The Freedom to Read Committee fulfilled its educational mandate, working with allied organizations over the past year to present two outstanding programs:

At BookExpo America in Chicago, AAP co-sponsored, with the American Booksellers Foundation for Free Expression (ABFFE) and the ALA-affiliated Freedom to Read Foundation, a program featuring Illinois Senator Richard Durbin, a primary sponsor of the original SAFE Act in the 108th Congress to amend the PATRIOT Ace and restore judicial safeguards when the government seeks records, including library and bookstore records, under Section 215. After his speech Senator Durbin received the first batch of petitions collected through the Campaign for Reader Privacy.

The American Library Association's Annual Conference in Orlando, Florida included a First Amendment program co-sponsored by the AAP Freedom to Read Committee, the ALA Committee on Intellectual Freedom, and ABFFE. Entitled "Censorship of the Written Word: Still Alive and Kickin," the program featured author Robie Harris, whose award-winning books for young people on reproduction and sexual health are perennially among the most challenged and banned in the country, and Jerilynn Williams, director of the Montgomery County, Texas, Library System, who successfully rallied her community to fight off an attempt to remove Harris' books from the library, and whose courage and determination won her a PEN/Newman's Own First Amendment Award.

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FREEDOM TO READ COMMITTEE MEMBERS, COUNSEL AND STAFF

The following served as regular members of the Committee during Fiscal Year 2004/2005

Lisa Drew (Lisa Drew Books/Scribner, Simon & Schuster)—Chair; **Susan Amster** (Harcourt Trade Publishers/ Reed ElsevierInc.), **Brenda Bowen** (Hyperion Books for Children), **Roy Kaufman** (John Wiley & Sons), **Heather Kilpatrick** (Time Warner Book Group), **Nancy Miller** (Random House Ballantine Publishing Group), **Emily Remes** (Simon & Schuster), **Andre Schiffrin** (The New Press), **Beth Silfin** (HarperCollins Publishers), **Mark Sirota** (Reader's Digest), **Anke Steineke** (Random House), **Suzanne Telsey** (The McGraw-Hill Companies), **Livia Tenzer** (Feminist Press at CUNY), **Jane von Mehren** (Penguin Books), **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 2004/2005

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Publishers understand that the First Amendment is no abstract legal concept. Threats to free speech have a profound impact on the way they do business. Government-mandated solutions for media violence and "indecency," attempts to impose liability for acts "inspired" by published works, high stakes libel suits aimed at silencing authors and publishers, the weakening of fundamental protections for journalists—all of these affect the business of publishing.

The mandate of the AAP Freedom to Read Committee is to protect the free marketplace of ideas for American publishers. The Committee coordinates AAP participation in important First Amendment court cases, sponsors educational programs, helps shape policy for the Media Coalition—a trade group that defends free speech on behalf of content-producing businesses—and works with groups within and beyond the book community to advance common interests in the area of intellectual freedom.

Publishers and the USA PATRIOT Act

Section 215 of the USA Patriot Act, especially as it applies to library and bookstore records, has disturbed the publishing community since passage of the Act in October 2001. Under Section 215, the FBI can seize on *ex parte* order from a secret Foreign Intelligence Surveillance court "any tangible thing" including business records they claim are "relevant" to an investigation. They do not have to show that the targeted individual may be involved in criminal activity or an agent of a foreign power. Subject to seizure under Section 215 are public library circulation and Internet use records, records of purchases by bookstore patrons, and if the FBI is interested in a book or author, *all of a publisher's records* pertaining to the book. Under a claim of "relevance," government agents are able to conduct fishing expeditions, to access information about subscribers to scientific journals and other publisher records. All of this occurs under a strict veil of secrecy. The recipient of a 215 order cannot reveal its existence nor seek to quash it.

Building on success the previous year in getting House and Senate bills introduced to restore judicial safeguards, AAP joined with the American Library Association, the American Booksellers Association, and PEN American Center in 2004 to co-sponsor the Campaign for Reader Privacy, an educational program and nationwide petition drive to

- AAP joined in asking the U.S. Supreme Court to overturn a California court ruling in *Tory v. Cochran,* the first libel case to be heard by the high court in more than a decade. Challenging a permanent injunction that prevents a disgruntled former client of celebrity lawyer Johnnie Cochran from *ever saying anything again* in a public forum about Cochran or his law firm, the case involves the most serious type of First Amendment violation, a prior restraint of speech, justifiable only to protect the highest national security interests. Cochran's death in March, shortly after the Supreme Court heard arguments, has opened the issue as to whether the case is now moot. The Supreme Court has requested attorneys on both sides to submit briefs on the question of whether the case will survive Cochran's death.

