



Freedom to Read Foundation News

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No. 4

Foundation Challenges Indianapolis Anti-Pornography Ordinance

The Freedom to Read Foundation has joined the American Booksellers Association, the Association of American Publishers and others to challenge an "anti-pornography" ordinance passed by the Indianapolis City Council and signed by Indianapolis Mayor William H. Hudnut III on May 1, 1984. The ordinance, similar to the one vetoed twice by Minneapolis Mayor Don Fraser, categorizes pornography as a type of civil rights violation that denies women equal opportunities in society. According to the ordinance, pornography creates and maintains sex as a basis for discrimination and perpetuates the "systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it promotes, with the acts of aggression it fosters, harms women's opportunities for equality of rights. . . ."

Pornography is defined in the ordinance as "the sexually explicit subordination of women, graphically depicted, whether in pictures or in words," where "women are presented as sexual objects who

- "... enjoy pain or humiliation; or . . .
- "... experience sexual pleasure in being raped; or . . .
- "... (are) tied up or mutilated or bruised or physically hurt or dismembered . . . ; or
- "... (are) penetrated by objects or animals . . . ; or
- "... are presented in scenarios of degradation, injury or abasement. . . or (are) shown as filthy or inferior, bleeding, bruised or hurt. . . ; or
- "... are presented as sexual objects for domination, conquest, violation, exploitation, possession or use, or through postures or positions of servility or submission or display."

The ordinance gives a cause of action to any woman who is "acting against the subordination of women" or anyone who can "prove injury by pornography in the same way that a woman is injured by it"

An injunction against the enforcement of the ordinance was entered days after the bill was to have gone into effect. Hearings on the constitutionality of the ordinance were held on July 30 before U.S. District Court Judge Sarah Evans Barker and it is expected that she will issue a ruling in the early fall. It is also expected that the losing side will appeal to the U.S. Supreme Court.

(Continued on p. 4)

President's Report to the ALA Council

The Freedom to Read Foundation reports to the American Library Association Council at each ALA Annual Conference and Midwinter Meeting. The following report was submitted by President William D. North on behalf of the Board of Trustees.

This has been a good year for the Freedom to Read Foundation and the cause of intellectual freedom. We were victorious in the case of *Janklow v. Viking Press* in our effort to limit the chilling effects of libel litigation on the distribution of books and information materials. We were successful in the Minnesota cases involving two Minnesota school districts in compelling adherence to objective and non-discriminatory guidelines governing the conduct of programs on the premises of non-public schools. We have, on behalf of the American Library Association, challenged the security classification practices and policies of the National Security Agency and already this litigation has prompted the removal of the classification from most of the materials challenged.

And most recently, the Foundation has filed an *amicus curiae* brief on behalf of the Indiana Library Association and the Indiana Library Trustee Association in support of the American Booksellers Association's challenge of an Indianapolis City Ordinance which would suppress graphic or pictorial representations of the "subordination of women" and compel librarians and other distributors of materials to determine at their peril what constitutes a representation of female subordination.

This meeting, nearly \$20,000 was appropriated by the Trustees in grants, awards and authorizations in support of First Amendment issues. And this is in addition to ongoing litigation and litigation support commitments.

Today, the Freedom to Read Foundation has become what it was intended to be when it was created a decade and a half ago—the action arm of libraries and librarians in support of intellectual freedom. It is credible, it is experienced, it is influential and it is unafraid to attack censorship and suppression in any form or forum.

The Foundation exists because of one inescapable reality—the only legal rights we have under the First Amendment or any other law are those we are able and

(Continued on p. 2)

1984 Election

Three New Trustees Chosen Two Re-elected

Three new trustees were elected to serve two-year terms on the Board of Trustees of the Freedom to Read Foundation in balloting held in May. J. Dennis Day, Director of the Salt Lake City Public Library; Alice Ihrig, Director of Civic/Cultural Programs, Moraine Valley College, Palos Hills, Illinois; and Judith A. Sessions, Meriam Library, California State University—Chico, Chico, California, joined the Board of Trustees at the Annual Meeting on June 21 in Dallas. Mr. Day had previously served on the Board of Trustees in his capacity as chair of the ALA Intellectual Freedom Committee.

