Freedom to Read Foundation News

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

Richard L. Darling, President Judith F. Krug, Executive Director

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Foundation Supports Appeal of Ruling on Prior Restraint

In response to a request from executives at Alfred A. Knopf Inc., publisher of Victor Marchetti and John Marks' *The CIA and the Cult of Intelligence,* the executive committee of the Foundation Board of Trustees authorized the filing of an *amicus* brief supporting an appeal to the U.S. Supreme Court. At issue is a ruling of the U.S. Court of Appeals for the Fourth Circuit on classified material which seemingly ignored a recent amendment to the Freedom of Information Act and a 1971 decision of the Supreme Court.

Ruling on the Central Intelligence Agency's demand for 168 deletions from Marchetti and Marks' book, the appeals court declared February 7 that a government employee can be enjoined forever from discussing or disclosing classified information, even if it has become public knowledge. Furthermore, Chief Judge Clement Haynsworth said, judges must give any government claim of secrecy the presumption of truth.

When it first reviewed the manuscript, the CIA demanded 339 deletions—a demand which the authors gradually reduced to 168 before publication of their work. In a trial over these deletions, U.S. District Court Judge Albert V. Bryan Jr. grew increasingly sceptical of CIA claims as he discovered that only twenty-six items had been classified during Marchetti's employment at the agency. Others, Bryan found, were declared classified when the manuscript was read or were nonsecret parts of voluminous documents that were classified as a whole.

Judge Haynsworth refused to agree that judges are qualified to decide whether government information was properly classified, or that the leaking of secret material invalidated a government demand that a former employee remain silent about it.

The appeals court ruling did not reflect a recent amendment to the Freedom of Information act giving federal judges the authority to decide whether a document has been properly classified through *in camera* inspection of it. In addition, it appeared to depart from the Supreme Court's 1971 declaration—in the Pentagon Papers case—that any form of prior restraint comes

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Moore v. Younger

California Librarians Exempted from Harmful Matter Law

In the first court ruling on the substantive questions raised in *Moore* v. *Younger,* the Foundation-funded suit challenging the validity of California's 1969 "harmful matter" law, Superior Court Judge Robert P. Schifferman declared January 13 in Los Angeles that librarians are not subject to the provisions of the criminal statute.

In briefs submitted to Judge Schifferman, and in oral argument in his courtroom, Foundation Attorney Tefft W. Smith contended that the statute should be declared unconstitutional because it forces librarians to choose between risking criminal prosecution under the statute's vague definitions, on the one hand, and unjustly restricting the right to read of minors, on the other.

During oral argument, part of the exchange between attorneys centered on the meaning of the statute's "affirmative defense" and its applicability to the dissemination of materials through libraries. According to the law, in any prosecution for dissemination of illegal materials it is a defense that the act was "committed in aid of legitimate scientific or educational purposes."

In a judgment of abstention entered November 1973, the U.S. District Court where the suit was originally filed ruled that it should abstain pending a state court decision on the applicability of the defense to librarians.

After hearing the arguments of Attorney Smith and attorneys representing California Attorney General Evelle J. Younger, the defendant, Judge Schifferman ruled that the affirmative defense clause affords librarians an absolute exemption from all provisions of the law. Younger's representatives had contended that there was no reason why librarians should be relieved of the admittedly difficult task of trying to determine what the law forbids.

In the significant portion of his ruling, Judge Schifferman stated:

> The court declares that it was the intention of the Legislature to provide librarians with exemption from application of the Harmful Matter Statute

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when acting in the discharge of their duties. The court declares alternatively that the availability and circulation of books at public and school libraries is necessarily always in furtherance of legitimate educational and scientific purposes for which these libraries were founded, and accordingly librarians are not subject to liability under the Harmful Matter Statute for distributing materials to minors in the course and scope of their duties as librarians.

In the remaining section of his order, Judge Schifferman denied the Foundation's motion calling for invalidation of the law on constitutional grounds.

