report on one of the most critically acclaimed and best-loved children’s books of all time, the article is saturated with details, some specifically noted by the Court of Appeals, any one of which would have put a reasonable reader on notice that the article as a whole was not to be taken literally.”

The brief states that “Opinions conveyed through the use of humor, while they may rub those criticized the wrong way, are no less entitled to First Amendment protection than those conveyed by other means,” concluding that “In short, satire is the type of speech on matters of public concern the protection of which is the transcendent purpose of the First Amendment.”

Among the 15 groups joining the *amicus* brief are the American Booksellers Foundation for Free Expression, the Association of Alternative Newsweeklies, the Motion Picture Association of America, PEN American Center, and the Reporters Committee for Freedom of the Press. The brief and a complete listing of the amici can be found on the AAP web site at www.publishers.org. Reported in: AAP Press Release, November 5.

broadcasting

Washington, D.C.

Federal regulators approved rules November 4 meant to prevent people from copying broadcasts of television shows

and movies and widely distributing them on the Internet. The decision, by the Federal Communications Commission, was widely hailed by Hollywood and the networks, which had lobbied hard for it. They have argued that at the dawn of digital television, they need regulatory and technological protection to avoid the experiences of the recording industry, which has been forced to cut prices and has filed hundreds of lawsuits to try to stop swapping of music on the Internet.

The movie studios and networks, as well as top regulators, including Michael K. Powell, the chair of the FCC, have said the rules are essential to accelerating the transition to digital television. Earlier this year, the commission reported that more than a thousand broadcast television stations were transmitting digital programming, and every major market is now served by at least one digital station.

But the rules were sharply criticized by consumer organizations, which said they would force viewers to buy expensive equipment to make copies of digital programs and would give the studios greater control over what has been the ordinary copying of programs for home use. The consumer groups contend that the rules will make it difficult for viewers to make copies of programs for later viewing and will make some of their current equipment obsolete. They have complained that the rules will make it difficult to transfer video clips of news and sports programs that ought to be considered in the public domain.

The rules were supported without reservation by Powell and his two Republican colleagues on the commission. The two Democratic commissioners issued statements that dissented in part from the order that adopted the rules. Their statements recognized the need to offer some protection against improper distribution but said that the regulations were too broad.

FCC officials said the order was supposed to enable viewers to make copies of digital television programs for their own use but not be able to distribute them in mass, through e-mail, for example. While current technology makes it difficult to send programs on the Internet, experts predict that advances in computer software will ultimately make it as easy to transfer television programs and movies as it is now to exchange sound clips and photos.

The rules, which require manufacturers to install new antipiracy technology on digital television sets by July 2005, may still face court challenge—some of the companies and groups commenting on the rules before they were completed said the FCC did not have the authority to issue them.

The rules permit the studios and networks to insert a special “broadcast flag,” or digital marker, into the data stream that is transmitted over the airwaves. The flag, which could be read by new equipment in ways intended to prevent piracy, would be invisible to viewers and would not interfere with the picture or sound. FCC officials and industry lobbyists said it would be ignored by current television equipment and would permit consumers to make copies of programs but not distribute them if the networks or studios so decided.

The movie studios and networks maintain that the rules are necessary to preserve high-quality over-the-air television. Cable and satellite television services are not as vulnerable to piracy because they can encrypt their programs.

“The FCC scored a big victory for consumers and the preservation of high-value over-the-air free broadcasting with its decision,” said Jack Valenti, the president and chief executive of the Motion Picture Association of America. “This puts digital TV on the same level playing field as cable and satellite delivery. All the way around, the consumer wins and free TV stays alive.”

In a statement, Powell said the new rules would help accelerate the transition to digital television and struck a “careful balance between content protection and technology innovation in order to promote consumer interests.”

“As recommended by many in the information technology community, we have identified objective criteria to guide our decisions on new content technologies. These criteria lay out a roadmap for companies seeking to bring new technologies to market,” Powell added.

But consumer groups said the rules went too far. “More than 40 million DVD players in consumers’ homes today will not be able to play content they record on new ‘flagged’ devices, making them at least partially obsolete,” said Chris Murray, legislative counsel at Consumers Union. “Technology always marches on, but that’s normally because new devices offer consumers better features and more flexibility to woo buyers in the marketplace, not because government fiat has rendered a particular technology obsolete. This time, the FCC’s ‘upgrade’ will be a downgrade for consumers.”

In their partial dissents, the Democratic commissioners, Michael J. Copps and Jonathan S. Adelstein, said the rules could make it impossible for Internet users to share digital video clips of news events and other programming that should be in the public domain. “I dissent in part, first, because the commission does not preclude the use of the flag for news or for content that is already in the public domain,” Copps said in a statement. He also said he dissented from elements of the order because it did “not expressly consider the impact of a technology on personal privacy.”

Adelstein said, “I dissent in part, as I do not believe we have fully achieved our goal of creating an effective and appropriately tailored pro-consumer digital broadcast television protection regime.”

“By subjecting, say, the State of the Union address to mandated redistribution control technologies, have we not undermined a core value of our society?” Adelstein wrote. “I search in vain for record support or a reason to lock up political speech from widespread distribution.”

They also warned that the rules could allow technology to track the viewing habits of consumers.

Commissioner Kathleen Abernathy supported the decision “because of the changes we have made to the way transmission and recording technologies are approved.” She added, “While we are asking for further comment on this issue, we set

up on an interim basis a transparent, open and objective approval process that will promote the development of competition in the marketplace and foster innovation.”

The FCC is establishing an interim process to consider content-protection technologies on an expedited basis. The agency hopes to finalize the list of approved technologies by early 2004. In addition, the agency is seeking more input on determining the criteria it should use for approving content-protection technologies. Reported in: *New York Times*, November 5; *nationaljournal.com*, November 4.

copyright

Boston, Massachusetts

A Boston College student has given up her legal challenge to a controversial provision of the Digital Millennium Copyright Act that lets copyright owners subpoena the names of suspected copyright violators without the approval of a federal judge. The student’s decision was part of an out-of-court settlement with the Recording Industry Association of America. Under the settlement, reached October 21, she agreed to stop fighting an RIAA subpoena that had demanded that the college reveal her identity. She also agreed to make a payment to the recording-industry group.

