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War and the Politics of Free Speech

Posted By [Timothy Zick](#) On September 23, 2007 @ 1:35 pm In [First Amendment](#) | [24 Comments](#)

A few days ago, the United States Senate handily (75-25) passed a "sense of the Senate" [resolution](#) ^[1] condemning a political [advertisement](#) ^[2] placed in the New York Times by the anti-war group MoveOn.org. Many conservatives, most prominently presidential candidate Rudy Giuliani, complained both about the substance of the ad and the process by which it came to be in the Times — the allegedly "discounted" price and the timing (the ad ran the day of General Petraeus's congressional testimony). The ad referred to General Petraeus as "General Betray Us" and accused him of "cooking the books" for the White House to justify the much-debated surge in Iraq. After reviewing the General's credentials, the Senate resolution calls on the Senate to "strongly condemn all personal attacks" against General Petraeus and other members of the armed services and to "specifically repudiate the unwarranted personal attack on General Petraeus by the liberal activist group MoveOn.org." (A proposal sponsored by Senator Barbara Boxer (D-California), which failed (51-46), more broadly called on the Senate "to strongly condemn all attacks on the honor, integrity and patriotism" of those in the armed services.)

As Sandy Levinson has [observed](#) ^[3], the ad was extraordinarily "dumb politics." It allowed supporters of the war in Iraq to once again shift the debate from events on the ground in that country to partisan domestic politics in this one. As I noted in an earlier [post](#) ^[4], there are substantial dangers attending the cozy relationship between many prominent Democrats and anti-war advocacy groups like MoveOn.org. In the face of what was indeed a sharp attack on General Petraeus, Republicans once again rallied behind the "support the troops" mantra. President Bush himself took the unusual step of condemning the ad, suggesting that members of the Democratic Party were "more afraid of irritating [MoveOn.org] than they are of irritating the United States military." Under the circumstances, many Democrats apparently felt they had no choice but to publicly denounce the ad and vote for the resolution.

It is a pity Senators of both parties did not reject and renounce this politicization of free speech. Although the Senate's finger-wagging resolution carries no penalties (and thus cannot be challenged as a violation of the First Amendment), it is shamefully antithetical to the spirit and values of the First Amendment. In [New York Times v. Sullivan](#) ^[5], the Supreme Court emphasized our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." In times of war, when lives are literally at stake, one can reasonably expect less inhibition on the part of speakers. Of course, senators possess individual expressive rights. But it is inappropriate for the United States Senate to *institutionally* condemn expression regarding matters of public concern, or to single out a political advocacy group for special rebuke. In our marketplace of ideas, the people ought to decide for themselves whether the criticism of General Petraeus constituted an unwarranted "personal attack" or a warranted criticism. The Senate's condemnation distorts the marketplace and threatens to chill others from presenting sharp attacks against favored subjects. Although it focuses on MoveOn.org and its advertisement, the Senate resolution seems to suggest that military leaders and members of the armed services are now beyond "sharp" and "caustic" criticism. Is the president, as Commander-in-Chief of the armed forces, entitled to the same protection from "personal attacks"? The business of the Senate is to debate and enact laws for the benefit of the country. Surely that distinguished body has more pressing business than the politicization of expression.

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URLs in this post:

- [1] resolution: <http://images.huffingtonpost.com/2007-09-20-Cornynamendment.pdf>
- [2] advertisement: <https://pol.moveon.org/petraeus.html>
- [3] observed: <http://balkin.blogspot.com/2007/09/on-general-petraeus.html>
- [4] post: http://www.concurringopinions.com/archives/2007/09/the_contemporar.html
- [5] New York Times v. Sullivan:
http://www.bc.edu/bc_org/avp/cas/comm/free_speech/nytv-sullivan.html
- [6] : <http://uchicagolaw.typepad.com/faculty/2007/09/columbia-moveon.html>

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