Libel Defense Resource Center

Seventeenth Annual Dinner Program

"Sullivan in the Year 2000: Will It – Should It – Survive?"

November 10, 1999

With Presentation of the
William J. Brennan, Jr.
Defense of Freedom Award
to
Floyd Abrams

Speakers
Harold Evans
Nina Totenberg
Jeff Greenfield

Presentation of Award by
Dan Abrams
SANDRA BARON: Good evening. LDRC members, their guests, members of the Bar, members of the media. As always, as you know, it is my job and my pleasure to welcome all of you and to give some thank you's. First and foremost, I want to thank all of you for coming tonight. Thank you very much, it's good to see you all. Special thanks, I think, we need to give to Media/Professional and Scottsdale Insurance for sponsoring the cocktail party which preceded this dinner. It's a long-standing tradition for which we should all express our appreciation to Chad and his colleagues who are here.

LDRC, as most of you know, is a membership association that was founded by some exceptional media companies about twenty years ago and has grown to include major broadcast and cable companies, magazine, book, newspaper and Internet publishers, the trade associations that represent media, reporters, news directors and editors, and media insurance industry representatives. The Defense Counsel Section, made up of law firms which do First Amendment defense, has grown to almost two hundred law firms across the country, Canada and England.

LDRC's mandate is to serve as a clearinghouse for information about media and First Amendment issues and to provide materials and services to assist all media and non-media to better understand, prevent and defend First Amendment matters. A description, for those of you who are not familiar with LDRC, and identification of some of the resource materials and services is in the program. As you all know, we are honoring Floyd Abrams tonight with LDRC's William J. Brennan, Jr. Defense of Freedom Award. A description of the award and the purpose of the award is also in the program. It was, as many of you remember, first given to Justice Brennan, who then allowed LDRC to rename it in his honor.

We've chosen to honor Floyd Abrams because Floyd is a unique advocate of First Amendment freedoms, one whose name has become virtually synonymous in the public mind with the defense of freedom. In honoring him with this award, we recognize the enormity of Floyd's contribution as an advocate, spokesman, and teacher for the First Amendment. For Floyd is not only one of the foremost advocates in courts of law, and he truly is that—a list of some of his cases appear in the program—but he's foremost a public spokesman, who in his countless public appearances, media appearances and interviews, as well as his own articles in the popular media, has been capable of making complex issues of First Amendment scholarship comprehensible well beyond the legal community. He has also, not surprisingly, proven to be an exceptional teacher of law students and journalism students. In this room, I know, is but some of the evidence of Floyd's persuasive qualities, lawyers whom he has taught and whom he has mentored who have, in turn, gone out to practice First Amendment and media law.

We selected Floyd to be the Brennan Award winner long before the mayor of New York decided to create a First Amendment crisis for the Brooklyn Museum of Art, and indeed for the entire creative community of the city, one that Floyd is endeavoring to resolve, both in the courts and in the court of public opinion. But these recent events, we believe, only underscore the correctness of our choice.

We wish to thank the speakers tonight, to be sure, and to thank Sidney Zion and Anthony Lewis, who wrote the wonderful essays about Floyd that appear in our program, two of the most literate and captivating writers on a subject that is quite dear to them both. And now I want to bring up Ken Vittor, Executive Vice President and General Counsel of the McGraw-Hill Companies and chair of the LDRC Executive Committee, now re-named our Board of Directors, who will introduce the theme we asked our speakers to address: "Sullivan in the Year 2000: Will it—Should it—Survive?" Ken...
KENNETH VITTOR: When the Supreme Court issued its historic—and stunning—decision 35 years ago in *New York Times Co. v. Sullivan*, First Amendment scholar Alexander Meiklejohn exclaimed: “It is an occasion for dancing in the streets.” And so it was.

In the revolutionary ruling written by Justice Brennan—aptly described by Floyd Abrams as a “majestic opinion” having “a command of American history that is rare in a judicial opinion”—the Court not only constitutionalized the law of libel, it rediscovered what Justice Brennan described as “the central meaning of the First Amendment.” Born out of the civil rights battles in the early sixties, *Sullivan* taught us that “uninhibited, robust and wide-open” criticism of government and government officials—even false and defamatory criticism—is indispensable to our constitutional form of government.

First Amendment commentator Harry Kalven distilled the essence—and the importance—of the *Sullivan* decision as follows: “[T]he presence or absence in the law of the concept of seditious libel defines the society. If . . . it makes seditious libel an offense, it is not a free society, no matter what it’s other characteristics.”

Now, 35 years after *Sullivan*, it appears to many that the dancing has stopped. Yes, *Sullivan* has resulted in significant First Amendment victories, particularly at the appellate level. And in a “chilling effect” we can all happily applaud, countless potential litigants and their contingency fee counsel have been persuaded not to bring libel claims against the media because of the heavy burdens of the “actual malice” rule. Indeed, in sharp contrast with tonight’s impressive gathering of First Amendment lawyers, there is no organized plaintiffs’ libel bar in the United States, in large measure due to *Sullivan*.

Yet the substantial gains achieved under *Sullivan* have come with surprising costs and unanticipated consequences. To cite but a few:

- Multi-million dollar jury verdicts against media defendants in libel cases—unknown and indeed unimaginable prior to *Sullivan*—are now barely newsworthy. Jurors, angry at what they perceive to be an arrogant and irresponsible press and hopelessly confused by the daunting complexity of the “actual malice” rule, now routinely and predictably deliver their expensive messages to the media in libel cases.
- Highly intrusive pre-trial discovery, concerning all aspects of the editorial process—generally irrelevant prior to *Sullivan*—now routinely compels the disclosure to libel plaintiffs of voluminous evidence concerning reporters’ states of mind and their most sensitive editorial work product.
- Substantial settlements—in amounts (even adjusting for inflation) far exceeding the $500,000 verdict which shocked the Supreme Court to action in *Sullivan*—are now considered by prominent media organizations to be the regrettable but unavoidable cost of doing business in the *Sullivan* era.
- Fraud, trespass, breach of contract litigations which attempt to avoid *Sullivan* by attacking newsgathering methods rather than the content of disputed—and often entirely accurate publications—are now increasingly commonplace.

