

# Freedom to Read Foundation

## REPORT TO COUNCIL

### 2016 Midwinter Meeting — Boston, Massachusetts

As President of the Freedom to Read Foundation, it is my privilege to report on the Foundation's activities since the 2015 Annual Conference:

#### LITIGATION

***Privacy and Surveillance:*** One of the ongoing priorities for the Freedom to Read Foundation is the preservation of reader privacy and the right of the library user to read and inquire free from any surveillance or unwanted interference by the government. In particular, FTRF wants to ensure that library users are not chilled in their right to receive information because they fear the government's warrantless surveillance of their communications will reveal the subject matter of their inquiries. Past history has taught us that individuals will avoid accessing controversial, unorthodox, or sensitive material they have a constitutional right to read if they believe the government is monitoring their reading habits.

To address this priority, FTRF recently joined two different *amicus curiae* briefs to challenge the government's bulk collection of phone metadata without a warrant and to support the right of libraries to challenge warrantless surveillance on behalf of their patrons.

The amicus brief filed in *United States v. Moalin* argues that the government should not be permitted to engage in warrantless searches and seizures of phone metadata because that metadata reveals information about an individual's expressive and associational activities that should be protected by both the First and Fourth Amendments of the Constitution. The underlying case arose as a criminal prosecution and involves the defendant's request for a new trial based on the government's failure to disclose that evidence used against the defendant was gathered through the National Security Agency's bulk phone metadata surveillance program without a warrant. The amicus brief signed by FTRF challenges existing Supreme Court precedent holding that individuals "voluntarily" provide such data to third parties like phone companies, thereby ending the user's Fourth Amendment expectation of privacy. The brief asserts that, given the realities of the digital age that require individuals to entrust their metadata and content to third party communications companies, this doctrine should be set aside and the government required to obtain a warrant whenever it seeks to access metadata that reveals information about a user's associations and expressive activities.

The amicus brief was prepared by the Brennan Center for Justice at New York University's School of Law. Joining FTRF on the amicus brief are the American Library Association, the Electronic Privacy Information Center, the National Association of Criminal Defense Lawyers, the Ninth Circuit Federal and Community Defenders and the Reporters Committee for Freedom of the Press. The case is currently pending before the Ninth Circuit Court of Appeals.

The second *amicus curiae* brief joined by FTRF asserts the importance of privacy to the unfettered exercise of First Amendment rights and argues that libraries, booksellers, and similar organizations can assert the rights of their users related to their privacy concerns associated with the government surveillance of users' reading records. The underlying lawsuit, *Wikimedia v. National Security Agency*, challenges the National Security Agency's practice of using "upstream surveillance" to intercept international communications as they travel across the internet's backbone and was filed by the ACLU on behalf of a number of legal, educational, and human rights organizations. The government argues that these organizations have no standing to challenge the NSA's surveillance; the amicus brief points out that individual users are likely to avoid challenging the law for fear that the content of their communications would be revealed. Consequently, libraries, booksellers, and similar organizations can assert their users' privacy rights on the grounds that such warrantless surveillance chills communications between users and the libraries, booksellers, and organizations that serve and represent them.

The amicus brief was written by the Electronic Frontier Foundation. Joining FTRF on the brief are the American Booksellers Association, the American Library Association, the Association of Research Libraries and The International Federation of Library Associations. On October 23, 2015 the district court dismissed the lawsuit on the grounds that the plaintiffs failed to provide factual evidence of how NSA actually was using its program to search and seize communications; it held that the plaintiffs lacked standing because the plaintiffs' alleged injury was speculative. The plaintiffs are currently considering an appeal to the Fourth Circuit Court of Appeals.

***Censorship:*** On July 7, 2015, the Ninth Circuit Court of Appeals issued the long-awaited decision in *Maya Arce, et al. v. Diane Douglas, et al* (formerly *Arce v. Huppenthal*). The lawsuit, filed by teachers and students in the Tucson Unified School District (TUSD) against the Arizona Superintendent of Public Instruction and other state officials, challenged the constitutionality of an Arizona statute prohibiting the use of class materials or books that encourage the overthrow of the government, "promote resentment toward a race or class of people," are "designed primarily for pupils of a particular ethnic group," or "advocate ethnic solidarity instead of the treatment of pupils as individuals." The plaintiffs filed the lawsuit after TUSD was forced to cease its Mexican-American Studies program and remove books from its classrooms. After the district court upheld the constitutionality of the statute, the plaintiffs appealed, asking the Ninth Circuit Court of Appeals to overturn the district court's decision.

At the request of the plaintiffs' legal counsel, FTRF's legal counsel authored an amicus curiae brief in support of the plaintiffs' First Amendment claims. The American Library Association, REFORMA, the Black Caucus of the ALA and the Asian/Pacific American Librarians Association all joined FTRF on the brief.

The Ninth Circuit issued a mixed opinion in the case, handing the plaintiffs both a defeat and a victory. It held that the district court's determination concerning the constitutionality of the statute

was correct, finding that, with the exception of the provision banning courses designed for students of a particular ethnic group, the statute, as written, was neither overbroad or vague in violation of the Constitution. However, it reversed the district court's grant of summary judgment for defendants on plaintiffs' equal protection claim and remanded that claim and the plaintiffs' First Amendment viewpoint discrimination claim to the district court for further proceedings. FTRF continues to monitor the lawsuit and is prepared to assist the plaintiffs as they pursue their claims before the district court.

