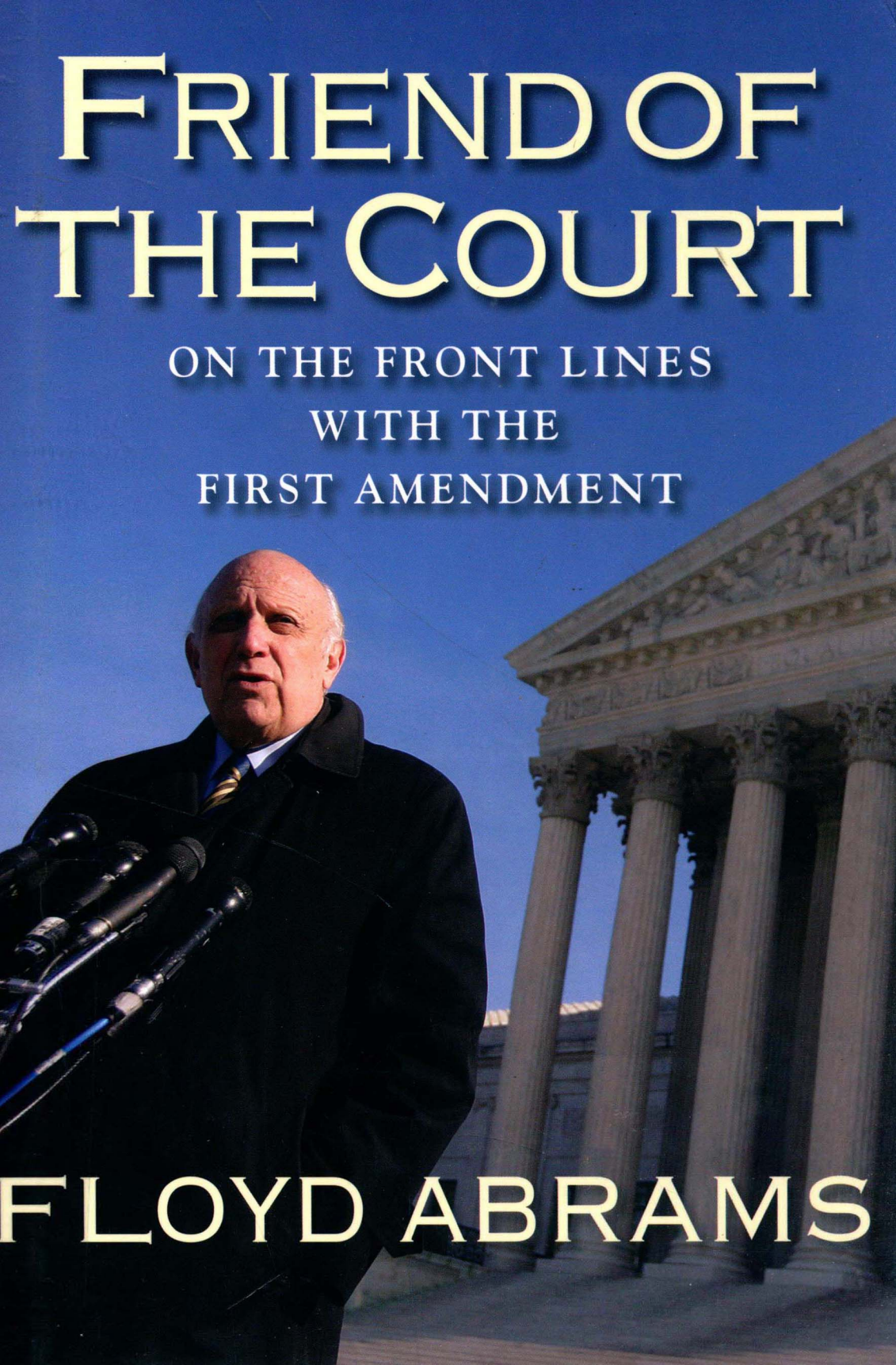
# FRIEND OF THE COURT

## ON THE FRONT LINES WITH THE FIRST AMENDMENT



FLOYD ABRAMS

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## *On the Front Lines with the First Amendment*



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*Friend of the Court*

*For Robert E. Cushman and Alexander M. Bickel, my teachers*

The very purpose of a Bill of Rights is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us.

