

Freedom to Read Foundation
REPORT TO COUNCIL

2008 Midwinter Meeting — Philadelphia, Pennsylvania

As President of the Freedom to Read Foundation, I am pleased to report on the Foundation's activities since the 2007 Annual Conference:

We were honored to be able to present "An Evening with Anthony Lewis" at this Midwinter Meeting, on Monday, January 14. The sold-out event, held at the National Constitution Center, featured a conversation in which the two-time Pulitzer Prize-winning author and journalist discussed his latest book, *Freedom for the Thought We Hate: A Biography of the First Amendment*, with FTRF trustee Chris Finan.

This is our third annual author event, a tradition begun in San Antonio with Sandra Cisneros and continued in Seattle with young adult author Chris Crutcher, who has become a stalwart friend and supporter of FTRF and ALA's efforts on behalf of intellectual freedom.

The Freedom to Read Foundation is deeply grateful to Anthony Lewis and Chris Finan for their participation, and to the National Constitution Center—a wonderful facility—for cosponsoring this event and helping to ensure its success.

SECURING THE RIGHT TO PRIVACY

FTRF remains steadfast in its opposition to provisions of the USA Patriot Act that undermine our civil liberties and threaten our right to privacy in what we read and view. As we reported a year ago, many of the lawsuits challenging those provisions, including the lawsuit filed by the four Connecticut librarians of the Library Connection, have accomplished their immediate aims without producing a definitive judgment on the underlying question of the USA Patriot Act's constitutionality.

For this reason, I am happy to report that one challenge has survived, despite this administration's best efforts to prevent these challenges from going forward. *John Doe and ACLU v. Mukasey, et al.* (formerly *John Doe and ACLU v. Gonzales, et al.*), first filed in 2004, challenges the use of National Security Letters (NSLs)—administrative subpoenas that FBI field agents can issue on their own authority without judicial review. NSLs compel the recipient to turn over records of electronic transactions, including Internet use records, and impose a comprehensive and permanent gag order on the recipient. From the time the litigation was initiated, FTRF has supported the "John Doe" plaintiff, an unnamed Internet Service Provider

(ISP), filing several *amicus curiae* briefs that underscore the threat to First Amendment values inherent in the NSL provision of the law.

As you may recall, “John Doe” won his first victory in September 2004, when Judge Victor Marrero of the U.S. District Court for the Southern District of New York held that NSLs were an unconstitutional violation of the Fourth Amendment’s prohibition against unreasonable search and seizure. He also ruled that and the accompanying gag orders constituted a prior restraint of speech in violation of the First Amendment. The government appealed to the U.S. Court of Appeals for the Second Circuit; that appeal was pending when Congress passed the USA Patriot Act reauthorization in March 2006, which included some modifications of the NSL provisions. The appellate court sent the case back to Judge Marrero for reconsideration of the constitutional questions in light of the statutory changes.

“John Doe” and the ACLU filed an amended complaint in the summer of 2006, arguing that the changes wrought by Congress in the reauthorized Patriot Act failed to remedy the NSL statute’s constitutional flaws. While the FBI withdrew its demand for records in November 2006, effectively ending the legal challenge to the NSL itself, it refused to lift the nondisclosure order preventing “John Doe” from revealing “his” identity. The ACLU and “John Doe” went forward with their constitutional challenge, asserting that the automatic gag order was unlawful, with FTRF again providing *amicus* support.

On September 6, 2007, Judge Marrero once again vindicated our arguments and struck a blow for civil liberties. He held the entire amended NSL statute to be unconstitutional, ruling that the gag order and the standard of judicial review mandated by the amended statute violate both the First Amendment and the constitutional separation of powers. He enjoined the FBI from issuing any NSLs, but stayed enforcement of his ruling pending the government’s appeal, in deference to the government’s national security claims. The government again filed an appeal with the Second Circuit, and briefing is underway. At its meeting on January 11, the FTRF Board gave unanimous approval, subject to review of the final brief, to FTRF participation in an *amicus* brief in support of “John Doe” and the ACLU.

