

# Freedom to Read Foundation

## REPORT TO COUNCIL

### 2010 Annual Conference — Washington, D.C.

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2010 Midwinter Meeting:

#### **BURTON JOSEPH**

This past spring, we lost another First Amendment champion when Burton Joseph, Vice President of the Freedom to Read Foundation, passed away at the age of 79. Burt, an attorney, never passed up any opportunity to defend civil liberties and the First Amendment after he fought for a client's right to sell Henry Miller's *Tropic of Cancer* in Lake County, Illinois in the early 1960s. He defended the demonstrators at the 1968 Democratic Convention in Chicago; sought to preserve the National Socialist Party's right to march in Skokie; and took the lead in challenging unconstitutional ordinances that sought to limit our right to read, such as the anti-violence, anti-pornography ordinance struck down in the landmark *American Booksellers Association v. Hudnut* lawsuit.

Burt was a great believer in the power of libraries and librarians' power to defend civil liberties. He faithfully served the Freedom to Read Foundation for decades as a board member, officer, and supporter. Last year, he co-chaired the FTRF 40<sup>th</sup> Anniversary Gala. In 2008, the FTRF Board of Trustees named Burt the winner of the Roll of Honor Award, in recognition of his years of service and his work defending First Amendment rights.

FTRF was not the only organization to benefit from Burt's passion, leadership, and courage. He also helped establish Lawyers for the Creative Arts, was a leader of the ACLU of Illinois, and was a founding member and former chair of the Media Coalition. At his death, he served as lead counsel for the Comic Book Legal Defense Fund and was executive director of the Playboy Foundation from 1969 to 1978.

We grieve his loss with his wife, Babette, and his daughters Kathy, Amy, and Jody; we will miss his warmth, humor, and loyal friendship. Contributions in Burt's memory may be directed to the Roger Baldwin Foundation of the ACLU of Illinois, 180 N. Michigan Ave., Suite 2300, Chicago, IL 60601.

## DEFENDING AND PRESERVING FIRST AMENDMENT RIGHTS

Last summer, Judith Platt, my predecessor, announced our decision to participate as *amicus curiae* in a critical First Amendment lawsuit pending before the U.S. Supreme Court, *U.S. v. Stevens*. We received criticism for our decision, based on the suit's subject matter—a federal law that criminalized depictions of the killing, maiming, and torture of live animals. In defending the law, the government proposed that such depictions become another category of unprotected speech, with exceptions carved out only for those depictions that had serious religious, political, scientific, educational, journalistic, historical, or artistic value, as determined by a judge and jury.

The FTRF Board firmly believed it needed to challenge the government's proposal that any speech could be denied First Amendment protection based on a balancing test that weighs the perceived "value" of the speech against a compelling government interest. Such a balancing test would allow the government to abridge broad categories of speech held to have "low value" and certainly would have a chilling effect on artists, writers, photographers, journalists, and filmmakers who would be unable to know what speech might be subject to prosecution.

I am pleased to report that the U.S. Supreme Court overturned the law on April 20, declining the government's invitation to establish a new test for identifying unprotected speech. In an 8–1 decision, the Court said the law "created a criminal prohibition of alarming breadth," that could be applied to a broad swath of constitutionally protected speech. It ruled that the exceptions for speech with "serious value" could not save the law, noting that "[m]ost of what we say to one another lacks 'religious, political, scientific, educational, journalistic, historical, or artistic value' (let alone serious value) but it is still sheltered from government regulation."

The court also declined to accept the government's assurance that it could be trusted to only prosecute depictions of "extreme animal cruelty," holding that "the First Amendment protects against the government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."

In response to the decision in *U.S. v. Stevens*, Congressional representatives have introduced two new statutes to regulate the depiction of animal cruelty. FTRF will continue to monitor this legislation to assure that such regulations address the crime of animal cruelty without infringing on First Amendment freedoms.

I am equally pleased to report that there is a successful conclusion in *American Booksellers' Foundation for Free Expression v. Strickland*, FTRF's challenge to an Ohio statute that classified profanity, violence, cruelty, and glorification of crime as obscenity for minors and then made it a crime to disseminate those materials on the Internet.

