

"FEW PEOPLE HAVE DONE AS MUCH TO SHAPE THE
FIRST AMENDMENT AS IT EXISTS TODAY."

- JAMEEL JAFFER

"IF THERE WERE THE HISTORY OF DEFENSE OF THE FIRST AMENDMENT IN
MODERN TIMES, THERE PROBABLY WOULDN'T BE A CHAPTER ABOUT
FLOYD ABRAMS, IT WOULD BE PART ONE."

- NINA TOTENBERG



FLOYD ABRAMS

Speaking Freely

SALTY FEATURES in association with AMERICAN MASTERS PICTURES present "FLOYD ABRAMS: SPEAKING FREELY" CO-PRODUCERS CHRISTOPHER ALLEN XAN PARKER SOUND RECORDIST E. BENJAMIN POSNACK
MUSIC BY OLIVIER MANCHON CLARE MANCHON CINEMATOGRAPHERS NELSON THOME SAMUEL RUSSELL EDITED BY HARRY JACKSON WRITTEN BY Yael MELAMEDE CLARE SMITH MARASH HARRY JACKSON FOR AMERICAN MASTERS EXECUTIVE PRODUCER MICHAEL KANTOR SERIES PRODUCER JULIE SACKS
PRODUCED BY Yael MELAMEDE CLARE SMITH MARASH DIRECTED AND PRODUCED BY Yael MELAMEDE





FLOYD ABRAMS Speaking Freely

A Companion Film Discussion & Activity Guide

ABOUT THIS GUIDE

This discussion guide is a resource to help engage with the documentary film **Floyd Abrams: Speaking Freely** which explores America's dedication to the foundational principles of free speech and free press through the groundbreaking work of attorney Floyd Abrams. Given this time in America and internationally, we believe the film offers critical context for how we came to this moment where free speech issues have never felt more complicated and urgent. We hope the materials below will inspire greater reflection and discussion about these critical matters.

To allow a wide range of people to engage with the material below, we provide a variety of options, some of which will be better for certain age groups over others.



1. CENSORSHIP

(0:26-3:49)

The Case:

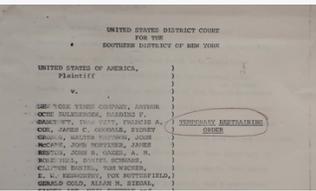
In 1999, New York Mayor Rudy Giuliani publicly attacked the Brooklyn Museum for its controversial art exhibit, "**Sensation.**" The exhibition displayed artwork that the mayor proclaimed was "sick" and "disgusting," including a depiction of the Virgin Mary made with elephant dung and sexually explicit sculptures. In an effort to stop the public from seeing it, the mayor threatened to withhold funds and evict the museum. The museum decided to sue the city with the help of Floyd Abrams, and in a rousing victory the Brooklyn Museum won the case.

Discussion Questions:

- What were the risks the museum took in fighting this case?
- What are some of the behind the scenes reasons the mayor might have attacked the museum so publicly? For example, might he have been influenced in any way by the fact that he was in the middle of an election campaign?
- How does the case resonate today? In what ways is it similar or dissimilar to recent discussions of book bannings?
- Is there an argument for the government to avoid funding controversial art? How should religious objections be expressed?
- Should there ever be limits on "offensive art"? Who gets to decide what offensive is?

Activities:

- Have each student argue this case from the city's position as well as the museum's.
- Put the students in small groups and have them find something on public display that they dislike and have them create a presentation on why it should be allowed to be displayed.



2. NATIONAL SECURITY (18:19-28:45)

The Case:

The Pentagon Papers was an extensive government report exploring America's historical involvement in the Vietnam War. The 7000-page report, which was labeled as Top Secret, was leaked to The New York Times (NYT). After months of preparation, the NYT began publishing the Papers because it maintained that the Papers showed the Government had lied to the public. The papers were released at a time when the war was still raging. The government claimed that publication might interfere with resolving and possibly ending the war. Claiming a threat to national security, President Richard Nixon's administration attempted to stop the NYT from publishing. The case made it all the way to the Supreme Court in record time which issued a landmark Supreme Court decision in which it sided with the Press and set a very high bar for government interference with the Press.