Elected to second terms were Lee Brawner, Executive Director of the Metropolitan Library System, Oklahoma City, and Russell Shank, University Librarian, University of California, Los Angeles.

New Officers Elected

At its initial organizing meeting, the 1984-85 Board elected Ella G. Yates, Library Consultant, Atlanta, Georgia, as President of the Foundation. Henry R. Kaufman, Attorney at Law, New York, was re-elected Vice President and J. Dennis Day, Salt Lake City Public Librarian, was elected Treasurer. Lee Brawner and David M. Jones, Superintendent of Schools, Sayville, New York, were elected to join the three officers on the Executive Committee.

Other members of the 1984-85 Board of Trustees are Dorothy M. Broderick, Associate Professor, University of Alabama; Eric Moon, Chair, ALA Intellectual Freedom Committee; E. J. Josey, ALA President; Beverly P. Lynch, ALA Vice President/President Elect and Robert Wedgeworth, ALA Executive Director.

At the close of the 1984 Annual Meeting, the terms expired of Trustees Burton Joseph and William D. North.

Foundation Reaffirms Support of Media Coalition

The Board of Trustees has voted to give a \$5,000 grant to the Media Coalition, in recognition of the many services provided by the Coalition to the Foundation.

In the past year, the Media Coalition has taken the lead in opposing the "anti-pornography" ordinances proposed and defeated in Minneapolis and passed in Indianapolis. The Freedom to Read Foundation and members of the Media Coalition are plaintiffs in the Indianapolis lawsuit.

The Coalition monitors the activities of state legislatures throughout the country with respect to First Amendment/obscenity related legislation and issues reports and bulletins to members. The Coalition also prepares and files *amicus curiae* briefs in First Amendment cases.

Report (from p. 1)

willing to assert or defend. Without resources to defend our rights, they cannot exist; without the will to assert our rights, they will be usurped.

Today, as never before in the past, the marketplace of ideas has been targeted for capture and control. In the "information society" which America has become, dominance of the marketplace of ideas is the pathway to power. As librarians, you are guardians of the marketplace of ideas—it is your special obligation to prevent its monopolization, suppression, or perversion.

And you cannot do it alone; nor can you count on the courts to protect you; nor can you rely on the Constitution to safeguard you.

You must rely on yourselves; on your collective will, resources and intelligence.

The Foundation represents this collective combination. There is no final victory in the war against censorship. There is only continuing vigilance and commitment to the predicate of a free society.

On behalf of the Trustees of the Foundation I ask that you acknowledge your commitment by joining the Foundation and lending yourself to the common defense of our most vital interest.

William D. North
President

Nominations for Freedom to Read Foundation Board of Trustees

Nominations for candidates to run in the 1985 election for the Board of Trustees of the Freedom to Read Foundation are now being accepted.

Four vacancies on the Board of Trustees will be filled in the election to be held May 1 through June 1, 1985. Nominations should be sent to:

Judith A. Sessions
Meriam Library
California State University—Chico
Chico, California 95929

Serving with Ms. Sessions on the nominating committee are Lee B. Brawner, Metropolitan Library System, 131 Dean A. McGee, Oklahoma City, Oklahoma 73101 and J. Dennis Day, Salt Lake City Public Library, 209 E. Fifth South, Salt Lake City, Utah 84111.

Nominations must be received by December 31, 1984.

Freedom to Read Foundation News is edited by the staff of the Office for Intellectual Freedom, American Library Association. It is issued quarterly to all members of the Foundation.

Regular membership in the Freedom to Read Foundation begins at \$25.00 per year. Contributions to the Foundation should be sent to: Freedom to Read Foundation, 50 East Huron Street, Chicago, Illinois 60611. All contributions are tax-deductible.

In The Spirit of Crazy Horse

South Dakota Libel Action Dismissed

The \$24 million libel suit filed by South Dakota Governor William J. Janklow against the publisher and author of *In the Spirit Of Crazy Horse* and three booksellers in South Dakota (Janklow v. The Viking Press, et al.) has been dismissed at the trial court level as anticipated in the Fall '83 issue of FTRF News (Vol. 12, No. 1-2).

The amicus curiae brief filed by the Freedom to Read Foundation challenged the use of libel actions as a means of enforcing prepublication censorship. The Foundation's argument that booksellers should not be held liable for the mere republication of an allegedly defamatory statement of a public figure focused on the potential effect on libraries and other distributors of information and ideas and the potential threat to the First Amendment rights of the public.

