"Is a Free Press a Threat to Freedom?"

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GEORGE BARASCH, Chairman

HONORABLE EDWARD THOMPSON,
Moderator

Speakers: Floyd Abrams
Cahill, Gordon & Reindel

Murray Baron
President of Accuracy In Media

Questions: The Audience

Conclusion: Moderator

MR. BARASCH: I welcome you this evening to a very special conference dealing with current trends in the transmission of information by the news media.

The establishment of a free press was based upon the belief that controversy is vital to public information and creates a system of justice in which exchange of views is the heart and soul of freedom. We believed in the dignity of man and the right to pursue life without fear and tyranny.

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If the press has become, as many believe, the mere expression of the strongest, then the law has no meaning and government has ceased to have the authority to dispense equal justice to all. The principle that the safety and security of the people must be the highest law is in serious danger of disappearing.

In *Watkins* v. *United States,* Justice Earl Warren stated: "The public is entitled to be informed concerning the working of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private right of the individual."

The liberty to publish without hindrance or recourse is not in itself an advantage over which society can wisely rejoice. On the contrary, it is the fountainhead and origin of evil, and the cause of injury to individuals who have done no wrong.

The question before you is not of small or private concern; it is a question of whether the constitutional right to freedom of the press has been so extended as to limit and nullify the freedom of individuals similarly guaranteed by other amendments of the Constitution.

The moderator of tonight's debate, the former administrative judge of the civil court and Supreme Court—Civil Division, is the Honorable Edward Thompson.

JUDGE THOMPSON: George, thank you very much.

The rhetorical question is whether a free press is a threat to freedom.

We almost say to ourselves, well, aren't you asking an inane question? How can freedom be a threat to freedom? And yet, freedom is of such an amoebic dimension—shapeless, formless, broadening here, thinning there, growing stronger here, and weaker there over the years; freedom carries with it such responsibilities that the very questions which President Barasch asked tonight burn within our inner souls, within our inner beings from time to time.

How fortunate it is tonight that we have opposing each other two strong advocates, with regard to the rights and the responsibilities of the press.

For the affirmative position, that the freedom of the press is a threat to our individual freedom, we are pleased to call upon Mr. Murray Baron, a graduate of Columbia University (Seth Low College) in 1928, prelaw course, and a graduate of the greatest law school in the United States, the Brooklyn Law School.

Mr. Baron started his employment during the Depression as an organizer in various trade unions: the United Mine Workers, the International Ladies' Garment Workers Union, the Leather Workers; he advanced to the position of international vice-president and then became a vice-president of the New Jersey CIO. From 1938 to 1942, he worked for the Department of Labor as a supervising inspector, both in the United States and as a representative to Puerto Rico in the Wage and Hour Division. In 1942 to 1943, he became the National Labor Relations Board examiner in New Jersey, Connecticut, and New York.

Mr. Baron is the owner, the proprietor, the manager—he is the boss of Murray Baron and Associates, located in Rye, New York. He and his associates are management and labor consultants dealing in arbitration in the United States, Europe, Africa, Latin America, and Asia.

He has traveled all over the world doing all sorts of things, settling all kinds of problems, as a trustee of the Freedom House, president of Peace With Freedom, Inc., and as a founder of the Citizens Committee. He has been a member of the Labor Relations Committee of the National Electronic Manufacturers Association; from time to time a consultant at the White House, as well as a consultant to a number of intelligence agencies; he has been a member of the National Council of the Foreign Policy Association; on the board of directors of Accuracy in Media, Inc., in Washington, D.C.; and he has been a columnist with *Twin Circle* and *National Catholic Publication,* and has published articles in the *New Leader, War-Peace,* and *League Industrial Democracy.*

He has lectured in schools from coast to coast and has occasionally participated in our debates, seminars, and classes.

It is an honor and pleasure for me to introduce you to Mr. Murray Baron.

MR. BARON: Thank you, Judge Thompson.

Now, the question framed for this evening's discussion: "Is a Free Press a Threat to Freedom?" I would have preferred to have it read, "Can the Free Press Be a Threat to Freedom?"

And I am on the affirmative, with the negative implication that that affirmative embraces.

We are here to discuss the phenomenon of an industry which in its broadest sense is possibly the second largest employer of labor in the United States. It is an industry, with respect to the printing press and the electronic press, which represents not only a concentration of power, but a place of increasing concentration which rivals that of any of the other major trustification periods in the history of the United States.

It is estimated that less than five hundred men and a handful of women, of our population of 220 million, control the overwhelming majority of the means of communication in the United States. So rapid is this growth of monopoly that it is not beyond reason to conjecture that an editorial denouncing the increasing trustification of the oil industry, for example, may be composed as I talk to you tonight, and may conceivably be transmitted throughout the United States by a handful of corporations, who in a double standard of historic proportions will denounce the monopolies existing in the nonmedia enterprises in our economy.

