

STATEMENT OF

FLOYD ABRAMS

BEFORE THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

AT A HEARING ON

FREE SPEECH 101: THE ASSAULT ON THE FIRST AMENDMENT

ON COLLEGE CAMPUSES

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Chairman Grassley and Ranking Member Feinstein: I appreciate the opportunity to appear this morning to comment on the status – or, I could say, the sad state – of freedom of speech on college campuses around the nation.

About two years ago, I gave a speech in Philadelphia at Temple University in which I tried to answer the question of what the single greatest threat to free speech was in the nation. And where it was. I concluded then, as I do now, that the locale of the threat was on our college campuses and that the nature of the threat was nothing less than the suppression of free speech on our campuses. I pointed out, as I would today, that while our problems did not approach those in many other countries around the world, that they were serious, troubling, disturbing.

That is so notwithstanding ever-increasing focus on the problem, as illustrated by this significant hearing. Put plainly, the problem arises less because of a desire of university administrators to limit speech on campus – there is some of that, but it is not the dominant cause – than the conduct of a minority of students who will simply not tolerate the expression of views which they view as socially harmful or destructive.

A critic of recent speech-destructive behavior on campus has an overstuffed menu of choices to choose to discuss. Shall I focus on Evergreen, Middlebury or Berkeley? Or Milo Yiannopoulos or Ann Coulter? On the cancellation of previously made invitations to speakers such as Christine Lagarde, the first woman to head the IMF? Or the loud and strident interrup-

tions to speakers – former New York City Police Commissioner Ray Kelly was one of many – to the point that the speech simply could not proceed?

Let me start instead with two examples. The President of California State University Los Angeles cancelled a speech by an editor of Breitbart, the conservative publication, who was about to speak on a topic that he had entitled as “When Diversity Becomes a Problem”. The explanation for the cancellation was—this one is worth saying slowly—“the need for free exchange of ideas.” According to the president of the university, the speaker could appear (but only appear) as part of a group of people with varying viewpoints on diversity. He could not speak alone, as left-wing speakers such as Cornel West and Angela Davis had spoken at CSU, with no request, let alone requirement, that the “other” side be heard simultaneously.

And, speaking of California, just yesterday (June 19<sup>th</sup>) a complaint was filed in federal court in San Francisco on behalf of Jewish students at San Francisco State University arising in part out of the misconduct of other students who effectively shut down a speech by the Mayor of Jerusalem by the use of amplified sound and loud and virulent anti-Semitic chants. The complaint sets forth in painful and exhaustive detail the disruption and the conscious decision of the university administration to order police to stand down and allow the shouting students to shut down the event and prevent the Mayor from delivering his scheduled speech, as well as the administration’s decision not to discipline any of the students, or the student group which prevented the speech from being delivered.

Thinking of just those examples, I couldn’t help but compare them to the time when I entered Cornell University more than a few years ago. At that time, upon entrance into the university, all students were required to sign some sort of document agreeing that we could be suspended for saying just about anything on just about any topic of which the university disapproved. In

fact, we were required to carry at all times some sort of identification card saying just that. And as I recall it, there really was very little controversial speech at all on campus—a real loss, I can say in retrospect—but very much the ethos of life in America on and off campus in the long ago 1950s.

In fact, in those days, what was viewed as the most dangerous threat to freedom of speech on campus was the power that wealthy and politically regressive alumni sometimes exercised on some campuses. For an artistic look at that sort of danger, have a look at an old movie called “The Male Animal”, with Henry Fonda playing the role of a professor at risk of losing his position because he read a letter to his English class from Bartolomeo Vanzetti, an anarchist convicted—quite possibly unjustly—of murder in a most celebrated trial of the 1920s. Colleges were also under siege during the McCarthy era and many behaved badly, dismissing scholars for their supposed political views.

But today there are new censors – sometimes students, sometimes with outside support -- who seek to place new limits on what may be said on campus. What can one say in response to this other than to quote from the statement of the American Association of University Professors that, in the clearest language, observed that “[o]n a campus that is free and open, no idea can be banned or forbidden. No viewpoint or message may be deemed so hateful or disturbing that it may not be expressed.” Oliver Wendell Holmes put it well, when he was a Harvard undergraduate before the Civil War and was a student editor of *Harvard Magazine*. “We must,” he wrote in 1859, “have every thought brought before us when we are young, and we may as well at once prepare for it.”

