

FREEDOM TO READ BRIEFS

Fiscal Year 2006/2007



Freedom to Read Committee

Association of American Publishers

71 Fifth Avenue, 2nd floor, New York, NY 10003

50 F Street, NW, 4th floor, 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 significant First Amendment court cases, educational programs, 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.

The Campaign for Reader Privacy

When publishers, authors, librarians, and booksellers came together four years ago in an effort to restore reader privacy safeguards that had been stripped away by the USA Patriot Act, initial lobbying efforts focused on changing Section 215, the provision which allows the FBI to seize business records, including those of libraries and bookstores, simply by asserting to the secret Foreign Intelligence Surveillance Act (FISA) court that they were “relevant” to an investigation. The lobbying effort was broadened to include National Security Letters under Section 205 when it became evident that these administrative subpoenas, which FBI field agents can issue themselves without approval of the FISA court, were being used to circumvent even the limited protections afforded by Section 215.

The Patriot Act reauthorization bill, passed in March 2006 under intense pressure from the White House, was a disappointment. Despite some improvements, including new reporting requirements to Congress, the reauthorization lacked what the Campaign for Reader Privacy sought as key safeguards: a requirement that the FBI show a connection between the material and suspected terrorist activity, and provisions that would allow for *meaningful* challenges to Section 215, National Security Letters, and their accompanying gag orders. A signing statement by President Bush saying in effect that despite the new reporting requirements the White House would continue to withhold information on implementation of the Patriot Act from Congress whenever it deems necessary, strengthened the Campaign’s resolve to continue the fight.

Changes in Congress wrought by the November 2006 elections and a call by Senator Patrick Leahy, the new Chairman of the Senate Judiciary Committee, for legislation to restore civil liberties and repair the “erosion of privacy” re-energized the Campaign. In early 2007 representatives of the Campaign’s four sponsoring organizations (AAP, the American Library Association, the American Booksellers Association, and PEN American Center) met with a member of Senator Leahy’s Judiciary Committee staff to lay out ongoing concerns. The meeting was well-timed, coming just days after the release of a report by the Justice Department’s Inspector General documenting widespread abuse of National Security Letters by the FBI.

The restoration of reader privacy safeguards remains a top legislative priority for AAP and the Freedom to Read Committee in 2007.

“Protecting Privacy, Challenging Secrecy, and Standing Up for the First Amendment”

One of year’s highlights was a program presented at the National Press Club in Washington in September to celebrate the 25th annual observance of Banned Books Week, under the sponsorship of the Campaign for Reader Privacy. Eight panelists, each of whom had taken a courageous stand on behalf of the First Amendment, offered an eloquent and sobering picture of a free press and free speech in crisis. Appearing on the panel were Pulitzer Prize-winning *New York Times* reporter James Risen, who exposed the NSA’s warrantless surveillance program and was threatened with espionage proceedings; journalist, author and teacher Mark Feldstein, who was visited at home by FBI agents attempting to ferret out “classified” documents that may have been leaked to journalist Jack Anderson decades ago, who demanded access to files and research documents Feldstein was using for his forthcoming biography of Anderson; Brian Ross and Richard Esposito, the ABC Nightly News reporters who broke stories on secret CIA prisons and harsh interrogation techniques and learned in the process that their phone calls from government sources were being monitored; and Barbara Bailey, George Christian, Peter Chase, and Janet Nocek, the four “John Doe” librarians from Connecticut who successfully challenged an FBI attempt to gain patron information using a National Security Letter. As Brian Ross of ABC News said: “I think what we’re really looking at is the criminalization of investigative journalism in this country.”