Secondly, whenever the courts or the government reach out to curb, control, regulate, or stop any organ of the media, one hears the buzz words: the "chilling effect" that certain judicial decisions, for instance, have upon "the right of the people to know." The third phrase is "confidentiality of sources."

First, with respect to "chilling effect." I know few things more chilling to the average consumer, say, of the *New York Times,* who spends about $200 a year for a delivered *Times,* than the realization that a handful of men and women control so much of the printed and electronic press of America. It is not chilling because these are evil men and women; not at all. They are, if they will permit the concession, fallible publishers and editors, though you will infrequently read an acknowledgment by an editorial writer that he or she has erred in some previous public recommendation.

Rarely do the media remind the reader that their value judgments of yesterday might have proven to be catastrophic. So, you have a one-way dialogue, a contradiction in and of itself, and a rather chilling effect on the people's right to know.

There was a letter in the *New York Times* not long ago regarding the increasing number of mergers and acquisitions—chains acquiring chains, and chains of corporate power acquiring individual newspapers.

As recently as July of this year there was a letter from Stephen R. Barnett, professor of law at the University of California in Berkeley. He remarked upon the inability of the media to satisfy "the people's right to know" about the internal, intramedia corporate mergers, corporate acquisitions, and the spread of corporate control of book publishing, of periodicals, and of the whole gambit of knowledge, information, and intellectual stimulation. Professor Barnett said that the press would be in a better position to protest closed trials if so many of them were not so inclined to put their own interest in secrecy first.

So we come now to the "confidentiality of sources." Government cannot claim an airtight secrecy of its internal operations, because the so-called adversary of the government claims the right of its citizenry to know, even if it receives stolen documents, information, and intelligence from inside the government archives on the theory that the people's right to know must be satisfied.

Well, let's move on; we will see whether we know enough about the men and women who control this vast enterprise.

They cater to a marketplace which yields in excess of forty, possibly fifty billion dollars in advertising, which seeks to persuade the consumers of America to purchase hundreds of billions of dollars of products and consumables in this country; and yet, we know so very little about who these people are.

Why is there no adversary press about the press themselves, about the media themselves? Just conceive of three networks providing the bulk of electronic reporting and journalism, and how very little is known about them. An occasional book lifts the veil, but not much else.

Now we move on to the power of the media—the power to reward, punish, glorify, crucify.

If I owned a press (English grammatic structure is difficult when you speak about the media, which is a plural singular, singularly plural), if I controlled the press for six months, I could, as a publisher, truthfully tell the virtues of candidate A and the sins and vices of candidate B without ever approaching a libelous threshold.

I would tell this truth and sanctify A and destroy the reputation of B. Now it is not quite that bold, because the objective newspaper would always include enough of the vices of the virtuous A and enough of the virtues of sinful B to give you ostensible balance.

But there is always a reserve in the media, and I speak about that in the broadest sense. One of the other ways to punish a recalcitrant, uncooperative, editorially-undesirable public figure is oblivion; simply do not mention him or her.

We have had four relevant cases in the courts of this country, one in the lower courts and three in the Supreme Court: *Sullivan* v. *New York Times*; the *Pentagon Papers* case; *Herbert* v. *CBS;* and the *Farber* case.

Let me comment on the last one first. There was a juncture in the hearings involving Myron Farber when the whole essence of the overwhelming power of the media was asserted by clear implication. That was the point at which Myron Farber resisted the judge's insistence that he turn over his notes, memoranda, and documentation in the Dr. X case on the theory that the judge would examine the material, in camera, without referring it to prosecution or defense, to determine whether it was exculpatory or incriminating and relevant in any case. Farber and counsel argued, "No, we will not; it invades the First Amendment." And I will say something about that in a moment.

Furthermore, upon examination of the material sought by the Court, Farber found no exculpatory evidence, no incriminating evidence, and therefore, for a second irrefutable reason he would not turn it over because it was of no evidentiary consequence.

Pause and contemplate the implication of this: Myron Farber, private citizen engaged for self-gain (as we later learned, a pecuniary motive), saying that if he found the material in his possession to be exculpatory or incriminating, he then would unilaterally violate: (1) the confidentiality of the information which he was arguing in another respect; and (2) he would say, yes, I will waive my rights under the freedom of the press, First Amendment. And he—who is he? Private citizen, uncredentialed, uncertified, unregistered as he properly is in our democracy under the First Amendment, but a private citizen reaching up

beyond the judicial system, arrogating to himself this awesome power to determine what is evidential, material, competent, or otherwise when a man's life is at stake.