—Justice Robert H. Jackson

# Acknowledgments

This book would not have been written but for an e-mail I received from one of the nation's leading First Amendment scholars, Professor Ronald Collins. In the course of his drafting of *Nuanced Absolutism: Floyd Abrams and the First Amendment* (Carolina Academic Press, 2012), an analysis of my views about the First Amendment, Professor Collins left an e-mail on my computer. He had, he wrote, "a great idea." I called him and learned the idea. It was that I should offer a book of my own, one that would contain a potpourri of my published and unpublished speeches, public debates, testimony, reviews, letters, and the like about the First Amendment. Readers will decide for themselves whether the idea was worth following up on, but I did so and this book is the result. I am most appreciative to Professor Collins not only for the concept of the book but for his continuing encouragement.

Many, although not all, of the materials in the book first appeared in somewhat different form in other publications, and I am grateful to them for permission to reprint them here. Newspapers include the *New York Times, Wall Street Journal, Washington Post, Los Angeles Times,* and *New York Law Journal.* Law reviews include the *Yale Law Journal Online, Harvard Law Review,* and *Wake Forest Journal of Law and Policy,* and magazines include the *Columbia Journalism Review, Nation, New York Review of Books,* and *Index on Censorship.* I appreciate Richard Heffner, the creator and interrogator, par excellence, of the *Open Mind,* the nation's longest-running and always intellectually

enlightening televised interview program, for permission to publish transcripts of two of my appearances. I appreciate the willingness of the Media Institute to permit me to publish an article I published in their "Speaking Freely" series of views. And I would like to thank Cambridge University Press for permitting me to reprint portions of an essay I wrote that was published in *The Content and Context of Hate Speech* (Michael Here and Peter Molnar, eds., 2012).

I appreciate the work done by my research assistant Lindsey Davis. I thank Marcy Lovitch and Judy Rhodes for much of the typing, Caren Biberman and her staff in the library at Cahill Gordon & Reindel LLP for their research assistance, and my inestimable assistant Denise O'Neill for overseeing my life at Cahill and shielding me from much of the turmoil of day-to-day life. I thank Karen Gantz, my agent, for her dedicated efforts on my behalf and her unflagging encouragement to write this book.

None of this, of course, would have been possible without the sufferance of my partners and generations of associates at Cahill Gordon & Reindel LLP who have been subjected to these sometimes changing views over the last four decades or so. And nothing at all would have been possible without the counsel, support, and love of my wife, Efrat, my children, Dan and Ronnie, and their stunning brood, Dylan, Teddy, Finn, and Everett.

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# Contents

# Introduction

Over half a century ago, when I was an undergraduate at Cornell University, I headed the school's debating team. One weekend we traveled to Montreal to participate in a tournament against a number of Canadian teams. When the tournament ended and we had our final dinner together, I rose to raise a glass and offer a toast, a bit uneasily, "to the Queen." The leader of the Canadian team responded without a pause: "To the American Constitution," he said, "with all its Amendments. Especially the First."

I think often about that toast. Did our Canadian colleague consider toasting then-President Dwight Eisenhower? Did he know, as Charles Miller would later write, that "[n]o other nation possesses a written constitution (still in use) as old as America and no other nation worships its constitution with such reverence"?[1] Or, like so many non-Americans, did he so admire the American Constitution and its crown jewel First Amendment that on the spot he came up with the toast? Whatever thoughts he had, his choice was sublime. To citizens of what other nation would one toast not a president, prime minister, or queen but an amendment to a then-167-year-old document?