Even some of the most passionate supporters of the *Sullivan* decision are troubled by what they perceive to be the unwise expansion of the scope of the original *Sullivan* rule. Anthony Lewis, author of an otherwise celebratory history of the *Sullivan* case, is critical of the extension of the “actual malice” rule to celebrities and other public figures seemingly far removed from the robust
criticism of government and “the central meaning of the First Amendment” discussed in *Sullivan*. Concerned that the *Sullivan* doctrine has become vulnerable because it has been spread too thin, Lewis pointedly asks what celebrity-libel plaintiffs such as Carol Burnett or Wayne Newton have to do with James Madison?

Other strong proponents of *Sullivan* fear a potential judicial backlash in response to a perceived imbalance in the current libel law and, perhaps more importantly, in reaction to what many judges believe to be an irresponsible press. After leaving the D.C. Circuit Court of Appeals to become President Clinton’s counsel, Abner Mikva ominously warned the press as follows:

> A feeling is abroad among some judges that the Supreme Court has gone too far in protecting the media from defamatory actions resulting from instances of irresponsible journalism . . . I’ve been a judge for fifteen years, and now that I’ve taken off my robes, one of the first things I must say is—Watch Out! There’s a backlash coming in the First Amendment doctrine.

We thought the best way to honor Floyd Abrams and the First Amendment values he so eloquently articulates was to discuss—hopefully, provocatively—the dilemmas and current challenges posed by the *Sullivan* case. Floyd’s willingness throughout the course of his illustrious career to question conventional wisdom surrounding First Amendment issues—to demand more of the press than it frequently demands of itself—has inspired us to reexamine the *Sullivan* case, and to ask: “*Sullivan* in the Year 2000: Will it—Should it—Survive?”

To help us think about these important issues, we are privileged and honored tonight to have uniquely qualified experts—and, of course, our Award winner Floyd Abrams—to share their thoughts and experiences with us. Recognizing that our distinguished speakers really need no introduction—and in the interest of time—I will not repeat the biographical information that is set forth in your Dinner program. Suffice it to say that each of our guests brings to this occasion a unique perspective and a rich range of journalist experiences from which to view and discuss the contemporary issues raised by the landmark *Sullivan* case.

Our first speaker tonight, Harold Evans, has practiced journalism on both sides of the Atlantic. As current Editorial Director and Vice Chairman of *U.S. News and World Report* and the *New York Daily News* and former editor of *The Sunday Times* and *The Times* in London, Harold Evans brings to our discussion the special perspective of a journalist of the first order who has worked both with and without the broad protections of the *Sullivan* case and the First Amendment. Harold . . .

**HAROLD EVANS:** Is this the point where I plead guilty? (LAUGHTER). I wanted to say when I received the invitation to speak here tonight, I thought of the paragraph in the New York newspaper (now happily extinct—we don’t like too much competition) in the fifties when I came here and the paragraph said—it was a reporter at the airport interviewing an actor—“He was asked if he contemplated any further act of matrimony. ‘Certainly,’ was his evasive reply.”

I felt like being “evasive” myself tonight because *Sullivan* is sacred to many of you, and I am very uneasy about *Sullivan*. But I was certainly pleased to say yes, yes, to speak in honor of Floyd Abrams. For me, his monogram, F.A., stands for “Flying Angel.” Whenever I was served a writ in Britain as editor of *The Times* or *The Sunday Times*—and that was pretty often over fifteen years—we knew we could always count on the brilliant Floyd for moral support and often an insight we might deploy, like a secret weapon, when we slunk into the High Court in the Strand. Hearing
that Floyd was on the line was like catching the sound of the trumpet in *Fidelio*. Liberation.

Our silks—that’s what we call our lawyers, you should come over, it’s really a lot of fun—our silks, with their wigs and everything, did pretty well considering that if ever we sought to infer that *Sullivan/New York Times* or *Near/Minnesota* might have a point or two, we would get the icy response from the judges that Britain was not yet the 51st state, and England’s green and pleasant land would never be soiled by America’s appalling trial by newspaper. I sat through many of those lectures. I was in the Supreme Court in Washington as it happens when Floyd fielded spitballs from the Justices in the *Nation* case, and I would have loved to bring him in as a pinch hitter for the orals in our encounters with the five law lords—five lords a leaping to the wrong conclusions (LAUGHTER).

So thank you, Flying Angel.

At least your familiarity with English law enabled you to remind the mayor of this great city that if he defamed a judge in England, as he defamed the judge in the Brooklyn art trial, he would have been slapped with contempt and might even now be serving time (LAUGHTER). Maybe there is a lot to be said for our system after all (LAUGHTER).

But actually there isn’t much. In 1972, in a Guildhall lecture, I described the British press as half-free by comparison to the United States press. Maybe now it’s 60% free, but a long way from 100%. The half-free press in Britain would never have been able to report the Watergate scandal, the laws of sub judice would have come down as soon as the burglars were arrested and then the law of confidence—even the most brilliant of you here have probably never heard of the law of confidence—the law of confidence would have prevented using the name of the Campaign to Re-elect the President Committee to find out where the money had gone. We would never have been able to do Watergate.

The law of confidence was wheeled out when I started to publish the diaries of the Cabinet Minister, Richard Crossman, even though he wanted them published and was long dead—he left it in his will—and it was used to prevent publication of the book *Spycatcher*, which is freely available here, and to punish the civil servant in the Falklands War who revealed that the Belgrano battleship was not where the government said it was when the Royal Navy sank it.

My Insight team was solely engaged in the investigation of serious political, social and business wrongdoing. For the half-free press, working on a piece was like defusing a bomb, turn the wrong screws and the whole thing would go off because of contempt, confidence, official secrets, Parliamentary privilege, slander—and libel. All subject to prior restraint, though it was the English jurist Blackstone who insisted that the freedom of the press lay in unfettered freedom to utter, then followed by punishment if wrong. I edited newspapers in Alice in Wonderland. Punishment first, verdict later. Punishment by suppression, verdict sometimes by letting you publish, but often not.

