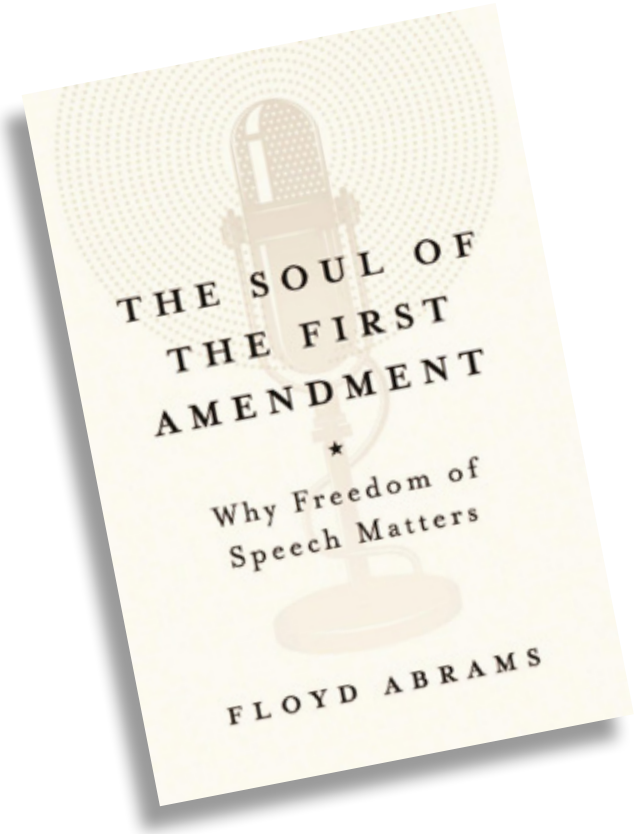
Book Review: The Soul of the First Amendment

By James E. Wildes



Free speech in America is being tested almost daily. Floyd Abrams's new book, *The Soul of the First Amendment,* offers timely ruminations on the meaning of the First Amendment and its application in current affairs. Abrams, a First Amendment litigator, author, and lecturer, brings his experience and insights to the discussion. The book is not a scholarly exposition or a survey of First Amendment law; rather, it is better described as a series of essays on topics ranging from the ratification of the Constitution as originally drafted, absent the First Amendment or any other part of the Bill of Rights, to observations concerning Edward Snowden, Julian Assange, and the response by members of the journalist community.

Abrams begins by noting that the delegates to the Constitutional Convention did not believe that a bill of rights was necessary. Critics of the new Constitution, including Thomas Jefferson, questioned the lack of a bill of rights to circumscribe the power of the national government. James Madison, who originally saw no need for a bill of rights, came around and created the first draft of a bill. Abrams explains that the introductory words to the First Amendment, "Congress shall make no law," has led the Supreme Court to rule that the First Amendment prohibited governmental, not private, suppression of speech. Abrams is firm in his opinion that the central purpose of the First Amendment is to impose limits on governmental authority over religion, speech, and press. In support of his argument, Abrams cites to several Supreme Court decisions that have protected loathsome speech: *Synder v. Phelps*[1] shielded church members from tort liability for demonstrations denouncing dead American soldiers on the days of their funerals; *United States v. Stevens*[2] struck down an act of Congress that criminalized the filming of animals being tortured and killed; and *Ashcroft v. Free Speech Coalition*[3] found unconstitutional a federal statute banning virtual child pornography on the internet.

Abrams takes issue with liberal jurists, in particular, Justice Stephen Breyer, who in his thoughtful book, *Active Liberty,* draws a distinction between what he describes as "active liberty" and "civil liberty." Active liberty involves a citizen's active participation in government, and includes the right to deliberate in the public place, the right to vote for war or peace, and the right to make treaties and enact laws. On the other hand, civil liberty involves freedom from government and the right of a citizen to pursue his or her own interests free of improper government interference. Justice Breyer maintains that the First Amendment should be understood to protect active liberty and to facilitate a conversation among ordinary citizens that will encourage their informed participation in the electoral process. Abrams disagrees with Justice Breyer's argument. Although Abrams acknowledges that a benefit of the First Amendment is that it generally results in a better-informed public and a more representative government, he believes that the First Amendment, first and foremost, seeks to safeguard against government intrusion into freedom of religion, speech, and press.