South Dakota Circuit Court Judge Gene Paul Kean dismissed not only the booksellers but the entire action on the basis that the statements were not, in fact, defamatory. Under the concept of "neutral reportage," a party is not liable for accurately reporting the statements of another party.

The Foundation learned, in August, that Governor Janklow will appeal the trial court decision. The Board of Trustees has agreed to continue support of the booksellers and will file an amicus brief in the appellate court action.

Excerpts from Judge Kean's decision follow:

The decision of *New York Times Co. v. Sullivan* extended first amendment coverage to defamation of official conduct of a public official... Even if the statements were false, no recovery was allowed unless made with actual malice. The term "actual malice" was defined to mean knowledge of falsity or reckless disregard of falsity... While the holding gave intrinsic first amendment value only to truthful speech about public officials, the court gave protection to negligently false speech about public officials because of its concern that common law strict liability might have a chilling effect on constitutionally valuable speech...

The allegations against Matthiessen and Viking Press do not claim they originated the defamatory statement. Rather, the plaintiff claims that the republication of the false statements are libelous under the maxim that tale bearers are as culpable as tale makers... When and under what circumstances, if any, may false statements about a public official be republished?...

The common law placed heavy emphasis on protecting a reputation... and was relatively insensitive to any considerations of free speech. The delineated "record privilege" was very narrow, and a republisher was as liable as the original defamer... The record privilege encouraged interests to those underlying the first amendment; it encouraged dissemination of information about public officials and government.

The United States Supreme Court has given some constitutional stature to the record privilege...

In 1977, the decision of *Edwards v. National Audubon Society* arrived upon the legal scene. By this decision, the federal courts provided more protection for republishers under the constitutional privilege of neutral reportage. This privilege shields from liability those who republish certain known libels of public officials or public figures whenever these charges are made provide certain criteria are met. The *Edwards* decision has not met with universal acceptance...

From the *Edwards* decision and the other cases that impliedly accept or totally accept its rationale, several criteria have been developed which must be met before the constitutional privilege of neutral reporting applied. First, the plaintiff must be a public figure or official; second, the report must be about a public controversy; third, the report must not occur in or espouse the truth of the defamatory statements, and, fourth, the report must be fair and accurate...

It appears to this court that the criteria should be more concerned with the person about whom the statements are made rather than who is making them. At a minimum the person allegedly defamed should be a public figure or public official. This would give currency to the concept that the fact the statement is made is what is important...

The second criteria that must be met concerns the news-worthiness standard or the controversy standard. It must consist of serious charges. Obviously, that criteria is met in this case since it contains charges of criminal conduct and conduct which is "morally reprehensible" by anyone's standards...

Thirdly, the republisher who asserts the truth of the underlying statements is not entitled to any privileged republication. Such failure to meet this criteria most often occurs when the republisher espouses his belief on the charges or decides not to attribute the defamatory statements to any other person or organization...

Lastly as the justification for the privilege is founded in the value of reporting that a specific charge was made, it is required that a defamatory charge must be republished accurately. Further, it is suggested by the decisions in this area that there must be at least a minimal degree of editorial fairness in reporting the charges which means that there must be some balance lent to the republication of the defamatory statements...

This court is of the opinion that the book *In the Spirit of Crazy Horse* is not defamatory... The book involves accusations made about a public official and relates to a long-standing controversy between the plaintiff and other public figures... The book does not concur in or espouse the charges made, but reports that the charges in fact were made. The total scope of the controversy including the negative findings of the FBI, the Senate Subcommittee hearing, and the plaintiff's denials provided the balanced analysis required of the struggle. If anything, the reader of the book is led to the

(Continued on p. 7)

Indianapolis Ordinance (from p. 1)

The complaint, filed by the FTRF and others, argues that the ordinance is unconstitutional, void and of no effect in that it: goes beyond the standard for obscenity established by the United States Supreme Court; imposes an unconstitutional prior restraint; is unconstitutionally vague and unconstitutionally restrains access to First Amendment-protected materials.

