

10-1-2004

## Watching and Learning: Interdisciplinary Panel Addresses Government Surveillance and the Arts

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### Recommended Citation

UB Law Forum (2004) "Watching and Learning: Interdisciplinary Panel Addresses Government Surveillance and the Arts," *UB Law Forum*: Vol. 17 : No. 1 , Article 24.

Available at: [https://digitalcommons.law.buffalo.edu/ub\\_law\\_forum/vol17/iss1/24](https://digitalcommons.law.buffalo.edu/ub_law_forum/vol17/iss1/24)

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# Law School Report



Artist Arnold Mesches chats with Dean Nils Olsen.

## Watching and learning

*Interdisciplinary panel addresses government surveillance and the arts*

The relationship of law, government and the arts – interactions that have been contentious in the post-9/11 era – was the focus of an interdisciplinary workshop on Sept. 10, 2004 titled “Government Policy, Cultural Production, Personal Privacy.” The eclectic gathering was co-sponsored by the UB Law School and the University Art Galleries, with the Baldy Center for Law & Social Policy acting as host.

Addressing such legislation as the 2001 USA Patriot Act and the 1966 Freedom of Information Act, as well as topics such as the artists’ role as dissenters during the 1950s McCarthy era, the workshop featured two panels of lawyers, artists and arts advocates. In conjunction with the workshop, the UB Art Gallery mounted two exhibitions: “Arnold Mesches: The FBI Files” and “Shutters,” an international group exhibition addressing how government

monitoring affects domestic spaces.

Mesches, a well-known painter, was among the panelists. Suspected of Communist activity in the 1950s and subjected to intensive surveillance for nearly 30 years, he obtained a copy of his 700-page FBI file through the Freedom of Information Act; pieces of that file are incorporated into his mixed-media works on exhibit at the UB Art Gallery.

The afternoon’s first panel discussion featured Nancy Buchanan, an artist and professor at the School of Film and Video at CalArts; David Craven, an art history professor at the University of New Mexico; artist Mesches, also a professor at the University of Florida; and Nils Olsen, UB Law School dean.

Olsen set the stage for the discussion with an account of the protracted legislative history of the 1966 Freedom of Information Act, which pried open the workings of a federal government

that had jealously guarded what we now think of as public information.

Olsen noted a seeming paradox: The same government that compiled hundreds of pages of “intrusive and almost absurd surveillance” on Mesches also managed to pass the Freedom of Information Act, which helped the artist publicize the intrusion and make creative use of the material.

The act was decades in the making, Olsen said, beginning in the 1940s with pressure from the American Society of Newspaper Editors. An Associated Press executive director, Kent Cooper, coined the phrase “the right to know” in 1945, and a 1953 report by the newspaper editors group concluded that government information was systematically being withheld from the press.

It was not until 1955, however, when Congress expressed concern over the scarcity of the information it was receiving from the Executive

Branch, that momentum for the act began to build. A subcommittee staffed by former journalists began to develop a record of the press' frustrated attempts to get information, and hearings revealed patterns of stonewalling by government agencies.

"It took three tries for a freedom-of-information bill to make it through Congress and be signed into law," Olsen said. "This is a very long and tortuous process toward legislation that continued well into the '60s."

The act finally was passed in 1966, and immediately President Lyndon B. Johnson insisted that presidents should continue to have the right to withhold information in the interest of national security – an insistence that has continued to this day.

Olsen noted that one impediment to the act's full effect is a backlog of information requests. There has been a dramatic increase in such requests, up to 24,000 in the year 2000. "It can take two to three years of constant nagging and letter writing to obtain records even when the agency is not ultimately refusing to produce them," Olsen said.

He also noted that the Privacy Act of 1974, which regulates the use of personal information by federal agencies, also provides an obligation of disclosure. "If you are looking for information," he said, "it is always a good idea to make requests under both laws."

The second panel, moderated by UB Law School Professor George Kannar, included Lee Albert, also a UB Law professor; Niels Bonde, an artist and professor at Malmö Art Academy in Copenhagen, Denmark; Marjorie Heins of New York University Law School and founding director of the Free Expression Policy Project there; Svetlana Mintcheva, director of arts advocacy for the National Coalition Against Censorship; and Miguel Ruiz, an assistant professor at UB's School of Informatics.

**A**lbert spoke to some of the provisions of the September 2001 legislation called the "Act Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism" – the USA Patriot Act.

In contrast to the slow-to-emerge Freedom of Information Act providing public access to government information, he said, the "much more massive, much more comprehensive" Patriot Act

providing government access to private information took just a few weeks to pass in the wake of the 9/11 attacks.

He noted that the act lowers the "threshold of probable cause" by allowing warrants directed at third parties with information on other individuals. "When information is shared with a private person, almost all protection is lost," he said. "There is virtually no privacy issue when information is in the hands of third parties. Think of all the



Professor George Kannar served as moderator.

information about you that exists in the hands of third persons: Internet service providers, banks, credit cards, doctors, hospitals, bookstores, libraries and an uncountable number of other institutions."

Albert also pointed out that the Foreign Intelligence Surveillance Act, despite its name, allows searches of U.S. citizens, and said that to conduct such a search, the government must show that the object of the search is an agent of a foreign government. Establishing probable cause is not required, and even an action like travel to a foreign country may be considered evidence of culpability.

The Patriot Act, he said, expands the range of objects that can be searched for under the Foreign Intelligence Surveillance Act, and forbids institutions that are asked about an individual – libraries or schools, for example – from telling anyone about the request, especially the subject of the search.

"It is very difficult to assess the efficacy of the Patriot Act in the war on terrorism," Albert said. "We just do not know what the government learns from it. The act itself contains a gag order to prevent people from talking about what they learn."

Albert concluded with remarks on two high-profile cases in Western New York. The first is the arrest of UB art professor Steven Kurtz, charged after a federal terrorism task force found in his home low-grade bacteria that he uses in artwork on the political dimensions of biotechnology. Kurtz and an academic friend in Pittsburgh, Albert said, were charged under a federal statute barring fraudulent use of the mails and the telephone, for arranging the transfer of the bacteria.

**T**he other local case was that of the "Lackawanna Six," charged with aiding al-Qaida. An intensive yearlong surveillance of the men, including hundreds of search warrants, turned up nothing. The break in the case came when the CIA intercepted a letter to one defendant from a co-defendant who was in the Middle East, saying he was to be "wed" the next day. The CIA mistakenly understood that to be a coded reference to a planned attack on a U.S. facility; the government picked up the letter-writer and interrogated him until he admitted having attended an al-Qaida training camp in Afghanistan. The FBI then questioned the other five defendants in Lackawanna, which finally provided probable cause to arrest them.

One of the perceived problems the USA Patriot Act sought to eliminate was the so-called "wall of separation" between law enforcement agencies – the FBI's failure to share information with the CIA. The irony, Albert said, was that it was this very "wall" that led to the breakthrough in the Lackawanna Six case. Unlike the CIA, the FBI knew that wed meant getting married and nothing more.