



# Freedom to Read Foundation News

50 EAST HURON STREET, CHICAGO, ILLINOIS 60611 PHONE (312) 944-6780

Lee B. Brawner, President

Judith F. Krug, Executive Director

Volume 13, No. 4

1985

## ALA Challenges Decision to Cease Publication of *Playboy* in Braille

On December 4, 1985, the American Library Association joined the American Council of the Blind, the Blinded Veterans Association, *Playboy Enterprises* and blind braille magazine readers in filing suit in the U.S. District Court in the District of Columbia against Librarian of Congress Daniel Boorstin. At issue is an amendment introduced by Rep. Chalmers Wylie (R.-Ohio) on July 18 (bill adopted on October 29) which reduced the Congressional appropriation for the books for the blind and physically handicapped program by \$103,000—the amount it costs to produce *Playboy* in braille. According to Wylie, “*Playboy* assails the traditional moral values and peddles licit as well as illicit sex. . . . The reading of *Playboy* . . . does lead to undesirable activities.” Dr. Boorstin, in obedience to the Congressional mandate, reluctantly ceased production of the braille *Playboy* with the December 1985 issue, and expressed “profound regret” at what he termed Congressional “censorship” of material for the blind.

The American Library Association, the American Council of the Blind, *Playboy* and the other plaintiffs are asking for declaratory and injunctive relief to prevent the books for the blind program (“the program”) from engaging in government censorship and suppression of the constitutionally protected ideas and expressions contained in braille editions of the textual portions of *Playboy* magazine.

The Foundation Trustees unanimously agreed to provide financial and legal assistance to the plaintiffs in this action and to file an *amicus curiae* brief at the appropriate time.

Excerpts from the complaint filed in *American Council of the Blind v. Boorstin* are included below. The material in parentheses has been summarized.

### The Parties

*American Council of the Blind* (ACB): (the largest national membership organization of blind and visually impaired persons is a not-for-profit, tax-exempt corporation, and the nation’s leading advocacy organization of and for blind and visually impaired persons.)

*Blinded Veterans Association* (BVA): (a not-for-profit organization open to any person who served in the Armed Forces of the United States, and “who, in the line of duty in such service, has sustained a substantial impairment of sight or vision. . . .”)

*J. Scott Marshall*: (a legally blind adult, member of ACB, an attorney, a graduate of Harvard Law School and a participant in the program.)

(Continued on p. 2)

## Sallisaw, Oklahoma

### Foundation Fights School Library Censorship

The Freedom to Read Foundation is providing legal and financial assistance to a group of parents and students in Sallisaw, Oklahoma who are fighting the removal of a book from the Eastside Grade School. *Faulkenberry v. Board of Education of Sallisaw*, filed in federal court on October 17, charges the Sallisaw Board of Education, four board members and the superintendent with violating the plaintiffs’ First and Fourteenth Amendment rights. At issue is the removal in March, 1985 of *The Sisters Impossible*, a children’s book by J.D. Landis, from the elementary school library.

*The Sisters Impossible*, an award-winning novel, realistically explores general themes relating to childhood, including sibling rivalry; the importance of family relationships; peer pressure and self-image; and competition. The book had been in the school’s library since 1981.

The controversy over the book grew out of the objections of the parents of a fourth-grade student to what they called the book’s “inappropriate language” and “negative attitude.” Despite the fact that the couple had not read the book in its entirety, they asked a member of the school board to remove the book from their daughter’s school. The board member kept the book but did not notify the appropriate school officials, thereby circumventing the school district’s established policy regarding school library materials which are challenged by citizens.

Subsequently, a review committee of teachers was appointed to review the book and make recommendations to the full board as to whether or not the book should remain in the library. The committee unanimously recommended that the book be retained and went on to note its approval of the book’s “extremely realistic” approach to “everyday problems faced by children of this age group.”

The school board refused to overturn its decision to remove the book, despite encouragement to do so from the Sallisaw Classroom Teachers Association and the Oklahoma Library Association.