The subpoena was among hundreds the RIAA has issued to obtain the names of suspected file sharers from their Internet service providers, which include a number of colleges. The recording-industry group has subsequently sued many of the people whose names it has learned, charging them with copyright violations.

In September, after coming under fire at a Congressional hearing, the RIAA said that before suing suspected copyright violators, it would issue them warnings and give them the opportunity of settling the disputes out of court. As a result of the Boston student’s settlement, the subpoena she had been challenging is moot, because the recording-industry group knows her name. The group has agreed not to sue her for copyright infringement.

A motion that had been filed in federal court on behalf of the student, a senior, attacked as unconstitutional the subpoena process laid out in the Digital Millennium Copyright Act. That provision allows the RIAA, as a representative of the copyright holders, to gain quick access to names of suspected copyright violators by issuing subpoenas signed only by a federal-court clerk, rather than by a federal judge, as is usually required. The American Civil Liberties Union represented the student in her challenge to the provision.

The subpoena provision was among the most contentious of the 1998 digital copyright act. Critics say it gives copyright holders an unprecedented ability to intimidate consumers, even those who have not actually violated copyright law. Backers of the provision say it is necessary to protect digital information, which can be readily distributed online.

David Plotkin, the student's attorney, said his client decided to settle with the RIAA because she was "overwhelmed" by the case and wanted to avoid mounting legal expenses. "Even if we won the motion to quash, this wouldn't necessarily go away," he said. "The recording industry may have come up with other ways to find out who she is, and to pursue her."

The student may also have been scared off by a motion filed by the U.S. Department of Justice to intervene in the case in support of the subpoena provision. Plotkin declined to reveal how much the student paid the group, but said it was "in the range" of \$2,500. In the settlement, the student did not admit wrongdoing, Plotkin added.

Despite the student's action, the American Civil Liberties Union has not given up its hope of challenging the subpoena provision. The group is considering representing other people who would challenge the provision, said Aden J. Fine, a lawyer for ACLU's national office in New York.

"The settlement is not, in any way, a concession that the claims that were raised were not going to succeed," Fine said, adding that it can be costly and taxing to go up against the RIAA. "This is a long and emotionally draining process, and the RIAA knows that, and that's what they're counting on, that nobody's going to have the stomach to fight them," he said. Reported in: *Chronicle of Higher Education* online, October 23.

privacy

Sacramento, California

California law enforcement officers should not spy on citizens exercising their constitutional rights of speech, religion and association unless they have reason to think a crime has been or will be committed—no matter what John Ashcroft says. That's the gist of one of a series of legal guidelines that state Attorney General Bill Lockyer sent to every police chief and sheriff in the state in October in the form of a book titled, "Criminal Intelligence Systems: A California Perspective."

"Put bluntly, it is a mistake of constitutional dimension to gather information for a criminal intelligence file where there is no reasonable suspicion" that a crime has been or will be committed, Lockyer's guideline says. If California's investigators follow that guideline, they will be using a different rulebook than the FBI. Federal officials rewrote their guidelines in May 2002 at the behest of Attorney General Ashcroft in reaction to the terrorist attacks of September 11, 2001.

FBI agents were told that "for the purpose of detecting or preventing terrorist activities, the FBI is authorized to visit any place and attend any event that is open to the public, on the same terms and conditions as members of the public generally."

That was a departure from rules that required agents to suspect someone had committed or was planning a crime

before they could start spying. The Ashcroft rules cautioned that "no information obtained from such visits shall be retained unless it relates to potential criminal or terrorist activity," but that didn't deter criticism from civil libertarians nationwide.

In July 2002, the American Civil Liberties Union asked Lockyer to ensure that investigations in the state were carried out with respect for Californians' right to privacy, which was made part of the state Constitution in a 1972 voter initiative. The group renewed its call after learning that the California Anti-Terrorism Information Center, part of Lockyer's office, was publishing bulletins about upcoming marches and rallies on the same bulletins it used to warn about terrorist activities.

Lockyer later conceded those bulletins should not have been issued by an anti-terrorism group and promised to issue guidelines making it clear that law enforcement should not spy on protesters without suspicion of criminal activity. "This report, we hope, will help law enforcement agencies understand the complex rights and responsibilities of both law enforcement and the public," Lockyer staffer Nathan Barankin said. "What the AG hopes is that they'll get it, and they'll read it, and take a look at their own policies to make sure they have effective and good ones in place."

The issue of police surveillance has led to a number of controversies in California. In Fresno, activists with Peace Fresno were startled to discover recently that a man who they said had been a regular at meetings was an undercover sheriff's deputy on an anti-terrorism team—a fact they discovered on the obituary pages after the deputy died in a motorcycle accident.

The sheriff later sent Peace Fresno a letter outlining his policy—identical to the Ashcroft guidelines for the FBI—while adding that the group was not the target of an investigation.

"I think (the Lockyer guideline) is absolutely necessary and very appropriate. . . . That's what we need here in California," said Peace Fresno vice president Camille Russell. "I'm tickled."

San Francisco police were also criticized by the city's civilian-run police watchdog agency after officers videotaped a war protest without obtaining permission from the chief, which police officials later conceded violated department guidelines. San Francisco police Lt. Morris Tabak said that while Lockyer's guidelines might prove helpful for departments that don't have established rules, they won't make much difference in the city, since the same rules have been part of San Francisco's general orders since 1993.

Nor will the new guidelines make much of a difference in joint state/federal task forces, even if agents are following different rules from one another, said FBI representative LaRae Quy. "We have a very good relationship with local and state law enforcement agencies, and this will be a

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success stories



libraries

Modesto, California

Responding to citizen and teacher outcry, Modesto City Schools Superintendent Jim Enochs backed a committee decision to return *Always Running: La Vida Loca: Gang Days in L.A.* to teacher Melissa Cervantes' classes at Beyer High School. The decision reversed the actions of district administrators who had removed the book in early November.

The award-winning book by Luis Rodriguez had been deemed unacceptable due to 'hard-core' descriptions of violence, drug use and sex. But the administrator who made the decision to remove the book had not followed the board's procedures established for advanced classes.

