

NEWS

He fought for Larry Flynt and NWA: A top free speech lawyer talks Trump and Twitter

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First Amendment attorney H. Louis Sirkin has sued Ted Cruz over sex toy sales in Texas and Kamala Harris over legalizing prostitution in California. Now he's got some opinions on Donald Trump, the Capitol breach and social media.

Based in Cincinnati at the firm Santen and Hughes, Sirkin's work goes back decades. He successfully represented pornographer Larry Flynt, despite Flynt wearing the American flag as a diaper to court.

He also successfully defended the director of the Contemporary Arts Center after police raided a Robert Mapplethorpe photography exhibit stating it contained obscenity and child pornography.

Now 80, he's representing hundreds of protesters who were arrested after curfew in Cincinnati during demonstrations for George Floyd in May and June.

Sirkin spoke to The Enquirer recently and laid out the free speech principles behind all the recent headlines.

He maintains that Americans have a constitutional right to lie, a right to preach violence and even a right to say the government should be overthrown. He also said there are limits and possible repercussions to all those things.

Speech before the Capitol raid

"What happened in Washington, to me, is as close to anything that I've seen that could cross the Brandenburg case," Sirkin said.

The landmark case from the 1960s, *Brandenburg v. Ohio*, was recently covered in-depth in The Enquirer. In it, the Supreme Court ruled that advocating illegal activity is protected, legal speech, unless it "is directed to inciting or producing imminent lawless action and is likely to produce such action."

Sirkin recalled a client who, in his opinion, likely didn't do as much as Trump or some of the agitators in the crowd on Jan. 6, but was still convicted.

In 2005, Sirkin was representing a member of an admittedly violent animal rights activist group. Stop Huntingdon Animal Cruelty USA used its website to rally activists to the homes of those associated with Huntingdon Life Sciences, Inc., a research company.

One target of the group, an employee of the company, had her tires slashed, her property graffitied and multiple protests outside her home, according to the case. The group also told her neighbors she was "puppy killer."

Sirkin said the messages prompting action against the woman were protected speech because they did not call for "immediate lawless action." The posts were made sometimes weeks in advance of demonstrations.

But an appellate court disagreed calling some entries on the site a "credible threat of violence."

"These six kids ended up going to prison," Sirkin said. "I really felt Brandenburg protected them. It should have been protected speech."

Aside from Trump and whether any of his words directly incited violence, he said there could be people in the crowd who may have crossed the line, too, by calling for Mike Pence to be hung and encouraging others to storm the building.

He added the prevalence of firearms at many political rallies only escalates the issue.

Can Twitter ban Trump?

Since the events on Jan. 6, there has been a tsunami of activity on the First Amendment Lawyers Association email Listserv.

"The emails have been flying," Sirkin said.

He said Trump's speech, Amazon's shutdown of the Parler social media website and Twitter's ban of Trump have all been hot topics.

"Freedom depends on the right to speak. That's the beginning of it all," Sirkin said. "Speech is so important. The right to ideas and to express those ideas. That's the whole fundamental right of liberty."

But even as a free speech advocate, Sirkin said private companies can ban, shut down and silence almost whoever they want online.

"As things stand today, the social websites are privately owned. The Bill of Rights does not apply to private action. It's only government action," he explained. "There's still an alternative means to get your message out. You can have your own server. You can have your own website."

He noted that Trump could hold a press conference at any time.

Sirkin said Twitter and Facebook aren't banning people because of their race or gender, which could be classified as discrimination under the law.

"Your political viewpoint is not a protected class. It's protected that you have the right to express your political position, where you say it (is not)," Sirkin said. "If you come to my house and you want to get me to donate to the Republican party, I have every right to tell you to get off my porch."

Section 230: Removing protections for social media

The news has been full of politicians and pundits discussing a repeal of Section 230 of the Communications Decency Act, a 1996 law that granted online platforms legal

immunity from what their users post.

Members of both parties have threatened to narrow or repeal Section 230. They say social media platforms should be held more accountable for how they police content.

For example, while individuals can be sued for defamation for something they post on Facebook and Twitter, the platforms themselves cannot be held responsible, unlike newspapers and magazines.

Sirkin thinks it would be a bad idea to roll back those protections.

"You can't make an owner of a bookstore responsible for the content of every single book he sells. You can't require him to have to read everything."

He went on to say private companies have wide-ranging freedoms to set their own guidelines.

"What speech you don't like, I might like," he said. "As long as they aren't getting involved with editing and redesigning material. I'm just hosting you. I'm saying, 'Here, I'm a bulletin board you can put up whatever you want, but here are my rules. If you violate my rules, I have the right to take your message off that message board.'"

A top First Amendment lawyer offers his take

While Sirkin said he will defend anyone's right to say just about anything, he is worried about the manner in which many have begun to express their ideas.

"It's not illegal to say hate speech. It's just not nice," Sirkin said.

Sirkin said the aggressive tone used by Trump, politicians and many others, while legal, sets a bad example.

"Being aggressive in your speech, being aggressive in labeling people and saying nasty things becomes an acceptable thing," he said. "Our children see that."

As an example, Sirkin pointed toward trashing talking on high school basketball courts.

"How can you blame them when they start junk talking and using the same words as the President of the United States," Sirkin said. "It's not illegal, but on that high school basketball court, those words may become fighting words."

He believes public officials have an extra responsibility to be careful with their words.

"There's an element of civility that I think we really want to instill," he said. "We want everyone to have the right to speak freely about how they feel, but let's do it with civility."

"If you want to tell me you don't like me because I'm Jewish, we can talk about it. We should be able to sit down and talk and try to understand each other's feelings... and that's how hopefully we can erase all that."