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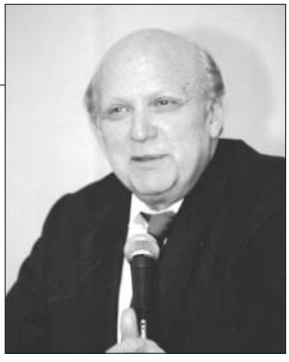
A QUARTERLY MESSAGE ON LIBERTY

Not under My First Amendment

Floyd Abrams

Though I consider myself more a political liberal than a free-marketeer, I am a great admirer of the Cato Institute for its consistent positions in favor of freedom and especially of freedom of speech. Many organizations to which I may be closer politically do not show such consistency. Too often, both sides of the political debate show a willingness to protect only the speech they like because they want to see their own opinions protected.

The first time I ever touched the issue of campaign finance was in 1972 on a matter in which I represented the *New York Times*. It arose under the Campaign Finance Act, which has been changed many times throughout the years to further tighten the limits on campaign spending. In 1972 campaign finance law said that if a corporation or union took out a newspaper ad that was favorable to a candidate for federal office, the money spent on the ad would count as a contribution to that candidate. Even if there was no coordination between the newspaper and the campaign at all, the newspaper had to keep track of the cost of the ad and get a cer-



***Floyd Abrams, a partner at the law firm of Cahill Gordon & Reindel in New York, is one of the nation's leading First Amendment lawyers. This is an excerpt from remarks given at a May 9 Cato Forum for his new book,* Speaking Freely: Trials of the First Amendment.**

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tification from the candidate saying that the money attributed to the ad did not put the candidate over the federal campaign spending limit.

The American Civil Liberties Union had submitted an ad in September of 1972 to the *New York Times* praising the members of Congress who had opposed President Nixon's school busing proposals. They had what they called an honor roll, and they listed about 120 members of Congress. To some extent, this was prearranged as a legal test. But, nonetheless, the *Times* took the position that unless the ACLU obtained certifications from the candidates, it would not print the ad. The ACLU said that it would not obtain the certifications, and the ACLU then sued the Federal Election Commission. The *Times* submitted a brief to the court in support of the ACLU's position, and they hired me as their attorney.

In that case, we were supported completely by more liberal people in our community. The ad was anti-Nixon. The plaintiffs were the *Times* and the ACLU. It was obvious to people whose political views I may tend to share that you couldn't have a statute that effectively cut off an entity from putting an ad in a newspaper about people in power, good or bad, unless they obtained some sort of certification from the people that they were talking about.

We argued the case here in 1972. I was pleased with the argument we had made, and only hours later I received a call from the law clerk of a judge on the circuit court asking what sort of order the *New York Times* needed to publish the ad. We got the order and later a ruling that the statute was unconstitutional.

"There must be some right under the First Amendment to gather the news."

I thought about that case a lot while I was representing Republican Sen. Mitch McConnell in his 2003 challenge to the McCain-Feingold campaign finance reform law. In *McConnell v. Federal Election Commission*, our allies were almost all on the right politically. Although there was some genuine libertarian support, including the ACLU, no other liberal organizations would join our very large coalition. In that world, campaign finance reform is now thought to be a good that good people should not oppose. That the very advertisement at issue in the 1972 case

would have been illegal under McCain-Feingold because it was published within 60 days of a federal election and contained the names of candidates seeking election did not lead any liberal organizations to support us.

During the 2004 presidential campaign, I received legal queries from both sides of the political spectrum. The distributor of Michael Moore's *Fahrenheit 9/11* called me wanting to know what limitations McCain-Feingold placed on television advertising for that movie. The ad was very hostile to President Bush, showing him with a golf club as he strutted about issuing warnings to terrorists. McCain-Feingold says that within 60 days of a federal election, no corporation or union can spend money for an ad that mentions the name of a candidate running for federal office. So I told the distributor that it could not show an ad like that in September or October because that was 60 days before the 2004 election. I also said that it could not show the ad during the 30 days before the Republican Convention because the statute also bars any such ads in that time period. Finally, it could not show the ad within 30 days of any state primary, even though there was no real Republican primary that year.

My own publisher later called me because he was publishing a book about John Kerry, and his name was in the title of the book and his picture was on the cover. They wanted to know the impact of McCain-Feingold on the promotion of that book. The answer was precisely the same, with a few different dates: no radio or television advertising within the last 60 days of the campaign, none within 30 days of the Democratic Convention, none within 30 days in any state where the Democrats had a primary scheduled. All of those restrictions were in place because campaign finance reform legislation prohibited mentioning Kerry's name, even as part of a book title, during the preelection period.

Giving that advice pained me, really angered me. Indeed, my sometime client at the publisher asked me, can that be constitutional? And I said, "Not under my First Amendment."

I try not to sound like a nag, but I become increasingly concerned that each new reform to campaign finance is clearly an impairment of and a burden on the First Amendment.

Sometimes we seem to end up with two First Amendments. The liberal-supported First Amendment tends to be suspicious of censorship of books and other media and very protective of the rights of people who have needed the First Amendment because their views—often left-leaning political views—were histori-

cally subject to prosecutions for speech. *Brooklyn Museum of Art v. Rudolph Giuliani* was an example of a classic First Amendment case that the left is likely to support. In 1999 Mayor Rudy Giuliani took the position that he could remove a painting from a private museum in New York City or eliminate city funding for the museum because he disapproved of the painting. We won that case in part because the court ruled that his decision to cut off funding when the museum would not cave in to him was retribution for keeping up a picture that he found unacceptable and blasphemous.