The Freedom to Read Foundation has filed an amicus curiae brief on behalf of the Indiana Library Association and the Indiana Library Trustee Association. Excerpts are included below:

STATEMENT OF INTEREST

The library is a unique and precious First Amendment institution. Historically, the purpose of the library has been twofold: (1) to acquire and to preserve library materials; and (2) to offer library patrons the most effective and economical access to the widest range of intellectual resources and information. The scope of a library's collection is a measure of the community's access to ideas; it is the forum for and fountainhead of that robust interchange of ideas so necessary to the functioning of our constitutional republican form of government. . . and is the predicate for the advancement of knowledge and the improvement of the human condition

Amici are vitally interested in the Indianapolis Ordinance before the Court. From an institutional perspective the Ordinance violates the integrity of library collections. Many of the works that fill the shelves of libraries in Indianapolis fall within the Ordinance's vague and boundless definition of "pornography"—a definition that encompasses far more than the limited class of speech the Supreme Court has held to be unprotected by the Constitution. To deny libraries and their patrons access to any work, under the guise that the work, by its nature or by its contents *is* sex discrimination, squarely conflicts with the First Amendment's mandate that government shall impose no prior restraint on the freedom to speak and cuts to the heart of the library's mission to present the broadest range of ideas to the public.

The Ordinance threatens librarians with suit for damages and injunctive relief for doing nothing more than fulfilling their obligations as librarians—responding to the public's need for access to information and education. It is an effective threat since librarians and other passive circulators of information have little incentive to risk their jobs, reputations, and freedom to defend their patron's right to read if confronted with controversy. By allowing "any aggrieved person" who is offended by the works in a library collection to file a claim for sex discrimination against librarians for the works on their shelves, the Ordinance erects a barrier of fear which neither public need nor interest can surmount. The Ordinance operates on the library and librarian as a mechanism for the silent suppression of controversy and a source of community consensus through coercion.

More than any other institution or persons impacted by the Ordinance, the interest of libraries and librarians in the controversy before the Court is immediate and direct for it challenges the very *raison d'être* of the profession and the *sine qua non* of its vitality—intellectual freedom. . . .

ARGUMENT

I

THE OVERBROAD ORDINANCE VIOLATES THE INTEGRITY OF THE LIBRARY COLLECTION AND FORCES LIBRARIANS TO EVALUATE MATERIALS BASED UPON AN UNCONSTITUTIONAL DEFINITION OF PORNOGRAPHY

The Supreme Court has long recognized that "sex and obscenity are not synonymous." The First Amendment protects a broad range of sexually related—indeed, sexually explicit—materials which fall outside the narrow definition of proscribed obscenity. Three strict prerequisites must be satisfied in order to find that a particular sexually related form of speech is obscene and thus outside the protection of the First Amendment:

- (1) whether the average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest;
- (2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by state law; and
- (3) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value. . . .

The root constitutional infirmity of the Indianapolis Ordinance is that its sweeping definition of "pornography" fails every element of this three-part test. First, the Ordinance ignores "community standards" and is not confined to appeals to "prurient interest." Instead, it creates a new and undefined category of speech—speech that in the eyes and ears of the beholder counsels the "sexually explicit subordination of women." Second, the Ordinance does not "specifically" define proscribed sexual conduct. No definition is given as to what "graphic sexually explicit subordination of women" may mean; presumably it means something that "also includes" the six items in paragraph 16-3(q)—items which themselves are vague and undefined, *e.g.*, "sex object," "scenario of degradation," conditions that are "sexual." Finally, the Ordinance offers no protection for works with "literary, artistic, political, or scientific value."

The very foundation of the Ordinance's definition of "pornography" is wholly inconsistent with the philosophy of the First Amendment. Government cannot constitutionally premise legislation on the desire to control the content of a person's private thoughts. . . . Yet, the Ordinance aims principally at eliminating "the bigotry and contempt" (clearly personal beliefs and attitudes) that pornography allegedly promotes and from

which allegedly flow acts of aggression and broad-based discrimination against women. . . . Notwithstanding the complete absence of empirical evidence to support this claim, this preemptive attempt to “cleanse” a person’s mind violates the settled principle that “the deterrents ordinarily applied to prevent crime are education and punishment for violation of the law,” not the suppression of ideas. . . .

