The Freedom to Read Foundation reports to the Council of the American Library Association at each Annual Conference and Midwinter Meeting. At the 1987 Annual Conference in San Francisco, the Foundation, for the first time in its history, provided a written report, along with its traditional oral one. The text of the oral report, presented by outgoing FTRF President J. Dennis Day on June 28 follows. The full text of the Foundation's written report to the ALA Council follows the oral one.

Good morning! The Freedom to Read Foundation is, for the first time in its history, presenting a detailed written report to Council reviewing the activities of the past year. There are two reasons for this:

Firstly, the serious nature and complexity of the cases requires a detailed presentation. Secondly, the Foundation Board of Trustees requested that I focus my oral report on the actions taken at our Annual Meeting held this week and to solicit your help in dealing with a serious problem we are facing.

On Thursday, at our Annual Meeting, the following occurred:

- two major changes in direction were initiated;
- two requests for funding were granted; and
- and two officers for the coming year were elected.

The two major actions were the reorganization of the Foundation and implementation of our new Roll of Honor. Elements of the reorganization that were completed at our Annual Meeting included:

- Expanding the number of elected Trustees from nine to eleven. (That was accomplished through the election and seating of six Trustees.)
- Development and implementation of a job description and performance planning process for the Executive Director of the Foundation.
- Development of an operational planning process and a plan for the 1988-89 year.

Plans for the new Roll of Honor were approved. The Roll does offer the opportunity to recognize the important and heroic struggles of frontline librarians.

As noted earlier there were two requests for funding which were granted.

The first is the Grendel case (Wasco Union High School, Calif.) which involves a policy adopted by the school board of prohibiting students from reading John Gardner's novel Grendel, without parental permission and unless 100% of students in the class had obtained parental consent. The second funding request granted was from the Media Coalition.

Our Annual Meeting is also the time for the changing of the guard. The Trustees stepping down at this time are Neil Adelman, Dorothy Broderick, Judith Drescher, and Regina Minudri. To each one of them a huge thank you for their thoughtful support.

Our newly elected officers are Judith Sessions, President; Bruce Rich, Vice-President; Pamela Bonnell, Treasurer; Burt Joseph and Robert Peck, Executive Committee.

In their capable hands and those of our new Trustees, I pass on the responsibilities of the Foundation. As the outgoing President, I would like to thank the members of the Board, the ALA unit liaisons, and the Foundation staff for their hard work and constant strong support.

The final part of my report is a request for your help. As you can see by our written documentation, we are in a period of unprecedented level and intensity of activity. This has created a significant strain on our budget. While our participation in any given case may not always be controlling, each time we enter, we identify librarians as part of a constituency. We stand up to be counted. And in this way, librarians are not only part of the "united front," but they also reiterate the purpose of the Foundation's being: to establish in law precedents on behalf of the freedom to read for the library community.

This takes money. It also takes commitment. In the case of the Freedom to Read Foundation, the two go hand in hand. Your contribution to the Foundation is a visible expression of your commitment to the principles of intellectual freedom and to making First Amendment guarantees an integral part of the practice of librarianship. By joining with us, you strengthen the "united front," and help bring us closer to the realization of our mutual goals. Thank you.

Freedom To Read Foundation Report To The ALA Council Sunday, June 28, 1987

Our First Amendment freedoms — to read, to view and to hear — are being assaulted on an increasing number of fronts, and I come to you today to enlist your active involvement and support in what may become a battle for the future of free thought and critical inquiry. While the past year has presented some strong challenges to the cause of intellectual freedom, the Foundation has develop-
opined an enlightened and intelligent approach which it has actively pursued in defense of the freedom to receive information.