The on-campus crisis is not limited to disinviting speakers. Wendy Kaminer, writing in the *Washington Post*, described a panel she was on at Smith College that dealt with freedom of

speech. At one point, Smith's President, Kathleen McCartney, had observed, tongue in cheek, "We're just wild and crazy, aren't we?" When a transcript was prepared, Kaminer writes, the word "crazy" was replaced by the words "[ableist slur.]" When one her fellow panelists mentioned that the State Department had, at one time, banned the words "jihad," "Islamist" and "caliphate", the transcript substituted the words ["anti-Muslim/Islamophobic language."] I know this sounds more like a script for Saturday Night Live than on-campus reality, but it's all real. As was the predictable reality that when Ms. Kaminer turned to Huckleberry Finn and discussed Huck's savior and the book's leading (and, by far, most attractive figure) by name—perhaps you can recall it-- she was challenged by other panelists for doing so and later accused in the Huffington Post with committing "an explicit act of racial violence".

The problem is not unique to our country. Just as the First Amendment, which applies only to the government and thus not privately funded institutions, and what I think of as the spirit of the First Amendment, which should be taken account of in all universities, has not sufficed to prevent such speech destructive activities here, the same has been true in other nations that pride themselves on the protection of free expression. The Observer has reported on one English university that banned supposedly "racist" sombreros and native American dress; and of another where a debate on abortion was cancelled by College Censors (that's their official name) on the ground that they wanted to protect "students' emotional wellbeing" by "avoiding unnecessary distress, particularly for any residents who may have had an abortion."

This sort of thinking makes this an extraordinary perilous moment with respect to free speech on campuses. It sometimes seems as if too many students, even if they are no more than a vocal minority, seem to want to see and hear only views they already hold. And to prevent others from hearing views with which they differ. On one level, this is all perfectly understand-

ble. Justice Holmes, to whom I referred earlier, in one of his most famous opinions, long ago observed that “[i]f you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.” But natural as that response is, as Holmes later made clear, it is contrary to the core of the First Amendment that “free trade in ideas” be protected. Yet to avoid what the Oxford censors characterized as “unnecessary distress” we have seen speech stifled time and again on campuses in our country.

I don’t mean to suggest that there are no hard cases about what should be permitted on a campus and what not. Incitements to violence are no more protected by the First Amendment on campus than anywhere else. And as the University of Chicago advised the entering class of 2020 at the same time it eloquently defended free speech on campus, “freedom of expression does not mean the freedom to harass or threaten others.”

Nor should students be condemned for feeling and speaking passionately against what they perceive to be racist speech or conduct. Indeed it is important that student activism should generally be encouraged and protected, just as criticism of that activism should be protected, just as I wish we had had far more of all of it when I was in college and that I had participated in it. The absence of such speech was a loss to me, my generation and our nation.

Most campus activism in public universities is protected by First Amendment and in private universities by internal commitments by universities to abide by First Amendment norms. We need more students, not fewer, to become involved with the public issues of the day and on campuses. Their doing so is indispensable if society is to change for the better. If students disagree with the views of a speaker, they should engage with it, picket it, even walk out on it. I do not, in that respect, agree with the criticism voiced by Fareed Zakaria, among others, of students

who peacefully walked out at Notre Dame when Vice President Pence was beginning a speech there. Doing so is not only one form of First Amendment protected conduct but a long-recognized and honored one. What is unacceptable is preventing speech from occurring, not protesting it.

Have students changed? Have their views? I have read a disturbing study, by the Higher Education Research Institute at UCLA, based on surveying the views of over 141,000 full-time first year students at colleges around the country. About 71% of them said that they agreed “strongly” or “somewhat” that “colleges should prohibit racist/sexist speech on campus”; about 43% of them said that they agree “strongly” or “somewhat” that “colleges have the right to ban extreme speakers from campus”; and only 64% said that they “strongly” or at least “somewhat” agree that “dissent is a critical component of the political process.” Put another way, over a third of the entering students polled did not agree that dissent is a critical component of the political process.

Another study concluded that while only 12 percent of my generation (don’t ask what ages I’m talking about) think the government should be able to punish speech viewed as offensive by minority groups, around a 25% of the immediately succeeding generations thought so, and 40 percent of millennials (people 18-34) think so. I know you can read that in two ways. One is the optimistic way. The younger people are, the more unwilling they are to simply accept the existence of often outrageous, even destructive speech. The other way is to conclude that the younger a generation is, the less knowledgeable it is about (or, worse yet, unwilling to accept) the essence of the First Amendment. In that respect, another study concluded that nearly a third of college

students could not identify the First Amendment as the one that even deals with freedom of speech. Maybe both are correct. But wouldn't it be better if we all condemned racist or sexist speech but we all also knew and celebrated the freedom provided by the First Amendment, especially if we know what it says and what it means.