Appeal Appears Certain

Due to his objection to Judge Schifferman's interpretation of the law, it appeared at the time of this writing that Attorney General Younger would appeal the ruling to the California Court of Appeals. However, should he fail to do that, it was determined at the Foundation Board of Trustees meeting in January that the Foundation would appeal the denial of the motion to have the law declared unconstitutional. There is an automatic right of appeal to the Court of Appeals, although not to the California Supreme Court.

In arguing against the constitutionality of the law, Foundation attorneys have pointed out that it is virtually impossible to determine the meaning of a law which, in addition to outlawing materials that are "obscene," also bans those which are not obscene but which are "harmful." In other arguments the Foundation has stated:

"The individual plaintiffs and association members are fearful that they will be prosecuted under the 'harmful matter' statute. They are certain that their library collections contain works which some prosecutor may deem 'harmful' to a minor. A prosecution would involve attendant expenses of defending against a suit and the social opprobrium which might result from the filing of criminal charges. They believe their future careers as librarians would be seriously threatened by a conviction, in that their ability to serve their constituency would be impaired by a deterioration of public trust which could result from prosecution.

"This threat of criminal prosecution compels plaintiffs and other librarians to act as censors of the materials they distribute, attempting to screen out the arguably 'harmful' from the 'non-harmful.' The plaintiffs and various association members do not consider themselves qualified to determine whether a given work is 'harmful' within the meaning of the 'harmful matter' statute. They do not receive in the course of their training as librarians any instruction which would so qualify them. Moreover, the terms employed to define 'harmful matter' are themselves vague, indefinite, and meaningless, particularly in the context of distribution through a library. Since librarians have no economic incentive to assure the distribution of a work and the inevitable tendency is to 'err on the side of caution,' any attempt by plaintiffs to avoid prosecution by restricting access or purging their collections of materials which might arguably be 'harmful' to minors will necessarily curtail the public's access to the entire range of legal reading materials. Any determination by a librarian that a given work may be 'harmful' will act as a complete restraint on the circulation of that work to minors, and perhaps others, without the benefit of any prior or concurrent judicial determination as to whether the work, in fact, is 'harmful matter.' "

Plaintiffs

Plaintiffs in the suit—filed in California Superior Court in April 1974—are Everett T. Moore, the Board of Library Commissioners of the City of Los Angeles, Albert C. Lake, Robert E. Muller, Chase Dane, the Rev. Charles J. Dollen, the American Library Association, the California Library Association, and the Los Angeles Public Library Staff Association. All of the individual plaintiffs are California librarians.

High Court Refuses to Rule on Student Rights

With Justice William O. Douglas filing the only dissent, the U.S. Supreme Court declined an opportunity to decide whether student editors enrolled in public schools have the same rights as adult editors.

In their February 18 ruling in *Board of School Commissioners of Indianapolis* v. *Jacobs,* the justices said the graduation of the student editors of the *Corn Cob Curtain* from Arsenal Technical High School in Indianapolis rendered the case moot. In their suit in U.S. District Court, the students won a ruling that the censorship exercised by Indianapolis school authorities was prior restraint. After that ruling was upheld by the U.S. Court of Appeals for the Seventh Circuit, the Indianapolis board of school commissioners appealed to the high court in Washington.

Attorneys representing the school commissioners before the Supreme Court called the paper "obscene, filthy, indecent, and defammatory," but they did not contend that it would have been illegal for adults to have published it.

Justice Douglas maintained that there was a live controversy before the Court, just as there had been two weeks earlier when the justices ruled on a residency requirement for divorce, despite the fact that the woman who challenged the requirement had been divorced in another state by the time her case reached the Supreme Court.

FTRF Report to the ALA Council

January 1975

In accordance with a request from the Council of the American Library Association, the president of the Freedom to Read Foundation reports to the Council at each ALA Annual Conference and Midwinter Meeting. The following report was submitted by President Richard L. Darling at the ALA's 1975 Midwinter Meeting in Chicago. It has been edited slightly for publication here.