Two of the major challenges to the principles of intellectual freedom in the past year have been the decisions in the Tennessee and Alabama school books cases. In *Mozert v. Hawkins County* — the Tennessee reading-series case — the District Court judge ruled that parents could remove their children from reading classes that used materials — such as the WIZARD OF OZ or THE DIARY OF ANNE FRANK — which did not conform totally to the parents’ religious beliefs. In *Smith v. Board of Commissioners* — the Alabama textbook case — the judge went much further — requiring the removal of 44 textbooks from Mobile County Public Schools because a group of fundamentalist parents felt that these textbooks did not actively support their religious view and that the textbooks, therefore, promoted the “religion” of “secular humanism.” Basically, these judges have said that parents can prevent their children’s exposure to any materials in the public school curriculum that either challenge or do not actively support the parents’ fundamentalist Christian views of society and social relations.

There is cause for grave concern for all of us in these decisions and, most particularly in the Alabama case. The logical outcome of what Judge Brevard Hand has decreed in his ruling is that each book supported by public money in a public institution must present — within its two covers — a sufficient representation of fundamentalist religious beliefs to satisfy the most vocal believer. Not diversity over a collection of materials taken as a whole, but a judicially determined acceptable amount of fundamentalist religion and “secular humanist religion” in each and every book.

One telling point is that virtually every incident reported in “Censorship Dateline” in the May and July issues of the NEWSLETTER ON INTELLECTUAL FREEDOM can be traced to the Tennessee and Alabama decisions. The fundamentalist right is on the march, my friends, and the Foundation needs your support in combating them.

Both of the decisions are being appealed. The U.S. Court of Appeals for the 11th Circuit has agreed to hear the appeal in the Alabama case on an expedited basis and the Foundation has filed an *amicus curiae* brief in this case. The Board believes that this is a critical case because it could well decide — for the foreseeable future — how much diversity of information will be available in our public schools and, thus, the breadth and depth of education that will be available to our children. But this issue is not just our public schools, it is our school libraries and public libraries as well. We have no reason to expect, if the right has its way with publicly-funded curriculum materials, that it will stop there. Our school libraries and our public libraries are also publicly funded, and we must assume that they will be the next targets of religious zealotry.

The Foundation has also filed *amicus curiae* briefs in *Commonwealth of Virginia v. American Booksellers Association*, and in *Bullfrog Films v. Wick* — a case on which the Foundation has reported to you before. Let me update you on this case first.

On October 24, 1986, U.S. District Court Judge A. Wallace Tashima ruled that the U.S. Information Agency violated the First and Fifth Amendments to the Constitution by using guidelines that were vague and unenforceable in deciding which documentary films were to receive “Certificates of Educational Character,” and he enjoined the agency from enforcing its guidelines until it formulates standards “consistent” with the Constitution. These certificates exempt U.S.-produced films distributed abroad from many import duties and red tape requirements of foreign governments. Lack of such certificates can effectively eliminate circulation of such limited-audience films.

The plaintiffs in this case, ten filmmakers from four production companies, charged that the USIA used the regulations to censor opinions that were at odds with those of President Reagan’s administration, and that the agency’s refusal to grant the export certificates “chilled” their right to make and distribute films that “present a point of view that is considered unfavorable” by the government.

Judge Tashima agreed. “These regulations are not merely flexible,” Tashima wrote, “they are boundless” and put the agency “in the position of determining what is the ‘truth’ about America, politically and otherwise. This, above all else, the First Amendmrent forbids.” The government is appealing the ruling. The Foundation voted to contribute $3,000 to the Center for Constitutional Rights toward legal fees in the appeal, and has filed an *amicus curiae* brief with the American Civil Liberties Union, the ACLU of Southern California, the Film Arts Foundation, and other film-related organizations.

The case of *Commonwealth of Virginia v. American Booksellers Association* involves a “harmful to juveniles” display statute passed by the Virginia legislature in 1985. This statute banned the display of materials depicting nudity, sexual conduct or sadomasochistic abuse, if these materials are displayed so that juveniles may examine or peruse them. The ban applied to materials that would be “harmful to juveniles,” even if these materials are not obscene and are constitutionally-protected. In 1985, a U.S. District Judge declared the statute unconstitutional because it would have the effect of limiting general public access to constitutionally protected materials. On appeal by Virginia, that ruling was upheld in 1986 by the 4th Circuit Court of Appeals. The Commonwealth has appealed that decision also, and the U.S. Supreme Court has agreed to hear the case.