After a federal district court found the statute unconstitutional, the Ohio legislature revised the law, which was then reviewed by the Ohio Supreme Court and the Sixth Circuit Court of Appeals. Both courts sought to determine if the law could be interpreted in a manner that would limit its application to personally directed communications and exempt materials that are posted

on generally accessible websites, public chat rooms, and online public forums, thereby protecting free expression on the Internet. The Ohio Supreme Court held that the law was limited to person-to-person electronic communications and could not be applied to materials distributed via mass methods that do not allow the user to prevent distribution to particular recipients; the Sixth Circuit then held that the revised law, as interpreted by the Ohio Supreme Court, did not violate the First Amendment or the Constitution.

Thus, as a result of the litigation pursued by FTRF and its litigation partners, Ohio abandoned the overbroad, unconstitutional law that significantly infringed on First Amendment rights. A much narrower law is now in place that does not impair the freedom to read.

## **NEW LITIGATION**

Despite legal victories like the result in *ABFFE v. Strickland*, states continue to pass unconstitutional laws that are intended to restrict and regulate the distribution of constitutionally protected speech on the Internet. The legislature in Alaska has enacted a law that criminalizes the distribution of “harmful to minors” materials on the Internet, without provisions to assure that the laws are not enforced in a manner that impairs free speech. FTRF has agreed to participate in a lawsuit challenging the law, which will be filed in the coming weeks. A full report on the new lawsuit will be presented at the Midwinter Meeting.

## **ONGOING LITIGATION**

The Foundation continues to monitor and to participate in lawsuits that address First Amendment rights in the library. One lawsuit, *Sarah Bradburn et al. v. North Central Regional Library District*, has drawn particular scrutiny since it challenges a library’s policy of refusing to honor adults’ requests to temporarily disable Internet filters for research and reading, even though the decision in *U.S. v. ALA* clearly provides for disabling filters on the request of an adult user.

On May 6, 2010, a majority of the Washington State Supreme Court concluded that the library’s filtering policy did not violate the Washington State Constitution. Notably, three justices of that court filed a vigorous dissent on the grounds that the decision was inconsistent with the U.S. Supreme Court’s opinion in *U.S. v. ALA*. The decision, however, does not decide the question of whether the NCRL’s filtering policy violates the First Amendment of the U.S. Constitution; the lawsuit will be returned to the federal district court, which will decide the constitutional issues raised by the lawsuit. FTRF is not a participant in the lawsuit, which was filed by library users and the ACLU.

FTRF has been involved in *Entertainment Software Association et al. v. Schwarzenegger*, a lawsuit challenging a California law that restricts the sale or rental of video games classified by the state as “violent video games” to those under the age of 18. After the Ninth Circuit Court of Appeals upheld the district court’s order enjoining enforcement of the law on the grounds that the statute violated the First Amendment, the State of California filed a petition for *certiorari* with the U.S. Supreme Court. On April 26, 2010, the Supreme Court granted California’s petition and asked the parties to brief two questions:

1. Does the First Amendment bar a state from restricting the sale of violent video games to minors?
2. If the First Amendment applies to violent video games that are sold to minors, and the standard of review is strict scrutiny, is the state required to demonstrate a direct causal link between violent video games and physical and psychological harm to minors before the state can prohibit the sale of the games to minors?

The Supreme Court has set a briefing schedule that requires all briefs to be filed by September 2010. FTRF is an *amicus curiae* in this case, and will be filing a brief in support of the plaintiffs.

### **JUDITH F. KRUG FUND**

Over the past year, a substantial amount has been donated to the Freedom to Read Foundation in memory of our founding executive director, Judith Krug. The FTRF Board decided to set aside these donations and create the Judith F. Krug Fund, with the intent of establishing projects and programs that would embody Judith's lifelong devotion to educating librarians, library workers, and the public about the importance of intellectual freedom. Plans for the fund were finalized at this meeting, and I am pleased to report that the Krug Fund will have two major components:

1. Banned Books Week Read-Out Grants for Libraries and Community Groups

Libraries and community groups will be invited to submit competitive applications for two grants (one for \$2500, the other for \$1000), to fund local Banned Books Week Read-Outs that will allow the successful applicants to stage a full Banned Books Week Read-Out, with funding to stage a major event featuring great authors. It is hoped that the grant program will seed local Read-Outs and encourage young people to understand censorship and the need to assure everyone's access to wonderful books.

