

...And Other Forms of Lawlessness

27 September 2007

The latest swift-boating (unless there is a new one among seven unanswered calls on my cell) is the whacko claim that I received \$720,000.00 from George Soros. Here is the real deal, with the order of things as well as I can remember without wasting even more time digging into papers and records.

Sometime after giving a potentially provocative interview to *Sixty Minutes*, but before it aired, I tried to get legal advice on my rights of free speech. I made two or three attempts to contact people at Freedom Forum, who I had given permission to use a quote (something like "in my thirty-some years in the government, I have never seen anything like the present restrictions on the flow of information from scientists to the public") on their calendar. I wanted to know where I could get, preferably inexpensive, legal advice. Never got a reply.

But then I received a call from the President of the Government Accountability Project (GAP) telling me that I had won the Ridenaur Award (including a moderate amount of cash -- \$10,000 I believe; the award is named for the guy who exposed the Viet Nam My Lai massacre), and offering pro bono legal advice. I agreed to accept the latter (temporarily), signing something to let them represent me (which had an escape clause that I later exercised).

I started to get the feeling that there may be expectations (strings) coming with the award, and I was concerned that it may create the appearance that I had spoken out about government censorship for the sake of the \$. So I called the President of GAP, asking how the nomination process worked and who made the selection. He mentioned that he either nominated or selected me. So I declined the award, but I continued to accept pro bono legal advice for a while.

The principal thing that they provided was the attached letter to NASA. This letter shows me why scientists drive 1995 Hondas and lawyers drive Mercedes. I have a feeling that the reader of that letter had at least one extra gulp of coffee that morning.

But it turns out that GAP has lost most of their cases in defending whistle-blowers. It is obviously not because they are crummy lawyers. Things are getting pretty tough in our country. It is still not clear to me what rights of free speech we actually have today.

Some people think that things must have changed in our government, since I have been speaking pretty freely of late. That is mainly appearance. The (free speech) situation in NASA is good at the moment only because our Administrator made a strong statement. The rules as written, according to GAP, will allow the next Administrator, if he so desires, to hammer the free speaker. But the big problem is that the Offices of Public Affairs in most agencies, at the Headquarters level, have been staffed with political appointees, who in effect are running Offices of Propaganda (Mark Bowen has written a book about this, which will come out in December). Public Affairs people at the field centers are dedicated professionals, but political appointees occupy the Headquarters positions in Washington. I complained about this to a Government Reform committee in the House (<http://www.columbia.edu/~jeh1/20070319105800-43018.pdf>), saying that there should be a law that Public Affairs must be staffed by professional civil servants, not political appointees. I did not seem to raise much interest. Too much reform for a Reform committee, I guess.

The bottom line is: I did not receive one thin dime from George Soros. Perhaps GAP did, but I would be surprised if they got \$720,000 (that's a lot of Mercedes). Whatever amount they got, I do not see anything wrong with it. They are a non-profit organization. Seems like a great idea to have some good lawyers trying to protect free speech.

By the way, in case anybody finds out that George Soros INTENDED to send me \$720,000 but could not find my address, please let me know! We are pretty hard pressed here.

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February 8, 2006

The Honorable Dr. Michael Griffin
Administrator
National Aeronautics and Space Administration
300 E St., SW
Washington, DC, 20546

Dear Honorable Dr. Michael Griffin:

The Government Accountability Project (GAP) represents Dr. James Hansen, chief of the National Aeronautics and Space Administration's (NASA) Goddard Institute for Space Studies. We seek your commitment that Dr. Hansen will not be punished for exercising his rights under the First Amendment, Whistleblower Protection Act (WPA), and the Anti-Gag Statute to share his internationally-renowned expertise on climate change. As you may have read or heard, he has been threatened with "dire consequences" if he does not submit to blanket prior restraint on his speech. Such threats violate all three of these laws.

Your leadership would be consistent with your recent laudable email reassurances to NASA staff about scientific openness. Obviously Dr. Hansen will be the credibility litmus test that determines how other NASA scientists view these reassurances. Dr. Hansen has emphasized to us that he shares your vision for NASA and has confidence in your leadership.

We also seek your commitment to bring NASA into institutional compliance with the relevant free speech laws. We offer our organization's good offices to share relevant expertise that would be helpful. At this time we are not releasing this letter, in hopes that we might be able to work collaboratively with your office with the aim of achieving for NASA a restored and deserved reputation as an agency committed to openness and scientific freedom and integrity.