Here, the Ordinance condemns shelf-upon-shelf of accepted literary works. Sex and sexuality have been subjects of absorbing interest to humanity since the beginning of time. . . . The *Bible* itself contains passages which, to some, may present the “graphic sexually explicit subordination of women.” The same can be said of a multitude of works from established classics like Voltaire’s *Candide* to contemporary best sellers like LeCarre’s *Little Drummer Girl*, Rossner’s *Looking For Mr. Goodbar*, Jong’s *Fear Of Flying* and Walker’s *The Color Purple*. Countless works could be accused of presenting women as “sex objects,” “in scenarios of degradation,” or as “inferior in a context that makes these conditions sexual.”

Even if the Ordinance were limited to library works with pictures alone, it would still run afoul of the First Amendment. No library could have a standard work of art history without exposure to prosecution and suit for damages. Works of Rubens, Ingres, Poussin, Copley and others, depicting nudes and rapes, all fall under the Ordinance’s terms. . . .

The Ordinance draws other constitutionally protected, yet controversial, materials within its broad sweep. Sexuality education, although a subject of scientific, educational, medical and psychological value, is also a subject of religious, moral and political controversy. Some groups condemn any depictions of sex, even in educational materials. We fear that well-intentioned but zealous citizens, armed with threats of damage actions, will use this new Ordinance as a tool to “purify” the libraries—to purge them of materials which they personally find morally or socially reprehensible.

The constitutional infirmity of the Ordinance’s overbreadth is compounded by the Ordinance’s vagueness and failure to give fair warning of the proscribed offenses. While a finder of fact may claim to know unlawful obscenity when he sees it. . . this surely cannot be said of “pornography” as defined by the Indianapolis Ordinance. What does it mean to say that “women are presented as sexual objects for domination, conquest, violation, exploitation, possession, or use or through postures or positions of servility or submission or display?” . . . To be sure, just as “one man’s vulgarity is another’s lyric,” one individual’s concept of “domination” or “subordination” will not square with another’s. All of this is compounded by the fact that the Ordinance gives *any* woman “claiming to be aggrieved on behalf of all women” the right to file a complaint to ban a book and for money damages.

For the librarian, this poses a very real and immediate threat and an unconstitutional burden that violates the integrity of the library collection and the public’s right to read. By training, librarians do not

review books to evaluate the merit of the ideas or points of view expressed in them. Such content-based judgements are as antithetical to librarians as they are to the First Amendment. But the Ordinance will force librarians to make such judgments. There is a strong likelihood that librarians may eschew materials that might fall within the Ordinance’s proscriptions rather than risk liability and the threat of prosecution by a citizen who later disagrees with a decision to acquire a certain work.

Such self-censorship is equally repugnant to the First Amendment as a court-ordered prior restraint This chilling effect alone is sufficient reason to declare the Ordinance unconstitutional. . . .

II THE ORDINANCE’S PURPORTED EXEMPTION FOR LIBRARY COLLECTIONS IS VAGUE AND CONTRADICTORY, AND EXPOSES LIBRARIANS TO PROSECUTION AND SUIT FOR DAMAGES

The Ordinance’s provisions for injunctive relief in themselves pose serious threats to the integrity of a library collection and the Ordinance provides no exemption for such actions. But perhaps the most frightening aspect of the Indianapolis Ordinance for librarians is the prospect of a suit for damages by “any person claiming to be aggrieved.” Time and again the Supreme Court has held that the “fear of damage awards . . . may be markedly more inhibiting than fear of prosecution under a criminal statute.” While the Indianapolis Ordinance purports to exempt libraries and librarians from such liability for damages, analysis of the law demonstrates that there is, in reality, no exemption whatsoever.

. . . (T)he Ordinance exempts libraries from prosecution for “Trafficking In Pornography” (as overbroadly construed) when “pornographic” material (as impermissibly defined) is “available for study, including on open shelves” whereas “special display presentations of pornography” is considered to be actionable sex discrimination. The Ordinance does not define “special display presentations;” nor can one glean its intended meaning from considering the Ordinance as a whole. Arguably, a library film festival on human sexual behavior or a library display on nudity in art could be subject to attack under the Ordinance. This undoubtedly will have a chilling effect on what a librarian, for fear of prosecution, may choose to display. The net effect is the imposition of a strict liability rule for exhibiting in “special display presentations” non-obscene material protected by the First Amendment. This is totally incomprehensible and blatantly unconstitutional.

