he perfect? No, but it's clear that he tried his best to do what he thought was right, especially in difficult situations. Melvin Purvis was a hero, and the FBI was fortunate to count him as one of its own. **TFL**

Mark V. Muller is a registered professional engineer in Texas and a practicing patent attorney employed by the law firm of Schwegman, Lundberg, Woessner & Kluth PA. He specializes in licensing and the prosecution of patents for computers, wireless communications, and software.

Speaking Freely: Trials of the First Amendment

By Floyd Abrams

Viking, New York, NY, 2005. 306 pages, $25.95.

Reviewed by Michael Coblenz

Underlying most attempts to censor or restrict access to information is a misplaced paternalism — or at least that was the sense I had after reading Floyd Abrams' *Speaking Freely: Trials of the First Amendment.* Time and again, in the trials that Abrams recounts, those in authority had played the concerned parent and tried to keep what they perceived as the childlike citizenry from seeing or hearing things that the government considered detrimental to their well-being.

Some of Abrams' examples are serious (such as the Pentagon Papers case) and others are amusing (such as Mayor Rudy Giuliani's attempt to close down an art exhibit that he found objectionable), but all represent very real threats to the First Amendment. Information is the lifeblood of democracy and should be restricted only in the most serious cases and only for the most important reasons — not on the basis of a whim or vague assertions of harm.

Clearly there are valid reasons to limit some types of expression, and obscenity and fighting words are among the types that are not protected by the First Amendment. There are also plenty of cases where the balance between access to information and countervailing societal needs weighs toward nondisclosure. Detailed plans for building nuclear weapons or the names of undercover spies, for example, are matters that are important to national security and should be kept secret. But far too often, as Abrams recounts in this book, the government claims to be protecting national security when it is actually trying to avoid embarrassment. The first case that Abrams discusses — the Pentagon Papers — is a good example.

The story of the Pentagon Papers began in 1967, when Secretary of Defense Robert McNamara requested an in-depth analysis of how the United States had gotten into the Vietnam War. The report that resulted was entirely historical — tracing American involvement in Vietnam from 1945 to 1968 — and did not deal with current military operations. A Pentagon analyst named Daniel Ellsberg was disturbed by what he discovered while working on the report, and he became even more troubled by the military leadership's lack of interest in the conclusions presented in the report. Ellsberg tried to bring the matter to the attention of members of Congress, and when that attempt failed, he sent a copy to the *New York Times.* The *Times* analyzed the material to make sure that publishing it would not threaten national security and then, on June 13, 1971, published the first of seven articles containing excerpts from the 3,000-page report. The Nixon administration immediately went to court to stop further publication.

The government's position was that publication of this secret report would harm national security. This argument initially appealed to the judge, and he asked the *Times'* lawyers to voluntarily stop further publication of the Pentagon Papers. When the *Times* declined to do so, the judge issued a temporary restraining order pending a hearing on the government's application for a preliminary injunction.

At the hearing, the government presented witnesses who testified that grave military and diplomatic harm would result from further publication of the report. The Department of Defense provided written statements and oral testimony from generals and high-level intelligence analysts, who said that the information in the Pentagon Papers would prove extremely harmful if disclosed to the nation's enemies. They warned that soldiers and spies would be killed and asserted that America's ability to engage in diplomatic negotiations around the world would be seriously eroded. One general said that "it would be a disaster to publish all of these other documents, let alone the ones that have been published."

Problems in the government's case surfaced almost immediately, when lawyers for the *New York Times* began to ask for specific examples of actual harm that could result from publication of the report. But all that the government witnesses could do was to repeat generalized assertions. Eventually, the trial judge became frustrated and began to question the government witnesses himself, but still none could give a single specific example of actual harm that would result from disclosure of the material in the Pentagon Papers. As a result, the judge denied the government's application for a preliminary injunction.

The government appealed, and the court of appeals sent the case back to the district court for further hearings, saying that the government should have additional opportunity to prove that publication would be harmful. But, rather than retrying the case, the *Times* appealed to the Supreme Court, which agreed with the trial court and allowed the newspaper to publish the Pentagon Papers.[1]

And did the dire warnings expressed by the Nixon administration and the Department of Defense come to pass? They did not. Abrams notes that scholars have analyzed the various predictions of harm made by the government, and found that none came true.

Abrams suggests that the widely reported collapse of the government's case contributed to the public's cynicism toward government as well as to the adversarial relationship between the press and the government. Revelations of deceit — found both in the litigation and in the Pentagon Papers themselves — angered the public and

REVIEWS *continued on page 56*

convinced the press that it had to be more active and vigorous in its dealings with the government.