FTRF’s defense of reader privacy does not begin or end with our concern about the USA Patriot Act. The Foundation recently joined with the New Jersey Library Association, the ACLU of New Jersey, the Electronic Frontier Foundation, and Privacy Rights Clearinghouse in filing an *amicus curiae* brief to the New Jersey Supreme Court in *New Jersey v. Reid*. The state is appealing a ruling by the New Jersey Court of Appeals requiring police officers to obtain a valid subpoena in order to get an ISP account holder’s personally identifiable information. FTRF’s brief asks the New Jersey Supreme Court to uphold the Court of Appeals’ decision. The case was argued on October 12, 2007, and we are awaiting a decision.

SECURING THE RIGHT TO READ

In the past six months, FTRF won two important victories in our efforts to protect the freedom to read materials published on the Internet. The first came on September 24, 2007, when Judge Walter Rice issued a written opinion in *ABFFE v. Strickland* (formerly *Bookfriends, Inc. v. Taft* and *ABFFE v. Petro*), in which FTRF is a plaintiff. In his opinion, Judge Rice ruled the Ohio

“harmful to minors” statute unconstitutional as applied to the Internet, and enjoined its enforcement. The decision has been appealed to the Sixth Circuit Court of Appeals, and briefs are due to be filed early this year.

FTRF also secured an interim victory in *The King's English v. Shurtleff*, a lawsuit challenging the constitutionality of Utah's expanded “harmful to minors” statute. The statute has an astounding reach; not only does it criminalize constitutionally protected Internet content, it gives the state's attorney general authority to designate a website to be “harmful to minors” without judicial review. In the spring of 2007, the State of Utah filed a motion to dismiss the lawsuit asserting that FTRF and its co-plaintiffs lacked standing to challenge the law. On November 29 2007, the court denied the state's motion and permitted the lawsuit to proceed, ruling that FTRF could continue to represent the First Amendment interests of Internet users across the country.

As reported at Annual Conference, Judge Lowell Reed issued his ruling in *Gonzales v. American Civil Liberties Union*, the longstanding challenge to the Children's Online Protection Act (COPA), the 1997 federal law that regulates and criminalizes protected Internet speech. In March 2007, Judge Reed permanently enjoined enforcement of COPA, which he found unconstitutional on its face.

The government appealed to the Third Circuit and on October 29, 2007, FTRF joined with the Association of American Publishers (AAP), the Center for Democracy and Technology, the Comic Book Legal Defense Fund (CBLDF) and several other partners in filing an *amicus curiae* brief urging the appellate court to uphold Judge Reed's ruling. We expect oral arguments to take place in the near future.

FTRF is also an *amicus curiae* in *U.S. v. Williams*, a lawsuit that challenges the federal government's PROTECT Act, a law that criminalizes advertising, promoting, presenting, distributing, or soliciting material in a manner that “reflects the belief, or is intended to cause another to believe,” that the material is illegal child pornography. On August 14, 2007, FTRF joined with the American Booksellers Foundation for Free Expression (ABFFE), AAP, CBLDF, and PMA, the Independent Book Publishers Association, in filing an *amicus curiae* brief that addresses the constitutionality of laws criminalizing the marketing of First Amendment protected materials in general. The brief focuses on materials published or sold by members of the *amici* groups. The Eleventh Circuit Court of Appeals heard oral arguments on October 30, 2007.

Finally, FTRF continues to participate in several important lawsuits implicating fundamental First Amendment rights. *American Civil Liberties Union of Florida v. Miami-Dade School Board* is a lawsuit challenging the Miami-Dade School Board's decision to remove from its classrooms and libraries all copies of the book *Vamos a Cuba* and its English-language counterpart, *A Visit to Cuba*. The lawsuit is still pending before the Eleventh Circuit Court of Appeals, which heard oral arguments on June 6, 2007. FTRF has filed an *amicus curiae* brief urging the appellate court to uphold a fine decision by the district court which, in a resounding defense of basic First Amendment principles, ordered the return of the books to school library shelves.