Concerned Citizens and Parents for Children’s Rights, a community group formed to fight censorship, presented the board with a 500-signature petition urging reinstatement of the book, but the board did not relent.

The lawsuit, filed in U.S. District Court for the Eastern District of Oklahoma, charges the defendants with abuse of discretion regarding the management of school affairs as a result of their interference with the school library, and

(Continued on p. 2)

## Foundation (from p. 1)

violation of the plaintiffs' First Amendment rights by the board's willful circumvention of established procedures for selection and reconsideration of library books. In addition, the parents and students allege a violation of due process both by the defendants' removal of the book without applying the standards and criteria set forth in the Sallisaw City School Media Center's Statement of Policy and by the defendants' threat to arbitrarily amend or withdraw the existing policy.

The plaintiffs are asking the court to order the return of the book, to enjoin the removal of other library material, and to direct the school board to follow the established policy for review or removal of material from the library.

The FTRF Board of Trustees unanimously agreed to give both financial and legal assistance to the Sallisaw plaintiffs, following an on-site visit by FTRF President Lee Brawner, FTRF Executive Director Judith Krug and FTRF counsel Jim Klenk.

## Playboy (from p. 1)

*Deborah Kendrick:* (a legally blind adult, a member of ACB, a professional freelance journalist, magazine writer, and a published poet who for many years has been a participant in the program. The braille edition of *Playboy* has materially helped Ms. Kendrick pursue her career by giving her access to the highest quality of contemporary expository and creative magazine writing.)

*Brian Charlson:* (a legally blind adult, member of ACB, a computer training instructor and, for many years, a participant in the program.)

*Playboy Enterprises, Inc.:* (a Chicago-based corporation and publisher of *Playboy*. In its 31 years of publication, not a single issue of *Playboy* has been found by a court to be obscene; courts have held that *Playboy* does not meet even one of the three tests a publication must meet before it can be found obscene. *Playboy* is one of the most popular and widely read magazines in America and throughout the world. It has a monthly readership in this country of over 15 million persons.)

*American Library Association (ALA):* a not-for-profit, educational organization committed to the preservation of the American library as a resource indispensable to the intellectual, cultural and educational welfare of the Nation. The ALA's direct membership includes over 42,000 librarians, libraries and members of the general public. . . .

The ALA, its members, and in particular the Association of Specialized and Cooperative Library Associations (ASCLA), a division of the ALA, have worked with the Library of Congress to establish standards and selection criteria for the program. . . . Included among ASCLA's 1,500 members are the libraries and librarians across the country who serve blind and physically handicapped people. . . .

*Dr. Daniel Boorstin:* (the Librarian of the Library of Congress and the person with overall and final authority for administration of the books for the blind and physically handicapped program of the Library of Congress.)

## Description of the Program at Issue

The books for the blind program of the Library of Congress, codified at 2 U.S.C. §135a, *et seq.*, has been in existence for over half a century. Under that program . . . Congress is authorized to appropriate 'such sums for

expenditure under the direction of the Librarian of Congress as may be necessary' to produce and distribute braille and/or recorded editions of materials 'for the use of the blind and for other physically handicapped residents of the United States. . . .'

. . . The Librarian of Congress arranges with public or other nonprofit libraries, agencies or organizations ('network libraries') to serve as local or regional centers for the circulation of braille and recorded materials. . . . Network libraries, as members or affiliates of ALA, operate on the basic principle that blind and physically handicapped individuals are a part of any library's service constituency and are entitled to access to programs and services on an equal basis with other members of the community. . . .

The annual Congressional appropriation to the Library of Congress. . . constitutes the majority of the funding for the program, but substantial additional funds are contributed to the program, either directly or in kind, from state, local, and other sources. For federal fiscal year 1985, the Congressional appropriation to the Library of Congress for the program was \$36,592,000 and the combined total expenditure for the program was approximately \$60,000,000.

