FREEDOM TO READ COMMITTEE MEMBERS, COUNSEL AND STAFF

The following served as regular members of the Committee during Fiscal Year 2005/2006

Lisa Drew (Lisa Drew Books/Scribner)—Chair; **Susan Amster** (Harcourt Trade Publishers/ Reed Elsevier Inc.), **Brenda Bowen** (Hyperion Books for Children), **Rosemarie Cappabianca** (McGraw-Hill Education); **Florence Howe** (The Feminist Press at CUNY); **Roy Kaufman** (John Wiley & Sons), **Heather Kilpatrick** (Time Warner Book Group), **Nancy Miller** (Random House Publishing Group), **Emily Remes** (Simon & Schuster), **Elisabeth Sifton** (Farrar, Straus & Giroux), **Beth Silfin** (HarperCollins Publishers), **Mark Sirota** (Reader's Digest), **Anke Steinecke** (Random House), **Suzanne Telsey** (The McGraw-Hill Companies), **Tina Weiner** (Yale University Press)

Counsel: **R. Bruce Rich, Esq., Jonathan Bloom, Esq.** (Weil Gotshal & Manges, LLP)

Staff: **Judith Platt,** Director Communications/Public Affairs and Freedom to Read

FREEDOM TO READ BRIEFS

Fiscal year 2005/2006

Freedom to Read Committee
Association of American Publishers

71 Fifth Avenue New York, NY 10003
50 F Street, NW, Suite 400, Washington, DC 20001

http://www.publishers.org

Publishers understand that the First Amendment is not an abstract legal concept. Threats to free speech, including government attempts to curb violence and "indecency" in the media, lawsuits to impose liability on publishers, film-makers, and others for criminal acts allegedly inspired by their works, libel litigation at home and in plaintiff-friendly foreign courts aimed at silencing authors and publishers, the erosion of fundamental protections for journalists and authors—all have a profound impact on the business of publishing.

The mandate of the AAP Freedom to Read Committee is to protect the free marketplace of ideas for American publishers. Through participation in important First Amendment court cases, through its educational programs, through its work with the Media Coalition and other anti-censorship groups within and beyond the book community, the Freedom to Read Committee serves as the publishing industry's early warning system, watchdog and advocate in the area of free expression.

Publishers and the USA PATRIOT Act

Three years ago, publishers, authors, librarians, and booksellers joined together in a *Campaign for Reader Privacy* to push for legislative changes in the USA into bookstore and library records. Under Section 215 of the Act, the FBI was given virtually unlimited authority to seize "any tangible thing" including library circulation and bookstore records, claimed to be "relevant" to an investigation. The seizure was to be carried out under a permanent and total gag order, allowing the recipient no recourse for challenging either the search or the gag. The Campaign coordinated a nationwide petition drive in bookstores and libraries across the country which garnered some 200,000 signatures supporting the restoration of reader privacy protections. The petitions were presented to members of Congress during Banned Books Week 2005.

A high point in the lobbying effort came on June 15 when the House, by a vote of 238 to 187 and in defiance of both the Republican leadership and the White House, approved Congressman Bernie Sanders' amendment to the Justice Department appropriations bill cutting off funds for FBI searches of bookstores and libraries under Section 215. (Although the amendment was not expected to survive the appropriations conference process and was eventually stripped from the final appropriations bill, the vote was a clear sign that members of Congress were hearing reader privacy concerns expressed by constituents).

into the anthrax killings in the fall of 2001 and its failure to pursue a "person of interest." Although not identified by Kristof initially, Hatfill subsequently identified himself as the "person of interest." Although a motion for re-hearing by the full appellate court was denied in October, one of the most respected judges on the court issued a blistering dissent, taking the panel to task for misinterpreting the state's defamation law. The Freedom to Read Committee is closely following the case as it goes to trial.

Educational Programs

In fulfilling its educational mandate, the Freedom to Read Committee co-sponsored several outstanding programs in 2005/2006:

At BookExpo America in New York, the Committee co-sponsored a program featuring Congressman Jerry Nadler (D-NY) who spoke about the need to amend the Patriot Act and restore meaningful judicial oversight to the process of obtaining records, including library and bookstore records, under Section 215.