The book was removed from three Beyer High School classrooms after home-schooling mother Pamela LaChapell complained about its graphic sexuality and violence. "This book is way over the top," she said. "To me, it's pornographic."

Last spring, LaChapell asked the Board of Education to remove five books from advanced English classes. The seven-member board said administrators should instead give parents more information about the books their children read, including annotations of each text. Parents can opt their children out of any assignment they find objectionable.

However, when LaChapell complained in October about *Always Running*, she got her wish. After taking a sec-

ond look at the board-approved book, district administrators told Cervantes that she could no longer use it in her class.

"She didn't do anything wrong. She took a book that was on the approved list," said David Cooper, director of secondary education. "But this is one that probably slipped through the cracks, that we didn't look at carefully enough."

Cooper said the book is not well-written and does not have the same literary value as other novels that LaChapell had objected to, such as Isabel Allende's *The House of the Spirits* and David Guterson's *Snow Falling on Cedars*.

Others found a lot to like in *Always Running*. The book won a Carl Sandburg Literary Award, a Chicago Sun-Times Book Award and was designated as a New York Times notable book. In addition to winning numerous fellowships and writing seven other books, Rodriguez was one of fifty people who received an "Unsung Heroes of Compassion" award from the Dalai Lama in 2000.

Rodriguez, an ex-gang member, wrote the cautionary tale to steer his son away from the streets. He said he gave the raw truth to show youngsters that gang lifestyles are not glamorous. It was too late to save his son, who is in prison, but Rodriguez said he has received hundreds of letters from youngsters who quit gangs or refused to join after reading his story. He noted that the book has been challenged in other California cities, including Fremont, San Diego, San Jose and Santa Rosa. He said critics usually object to the sex scenes, even though there is more violence than sex.

"I know it's a hard book. It's very graphic," said Rodriguez, who has given readings and held seminars at schools and universities across the nation. "I'm the first one to admit that it's not a book for everybody." Rodriguez said parents should opt their children out of the book, instead of the book being banned.

Beyer High School Principal Randy Fillpot said he got an October 23 visit from LaChapell, but no complaints from parents or students. LaChapell, who home-schools a child and has older children in college, said three parents called her to complain about *Always Running*. She declined to identify them and said they were not willing to discuss their concerns with school officials because they are worried about retribution.

"Students who are bothered by this material are afraid that it will cost them a grade if they speak out," LaChapell said.

The district's swift action pleased LaChapell but outraged Barney Hale, executive director of the Modesto Teachers Association, which represents about 1,800 teachers. He said administrators violated their own policy by pulling the book without taking the matter back to the board that approved it. "Obviously, that's all been circumvented," he said.

After the uproar began, the book was sent through the proper procedure—review by a committee of high school English department chairs. They disagreed with the complaint and recommended reinstating the book, which is on a

state-approved list. By following this recommendation, Enochs in effect extended procedures developed for challenging books in advanced classes to other classes in the district.

Back in Cervantes' class, students were "fighting with their heads, not with their hands," said their teacher. They were writing letters to board members and lobbying in favor of the book, which they believed had been misrepresented. When Enochs reinstated the book, the students felt they had won. Cervantes felt they had learned a valuable lesson—that sometimes, the system works. Reported in: *Modesto Bee*, November 1, 21.

Vero Beach, Florida

A committee of parents and educators unanimously recommended November 24 that Indian River County Schools not ban a well-known Florida novel that drew complaints from two parents about racially offensive language. By an 8-0 vote, the panel appointed by the School District wrote in its recommendation that Merritt Island resident Patrick Smith's *A Land Remembered* illustrates "tolerance among people of different races by the example of the main characters."

"I'm not disappointed, I expected it," said Dale Alexander, one of the parents who said the book's use of the "N-word" created a hostile learning environment for his children. Alexander's daughter, Maria, and Melvin Yorker's son Demario, both eleventh-graders at Vero Beach High School, told their parents they were upset when an English teacher read aloud a passage from the book containing the word, prompting laughs among some white students.

The novel traces Florida's settlement from 1858 to 1968 through three generations of the MacIvey family, and does not repeat the word in characters' final eight years. Published in 1984, *A Land Remembered* is a selection of "Just Read Central Florida." Smith said it was nominated for a Pulitzer Prize.

Smith said he was not bothered but puzzled by the controversy that emerged about the novel, which has been used in Florida schools for years. "There's not one single incident where the word is used in a threatening manner, in a racial incident or anything," he said. "It's used only in conversation between characters of that period."

Alexander and Yorker said they did not object to the book itself or its inclusion in a school library, only to the offensive language being read aloud in a classroom. "That word is one we're trying to get away from in 2003," Yorker said. Alexander and Yorker said they had consulted a prominent civil attorney about a possible lawsuit against the School District if no action is taken.

The committee suggested that continued reading of *A Land Remembered* could provide opportunity for "teachable moments." They also recommended teachers preface the reading of any sensitive material with classroom discussion. Reported in: *FloridaToday.com*, November 25.

Urbandale, Iowa

In a controversial move, the Urbandale library board decided November 24 that children 14 and older can still come in and check out R-rated movies without their parents knowledge. Board members said it was not their job to supervise every movie, book, or magazine that is checked out.

"If we talk about videos, DVDs this month, then six months from now we're talking about CDS, and six months later magazines, and six months after that books," Library Board member Mark Zlab said. "And where does it stop?"

The issue had been debated for a month. The policy is similar to other libraries around the country, and is adopted in the American Library Association's bill of rights.

The library board said the library will send a flyer to parents letting them know they won't censor items checked out, so if parents are worried they need to watch what their kids bring home or go to the library with them. Reported in *IowaChannel.com*, November 25.

broadcasting

Washington, D.C.

The Federal Communications Commission has given U2's Bono a pass on his use of the f-word on television during the prime-time broadcast of the Golden Globe awards on NBC last January. While at the podium during the broadcast of the awards show, Bono let slip, "this is really, really, f—— brilliant." The Parents Television Council and more than two hundred individuals complained to the FCC against dozens of NBC affiliates that aired the broadcast. On October 8, the FCC may have opened the floodgates of more f-word slinging in prime-time when they made a ruling that Bono's use of the word did not constitute a violation of the nation's broadcast indecency rules.

