

What Are The Limitations On Freedom of the Press?

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The following is an edited transcription of a panel discussion held at the University of California, Berkeley, School of Law.

DEAN KADISH:

Good evening. If I may, my name is Sanford Kadish, I work around the Law School. My role tonight is that of moderator and my function is to introduce the subject and to introduce the speakers to you tonight.

The subject as advertised is, "What are the limits on freedom of the press?" As you all know, this is a subject which has been very much in the news. Indeed, our newsman guest has been responsible for making a good deal of that news in connection with material which was given to him. He then disclosed the material for publication and declined to reveal the source, which raised rather troublesome questions which were written about for some time in the press.

These are issues which you should note, particularly those of you who are involved in the law in various ways. These involve such issues as the duty of a newspaper reporter to testify to evidence of

criminal action when called upon to do so by the orderly processes of a Grand Jury, the freedom of a newspaper to carry advertisements which seem to find people for jobs on a discriminatory basis — only whites, only women and so on, the duty of a newspaper to avoid defaming persons in national life or other persons in the course of reporting news, the duty to avoid disclosure of pre-trial information in a criminal case which might prejudice the rights of a defendant being tried. These are examples of the kinds of issues which have beset the courts and the Supreme Court of the United States in particular.

As you immediately see, in each instance there are reasons of public interest that, in the case of ordinary citizens, justifies the restraint. In the first case it is the duty of the citizen to disclose information bearing upon criminal actions when subpoenaed to do so by a legally constituted body — a well-recognized obligation on the part of citizens. In the second case I mentioned, it is the duty to avoid assisting in illegal actions by becoming a participant in the illegal action. In the third case it is the duty to avoid injury to other persons by spreading injurious falsehood which tends to prejudice his reputation and his livelihood and his privacy. And in the final case, most dramatic of all, it is the duty to avoid prejudicing the right of a defendant to a fair trial.

Because of these weighty considerations in an ordinary case, a citizen is subject to each of these restraints. The tough problems which have arisen, however, have to do with whether, because of the special role and mission of the press in our democratic life, they ought to be exempt from all or some of these restraints which control the rest of us. That interest, in a word, is the interest in maintaining a vigorous, unrestrained, uninhibited press to serve the public interest by making the fullest possible disclosure of the most varied kinds of factual developments and opinions. What you can say without controversy is that these are tough questions. (laughter) Nothing more can be said without a great deal of controversy and, judging by the preprandial discussion which some of us have had, I expect there will be a fair amount of controversy about these issues tonight.

Let me turn to our guest speaker Daniel Schorr. If I may begin with a personal note, I met Mr. Schorr in 1972 at a very dull and pompous and boring meeting outside Washington D.C. He and I and a group of other people were called upon to deliberate upon the significance of drugs in influencing American life. (laughter)

It was chaired by Mr. Jay Prenowsky who didn't know very much more about drugs than Dan or I did. My most vivid memories of that event were not the deliberations as such, but the intervals when Daniel Schorr would be asked some questions about what was going on. That was the time of the beginning of Watergate and he would reveal to us some of his observations on what was happening in the Watergate affair that otherwise weren't known at the time. I remember vividly; he probably forgets. This was long before there was a real hint of the infamy that was to follow. He began telling us that none of us realized just how corrupt and evil that bunch were that were now running the country while some skeptics were saying in effect, "That's a lot of hyperbole" and "Dan, you're imagining things, you're not on television now. Why don't you tell it straight?" (laughter) The final chapter, of course, you all know. He was dead right, he knew it all the time and, having briefly followed some of Daniel Schorr's career, I know that that's not the first time it was so.

Here he is with us now after a most distinguished career as a journalist. He is here now as a Regents Professor attached to the Journalism School. You all know of his activities as a CBS correspondent — he covered the Watergate case, and a great many other kinds of cases, with great integrity and honesty and probity. For his coverage he received a number of awards which testify to the recognition he received such as the Overseas Press Club Award in 1963 and the Emmy Award in 1972. You are also aware of the principled and courageous stand he took with respect to refusing to disclose his source when in good conscience thought it wasn't right to do so.