Even more troublesome is the lack of *any sort* of an exemption for “Assault or Physical Attack Due to Pornography.” According to the language of the Ordinance as finally adopted, libraries are exempt from prosecution (under the “Trafficking” provision) for the general circulation of “pornography” on open shelves,

but are subject to prosecution (under the "Assault" provision), *if*, after viewing a "special display presentation" or even "exempted" material on open shelves, the viewer assaults a third party "in a way that is directly caused by specific pornography." The failure to reconcile these two sections leaves a gaping void and effectively destroys any intended protection for the librarian.

The Ordinance's attempt to fashion a scienter requirement requiring proof that a librarian "knew or should have known" that the materials were pornographic does not cure this constitutional infirmity. In this day and age, it costs only a few dollars to file a lawsuit, and the courts have recognized that the costs in time and treasure of merely defending one's innocence can be as effective an inhibitor of free expression as the risk of liability, however remote . . .

While librarians are philosophically committed to the concept that a library is an "open port" in the free marketplace of ideas. . . there are practical limits on their capacity or willingness to support such commitment when the choice is between purchasing legal services and purchasing additional works for the library collection. Moreover, as community institutions, many libraries are particularly dependent on the favor of public officials, who, as in this case, may have significant influence over their future operations and funding. Simply stated, if the Ordinance is upheld, only the most courageous librarian will be able to resist a demand for the culling of his collection of "pornography" as defined by this remarkable Ordinance.

Of course, the lack of incentive for librarians and other passive distributors of publications to resist self-censorship where the alternative is exposure to litigation has its greatest impact, not on the librarian or distributor, but on the public. It is the public's right to know and the public's right to read which is affected by the self-censorship decision. Silent suppression by self-censoring selection affords no standing to sue. And yet the closing of the channels of distribution by intimidation can be as effective in suppressing a work as in prohibiting its publication. The sum and substance of the First Amendment is not merely the right to speak but also the right to hear; not merely the right to write or print but also the right to read. . . There can be no ". . . uninhibited, robust, and wide open . . ." debate on public issues of the type the Supreme Court has mandated, if the distribution channels through which that debate must be communicated are subject to interdiction by *in terrorem* exposure to litigating over whether a work contributes to the "subordination of women."

Finally, even if librarians and libraries were completely exempt from any liability under the Indianapolis Ordinance, the Ordinance will undermine the integrity of library collections and fetter the librarian's mission to provide library patrons with the fullest range of constitutionally protected materials. If publishers and booksellers refuse to publish and distribute works for fear of prosecution under the Ordinance, there will be that many fewer titles for librarians to purchase and

circulate to their patrons. The ultimate losers will be the citizens of this State, who will be deprived of their right to receive information.

ALA Files Suit Against the National Security Agency

The American Library Association, the District of Columbia Library Association, the Virginia Library Association and other historical and research organizations in cooperation with the American Civil Liberties Union Foundation National Security Project, filed suit against the National Security Agency (NSA) on February 15, 1984. The suit challenges the constitutionality of NSA's removal of classified and unclassified documents from public access. The documents consist of letters of William F. Friedman, a pioneer in cryptology (code-breaking) and one of the agency's top code breakers. Several of the letters were mentioned by James Bamford in *The Puzzle Palace*, a book that was highly critical of NSA.

As reported in the Winter 1984 issue of the *FTRF News* (Vol. 12, No. 3), the Board of Trustees of the Freedom to Read Foundation voted at Midwinter to support the case of *ALA v. Faurer* (then referred to as *Peterzell v. Faurer*); to reimburse any expenses incurred in the suit by the District of Columbia Library Association and the Virginia Library Association and to request the ALA to become a co-plaintiff in the litigation.

At the 1984 Annual Meeting in Dallas, the Board of Trustees voted to reaffirm its Midwinter commitment by granting another \$2,500 to the American Civil Liberties Union (ACLU) Foundation National Security Project.

ALA's complaint, filed in Federal District Court in the District of Columbia, charges that NSA acted without authority by:

- 1) directing the Marshall Library to withdraw unclassified documents from public access,
- 2) classifying documents that had previously been available to the general public for several years, and
- 3) directing the removal of the newly classified documents from public access.