- Early in 2004 AAP took the lead for a second time in an *amicus* brief asking the U.S. Supreme Court to strike down the Children's Online Protection Act (COPA). The case went up 3 years ago on the narrow question of whether "community standards" can be applied to the Internet. Failing to strike COPA down solely on this ground, the Court sent the case back to the 3rd Circuit, which again held COPA unconstitutional, this time on broader First Amendment grounds. In June 2004 the Supreme Court, while upholding the preliminary injunction, ruled that the many legal and technological changes that have occurred in the five years since the case was first heard have changed the landscape enough to warrant a new trial. The COPA challenge is once again before the district court, with the burden on the government to prove that the Act is the least restrictive means of protecting minors from unsuitable material on the Internet.

- Two years ago, AAP was among the plaintiffs challenging an Arkansas statute governing the display and accessibility of harmful to minors material. The case ended successfully in November when a federal district court held the statute to be an unconstitutional burden on adults and older minors to access material to which they are entitled.

- AAP joined U.S. and Canadian media organizations as a friend of the court in the Court of Appeal for Ontario in *Bangoura v. The Washington Post*, a Canadian case with far-reaching implications for Internet speech. A Canadian trial court ruled that a libel case against the *Washington Post* could proceed in Canada because the allegedly defamatory story, which still resides in the *Washington Post's* online archives, can be downloaded in Ontario. The ruling cited a recent finding by an Australian court that publication takes place where an article is downloaded and read rather than where it originates. The Canadian case is particularly troubling because the plaintiff was a U.N. official stationed in Kenya at the time the articles, accusing him of malfeasance, were published and has only resided in Ontario for the past several years. The archived item in question has been downloaded once—by the plaintiff's attorney. However, the Canadian judge ruled that the *Post* "should have reasonably foreseen that the story would follow the plaintiff wherever he resided."

- In February 2005 AAP joined an *amicus* brief to the California Supreme Court in *Lyle v. Warner Brothers*, a sexual harassment case with significant First Amendment ramifications. The case was brought by Amaani Lyle, a writer's assistant hired to take notes during brainstorming sessions of the writing team for the TV sitcom "Friends." Fired for lack of typing skills, Lyle filed a sexual harassment suit against Warner Brothers, claiming that the sexual content of the conversation in the writers' room, although not directed at her, created a hostile work environment. The case was dismissed by the trial court but reinstated by California's intermediate appellate court which ruled that a jury must determine whether the speech in the writers room was necessary to the creative process. Our brief argues that the ruling threatens the ability of authors and book editors to create works of fiction and non-fiction "with a free exchange of ideas and information during the creative and editorial process," and threatens booksellers and librarians because of its inevitable chilling effect. In addition, the appellate court's sweeping definition of "hostile work environment" to include speech that is neither directed at nor concerns the plaintiff could also apply to the production and distribution of First Amendment-protected materials and might well impose liability on printers and retailers whenever an employee objects to content.

bring about legislative changes in Section 215. Evidence that this message is reaching Capitol Hill came in a House vote in July on an amendment to cut off funding for Justice Department 215 searches of libraries and bookstores. Although the amendment was narrowly defeated, the fight on the floor of the House reflected what one newspaper termed "the growing consensus on Capitol Hill that too much liberty and privacy was given up under the Patriot Act."

During the celebration of Banned Books Week in September the Campaign held a press conference on Capitol Hill at which AAP President Pat Schroeder joined with PEN President Salman Rushdie and officials of ALA and ABA in presenting members of Congress with petitions containing more than 180,000 signatures collected in bookstores and libraries across the nation. Petitions and information on the Campaign were also circulated at the National Book Awards celebration in November. As the 109th Congress begins its work on the PATRIOT Act, re-examining provisions such as Section 215 that are due to expire at the end of 2005, the Freedom to Read Committee is gearing up for a full-scale lobbying effort.