In my very first week of editorship, I was working on a story for the newspaper when a man in a bowler hat came in and gave me an envelope, but I opened it and it basically said I had to take the story off the front page and not publish it at all because the subject, a British Member of Parliament, had protested to the court and gotten an ex parte injunction. We were simply showing that this British Member of Parliament was in the pay of the Greek colonels of the military junta. So we lost the right to publish the story. It took two or three weeks to get it into the paper. But that was only scene one, act one.

Libel of course was our constant concern. But I give you a glimpse inside the penitentiary in which I served because I want to keep concerns about libel in context. And though it was often intense and difficult and costly and raised my blood pressure, I want to say, absolute liability never
deterred us. There was no single investigation we abandoned because we had to prove the truth of what we printed and face the risk of a jury going wild about damages. The Insight team—an exceptional bunch, it had a mix of Australians in it, South Africans, it was kind of a British Empire group—took pride in amassing the evidence. But can we prove it? Can we prove it? was the constant refrain throughout the corridor and in my office, and our house lawyers were only too happy to test our levels of proof.

Despite the onus of proof on us, we were able to publish an amazing amount of material. That the makers of the drug thalidomide were negligent, that the lawyers on behalf of the plaintiffs were negligent, that contempt should not apply in the face of the manifest injustice of little compensation for the victims—which took us all the way to the European Court. That the DC-10 Ship 29, dropped out of the sky over Paris, killing 346 people because McDonnell-Douglas had failed to replace a defective door. That Kim Philby was a Soviet spy, that Bernie Cornfield of IOS was a fraud, that the Member of Parliament for Buckingham South was a crook, the Right Honorable Robert Maxwell, then thought not to be a crook.

Would Sullivan have helped us in all this? The answer is, how many people here know Evelyn Waugh’s novel Scoop? Well you should. Anybody with any remote connection with the press should read Evelyn Waugh’s Scoop. In it, the owner of the paper the Daily Beast of Fleet Street is called Lord Copper. And when he ventures an opinion, such as it is very hot in the arctic, his staff is frightened to question him and the answer always is, "yes, Lord Copper, up to a point, Lord Copper." Up to a point. Well “Up to a point, Lord Copper” is the way I feel about Sullivan. Clearly a whiff of Sullivan can be rejuvenating. It influenced the unprecedented ruling in favor of the Sunday Times when it was sued for libel by the Derbyshire County Council a few years ago. A local authority, it was ruled for very first time in England, could not sue for libel. This was very much a victory in the public interest, for which we are grateful to Sullivan and those lawyers who argued the case.

I cannot say the same for the workings of what I know of Sullivan in the United States since I came here to live permanently in 1984. The verdict in Sullivan was welcome, vital in enabling light and heat to be applied to the crimes of the South. It certainly was. But as a precedent, we cherish it to protect the press in the very important business of reporting and commenting on public affairs of comparable significance. As Tony Lewis put it, it recognized that free speech was not simply a right but a political necessity.

But I have the impression that Sullivan is being grossly abused in a culture of celebrity. Now it will be objected that the British press, without the protection of Sullivan, is as reckless and lethal. Actually it isn’t quite as bad, not quite. But bear in mind that there is a very real restraint on victims in Britain—the fear that if they complain, they will become the subject of a vendetta, and that happens all too often.

Sullivan here seems to me to have afforded the most protection—if you will, the most license—to the trivia cops, to the trashers, the casual character assassins on the Internet and the supermarket sheets. Investigative journalism has not observably flourished because of Sullivan, and I first saw it in operation in the ‘50s when I came here. Altogether—and I’m not alone in saying this, many editors say it—standards have fallen. Just one instance, the leading newspapers BS, before Sullivan, would not publish ad hominem blind quotes. You know what I mean: "Friends say he has only recently stopped beating his wife . . ." The New York Times will now publish ad hominem blind quotes—all the rumor that’s not fit to print. So will the electronic anarchists. We won’t at U.S. News and those good people at the Associated Press won’t, but we’re all wimps. Casual defamation is a gross industry, any source will do, as you saw in the Clinton scandal. Any source will do. It is so
easy. And it is one thing, I think, to facilitate criticism and the exposure of public business. It is another to remove the right to a reputation from anyone who happens to have five minutes of fame.

I think this is regrettable, not simply because it discourages entry into public life. Not simply because professional standards and aspirations are eroded, bad journalism driving out good. Not simply because it is one of the reasons the press has come to a disabling all-time low in public esteem. All that is true.

What should concern us most of all is that the values of human dignity have been debased by too many of Sullivan's exploiters, and human dignity was the very heart of Sullivan.

If my best friend Plato asked me to construct a new Republic of laws tomorrow, I think I would keep everything you have here, from the First Amendment on to the Freedom of Information Act, but amend Sullivan. The language would be about freedom to report matters of genuine public concern, about fairness, and it would pay obeisance to the right to personal privacy, and protection from harassment and intrusion. I know I would have to wrestle with Chief Justice Hughes' insistence in Near v. Minnesota that "the rights of the best of men are secured only as the rights of the vilest and most abhorrent are protected." So it would be very hard work drafting, but of course we would call upon the wisdom of the best of reasonable men, the Flying Angel, Floyd Abrams. Thank you.

KENNETH VITTOR: Well we asked our speakers to be provocative. Our next speaker, Nina Totenberg, National Public Radio's legal affairs correspondent, is uniquely qualified to discuss the Sullivan case. As one of the most respected and authoritative commentators on contemporary legal issues and the Supreme Court, Nina Totenberg's observations on the judiciary and the press under Sullivan are of particular interest. Nina . . .