I have one final word to say in his behalf as he prepares to ascend this platform and that is I've learned tonight to my great pleasure that he is a graduate of DeWitt Clinton High School in the Bronx (laughter) and the City College of New York and I am proud to claim him as a fellow alumnus. (applause)

DANIEL SCHORR:

I don't know why there is something more imposing about this speaking engagement than previous speaking engagements on this campus. I have spoken frequently in the School of Journalism and once in the School of Business, but somehow there is something about the law that intimidates me. (laughter) Maybe that's because I've had a couple of brushes with the law. It is different somehow tonight. First of all, we're live on radio and we're being taped for

campus television; and that, of course, is intimidating in itself because I'm not accustomed lately to being on the air. It gives a very special sense of significance to what I'm about to say.

Secondly, there is something about law school that makes it different to me than speaking on any other campus, and I guess it has to do with the word 'law.' It was two weeks ago that I got a letter from the Department of Justice telling me that after fifteen months I was no longer under investigation by them for possible violation of the Espionage Act or some other act. For fifteen months, apparently, I'd been under investigation to see whether there was any kind of law to be thrown at me and it took a very long time before they decided there wasn't any. That, plus the fact that there was a point at which jail loomed as a rather imminent danger, makes me feel differently about the law.

I looked at the topic for tonight, 'Limits on the Freedom of the Press.' Yesterday I asked Dean Bailey of the Journalism School who the hell ever chose that as the topic, and he looked at me and said, "You did." I don't know why I chose that topic, except possibly that it was bait for the Law School people; I knew that it would appeal to them. (laughter) The other possibility was that, having done a great deal of public speaking in the past several months, I was looking for a rest, and wanted to get up and say, "My subject tonight is the limits on freedom of the press. I don't think there should be any. Thank you very much." (laughter and applause)

Actually when I did choose that subject it was because I had wanted to put out a deliberately provocative subject, 'Why is a reporter talking about limits on freedom of the press?' The answer is because he's the only safe person to talk about it. As soon as you get judges talking about it or Congressmen talking about it, they talk about it in a somewhat more alarming context. My purpose tonight is to try to negotiate some kind of reasonable compromise with the law, to try to explain to you my view of what freedom of the press is, but also to explain my view of what the permissible limits of freedom of the press are. I don't expect that I'll have full concurrence with my views by everybody, but I rarely have full concurrence with my views anyway.

Let me say first that there have been threats to freedom of the press and that they don't come in the form of "Let's threaten freedom of the press." They're almost always stated in terms of public values, usually quite legitimate values. The one I was confronted with came from Congress and had to do with the fact that the House

of Representatives had decided that a report which had been drawn up by its own Select Committee on Intelligence, a report that this committee had voted 9 to 4 to publish, should not be published. No member of the House outside the Committee itself had read the report, so the decision was not based on anything quite as rational as having gone into the subject and substance of it. It was a political decision. By political decision I don't necessarily mean to be pejorative. The House of Representatives is a political body. It is politically elected and has political responsibilities.

When they perceived, I think inaccurately, that they were in trouble because the investigations of the intelligence community had gone so far that a certain backlash had begun to build up, and the White House began to make an election issue of this security conscious Administration against a leaky House of Representatives, there was a kind of panic in the House. In response to what they considered to be the mandate of their constituents — at least as represented by the American Legionnaires (laughter) — they decided to forbid, or at least forbid their own committee, to publish the report. Then when I appeared to act in defiance of them and proceeded to publish a report that they did not publish, it became rather natural for them to pick me as a target amid a great deal of debate featuring the name of Benedict Arnold. Congressman Stratton of the State of New York, who introduced the resolution for a House investigation, told me himself that the initial idea was simply to have me cited for contempt of the House for having done what the House did not want done. And, weirdly enough, there exists a Supreme Court precedent allowing a chamber of Congress, if it feels that its legislative duties have been interfered with, to cite a citizen for contempt for obstructing its legislative process.¹ They sentence you to jail just like that. However, they discovered that because of due process it could only be done after a trial. (laughter)

They contemplated having a trial for me in the well of the House of Representatives and they went so far as to research that possibility. They then decided that was not exactly the way they wanted to go. They dropped the idea of a summary citation for contempt and decided instead to first investigate the source of the leak. They asked the House Judiciary Committee to do that and the Judiciary Committee said they would rather not. They then asked the House Rules Committee and they weren't really interested. So they found the House Ethics Committee, who later became very busy with Wayne

1. *Barenblatt v. United States*, 360 U.S. 109 (1959).