The Freedom to Read Foundation will enter the litigation as an *amicus curiae*. The case is considered vital for several reasons. The most immediate is the existence in a number of other states of similar laws, some of which have been declared constitutional in other courts. The longer term reason for the Foundation’s entering into this case, however, is the belief that the Supreme Court’s ruling in this instance will be the precedent for minors’ access to printed materials for the next generation.

There have also been important decisions in two cases on which I reported to you at the Midwinter Meeting — *Pope v. Illinois*, a victory (we think); and *Meece v. Keene*, a loss.

In *Pope v. Illinois*, the U.S. Supreme Court ruled in a 6-3 decision issued May 4, 1987, that the third or “value” prong of the tripartite test set out in *Miller v. California*, for judging whether material is obscene must be determined by whether “a reasonable person” would find...
serious literary, artistic, political, or scientific value in the material, taken as a whole. This ruling overturned a decision by the Appellate Court of Illinois, 2nd Circuit.

In the decision, written by Justice White, the Supreme Court held that in a prosecution for the sale of allegedly obscene materials, the jury should not be instructed to apply community standards in deciding the value question. Only the first and second prongs of the Miller test — appeal to prurient interest and patent offensiveness — should be decided with reference to "contemporary community standards."

In the opinion, Justice White wrote: "The idea that a work represents an artist's serious literary, artistic, political, or scientific value is not a question that can be resolved by reference to community standards. Only the first and second prongs of the Miller test — appeal to prurient interest and patent offensiveness — should be decided with reference to "contemporary community standards.""

Now, we only need a determination of what a "reasonable person" is.

And, finally, in a serious setback for the First Amendment — and for clear use of language — the U.S. Supreme Court ruled in 1987, the Court upheld the Foreign Agents Registration Act (FARA), specifically a provision classifying as "political propaganda" all foreign government films that might influence public opinion on United States foreign policies.

This case arose out of a suit by a California State Senator who wanted to show three Canadian films to constituents and who said that the application of the phrase "political propaganda" to three films violated his right to free speech by implying government disapproval and, thus, "tainting" him. Although the provision of FARA does not bar presentation of such films, State Senator Barry Keene said that the government's classification had deterred him from showing them because he felt that voters would be suspicious of a candidate who showed films officially classified as propaganda.

Justice John Paul Stevens, writing for the Court majority, held that, "Since the Act neither inhibits appellee's access to the films nor prohibits, edits, or restrains the distribution of materials to which the term 'political propaganda' applies, it places no burden on protected expression. To the contrary, it simply requires the disseminators of propaganda to make additional disclosures to better enable the public to evaluate the material's impact, allows them to add further information that they think germane, and thereby actually fosters freedom of speech."

It is apparent that we cannot count on the Executive Branch nor the U.S. Supreme Court for sure defense of the freedoms to read, view and hear. We must count on those whose profession is the creation of access to and dissemination of information — on librarians — to help us to defend these freedoms. I am, therefore, asking, and urging, each of you to become a participant in this defense by joining the Freedom to Read Foundation, so that we have the resources necessary to carry on this fight.

Thank you.
Respectfully submitted,
J. Dennis Day
President

1987 Election
4 New Trustees Chosen, 2 Re-elected

Four new Trustees were elected to serve two-year terms on the Board of Trustees of the Freedom to Read Foundation in a ballot held May 1 to June 1.

E.J. Josey, Professor, School of Library and Information Science, University of Pittsburgh, Pittsburgh, Pennsylvania; Jeanne Layton, Director, Davis County Library, Farmington, Utah; Robert S. Peck, Staff Director, Commission on Public Understanding About the Law, American Bar Association; and Nancy Zussy, State Librarian, Washington State Library, Olympia, Washington, joined the Board of Trustees at the close of the annual meeting on June 26 in San Francisco.