NINA TOTENBERG: Good evening. Before I talk about Sullivan, I want to talk about Floyd. This award tonight is given in the name of the late and great Justice William J. Brennan, Jr., and I can think of no one who deserves it more than my dear friend, the Flying Angel. And my dear lawyer, the Flying Angel. There are a lot of reasons—some of them obvious, some of them not. Obviously he is a hero to those of us who prize the values of the First Amendment. He is the, this may be not as glorious as the Flying Angel, he is the crusader rabbit of free expression (LAUGHTER), defending most recently, like the Energizer Bunny, the Brooklyn Museum of Art. He's been at the vortex of just about every major First Amendment battle since and including the Pentagon papers case. And while he's at the very top of everyone's "A" list of First Amendment scholars and litigators, what makes him so remarkable, frankly, is his personal decency, his willingness to give of his time, his genuine care for the positions and the people he's chosen to defend . . . in my case, rushing to the rescue when the U.S. Senate had me tied to the railroad tracks of its leak investigation in the Anita Hill/Clarence Thomas affair.

Spill the beans, spill the beans, they cried, or we will run you over. Not so fast, said Floyd Abrams, she's my client (LAUGHTER).

For those of you who haven't experienced it, there is really nothing quite like the mantle of the Abrams protective arm. You know you have a lawyer with the best judgement, the savviest media approach, and the greatest legal skill that money can buy—or in my case, get donated to you and your organization for half the price (LAUGHTER). In short, Floyd is a mensch, but a really, really, really smart mensch.

About the only time I know of that he exhibited poor judgement—and I've told this story before—was the night after I had broken the Anita Hill story and he called me back. I'd spent the
day watching the doings in the United States Senate and decided that the person that they really wanted to kill was me. And so I put in a call to Floyd. Will you represent me if it comes to that? I asked him. Oh, Nina, he said, don’t be silly, they’re not going to go after you. As I said, it was the only time in all the years that I’ve known him that he has misjudged a situation, but then he wasn’t in Washington.

In the six months that followed, he helped me navigate the shoals of a congressional subpoena and investigation, a body politic that wanted someone to punish; my own occasional and often not so occasional short temper about the whole thing; and an organization that stood behind me 100%, except that it would have loved to have found a place to run and hide.

To NPR’s credit, and Floyd’s, he somehow, gently, in that very special way of his, made it possible for us all to stand firmly for an important principle, and most importantly, to win. As usual, he never took any credit, but he deserved it all.

I want also to say something about Floyd as a friend to the man whose name graces this award. Justice Brennan was one of those very special people who never lost his humanity despite his stature. He was never too important to spend time with a younger or a student or a friend who had become infirm. When Judge Bazelon became ill with Alzheimer’s disease, Justice Brennan would have him up to chambers with other judges sometimes or friends, to have lunch. Bazelon was really too ill to contribute much to the conversation, but Brennan knew it was important that he could still be part of the game. And so when Justice Brennan became so very ill in the last year of his life, I watched with great care, that Floyd Abrams was one of those who visited the hospital regularly to see and entertain the old man who had done so much for the country and for us all.

Now, my assigned task here for the evening is to deliver some incredibly perceptive and smart piece of First Amendment analysis or wisdom and in this crowd, I’m just not smart enough to do that. So let me revert to the thing I do know something about, well maybe know something about, and that’s the Supreme Court and the press. What do the justices think of the “media”? Well in a word, they hate us. Much like the rest of the American public, they hate us, and I would have to say, sometimes with good reason.

Fortunately for us, they do think a good deal of the First Amendment. More than I might have given them credit for a few years ago. The question is in what context? In the context of forbidding people to publish and earn money—as in the Son of Sam law—the Court was, I think, surprisingly firm. The state can’t do it. But in the national security context—the Snepp case is the most recent example that comes to mind—the result was really quite different. I have wondered often what would happen today if a case like the Pentagon Papers case were to come up. Supposing, for example, that I were to get hold of the government’s secret submission in an immigration court to exclude foreign nationals from the country because of allegations that they might be terrorists. And suppose that the government claimed that my story might compromise key intelligence sources on terrorism. I wouldn’t bet the farm on the outcome.

On the domestic side of the equation, the court has been pretty reliable in dealing with direct threats to press freedom. It said Jerry Falwell couldn’t get damages for emotional distress when a less than auspicious publication said naughty things about him in a satire. I doubt that the notion of tortious interference is likely to go anywhere these days, or really that it ever was. But there are other, back door, ways to intimidate news organizations. Not the least of which is the cost of defending lawsuits that in the end may exonerate the news organization. Food Lion is a prime example, and it ain’t over yet.

But the best example that I can think of is last year’s ride along case in the Supreme Court.
CNN went along when the Interior Department executed a search warrant on a rancher’s property
to find evidence of violations of the Endangered Species Act. The rancher sued the feds for invading
his privacy by bringing along the press, and the rancher sued CNN. The Supreme Court granted the
case, but only as it applied to the feds. In the end, the court concluded the feds were liable, but may
have had qualified immunity since there was no law against them doing what they were doing at the
time. The Court, however, did not review the case as it applied to CNN. And it wouldn’t let CNN
participate in the argument and it refused to stop the case against CNN brought by the rancher. So,
while the Court continues to have great respect for the First Amendment, the treatment of CNN
suggests that it has considerably less respect for modern journalism. And that, over time, I think, is
worth worrying about.

Finally, I want to address the question about *New York Times v. Sullivan* and what the Court
might or might not do to trim it’s sails. The big opening, it seems to me, is in the question of malice
and the standard for proving reckless disregard for the truth. This is a subject that all public figures
have views about, I promise you, as the widow of a one-time United States Senator who had to be
talked out of suing a publication for libel when he was told by me and every lawyer he consulted that
he couldn’t win. I promise you, they all think about it.

We all told him then that the standard was too high. But that was then, and this is
now—post-George W. Bush and cocaine, post-Richard Jewell and the Atlanta bombing, post-Bill
Clinton and every screwy scrummy story, true and untrue, published about him and the Mrs.

“One of these days,” as Ralph Cramden used to say, “one of these days, Alice, it’s going to
be pow, right in the kissar.” If Bill Clinton had not had so much soiled linen, do you think he could
have sued Jerry Falwell for that video essentially accusing the President and the First Lady of murder
and drug running? Well, we will never know whether Falwell would have been held liable, but one
of these days there will be a politician willing to take the leap, and without so much dirty linen. And
my guess is that the courts will use that occasion to constrict *New York Times v. Sullivan* in terms
of its definition of actual malice.