Years later a deputy director of the CIA observed to a congressional committee that the First Amendment was, after all, "only an amendment."[2] Jefferson knew better. The primary author of the *Federalist Papers*, Alexander Hamilton, had opposed the inclusion of a Bill of Rights. "Why," he wrote in Federalist No. 84, "should it be said that the liberty of the press shall not be restrained when no power is given by which restrictions may be imposed?"[3] And "[w]hat is the

liberty of the press? Who can give it any definition which would not leave the utmost latitude for evasion?"[4] But Jefferson, then serving as the American minister to France, was adamant. A constitution, he wrote, must contain "a bill of rights providing clearly and without the aid of sophisms for freedom of religion, freedom of the press," and the like.[5]

Jefferson would come to denounce the behavior of the press, writing to James Monroe in 1816 about his "forty years of experience of the wretched guess-work of newspapers."[6] He once suggested that newspapers should be divided into four parts: "truths," "probabilities," "possibilities," and "lies."[7] The first, he said, would "be very short." But for all his irritation, often justified and not always voiced with such bemusement, he never doubted the essentiality of adopting a First Amendment that would protect freedom of speech and of the press in sweepingly broad language.

This book is about what to make of those protections, particularly as they relate to the press. Most First Amendment law relating to free speech is of recent vintage, the product of cases decided within the last half century. During that time period I have devoted a good deal of my life trying to persuade overwrought and often inflamed public officials, judges, juries, and the public generally to celebrate and not constrict the unique level of freedom of expression afforded in this country. In the widest variety of forums—in the courts, before Congress, in articles and speeches delivered around the nation—I have urged that we read the First Amendment broadly, sometimes nearly absolutely so. I have criticized presidents for executive orders they have entered, Congress for adopting (or not adopting) legislation, and judges in this country and abroad for entering court orders limiting what could be printed, broadcast, or displayed or punishing those who did so. Occasionally, as well, I have exercised my own First Amendment right to criticize journalists and others for what I viewed as their reckless behavior and for their failure to acknowledge or respect the rights of others. A number of the speeches and articles that follow contain such criticism. This book reflects my efforts, in court and out, to walk on both those paths, defending the First Amendment while sometimes criticizing those I thought were misusing it. The reader may decide if I did so without losing my way.

This book is not one of legal scholarship. Thoughtful and often comprehensive academic studies about each of the topics discussed here have been written by scholars. But, with due respect to their work, the First Amendment is too important to be left to them alone.

The world of law, including First Amendment law, begins with a client with a problem and a lawyer who represents that client. Given my years of counseling about and litigating First Amendment issues, I thought a serious contribution to understanding the First Amendment could be offered by someone who actually practices in the area, appears before judges and Congress, and publicly debates issues relating to freedom of expression.

The audience that finds this book of interest may include scholars but not be limited to them. The articles, speeches, and debates reprinted here, with minimal changes, were directed originally at the public at large. The briefs and oral arguments that are quoted were aimed at judges. The testimony was drafted in the hope of persuading legislators to support one or another piece of proposed legislation. While I have tried to be fair in my presentations, they are all, in one way or another, a form of public advocacy, usually about issues then requiring some sort of resolution. In choosing pieces for inclusion, I have limited myself to topics that remain of ongoing import.

## Three Propositions

Some years ago, I accompanied a group of journalists to speak with McGeorge Bundy, then the president of the Ford Foundation. Introducing himself to the group, he observed that he had long been struck by the fact that the worst thing one could say about a journalist was that he or she was too academic, while the worst thing one could say about a scholar was that he or she was too journalistic. I've often thought that litigating lawyers and legal scholars tend to view each other with similar suspicion—the former viewing the latter as too unworldly, ideologically fixated, and "academic," the latter thinking that litigators are too shallow, single-dimensional, and unreflective.