The Press Besieged

Over the past several years, publishers have watched with growing unease the erosion of fundamental protections for investigative journalists and authors. A number of high profile cases have underscored an increasing willingness on the part of federal authorities to subpoena journalists and to hold out the threat of civil and criminal contempt for refusal to identify confidential sources. Indeed, in a 2003 decision Judge Richard Posner, the influential Chief Judge of the U.S. Court of Appeals for the 7th Circuit, expressed skepticism about the existence of any reporters' privilege, stating that "we do not see why there needs to be special criteria merely because the possessor of the documents or other evidence sought is a journalist."

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. Among the most publicized incidents:

- James Taricani, a television reporter for an NBC station in Rhode Island, was cited for criminal contempt for refusing to identify the source of an FBI videotape of an aide to a former mayor of Providence accepting a bribe. Although spared prison for health reasons, Taricani was sentenced to six months' home confinement

- The special prosecutor investigating the leak of Valerie Plame's identity as a CIA agent sought testimony from at least five reporters in an effort to determine the source of the leak. Judith Miller of the *New York Times* and Matt Cooper of *Time* magazine have been cited for contempt and are facing up to 18 months in prison pending their appeal to the U.S. Supreme Court.

- The same special prosecutor, Patrick Fitzgerald, sought to obtain all telephone records of two *New York Times* reporters covering a 20-day period in the fall of 2001 in connection with a series of articles about the government's investigation into whether Islamic charities were complicit in the September 11 attacks.

- Six reporters have been subpoenaed, and five have been held in contempt, in connection with former nuclear scientist Wen Ho Lee's civil lawsuit against the government

- More than a dozen news organizations have been subpoenaed in connection with a civil suit against the government filed by Steven Hatfill, who was named as a "person of interest" during the investigation of the anthrax attacks

These and other incidents have underscored the need for federal legislation that would provide journalists with a degree of protection against compelled testimony in federal court. AAP Freedom to Read counsel worked on a task force to develop draft legislation, the "Free Flow of Information Act." Introduced in both the House and the Senate with bipartisan sponsorship, the Act would codify Department of Justice guidelines that have been in place since Watergate, requiring federal prosecutors and judges to meet strict standards and exhaust other remedies before they could subpoena reporters. The legislation, which would specifically cover book publishers and authors, would prohibit under any circumstances the compelled disclosure of the identity of confidential sources or of information that could lead to the discovery of their identity.

In the Courts

The Freedom to Read Committee was involved in a number of important First Amendment court cases over the past year:

- AAP played an important role in a landmark First Amendment victory in Texas in *New Times v. Isaacks*, a case involving the right to satirize public officials. In a unanimous ruling, the Texas Supreme Court dismissed a libel suit brought by two public officials against an alternative weekly newspaper, and in so doing strengthened free speech protections in the state. The Freedom to Read Committee organized an *amicus* effort in which a broad coalition of media and First Amendment groups asked the court to protect the use of "comic exaggeration" to focus attention on the abuse of authority. The case arose from a fictitious "news" article satirizing local officials who, as a way of enforcing a school violence "zero-tolerance policy," jailed a 13-year old student for writing a school-assigned Halloween essay. The *Dallas Observer* published a satirical report of the arrest of a 6-year old girl for a book report on *Where the Wild Things Are* that contained "cannibalism, fanaticism, and disorderly conduct." The article contained outrageous fictional quotes from several real people, including then-Governor George W. Bush, a representative of the ACLU, and the plaintiffs, a county district attorney and a juvenile court judge. The piece drew criticism from some readers who apparently believed it to be true, and plaintiffs sued for defamation. Neither the trial court nor the state's intermediate appellate court would dismiss the case, finding that a jury had to determine whether a "reasonable person" would believe the story to be true and whether the newspaper acted with "actual malice" in publishing it. In a ruling that reflected a careful reading of AAP's brief, the Texas Supreme Court rejected the argument that the fact that some readers believed the story to be true undermined the newspaper's claim that the piece was meant to be understood as satire. The state Supreme Court held that "…the question is not whether some actual readers were misled, as they inevitably will be, but whether the hypothetical reasonable reader could be….This is not the same as asking whether all readers actually understood the satire or 'got the joke'." The Texas Supreme Court also rejected the argument that the newspaper's admitted intent to ridicule the defendants could be taken as evidence of actual malice, ruling significantly that "actual malice concerns the defendant's attitude toward the truth, not toward the plaintiff."