The FCC said that the singer's use of the word was so "fleeting and isolated" it did not reach the level of indecent speech under the FCC rules. Those rules stipulate that indecent speech is language that used in a context that "depicts or describes sexual or excretory activities or organs in terms patently offensive as measured by contemporary community standards."

The FCC stated, "The word 'f——ing' may be crude and offensive, but, in the context presented here, did not describe sexual or excretory organs or activities. Rather, the performer used the word 'f——ing' as an adjective or expletive to emphasize an exclamation. Indeed, in similar circumstances, we have found that offensive language used as an insult rather than as a description of sexual or excretory activities or organs is not within the scope of the commission's prohibition of indecent program content." Reported in: *antiMusic.com*, October 8. □

(censorship dateline . . . from page 14)

The program will take place in 2004 at South Florida University, the University of Texas at Austin, Winthrop University, Kent State University and the University of California at Berkeley. ASNE will fund over \$700,000 in grants to the schools.

"ASNE is an organization that exists in service to newspapers and the First Amendment," Bhatia said. "We didn't feel comfortable putting money in for [the High School Journalism Institute] into a university where the leadership, in this case the acting president, shows a disregard for them," he said.

The editors of the Hampton Script redesigned the October 22 issue with Haysbert's letter on the front page, and distributed the reordered newspaper at Hampton's Homecoming game on October 25.

Chris Campbell, Director of the Scripps Howard School of Journalism and Communications, said that in addition to the re-issue of the October 22 edition, Haysbert appointed a task force headed by Scripps Howard Endowed Professor of Journalism Earl Caldwell to ensure free press within the newspaper. "The task force was created to deal with student newspaper construction. It will essentially give students a free press newspaper," Campbell said.

Other members of the task force include Talia Buford, a junior print journalism major, Daarel Burnette, II, a sophomore print journalism major, three faculty members, three advisors to the student newspaper and Campbell himself.

"The task force is expected to recommend guidelines for roles of editors and advisors, and once that work is done, hopefully that will resolve the situation," Campbell said. "The task force will make recommendations [to the newspaper], and those may end up leading to further change." Reported in: *Badger-Herald* [Wisconsin], November 18.

books

Halifax, Nova Scotia

The road to hell apparently stops at the Nova Scotia border. The new book *The Road to Hell: How the Biker Gangs Conquered Canada*, by Montreal journalists Julian Sher and William Marsden, won't appear on shelves in the province any time soon. "We've asked our stores to pull the book but it's not our decision," said Soyra Gaulin, spokeswoman for Indigo, Chapters and Coles bookstores. "Apparently there's contents in the book that might jeopardize trials going on, and that's why it's (banned) in Nova Scotia only."

Publisher Random House issued the ban order to bookstores, Gaulin said, but it wasn't immediately clear why. Chris Hansen of the province's Public Prosecution Service said her department had no input into the ban. "All I can surmise is that it's the publisher's decision based on legal advice," she said.

Gaulin said the book will not be shipped for sale into Nova Scotia and she didn't know what would happen to any

copies already in the province. She referred all other questions to Random House, which published the book through its Knopf branch. No representatives at either publisher could be reached for comment, and neither could the authors.

According to the Random House Web site, "murder plots, drug deals, money laundering and assassinations are brought to life through never-before-revealed police files, wiretaps and surveillance tapes" in the book. "The authors tell all about [biker boss Maurice] Mom Boucher's war on the justice system; how he finally lost in Quebec, thanks in part to Dany Kane, a reluctant biker turned informer; but how across Canada the Hells have succeeded in building a national crime empire," the Web site states.

Kane and his gay lover Aime Simard, both of Quebec, were charged with the February 1997 shooting death of Robert Ernest MacFarlane of Hatchet Lake. The Hells Angels associate and married businessman was gunned down in a gang-ordered hit in the Lakeside business park outside Halifax.

In August 2000, Kane died in his car of carbon monoxide poisoning inside his Quebec garage. Police at the time called the circumstances "curious." Despite his death, police used the information he provided in a nationwide biker sweep in March 2001.

Simard, who pleaded guilty to MacFarlane's killing and later testified against his married lover, was killed in his Saskatchewan Penitentiary cell on July 18. The *Montreal Gazette* reported that investigators found a document in his cell indicating he was expected to testify at an upcoming Hells Angels-related murder trial in Nova Scotia. Reported in: *Halifax Herald*, November 5.

art

Nevada County, California

The Arts Advocacy Project of the National Coalition Against Censorship (NCAC), the Oakland, California, First Amendment Project, the ACLU of Northern California and other free speech organizations protested the cancellation of the Annual Open Studios Art Show at the Rood Administrative Center in Nevada County. County officials canceled the entire show after an initial attempt to remove five individual works, which contained partial nudity.

The organizations urged the County to adopt exhibition guidelines, which "recognize the freedom of artists to express diverse views, show respect for the curatorial judgment of the Nevada County Arts Council, and affirm the rights of people in the community to see a wide range of artwork."

Svetlana Mintcheva, coordinator of NCAC's arts advocacy project, said "the beliefs of a small minority, who think that the human body is an object of shame, are countered not only by centuries of art, but also by decisions of the U.S. Supreme Court. We are all entitled to our beliefs; however, it

is not a democratic government's mandate to embrace the beliefs of one group at the expense of everyone else."

David Greene, executive director of the Oakland-based First Amendment Project, voiced his concerns over Nevada County's commitment to arts, culture and freedom of expression, "It is a sad statement about the role of art in public life," said Greene, "when an entire art exhibit is canceled in the service of personal prejudices."

Following is the text of a letter sent October 9 to county officials by the protesting groups:

We were disturbed to learn that Nevada County officials ordered the removal of all work from the Annual Open Studios Art Show at the Rood Administrative Center. Ironically, the order was issued on the very first day of a month that Nevada County had proclaimed "Arts, Culture and Humanities" month with a resolution stating that the Board of Supervisors "encourages community support of all artists and especially the activities of the Nevada County Arts Council."