Pamela G. Bonnell, Library Manager, Plano Public Library System, Plano, Texas; and R. Bruce Rich, Attorney, Weil, Gotshal & Manges, New York, New York, were re-elected to second terms.

The new and re-elected Trustees will join the following persons to constitute the 1987-88 Board: Margaret E. Chisholm, Dennis Day, Judith Farley, Thomas J. Galvin, Elliot Goldstein, Burton Joseph, C. James Schmidt, William Summers.

Pornography Victims Protection Act
of 1987


The bill provides for the punishment of any person who "coerces, intimidates, or fraudulently induces an individual 18 years or older to engage in any sexually explicit conduct for the purpose of producing any visual depiction of such conduct . . . ." The punishments would also apply to any person who transports, receives or distributes such a visual depiction — booksellers, wholesalers, publishers, librarians, etc.

Significantly, the bill provides that the fact that, among other things, the individual consented, signed a contract or was paid does not negate the finding of "coercion." Moreover, while there are repeated references to "pornography," the term is nowhere defined in this statute.

If this bill sounds familiar, it is because it has taken a portion [sec. 16-3 (g) (5)] of the MacKinnon/Dworkin Indianapolis ordinance and proposes to insert it into Federal law.

In the case of the Indianapolis ordinance, U.S. District Court Judge Sarah Evans Barker ruled that, "The Ordinance's proscriptions are not limited to categories of speech, such as obscenity or child pornography, which have been excepted from First Amendment protections and permitted some governmental regulation. The City-County Council, in defining and outlawing "pornography" as the graphically depicted subordination of women, which it then characterizes as sex discrimination, has sought to regulate expression, that is, to suppress speech . . . ."
Judge Barker's ruling was affirmed by the U.S. Court of Appeals on August 29, 1985. In his decision, Judge Easterbrook restated the unconstitutionality of the ordinance because of its content-based discrimination. He noted, moreover, that “[t]he ban on distribution of works containing coerced performances is limited to pornography: coercion is irrelevant if the work is not ‘pornography,’ and we have held the definition of ‘pornography’ to be defective root and branch.”

The proposed federal bill suffers from the same content-based suppression of speech and vagueness of terminology.

Other Annual Conference Meeting News

Roll of Honor

The Board of Trustees voted to establish a Roll of Honor to recognize and honor those who have played an active role in support of intellectual freedom through their commitment to and defense of the First Amendment. Those eligible for this honor will be former and current FTRF members, major donors and individuals associated with the Foundation through litigation.

The award will consist of a plaque, or plaques, to be presented annually during the Annual Conference Membership Meeting of the American Library Association. Nominations are requested. All nominations must be in writing and received no later than December 1, 1987.

Foundation Reaffirms Support of Media Coalition

The Board of Trustees voted to give a $7,500 grant to the Media Coalition, in recognition of the many services provided by the Coalition to the Foundation.

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 filesamicus curiaebriefs in First Amendment cases.

Grant to ACLU of Southern California

The Board of Trustees voted to give a $1,500 grant to the ACLU of Southern California to assist in its continuing challenge to the censorship of John Gardner’s Grendel by the Wasco Union High School Board of Trustees.

This case concerns a policy, adopted in 1985 by the Wasco School Board, that prohibited students from reading Grendel without written parental permission and banned all class discussion or instruction of the book unless 100% of the students in the class had obtained parental consent. The ACLU obtained a preliminary injunction in November 1985. Subsequently, the board decided to remove Grendel from the curriculum altogether. The ACLU of Southern California has filed a supplemental complaint with the trial court to challenge this new act of censorship.

Smith et al. v. Board of School Commissioners of Mobile County, et al.

A three-judge panel of the U.S. Court of Appeals for the 11th Circuit heard the appeal in the “Alabama textbook” case on an expedited basis, on June 23, 1987. Foundation counsel reported that oral argument went well before a panel composed of Judges Frank M. Johnson, Jr., Joseph Eaton, and Thomas A. Clark. A decision is expected in two to six months. Counsel noted that the judges are well aware of the need for an expedited decision in light of the rapidly-approaching new school year.