For many years, the program has produced braille and/or recorded editions of various magazines of interest to the blind and physically handicapped. Program materials are selected pursuant to the selection policy of the Library of Congress National Library Service for the Blind and Physically Handicapped (NLS). The policy provides that the selection of any given material is not to be interpreted as an endorsement by the Library of Congress of the views expressed therein, and recognizes that items selected, after due deliberation and in accordance with the policy and its selection criteria, may be disseminated to willing recipients, and maintained in the collection, even if they would be offensive or unacceptable to others. NLS subscribes to plaintiff ALA's *Library Bill of Rights* and *Freedom to Read Statement*. The program produces a wide range, but limited number, of magazines in braille and recorded editions, which includes, in addition to *Playboy: Ladies Home Journal, National Geographic Magazine, National Review* and *Psychology Today*.

The Library of Congress long ago established procedures to assist the Library in determining which printed materials the blind and physically handicapped most want to be produced in braille and/or recorded editions. The major element of that procedural system is an advisory committee, a majority of whose members are blind or physically handicapped individuals. . . .

Four of the twelve members of the advisory committee are professional librarians, one from each of the four regions defined by the Library of Congress.

The advisory committee, and individual members thereof, are free to recommend categories of magazines, and if they choose, particular magazines, to the Library of Congress for offering in braille on a trial basis to the approximately 17,000 braille readers who participate each year in the program. However, the ultimate selection of materials for the program is a function of professional standards of quality, balance and reader demand and is not dependent on the composition of the Advisory Council at any point in time. In addition, individual braille reader participants may themselves request that specific magazines be offered in braille on a trial basis. Every three months, based on these recommendations from the advisory committee,

requests from braille reader participants, and suggestions from the staff of the Library of Congress, the program produces a braille edition of at least one new magazine, and offers that magazine to the braille reader participants of the program on a trial basis. Readers who participate in these trials complete a reader survey questionnaire which is considered by the Library of Congress in determining which magazines will be produced on a regular basis in braille or recorded editions. . . .

In recent years, the program has had sufficient funding to produce regular braille editions of approximately 36 magazines. Since 1970, *Playboy* has continuously been on the list of regular braille editions. During that time, *Playboy* has consistently been one of the six or seven most demanded magazines, and has frequently ranked even higher than that in readership demand.

In 1981, the Director of the program asked the Collection Development staff of the Library of Congress "to review the appropriateness of continuing to offer *Playboy* in braille to eligible blind persons." In December 1981, after a rigorous internal review, using established standards and criteria, the staff determined that *Playboy* "remains head and shoulders over its competitors. In fact, its 1980 circulation surpassed *Good Housekeeping* and *Ladies Home Journal*. In terms of the quality of the writing, which is a prime consideration for selecting periodicals for this program, it is top notched." Thus, based on readership demand and the professional judgment of the relevant staff of the Library of Congress that the writing in *Playboy* was "top notched," the program decided to continue publication of braille editions of *Playboy*.

If a magazine is selected for inclusion in the program, the Library of Congress requests permission from the publisher/copyright owner to reproduce the magazine in braille and/or recorded edition. Since 1970, *Playboy* has granted the library of Congress a license to reproduce any materials for which *Playboy* owns the copyright. *Playboy* has never charged anything for that copyright permission.

Once copyright permission is obtained, the program produces a braille and/or recorded version of the copyrighted materials, without any editorial selection by the publisher/copyright owner, or by the Library of Congress. However, because photographs, pictures and cartoons cannot be reproduced in braille or recorded editions, they and their accompanying captions are omitted from the braille and/or recorded editions. Furthermore, in order that the braille and/or recorded editions may be mailed free of postage to the participants of the program, pursuant to 39 U.S.C. §3403, all advertising matter is omitted from the braille and/or recorded editions.

Public libraries throughout the United States participate in the program through network libraries and inter-library loans. Copies of magazines in braille are available to regional libraries in the United States, which in turn make them available to readers directly or through inter-library loan. Thus, the blind and physically handicapped have access to these materials through public libraries.

Individuals may also have access to the program directly through the Library of Congress (by completing) a detailed application form. . . ." No participant in the program will receive *Playboy* or any other magazine unless he or she makes an affirmative request. . . .