Of course, "extreme" speech is sometimes upsetting, sometimes painful to hear—if you choose to do so. Racist or sexist speech is harmful to the body politic and painful to those at whom it is aimed and those who listen to it. But the First Amendment is rooted in the notion that government (including the administrators of state universities) is not to be trusted to determine what is "extreme" speech, what is "sexist" speech, or the like. Or to punish it, even if they think they can define it. Former President Obama, I think, put it well when he said this: "I've heard of some college campuses where they don't want to have a guest speaker who is too conservative or they don't want to read a book if it has language that is offensive to African-Americans or somehow sends a demeaning signal towards women. I've got to tell you, I don't agree with that, either. I don't agree that you, when you become students at colleges, have to be coddled and protected from different points of view."

A final note. I understand why any university leadership seeks to avoid any potential conflict on campus about speech that some students finds deeply offensive. Why would it not? What university administration would not seek to avoid such any such clash, especially since our nation still has so much to answer for with respect to its historic mistreatment of racial and other minorities? And at a time where serious steps must still be taken, on campus and off, to address ongoing manifestations of racism, sexism, anti-Semitism or the like.

But the answer to the suppression of almost any speech, the First Amendment answer, cannot be to limit expression but to discuss it, not to bar offensive speech but to answer it. Or to ignore it. Or to persuade the public to reject it. I know that's easy to say but it's got to be the way we respond to speech which we abhor. What is unacceptable is to suppress the speech. That is why I welcome this hearing the opportunity you have given me to participate in this hearing.

Floyd Abrams is senior counsel in the New York law firm of Cahill Gordon & Reindel LLP and the author of “The Soul of the First Amendment”, “Friend of the Court: On the Front Lines with the First Amendment” (2013) and “Speaking Freely: Trials of the First Amendment” (2005).

Mr. Abrams has argued frequently in the Supreme Court in a large number of its most significant First Amendment cases. He was co-counsel to The New York Times in the Pentagon Papers case; counsel to the Brooklyn Museum of Art in its legal battles with Mayor Rudolph Giuliani; counsel to Senator Mitch McConnell and the National Association of Broadcasters in a First Amendment-rooted challenge to the constitutionality of the McCain-Feingold campaign finance legislation; counsel to Senator McConnell in the Citizens United case; and counsel to many journalists, including Judith Miller and Myron Farber, who sought to protect the identity of their confidential sources. He has represented The Times, ABC, NBC, CBS, CNN, Time Magazine, Business Week, The Nation, Reader's Digest, The McGraw-Hill Companies, Inc. and numerous other clients in trials and appeals.

Mr. Abrams graduated from Cornell University in 1956 and the Yale Law School in 1960. He was a Visiting Lecturer at the Yale Law School from 1974 - 1980, 1986 - 1989, 2012 - 2013, and 2014 – 2015. He taught at the Columbia Law School from 1981 - 1985, and served from 1994 to 2009 as the William J. Brennan, Jr. Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism. He is now an adjunct professor at NYU Law School.

Mr. Abrams has received many awards including the Lifetime Achievement Awards from the CUNY School of Journalism, the American Lawyer, the New York Law Journal, and Benchmark, as well as the Fred Friendly Lifetime Achievement Award of Quinnipiac University. He was awarded the William J. Brennan, Jr. Award for outstanding contribution to public discourse; the Learned Hand Award of the American Jewish Committee; and the Thurgood Marshall Award of the Association of the Bar of the City of New York. Other awards include the William J. Brennan, Jr. Award of the Libel Defense Resource Center; the Milton S. Gould Award for outstanding appellate advocacy by the Office of the Appellate Defender in New York; and the Ross Essay Prize of the American Bar Association.

Mr. Abrams served on the Technology and Privacy Advisory Committee of the United States Department of Defense in 2003-2004 and as the chair of the New York State Commission on Public Access to Court Records in 2004. He also served as Chairman of the Communications Committee of the Association of the Bar of the City of New York, as well as Chairman of the Committee on Freedom of Speech and of the Press of the Individual Rights Section of the American Bar Association and of the Committee on Freedom of Expression of the Litigation Section of the American Bar Association.

Senator Daniel Patrick Moynihan characterized Mr. Abrams as “the most significant First Amendment lawyer of our age.”