If, over time, the protections of *Sullivan* are eroded, I feel constrained to observe that there
are some in our profession—and I do not mean just tabloid journalists—who bear some responsibility.
Maybe even some of us in this room. It seems to me that freed from the onus of pre-*Sullivan* type
libel suits, we have gotten awfully sloppy in our thinking and our use of language.

Too often these days, I pick up the newspaper or switch on the tube to hear that such and
such fact has been learned which “raises questions” about whether so and so violated the law or told
the truth or whatever. With expressions like “raises questions,” we can go from an innocuous fact
A right to conclusion Z, barely stopping to pause in the middle. It raises questions about how long
we will continue to have the full protections of *New York Times v. Sullivan* as we have come to know
and love them. Thanks very much.

**KENNETH VITTOR:** The press has undergone significant transformational changes since
the turbulent days of the civil rights movement and the *Sullivan* case. From Walter Cronkite and
Huntley/Brinkley to 24-hour news cycles, the Internet and, yes, Matt Drudge, the changes in the way
news is gathered and disseminated have been truly profound. As one of most respected and
perceptive observers of journalism and contemporary modern politics, CNN senior analyst and co-
anchor of CNN’s *Newsstand*, Jeff Greenfield is particularly well qualified to discuss the *Sullivan*
case and the press.
JEFF GREENFIELD: I should just observe, in case some of you wonder what the hell I’m doing here, I was trained as a lawyer before I abandoned the law for journalism, thus giving me a connection to two of the most revered and respected professions. One request tonight was for a food taster. Thank you. (LAUGHTER).

A lot of you are here to honor Floyd Abrams, I’m sure, for very high-minded and noble reasons, and I’m here because I owe Floyd Abrams—big time.

A year and a half ago, when the “Tailwind” story blew up in our face at CNN, we made a decision that helped us climb out of the hole that we had dug for ourselves. We decided to bring in an independent analyst to look at what had happened and to explain not just to us but to the public, why it had happened.

We wanted someone who understood the press, who is not an enemy of the press, but who would also be neither protective nor defensive—someone who, in the words of the late, great National League umpire Bill Klein, would “call ‘em as he saw ‘em.” And Floyd Abrams was the man, and painful as his findings were about what had happened, it was a critical first step, not just in leveling with our audience but also in helping us put into place safeguards that make it much less likely that it will ever happen again. So we owe him.

I think the fact that a man that spent and spends his life defending the First Amendment would prove so clear-eyed a critic is no surprise to anyone who has known, or worked with, or interviewed for that matter, Floyd Abrams.

I particularly delight in that small smile of his—as Mark Twain once described it, a Christian with four aces. Floyd understands the press and its failings, even as he resolutely defends us from, sometimes, the consequences of our own acts. And I think it’s that approach, that clear-eyed approach that we could use a lot more of in the press.

So it’s one of those occasions when people love to trot out Thomas Jefferson’s famous line that, “were it left for me to decide between a government without newspapers, and newspapers without government, I should unhesitatingly choose the latter.”

We in the press, we love that line. We never tell people he said that before he became President. After seven years in office, he said, “nothing is to be believed that now appears in a newspaper. Truth itself becomes suspicious by being put into that polluted vehicle.” That same year he said, “the man who never looks at a newspaper is better informed than he who reads them; inasmuch as he knows nothing is better informed than he whose mind is filled with falsehood and errors.” I offer these words as a reminder that even the most devoted defender of liberty may have less than a sanguine view of what we do and how we do it.

Which brings me to the brief and possibly unsettling point I wish to make. I must have had a premonition of what I was going to do with my life in law school because my note in law school was about libel. And about *Times v. Sullivan*. And it’s clear, as Tony Lewis has noted—he being more or less an official historian of the case—this was basically the Court’s way of saying, look, you can’t use libel as a backdoor approach to seditious libel prosecutions against critics of your official conduct.

And in that context and in many other First Amendment cases, we often hear talk about—we heard it tonight—about the “chilling” effect that government actions or law suits might have upon the press or on speech. And I just want to make two quick points.

The first is: it hardly needs the government or even enemies of the press to chill the press. Many things chill good journalism, corporate tenacity, laziness, focus groups, consultants who tell you that the people don’t really care about that stuff anymore. Mindless mania for ratings which say
that we will skip the story about what your government is doing for one about you lunching at a salad bar of death (LAUGHTER). All of these things, in effect, have a chilling effect on good journalism, even though they have nothing really to do with the First Amendment in terms of our enemies or advisors.

There’s another point I wish to make before I leave. And I make it as a practicing journalist. Which is, one of the things that Sullivan still maintains is that some speech should be chilled. Some speech is unworthy of protection. You want people in the press not to perform that kind of speech. Specifically, if I, as a journalist, broadcast a false statement that defames someone and I do it deliberately, or, if that guy can prove it, recklessly, I should be sanctioned, in a way that will keep me and my colleagues from doing it again.

Remember, some journalists make the mistake of calling journalism a profession. And by most standards, is it a profession? In that there are no barriers to entry, and there are no sanctions to remove people from that profession? So if I behave as not simply an incompetent journalist, but a malicious one, what is the remedy?

Now, in the old days, people aggrieved by a newspaper editorial would march out of the office with a horse whip. But, except in certain neighborhoods, that is not considered desirable. So what is the alternative? Barring infliction of physical violence—which I think justified only in the case of news people acting as a mob and in which case I would have hoped Richard Jewell would have been in good enough shape to just deck one of those people and get them out of his way—but that not being logical or practical, what’s the remedy?

Some years ago, in Philadelphia, a local news station rushed onto the air with a breathless report that the Mayor of Philadelphia, a public official by anybody’s standards, was under federal investigation for bribery and kickbacks. It led the news, it was a great story, and they got it really late. So they put it on the air without one iota of checking, and the story turned out to be false. And the station not only apologized, they, without even a suit being filed, paid the mayor a substantial amount of money.