At the ALA Annual Conference in Chicago, the Committee co-sponsored "Intellectual Freedom: A Casualty of War?" exploring the history of intellectual freedom in wartime, the extent to which the current war has had an impact on free speech and dissent, and strategies for the book and information communities to help maintain our liberties during "perilous times." Featured speaker was University of Chicago Law Professor Geoffrey R. Stone, author of *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism,* joined by First Amendment lawyer Floyd Abrams.

In February 2006, the Committee joined with the Media Law Resource Center and Bloomberg News in co-sponsoring a symposium on *International Libel and Privacy: Navigating the Minefield.* An expert panel consisting of Bloomberg media counsel Charles Glasser, Kurt Wimmer (Covington & Burling), Elisa Rivlin (Simon & Schuster), Stephen Fuzesi (*Newsweek),* and Dave Tomlin (Associated Press) discussed the fascinating and troubling tangle of defamation and privacy laws in countries without our First Amendment safeguards.

- AAP joined an *amicus* brief citing "the growing and dangerous threat of 'libel tourism'—the cynical and aggressive use of claimant-friendly libel laws in foreign jurisdictions with no legitimate connection to the challenged publication," in support of U.S. author Rachel Ehrenfeld, who has asked a federal court in New York to declare that a British default libel judgment against her is unenforceable in the U.S. The judgment, which imposed substantial damages and an injunction against U.K. publication of Ehrenfeld's book *Funding Evil*, as well as containing a "declaration of falsity" against the book, arose out of a libel action brought by Saudi businessman Khalid Bin Mahfouz in the U.K. despite the fact that Ehrenfeld's book was never published there and Bin Mahfouz doesn't live there.

- In 2004 AAP had joined a distinguished group of U.S. and Canadian media organizations in intervening as a friend of the court in the Ontario Court of Appeal in *Bangoura v. The Washington Post.* Supporting the *Washington Post,* we asked the appeals court to overturn the ruling by a lower Canadian court which allowed a libel suit to proceed in Canada merely on the basis that an allegedly defamatory article could be accessed through the paper's online archive (and notwithstanding the fact that the plaintiff had not been a Canadian resident when the article was written and no one in Canada but the plaintiff's attorney had downloaded the article from the archive.) On September 16, 2005 a favorable ruling came down from the Ontario Court of Appeals. Not only did the ruling overturn the decision of the lower court, it recognized the fact that the refusal of U.S. courts to enforce foreign libel judgments that do not meet the standards established in *New York Times v. Sullivan* is "rooted in the guarantees of freedom of speech and of the press under the First Amendment of the U.S. Constitution."

- In February 2006 AAP supported an unsuccessful petition for Supreme Court review of a troubling federal appeals court ruling in *Hatfill v. New York Times.* In the summer of 2005, a three-judge panel of the U.S. Court of Appeals for the 4th Circuit reinstated a lawsuit, which had been thrown out by a lower court, in which biological weapons expert Stephen Hatfill claimed defamation and intentional infliction of emotional distress arising from a series of columns in which Nicholas Kristof castigated the FBI for its handling of the investigation

Jubilation over passage of the Sanders amendment was short-lived, however. The House passed Patriot Act reauthorization legislation, extending Section 215 for 10 years and making only minor changes to the existing law, leaving the door open for potential government abuse of reader privacy. In July, the Senate passed its own version of the reauthorization which, while not perfect, contained important safeguards for protecting library, bookstore, and publisher records. As the December 31 expiration date for Section 215 and other provisions approached, efforts to reconcile the two re-authorization bills stalled in the Senate when a bipartisan group of six refused to accept a conference bill that clearly lacked civil liberties safeguards. With a temporary five-week extension of the expiring provisions in place, the battle in the Senate continued into the first weeks of 2006. Early in the new year intense pressure from the White House managed to crack the bipartisan coalition and in February key Senators announced a deal, virtually assuring passage of a bill that left serious civil liberties concerns unresolved. The Senate approved the bill on March 2, with ten Senators voting against it. On March 7 with just two more votes than needed to meet a required two-thirds majority, the House followed suit.

The new law makes 14 of the 16 provisions permanent, and creates a four-year sunset for the other two (including Section 215). Despite some modifications, the reauthorizing legislation does not include the most important changes to Section 215 sought by the Campaign for Reader Privacy—a standard of individualized suspicion and provisions allowing *meaningful* challenges to the order and the accompanying gag order.