One of the more interesting chapters in the book compares free speech laws in other countries to the protections offered by the First Amendment. For instance, the Supreme Court of Canada rejected a free speech defense of a defendant who had been convicted of hate speech. The defendant, a religious zealot, had placed flyers containing hateful speech in mailboxes after he learned that high schools in Sas-

katchewan were about to include homosexuality as a subject. Citing *Synder v. Phelps,* Abrams states that American law could not be more different. In another example, a person in England was convicted for carrying a poster that showed the World Trade Center on fire with the caption, "Islam out of Britain—Protect the British People." The conviction was upheld by the European Court of Human Rights, which found that the poster constituted a public attack on all Muslims in the United Kingdom. Abrams contrasts the British case with assertions made by Donald Trump about people of Mexican descent and about banning all Muslims from entering the United States for a period of time. Abrams observes that much criticism was directed at the statements of Donald Trump, but no one suggested that such statements could have formed the basis of criminal liability in America. Germany, as well as other nations, have adopted laws criminalizing Holocaust denial. Abrams is measured in his discussion of these laws, recognizing that some nations have responded to its past calamities by adopting limitations on hateful speech. However, in Abrams's opinion the United States Constitution, which imposes limitations on this type of legislation, has served this country well.

With respect to libel law, Abrams explains that England has become a legal paradise for plaintiffs bringing libel suits with success rates of over 90 percent. In England, defamatory statements are presumed false and the defendant must affirmatively prove their truth. Of interest is that Cambridge University Press declined to publish a book accusing Vladimir Putin of having connections to gangsters. Cambridge explained that it could not risk a libel suit. The book was never published in England; it was published in the United States and no litigation ensued. Abrams reasons that there would be little concern of a libel suit in the United States because the Supreme Court in *New York Times Company v. Sullivan*[4] held that in order for a public official to prevail he or she must prove by clear and convincing proof that the false statement was made with actual knowledge of falsity or actual malice. According to Abrams, the gulf between English and American defamation law is so large that as a result of a law signed by President Barack Obama in 2010, English libel judgments are generally not enforceable in the United States. At the end of the chapter, Abrams recounts troubling examples of how free speech at times has been tested throughout American history: the Sedition Act of 1798 made criminal much of the criticism directed at President John Adams and other government officials; the jailing of socialists and anarchists by the Wilson administration for their speech during World War I; and the victims of the House Un-American Activities Committee under Senator Joseph McCarthy.

Another difference between American and European free speech jurisprudence highlighted by Abrams is the legally enforceable "right to be forgotten" adopted in the European Union. Abrams explains that the source of the right was a 2014 decision of the European Court of Justice that determined that Google and other search engines must remove links to content initially published in newspapers or elsewhere that discloses information that is later determined to be inadequate or irrelevant. Truth and accuracy are not determinative factors in deciding what needs to be removed. More than 95 percent of the requests for removal are from ordinary members of the public, as opposed to high profile individuals, such as politicians or criminals. Google, according to Abrams, considers the public interest in its search results in responding to the requests for removal; if for instance, the matter related to criminal convictions, matters of financial dishonesty, professional negligence, or the conduct of public officials. It is Abrams' view that Americans can feel confident that no American court could issue an order similar to the European "right to be forgotten," which would be consistent with the First Amendment.