Now, the presidency cannot itself adequately cope with 365 days of eternal exposure and criticism. The power of the media, the late Dean Acheson said, has almost rendered the presidency as ungovernable. Congress has long been unable to do anything about it because the First Amendment upon which this whole superstructure of self-promotion rests simply says that Congress shall make no laws abridging the freedom of the press. That says nothing about the executive office and nothing about the judiciary.

I think, with the media controlling the dialogue, the public is being cautioned and brainwashed by a self-interested adversarial party—namely, the media, though not by all of them. There are many in the media who agree with some of what is being said here tonight.

The fact of the matter is that the judiciary is the last barrier—in the words of the late Alexander Bickel, formerly special counsel of the *New York Times*—that no enterprise in our system of checks and balances can assert total, complete, absolute power. Capital, labor, and certainly politics and government have discovered that. And yet the presidency cannot be sustained because the aggregation of such awesome power is inevitably exercised until it is stopped by the collective expression, if you will, of the various institutions of society.

When the decision in the *Sullivan* case was rendered, the editorial writers of the media hailed the sagacity of the great Supreme Court which in its wisdom was able to find the essential truth; thereby nearly nullifying the libel laws of this state.

What was the theory of the *Sullivan* case? It was that one who becomes a public figure, which includes all public officials and anyone else who becomes, emerges, or grows into public notoriety or celebration—frequently made a public figure by the media—is an open target for everything except willful, reckless disregard of the facts, and the ingredient of malice, which proved to be academic until *Herbert* v. *CBS* came up. And all the Court said was: Now, look, *Sullivan* v. *New York Times* has to be implemented by the right of a litigant to probe the motivation after it is determined whether there was a reckless disregard of the facts, and malice, by properly seeking the motivations, intellectual or ideological, of the newspapermen or newspaperwomen involved, when they ran or did not run a story, or cited or did not cite certain facts available to them.

The press was almost inarticulate about its response, or if articulate, a cacophony of voices in the media ensued.

Some said: Now just a minute, don't get overreactive; after all, this was a logical follow-up of the *Sullivan* decision. *Herbert* v. *CBS* merely established that if it is possible you are going to libel someone and you deny the libelous statement you have published, for goodness sake, let that person have his day in court to prove that you did it willfully, recklessly, and with malicious disregard.

And now the Pentagon Papers. I think Floyd Abrams will confirm that, even while the press prevailed on the Pentagon Papers case, Justice White and one or two others cautioned the successful litigants—the *Times*, the *Washington Post*, and others—to be very careful since what was being dealt with was prior restraint.

I stand here today as an advocate—as I am sure Floyd Abrams will—and under no circumstance, except in the rarest, would I favor any prior restraint. I have no time to discuss the exceptional cases. Prior restraint is a dreadful, risky thing in a democracy.

Punitive consequences ought to flow from some of the things that the press do without prior restraint. In the Pentagon Papers case, we had this remarkable double standard. The *New York Times*—and I am not concentrating on the *Times* as being typical of all papers or of the media in America, because it is a very good paper—the *New York Times* was a fence for material stolen, incidentally, by Daniel Ellsberg. The night that Ellsberg was identified by Sidney Zion—who had just left the *New York Times*—I happened to be on a radio program with Sidney when he released the identity of the progressive, enterprising, investigative, and subversive Daniel Ellsberg.

We have not learned everything about that occurrence at the *Times*—for instance, their then general counsel refused to handle the Pentagon Papers case. When Floyd Abrams came on the scene, the managers set up a security system in the *New York Times* to receive these documents having to do with the national security. They built an internal structure, and you had to have a pass and approval for personnel to move from the general offices of the *New York Times* into the sanctums sanctorum; and it took months to prepare the publication of the Pentagon Papers case. *New York Times* security versus national security!

At the recent *Washington Post* stockholder's meeting, as a stockholder in that flourishing paper and as president of Accuracy in Media [A.I.M.], I asked Mrs. Kay Graham: If your confidential secretary were to slip documents or confidential memoranda to Accuracy in Media revealing that your editorial department had made a decision to omit certain information that would contradict its editorial policy, would you applaud and possibly promote your secretary because she was satisfying the people's right to know what you and your editors were doing in the way of editorial policy?

Mrs. Graham, who is regal but not the wisest person in the media world, said hesitatingly, with the other board of directors and members

looking on, "Of course I wouldn't reprimand her, she would be doing her duty as an American citizen." The chairman of the board of A.I.M. got up and said, "Oh, let's get a repeat on that."

We have taped these colloquies that take place annually. That is a good thing to know, because there is so much we do not know about this very powerful industry.

Michael Garner, editor of the *Des Moines Register,* not so long ago published in the *Wall Street Journal* five incidents involving conflict of interest, violations of law, conspiracy on the part of the media, and influential media individuals that the general press never published. Each one of the five could have been a front-page story.