Perhaps the best justification for government openness and accountability — and the importance of a free press to ensure such openness and accountability — came in the very first legal opinion in the case, which was heard by Judge Murray Gurfein, a recent Nixon appointee. The Nixon White House considered Gurfein "new and appreciative" and hoped that he would show his gratitude by ruling in the government's favor. But, in a decision that is a testament to judicial independence, Judge Gurfein had harsh words for the administration:

> The security of the Nation is not at the ramparts alone. Security also lies in the value of our free institutions. A cantankerous press, an obstinate press, a ubiquitous press must be suffered by those in authority in order to preserve the even greater values of freedom of expression and the right of the people to know. ... [I]n the last analysis it is not merely the opinion of the editorial writer, or of the columnist, which is protected by the First Amendment. It is the free flow of information so that the public will be informed about the Government and its actions. ... There is no greater safety valve for discontent and cynicism about the affairs of Government than freedom of expression in any form. This has been the genius of our institutions throughout our history. ... It is one of the marked traits of our national life that distinguish us from other nations under different forms of government.[2]

Judge Gurfein saw through the Nixon administration's bogus appeals to patriotism and national security.

Faux moral rectitude doesn't work much better, as Rudy Giuliani found out when he tried to shut down an art exhibit in 1999. Abrams describes this encounter, and the Giuliani we meet in the book is not the hero of Sept. 11, but a bully, an intellectual lightweight, and a politician willing to subvert the Constitution for his own political ends.

In 1999, the Brooklyn Museum planned to display an exhibit of controversial British artists under the title "Sensation." The exhibit included more than 90 works of art by 40 contemporary British artists. Among the pieces the museum considered shocking (or "sensational" — hence the title of the exhibit) were partially dissected animals suspended in formaldehyde and a portrait of an English child-killer created out of tiny handprints of children (a concept that I personally find chilling). Not considered particularly offensive were five paintings by a Nigerian-born artist named Chris Ofili, whose paintings incorporated elephant dung (which is quasi-sacred in Nigerian tribal culture) to provide texture. The dung had been painted over, and was not a visible component of the work. One of these pieces — entitled "Virgin Mary" — depicted a tribal woman in traditional attire.

Two weeks before the exhibit was scheduled to open, the conservative *New York Daily News* ran a story about the exhibit under the headline "Brooklyn Gallery of Horror: Gruesome Museum Show Stirs Controversy." The story described one particularly controversial piece as a painting of the Virgin Mary "splattered with elephant dung." When asked about the exhibit at a press conference, Giuliani said, "It offends me. The idea of in the name of art having a city subsidize art, so-called works of art, in which people are throwing elephant dung at a picture of the Virgin Mary, is sick."

The problem was not that Giuliani objected to the exhibit or to Ofili's painting — the mayor was as free as anyone to take offense — but, rather, that he then used his position as mayor to stop the exhibit. "What the city is going to do is try to remove all the funding it possibly can from the Brooklyn Museum, and send them a message."

After Giuliani's remarks, the museum went to federal court to obtain an injunction to prevent the city from withholding funding. The law in this area is absolutely clear, and the Supreme Court has affirmed it time and again. There is no requirement that the government fund art, and, when it does, it may fund any type of art it chooses. But, if the government does fund art, it cannot later withdraw its funding because it finds viewpoints that the art expresses objectionable. According to the Supreme Court, the government may not prohibit "expression of an idea merely because society finds the idea offensive or disagreeable."[3]

Based on the clear legal precedent, the U.S. district judge ruled in favor of the museum. He began by quoting the 1943 Supreme Court opinion by Justice Robert Jackson that held that a state could not force children of Jehovah's Witnesses to recite the Pledge of Allegiance: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. ..."[4] The district judge then added that the First Amendment bars "government officials from censoring works said to be 'offensive,' 'sacrilegious,' 'morally improper,' or even 'dangerous.'"[5] The city, therefore, could not withhold funding from the Brooklyn Museum. The district court's ruling was clearly within mainstream First Amendment jurisprudence, as the city tacitly recognized when it settled the case a few months later.

Despite the outcome, Giuliani called the judge "biased," "intellectually dishonest," and "totally out of control." It is difficult to imagine that Giuliani, a lawyer who rose to fame in New York as a federal prosecutor, would be totally ignorant of First Amendment law. The only possible explanation for his behavior is political opportunism — his desire to show a certain portion of the voting public that he shares its values.

The most ironic thing was that Giuliani's actions backfired completely. Not only did he publicly reveal his ignorance and contempt for the Constitution, but the attention he created

also brought more people to the museum. A spokeswoman for the Brooklyn Museum said that the controversy helped draw a crowd that was "incredible for a contemporary show."

The lesson of these two cases — and the others described in the book — is that the truth eventually comes out, and the more the government tries to hide it, the more curious the public becomes. Had Nixon allowed publication of the Pentagon Papers and then explained that his administration was taking the matter seriously, the public might have shrugged and moved on. Had Giuliani simply ignored the Brooklyn Museum's exhibit, it probably would have drawn a typical crowd and closed without much public interest. But this is a lesson that politicians apparently never learn. **TFL**

Michael Coblenz is an intellectual property attorney in Lexington, Ky.

Endnotes

[1] *New York Times Co. v. United States*, 413 U.S. 713 (1971).

[2] *United States v. New York Times Co.*, 328 F. Supp. 324, 331 (S.D.N.Y. 1971).

[3] *Texas v. Johnson*, 491 U.S. 397, 398 (1989).

[4] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

[5] *Brooklyn Institute of Arts and Sciences v. City of New York*, 64 F. Supp. 2d 184, 198 (E.D.N.Y. 1999) (citations omitted).