Abrams defends the decision of *Citizens United v. Federal Election Commission,*[5] a case that he has great familiarity with because he represented Senator Mitch McConnell in the litigation. He reminds the reader that *Buckley v. Valeo*[6] held that individuals can speak in support of candidates for public office and they can also spend whatever amounts they decide to buy the advertisements that contain that speech. According to Abrams, *Citizens United* extended the same right to corporations. Abrams, in response to the warnings and predictions that *Citizens United* would result in cash flowing into elections by corporations, refers to the fact that, as of February 2016, of the $87 million or $1 million-plus contributors to super PACS only eight were from corporations. Abrams further adds that *Citizens United* upheld as constitutional the disclosure requirements of campaign finance laws. Indeed, Abrams seems to advocate for greater disclosure about the amount of contributions and the identity of contributors. Abrams also notes that only a small percentage of money spent on federal races came from secret or "dark money."

Abrams observes that having broad First Amendment rights does not answer the important questions of when and what to publish. In what became known as the *Pentagon Papers Cases,* the majority of the Supreme Court in *New York Times v. United States*[7] found that prior restraints could be issued under only extraordinary circumstances and, accordingly, affirmed the refusal of the lower courts to enjoin *The New York Times* and *The Washington Post* from publishing classified information showing that the United States government had engaged in widespread public deception about the nations involvement in the Vietnam war. Abrams recalls that as an attorney for *The New York Times* he was criticized for being unpatriotic. He continues the discussion by offering his views on Julian Assange and Edward Snowden. Assange defends publishing classified information on WikiLeaks; specifically, he contends that his job is to pass the "whistleblowers" message onto the public and not to inject his own beliefs. Abrams finds Assange's defense unconvincing since it does not consider the impact of the disclosed information, including the identities and locations of informants on the Taliban. WikiLeaks has additionally, without compelling justification, disclosed personal identifying information of Democratic Party donors. Snowden, in Abrams' opinion, deserves credit for exposing the fact that the government engaged in

surveillance of Americans. However, other Snowden revelations may have also compromised critical foreign intelligence collections sources. Abrams notes that the editors of *The New York Times* made decisions to publish some portions of the Pentagon Papers, but also made decisions not to publish other documents due to their sensitive nature.

Abrams explains in the beginning of his book that the soul of the First Amendment is freedom of speech. If a book is measured by whether the author accomplished what the author attempted to do, then Abrams succeeds. Abrams raises important freedom of speech questions at the beginning of his book and throughout the book he explores the issues through his analytic lens. A reader who is only generally familiar with the First Amendment will broaden his or her knowledge of free speech. A reader who is informed about the First Amendment is likely to come away with a deeper understanding of free speech. To his credit, Abrams does not pretend that he knows all of the answers. He states that the American press has significant latitude in deciding what to publish. However, as Abrams stresses, the First Amendment does not answer the question of what should be printed. Abrams importantly acknowledges the limits of the written words of a constitution. Indeed, continued respect by the American public of the First Amendment, as with all constitutions or laws, will depend on whether it is deemed a core value to Americans. Judge Learned Hand in his often anthologized speech, *The Spirit of Liberty,* captured the essence of the soul of any law that endures.

> I often wonder whether we do not rest our hopes too much on constitutions, upon laws, upon courts. These are false hopes; believe me, these are false hopes. Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it....While it lies there it needs no constitution, no law, no court to save it.[8]

Abrams is an important voice that should be listened to as the limits of free speech continue to be debated. **CL**

James E. Wildes has been a litigator for more than 29 years and has served as an arbitrator and an attorney trial referee of the superior Court since 2003. He has also been an instructor/facilitator for courses on advanced direct and cross-examination of experts and on advanced deposition techniques. Attorney Wildes is a former editor-in-chief and managing editor of the Connecticut Bar Journal.

Notes

1. 562 U.S. 443 (2011).
2. 559 U.S. 460 (2010).
3. 535 U.S. 234 (2002).
4. 376 U.S. 254, 276 (1964).
5. 558 U.S. 310 (2010).
6. 424 U.S. 936 (1976).
7. 403 U.S. 713 (1971).
8. Diane Ravitch, The American Reader, 287-88