And I suspect, I hope, the station made sure that kind of reporting wouldn’t happen again. And the damage to the First Amendment was exactly what? The damage to speech that we revere was exactly what? By my rights, none. Of course you don’t want public officials or, for that matter, powerful private people like a Robert Maxwell to silence critics with the threat of libel suits. And the Maxwell case is a good example. He filed a writ the minute somebody started looking into that Ponzi scheme of his.

But neither, I suggest to you, do we want powerful media entities, which grow bigger and more powerful and more complicated and more entwined with potential conflicts by the day, to use the First Amendment the way a drunken diplomat uses a passport on the New Jersey Turnpike: to whip it out and say, sorry, the discussion is over. The First Amendment, I think, is the beginning of the discussion, not the end of the discussion. The snappy title of that law review note that I wrote was, “The Scope of First Amendment Protection for Good Faith Defamatory Error.” (Some of you may have heard the Dixie Chicks version of that recently) (LAUGHTER).

Well, the fact of the matter is there is also plenty of First Amendment protection for a lot of bad faith speech . . . for robust and wide-open exchanges that are often, not only impolite, but downright mean-spirited. Just turn on your radio or television. That’s fine. But I have to say as we look at where Sullivan may go—and I think that the warnings of both Harry and Nina are quite appropriate—I do want to say that I hope we never see the day where Sullivan will mean that people who hold public trust or high public profiles are helpless, legally helpless, in the face of deliberate or
reckless falsehoods that smear their reputations and do them real harm.

Seventy years ago, nearly, in a line that used to be quoted all the time—and maybe it’s a sign of the times that it isn’t quoted nearly so much—Judge Learned Hand gave a then once famous speech on the spirit of liberty. And what he said that most resonated was, “the spirit of liberty is the spirit that is not too sure it is right.” And I think it is a test we and the press ought to remember, and not just about those we cover, but about ourselves. Thank you.

KENNETH VITTOR: To present the LDRC’s William J. Brennan, Jr. Defense of Freedom Award to Floyd Abrams, the LDRC Board of Directors wanted to find a first-class journalist who has known Floyd for the reporter’s entire life. After an exhaustive search, we found Dan Abrams. We all know Dan Abrams as an intrepid, enterprising reporter with Court TV and now NBC News, but Floyd knows Dan best as his son.

DAN ABRAMS: I remember my father telling me about a senior thesis written by a nineteen-year-old Cornell University student, entitled “Lest Justice Prove Violence: Fair Trial, Free Press and the First Amendment.” The author, president of the Cornell University debate team, advocated adoption of the English system—that the press should be prohibited from publishing the criminal record of a defendant or even from publishing a confession unless they had already been admitted into evidence. Precisely the kind of legal standards my father battles against on a regular basis. Many of the details, even the words, from that essay remain imbued in my father’s mind . . . but it is not because he was appalled or because he recalls some scathing intellectual battles with the author. It’s because “Fair Trial, Free Press” was written by Floyd Abrams.

When the author was contacted for comment about his 1956 senior thesis, Abrams said, “I was very young and conservative back then. I was in thrall to Justice Frankfurter and his anglophile views. And I had never met a journalist” (LAUGHTER).

Well, whether he saw the error in Justice Frankfurter’s ways or whether he has just become smitten with the journalists he has encountered, Floyd Abrams has returned from the dark side with a vengeance.

When I was in the seventh grade (they asked me to do the personal side), my English teacher asked me what my Dad did for a living. I remember proudly pronouncing that he was a First Amendment lawyer. I am sure I had no idea what that meant, but I said it with that confidence only a seventh grade can muster when talking about his father. She smiled and lowered her voice and with an ever so patronizing whisper assured me that there was really no such thing as a First Amendment lawyer.

Well now she was treading on my turf. She could teach me about words like sinecure and lugubrious, but I would teach her about my father. I knew that, at the least, I had heard people describe my father that way. I was adamant, he was more than just a lawyer, he was a First Amendment lawyer! She suggested I go ask my father. Well I did.

His response was the right one, that I was right. He did a lot of work on First Amendment cases, and he was a lawyer. And while most people weren’t really called First Amendment lawyers yet, he warned with that “Times are a changin” kind of tone, in the coming years, there might be more need for these type of lawyers and expected that my teacher would become more familiar with the terms First Amendment lawyer and libel lawyer. Apart from the thrill of correcting Mrs. Sherman, in retrospect, he was right about the future of libel law. And while it has certainly created business for him, maybe even a career, I assure you, the wave of lawsuits against the press and particularly
those applying novel theories of liability, are viewed by Floyd Abrams not just as a phenomenon but as a constitutional tragedy.

That is what makes him the ideal candidate for this type of award . . . what he says behind closed doors. When he is representing the press, he is not just serving as an advocate. He believes in it with all his heart and he loves what he does. When he used to come say goodnight to my sister and me when we were kids, we knew that to prolong the visit, we could ask him about one of his cases (LAUGHTER). With a gleam in his eye and the excitement of a teenager, he would try to explain concepts like actual malice and involuntary public figures (LAUGHTER) to two pre-teens who’s sole interest in probing the issue was to secure those extra minutes.

And to his credit, we understood enough to talk about his cases with him . . . quality, I might add, which makes him a superb trial lawyer.

In conclusion, let me just say as you all present the Defense of Freedom Award to my father, I would like to take this unique opportunity to present a sort of lifetime parent award. The only thing more important to Floyd Abrams than his work is his family. People who know my dad often talk about how he still works every weekend, as he has for most of his life. But he has always made, and still makes, plenty of time for my sister Ronnie and me.

When we were younger, it meant taking us to the park or on trips. When I was in high school, it even meant renting a lime green hot rod Corvette to drive me upstate because he thought I would like a “sportier car” (LAUGHTER). If you know my dad, you know he is not a hot rod kind of guy. Ronnie and I have always known he would support us in all of our choices and endeavors. Even the absurd ones like when I wanted to build an enormous Monopoly set out of wood or when Ronnie and I wanted to move into a houseboat or Ronnie’s desire for a pet Cougar to keep her company in her closet-size bedroom. Somehow he dissuaded us while always making us feel like our goals were admirable.