On the basis of a First Amendment right of access, ALA is asking for a declaration that NSA has no legal authority to interfere with public access to unclassified documents and that NSA be enjoined from further attempts to withdraw and classify documents that had been openly available.

At some time during the week before ALA's complaint was filed, NSA officials visited the Marshall library and in anticipation of the suit, classified some of the previously unclassified material and ordered the library to return most of the unclassified, withdrawn ma-

terial to the open shelves; all but thirty-four documents were made available to the public.

The government's Motion to Dismiss, filed in June, addresses much narrower issues than were presented in ALA's complaint. Whereas NSA had originally claimed the broad right to restrict information that is not classified, NSA now asserts the authority to classify documents that have not been created by the government (here, the personal letters written by Friedman) and that have previously been available to the public.

The potential significance of the government's motion can be best understood by reviewing the sequence of events that led to the filing of this suit:

- 1969 Cryptologist William Friedman died; his private papers were given to the Marshall Library and the entire collection was reviewed by NSA; certain documents, both classified and unclassified, were locked away in a vault.
- 1977-78 Remaining documents were opened to the public.
- 1979 James Bamford requested to see, and the library opened to the public at large, the withdrawn but *unclassified* material.
- 1980 NSA reviewed the open collection and withdrew some of the documents seen by Bamford.
- 1981 NSA again reviewed the collection.
- 1983 Bamford's *The Puzzle Palace*, a book critical of NSA, was published; NSA reviewed the collection and removed documents referenced by Bamford. (Note: on each NSA review and removal from the open collection, some of the withdrawn items were classified, some were not classified.)
- 1983 (May/June) Plaintiff/researcher Peterzell reviewed the open collection and learned that the majority of withdrawn documents had been withdrawn for "other reasons than classification."
- 1984 (Feb.) NSA returned all but thirty-four of the withdrawn unclassified documents to the open shelves.

The government's argument is based on the following assertions:

- 1) That there is no First Amendment right of access to classified information.
- 2) That NSA is authorized to withhold classified documents from public view.
- 3) That previously declassified documents may be reclassified and that the unauthorized release of sensitive documents does not preclude classification.
- 4) That there has not been sufficient irreparable injury to warrant injunctive relief.

Counsel for the ACLU Foundation National Security Project is completing discovery and will be filing a motion in the near future.

Crazy Horse (from p. 3)

conclusion that attempts to defame the plaintiff have backfired upon the accusers. . . .

There are other accusations which do not involve accusations of criminal conduct, but which are more properly categorized as opinions about the plaintiff's attitude or conduct in office. In reviewing the context in which the author's opinions and characterizations are given, the court cannot find that such opinions are actual defamation. . . . To rule that criticizing a public official on his stance about a highly charged issue (is defamatory) would be akin to the court placing censorship upon an individual's right to criticize its elected public officials on public issues. . . .

As this court has determined that as a matter of law the book is not defamatory, the motion to dismiss as to the defendant Matthiessen shall be granted. It logically follows that if the book is not defamatory then the publisher, the book distributors and booksellers may not be sued for defamation. Thus, the motion to dismiss for failure to state a cause of action shall also be allowed as to these defendants.

Other Annual Meeting News

Board Funds Washington State Library Case

As reported in the last issue of the *FTRF News* (vol. 12, no. 3), the American Civil Liberties Union (ACLU) of Washington Foundation had asked for support in its lawsuit against the Evergreen School District. The suit, *Marian English, et al. v. Evergreen School District, et al.*, involves the removal of over thirty books from school libraries, without notice to parents and students, without opportunity for a hearing, and in direct violation of the school district's policies.

At the FTRF Annual Meeting, counsel reported that all but one book had been returned to the shelves, but that little else had happened in the case, due to illness of one of the local attorneys.

The Board felt that the issues presented in the case deserved further support and voted to give a \$1,000 grant to the ACLU of Washington Foundation.

Minnesota Students' Rights Cases

Two related Minnesota students' rights suits funded by the Foundation have been successfully settled (see *FTRF News*, vol. 12, no. 1-2). Both cases concerned the right of students to hear outside speakers in Minnesota elementary and secondary schools.