Production of braille editions of magazines and books is extremely expensive, and because the potential readership is relatively small, it is not commercially feasible to

produce most magazines in braille. Virtually all of the magazines produced in braille in this country are produced by this program. In reality, (the) blind and physically handicapped have no alternative sources for obtaining or receiving the information, opinions, ideas, fiction, humor, and political and social commentary contained in those magazines.

### Claims

(On July 18, 1985, Rep. Chalmers Wylie offered a floor amendment to a bill which would have appropriated \$33,864,000 for the program. In explaining the reason for his amendment, Rep. Wylie stated: "I have asked the Library of Congress to stop using money to reproduce *Playboy* in braille. They have not stopped using the money for this purpose, and so I am offering this amendment. . . . The reduction of \$103,000 is the amount I was given as being the cost to reproduce and distribute *Playboy* in braille last year. . . .")

(Wylie went on to say that he thought "the debate here on the floor will clearly indicate my intent in introducing the amendment," and stated further that because of his previous correspondence with the Library of Congress, he had "a feeling that the Library of Congress will discontinue publishing *Playboy* in braille. . . .")

(A voice vote was taken on the proposed amendment and it was defeated. Rep. Wylie then demanded a recorded vote and made the "point of order that a quorum is not present." After a five minute recess to obtain a quorum, the Congressional Record shows 216 Congressmen voted for the Wylie amendment and 193 voted against it.) There is no indication in the legislative history that there was any further debate after a quorum was present, or that any of the Congressmen who voted in favor of the amendment who had not been present during the initial floor debate were aware of that debate or of Rep. Wylie's reasons for the amendment.

Thereafter, the House bill, as amended by the Wylie amendment, was considered by the Senate and, with amendments not relevant here, was passed by the Senate. . . . There was no mention of or reference to *Playboy* in any Senate report, or in any Senate Committee hearing, or on the floor of the Senate. So far as appears from the legislative history, the Senate simply acceded to the House's desire to reduce the funding for the books for the blind and physically handicapped program by \$103,000, without requiring that any particular magazine be deleted from the program. . . . (On November 13, 1985, the bill was signed into law by the President.)

In these circumstances, involving an unambiguous floor amendment to an appropriations bill, ordinary canons of statutory interpretation preclude reference to the ambiguous floor debate preceding passage of that amendment to change or restrict the otherwise plain meaning of that amendment, particularly when there is no clear indication that a majority of the Congressmen who voted for the amendment were even aware of the substance of the floor debate. . . .

Nevertheless, defendant Boorstin believes that the Wylie amendment does prohibit him and the Library of Congress from producing braille and/or recorded editions of *Playboy*, and therefore requires him to disregard the Library's viewpoint-neutral selection criteria, procedures, and historical practices with respect to selection of program materials. Defendant Boorstin's decision to delete *Playboy* Magazine from the program. . . is without support in the Wylie amendment, conflicts with the

procedures and viewpoint-neutral standards mandated by 2 U.S.C. §135a, and violates the First and Fifth Amendment rights of the plaintiffs.

Unless this Court issues an order directing defendant Boorstin to consider *Playboy* for inclusion in the books for the blind and physically handicapped program using the same procedures and the same professional standards of quality, balance and readership demand as are applied to all other magazines, defendant Boorstin and the Library of Congress will not produce braille and/or recorded editions of *Playboy*, and plaintiffs will be irreparably injured. . . .

If the Wylie amendment does prohibit defendant Boorstin from producing braille editions of *Playboy*, the amendment violates plaintiffs' constitutional rights under the First and Fifth Amendments to the United States Constitution . . . (and therefore) plaintiffs request a judgment declaring that the Wylie amendment does not prohibit defendant Boorstin from producing braille editions of *Playboy*.

If the Wylie amendment is interpreted to require defendant Boorstin and the Library of Congress to delete *Playboy* from the regular list of braille edition magazines, the amendment constitutes discriminatory suppression and government censorship of a lawful magazine because of the content of the magazine and the ideas and viewpoints expressed therein, and denies the blind and physically handicapped access to that information in violation of the First and Fifth Amendments to the United States Constitution.