And most importantly, now I speak to my father on the phone almost every day . . . often about the indignities one suffers as a television journalist. He convinces me not to change careers. But most often it’s just to say, “Hi.” So thanks to the Libel Defense Resource Center for choosing the right guy for this award, and Dad, thanks for everything. You will always be my role model and one of my best friends.

**FLOYD ABRAMS:** We’re in New York City so you know all the word nachas. (LAUGHTER). What more could a father ask for than to have a son like Daniel, a daughter like Ronnie and a mother like Efrat, who made it all possible. How can I turn to *New York Times v. Sullivan* after that? But I will say that standing here with all of you, so many of you that I know, with my family, with many of the partners in my firm and many of the associates in my firm, I do want to start by paying tribute to two people who cannot be here today, two people from whom I learned so very much and whom I think of as I hear the speeches here today. When I listen to Nina Totenberg, I can’t help but think of the unforgettable lunches she and I used to have with Justice Brennan, whose name graces the award that has been given to me tonight. Every moment of those extraordinary, warm, intimate, loving exchanges is indelibly imprinted in my memory.

And listening to Harry Evans recalls the first time I met him in one of the Fred Friendly seminars, this one held in England, with English and American judges, journalists and lawyers. It was an exchange that left all of us, all of us Americans at least, sure that whatever the differences there were between us, we had more in common with other Americans than with any of the Brits over there (LAUGHTER). And it also left me with enormous, unending, lasting memories of Fred Friendly.
I’m so very glad Ruth Friendly is with us tonight.

Years later, I dined once with, among others, Fred and Justice Brennan. They were two of the greatest teachers ever. And they had a marvelous exchange. The case was then pending in the Supreme Court about who owned Ellis Island, between New York and New Jersey, and Fred Friendly—in his understated way—asked Justice Brennan how he would have voted in the case. And Brennan said, “for New Jersey.” And Friendly, who was absolutely outraged, said, “You just can’t say that, you can’t just say New Jersey, you have to know what the framers intended and what the documents were between New York and New Jersey and what was intended back then.” And Brennan said, “No, I’m from New Jersey” (LAUGHTER). “And,” he said, “by the way, that’s as good a reason as any of them will come up with” (LAUGHTER).

A few years ago, I received an award from the Anti-Defamation League. I was very honored—it’s an extraordinarily effective and important organization, not at all antithetical to the First Amendment, that identifies and combats racist speech—but I did feel just a bit out of place. I remember thinking it was a little odd for me—spending so much of my life doing what might be thought of as pro-defamation work—to be receiving an award from the Anti-Defamation League. Tonight I feel right at home (LAUGHTER) with all of you.

I wanted to say just a few words about something that comes to mind when one thinks of *New York Times v. Sullivan*, but is not at the heart of the question of whether we should have it or will have it—I’ll say a word or two at the end about that—but something about truth and journalism.

The topic, of course, is suggested by the central, the most important and certainly best known holding of the *Sullivan* case itself: that the protection of speech about public officials (or, now, public figures) exists even when it is false, so long as it is not uttered with actual malice. The idea of affording more protection to speech than the defense of truth provides. And that notion, the fact that *Sullivan* does give that protection, leads me to just a few thoughts about what we mean about truth and some related subjects.

We lawyers know that when we speak of the truth of journalists, we frequently mean what we call hearsay. That is, journalists frequently report on what people say. If the journalist gets it right—if the substance of it is correct, if it is fairly and accurately conveyed—the story is likely to be accurate. Accurate but, on a different level, not necessarily true. What a source says—even a prominent, well-placed, responsible source—may not be true. It does not make it less journalistically sound to report (accurately) on what such a source says, and it is one of the benefits of *New York Times v. Sullivan*, that it protects such reporting. But it still may not be true in the other sense we use the word truth. We lawyers know that even when journalists report accurately about what people say, our journalistic clients may still be at risk, since, as a general matter, when a journalist reports a false and defamatory charge, the publication may still be at risk for doing so, at least until the Supreme Court adopts some kind of concept of neutral reporting.

But to move away for a moment from the law, let’s talk a little bit about the limitations of truth. Truthful reporting does not necessarily mean fair reporting. It does not necessarily mean wise reporting, or even reporting that is worth reporting. Truth is a pre-condition for good reporting, but it is only the first element in it.

Years before the awful excesses of the reporting on Bill and Monica, which I have no doubt the press will pay dearly for in the years to come, Pete Hamill had written in *Esquire* that “These days, most members of the Washington press corps wear a self-absorbed sneer. They sneer at any expression of idealism. They sneer at gaffes, mistakes, idiosyncrasies. They sneer at the ‘invisibility’ of national security advisor Anthony Lake but sneer at others for being publicity hounds. They sneer
at weakness. They sneer at those who work too hard, and those who work too little. They fill columns with moralizing and then attack others for moralizing. The assumption is that everyone has a dirty little secret, and one’s duty is to sniff it out.”

And there was a line by Oz Elliott, an old friend and former Dean of the Columbia Graduate School of Journalism, who—also pre-Bill and Monica—wrote, “Having withdrawn from the field in the 1980’s, it appeared that journalists were returning to the fray in the ‘90’s—with a vengeance, and with a chip on the shoulder. In the cynical new journalism that results, it seemed there was an unkind cut for almost anyone in public office, and little sense that any public policy was much worth pursuing.”

Let me just pursue with you the last phrase that Oz Elliott used. The single most telling criticism of the press that I’ve read in recent years related less to its quite occasional publication of falsehoods or even its more than occasional dissent into cynicism, than to its ignorance and self-satisfaction about its ignorance. Early this decade, Jay Rosen, the Professor from NYU, wrote an extraordinary article, I think, about the press treatment of the then-newly elected President, Vaclav Havel of Czechoslovakia. He had come to Washington to give a speech. He had, of course, been jailed in Czechoslovakia for years, for his writings under Communist rule, and Washington—bi-partisan Washington—was delighted to greet him. He spoke to Congress; he was applauded enthusiastically. He told the Congress that the people of Eastern Europe could offer to the West some lessons from their “bitter experience” under Communist rule, and that experience, Havel said, had left him certain of his proposition. “Consciousness precedes being and not the other way around, as the Marxists claimed.”