Support of artists also means support of artists' right to free creative expression. Yet the Annual Art Show was canceled precisely so as to silence one type of artistic expression. The order to cancel the show came after an initial attempt by the County to remove five individual works because they contained partial nudity. Faced with protests by the artists and other members of the community, all of whom were opposed to the censorship, county officials decided that the whole exhibit should be taken down.

The human body is not obscene. There are representations of nudes in many public places—by far not only in galleries and museums. There are nude sculptures in the capital's public squares and nudes in the friezes of government buildings. The U.S. Supreme Court has specifically declared that simple representations of nudity are a constitutionally protected form of artistic expression.

People in this country hold a variety of religious and moral beliefs.

The government should not embrace the beliefs of one group to the disadvantage of everyone else. The First Amendment bars government officials from discriminating against expression—including artistic expression—because somebody finds it sacrilegious, morally improper or otherwise offensive.

The attempt to censor and the subsequent cancellation of the show raise doubts about Nevada County's commitment to the arts, culture and freedom of expression. It is a sad statement about the role of art in public life when county officials would rather cancel an entire exhibit than put aside their personal prejudices and allow the artwork to be seen. With the clear intent to suppress representations of nudity, the County has silenced 65 artistic voices. What an inauguration of Arts, Culture and Humanities month!

The Art Show has now, fortunately, found another home. Nevada County, however, faces the decision of whether it wants to truly support the arts and display the diverse work of area artists in its public buildings or let the prejudices of a few

public officials dominate what Nevada County citizens can see. We hope the guidelines the County is planning to institute in the future will recognize the freedom of artists to express diverse views, show respect for the curatorial judgment of the Nevada County Arts Council, and affirm the rights of people in the community to see a wide range of artwork. We would be happy to work with you in developing those guidelines. Reported in: NCAC Press Release, October 9. □

(from the bench . . . from page 20)

Another judge on the panel, Barrington D. Parker, Jr., said that if the courts accepted the government argument "we would be effecting a sea change in the constitutional life of this country."

A lawyer for the government, Paul D. Clement, said the nature of the conflict meant that military principles, not the usual rules of the American criminal courts, had to be applied to protect the country properly.

"Al Qaeda made the battlefield the United States," Clement told the panel in a crowded courtroom. "And there's every indication they want to make the battlefield the United States again."

The third judge on the panel, Richard C. Wesley, at times sparred with the other judges, suggesting that the terrorist attacks of September 11, 2001, were different from other conflicts. "This happened on our soil," Judge Wesley said.

Clement, the deputy solicitor general, expanded arguments that government lawyers made when a federal district judge began considering the case last year. He said the president's power as commander in chief had always included the power to detain military enemies.

Lawyers arguing on behalf of Padilla told the judges that the government was distorting principles of American liberty by expanding battlefield concepts to civilian life. One lawyer, Jenny S. Martinez, said, "The president seeks an unchecked power to substitute military power for the rule of law."

Both sides appealed parts of rulings by Michael B. Mukasey, chief judge of the U.S. District Court in Manhattan. Judge Mukasey said President Bush had the authority to detain Padilla if there was "some evidence" he was involved in terrorism, but also said Padilla had a right to meet with his lawyers.

Padilla, a former gang member in Chicago and a convert to Islam with a long criminal record, was arrested after traveling from Pakistan. On May 8, 2002, he was taken to New York on a material witness warrant. In June, Bush declared him an enemy combatant, and he was moved from a federal jail in Lower Manhattan to a Navy brig in Charleston, South Carolina. He has been held incommunicado since then.

All three judges on the panel indicated that they viewed the case as a crucial test of government powers. The appeal on Padilla's behalf has attracted wide attention because he is the only American taken into custody in this country and declared an "enemy combatant."

The appeal drew added interest after the Supreme Court decided to consider whether the detainees at the naval base on Guantánamo Bay, Cuba, could challenge their status in civilian courts. That decision was seen by some experts as an expression of a new willingness by the courts to challenge the administration's contention that the nature of the antiterror effort made the administration the final arbiter on many questions over treating detainees.

Judge Pooler and Judge Parker were appointed to the federal bench by President Bill Clinton. Judge Parker, who was elevated to the appeals court from the District Court in Manhattan by Bush, at times suggested that he was also alarmed by the government's arguments.

Judge Parker made several of those comments after Clement argued that the court would be mistaken to test Padilla's detention against usual civilian rules. Clement is the principal deputy to Solicitor General Theodore B. Olson. The government has said Padilla was "associated with Al Qaeda," met officials of the group in Afghanistan and received training in explosives in Pakistan.

"The normal system does not apply," Clement said.

Judge Parker then said that "what troubles me" was what he described as "the ease with which" Clement transposed military rules into the civilian sphere. Judge Parker said he believed that only Congress could make what he described as an unprecedented decision that would permit the indefinite detention without charges of an American arrested in this country.

Clement answered that the government was proposing no change at all, because the detention without charges of people captured in war had been recognized "over and over again in military engagement after military engagement." Reported in: *New York Times*, November 18.

privacy

San Francisco, California

The FBI and other police agencies may not eavesdrop on conversations inside automobiles equipped with OnStar or similar dashboard computing systems, a federal appeals court ruled November 18. The U.S. Court of Appeals for the Ninth Circuit said the FBI is not legally entitled to remotely activate the system and secretly use it to snoop on passengers, because doing so would render it inoperable during an emergency.

In a split 2-1 ruling, the majority wrote that "the company could not assist the FBI without disabling the system in the monitored car" and said a district judge was wrong to have granted the FBI its request for surreptitious monitoring.

The court did not reveal which brand of remote-assistance product was being used but did say it involved "luxury cars" and, in a footnote, mentioned Cadillac, which sells General Motors' OnStar technology in all current models. After learning that the unnamed system could be remotely activated to

eavesdrop on conversations after a car was reported stolen, the FBI realized it would be useful for "bugging" a vehicle, Judges Marsha Berzon and John Noonan said.

When FBI agents remotely activated the system and were listening in, passengers in the vehicle could not tell that their conversations were being monitored. After "vehicle recovery mode" was disabled, the court said, passengers were notified by the radio displaying an alert and, if the radio was not on, the system beeping.