The Board of Trustees of the Freedom to Read Foundation held its semi-annual meeting on Saturday, January 18, 1975, with news of a court victory, about which I shall report in a few minutes. Before turning to that piece of good news, I must bring you up to date on the results of Foundation action reported to you earlier, and tell you of new activities that have arisen since our last report.

At the New York conference last summer, then President Allain reported the trustees' decision to petition for a reduction of sentence in the case of *Hamling* v. *U.S.*, the case in which a publisher and an editor had received sentences of four and three years imprisonment respectively. To our regret, the petition was denied. At present, Mr. Hamling has requested a new trial in the U.S. Court of Appeals for the Ninth Circuit, on the basis of substantial error in the first one.

Mr. Allain also reported that the trustees had voted stand-by authority to the executive committee of the Foundation Board to file an *amicus* brief in the case of *Board of School Commissioners of Indianapolis* v. *Jacobs,* a case in which the issue was the school commissioners' power to control the content of student publications. Unfortunately, we were not able to secure the necessary documentation in time to meet the deadline for filing a brief. This case was argued before the U.S. Supreme Court in December, but there has been no decision as yet.

In the early autumn, the American Library Association was asked to join in a suit against the General Services Administrator of the United States, Mr. Arthur T. Sampson, by the Reporters Committee for Freedom of the Press. This suit sought to prevent the General Services Administrator from carrying out the agreement to deliver to former President Richard Nixon the presidential papers and recordings generated during his administration. Mrs. Krug and General Counsel William D. North attended a meeting in Washington called by the Reporters Committee, at which the proposed complaint was presented. Total lack of ALA policy concerning this issue precluded our joining in the action. At the same time, however, Mr. Nixon filed a suit against Mr. Sampson to compel him to comply with the agreement. Both suits were made moot by Congress enacting Public Law 93-526, the "Presidential Recordings and Materials Preservation Act." This law, which establishes a Public Documents Commission to study and recommend legislation concerning the difficult problem of ownership of the papers of federal officials, is of great interest to the American Library Association. The Intellectual Freedom Committee and other units of ALA concerned with access to public documents will wish to provide input for an ALA statement to the Public Documents Commission.

The trustees have also considered a request that the Foundation, on behalf of the ALA, file an *amicus* brief in the case of *Miranda* v. *Hicks,* which has been granted certiorari by the U.S. Supreme Court. We expect momentarily to receive the appeal brief, and, if it provides the opportunity to file an effective *amicus* brief on an important principle, the *in rem* proceedings, which would require a prior civil finding of obscenity by a court of competent jurisdiction before criminal action can be taken, the trustees have voted stand-by authority to do so. We have presented this case to the ALA Executive Board and have its permission to file the brief, if appropriate, in the name of the American Library Association.

Victory in California

The most important development relates to the case of *Moore* v. *Younger,* the suit which the Foundation and ALA initiated in order to challenge the constitutionality of the California "harmful matter" statute. This suit was originally filed in the U.S. District Court in 1972. After consideration by a three-judge federal court, the suit was filed in the California courts for interpretation of the law, but with the federal court retaining jurisdiction if we failed to obtain relief in the state courts.

We filed suit in the Superior Court of California, County of Los Angeles, in April 1974. After preliminary activities, hearings were held on Friday, January 10, 1975, before Judge Robert P. Schifferman. On Monday, January 13, Judge Schifferman issued his decision, which exempted librarians from the law.

[*The text of the decision appears elsewhere in this issue.*]

We have won our first victory in this lengthy suit. However, it is a limited victory. It applies only to the County of Los Angeles, and it fails to address the question of the constitutionality of the law. We assume that California Attorney General Younger will appeal Judge Schifferman's decision. If he does not, we most certainly shall do so in order to assure state-wide application of the decision, and to secure action on the constitutional issue. We shall be reporting again on *Moore* v. *Younger.*

The membership of the Foundation has now reached approximately 1500. Much of the increase has resulted from Council's authorization that the Freedom

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to Read Foundation be included on the ALA membership form. The trustees are grateful to you. But while our membership has increased, it still represents only a small fraction of the membership of ALA.