Again we asked Mrs. Graham—several of her reporters were involved on the alleged Dr. Bourne incident involving the use of drugs: "Since you visited the penalties of publicity on Dr. Bourne, don't you think you ought to tell the public that some of your own reporters participate in these drug activities?"

She said, "We don't inquire into the personal lives of our reporters." So said the publisher of a paper that has ravaged and wrecked many a political figure in this country.

Now, I do not have time to go into some other material which I hope will come up in the discussion, but I say with due deference that the American press is like democracy in that—in Churchill's words—democracy is the worst way of running a society except for all the other systems.

The American press is the best in the world, and very bad at the same time.

Thank you very much.

JUDGE THOMPSON: Thank you, Murray.

And now for the opposite viewpoint.

Our next speaker, Floyd Abrams, is a partner in one of the greatest law firms in the city of New York, and indeed the nation—the firm of Cahill, Gordon & Reindel. He is a visiting lecturer at the Yale Law School where, since 1974, he has taught a course in constitutional law.

He graduated from Cornell University in 1956 and the Yale Law School in 1960. In 1967, Mr. Abrams was awarded the Ross Essay Prize of the American Bar Association for his study of the Ninth Amendment of the U.S. Constitution; in 1978, Mr. Abrams was awarded the First Amendment Prize of the American Jewish Congress.

During the latter part of last year, Mr. Abrams represented NBC in the "Born Innocent" case in San Francisco, about which so many of us read, involving the alleged imitation of an award winning program; he also represented Myron Farber in his legal battles in New Jersey.

He has, as well, represented newspapers, broadcasters, and journalists in various litigations, and has appeared before the United States Supreme Court in a number of prominent cases: the Pentagon Papers case; the Nebraska Press Association, the Landmark Communications, and Daily Mail cases; *Herbert* v. *Lando;* and the case involving the right of television broadcasters to copy and broadcast the Watergate tapes.

Mr. Abrams is chairman of the Committee on Freedom of Speech and of the Press, of the Individual Rights Section of the American Bar Association. He is also the chairman of the Committee on Freedom of Expression, of the Litigation Section of the American Bar Association. He has published articles in the *New York Times* magazine section, the *Yale Law Journal,* and other publications throughout the country.

Just last month in Dallas, before the American Bar Association Convention, I had the pleasure to listen to Mr. Abrams as one of the protagonists, if you will, on a panel—the negotiator, the settler, and the moderator—of which the Honorable Lewis Powell, the associate justice of the Supreme Court, was a member.

It is my pleasure to introduce to you Mr. Floyd Abrams.

MR. ABRAMS: I had thought to start with a discussion of the topic, "Is a Free Press a Threat to Freedom," in a world context and to point out to you that the American press is not only the freest in the world but serves its public the best because of its freedom.

One example I want to cite is the following: Just last week in the bookfair held in the Soviet Union, copies of *Animal Farm* and other books were seized by the Russians in the name of freedom of speech because such books, so the Russians said, did not contribute to détente, and in affirmation of the freedom of speech, the Soviets took the books off the shelves.

Well, such crimes happen now and then for freedom of expression.

But Mr. Baron provokes me a bit. After all, he comes before you and deals with three cases—in two of which I was the counsel, both of which I lost. In the third case—the Pentagon Papers case—which we did win, I was co-counsel. And so I simply cannot resist the opportunity to reargue with Mr. Baron, and perhaps with some of you, about those cases, because I think they provide by their own nature some sense of the conflicts in the courts these days, surely with respect to freedom of the press.

I had said at my table before I got up that the last thing I was going to raise was the *Farber* case again. It is one thing to lose it, but it is another thing to get up and proclaim my loss to the world; but let me do it. I cannot help but say that I think the story of the Farber case did not get out right in part because the *Times* was on strike, and in part—perhaps due to counsel or circumstances—because the judiciary of our neighboring state was so angry with us all the time.

The subpoena in the *Farber* case was essentially for all notes and all drafts of all documents that the *Times* had, which Mr. Farber had prepared with respect to two series that the *Times* published prior to the indictment of the doctor who was accused of first degree murder.

Our basic legal position was that before Mr. Farber went to jail he was entitled to a full-fledged hearing, full due process rights like any other criminal defendant.

We also argued that the subpoena was overbroad and urged the judge to strike the subpoena on that ground. And we urged upon the court something which exists in New York—a shield law. That was really our first argument, which was not that the First Amendment provided an absolute bar for Mr. Farber ever turning over any material, but that the existing New Jersey statute which was adopted by the legislature (and similar statutes that exist in New York and elsewhere) provides that no journalist who obtains material in confidence is required to divulge them to any source. This meant that to the extent Mr. Farber had received information in confidence, he did not have to divulge it to any court.