The call for proposals will go out July 2010 and the announcement of the winning libraries or community groups will be made in August 2010.

2. Online Learning for LIS Students

FTRF staff will work with LIS leaders to develop an intellectual freedom curriculum that would be provided to library school students via online instructional tools. The project contemplates both live lectures and seminars by leading intellectual freedom scholars that would be archived for future viewing and self-directed content on IF topics. The project would carry on Judith's passionate devotion to teaching intellectual freedom principles to new members of the library profession; she made a point of speaking and teaching at library schools, including extended seminars at Simmons and other library schools.

### **2010 ROLL OF HONOR RECIPIENT ROBERT M. O'NEIL**

It gives me great pleasure to announce that Robert M. O'Neil, director of the Thomas Jefferson Center for the Protection of Free Expression at the University of Virginia, is the recipient of the

2010 Freedom to Read Foundation Roll of Honor Award. O'Neil, who also serves on the law faculty at UVA, has a storied history as an advocate for the First Amendment. He began his legal career as a clerk for Supreme Court Justice William J. Brennan, Jr., in 1962, and from there held a number of positions in academia, including president of the University of Virginia. He is also a member of the National Advisory Board of the American Civil Liberties Union.

O'Neil was the keynote speaker at FTRF's 10th Anniversary Gala in 1979. At the Foundation's 40th Anniversary Gala in 2009, he presented the Thomas Jefferson Center's William J. Brennan Award for free expression posthumously to FTRF Executive Director Judith Krug.

O'Neil has made academic freedom a hallmark of his career, particularly through his work with the American Association of University Professors. Among the many books he has written are *The Rights of Public Employees*, *Classrooms in the Crossfire*, *Free Speech in the College Community*, and *Academic Freedom in the Wired World*. We are very pleased to add Bob O'Neil to the FTRF Roll of Honor.

## **2010 CONABLE CONFERENCE SCHOLARSHIP**

I am also pleased to announce the winner of the 2010 Gordon M. Conable Conference Scholarship, Aubrey Madler. Madler, an information specialist with the University of North Dakota's Center for Rural Health, is the third recipient of the Conable Scholarship.

Madler holds a B.S. in Elementary Education from Mayville State University and worked as a paraprofessional in libraries for several years prior to receiving her M.L.S. from Texas Women's University in 2008. In her capacity at the Center for Rural Health, she provides reference services and maintains databases, online information guides, and print collections for the Rural Assistance Center. She also serves on the Intellectual Freedom Committee of the North Dakota Library Association and maintains a blog in that capacity.

The Conable Scholarship provided the funds that made it possible for Madler to attend the 2010 Annual Conference in Washington, D.C. Madler attended various FTRF and other intellectual freedom meetings and programs during the conference, spent time consulting with a mentor, and reported about her experiences and thoughts via OIF's blog (<http://oif.ala.org/oif>). She also will prepare a more formal report upon her return to North Dakota.

## **FTRF MEMBERSHIP**

The Freedom to Read Foundation continues to offer free one-year memberships to graduating library school students to provide new entrants to the library profession an opportunity to understand and participate in the crucial work of the Foundation. This successful program has garnered over 200 new librarian members for FTRF and will be continued through December. More information on the program can be found at <http://www.ftrf.org/graduates>.

Membership in the Freedom to Read Foundation is the critical foundation for FTRF's work defending First Amendment freedoms in the library and in the larger world. Your support for intellectual freedom is amplified when you join with FTRF's members to advocate for free

expression and the freedom to read. I strongly encourage all ALA Councilors to join me in becoming a personal member of the Freedom to Read Foundation, and to have your libraries and other institutions become organizational members. Please send a check (\$35.00+ for personal members, \$100.00+ for organizations, \$10.00+ for students) to:

Freedom to Read Foundation  
50 E. Huron Street  
Chicago, IL 60611

Alternatively, you can join or renew your membership by calling (800) 545-2433, ext. 4226, or online at [www.ftrf.org/joinftrf](http://www.ftrf.org/joinftrf).

Respectfully submitted,

Kent Oliver  
President, Freedom to Read Foundation