Discussion Questions:

- What was the case for these leaks being a threat to national security?
- How could the government's case be made stronger?
- In your opinion, are there any permissible reasons to stop publication?
- What do you think is a fair level of government transparency with its citizens? If the Pentagon Papers had included strategies for ending the Vietnam War, should that have been allowed to be published?

Activities:

- Have each student research and present a modern-day example of a leak, and the ways it was similar or dissimilar to the Pentagon Papers. (Possible examples: Edward Snowden; WikiLeaks; Reality Winner)
- Have the class split into small groups and have them come up with 3 reasons for and against allowing the Pentagon Papers to be leaked.



3. CONFIDENTIAL SOURCES

(37:45-50:17)

The Case:

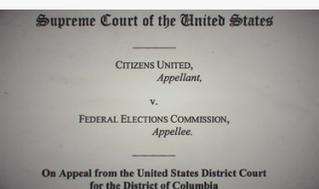
In 1991, Nina Totenberg broke the story of Anita Hill's sexual harassment allegations against Clarence Thomas in the midst of his confirmation hearings for the Supreme Court. While Thomas was eventually confirmed, the Senate Judiciary Committee wanted to know how Totenberg learned of Hill's complaint, which had been shared with the Judiciary Committee but had not been made public. The committee began an investigation, but Totenberg refused to reveal her source, despite the threat of being held in contempt.

Discussion Questions:

- Why would a journalist want to protect the identity of their sources?
- What are the pros and cons of allowing journalists to use confidential sources?
- How might public opinion impact leak investigations, as seen in the situations of Nina Totenberg and Judith Miller?

Activities:

- In small groups, have the class research and present high-profile examples where journalists have used confidential sources and the journalist has been pressured to provide information.
- Have students research state shield laws and write their version of what a federal shield law could be.



4. MONEY IN POLITICS

(51:13 - 01:04:43)

The Case:

The role of money in politics has long been a contentious issue in American politics. In one effort of reform, congress passed the 2002 Bipartisan Campaign Reform Act, which set limits on when corporations could spend money in the lead up to elections. A conservative non-profit corporation, Citizens United, sued after its film, a strong critique of primary candidate Hillary Clinton, was barred from airing on ahead of the Democratic primary. The case went to the Supreme Court and in a broad decision, the Court struck down limits on corporate spending. The precedent of the First Amendment protecting independent spending by corporations in elections was set.

Discussion Questions:

- How do you feel about corporations putting money into our elections?
- Should there be a limit to the amount of money spent in a campaign?
- The law draws a distinction between donations made to candidates, which has limits per election cycle, and the spending that occurs in support of a candidate (such as producing media for or against a particular candidate, as Citizens United did) – what do you think about that distinction?
- Floyd Abrams has noted that in the aftermath of Citizens United there was not the predicted wave of corporate money flooding into elections – but that there has been an increase in wealthy individuals spending. Does this argument change how you think about this decision or how the issue of money in politics should be addressed?

Activities:

- Have a class discussion about the limits around money in politics.
- Have 2 students participate in a mock argument representing both sides of this argument.
- Divide the group in two and have them research and argue the sides of the Citizens United case.
- As a group, discuss other ways the issue of money in politics changes the political system and how it might be tackled.



5. INFORMATION, DATA, AND TECHNOLOGY (01:10:15 - 01:17:50)

The Case:

Clearview AI is a facial recognition software that built its algorithm using billions of photos scraped from public social media profiles. In 2020, the ACLU sued the company in Illinois, where a state law barred the use of people's biometrics without their permission. Clearview, with Abrams as their attorney, argued that the use of publicly available information was protected by the First Amendment. While the case was settled, this area of law remains new and largely untested.

Discussion Questions:

- Should there be limits on the access to information now that information is so much more widely and quickly accessible?
- What are some strategies for dealing with evolving technology? In this case, some of the people whose photos were used to build Clearview's facial recognition software were posted before this technology existed – what are the lines of consent there?
- While Abrams argues that Clearview's First Amendment rights allow for their work, Jameel Jaffer notes that the First Amendment rights of citizens could be curtailed by facial recognition technology – that if people can be readily identified at a protest, they may not speak up. Discuss this tension. How do we balance competing First Amendment rights?