More recently, I have found that people and organizations on the political right have found their own causes that lead them to be protective of the First Amendment. Conservatives had never seemed to care too much about editorial freedom until the resurgence of the Fairness Doctrine. Liberals in the 1970s and 1980s pushed for broadcast regulation out of fear of the large companies that run broadcast media and out of a desire that more views be expressed. But people on the right got the idea that Rush Limbaugh would be at risk if the Fairness Doctrine were back in vogue. Even at its worst, the Fairness Doctrine never required person-for-person or issue-for-issue answers at the same time and to the same degree. It did require that if you took a position on a controversial issue of public importance you had to give some time to an opponent. But concern about the freedom of broadcasters to express conservative ideas led them to articulate strong and, from my point of view, persuasive and correct defenses of the First Amendment.

A number of recent Supreme Court cases have stemmed from protests near abortion clinics. Justice Scalia, Justice Thomas, and other jurists on the political, social, and cultural right have been much more protective of such speech than other members of the Court, arguing that while you cannot block someone from going in for a medical procedure that the Supreme Court has said is protected by the Bill of Rights, you must be allowed to protest, and protest loudly, near an abortion clinic—even in a way that would be discomforting for people who choose to go in. That sort of free speech is something that, ordinarily, we would all agree the First Amendment allows.

And then in campaign finance, again, we have had the sort of varying reactions that I have described. When one looks at the Supreme Court and tries to make a judgment about which jurists are more likely than not to be protective of the First Amendment, only Justice Kennedy is consistently supportive of the First

Amendment in almost all circumstances. I don't mean he always votes the way that I and lawyers who take similar positions might choose, but he is always sympathetic to and appreciative of the strengths of First Amendment arguments, and I think he deserves credit for that.

As I look back on my career, I see certain classic First Amendment cases. By classic, I don't mean that they are necessarily great cases, but classic in that they are in the tradition of serious, important First Amendment challenges. My earliest First Amendment work was protecting journalists' confidential sources in the late 1960s. The 1968 Democratic Convention in Chicago spurred a number of criminal and civil cases in which subpoenas were served on the national press. Before the 1960s, fewer subpoenas were served on journalists because there was a shared sense that journalists were not part of the political process. In the late 1960s and early 1970s, however, prosecutors and defense lawyers started to get the idea that journalists were a good place to go for information. Journalists always seemed to be around when newsworthy matters were occurring, and those newsworthy matters frequently led to litigation.

As a young lawyer, I became involved in the 1972 case that became known as *Branzburg v. Hayes*, which asked whether journalists could conceal the identities of sources to whom they had promised confidentiality. Paul Branzburg had written an article for the *Louisville Courier-Journal* designed to show how easy it was to make hashish in Louisville. In order to get access to the areas where the drug was made, he had to agree not to disclose whom he saw making it. The case ended in an enigmatic five to four decision. The press lost. However, Justice Lewis Powell wrote a separate concurring opinion that seemed to say that there should be some sort of balancing test in which the interests of the First Amendment and the interests of law enforcement were considered by the Court. Justice Potter Stewart later gave a speech saying that he felt the opinion was four and a half to four and a half, since he couldn't tell which side Justice Powell was on. Justice Powell's opinion in the *Branzburg* case is no clearer today than it was in 1972.

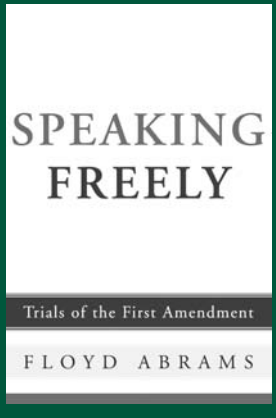
I currently represent Judith Miller and Matthew Cooper, two journalists who have been subpoenaed to testify before a grand jury about the leak of the identity of CIA agent Valerie Plame.

The First Amendment interest here is a step removed from one in which speech itself is banned. The argument is that there must be some right under the First Amendment to gather the news, and that the right would be unduly burdened, impaired, and limited if journalists could not make promises of confidentiality and keep those promises. When I started to practice law in this area, there was no case law saying there was even a right to gather news.

Run of the mill libel and privacy cases are a different sort of case. Cases in the libel area have all been transformed as a result of the Supreme Court decision in *New York Times v. Sullivan* in 1964. Even if the press says something about a public figure or public official that turns out not to be true, it is still protected as long as the speaker said it in good faith and did not have a high level of awareness of its probable falsity. That doctrine, "actual malice," is quite literally unknown in the rest of the world.

Looking at the cases I chose to describe in my book—some of which I picked because they were important cases and some because I had especially enjoyed them and wanted to talk about them—I was struck by the thought that we would have lost every single one of those cases in England. The *Pentagon Papers* case, the *Nebraska Press Association* case dealing with prior restraints on the press about trials and the pretrial area, all the libel cases that I looked at—all would have gone the other way in England.

The *Brooklyn Museum* case was the only one that was close. English friends of mine told me that even English judges might not have allowed Mayor Giuliani to do what he was doing, not because of any English equivalent of the First Amendment, but just because that sort of thing is not done in the old country. Yet, despite setbacks throughout the years, including the battle against campaign finance reform that we're still fighting, we're lucky in this country to have a First Amendment that usually works.



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