

# FREEDOM TO READ BRIEFS

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*A publication of the Freedom to Read Committee of the Association of American Publishers.*

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**F**or publishers, the First Amendment is not an abstraction. Their day-to-day operations are profoundly affected by a host of free speech issues, including government-mandated “solutions” to media violence, attempts to hold publishers and film-makers liable for criminal acts by those who are “inspired” by their works, and high-stakes libel and defamation actions seeking to silence print and online critics. In attempting to bring to the marketplace information and ideas that will inform public debate on important issues, publishers often come into direct conflict with the inevitable desire of those in power to shield their actions from public scrutiny. The Freedom to Read Committee of the Association of American Publishers works in a variety of ways to insure that American publishers can operate in a truly free “marketplace of ideas.”

This has been a particularly difficult year for free speech, open government, and the right to dissent. In last year’s edition of *Freedom to Read Briefs* we noted that groups and individuals representing every point on the political and social spectrum were all too eager to curtail speech and muzzle the press in the interest of a “higher good.” In the wake of the horrific events of September 11, 2001, that “higher good” became the war on terrorism. Some of the powers granted to the federal government under the USA Patriot Act, including the ability to obtain library and bookstore records under a gag order, with virtually no judicial review, combined with a directive from the Attorney General encouraging federal agencies to resist compliance with Freedom of Information Act requests, and a Presidential Executive Order undermining the public’s rights under the Presidential Records Act, have combined to further chill the climate for First Amendment rights.

## ***STABBING HISTORY IN THE BACK***

Publishers, along with authors, historians, and scholars, were deeply disturbed by Executive Order 13,233, signed by President George W. Bush on November 1, 2001, which limits access to presidential records and gives incumbent and former presidents, and even members of a president’s family, veto power over the release of records.

In an *amicus* brief submitted February 28, 2002 to the U.S. District Court for the District of Columbia, AAP, leading a distinguished coalition of organizations representing authors, journalists, librarians, booksellers, and historians, called the Bush Order a “real, substantial, and immediate threat...to the integrity of the historical record and to the public interest.” The brief was submitted in support of a legal challenge brought in November by the public interest group Public Citizen seeking to compel the National Archives to abide by the terms of the Presidential Records Act. Enacted in 1978 in response to public outrage over the abuses of the Nixon Administration, the Act established permanent public ownership and governmental control of presidential records, setting forth procedures governing their preservation and making them publicly available 12 years after a president leaves office.

As presidential historian Richard Reeves noted in a *New York Times* op-ed: “With a stroke of the pen on Nov. 1, President Bush stabbed history in the back...From now on, scholars, journalists, and any other citizens will have to show a demonstrated, specific ‘need to know’ in requesting documents from the Reagan, Clinton, and two Bush presidencies—and all others to come.”

Timed to prevent the release of Reagan-era records, which as Reeves pointed out, “could be embarrassing to some men and women now back in power with the second Bush administration,” the Executive Order, as the *amicus* brief notes is “not an implementation of the PRA, as it purports to be, but rather an unlawful attempt to render it void.” Noting “publishers serve the primary interest animating the PRA by disseminating works that draw significantly upon presidential records, thereby insuring broad public access to the information,” the brief asserts that the Executive Order “sharply limits the ability of publishers to fulfill this core mission.”

Urging the court to grant plaintiffs’ motion for summary judgment, the brief argues: “Against the tendency of those in power to distort and conceal...the work of historians and journalists in ‘keeping the record straight’ plays a pivotal role in the successful operation of our democratic system.”

### ***RE-WRITING HISTORY IN THE BIG APPLE***

Over the past year, access to official papers was an issue at the local, as well as the national, level. Under arrangements made in the last days of the Giuliani Administration, the records of Rudy Giuliani’s eight-years as mayor of New York (including photographs, materials relating to the World Trade Center, tapes, and papers) were turned over to a private group for pre-screening and archiving under Giuliani’s direction.