FTRF continues to monitor *Sarah Bradburn et al. v. North Central Regional Library District*, which challenges a library's restrictive use of Internet filters and its policy of refusing to honor adults' requests to disable temporarily the filter for research and reading. FTRF is not currently a participant in this lawsuit.

SECURING THE RIGHT TO KNOW

In 2001, President Bush signed Executive Order No. 13233, which subverts the Presidential Records Act of 1978 by imposing restrictions that threaten the timely release of presidential and vice-presidential records in accordance with the standards established by enactment of the Presidential Records Act. Professional historians, archivists, and public interest groups joined to file a lawsuit, *American Historical Association v. National Archives and Records Administration*, to challenge the legality of the executive order. FTRF has participated in the lawsuit as *amicus curiae*, supporting the public's right to access important government records.

After many years of litigation, Judge Kollar-Kotelly of the federal district court in Washington, D.C., issued an opinion on October 1 that enjoins the U.S. Archivist from relying on the order to delay the release of presidential records. It is her finding that the U.S. Archivist's reliance on the executive order to delay release of former presidents' records violates the Administrative Procedures Act. However, she also held that some aspects of the challenge were not ripe for review, and she did not overturn Executive Order No. 13233. Neither side appealed the decision.

LOOKING AHEAD

In the course of its deliberations, the Board identified several issues, including growing evidence of tacit or explicit censorship involving licensed databases, which, while still under the radar, might well develop into legal battles in the not-too-distant future. The Board approved creation of an ad hoc strategic policy group to begin the process of identifying potential landmines and developing positions and strategies to deal with them. Jim Neal agreed to serve as chair, and will report back to the Board at 2008 Annual Conference.

CONABLE SCHOLARSHIP

The FTRF Board at this meeting agreed to a tentative plan to use the money collected following Gordon Conable's untimely death to create a scholarship program. The Conable Scholarship will provide funds for a new librarian or library student who shows a particular interest in intellectual freedom to attend Annual Conference. Mentoring was an important value for Gordon, and the Board is pleased to be able to honor his memory in this way. If you would like to donate to the Conable Scholarship, please contact FTRF at frf@ala.org or (800) 545-2433 x4226.

FTRF'S 40TH ANNIVERSARY

In 2009, the Freedom to Read Foundation will mark the 40th Anniversary of its founding, and one of the happiest tasks before the FTRF Board at this Midwinter Meeting was to begin the process of planning a celebration (or a series of celebrations) for the 2009 Annual Conference in

Chicago. It was agreed that the event should serve both to mark how far we've come and what we've accomplished in the fight to defend basic First Amendment rights and to illuminate how far we still have to go in the ongoing struggle for intellectual freedom. I'm delighted to report that two of the most creative members of the FTRF Board—Burt Joseph and Bob Doyle—have agreed to co-chair an ad hoc committee to explore possibilities and develop a plan for the celebration.

ORGANIZATIONAL MEMBERSHIPS

Last year in Seattle, FTRF's then-president John W. Berry informed you of the Foundation's new organizational membership system. I'm happy to report that, due in large measure to the efforts of FTRF Treasurer Jim Neal, the Foundation now has more than 100 organizational members, including 45 academic libraries that agreed to provide support at the \$500 and \$1,000 levels. A list of these members can be found in FTRF's most recent newsletter.

The Board's next focus will be major public libraries—encouraging them to join FTRF by showing the vital importance of the Freedom to Read Foundation in protecting public libraries' interest in providing free access to information. We strongly encourage all ALA Councilors to promote FTRF organizational membership to their home institutions.

We encourage all of our colleagues and friends to become personal members of the Freedom to Read Foundation. Please send a check to:

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

You also can use a credit card to join the Foundation. Call (800) 545-2433, ext. 4226, or visit us online at www.ft rf.org to use our online donation form.

Respectfully submitted,

Judith Platt,
President, Freedom to Read Foundation