In several decisions, the United States Supreme Court has made it clear that even in programs where speech is subsidized by the government, or takes place in or through a government-created forum, the government may not discriminatorily subsidize or permit some lawful speech and refuse to subsidize or permit other lawful speech when the basis for the distinction is the government's agreement or disagreement with the content of the speech or with the ideas or views of the speaker. . . .

The motivation for, purpose for, and effect of, the Wylie amendment is to restrict and suppress the access of the blind and physically handicapped to the viewpoints, ideas and information expressed in a single, lawful magazine, otherwise available to sighted readers, solely because the government deems those ideas to be dangerous, bad, immoral, or otherwise undesirable, and to deny plaintiff Playboy Enterprises, Inc. access to a public or limited public forum.

The Wylie amendment is not designed to and does not further any legitimate governmental purpose.

The Wylie amendment is underinclusive. It does not prohibit the use of federal funds to produce braille or recorded editions of any other magazine or book, regardless of its content, and does not deprive the sighted of access to printed editions of *Playboy*, which continue to be maintained in the collection of the Library of Congress at public expense.

The Wylie amendment is overinclusive. It prohibits defendant Boorstin and the Library of Congress from producing a braille edition of any issue or portion of *Playboy*, regardless of its content. . . .

Because of the Wylie amendment, the blind and physically handicapped potentially have access through the program to all of the approximately 11,000 magazines published in this country, except one. In fact, every magazine published in the world, except *Playboy*, may be

considered for inclusion in the program under the professional standards of quality, balance and readership demand applied uniformly by the Library of Congress to all other magazines. However, because of governmental interference with that process, the blind and physically handicapped do not have access to the ideas and views expressed in *Playboy*.

For the first time in the fifty-four year history of the program, Congress has intruded on the professional standards of quality, balance and readership demand which the Library of Congress has employed to provide the blind and physically handicapped with access to a wide variety of materials. This governmental intrusion effectively prohibits the blind and physically handicapped from reading information, opinions, ideas and views which the Congress finds unacceptable, for whatever reason.

The Wylie amendment also constitutes and, in the circumstances of this case, has the practical effect of a prior restraint on *Playboy's* future speech, regardless of the content of that future speech or of how inoffensive or politically or socially important that future speech may be. . . .

In purpose and effect, the Wylie amendment constitutes a civil Bill of Attainder which punishes, penalizes and prohibits the future speech of *Playboy* because Congress has determined, retroactively, that portions of *Playboy's* past speech were, in the view of Congress, unacceptable. . . .

The purpose and effect of the Wylie amendment is to deprive plaintiffs . . . of their constitutional right to receive and disseminate information. The consequences of this deprivation to plaintiffs . . . are particularly severe because they have no alternative means for obtaining that information. . . .

As defendant Boorstin has admitted, the Wylie amendment has raised concerns among librarians and others that Congress has abandoned its traditional role of neutrality and may now engage in viewpoint-censorship of materials produced by or disseminated through the Library of Congress and other federal programs, forums, or subsidies, whenever Congress deems those materials offensive or unacceptable. The Wylie amendment therefore has created a severe chilling effect on persons seeking to communicate with the blind or visually impaired, and on anyone wishing to communicate through federal programs, forums or subsidies.

For these reasons, the Wylie amendment violates the constitutional rights of all of the plaintiffs under the First and Fifth Amendments to the United States Constitution.

### **Prayer for Relief**

(The plaintiffs have asked the Court to declare that the Wylie amendment does not prohibit Dr. Boorstin and the Library of Congress from producing braille and/or recorded editions of *Playboy* and to direct Dr. Boorstin and the Library of Congress to consider *Playboy* for inclusion in the program for fiscal 1986 using the same standards that are applied to all other magazines.)

(Plaintiffs have also asked that, if the Court determines that the Wylie amendment does prohibit the Library of Congress from producing braille and/or recorded editions of *Playboy*, that the Court declare the Wylie amendment to be a violation of the plaintiffs' constitutional rights under the First and Fifth Amendments to the United States Constitution.)