Hays and other important matters. (laughter) Up until that point the Ethics Committee had done nothing. And I must say, first they tried to exercise their responsibility without crossing that tenuous line that separates the responsibility of Congress from the responsibility of the press.

They interviewed some four hundred witnesses including members and staff of the House, the staff of the committee, and people from the CIA and elsewhere in the Executive Branch to see if they could trace the source of the leak without having to cross that constitutional Great Divide and call in a reporter to ask him, under the threat of contempt and jail, "Where did you get that report?" But they didn't succeed in the seven months of their investigation and finally they did call me.

The House Ethics Committee had been told to find out why it is that the House of Representatives can't keep its secrets. The only way they could find out was to go to somebody who had published the secret. That was their mission, that was their mandate, they regarded that as a legislative necessity and within the proper domain of the House of Representatives. The House couldn't perform its business — it couldn't keep its secrets — and if it required calling a reporter to find out why, that was what they were prepared to do. But perhaps without realizing it, they were invading constitutional rights.

So they called me and in the end we faced the moment where I was asked, 'Where did you get the report?' They knew what was going to happen. I said, 'I can't tell you.' I was asked nine different ways, and nine different times. I was warned that my refusal to answer would subject me to a citation for contempt. I would go to jail, be fined or both. It frightened me. It was a very serious matter and it had what we call a "chilling effect." Calling a reporter and subjecting him to the threat of contempt has to have a chilling effect on the exercise of our press freedoms. Had they succeeded and I'd gone to jail, it would have been a lot more chilling, especially for me.

We held them off. They didn't proceed, finally; they didn't have the votes on the floor of the House because public opinion had swung in the meanwhile. But it isn't as though you win a victory that stays won. It was one of the examples where Congress, perhaps not quite realizing what they'd done, had encroached on one of the really fundamental and sacred freedoms — freedom of the press — by trying to find out my source.

One of the other things I found out travelling around our country

talking about this matter (and even occasionally listening), is that people who want to be supportive don't understand why some of these things which seem so small and parochial become so important. With a great many people I've talked to in various audiences the question arises, "If you think the public has a right to know everything, then why don't they have a right to know where you get your news?" That makes sense on the surface of it. They're very interested to know where you get something like that. They say, "Congress wants to know and they should know, and we want to know and, by the way, who was Deep Throat? (laughter) Why can't we know things like this?"

There is a tension between various elements in our society. There is a natural wish of Congress and a natural curiosity of the people at large to understand everything they can. You have to understand that — however contradictory this sounds — there are certain things that those engaged in trying to give you all the information still have to keep secret.

It may seem to be a contradiction, but it really isn't because if you can't keep your source of information secret, you would not acquire the most essential information that you want to give. If on one occasion you are forced to betray a source that you promised to protect, then all your sources dry up. The entire system of unofficial communication of information begins to break down. And I think that system of unofficial communication is more important than people realize. You live today in an age with a great number of people not understanding other people, of groups in society which are set at sword's points; and part of the reason they are set at sword's points is that there are walls between people.

An example of this is the *Branzburg-Caldwell* case.² It involved a reporter named Earl Caldwell who was in touch with the Black Panthers. They wanted America to understand them. They obviously weren't going to go to the prosecutors, the police or the F.B.I. and talk about things which they had done which were illegal. They had a grievance; and if there was any way of ever bringing America together it was for the large majority of the American people to understand a little bit about what drives more minorities to doing such desperate things as carrying guns, making threats, and other illegal acts. Caldwell was a safety valve.

Another one of our safety valves, for Catholics, is to go to a priest and confess. And, because a safety valve is so important, the law

2. *Branzburg v. Hayes*, 408 U.S. 665 (1972).

protects the right of the priest to keep confidential what he hears from the person who has confessed, even though it may involve something the police would like to know. In fact, the law itself, has the most sweeping protection of privilege — that is the lawyer-client privilege — because, by God, lawyers wrote it. (laughter) There's also a certain recognition of privilege with regard to doctors and their patients. And the reason that this privilege exists is that if it didn't exist the whole system wouldn't work.