AAP joined a group of historians and journalists in protesting the arrangement. In a letter urging the current mayor, Michael Bloomberg, to nullify the contract, AAP wrote: “The U.S. book publishing industry, which includes some of New York’s most notable corporate residents, is dismayed at the news that the City has entered into an agreement to place all of the records of former Mayor Giuliani’s eight-year administration into private hands for archiving. Notwithstanding protestations that the records remain the property

of the City, we believe that by entrusting to private interests and to Mr. Giuliani the authority to determine which materials may eventually be accessed by scholars, authors, and historians and which materials will never see the light of day by virtue of Mr. Giuliani's 'personal interest' in them, the City is abdicating its responsibility not only to its citizens, but to history as well."

### ***"SON OF SAM" REDUX***

On February 21, 2002 in an appeal that took more than two years to decide, the California Supreme Court struck down California's "Son of Sam" law requiring convicted felons to surrender proceeds from the sale of their stories for books, movies, magazine and newspaper articles to a victims' compensation trust fund. The California high court found the statute in violation of the First Amendment to the U.S. Constitution and Article 1 of the California Constitution. This is the first time since the U.S. Supreme Court's 1991 ruling striking down New York's "Son of Sam" law (*Simon & Schuster Inc. v. Members of the New York State Crime Victims Board*) that the highest court of a state has looked at the issue. The California court found that the challenged portion of the California statute "imposes a content-based financial penalty on protected speech," and, like its New York counterpart, was not narrowly tailored and failed to satisfy strict scrutiny because it was is over-inclusive. In December 1999 AAP led an *amicus* effort urging the California Supreme Court to strike down the law. In its unanimous ruling the California Supreme Court cited AAP's brief and the "sobering bibliography," listing hundreds of works by American prisoners and ex-prisoners, which accompanied it.

### ***DEVELOPMENTS IN THE COURTS***

Court seeking to overturn the Child Online Protection Act (COPA). Dubbed "CDA II," COPA was Congress' second attempt to criminalize constitutionally-protected speech on the Internet by making an end-run around the Supreme Court's unanimous ruling striking down the Communications Decency Act. The *amicus* brief argues that COPA, which makes it a crime to communicate to minors "for commercial purposes" via the World Wide Web material deemed "harmful to minors," would impermissibly deny adults access to constitutionally-protected materials. While the district court found COPA to be unconstitutional on a number of grounds, the 3<sup>rd</sup> Circuit affirmed the preliminary injunction on a much narrower basis, focusing on the impossibility of establishing one "community standard" by which Internet speech can be governed. The Supreme Court heard oral argument in the case in November and seemed to focus its attention solely on the question of community standards in cyberspace. AAP led a broad coalition of *amici* in filing a brief to the U.S. Supreme

- Notwithstanding the fact that federal courts in New York, New Mexico and Michigan have held state statutes banning harmful to minors material on the Internet to be unconstitutional, state legislators persist in wasting taxpayers' money by enacting such statutes and defending them in court. AAP was a plaintiff in the New York and New Mexico cases, and last year joined other

members of Media Coalition in again challenging similar statutes in Arizona and in Vermont. The Vermont case is still pending, but in February 2002 we prevailed in Arizona. On February 21 a U.S. district court issued a permanent injunction barring enforcement of the Arizona statute.