The appeal filed by the Alabama Board of Education and twelve Mobile parents has attracted wide support. Fifty-five groups have filed amicus curiae briefs in support of the appeal. Among them are the Freedom to Read Foundation and the Association of American Publishers, as well as the American Library Association.

The following are excerpts from the brief prepared for the Association of American Publishers and the Freedom to Read Foundation.

While textbook censorship efforts are not new, what is unusual about the instant case is the nature of the legal attack which has been mounted. Purportedly based upon an Establishment Clause violation, the district court has banned outright from Alabama’s public schools 44 elementary through high school level textbooks, published by the gamut of our nation’s leading educational publishers. In actuality, this case involves, and the lower court outcome results from, the efforts of a small group of parents with a particular religious point of view to force school officials to purge textbooks those parents find offensive. The legal standard adopted by the district court would give those parents, and other groups hostile to various ideas commonly taught in the public schools, a constitutional weapon they could use to pressure school officials to censor textbooks those groups find offensive to their religious views. This same procedure might very well be directed against librarians and the books on library shelves.

The district court was able to reach its result only through a fundamental misportrayal of a supposed bias and secular humanism point of view said to permeate all of the challenged materials. This faulty construct (built upon other equally flawed premises, such as the court’s attempted definition of religion) is at odds with what the record evidence and any basic understanding of the publishing process reveal about how textbooks are created and how their contents are shaped.

The district court censored textbooks because they contain secular values that are not congruent with the “religious” sensibilities of the plaintiffs. The court would not have been a party to this censorship if it had applied the test required by the Supreme Court in Lemon v. Kurtzman. Under Lemon, mere congruence between the secular ideas advocated by a government and the ideas of a religious group does not violate the Establishment Clause. Instead, courts are obliged first to consider the secular purposes advanced and accomplished by the state. The district court utterly failed to do this, and that failure was reversible error. Had the court applied the Lemon test, it would not have had to pursue its speculative and standardless inquiry into, inter alia, the nature of religion, the essence of “secular humanism,” and the subjective effects on children of the failure to discuss certain items in elementary and high school textbooks. Had the court applied the Lemon test, it would necessarily have found that the textbooks in question do advance secular values, for no child reading the textbooks could reasonably believe that they were intended to do anything other than provide factual information and promote secular values.

Thus, even if “secular humanists” have adopted, as “religious” faith, the secular values allegedly advanced in the textbooks, it is simply not credible to believe that the
advancement of their religious faith has been the primary effect of using these textbooks. Alabama’s decision to approve these texts therefore does not violate the Establishment Clause.

Moreover, the improper approach used by the district court — abstractly defining “religion” and then hunting for allegedly religious views implicit in certain school books — would lead to harmful self-censorship on the part of the textbook publishers, and inevitably would require courts to act as a super censor, scrutinizing individual texts to determine whether they contain too many, or too few, references to religion. Far from resolving First Amendment problems, this approach would entangle the courts and the government in just the sort of religious determinations the Establishment Clause was designed to prevent. The effective result of the decision below is that secular values cannot be taught in the public schools — a result that is contrary to numerous Supreme Court opinions and is at odds with universally accepted notions of what public schools should be teaching. Finally, the court’s decision will increase the pressure on librarians and other school officials to censor books for ideological reasons. Moreover, if the decisions were to be applied to library books, the court’s approach would produce even more dangerous results, because it would make it impossible for librarians to make available to students books describing or promoting a wide diversity of views . . .

The Supreme Court has noted that mere congruence between secular values promoted by the state and values promoted by a religious group is irrelevant and does not constitute a violation of the Establishment Clause. As the Court has emphasized:

the “Establishment” Clause does not ban federal or state regulations of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions. In many instances, the congress or state legislature conclude that the general welfare of society, wholly apart from any religious considerations, demands such regulation. Thus, for temporal purposes, murder is illegal. And the fact that this agrees with the dictates of the Judeo-Christian religions while it may disagree with others does not invalidate the regulation. So too with the questions of adultery and polygamy. The same could be said of theft, fraud, etc., because those offenses were also proscribed in the Decalogue.