Now the fact of the matter is that certain alienated parts of America want to communicate to the rest of America because they need a long-range way to find some solutions to the problems that divide them. This rests on the ability to communicate in unofficial ways; and one of these is to say something to a reporter. They trust you, they tell you what's going on and you don't tell the cops. Remember, that if Caldwell knew he had to tell the cops then he would say to the Black Panthers, "Don't tell me because I'm going to be forced to tell."

If we're going to have a system in which reporters have to reveal their sources, the best thing is that they shouldn't have those sources. But then it is America which suffers. You could cut off that unofficial channel which crosses the barricades that exist between some groups in America and the majority of Americans. You just won't know what's going on. The first thing you'll know is that guns start going off or something else starts happening because there's been no communication. What is very hard for people connected with the law to understand is the positive value of the kind of channel that exists through the press in this country.

That brings me to my main point. I am not an absolutist about these questions of press rights. I understand that there are various important values in this country. I understand the right of a free press versus the right to a fair trial. Some people say it's the First Amendment versus the Sixth Amendment (which guarantees the right to a fair trial). And we constantly run into trouble.

My problem was with Congress. For others it is the Executive Branch. When the Pentagon Papers reached *The New York Times*, the Justice Department, on behalf of President Nixon, went to the courts and tried to get an injunction against publication. If there's anything that should be important to this country it is that there should be no prior restraints on publication. This went to the Supreme Court and there was a decision that wasn't all that wonderful; but

it did permit the publication of the Pentagon Papers³ (to go ahead). But if you read the decision carefully, consensus was reached only on the idea that there was nothing grave enough in the Pentagon Papers to warrant an injunction. That, for a lot of people, isn't a very happy solution to the problem, because what it didn't give is an absolute statement that there can be no prior restraint. In fact, there was a suggestion that there could under certain circumstances be legally-valid prior restraint, that is, censorship in advance, telling you that you cannot publish something.

Our main problem, oddly enough, is not with Congress, not with the Executive, but with the courts. That's strange since the courts, on the whole, have done a wonderful job of trying to protect American constitutional rights. Why is it then that we, who are trying to exercise those rights, argue with the courts? Why the gag orders in Nebraska, the jailing of people in Fresno because they refuse to reveal their sources? Why is it that the courts which, on the whole, have done a pretty good job of trying to maintain the rights of Americans, are up against the press which is also trying in its own way to keep America free?

It is because the press, which can fight pretty well against a lot of other adversaries, finds it hard to fight the courts when they say that there is an argument between your Amendment and our Amendment, the First and the Sixth. There's an argument between the need for justice and the need for public information. And so we (meaning the courts) will decide that. This means that the courts, which are in a sense a party to a very important dispute, are also the referee in that dispute. They see things their way. The average judge tends to see the importance of being able to conduct his trial properly and he sometimes sees it as necessary to declare somebody in contempt or issue a gag order simply because he's trying to do his job. He understands something about our job, but he clearly, for quite human reasons, sees his job in more specific and clear terms than he sees our job. So when a judge says to you, "Look, I'm just trying to make sure everybody gets a fair trial," it would seem to be an unarguably just premise.

But I submit the premise *is* arguable. I would even go so far as to say that not in all cases is the conclusion of a fair trial the most important thing that could happen in this country. It sounds like a strange thing to say, but for many reasons a lot of trials don't end;

3. *New York Times Co. v. United States*, 403 U.S. 713 (1971).

if the evidence is still pending, if something happened and the judge feels the trial should not continue, then cases get thrown out and a lot of people who would be considered guilty in a general and moral sense, go free. So it isn't true that every person must get a complete trial. It isn't true that this is the only important value in American society.