As background, in publicized speeches and papers Dr. Hansen has been sharing scientific research indicating that the "Earth's climate is nearing, but has not passed, a tipping point beyond which it will be impossible to avoid climate change with far-ranging, undesirable consequences." His disclosures have sparked a sharp response from NASA headquarters (HQ) Public Affairs Office (PAO) officials such as a Mr. George Deutsch, who reportedly explains that his job is "to make the President look good." As part of the PAO effort, Mr. Dwayne Brown has threatened Dr. Hansen with "dire consequences" unless our client refers all communications to PAO, so that others may speak for him or remain silent for him, thus in effect turning down media interviews for no apparent or appropriate reason.

PAO has drafted a policy of blanket prior restraint to institutionalize Dr. Hansen's treatment. The policy would cover all NASA scientists, civil servants and government-paid

contractors. To summarize, it would require that *all* communications from the media go through PAO; *no* comments or interviews may occur without advance permission; and that higher management officials have a “right of first refusal” (PAO’s words) to substitute for NASA’s career scientists responding to *all* interview requests.

Neither Mr. Brown’s threats nor the PAO policy can coexist with the United States Constitution. It is beyond any credible debate that the First Amendment protects Americans from having to get prior permission to exercise free speech rights. Our nation long has prided itself that we do not have an Official Secrets Act.

These actions also would directly violate two specific laws passed by Congress to implement constitutional free speech rights: the Whistleblower Protection Act (WPA) of 1989, 5 USC 1101 *et seq.*, and the Anti-Gag Statute, found in section 620 of the Transportation, Treasury and Independent Agencies Appropriation Act of 2005. These are fundamental laws with an impressive mandate; for example, the Anti-Gag Statute has passed congress with unanimous bipartisan consensus each year for 17 years. The popularity of these laws is understandable. As the sponsors explained in floor speeches, the WPA more accurately should be called the Taxpayer Protection Act. The stakes are particularly high if a gag order silences employees from even protesting censorship. They are higher still when the secrecy suppresses scientific findings relevant for understanding climate change – a most serious threat to citizens of every nation.

It is the Government Accountability Project’s mission to monitor these laws. We are a non-profit, non-partisan organization whose mission is to represent and otherwise support “whistleblowers,” employees who exercise free speech rights to challenge abuses of power that betray the public trust. Those two laws are the twin pillars of legal rights for government whistleblowers. We led multi-year efforts of good government coalitions to earn passage of both laws. While we hope to work with your office constructively, we have no intention of passively acquiescing if they are defied. And Dr. Hansen will not be silenced.

Of course, agencies have the right to insist that their employees speak with one voice when describing official policy. That does not mean, however, that they lose their rights as free citizens by working for the government. *Pickering v. Board of Education*, 368 U.S. 415 (1968).

The Whistleblower Protection Act shields public disclosures that employees reasonably believe are evidence of illegality, gross waste, gross mismanagement, abuse of authority, or a substantial and specific danger to public health or safety. The only exceptions are if information is classified, or if its release is specifically prohibited by statute. In 5 USC 2302(b)(8), the WPA outlaws “threatened” retaliation the same as actual harassment, because like all other prior restraint it proactively suppresses the flow of information. Mr. Brown’s pending threat of “dire consequences” constitutes a violation *per se*. Even your helpful email communication will not overcome the deep chill that Mr. Brown and other Public Affairs officials have spawned.

The Anti-Gag Statute bans spending to implement or enforce agency nondisclosure rules that seek to trump the whistleblower law or the Lloyd Lafollette Act of 1912, 5 USC 7211. The latter protects all communications with Congress. Indeed, any lawful nondisclosure rule must include a specific qualifier preserving free speech rights under those and related good government laws, as follows:

No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: 'These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military); section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling.'

There is personal liability for repayment under the Anti-Deficit Act for officials responsible for violating the spending ban.

Both by setting a positive example through outreach and reassurance to Dr. Hansen and revamping your agency's press policy, you can bring NASA into compliance with these two fundamental good government statutes. We will gladly work cooperatively with your staff on this matter, a far less burdensome option than conflict challenging WPA violations that have occurred already, as a minimum. It is all the more detrimental for the taxpayers when the government violates the laws designed to protect those challenging government censorship or other forms of lawlessness. Our organization will contact your office to see if we may be of assistance.

Sincerely,

Thomas Devine
Legal Director

Louis Clark
President
Counsel for Dr. James Hansen

cc: NASA Headquarters