David Sobel, general counsel at the Electronic Privacy Information Center, called the court's decision "a pyrrhic victory" for privacy. "The problem (the court had) with the surveillance was not based on privacy grounds at all," Sobel said. "It was more interfering with the contractual relationship between the service provider and the customer, to the point that the service was being interrupted. If the surveillance was done in a way that was seamless and undetectable, the court would have no problem with it."

Under current law, the court said, companies may only be ordered to comply with wiretaps when the order would cause a "minimum of interference." After the system's spy capabilities were activated, "pressing the emergency button and activation of the car's airbags, instead of automatically contacting the company, would simply emit a tone over the already open phone line," the majority said, concluding that a wiretap would create substantial interference.

"The FBI, however well-intentioned, is not in the business of providing emergency road services and might well have better things to do when listening in than respond with such services to the electronic signal sent over the line," the majority said.

In a dissent, Judge Richard Tallman argued that a wiretap would not create unnecessary interference with emergency service and noted that "there is no evidence that any service disruption actually occurred. The record does not indicate that the subjects of the surveillance tried to use the system while the FBI was listening. One cannot disrupt a service unless and until it is being utilized.

"The record indicates that the only method of executing the intercept order in this case involved activating the car's microphone and transferring the car's cellular telephone link to the FBI. This conduct might have amounted to a service disruption, had the subjects of the surveillance attempted to use the system, but there is no evidence that they did."

The majority did point out that the FBI cannot order the system to be changed so that the emergency functions would work during surveillance. Congress ordered telephone companies to do just that in the 1994 Communications Assistance for Law Enforcement Act, but current law does not "require that the company redesign its system to facilitate surveillance by law enforcement."

The decision is binding only in California, Oregon, Nevada, Washington, Hawaii, and other states that fall within the Ninth Circuit's jurisdiction. No other appeals court appears to have ruled on the matter. Reported in: *C/Net*, November 19. □

(is it legal . . . from page 26)

matter for the courts to work out, not the individual law enforcement agencies,” she said.

Barankin agreed, saying that state law enforcement agencies have managed to work with federal agencies in the past despite disagreements on issues such as medicinal marijuana and questioning Middle Eastern immigrants. “There’s way too much that we concur on and way too much work for us all to do,” he said.

Civil libertarians welcomed Lockyer’s guidelines. Jim Dempsey of the Center for Democracy and Technology said other states would be wise to follow Lockyer’s lead, for philosophical and practical reasons. “What the attorney general is doing is very positive, both from a civil liberties standpoint and a counterterrorism standpoint,” he said. “He’s saying he wants California police to be focused, to prioritize,” rather than “going off on fishing expeditions.”

But ACLU attorney Marc Schlosberg, while praising the guidelines, said he would like to see them reissued in a simpler form that would make the rules clear to every law enforcement official in the state. “We welcome this as a first step,” he said. “But we really need more concrete guidelines as well.” Reported in: *San Francisco Chronicle*, October 18.

Washington, D.C.

A little-noticed measure approved by both the House and Senate would significantly expand the F.B.I.’s power to demand financial records, without a judge’s approval, from car dealers, travel agents, pawnbrokers and many other businesses, officials said November 11.

Traditional financial institutions like banks and credit unions are frequently subject to administrative subpoenas from the Federal Bureau of Investigation to produce financial records in terrorism and espionage investigations. Such subpoenas, which are known as national security letters, do not require the bureau to seek a judge’s approval before issuing them. The measure now awaiting final approval in Congress would significantly broaden the law to include securities dealers, currency exchanges, car dealers, travel agencies, post offices, casinos, pawnbrokers and any other institution doing cash transactions with “a high degree of usefulness in criminal, tax or regulatory matters.”

Officials said the measure, which is tucked away in the intelligence community’s authorization bill for 2004, gives agents greater flexibility and speed in seeking to trace the financial assets of people suspected of terrorism and espionage. It mirrors a proposal that President Bush outlined in a speech two months earlier to expand the use of administrative subpoenas in terrorism cases.

Critics said the measure would give the federal government greater power to pry into people’s private lives. “This dramatically expands the government’s authority to get private business records,” said Timothy H. Edgar, legislative counsel for the American Civil Liberties Union. “You buy a

ring for your grandmother from a pawnbroker, and the record on that will now be considered a financial record that the government can get.”

The provision is in the authorization bills passed by both houses of Congress. Some Democrats have begun to question whether the measure goes too far and have hinted that they may try to have it pulled when the bill comes before a House-Senate conference committee. Other officials predicted that the measure would probably survive any challenges in conference and be signed into law by President Bush, in part because the provisions already approved in the House and the Senate are identical.

The intelligence committees considered the proposal at the request of George J. Tenet, the director of central intelligence, officials said. Officials at the CIA and the Justice Department declined to comment about the measure.

A senior Congressional official who supports the provision said that “this is meant to provide agents with the same amount of flexibility in terrorism investigations that they have in other types of investigations. This was really just a technical change to reflect the new breed of financial institutions.”

Asked what had prompted the measure, the official said: “This is coming from 3,000 dead people. There’s an ever-expanding universe of places where terrorists can hide financial transactions, and it’s only prudent and wise to anticipate where they might be and to give law enforcement the tools that they need to find them.”

Christopher Wray, the Justice Department’s assistant attorney general in charge of the criminal division, also addressed the issue in October at a Senate hearing. Wray said that compared with the antiterrorism law that allowed agents to demand business records with court approval, the FBI’s administrative subpoenas were more limited. The administrative subpoenas “do provide for production of some records,” he said, but “they don’t cover as many types of business records.” Reported in: *New York Times*, November 12.

etc.

Miami, Florida

Three miles off the Florida coast in April of 2002, two Greenpeace activists clambered from an inflatable rubber speedboat onto a cargo ship. They were detained before they could unfurl a banner, spent the weekend in custody and two months later were sentenced to time served for boarding the ship without permission. It was a routine act of civil disobedience until, fifteen months after the incident, federal prosecutors in Miami indicted Greenpeace itself for authorizing the boarding. The group says the indictment represents a turning point in the history of American dissent.

“Never before has our government criminally prosecuted an entire organization for the free speech activities of its sup-

porters,” said John Passacantando, the executive director of Greenpeace in the United States.