Immunity was given to John Dean and the special prosecutor, Archibald Cox, didn't like that because he thought it would interfere with his investigation. He went before Judge Sirica and tried to get the public hearings of the Senate Watergate Committee stopped altogether. Then he tried to get them held off television and then finally he went in with the suggestion that anybody who was given immunity, or partial immunity as Dean was, should at least have to testify behind closed doors so that his testimony could not confuse the prosecution. Sirica called a hearing and obviously had a very strong predilection towards granting that request, because judges believe in what other judges do. That's a normal thing. But the Senate Watergate Committee argued, "First of all, we think it's exceeding your powers to issue orders to Congress as to how it conducts its investigations."

The argument was also made that it may well be more fundamentally important for America to find out what happened in Watergate than for one, two, three, four or five people to go to jail. If the price of public information on something like that should happen to be that a couple of culprits go free, maybe that price is worth paying.

Today, in what is called a media age, there is nothing quite as important as how people perceive what is going on. And, while I don't think that in most cases the information prejudices trials, lawyers have a tendency to exaggerate. Lawyers always come in and say that if there is anything in the papers, their client can't get a fair trial. In most cases lawyers tend to exaggerate that and they'll admit it when you have a drink with them. But they have to make the argument.

There are very few examples where publicity has a demonstrable effect. In the case of the trial of John Mitchell and Maurice Stans before the Watergate trial and the investigation of Robert Vesco, it was claimed they couldn't possibly get a fair trial because of all the publicity it had been given. And, perhaps proving them right, they were acquitted. (laughter)

But there are a lot of things you can do. You can sequester a jury; you can change from one city to another. There are a lot of things

you can do before you have to resort to silencing the press. Now, I don't think that we should say without discussion that if a trial is involved the press has to take a back seat. Not always. I value fair trials; I value justice. But, I would submit that there is a very real value in American society right alongside the value of seeing justice done. They come into sharp conflict. There is a decision to make, and that decision need not always be that a fair trial is more important than free information simply because the one who decides is the judge.

Then, if so far I've talked about what I do not consider to be permissible limitations on freedom of the press, I owe it to you to say where I do see limitations on press freedoms as a necessary thing. I speak to many large groups and inevitably there arises the question, "Since you published the report and know a lot of things the CIA does wrong, is there no limit on disclosing the nation's secrets? Would you publish anything, would you broadcast anything you have?" This question involves a series of basic misunderstandings.

Behind that question, first of all, is an attribution of omniscience to me which isn't entirely warranted. It's not as if I can learn anything I want to know and then I decide what to broadcast and not to broadcast. As a matter of fact, most of the nation's secrets — and this may come as a big shock to you — I do not get to know. (laughter) Those secrets which a reporter gets to know usually shouldn't have been secrets in the first place. The only reason you get to know this is that there is somebody in the government who says, "This is for the birds. It's an embarrassment; it's not a secret." (laughter) Most of the secrets that come out are things that shouldn't have been a secret anyway.

When something reaches me as a reporter (I've said this before, and I don't know if it would be better understood in Law School than it was in Business School or a lot of other schools) the question has to be, "Would you publish anything you get? Would you reveal any of the nation's secrets, no matter what?" The first principle which I have to establish — and which is so very hard to establish — is that information that reaches me isn't a secret anymore by virtue of the fact that it has reached me. I am a reporter and don't represent the intelligence community or the Pentagon. I represent the public. When information reaches me it is already unsecret by virtue of the fact that I have it. Not only because of that; but because if I have it, I'm pretty sure Seymour Hersh has had it yesterday (laughter) and the KGB last week. (laughter) And not only because nothing

reaches me which isn't probably available to other reporters, but also because it isn't my function or prerogative to classify information.

That has been so hard for me to get across to people. I am not a government official. I don't classify. My job is to find out what is going on the best I can. It is *ipso facto* (I got that phrase from law school (laughter)) not a secret at the point when it reaches me.

Now everybody has questions about disclosure versus national security. I would submit to you that we have a very big government taking care of national security. And very strong courts are taking care of justice and gag orders. I think the real limitation that we have to consider on freedom of the press should be the exercise of responsibility by the press in matters where there isn't a big institution to provide protection.