BookExpo America, which provided funding to record the event, has posted a video of the entire program at: <http://bookexpocast.com/video-streaming/>

Journalist’s Protection

As the erosion of fundamental free press protections continued unabated, the Freedom to Read Committee brought AAP’s influence to bear in a number of cases:

- AAP joined an *amicus* brief asking the Supreme Court to review a troubling 4th Circuit ruling reinstating a suit against *The New York Times* for defamation and “intentional infliction of emotional distress” brought by former army biological weapons expert Stephen Hatfill. At issue was a series of columns in which Nicholas Kristof criticized the FBI’s investigation into the anthrax killings and its failure to pursue a “person of interest.” Not initially named in the Kristof columns, Hatfill later identified himself as the “person of interest.” The Supreme Court refused to hear the appeal and sent the case back for trial, but in January 2007 the trial judge threw the case out for a second time, saying that Kristof did not act with malice and calling the columns “cautiously worded.”

- AAP joined in asking for Supreme Court review of contempt citations against reporters who refused to name confidential sources in a civil suit brought by former Los Alamos scientist Wen Ho Lee. Lee sought to have reporters from *The New York Times*, the Associated Press, and CNN identify officials who might have leaked information from his personnel files, in violation of the Privacy Act, while he was under investigation by the government. In upholding the contempt citations, the federal appeals court made no attempt to balance the public’s interest against Lee’s privacy rights. After the Supreme Court refused to hear the case, the news organizations agreed, as part of a comprehensive settlement, to pay Lee \$750,000, saying they had little recourse in the absence of a federal shield law.

- AAP joined an *amicus* brief to the 9th Circuit supporting *The San Francisco Chronicle* and two of its reporters cited for contempt for refusing to identify confidential sources who provided grand jury transcripts which led to a series of articles and a book exposing the widespread use of steroids among professional athletes. Stressing the historically important role of confidential sources in reporting on matters of public concern, the brief argued that the federal appellate court should recognize a common-law reporters privilege in light of the widespread recognition of such a privilege under state law. In the wake of admissions by one of the defense attorneys that he was the source of leaked grand jury testimony, the government withdrew its subpoenas and the contempt citations against the reporters were dropped.

These cases underscore the urgent need for federal legislation to provide some degree of protection to journalists against compelled testimony in federal court. The Freedom to Read Committee actively lobbied for a federal shield law which failed to pass the last Congress. Enactment of federal shield legislation will be a legislative priority in the 110th Congress.

In the Courts

· AAP welcomed a ruling by the California Supreme Court in April in *Lyle v. Warner Brothers*. AAP had joined an *amicus* brief asking the court to dismiss this sexual harassment suit brought by a former writer's assistant on the television show *Friends* who claimed that the sexually explicit conversation in the writers' room, although not directed at her, created a hostile work environment. The brief argued that such a sweeping definition of a "hostile work environment" would chill the free exchange of ideas and information that are part of the creative process and inhibit the production and distribution of First Amendment-protected works. While the California Supreme Court dismissed the suit on statutory grounds before reaching the First Amendment issues, a concurring opinion by one of the justices cited the same First Amendment concerns and quoted directly from the *amicus* brief.

· In September AAP joined in filing an *amicus* brief in federal district court in New York supporting a legal challenge to the National Security Letter provision of the Patriot Act. The challenge was brought in an amended complaint filed by the ACLU in July which argued that changes made by Congress in the USA Patriot Act do not bring the NSL provision into compliance with constitutional requirements.

· AAP, as part of a coalition of media groups ranging from Amazon.com to the Reporter's Committee for Freedom of the Press, joined an *amicus* brief attacking "libel tourism," and supporting U.S. author Rachel Ehrenfeld's effort to have a British libel judgment against her declared unenforceable in the U.S. Issued in default because Ehrenfeld declined to appear to fight a libel suit brought by Saudi businessman Khalid Bin Mahfouz, the British judgment imposed substantial damages, an injunction against U.K. publication of Ehrenfeld's book *Funding Evil*, and a "declaration of falsity" against the book.

In April a federal court in New York dismissed Ehrenfeld's motion on jurisdictional grounds. Ehrenfeld appealed to the 2nd Circuit, which heard the case in November. The *amicus* brief argues that even without U.S. enforcement Ehrenfeld has suffered damage and that American authors need "a means to affirmatively counter such attacks and relieve themselves of the stigma and financial threat posed by such judgments."