Activities:

- Discuss which technologies affect speech and spread of information.
- Divide the group in two and have them debate the basic arguments of Clearview and the ACLU, for example: The information used is public; those who posted those photos consented to that v. How people could not consent to that usage as it may not have existed when the photo was posted.
- Have the class research top social media platforms and what information they typically share with others; present on how to curate settings.

Who is in the Film:



Dan Abrams

Floyd Abrams' son, TV host and media entrepreneur.



Ronnie Abrams

Floyd Abrams' daughter and a U.S. federal district judge in New York.



Lee C. Bollinger

President of Columbia University through the 2023 academic year, Bollinger is also the Seth Low Law Professor at Columbia and a First Amendment scholar.



Vera Eidelman

Staff Attorney at the ACLU's Speech, Privacy, and Technology Project
Eidelman led the ACLU's lawsuit against Clearview AI in Illinois.



George Freeman

Floyd Abrams' former associate and mentee, Freeman was previously the Vice President and Assistant General Counsel for The New York Times and is the current Executive Director of the Media Law Resource Center.



Richard Hasen

A Professor of Law and Political Science at the University of California, Los Angeles, Hasen specializes in campaign finance law and is a legal scholar.



Kashmir Hill

Tech Reporter at The New York Times.



Jameel Jaffer

Executive Director of the Knight First Amendment Institute at Columbia University.



Adam Liptak

A former associate at Cahill Gordon & Reindel and a mentee of Floyd Abrams, Liptak is now the Supreme Court Reporter for The New York Times.



David E. McCraw

Senior Vice President and Deputy General Counsel at The New York Times.



Ari Melber

A former associate at Cahill Gordon & Reindel and a mentee of Floyd Abrams, Melber is now the Chief Legal Correspondent for MSNBC and host of The Beat with Ari Melber.



Judith Miller

A former reporter and editor for The New York Times (1977-2005), Miller once spent 85 days in jail for refusing to testify about her sources.



Eleanor Holmes Norton

Former Assistant Legal Director of the American Civil Liberties Union (1965-1970), Norton is currently a D.C. Congresswoman.



Theodore B. Olson

Former Solicitor General (2001-2004) and Partner at Gibson, Dunn & Crutcher.



David Rudenstine

Legal scholar and the Sheldon H. Solow Professor of Law at Cardozo School of Law, Rudenstine wrote *The Day the Presses Stopped: A History of the Pentagon Papers Case*.



Kate Shaw

Professor and Co-Director at Floersheimer Center for Democracy at Cardozo School of Law, Shaw is also a contributor with ABC News and co-hosts the Supreme Court podcast *Strict Scrutiny*.



Emerson Sykes

Senior Staff Attorney with the ACLU Speech, Privacy, and Technology Project.



Zephyr Teachout

Fordham Law Professor, activist and a former candidate for Governor of New York State.



Nina Totenberg

A former Reporter for the *National Observer* (1968-1973), Totenberg is currently the Legal Affairs Correspondent for National Public Radio.

ADDITIONAL RESOURCES

ARTICLES:

"The Secretive Company That Might End Privacy as We Know It"

by Kashmir Hill, The New York Times (Jan 18th. 2020)

"Clearview AI's First Amendment Theory Threatens Privacy—and Free Speech, Too"

by Jameel Jaffer, the Knight First Amendment Institute at Columbia University (Nov. 17th 2020)

BOOKS:

Speaking Freely: Trials of the First Amendment by Floyd Abrams

The Soul of the First Amendment by Floyd Abrams

Friend of the Court: On the Front Lines with the First Amendment by Floyd Abrams

National Security, Leaks and Freedom of the Press: The Pentagon Papers Fifty Years On
by Lee Bollinger

The Free Speech Century by Lee Bollinger & Geoffrey R. Stone

The Day the Presses Stopped by David Rudenstine

The Story: A Reporter's Journey by Judith Miller

Corruption in America: From Benjamin Franklin's Snuff Box to Citizens United
by Zephyr Teachout

Dark Money: The Hidden History of the Billionaires Behind the Rise of the Radical Right
by Jane Mayer

COURT CASES:

New York Times Company v. United States (1971)

Brooklyn Institute of Arts v. City of New York (1999)

Citizens United v. Federal Election Commission (2008)

ACLU v. Clearview AI (2020)