What I'm talking about is the privacy of the average, individual citizen. I think that is being eroded a lot faster today than is national security. I think we live in an age of enormous public interest in gossip; and gossip implies prying into people's lives. And the press has become extremely adept at prying. They know what levers to push, the places to go to find out people's credit ratings; they know the people to call to find out who's sleeping with whom and what's going on. The result of this is that there is a great deal of material in some papers and some local stations that can only be classified as gossip damaging to individuals without any essential importance in terms of public information. I think of horrendous questions that arise in newspaper offices like, 'Do we publish the name of a rape victim?' These are questions the Supreme Court is loath to interfere in. They don't want to make freedom of the press issues out of them. But precisely because the legal protection of privacy is not very strong, I would say it's an area where the press must exercise its own responsibility, because there is nobody else to protect the average citizen except us.

I'll give you a couple of examples of problems that I faced in that connection very early in my career as a Watergate investigator. I got a piece of information that was interesting in its own way. You recall that they had two bugs in the Watergate building in Democratic headquarters, one on Larry O'Brien's phone which didn't work very well and another on the telephone in the office of Spencer Oliver, who was the Democratic liaison to state Democratic Committees. He didn't spend a lot of time in the office and for some reason it was to his [Oliver's] phone that the girls went if they wanted to make private calls. (laughter) Oliver's secretary and various other secretaries

around the office used to go in and use that phone. Across the street in the Howard Johnson Motel sat Alfred Baldwin III, a former F.B.I. agent, with earphones on his head and a typewriter, typing it all down. (laughter) He finished and made a report, which was called the Gemstone Report, and brought a copy over to the Committee to Reelect the President. A copy went over to Haldeman at the White House, and eventually a copy ended up in the office of the prosecutor when they began investigating; and since I had friends, I got to see a copy of it.

Gemstone had nothing in it of any political importance. There was nothing in it that had to do with the campaign or anything like that. But there was an awful lot of girls talking to friends about how they scored last night. (laughter) And I looked at this material and said, 'Is this news?' (laughter)

If you want to know for what they spent a quarter of a million dollars, got seven people arrested, and the Nixon Administration overthrown, it was for a couple of secretaries talking about how they got laid. In a sense it had a kind of marginal interest. (laughter) But I decided there was an interest in protecting the people whose privacy was being violated by being wiretapped and that for me to make a story about it would represent a further invasion of their privacy. And while it would be a great story for the National Enquirer (laughter), I decided to forget the story.

Occasionally there are borderline stories to worry about. I had a terrible problem when I came across the fact that the Senate Intelligence Committee was investigating assassinations. One of the biggest questions was what the presidents knew about assassinations. You don't find in the files of the White House a memo in which President Kennedy says, "I want Castro bumped off. Please report before the close of business on Friday." (laughter) They don't write those kinds of memos. The Senate Intelligence Committee had a great deal of trouble trying to find out to what extent the CIA was acting on its own and to what extent it responded to Presidential orders. That meant a peculiar problem at one point.

The CIA had been involved with the Mafia in trying to assassinate Fidel Castro. There was a Mafia girl by the name of Judy Campbell. She met President Kennedy and he used to go to bed with her all the time at the Mayflower Hotel in Washington. The Committee was looking into that only because of the questions, "Could Kennedy have known from her, since she was a friend of the Mafia? Could they have discussed the assassination of Castro, in which case Kennedy

would have known.” They finally decided that they probably had not. (laughter) That is to say, they had testimony that she didn’t know about the assassination plots, whatever other subject they might have discussed.

But I had the problem that, on a tip from the Senate Intelligence Committee, I got to know about President Kennedy and Judy Campbell. And I hate stories about Presidents and their private lives. I just hate that kind of story. Suppose it was a story about the President being blackmailed by the Mafia or a story about whether the President knew about assassinations. That would be a different story. I agonized about it because sometimes the distinction between an invasion of privacy and a *necessary* invasion of privacy is important if the country is to know what is going on in government. This isn’t an easy question. But what I’m trying to say is that these are day-to-day decisions; they come up in various forms and aren’t always easy.

I wish we had a better understanding with the courts and the legal profession. I would like to try to understand their problems and I wish they had a better understanding of the needs of those who provide public information. And I think that might happen, I think there might be something afoot. There are a whole lot of stories which newspaper people voluntarily agree to forget. There are a lot of appeals that can be made to the press without the threat of jail and gag orders. For example, we could hold off a day on a story, or not give part of it too much attention, because it would scare away a witness.