Conversely, the Establishment Clause does not prohibit the state from teaching ideas that may be hostile to someone’s religious beliefs. The state “has no legitimate interest in protecting any or all religions from views distasteful to them.” (Joseph Burstyn, Inc. v. Wilson quoted in Epperson v. Arkansas.)

More generally, the district court erred in assuming that the texts’ repeated emphasis on secular values implicitly deprecates religious values in violation of the Establishment Clause. To the contrary, it is precisely because of the secular nature of the values inculcated through the texts that the state’s decision to allow the texts to be used is constitutional . . . .

The standards adopted by the district court are so amorphous that they pose a grave risk of self-censorship by textbook publishers. The district court ruled that even though the books at issue in this case were neither published nor selected with the intent to advance or inhibit a religion, they nonetheless have the impermissible effect of inhibiting theistic religion and advancing secular humanism. Secular humanism, according to the district court, is a religion because it “makes a statement about supernatural existence a central pillar of its logic; defines the nature of man; sets forth a goal or purpose for individual and collective human existence; and defines the nature of the universe, and thereby delimits its purpose . . .”

The contours of this holding are indiscernible. The opinion provides no guidance for authors and publishers to help determine whether or not their books, after being tailored to meet the needs of a national audience and then clearing rigorous adoption processes, will nonetheless be found impermissibly to establish religion. Specifically, the court’s definition of religion is so broad as to include a vast array of theories and thought systems. A publisher wishing to avoid having its books thrown out of the schools as “religious” would have to alter radically its treatment of nearly every subject, a constitutionally troubling form of self-censorship . . .

Similarly, the district court’s holding that the history books contain an insufficient number of references to religion creates the specter of compelled speech, itself a form of self-censorship. Book publishers, concerned about criticism regarding the number of references to religion and about how those references will be perceived, may be induced to include either more references to religion than they believe an effective presentation should contain or fewer references in the hope of avoiding controversy altogether. Either result would stifle an ongoing process of discerning the appropriate presentation of history to children of different ages . . .

Libraries are an integral component of the public schools, an essential supplement to the teaching curriculum that helps students “acquire critical thinking and problem solving skills needed in a pluralistic society” through voluntary access to diverse ideas and information. Amici oppose any decision that poses an unnecessary danger to the library’s function as a repository of books and other media containing diverse ideas chosen without reference to the “personal, political, social or religious views” of members of the school community. The decision below poses just such a danger, for it allows people to deprive students free access to ideas solely because some may find the ideas offensive.

The thrust of the court’s ruling is that books containing ideas that are congruent with the ideas of a religious group, or that are offensive to the ideas of another religious group, do not belong in public schools. That ruling would give private pressure groups a formidable weapon they could use to force public officials and school officials to censor whatever books they happen to dislike. Amici have seen firsthand how often public and school officials succumb to such pressures and agree to the banning of books for ideological reasons. Even enlightened officials often bow to such pressure, deciding it is necessary, or expedient, to censor a particular book rather than to jeopardize an entire budget, or lose an election. Or they may feel that no single book is worth prolonging public controversy and discord. To these already considerable pressures the district court has now added an even more
significant pressure by ruling that the Constitution actually requires the banning of books when some group's religious sensibilities are offended. This ruling subjects public and school officials, and textbook publishers, to tremendous pressure to keep even possibly controversial ideas out of textbooks and, by extrapolation, school libraries, in order to avoid divisive and expensive constitutional litigation. The district court's erroneous holding that the Constitution prohibits even incidental congruence between ideas found in texts and ideas promoted by (or hostile to) particular religious groups will thus have severely inhibiting effects on individuals who select textbooks and library books for public school students.

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