While reader privacy advocates were able to take some comfort from the fact that the new law mandates heightened oversight by Congress, even this small reassurance was undermined by a statement issued by President Bush when he signed the bill on March 9. The statement reiterated the "unitary executive branch" privilege, reasserting the President's authority "to withhold information the disclosure of which could impair foreign relations, national security, the deliberative processes of the Executive, or the performance of the Executive's constitutional duties" signaling the intention of the White House to withhold information whenever it deems necessary. AAP joined with its colleagues in the Campaign in issuing a statement deploring the message from the White House. As AAP President Pat Schroeder said: "The heavy-handed assertion by the White House that it unilaterally decides what to tell Congress about enforcing the Patriot Act should make members of Congress mad enough to re-energize the fight to restore basic civil liberties. As far as we're concerned, that fight is far from over."

The Press Under Siege

Publishers have watched with growing unease the erosion of fundamental protections for investigative journalists and authors as federal authorities demonstrate an increasing willingness to subpoena journalists, holding out the threat of civil and criminal contempt citations for refusing to identify confidential sources. Although journalists have fairly strong protection against compelled disclosure in state courts (31 states and the District of Columbia have reporter's shield laws on the books, and another 18 recognize some degree of common law privilege) this protection has never been codified for federal proceedings. Over the past several years, more than two dozen subpoenas have been issued to obtain reporters' source notes and other materials, underscoring the need for federal legislation that would give journalists some degree of protection against compelled disclosure of confidential sources. In 2006, the Freedom to Read Committee will continue its lobbying efforts to effect passage of an adequate federal shield law.

In the Courts

The Committee directed AAP's participation in a number of important First Amendment cases in 2005/2006.

- AAP joined a coalition of media groups in asking the U.S. Supreme Court to review the contempt orders imposed on New York Times reporter Judith Miller and Time Magazine reporter Matt Cooper for refusing to testify in the grand jury investigation of the Valerie Plame leak

- In May 2005 a federal judge in South Carolina issued a permanent injunction barring enforcement of a state statute criminalizing the digital communication of work considered to be harmful to minors, including "depictions of nudity and sexual content." AAP was one of the plaintiffs in the case, *Southeast Booksellers Association v. McMasters*, which was filed in the fall of 2002. The South Carolina victory was the latest in a series of successful legal challenges to state Internet harmful to minors laws spearheaded by Media Coalition.

- Joining with 13 co-plaintiffs, AAP went into federal court in Salt Lake City in June to challenge Utah's newly enacted Internet harmful to minors statute. The statute requires the state attorney general to compile a "blacklist" of Internet sites that contain harmful to minors material. Internet service providers would then be required to block access to the sites and web site operators would be required to rate their sites and control minors' access to material that might be considered harmful to minors. The complaint charges that the statute "imposes severe content-based restriction on the availability, display and dissemination of constitutionally protected speech on the Internet."

- AAP joined an *amicus* brief in *Forensic Advisors v. Matrixx Initiatives*, a case making its way through the Maryland courts, supporting the right of a journalist and publisher to keep confidential subscriber lists and source material, and supporting the right to read and speak anonymously on the Internet. The brief argues that Maryland's journalists' shield law protects against compelled disclosure of sources and information used in newsgathering, and that the First Amendment protects anonymous speech.

- AAP joined *amicus* briefs supporting two separate challenges to Section 205 of the USA Patriot Act dealing with the issuance of National Security Letters— administrative subpoenas issued without judicial oversight that give the FBI virtually unlimited power to obtain electronic communications transactions. In the first case, the government is appealing a ruling by a federal judge in New York, which held that NSLs violate the Fourth Amendment's ban on unreasonable searches, and that the accompanying gag order violates the First Amendment. The second challenge was brought by the ACLU on behalf of an ALA member in Connecticut who received a National Security Letter and sought to have the mandatory gag order lifted to enable the recipient to participate in the final, critical days of the debate over reauthorization of the Patriot Act. On September 9, finding that the government could not support its allegation that the gag order was necessary (and underscoring the importance of judicial oversight even when national security is involved), a federal district court in Connecticut lifted the gag order, but stayed the ruling pending the government's appeal. Both cases are now before the 2nd Circuit Court of Appeals.