I think that in our society, whenever you’re trying to find an absolute solution, something goes wrong. You violate somebody’s rights and somebody ends up a revolutionary. In most cases, there are accommodations that could be reached once you get sufficient understanding. I want you lawyers to know that I’m willing to understand your needs; but don’t arbitrarily impose your needs on us just because you have control over the writing of the laws and control of the courts. Don’t arbitrarily impose your needs on us and send some reporters to jail — this will accomplish nothing. They’ll go to jail, most of them, and stay there because they have to stay there. In this country the rule of law will not survive unless the press is free enough so that this country knows what is going on. Thank you. (applause)

DEAN KADISH:

I’d like to introduce Professor Choper, my colleague at the law school whose task it is to respond. Most of you here know Jesse Choper.

Usually he's cast in the role of the principal speaker. Recently he came back from Michigan where he delivered a series of lectures on constitutional law and was beset by commentators on all sides buzzing around him. Now he's cast in the role of buzzing fly himself and it's his job to generate some controversy around here and to let Mr. Schorr know that everybody doesn't necessarily agree with everything he says all the time, even though he's right. (laughter) (applause)

PROFESSOR CHOPER:

I want to say at the outset that as a matter of values I agree with a great deal of what Mr. Schorr has had to say. We have heard his plea for protection of freedom of the press and the values it represents. I think at this particular period in our history we have seen the tremendously important contributions made by what many people regard as the fourth branch of government, although an unofficial one, to the conduct of ongoing effective government in this country.

But if I have to engage in controversy of some sort I think I would be on firmest ground by talking about the role of the courts and freedom of the press. At the risk of sounding defensive in respect to that matter, I would disagree with Mr. Schorr's conclusion that the courts have been generally hostile to the interests of the communications media and have not been very protective of the First Amendment freedom of the press. I should like to consider four significant decisions — three of them rendered by the Supreme Court under the stewardship of Chief Justice Burger, which is noted generally as being more conservative than its predecessor. Let me first quickly describe these decisions and then talk a bit about the one that does serve as an irritant to the press.

One well known series of cases in which the Supreme Court has afforded very substantial protection to freedom of the press began with *New York Times Co. v. Sullivan*.⁴ They have ruled that the press is constitutionally protected in almost all circumstances from being held civilly or criminally liable for defaming public officials as well as private citizens who attain a certain degree of public prominence. Thus, a very significant constitutional immunity was given to the press in these decisions rendered by the Warren Court beginning in the mid-1960's.

More recently, in *Miami Herald Publishing Co. v. Tornillo*,⁵ a unanimous Supreme Court, in an opinion by Chief Justice Burger,

4. 376 U.S. 254 (1964).

5. 418 U.S. 241 (1974).

held that a statute requiring a newspaper to publish a reply by any person who had been subject to criticism in that paper abridged freedom of the press. This is quite a significant decision, not only with respect to its invalidating right-of-reply statutes, but because of the very broad language the Court used in affording protection of the press' right under the First Amendment.

So far as gag orders are concerned, less than a year ago, in *Nebraska Press Ass'n v. Stuart*,⁶ the Court, again unanimously, handed down an extremely protective decision overturning the gag order that had been issued by a state judge in Nebraska to which Mr. Schorr has referred. The Court ruled that only under the most limited circumstances does the First Amendment permit a court to protect the fairness of a criminal trial by issuing a restraining order against the press. In emphasizing the Court's solicitude for the press, I should add that the Court has suggested that it might well be that judges may enjoin lawyers from making public statements about a pending case but may not similarly silence the press.