Members of Congress broke into sustained applause. The press was amused. The Boston Globe wrote about the speech as follows:

“What, a real live philosophical notion, discussed in front of our Congress people? What gives? Hey, folks, the man is an intellectual.”

The Washington Post wrote that “while ‘consciousness precedes being’ is not often the subject of floor debate, this did not stop Congress from cheering.”

The Washington Post editorial about the speech said it was “impressive and humbling.” It said that Havel “is not kidding about this stuff.” It’s editorial was headlined, “Let’s Hear it for Hegel.” (LAUGHTER).

Newsday reported: “The audience looked a little perplexed, but it went ahead and applauded anyway.”

And the Washington Times put it this way: “I don’t think ten men in the chamber knew what he was talking about, and in fact, I don’t know what he was talking about” (LAUGHTER).

Now one of the striking things to me about all these comments was this: no one, not anyone, tried to explain what it was Havel was talking about. Journalists who had mastered extraordinarily complex matters, relating to weapons systems, economics and the like, laughed at Congress, laughed a little at themselves, but made not the slightest effort to understand what it was the man was trying to convey. The portrait of Havel offered by journalists, as Professor Rosen said, was “a speaker of alien discourse.”

Rosen’s view was that the answer had less to do with a lingering anti-intellectualism in the press than its resistance to a certain kind of discourse. To raise the issue of “consciousness,” he wrote, is to speak frankly of the inner life, rather than outward events. Journalists tend to dismiss such talk, but not because they are godless technocrats, unmoved by deeper questions. They are simply more interested in the game of power, and they consider ideas about the nature of “being”
irrelevant to their journalistic task.

I think that is a serious criticism of the press, and it has nothing to do with truth-telling or the lack of it.

Let me put it in my own language. Too many reporters, I think, shy away from discussing ideas, even when political figures voice them. Even when ideas are offered in statements by candidates for President of the United States. Too many reporters are in a different sort of way so truth-obsessed—in the too-narrow sense—that they cannot distinguish between truths that matter and lies that don’t. Too many journalists can no more distinguish between a fib and a lie than between a lie and a war crime, and too many editors, formerly my clients, cannot distinguish between fact and opinion and tough mindedness and cynicism.

These are real problems, I think, with journalism. They’re among the problems that have led the public to be so critical of the press that a recent report of the First Amendment Center concluded, based upon significant new polling data, that more than half the public now believes the press has too much freedom.

I’ve thought a lot, or tried to, about journalists and truth-telling and I’ve come to the conclusion that one of the things that journalists are best at doing is truth-telling. Truth-finding, truth-telling and often lie-detecting. They don’t always get it right, they sometimes get it wrong, but they are successful, effective, talented and in that respect, the press knows just what Walter Lippman was talking about long ago when he said that the role of the press was to be “like the beam of a searchlight that moves restlessly about, bringing one episode and then another out of darkness and into vision.”

That is not a minor skill. That is an irreplaceable contribution to the public, and when the press aims its search light at public officials, when it (in de Tocqueville’s great phrase) “summons the leaders of all parties in turn to the bar of public opinion,” it serves the public mightily.

But telling the truth and exposing those who don’t, are not the only virtues. There are others. One of the many others is a sense of balance and perspective, an ability to assess just how important a particular truth or lie is. And that virtue, I suspect, is often just as lacking in newsrooms as it is in law offices.

None of which, of course, begins to answer the ultimate question posed by our hosts tonight, and an interesting question it is. Will New York Times v. Sullivan be retained in the 21st century? Should it? If the question were phrased more harshly: has the press shown that it deserves the added protection of that case—deserves in the sense of behaving in a fashion that all of us would agree entitles it to that protection—I think all of us would take, at least all of the lawyers here, would take a deep breath. We do have clients around.

But if the question asks something else—and this is what Harry Evans addressed—whether the public benefits sufficiently from giving the press an extra legal break—from paying the price, having victims of sometimes wrong-headed statements lose their right as it would otherwise have been to vindicate their reputation—then I think the answer is yes. And that is because Justice Brennan and his colleagues understood in 1964 what the libel lawyers who represent the press in this room, understand today. And that is that, in fact, the defense of truth is insufficient to protect even truthful speech. That is the nature of our legal system. It is because, in fact, the press would steer clear of setting forth its truth if by doing so it exposed itself to truly ruinous libel judgements.

Will Sullivan survive? I sometimes think of the case as sort of a wondrous gift to the press from a loving uncle who is no longer alive. In his place in the family comes a not-at-all avuncular figure who is not at all loving and not, in fact, at all admiring of press behavior. And the new uncle
has it in his power to take the gift back. To do so however, will be aggravating to the uncle, will be irritating because the uncle will be criticized within and without the family for doing so. To leave the gift as it is, however, will frustrate the new uncle’s increasingly deeply-felt sense that his nieces and nephews should behave better.

What to do? What to do indeed and what is there to say to the new uncle to persuade him to leave things as they are? Probably nothing. It is probably best to stay away from him, hoping he will become interested in other subjects— (LAUGHTER) the Second Amendment perhaps.

But there is something worth doing. It’s easy to say as it is hard to do: it’s to behave a bit better, to show anew that the gift is deserved and that it will be used, not alone for private benefit, but for public good. I know there are journalists here, so I say to them, is that clear? (LAUGHTER)

I want to say to all of you, I deeply appreciate this award. I appreciate the presence of so many of my friends here. I appreciate Sid Zion and Tony Lewis for writing those glowing, sometimes not entirely truthful, descriptions of me. I told you before, truth doesn’t matter that much, and it’s good to have you all here. Thank you very much. I do want to offer an absolutely last comment and that is that without Ken Vittor, without Sandy Baron, none of this, not a bit of it would have been possible. Thank you very much.