

Monday, April 2, 2007

**"Bong Hits 4 Jesus": Strange bedfellows justifiably rally behind the First Amendment.**

The First Amendment and the rest of the Bill of Rights. (From the public domain.) Around six years ago, I learned about the Foundation for Individual Rights in Education. It is an indispensable and phenomenal organization that stands up for students and professors against such unjust academic administrative oppression of expression as the ultimately reversed 1989 probation of a student at Tufts (my undergrad alma mater) for distributing an offensive, abhorrent, and sophomoric t-shirt with fifteen alleged reasons why beer was better than women at Tufts. At the time, I immediately wrote Tufts' dean of student affairs about my revulsion over this curtailment of this student's free expression rights, only to receive a trite -- but polite (so as to avoid being offensive to me, of course, where a student had been disciplined for being offensive) -- reply asserting that reasonable time, place and manner restrictions on expression were acceptable, and hoping that I still was happy I attended Tufts (which I was and still am, it having been a critical mind, humor and experience-expanding watershed where students and professors of all sorts of viewpoint stripes could honestly discuss and debate their views (or just hike the White Mountains without discussing their political views) and then drink beer together (or do both at the same time), which is why I was so saddened that this beer t-shirt discipline had ever taken place). I was delighted to later learn that the FIRE was on the same page with me on this t-shirt matter. I proudly answered the FIRE's call in representing past American University student Ben Wetmore -- a political conservative (as was my law partner Jay Marks in many ways when he attended the same campus as an undergrad and law student) who was wrongfully physically manhandled for videotaping Tipper Gore's on-campus speech and later hauled before a kangaroo campus disciplinary Star Chamber court. Although I did not share most of Mr. Wetmore's politics, I strongly believe he was on the side of the angels in his disciplinary hearing, and certainly had my own antipathy -- shared with Frank Zappa -- against Tipper Gore and company for trying to censor music (despite her denials of censorship, which she politely conveyed to me in response to my 1987 letter of protest to her). A few months before hooking me up with Ben Wetmore, the FIRE linked me with then-professor Sami Al-Arian to advise him on his Constitutional claims after he was suspended from the University of South Florida, after the university experienced substantial heat following Mr. Al-Arian's appearance on the O'Reilly Factor. Once again, my views about Mr. Al-Arian's politics were irrelevant to his unjust suspension and subsequent firing over his appearance on the O'Reilly Factor. (As an aside, a few years later, going opposite O'Reilly, I stood up for Mr. Al-Arian's criminal defense rights against a retrial after a mistrial on most counts against him). I soon recognized that the FIRE probably received as much -- or more -- financial and other support from political and religious conservatives than anybody else, because they so often were the targets of campus censorship. The only thing that kept me from losing my breakfast over finally being in the same room with Ed "porn censor" Meese as he talked in favor of the FIRE's agenda at the National Press Club a few years ago was that Meese no longer had any official political power, and that he was counter-balanced by the ACLU's Nadine Strossen, who confirmed that she and Meese were able to find common ground in support of the FIRE as fellow board members of the organization. Flash forward to 2002, when high school student Joseph Frederick unfurled a "Bong Hits 4 Jesus" banner on a public sidewalk as the Olympic torch approached during its Juneau, Alaska, leg. Instead of the school's respecting Mr. Frederick's right to make such a First-Amendment-protected statement (off campus at that), the school principal Deborah Morse insisted he and his associates lower the banner. Mr. Frederick refused and rightly asserted his First Amendment free expression rights. Ms. Morse grabbed and crumpled the banner and suspended Mr. Frederick from school for ten days. Mr. Frederick sued principal Morse for money damages for violating his First Amendment rights, and the United States Court of Appeals for the Ninth Circuit upheld his right to do so. On March 19, 2007, the United States Supreme Court heard this "Bong Hits 4 Jesus" case, formally known as *Morse v. Frederick*, No. 06-278. The oral argument transcript is here. The briefs are here for the principal parties and the many amicus parties. Check back here for any future release of the audiotaped oral argument. (The Supreme Court forbids videotaped arguments). Notably and understandably, the Christian Legal Society and the ordinarily conservative Rutherford Institute and American Center for Law and Justice filed amicus briefs supporting student Frederick's side, because an adverse ruling against Mr. Frederick will harm the future right of students to exercise expression supporting views near and dear to the latter organizations' hearts. At first blush, Mr. Frederick and his counsel, the American Civil Liberties Union, may seem like strange bedfellows with such organizations, but they all have recognized that robust First Amendment protections for students and everyone else is critical to the ACLU's broad First Amendment protection interests and the interests of the other organizations listed here against government officials not favorably disposed to their agendas. Speaking of Star Chambers (or Starr Chambers in this instance), former Bush Solicitor General Kenneth Starr argued before the Supreme Court against Mr. Frederick, making an effort to exclude student drug advocacy from First Amendment protection. So much for teaching students about everyone's right to seek legislative changes to and judicial limitations on current laws. By the way, the day after the "Bong Hits for Jesus" case was heard, Slate posted this article about substantial official religious support for legalizing medical marijuana. In other words, although his using Jesus's name on his banner likely offended many people, Mr. Frederick was addressing a

serious issue, in that the federal and state governments should stop banning marijuana and should stop politicizing the use of marijuana as medicine. Jon Katz.Â ADDENDUM: Last month, the principal at Wilton (Connecticut)Â High School, which is but a few miles from where I grew up and attended public school, cancelled a student play about Iraq entitled "Voices in Conflict." Hopefully the Supreme Court's Morse v. Frederick decision will minimize such autocratic and unconstitutional censorship authority in public schools.

Posted by Jon Katz in First Amendment at 02:00