Let me turn now to the *Newsman's Privilege* case — *Branzburg v. Hayes*⁷ — that Mr. Schorr described to you. That was the case in which, in three different parts of the country (California, Kentucky and Massachusetts), newsmen had been permitted to attend meetings held by the Black Panthers, or, in the Kentucky case, to observe how someone was making hashish out of marijuana. These newsmen were called before grand juries engaged in criminal investigations and were asked to disclose certain things they had seen that, in the grand juries' reasonable determination, related to the conduct of criminal activity. All three newsmen refused to comply with the grand juries' requests and they were cited for contempt. The Supreme Court of the United States upheld their convictions, saying that a newsman's rights are no greater than those of an ordinary citizen in respect to having to disclose relevant information to a Grand Jury which, in good faith, is conducting a criminal investigation.

I tend to agree with Mr. Schorr's view that the *Branzburg* decision was not as protective of freedom of the press as it might have been. But in listening to him this evening, it occurred to me that there was an interesting parallel between *Branzburg* and a case I think that many of you are familiar with — *United States v. Nixon*.⁸

That was a case in which, after a grand jury had indicted a group

6. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

7. 408 U.S. 665 (1972) *supra* note 2.

8. 418 U.S. 683 (1974).

of presidential advisors, the Special Prosecutor sought disclosure of certain information, not from the press, but rather from the President of the United States, who responded by asserting a privilege which is entitled to at least as strong a constitutional protection as a newsman's privilege. This is the famous *Executive Privilege* case in which President Nixon claimed that in order to achieve full and free interchange among his advisors, the information and the conversations that he was requested to disclose must remain confidential. Mr. Nixon's argument was quite similar to Mr. Schorr's contention that in order for newsmen to effectively disseminate information, they should have a strong constitutional privilege, because they might find themselves cut off at the source if they were forced to disclose their sources, information or conversations.

Well, in defense of the courts, or perhaps in criticism of the courts, I should like to observe that, in similar circumstances, the United States Supreme Court rejected the claim of newsman's or press privilege in *Branzburg v. Hayes* and the claim of executive or presidential privilege in *United States v. Nixon*. My point is that I hope I can persuade Mr. Schorr that he is not a member of a profession that faces a hostile judiciary but rather that, in the main, the Supreme Court has been sympathetic and solicitous of the interests of freedom of the press.

Mr. Schorr made another point that I found particularly interesting. He said that the courts tend to place limits on freedom of the press when the press interferes with the court's own affairs. I believe that there is truth in that characterization in the sense that in those cases in which the claims of the press were rejected, the Court was concerned with an ongoing criminal prosecution, the business of the courts, if you will. For example, although gag orders to protect a fair trial have now been effectively invalidated by the Supreme Court's most recent decision in the *Nebraska Press Ass'n* case, nonetheless, a great many judicial restrictions of freedom of the press in fact emanated in those circumstances.

I personally tend to agree with Mr. Schorr's balance of the interests in those cases. I do think that, at least in certain circumstances, I would have the freedom of the press prevail over the interests of a fair trial. The consequence would be that you would have to let the person who was charged with the crime go free, for we cannot convict people who have been deprived of a fair trial because the community from which the jury is drawn had been inflamed by the information disseminated by the media. This issue is a very contro-

versial one. I don't think very many lawyers or judges would agree with me, but I do tend to the decision that in some instances the public's interest in obtaining information outweighs the guilty person's being convicted.

We should note, however, a certain parallel between the "fair trial-free press" cases and *United States v. Nixon*. In that case the exclusive government interest in requiring the President to disclose confidential conversations with his advisors was not protecting a fair trial in terms of the innocence of the accused, but in seeking to convict them. As you will recall, the case arose out of the prosecution of the President's closest advisors, Mitchell, Haldeman, et al. It involved a subpoena by Special Prosecutor Jaworski, who said that the requested information was needed to successfully conduct those prosecutions. The interest that the Court held outweighed the claim of presidential privilege was not in assuring that the innocent were not convicted, not in seeing to it that those persons who were charged with the crimes did not have their due process rights to a fair trial breached, but rather the prosecution's interest in seeing to it that the people who were charged had all the adverse evidence against them presented in that prosecution.

So, perhaps there is something that Mr. Schorr rightly criticized the courts about. But if I would add anything to his criticism, it is that in the thinking about the question of freedom of the press versus other public interests you might also think about *United States v. Nixon* — a case that most members of the press would agree with, but one which rejected a claim of constitutional privilege which has somewhat comparable status to the constitutional freedom of the press.