In court papers, the organization’s lawyers warned that the prosecution “could significantly affect our nation’s tradition of civil protest and civil disobedience, a tradition that has endured from the Boston Tea Party through the modern civil rights movement.”

Legal experts and historians said that the prosecution might not be unprecedented, citing legal efforts by state prosecutors in the South to harass the NAACP in the 1950s and 1960s. But they said it was both unusual and questionable.

“There is not only the suspicion but also perhaps the reality that the purpose of the prosecution is to inhibit First Amendment activities,” said Bruce S. Ledewitz, a law professor at Duquesne University in Pittsburgh who has studied the history of civil disobedience in America.

Matthew Dates of the United States attorney’s office in Miami declined to respond to questions about whether the prosecution was unusual or politically motivated. In court papers, prosecutors defended the indictment. “The heart of Greenpeace’s mission,” they wrote, “is the violation of the law.”

Greenpeace, a corporation, cannot serve prison time. But it can be put on probation, requiring it to report to the government about its activities and jeopardizing its tax-exempt status. If convicted of the misdemeanor charge, Greenpeace could also face a \$10,000 fine.

The group is charged with violating an obscure 1872 law intended for proprietors of boarding houses who preyed on sailors returning to port. It forbids the unauthorized boarding of “any vessel about to arrive at the place of her destination.” The last court decision concerning the law, from 1890, said it was meant to prevent “sailor-mongers” from luring crews to boarding houses “by the help of intoxicants and the use of other means, often savoring of violence.”

Passacantando said he had authorized the boarding in 2002. “The buck does stop with me,” he said. Greenpeace maintains that the ship in question was illegally importing mahogany from Brazil. The harvesting and shipment of mahogany is governed by stringent international rules meant to prevent damage to the Amazon’s environment. In the indictment, federal prosecutors said that Greenpeace’s information was mistaken.

Passacantando said the prosecution of the organization was unwarranted and part of what he called Attorney General John Ashcroft’s attack on civil liberties. He acknowledged, however, the importance of ensuring the safety of the nation’s ports in light of the September 11, 2001, terrorist attacks.

“If we were to lose this trial,” he said, “it would have a chilling effect on Greenpeace and on other groups that exercise their First Amendment right aggressively. The federal government is using 9/11 to come down harder on an action like this, which was a good and dignified and peaceful action.”

Even a minor criminal conviction, legal experts said, could have profound consequences. “You in effect have a record,” said Rodney A. Smolla, dean of the University of Richmond School of Law in Virginia. “It has a chilling effect.”

In their legal papers, prosecutors acknowledged that a conviction could have tax consequences and “a chilling effect on First Amendment rights.” Still, they opposed the organization’s request for a jury trial, which is ordinarily available only where the defendant faces more than six months in prison.

The potential loss of constitutional rights, prosecutors wrote, does not require a jury. They cited a misdemeanor domestic violence prosecution in which the defendant was denied a jury trial although he faced losing his license to carry a gun. In contrast to speculation about the impact of a conviction on Greenpeace’s First Amendment rights, prosecutors wrote, the defendant in the gun case “was not entitled to a jury trial even though he was definitely faced with loss of his Second Amendment rights.” Reported in: *New York Times*, October 11.

Albany, New York

A civil liberties group argued in a lawsuit November 3 that the head of New York’s commission on lobbying is using his powers to scare people and groups they join from using their First Amendment rights. The lawsuit brought by the New York Civil Liberties Union suggested that David Grandeau, executive director of the Temporary State Commission on Lobbying, was exceeding his authority. It said his demands “would open the door to virtually unchecked monitoring of First Amendment activity” by the lobbying commission. “The threat of such monitoring would further chill the First Amendment rights of advocacy organizations such as the NYCLU.”

Filed in U.S. District Court in Manhattan, the lawsuit stemmed from action taken by the lobbying commission after NYCLU officials helped create a billboard near an Albany-area mall when a man was arrested there on March 3 wearing a “Give Peace a Chance” T-shirt.

Stephen Downs, of Selkirk, N.Y., wore the anti-war shirt while he shopped. Mall security guards told him to remove it or leave the mall, which is private property. Downs refused, and police arrested him after mall security said he was causing a disturbance. A trespassing charge eventually was dropped.

The billboard near the Crossgates Mall carried the text: “Welcome to the mall. You have the right to remain silent. Value free speech. www.nyclu.org.” Alongside it was the image of a person gagged with material wrapped around his head and mouth.

In the lawsuit, the NYCLU said the lobbying board claimed costs related to the billboard were lobbying expenses stemming from the civil liberties group’s effort to promote pending legislation guaranteeing First Amendment rights at shopping malls. The NYCLU said in court papers,

though, that the billboard, which was up for one month, made no mention of the legislation and did not suggest any-one take action with respect to it.

Grandeau called the dispute a “classic struggle of good versus evil.” “I see the NYCLU trying to prevent people from knowing what’s going on, trying to contract what’s available to the public,” he said. “Dark versus light.” He said the NYCLU had a history of failing to obey lobbying laws, having paid fines ranging from \$250 to \$1,000 three times since 1996 after doing so.

Grandeau said he suspected the NYCLU might be seeking an edge in a dispute in federal court in Manhattan over a probe the lobbying commission had conducted of political allies Russell Simmons and Benjamin Chavis. A judge ordered the investigation halted until she decides whether it violated the First Amendment rights of rap record mogul Simmons and former National Association for the Advancement of Colored People head Chavis.

The men sued the commission earlier this year, saying they were unjust targets in a probe to learn whether they violated state lobbying laws with their opposition to the state’s Rockefeller drug laws. The NYCLU submitted arguments to the court in the case. Reported in: Associated Press, November 3. □

(in review . . . from page 6)

ness of the current war on terrorism differentiates it from past abuses, especially as applied to “enemy combatants.” He examines the unconstitutionality of detentions and proposed military tribunals. He explains the impacts of the USA Patriot Act and how it was that Congress passed without knowing what was in it. The Attorney General’s Guidelines on General Crimes, Racketeering Enterprise, and Terrorism Enterprise Investigations are compared to J. Edgar Hoover’s COINTELPRO. Hentoff discusses the potential of surveillance technology like Carnivore, Magic Lantern, and Poindexter’s various schemes. The initial leak of Patriot II is covered and its provisions analyzed, but the book concludes before Patriot II’s provisions began to be introduced piecemeal as separate bills under new titles.