Merritt Fund

The final item I wish to discuss is the meeting of the trustees of the LeRoy C. Merritt Humanitarian Fund, which was held Friday, January 17, 1975. You will recall that Mr. Allain reported in New York that the trustees had voted to expand the humanitarian purpose of the Fund. Originally, the Fund provided grants to librarians whose jobs were in jeopardy because of their support of intellectual freedom. The new terms provide support for librarians who have suffered not only because of their defense of intellectual freedom principles, but also because of their sex, sexual preference, race, creed or national origin, or because of denial of due process in employment practices. In addition, the new terms permit contributors to the Fund to elect the Fund trustees from their own ranks. After the New York Conference we learned that we must create a new fund to achieve our purpose.

On January 17, therefore, the LeRoy C. Merritt Humanitarian Fund No. 2 was created, with temporary trustees who will conduct an election to select regular trustees. The trustees of the original Fund will operate in cooperation with the new ones until the original Fund's resources are exhausted. All contributions after January 17 will be credited to the new fund with its broader scope. Requests for assistance should continue to be directed to the director of the ALA Office for Intellectual Freedom.

We hope that the LeRoy C. Merritt Humanitarian Fund, with its enlarged scope making it a broadly-based fund for humanitarian purposes, will continue to have your financial support, and that you will assist us in informing others of its existence and of its enlarged mandate.

Respectfully submitted,
RICHARD L. DARLING, President,
for the Freedom to Read
Foundation Trustees

Appeal *(from p. 1)*

before the courts with "a heavy presumption against its constitutional validity."

Election Scheduled for May

Four vacancies on the Foundation Board of Trustees will be filled in the annual election to be conducted in May. Ballots will be mailed May 1st to all Foundation members whose dues are paid for the year 1974-75.

The slate of candidates was prepared by the nominating committee chaired by Mrs. Dale B. Canelas, assistant administrative librarian at Northwestern University.

Elected trustees now serving on the Board of Trustees are President Richard L. Darling, dean of the School of Library Service at Columbia University, Dale B. Canelas, Frances C. Dean, coordinator of the selection division of the department of media and technology of the Montgomery (Md.) County Schools, Stanley Fleishman, Los Angeles attorney, Evelyn Levy, regional librarian at Enoch Pratt Free Library, Eli M. Oboler, university librarian at Idaho State University, Helen W. Tuttle, assistant librarian for preparations at Princeton University, and Jane Wilson. The terms of Darling, Levy, Oboler, and Wilson will expire at the conclusion of the Board meeting scheduled for June 27 in San Francisco.

Goals Award Requested to Assist Foundation

At the American Library Association's 1975 Midwinter Meeting in Chicago, the ALA Intellectual Freedom Committee and the ALA Intellectual Freedom Round Table voted to file an application for a $12,000 J. Morris Jones-World Book Encyclopedia-ALA Goals Award grant to assist the Foundation in the appeal of *Moore* v. *Younger*. The application was filed February 7.

The application for the grant notes that the suit was the first ever filed by librarians in order to set legal precedent for the *Library Bill of Rights*. Support of intellectual freedom principles and the defense of librarians whose positions are jeopardized by their adherence to those principles are long-standing programs of the ALA. Goal VI of the nine-goal Jones Award is devoted to the achievement of intellectual freedom in libraries.

The award was established in 1960 by Field Enterprises Educational Corporation, publisher of *World Book Encyclopedia*. J. Morris Jones was editor-in-chief of the encyclopedia from 1940 until his death in 1962.

Winners of grants under the Jones Award will be announced in May.

Freedom to Read Foundation News is prepared by the staff of the ALA Office for Intellectual Freedom.
Please direct correspondence to Freedom to Read Foundation, 50 East Huron Street, Chicago, IL 60611.