Stark v. School District No. 1, involved speakers on "alternative life styles" and was voluntarily dismissed; *Stark v. Osseo School District* challenged the school board decision that prevented Matthew Stark, Minnesota Civil Liberties Union Executive Director, from speaking at Osseo High School. The case was settled with a direction to the school district to adopt a new policy consistent with First Amendment guarantees of free speech.

Foundation to Support Litigation Against United States Information Agency

The Board of Trustees has voted to support *Bullfrog Films v. Wick*, the Center for Constitutional Rights' (CCR) lawsuit against the United States Information Agency (USIA). The Board originally considered CCR's request for assistance at Midwinter, but agreed to hold its decision until staff and legal counsel could evaluate the precise nature of the litigation strategy and the appropriate role for the Foundation (see *FTRF News*, vol. 12, no. 3).

The litigation grew out of the concerns of small, independent filmmakers who have been denied "Certificates of International Educational Character" because their films have been judged as "misrepresentative" or liable to "misrepresentation by foreign audiences lacking adequate American points of view" by USIA. Under the terms of the "Beirut Agreement," once an exporting country has certified a film as being educational, scientific or cultural, importing countries will exempt the material from all import duties, fees and taxes. These fees can range upwards to \$10,000.

The majority of films denied certificates fall into one of three categories: blatant promotion of a specific product or service, offensive religious proselytizing or political propaganda. The last category has raised the most questions.

The Foundation's concern for this issue includes not only the fact that filmmakers risk having their First Amendment freedoms curtailed if they choose to express views with which the government disapproves, but that they will be forced to pass on the costs of the added import duties to their customers—including libraries.

The Board voted to donate \$2,500 to the Center for Constitutional rights and to participate in an *amicus curiae* brief if and when counsel determine it is necessary.

American Library Association Honors William D. North

A resolution commending William D. North, past FTRF president, for his years of service and dedication to the Foundation and the cause of intellectual freedom, was adopted by the American Library Association at the ALA Annual Conference on June 27, 1984. The resolution stated:

WHEREAS, The Freedom to Read Foundation was incorporated in 1969 as an agency committed to the protection and legal support of First Amendment rights of libraries and librarianship as resources indispensable to the intellectual, cultural and education welfare of the nation; and

WHEREAS, William D. North was one of the original members of the Board of Incorporation who chartered the course for the establishment of policies and functions of the Foundation; and

WHEREAS, William D. North has given fifteen consecutive years of constant dedicated, loyal and honest opinions and services to the Board of Trustees of the Foundation, the majority primarily on a volunteer basis without fiscal remuneration; and

WHEREAS, William D. North has remained a strong proponent of the right to read, to see, to speak in the name of intellectual freedom; and

WHEREAS, William D. North has remained a lucid spokesman and staunch leader in assessing the marketplace of ideas and articulating trends and forecasts to the library world; and

WHEREAS, William D. North's term of service as an elected member of the Board of Trustees of the Freedom to Read Foundation expired on June 21, 1984; NOW, THEREFORE, BE IT

RESOLVED, That the American Library Association join with the Board of Trustees of the Freedom to Read Foundation in extending sincere thanks to William D. North in appreciation for his many years of dedicated and yeoman service to the cause of intellectual freedom and its varied interpretations under the First Amendment of the U.S. Constitution.

David M. Jones

It is with great sadness that we report the sudden, untimely passing of FTRF Trustee David M. Jones on August 1, 1984. Dr. Jones, Superintendent of Schools in Sayville, New York, was elected to the Board of Trustees in June, 1983, and to the Executive Committee at the 1984 Annual Meeting in Dallas.

David was a public school educator for twenty-eight years, Superintendent in Sayville for thirteen years and served on numerous local, state and national committees.

Foundation Trustees, members and staff who had a chance to work with David will remember him as a dedicated, thoughtful man who took his role as Trustee seriously, but never forgot the importance of a generous word or light-hearted remark.

Our condolences to his family, friends and colleagues. David M. Jones will be sorely missed.

At the request of David's family, a scholarship fund has been established in his honor. Donations will be used to make it an ongoing Memorial Fund. The interest from the fund will be used to provide a scholarship for Sayville students.

If you would like to make a donation, please send a check or money order to:

David M. Jones Memorial Scholarship Fund
Sayville Public Schools
99 Greeley Avenue
Sayville, New York 11782