· In October AAP led an *amicus* effort representing publishers, booksellers, and librarians in urging the Texas Supreme Court not to review a lower state appeals court's dismissal of a libel suit brought by a group called the Local Church against Harvest House Publishers. At issue was Harvest House's *Encyclopedia of Cults and New Religions*. The 730-page book makes mention in its introduction and appendix of unflattering characteristics of some cults and new religions and while the Local Church did not challenge any portion of the *Encyclopedia* that mentioned them directly, they claimed their inclusion in the *Encyclopedia* was defamatory because of general comments regarding cults. A Texas trial court failed to dismiss the case, but the Texas Court of Appeals in Houston did, holding that a "reasonable reader" would not believe that all of the characteristics cited applied to all of the groups listed. The Texas Court of Appeals also ruled that determining that a group is a cult is not actionable "because truth or falsity of the statement depends upon ones' religious beliefs, an ecclesiastical matter which cannot and should not be tried in a court of law." Calling the Texas appeals court ruling "correct in all respects" and citing the Local Church's history of suing its critics, AAP's *amicus* brief points out that libel suits without merit have a profound chilling effect "...because publishers are deterred from engaging in truthful or non-defamatory speech by the enormous costs of defending defamation lawsuits." On December 1 the Texas Supreme Court denied the Local Church's petition for review.

· In November the U.S. Court of Appeals for the 7th Circuit held unconstitutional an Illinois statute prohibiting the sale of video games with sexual content to minors and ordering retailers to post in-store signs informing customers about video game ratings. AAP had joined in filing an *amicus* brief pointing out that while it is permissible to restrict the sale of sexually explicit material to minors, the Supreme Court has ruled that such restrictions must take into account the serious literary, artistic, political or scientific value of the work as a whole, which the Illinois statute failed to do. The brief also argued that the mandated signs were compelled speech.

Educational Programs

While the First Amendment places a heavy burden of proof on libel plaintiffs in the U.S., these same safeguards do not exist in other parts of the world. American publishers find themselves increasingly threatened by “libel tourism”—disastrously expensive litigation brought by wealthy plaintiffs in plaintiff-friendly foreign jurisdictions with no substantial connection to either the publication or the parties involved. The emergence of the Internet as a publishing medium has further complicated this situation. To give publishers a better understanding of these issues, the Freedom to Read Committee joined with the Media Law Resource Center and Bloomberg News in co-sponsoring a symposium in February on International Libel & Privacy: Navigating the Minefield.

Two additional educational programs were co-sponsored with the American Booksellers Foundation for Free Expression and the ALA-affiliated Freedom to Read Foundation:

The first, held at BookExpo America in Washington, DC, looked at Threats to Press Freedom in the War on Terror. Panelists were former Washington Post reporter Myra McPherson, Pulitzer Prize-winning political cartoonist Doug Marlette, and former New York Times executive editor Howell Raines, and the discussion focused on attacks on press freedom and how they threaten our ability to hold the government accountable.

The second program—Nothing But the Facts—held in New Orleans during the ALA Annual Conference, featured Reverend Barry Lynn, executive director of Americans United for Separation of Church and State, and Dr. Michael Ruse, Professor of the History and Philosophy of Science at Florida State University, both of whom eloquently argued that keeping “intelligent design” out of science classrooms is not a violation of the First Amendment.

FREEDOM TO READ COMMITTEE MEMBERS, COUNSEL AND STAFF

The following served as regular members of the Committee during Fiscal Year 2006/2007

Nancy Miller (The Random House Publishing Group)—Chair; **Susan Amster** (Harcourt Trade Publishers/Reed Elsevier Inc.); **Brenda Bowen** (The Disney Book Group); **Rosemarie Cappabianca** (McGraw-Hill Education); **Florence Howe** (The Feminist Press at CUNY); **Roy Kaufman** (John Wiley & Sons); **Heather Kilpatrick** (Hachette Book Group USA); **David Levithan** (Scholastic, Inc.); **Jamie Raab** (Warner Books Inc./Hachette Book Group USA); **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); **Amy Wolosoff** (Holtzbrinck Publishers).

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

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