And so the argument was made. There was never a ruling made on that argument until the New Jersey Supreme Court ruled against it in a five-to-two vote and interpreted the statute to say that, although that is exactly what the statute means, it has to yield to the right of the defendant in a criminal case.

My own sense is that, while I can understand limiting privilege laws, shield laws and the like, it is unacceptable to limit only shield laws which deal with journalists. There is a shield law in existence in the New Jersey books right next to the journalist's privilege. (All the statutes are written down in New Jersey—all the privileges are written right next to each other.) As counsel, I had the benefit of it—a "privilege" not to disclose information, which Mr. Farber had divulged to me, that could, in theory, have cleared Dr. Jascolovitch. But no judge would ask me to divulge what my client told me because I am a lawyer, because of the attorney-client privilege, and because we believe as a society that it is very important that clients agree to confide in their lawyers.

But one may disagree about having a shield law. Some may say, as Mr. Baron has on occasion, that journalists are different than lawyers. Indeed, they are, and we can talk about the differences.

The New Jersey Supreme Court said, subject to having to yield to other rights, that my client should not have been sentenced to jail for six months for criminal contempt.

Well, that is the brief reargument of the *Farber* case. We argued, as Mr. Baron rightfully says, that there was a First Amendment privilege. We did not argue that there was an absolute right of journalists never to divulge confidential sources.

Our constitutional argument was precisely the same argument made before the Supreme Court in 1972, in the *Branzberg* case, which also related to confidential sources, and essentially it was: Go someplace else first. Make sure you exhaust all other places before you create this conflict; make sure you need the information very, very badly before you reach this issue.

What was the *Farber* case? The *Times* paid $285,000 in fines. Mr. Farber was in jail for forty days; he was sentenced to jail for another six months, and he would have spent the time in there had the trial judge in New Jersey not suspended the sentence.

I do not know what it is that Mr. Baron wants; worse law than that? I think it is fair for me to ask you if our society was really well served by that law. The position of the press—and now I speak not legally but, I like to think, consistently with our legal position—is not that the press are entitled to all these special rights because they are all such marvelous, heroic, saintly people, but because the press perform a certain societal role. Sometimes they perform it badly, sometimes they perform it well, but they are the only ombudsmen, Mr. Baron, that we have out there checking up on the institution of government that is not within the government itself. And they are perhaps the only institution in our society which can take the time and trouble to make the effort to try to write a story about whether indeed there has been an unreported, unindicted crime which had gone on in a neighboring state.

I assure you the press can write about other things. They do not have to write about stories like this. They can write what John Chancellor calls "nonfiction, nonnews." They can give you information about how to do things. They can give you recipes or tell you how not to get sick. They can fill the papers, and they will not sell a paper less.

The question is whether or not we want the press to write stories like this, to at least make the effort to investigate stories, because it seems to me that if the law will not change, its ultimate effect will be that the price of these stories will be either the breaching of a confidential relationship entered into by journalists for the stories, or extraordinary fines, jail sentences, and God knows what else. The press would simply have to go do other things, to write about other things entirely.

Mr. Baron referred to a case—*Herbert* v. *Lando*—which he rightfully says follows the libel ruling of the Supreme Court in *New York Times* v. *Sullivan*. How could we have said to the Supreme Court of the United States, Mr. Baron asked—notwithstanding the fact that the press cannot lose a libel case brought by a public official or public figure unless they published a story knowing it was false or having serious doubts as to its truth—that we thought, yes, that questions should not be allowed of the sort that were at issue in the *Herbert* case.

There were 2,600 pages of questions asked of Barry Lando, the CBS producer, in the *Herbert* case and 250 exhibits produced. There was full testimony as to everything CBS knew, everything it had learned, and everything that it did.

The question in the case was this: Were questions in the pretrial deposition proper, not as to what the CBS producer knew, what CBS did, or what documents CBS held, but what it *did not* do? Why certain things were published and certain things were *not* published? Why one person was interviewed and *not* another person?

We were the ones in that case saying to the Court: Look, you draw the inferences. If we had information and did not publish that information, you are entitled to draw an inference that we bore malice, as constitutionally defined. We were prepared to take that risk. We were prepared to give up answers to questions which, in my view, were pushover questions. Questions as to state of mind are not hard questions to answer. As practicing lawyers, as judges, we know that questions such as these are easy, set up, softball pitches which the press like to answer.

The issue in that case rested on high principle. While Mr. Baron accurately characterizes some of the outcries of the press, which I share, many in the media cannot feel quite content with the ruling I sought, because in some ways it makes it easier for the press to win libel cases. To win a libel case, what you really want to do, the best way to win it, obviously, is to say: I did not harbor any malice, here is everything I did, everything I knew—here is everything.