- Charging that the Children’s Internet Protection Act, which mandates the use of blocking software on computers in public libraries is unconstitutional because it restricts library patrons’ access to First Amendment-protected material, the American Library Association and the ACLU have filed lawsuits seeking to overturn the Act. The case went to trial at the end of March 2002, and although AAP is not yet involved in the litigation we are following it closely with an eye to providing *amicus* support to the plaintiffs at an appropriate time.
- AAP joined with a group of media and civil liberties organizations in an *amicus* brief asking a federal court in California to declare unenforceable a ruling by a French court against U.S.-based Internet service provider Yahoo!. The French judge held Yahoo liable for allowing Nazi memorabilia to be offered for sale on its auction sites in violation of French hate speech laws. Noting specifically that it does *not* address disputes concerning intellectual property, the *amicus* brief argues that “freedom of expression would be crippled were online speakers in the United States required to conform their speech to the restrictions of foreign nations, which vary widely from country to country and often conflict with core First Amendment principles.” The federal district court agreed, ruling in November that Yahoo is not bound by the French court ruling. The ruling is being appealed to the 9<sup>th</sup> Circuit.
- AAP welcomed a 9<sup>th</sup> Circuit ruling which held that a computer-altered photo of actor Dustin Hoffman which appeared in *Los Angeles Magazine* was not a violation of the actor’s publicity rights but an editorial use of his image which was entitled to full First Amendment protection. AAP was among the *amici* asking the 9<sup>th</sup> Circuit to reverse the lower court and rule in the magazine’s favor.
- AAP, the American Booksellers Foundation for Free Expression, the ALA-affiliated Freedom to Read Foundation and others joined in filing an *amicus* brief to the U.S. Supreme Court in *Ashcroft v. Free Speech Coalition*, a facial challenge to the Child Pornography Prevention Act, on appeal from the 9<sup>th</sup> Circuit. The CPPA broadens the definition of child pornography to criminalize images of adults who “appear to be” minors or images created totally by computer without involving real children. While remaining sensitive to the underlying serious and legitimate concerns about sexual abuse of children, the brief stresses the constitutional dangers and the fact that mainstream works of art are susceptible to prosecution under the Act.

### ***A LITTLE HELP FROM OUR FRIENDS***

The Freedom to Read Committee works closely with allied organizations, notably the American Library Association's Office for Intellectual Freedom and the American Booksellers Foundation for Free Expression. AAP is a founding member of Media Coalition, a group of trade associations working together on censorship issues.

In fulfilling its educational mandate, the committee sponsored a seminar in October entitled "Risky Business: Publishing Exposés in Print and Online." The panel, which included best-selling author James Stewart (*Den of Thieves*), literary agent/attorney Gail Ross, Scribner vice president Lisa Drew and others, offered a fascinating behind-the-scenes look at the decision-making and risk-assessment process involved in publishing works of investigative journalism.

In June the committee joined with ABFFE and the Freedom to Read Foundation to co-sponsor "Murderous Media? The Debate Over Media Violence," at BookExpo in Chicago. The lively and informative discussion, moderated by author Sara Paretsky, explored the connection (or lack thereof) between fictional portrayals of violence on film and other media, and actual acts of violence. Panelists included Pulitzer Prize-winning author Richard Rhodes, clinical psychologist Ginger Rhodes, psychiatrist Dr. Carl Bell, and Dr. Brian Wilcox of the University of Nebraska.

### ***LOOKING AHEAD***

The Freedom to Read Committee anticipates a year of active participation in judicial proceedings, along with a broadened educational mandate. In resisting attempts to erode those rights guaranteed by the First Amendment, especially as they affect publishers, the Committee's activities will continue to be guided by the belief that real national security cannot be achieved by sacrificing basic democratic principles embodied in the Bill of Rights, nor can the protection of our children be accomplished by abandoning the First Amendment.

**\*FREEDOM TO READ COMMITTEE MEMBERS,  
COUNSEL AND STAFF**

The following served as regular members of the Committee during  
FY 2001/2002

**Jane Isay** (Harcourt, Inc.)-*CHAIR*; **Susan Amster** (Harcourt General); **Jean Casella** (The Feminist Press at CUNY); **Lisa Drew** (Scribner); **Phyllis Fogelman** (Penguin Putnam Books for Young Readers); **Lisa Holton** (Hyperion Books for Children); **Roy Kaufman** (John Wiley & Sons); **Heather Kilpatrick** (AOL Time Warner Book Group); **Kristin Kleimann** (Fodor's Travel Publications); **Nancy Miller** (The Ballantine Publishing Group); **Emily Remes** (Simon & Schuster); **Andre Schiffrin** (The New Press); **Mark Sirota** (Reader's Digest); **Linda Steinman** (Random House); **Suzanne Telsey** (The McGraw-Hill Companies); **Jane von Mehren** (Penguin Books); **Marlie Wasserman** (Rutgers University Press); **Susan Weinberg** (HarperCollins Publishers)

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