I am extremely pleased to report that the federal district court in Arizona has entered a final decree in favor of FTRF and its fellow plaintiffs in *Antigone Books L.L.C., et al., v. Tom Horne*, our legal challenge to the Arizona statute that makes it a crime to publish, sell, loan or disclose images that include nudity without the depicted person's consent for each distribution. Although the statute had the laudable goal of preventing "revenge porn," the law, as written, threatened to make the dissemination of a large number of historic, artistic, educational and other newsworthy images a crime punishable by fines and imprisonment, placing librarians at risk of prosecution for distributing images such as the iconic photo of "Napalm Girl" fleeing from an attack on her village during the Vietnam war. The final decree resolves all claims in the lawsuit and permanently enjoins Arizona's state prosecutors from enforcing the law.

## **GLOBAL STRONG ENCRYPTION**

The Freedom to Read Foundation trustees have voted to sign on to a coalition letter endorsing strong encryption for networks, digital communications, and data and urging governments to refrain from any action that would compromise the security of encrypted networks, communications, and data. The letter, circulated by the digital rights and free expression organization Access Now, has been endorsed by many other organizations, including the American Library Association, the Center for Democracy and Technology, the Electronic Frontier Foundation, and PEN International. We are pleased to join the campaign to secure the Internet and preserve the right of free expression in the digital age.

## **DEVELOPING ISSUES**

Members of the Foundation's Developing Issues committee reported on a number of issues involving threats to free expression or civil liberties. Martin Garnar led a discussion on diversity and free speech issues on campus and Doug Archer explored the potential for challenges to religious materials in libraries arising from anti-Islam and anti-Muslim sentiment and from the mistaken belief that the separation of church and state bars any discussion of religion in publicly funded agencies. Ray James reviewed access and service to diverse populations, while Baxter Andrews provided information and web resources addressing privacy and national security. Em Claire Knowles concluded the report by leading a discussion about the European Union's "right to be forgotten" concept and its potential impact on access to information.

## **THE JUDITH F. KRUG MEMORIAL FUND**

The Judith F. Krug Memorial Fund, which was created by donations made by Judith's family, friends, colleagues, and admirers, supports projects and programs that assure that her passion to educate both librarians and the public about the First Amendment and the importance of defending the right to read and speak freely.

In 2015, the fund continued to support two major initiatives: a grants program that underwrites Banned Books Week activities in libraries, schools, and community institutions across the country and an education initiative intended to augment and improve intellectual freedom education in LIS programs.

For this year's Banned Books Week, the Krug Fund made grants to the Chapel Hill Public Library in North Carolina, the Kurt Vonnegut Memorial Library in Indianapolis, Indiana, the Virginia Beach Public Library in Virginia, SA Youth (an organization that works with at-risk youth) in San Antonio, Texas, and Remembering for the Future Community Holocaust Initiative in Neptune Beach, Florida. Their initiatives included a new series of Banned Book Week trading cards, development of a curriculum addressing banned books in schools, interactive displays, and a "lock-in" with banned books. Grant recipients' photos, videos, and written reports of their events will be available online at [www.ftrf.org/?Krug\\_BBW](http://www.ftrf.org/?Krug_BBW).

This past fall, Professor Emily Knox once again taught "Intellectual Freedom and Censorship," under the auspices the University of Illinois Graduate School of Library and Information Science (GSLIS) and the Krug Memorial Fund. The online, graduate-level class was well-received by students and we look forward to continuing our educational partnership with GSLIS. We thank Professor Knox and FTRF education consultant Joyce Hagen-McIntosh for their thoughtful and dedicated work towards fulfilling FTRF's goal of assuring the availability of intellectual freedom curricula and training for LIS students and professionals.

## **EXECUTIVE DIRECTOR JAMES LARUE**

At this meeting we welcomed our new Executive Director, James LaRue. The CEO of LaRue & Associates, Jamie has had an active career in writing, speaking and consulting prior to joining FTRF. He served as the director of the Douglas County Libraries in Colorado for many years and previously worked as the Library Services Director at the Greeley, CO Public Library. He has also held positions at the Lincoln Library in Illinois and Illinois State University. He has a Master's degree in Library and Information Science from the University of Illinois, Champaign-Urbana and a Bachelor's degree in Philosophy and English from Illinois State University.

While Jamie may be new to FTRF's and ALA's staff roster, he has a long history of professional engagement and involvement with ALA and other professional organizations. He has served as president of the Colorado Council for Library Development and the Colorado Library Association and has most recently been active on ALA's Digital Content Working Group. He is a member of the Library Leadership and Management Association (LLAMA) and Public Library Association (PLA), and the ALA Intellectual Freedom Round Table. He was named Colorado Librarian of the Year in 1998 and received the Julia J. Boucher Award for Intellectual Freedom from the Colorado

Library Association in 2007. In 2004, he was awarded the National Council of Teachers of English/Support for the Learning and Teaching of English Intellectual Freedom Award. Among his publications is *The New Inquisition: Understanding and Managing Intellectual Freedom Challenges* (2007).

## **FTRF MEMBERSHIP**

Your membership in the Freedom to Read Foundation is needed to sustain and grow FTRF's unique role as the defender of First Amendment rights in the library and in the wider world. I invite you to join me in supporting FTRF as a personal member, and ask that you please consider inviting your organization or your institution to join FTRF as an organizational member. Please send a check (\$35.00+ for personal members, \$100.00+ for organizations, and \$10.00+ for students) to:

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

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

Respectfully submitted,

Julius C. Jefferson, Jr.  
President, Freedom to Read Foundation