Hentoff avoids the temptation to focus only on underlings and insists the reader recognize that all of these actions carry the approval of George Bush. He challenges citizens who ignorantly make patriotism a club to undermine liberty and he particularly features the resistance spearheaded by the Bill of Rights Defense Committee.

While Hentoff addresses the threats to the confidentiality of reading under the Patriot Act, the index has only one reference to ALA and two to librarians. By contrast, six chapters discuss Lincoln’s suspension of constitutional rights during the Civil War and the court’s rejection of it in *ex parte*

Milligan. Unfortunately, while an understanding of that previous expansion of wartime powers provides important background, Hentoff’s attitude toward Lincoln may be more off-putting than persuasive.

While this is not a definitive study of civil liberties following the September 11th attacks, it gathers enough information to serve the needs right now of those who hope to reverse the trend and make its eventual study something other than a tragedy.—Reviewed by Carolyn Caywood, Virginia Beach Public Library

In Defense of Liberty: The Story of America’s Bill of Rights.

Russell Friedman. Holiday House, 2003. 196 p. \$24.95.

Russell Friedman has been honored with awards for his photo-essay approach to non-fiction for children. This book can serve both students and the interested layman seeking background on civil liberties. Its appearance is opportune because no reader could come away without seeing precisely how recent government actions have changed the direction of U.S. constitutional evolution.

While Friedman addresses each of the first 10 amendments plus the Fourteenth and also gives English historical background, at least half the material directly addresses intellectual freedom. As is appropriate in a book for juvenile readers, when possible Friedman chooses cases that involved minors to illustrate the rights guaranteed by those amendments. His treatment of the amendments is not equal—the First gets two chapters while the Sixth and Seventh are merged.

Following two chapters on the development of human rights from the Magna Carta to the Glorious Revolution, the religion and expression clauses of the First Amendment are addressed separately using the Jehovah’s Witness students refusal to salute the flag and the Tinker children’s Vietnam war protest armbands as frames around other significant historical events and court cases. The chapter on freedom of religion introduces the role of the courts in interpreting the Bill of Rights. In addition to the obvious school cases, Friedman also discusses religious exemptions from military service and from medical treatment. Under freedom of expression, he covers Palmer and McCarthy, obscenity and hate speech, the Internet, and points out current issues such as spam.

Since there has been limited judicial review, the chapter on the Second Amendment focuses more on how gun control efforts have been received by the public and legislatures. Lacking other material, the chapter on the Third Amendment focuses on Colonial history and the amendment’s possible extrapolation as a right to privacy within the home. The chapter on the Fourth further explores privacy and intrusive technology from wiretapping to databases to thermal imaging. It also examines Hoover’s excesses, the establishment of the Foreign Intelligence Surveillance Court, and makes a brief mention of post 9/11 Justice Department actions. School drug testing cases conclude the chapter.

Along with the Fifth Amendment and Miranda warn-

ings, Friedman introduces evidence of false convictions revealed by recent DNA tests. The Sixth and Seventh are treated together in a single chapter on the right to a fair trial. In re Gault launches a discussion of how minors are tried and Friedman compares World War II and post 9/11 detentions without trial. Death penalty issues and punishments in other places and times are covered under the Eighth Amendment.

Friedman uses "The Mysterious Ninth" to cover the reproductive rights cases from *Griswold v. Connecticut* to *Roe v. Wade*. Under the Tenth, he contrasts how states' rights was an issue in both limiting child labor and fostering segregation to set the stage for what he calls "Madison's Most Valuable Amendment." This proposed amendment would have applied civil liberties protection to state governments but did not pass as part of the Bill of Rights. Friedman sees the Fourteenth Amendment as its vindication and thus includes the Civil Rights movement in his book.

Excellent as this book is in many ways, it contains errors of oversimplification. Though they are not substantial, the additional sentences to clarify them would have also made the author's points stronger. For example, on page 52, Friedman gives the impression Justice Holmes was writing majority opinions, not dissents, when he could have shown how powerful a dissent can become in influencing later Supreme Court decisions. Earlier, on page 38, Friedman says, "the Court often change its mind on constitutional issues," referring to *West Virginia Board of Education v. Barnette*, thereby ignoring the role of precedent and undermining the significance of those changes. In describing the Colonial period case of John Peter Zenger, Friedman leaves the impression that Zenger wrote as well as publishing the government criticisms that landed him in jail, which clouds the issue of freedom of the press.

Though Friedman has included material from very recent court cases, the book apparently went to press before the Supreme Court's CIPA decision. The Bill of Rights appears at the back in text and facsimile along with a list of significant court cases, footnotes, a bibliography including both books and Web sites, and an index.—Reviewed by Carolyn Caywood, Virginia Beach Public Library □

(ALA President's statement . . . from page 1)

of their over 26 million residents, its discomfort with some provisions of the USA PATRIOT Act. We are, as members of the American public and as librarians, deeply concerned about certain provisions of the USA PATRIOT Act which increase the likelihood that the activities of library users, including their use of computers to browse the Web or access

e-mail, may be under government surveillance without their knowledge or consent. We are also deeply concerned about the revised Attorney General Guidelines to the Federal Bureau of Investigation, and other related measures that give the federal government overly-broad authority to investigate citizens and non-citizens without particularized suspicion, to engage in surveillance, and to threaten civil rights and liberties guaranteed under the United States Constitution and Bill of Rights.

As the Committee is aware, the ALA has been very involved in advocating for legislation that would amend the USA PATRIOT Act to protect civil liberties and the privacy of the public while at the same time ensuring that law enforcement has the appropriate tools necessary to safeguard the security of our country. We have also advocated meaningful Congressional oversight of and accountability to the public for the implementation of these expanded authorities, and so we genuinely appreciate this hearing to address how the protection of civil liberties, privacy, and the free and open exchange of ideas enhance the vital efforts of law enforcement and the security of our country. □

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