At some risk, then, I begin with three observations that I often urge on young litigators who seek to represent clients in First Amendment cases. The first is that *the First Amendment is not left or right, liberal or conservative.*

This may sound obvious, but it is far from that. There was a time, as an article set forth in Chapter 10 entitled "Look Who's Trashing the First Amendment?" that I wrote for the *Columbia Journalism Review* details, when the First Amendment was viewed almost exclusively as providing protection for those on the left. As Yale law professor Jack Balkin observed, this was true whether speech was that of "French émigrés and Republicans in the 1790s, abolitionists in the 1840s, pacifists in the 1910s, organized labor in the 1920s and 1930s, or

civil rights protesters in the 1950s and 1960s." But in the years that followed, particularly toward the end of the twentieth century, conservatives increasingly sought the protection of the First Amendment as well. When they wanted to protest near abortion centers, to say things on campus that "hate speech" regulations banned, or to spend corporate money to support candidates of their choosing, conservatives made First Amendment–rooted arguments supported by the language of liberal jurists of the past. And conservative Supreme Court jurists—Justice Anthony Kennedy, in particular—drafted impassioned First Amendment opinions and dissents. The days are past in which Circuit Judge Alex Kozinski could teasingly observe that "liberals don't much like commercial speech because it's commercial; conservatives mistrust it because it's speech."[8]

One reason that it is often difficult to predict, on a simple left-right basis, which ideological side will favor or disfavor a particular First Amendment argument is that the sides shift as does perceived political, ideological, or personal gain. As one of my writings in Chapter 10 describes, for a number of years my firm defended NBC against a series of claims made by a conservative group called Accuracy in Media (AIM) that one televised documentary or program after another had violated the fairness doctrine. That provision of law, which was abandoned by the Federal Communications Commission (FCC) in 1987, had required broadcasters to present "both" sides of controversial issues of public importance that it addressed. The effect of the doctrine was that the FCC became immersed in making content decisions about what topics had been addressed and whether the opposing sides had been heard sufficiently. AIM believed, or said it did, that NBC's documentaries, which generally sought to expose one sort of social evil or another, often did not sufficiently present the "good" side of then currently existing policy. When NBC televised a documentary revealing recurrent problems with pension plans, AIM argued that not enough time had been expended on the program in showing successful pension plans. When CBS offered an award-winning program about hunger in America, AIM objected, maintaining that fewer people were hungry than the documentary had indicated. The visage of a government entity deciding such issues obviously raised substantial First Amendment issues. As the FCC determined when it abandoned the doctrine, the effect of its enforcement had been to chill speech, not to increase it, with over sixty reported instances in which its policies had inhibited the coverage of contro-

versial issues.[9] But when we raised such issues at the time AIM filed multiple complaints, we received little support from conservative or liberal commentators.

Years passed. Talk radio became conservative, ever more so, and increasingly powerful. Liberals in Congress and out began to urge that the fairness doctrine should be revived so as to ensure that Rush Limbaugh and other on-air conservatives be subject to it, thus diluting the impact of their speech. Conservatives, who had rarely embraced the position we had taken on behalf of the networks, suddenly rediscovered the First Amendment. Viewing all this, it is difficult to resist the force of Stanley Fish's sardonic observation that free speech is "the name we give to verbal behavior that serves the substantive agendas we wish to advance."[10] I wish I was sure he was wrong.

In 1997, I participated in a panel sponsored by the *Nation* magazine. According to the magazine, there was reason for concern because in one Supreme Court case after another—cases involving caps on campaign spending, public access to the airwaves, and the like—"the wrong side kept winding up with the First Amendment in its corner." The *Nation*'s editors urged a rethinking of the First Amendment. I offered a different sort of rethinking. Did it ever occur to them, I asked, to rethink their political positions to avoid being on the wrong side of the First Amendment?[11]

Of course, the determination of which side is "right" and which "wrong" in First Amendment cases is what the cases are about. Waving a First Amendment banner is no assurance of success. The First Amendment proposition that I urge upon nascent First Amendment litigators to urge most upon the courts is usually the most obvious one: that *the central concern of the First Amendment is the danger of government control over what is thought and what is said.* It is not just that the First Amendment, like the rest of the Bill of Rights, applies only to acts of the government. It is that it is, at its core, a protection against government. That, surely, is what Jefferson had in mind when he wrote that a bill of rights was "what the people are entitled to against every government on earth."[12] It is what Justice William O. Douglas meant when he observed that "[t]he struggle for liberty has been a struggle against government."[13] And it is what Justice Robert Jackson, in a typically felicitous phrase, conveyed in stating that "[t]he very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person