Well, we were prepared to risk some of the protections of the *New York Times* v. *Sullivan* case, if those are the protections of *New York Times* v. *Sullivan*. The Court did not take our offer, and we are back in the embrace of that marvelous case.

Mr. Baron mentions the Pentagon Papers case. We will speak a bit nonlegally about that case.

Do you recall the prophecies of doom that the U.S. government issued during the course of that case—what they said would happen, the things that would occur, the men that would die, the loss of peace, perhaps, in the world if the papers were published? And then we read the Pentagon Papers in our newspaper because the *Times* was allowed to publish them and because other newspapers did, in fact, publish them.

The case against the *Times* was at its heart a fraudulent one, not because the government is not allowed to go to court sometimes to get a prior restraint—very rarely, as Mr. Baron accurately states—but because there was no case, because it was predictable in reading those papers that there would be no harm, except a generalized harm which one can only say is true any time a newspaper publishes information which on some theory or another could hurt the country. It is perfectly true to say that when the Pentagon Papers were published, it might have been the case that some countries would lose confidence in us in terms of holding our secrets. The Supreme Court, unanimously I think, said that was not a good enough reason to have a prior restraint on publication.

Today is the day that the *Progressive* case ended in Chicago. I thought I would conclude with just a word or two on that case because it is so recent, so current, and because it shows, I think, the risks of government litigation in an effort to obtain a prior restraint against publication.

From the press' point of view, the *Progressive* case is hardly the best case to litigate the issue of whether the press should be restrained in publication. What could be worse, one could add, is a case in which a magazine intends to publish very sensitive material about how to make a hydrogen bomb no less.

(I used to give a final exam at the Yale Law School in which I asked my students whether a prior restraint could be entered by a court if that ever came about.)

So on the face of it, it is not a very easy case, not a very attractive case for the press, and it is not one which I find easy to deal with on the basis of making my own journalistic judgment about whether to publish it.

I would not have objected or thought it outrageous for the government to look to that case to see if they really thought they could meet the tests set forth in the Pentagon Papers case, as to when you could get a prior restraint on publication—whether publication would surely result in direct, immediate, and irreparable harm to the nation or its people. I waited for the government to try to prove that; and look what happened in the case.

Litigation has, as we all know, a momentum of its own. Lawyers make arguments, and sometime not very good arguments because once one is in court you do try to win a case. And so, having started with the notion that the government could meet the Pentagon Papers test, they took three steps down the road.

First they came up with the theory that every piece of information which was restricted, was classified at birth—not classified by an act of a government official or by anyone's decision, but classified at the moment when one had the idea—and could not be published.

Second, the day before yesterday they argued in the court of appeals in Chicago that all technical information was unprotected by the First Amendment. That is an absolutely unprecedented argument in our nation's history. We would need years to find out what technical information is, if we were to adopt that as an exception to the First Amendment.

And finally, the government asked for a closed hearing of the entire oral argument in the court of appeals.

The problem with censorship is that it leads to more censorship. It

leads to a censorial mentality, to a state of affairs which is, in the most real sense, unAmerican.

I would like to close by saying I agree with Mr. Baron on something, but since I cannot think of anything on which we agree, except my pleasure in seeing him and his in seeing me, I welcome your questions.

JUDGE THOMPSON: Thank you very much, Mr. Abrams.

And now we shall have a few minutes for questions. We have had two marvelously brilliant, intelligent presentations tonight. They add to our knowledge and awareness relating to this subject.

Judge Alexander.

JUDGE ALEXANDER: I was struck by Mr. Abrams's closing remark on censorship, on the trouble with censorship leading to more censorship, and it seems to me that an unbridled freedom of the press, irresponsibly exercised, might very well lead to irresponsibility, since if there are no checks on that exercise of freedom, then who is to say what the limits of the rights of the press may be?

I wonder if Mr. Abrams would like to comment on that observation?

JUDGE THOMPSON: Mr. Abrams.

MR. ABRAMS: I think that any proponent of the press, Judge Alexander, has to concede that inherent in his argument is the risk of press irresponsibility and, indeed, the risk of substantial press irresponsibility.

I grant that, and I can simply state the issue as I view it in the following fashion: It seems to me that the choice we have to make as a society is how we are to cut this, if we are to cut it at all, so as to protect the benefits of freedom of press without losing them.

My own view is that the Supreme Court, subject to certain reservations I have about some very recent cases, has done a fairly good job in doing that, and essentially the way they have done it is to say that while there are certain categories of unprotected speech: obscenity, whatever it means; libel, whatever it is; fighting words, however hard they are to define; that with few exceptions such as these, we do not balance on the basis of what is responsible and what is irresponsible, we do not permit the law to play a role in making that decision.

The First Amendment, which says Congress shall make no law abridging freedom of the press, means not only Congress but, as the courts have told us, the judiciary and the executive branch as well. Once we start pruning down the First Amendment by redefining what is responsible and what is irresponsible, we start on a process to which there is no end, it seems to me, except at least a significant risk of living in a repressive society.

The price we pay for that is some press irresponsibility, and basically allowing the press and the libel laws, including the law of privacy, to deal in their own way with irresponsibility, and the public to deal in their own way, but not to deal with it by the process of law.

JUDGE THOMPSON: Any other questions?

Judge Liebowitz.

JUDGE LIEBOWITZ: I would like to direct this question to both of the speakers.

Mr. Baron struck a note that concerns me, and I am sure many citizens, and that is the tendency toward a monopolistic press, which I think is a serious matter. I do not know how much you can say about it, but, if it does exist and if the press or media are veering in that direction, what do you predict the consequences will be, if there are any consequences?

JUDGE THOMPSON: Mr. Baron.

MR. BARON: I do not know whether I cited the status of competition in the media in my brief commentary. Ninety-seven percent of the towns and cities of this nation have no competing press. Two percent of our communities are one-newspaper communities.

Now those are pretty ominous statistics. Secondly, there is nothing wrong with conceding that the press has a constitutional right to be irresponsible, except for the limits that Floyd gave.

Thirdly, there is nothing wrong with the media that a reestablished competition could not partially cure. Do you remember, about four or five years ago, when the *New York Times* ran a news story for a few days in the TV section? Bear in mind that papers and the TV are restricted by time and space to using only about 10 or 15 percent of the daily input. But they found the space to expose CBS as harboring in its Musical Records Division a drug ring which was paying millions of dollars in drugs in order to get favored treatment of their records. The *New York Times* story was a juicy, remarkable story.

Here was one section of the media visiting scrutiny upon another section of the media in a very rare demonstration of investigative reporting.

The *New York Times,* with a little whimsical sense of humor, sent a reporter over to the CBS News Division to ask CBS News whether they would further investigate the parent corporation's attitude and proposed action regarding the drug ring. CBS News said audaciously: Of course we will. It is a news story, and we are going to track it down no matter where it leads.

Did you ever hear again about CBS News running any features about its parent company's involvement in drugs and corruption? Of course not.

Now why did the *Times* do that? Well, the scuttlebutt is that the

advertising dollars are being fought for as if in a jungle, and the *New York Times* did not mind putting a burr on CBS because, as it is known, the print and electronic media are in competition. But just think how little of that is done.

I cannot say—Floyd Abrams will not ask me for proof now—but, there is corruption in the media. There are instances where reporters are paid off not to run stories containing certain facts. There is indeed a conflict of interest among editors and publishers regarding the way they treat stories that affect their welfare, their economic welfare. How little exposure is made of this vast industry which claims to this hour that its right under the Constitution is to be a corrective, always on the side of the government. Of course, that is the virtue of the freedom of the press. But I think I can make a case that the media are people, corruptible people as well; let's expose it. And believe me, the media have low credibility; remember, almost every institution has been ravished by this continued exposure, and what occurred? Like an Australian boomerang, the media stung as they received from the general population the same ingratitude and cynicism that they have helped to promote about everything else in society.

My answer is simply this: The press have a constitutional right to be irresponsible and all of us in society have a constitutional right to expose that irresponsibility.

JUDGE THOMPSON: Mr. Abrams.

MR. ABRAMS: Well, I simply cannot comment on some of the things that Mr. Baron said. I do not know the source for his scuttlebutt, or what it is Mr. Baron heard about who it is on the *New York Times* he believes . . .

MR. BARON: I did not mention the *New York Times,* Floyd, please. I did not say . . .

JUDGE THOMPSON: Please, Mr. Baron.

MR. ABRAMS: He said the *New York Times* exposed CBS, and the scuttlebutt was, as he said, that there were economic motives. All I can say is that I have no knowledge or information about that.

I am surprised that Mr. Baron, who does not like confidential sources, would use them in spite of his dislike.

With respect to the question, I think the monopolistic press question is a very serious and difficult one. First, I do not think that it poses the issue entirely fairly to focus on the press by segregating newspapers from television or magazines—as separate from each of the other elements of the press which Mr. Baron otherwise puts together for the rest of his presentation. And so those people that live in a one-newspaper town—and they are much poorer for living in a one-newspaper town—at least have the benefits of all the magazines that they choose to buy, and the magazines are in serious competition. They also have the benefits of all the radio stations, which it seems to me are not often enough talked about, with all their talk shows, and with an extraordinary diversity of views being presented day and night; of television; and of the rest of what Mr. Baron would otherwise call the media. And yet, that being said, I do not think I have fully answered the question.

All I can say is that to the extent that we move more and more into a situation where we have one-newspaper towns, we do so at our peril.

I think we should do things as a society to try to encourage more newspapers to develop. In the long run, we will have more cable-television stations and more outlets in other forms of media through which views can be expressed.

We do have the antitrust laws. I express no views as to when and how they should be applied in situations like this. But it does seem to me that, in the long run, we probably should take some kind of action as a society to try to ensure the existence of as many outlets of news and public events as possible; what that does not include is content control by government in any guise, but what it should include is the encouragement of more sources of information for the public.

JUDGE THOMPSON: Thank you very much.

Will you please rise and identify yourself as you ask the question?

JUDGE NAUMOFF: Ben Naumoff. This is a question addressed to Mr. Baron.

Let's assume the factual situation you have developed, and a general agreement about problems with respect to the media—not only newspapers but radio, television, and so on.

The question is: What kind of a solution can you conceivably propose for that? Would you advocate, for example—comparable to the kind of thing that has developed within the labor movement—the creation of a public review board which passes on this and gives it a considerable amount of publicity, notoriety and so on, which may tend toward solving this part of the problem; or is the problem one which is in effect insurmountable, given the feeling that we have to accommodate to freedoms, whether for the individual or institutionally?

JUDGE THOMPSON: Before you answer that, Mr. Baron . . . Ben, would you identify yourself to the audience? There are many here who possibly do not know you.

JUDGE NAUMOFF: I was original administrator of the U.S. Department of Labor for dealing in labor relations.

MR. BARON: And I can add, a colleague of mine in the New Deal days in government service.

I have several suggestions. They are already sprouts, some of them.

One, simply, is to have an ombudsman, which is true of several

papers, including the *Louisville Courier Journal*. The ombudsman, though paid by the newspaper, is given regular space in the newspaper to deal with the complaints of the reading public, independent of editorial control. This is a very effective way of providing some corrective. Wherever it has been instituted it has been retained.

The Op-Ed page, instituted in the *New York Times* in the early 1970s, was a partial response to Agnew's speeches in 1969 and 1970.

Secondly—I am not sure that Floyd and I would agree upon this, although we agree on a number of things, like prior restraint, censorship, and keeping government out of these controversies—I think that the U.S. government ought to have one of the channels on the publicly owned frequencies in the electronic spectrums, continuously allocated to the private sector, in order to deal with the press, the media.

I think there is nothing wrong with this. CBS is attempting to bridge the gap, but there are countries in western Europe in which the government has access to one of the many channels.

JUDGE THOMPSON: Which countries?

MR. BARON: France, although it is a poor example. The French government is an authoritarian democracy, as it were, and they have abused their use of those channels.

Italy is another; they also have abused it. But I think in the United States, a skeptical republic, the public will discount necessary self-serving government propaganda.

Third, having to do with this very gray problem: Floyd, those figures are verified figures. Ninety-seven percent of our cities and towns have one newspaper. We speak here in a town that used to have thirteen or fourteen papers.

Another proposition is rather simple, though startling. The highly profitable newspaper and TV combines (especially those of TV who are almost printing the money, however inflated) ought to divert a percentage of their gross earnings to subsidize our opposition papers. Not too large a deduction, but with the kind of money that is being made . . .—talk about profit making, the *New York Times* increased its price from three cents to twenty-five cents. That was rarely done with full conscientious soul-searching or apologetic explanation to the public as to why they can so unilaterally increase the price as they do.

JUDGE THOMPSON: Mr. Abrams, I would like to give you an opportunity to answer that particular challenge for a moment or two.

To give us both sides of the question, will you tell us whether the newspapers or the media are doing anything about their own censorship in that regard.

MR. ABRAMS: Yes. I think that—and you can pass around judgment on this, there are some bad examples as well as good—in terms of the newspapers and broadcasters that we have been talking about, I think one can demonstrate that they have been taking major steps in that respect. Some have established ombudsmen, others have established correction policies far different, far more pervasive than ever before.

I think if you read the *New York Times* today, or any day, you will see material in the correction column that you never saw before. There are Op-Ed pages, as Mr. Baron points out.

I agree with Mr. Baron that there is still not enough written by the press about the press, but I think—from his very examples—there is more written by the press about the press every day.

The Gardner articles in the *Wall Street Journal* are one example. There are articles in the *New York Times* and they have articles in other publications around the country dealing with the press itself. This is a growing field. Journalism will continue to grow, and I have no doubt that we will all be well-served by having more reporting done with respect to that subject.

JUDGE THOMPSON: In conclusion, thank you Mr. Abrams and Mr. Baron. And thank you, Mr. Barasch.