Richard S. Salant Lecture *on* Freedom of the Press

with

Floyd Abrams

2013

HARVARD Kennedy School

SHORENSTEIN CENTER

on Media, Politics and Public Policy

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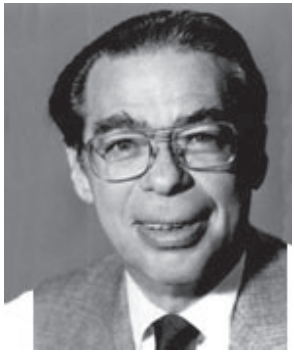
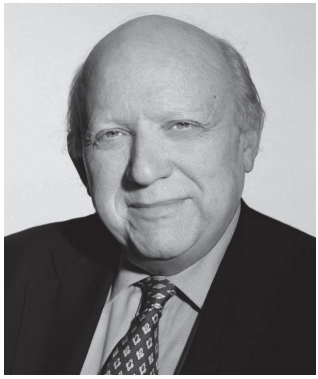
History

In 2007, the estate of Dr. Frank Stanton, former president of CBS, provided funding for an annual lecture in honor of his longtime friend and colleague, Mr. Richard S. Salant, a lawyer, broadcast media executive, ardent defender of the First Amendment and passionate leader of broadcast ethics and news standards.

Frank Stanton was a central figure in the development of television broadcasting. He became president of CBS in January 1946, a position he held for 27 years. A staunch advocate of First Amendment rights, Stanton worked to ensure that broadcast journalism received protection equal to that received by the print press. In testimony before a U.S. Congressional committee when he was ordered to hand over material from an investigative report called "The Selling of the Pentagon," Stanton said that the order amounted to an infringement of free speech under the First Amendment. He was also instrumental in assembling the first televised presidential debate in 1960. In 1935, Stanton received a doctorate from Ohio State University and was hired by CBS. He became head of CBS's research department in 1938, vice president and general manager in 1945, and in 1946, at the age of 38, was made president of the company. Dr. Stanton was an early proponent of the creation of a Press and Politics Center at the Kennedy School. He served on the advisory committee for the proposed Center in the early 1980s and was on the Shorenstein Center's advisory board from 1987 until his death in 2006.



Richard S. Salant served as president of CBS News from 1961 to 1964 and from 1966 to 1979. Under his leadership, CBS was the first network to expand its nightly news coverage to a half-hour on weekdays; start a full-time election unit; create additional regional news bureaus outside New York and Washington; and launch *60 Minutes,* CBS Morning News and Sunday Morning programs. He was credited with raising professional standards and expanding news programming at CBS. Salant was known as both a defender of the news media's First Amendment rights and a critic of what he considered the media's excesses and failings. Salant graduated from Harvard College in 1935 and from Harvard Law School in 1938. He worked in government and as a lawyer. Mr. Salant represented CBS in hearings before the FCC and Congressional committees and in a suit with RCA-NBC over which network would develop color television. Although CBS lost, Salant impressed the network's president, Frank Stanton, who later appointed him vice president of CBS News in 1952.



Floyd Abrams is a member of the Executive Committee and Cahill Gordon & Reindel LLP's litigation practice group. Described by Senator Daniel Patrick Moynihan as "the most significant First Amendment lawyer of our age," Mr. Abrams has been named one of the "100 Most Influential Lawyers in America" by *The National Law Journal* (2013.)

Floyd Abrams has a national trial and appellate practice and extensive experience in high-visibility matters, often involving First Amendment, securities litigation, intellectual property, public policy and regulatory issues. He has argued frequently in the Supreme Court in cases raising issues as diverse as the scope of the First Amendment, the interpretation of ERISA, the nature of broadcast regulation, the impact of copyright law and the continuing viability of the Miranda rule. Most recently, Floyd prevailed in his argument before the Supreme Court on behalf of Senator Mitch McConnell as *amicus curiae*, defending the rights of corporations and unions to speak publicly about politics and elections in *Citizens United v. Federal Election Commission*.

Mr. Abrams's clients have included The McGraw-Hill Companies in a large number of litigations around the country involving claims against its subsidiary, Standard & Poor's Financial Services LLC, *The New York Times* in the Pentagon Papers case and others, ABC, NBC, CBS, CNN, *Time* magazine, *Business Week*, *The Nation*, *Reader's Digest*, Hearst, AIG and others in trials, appeals and investigations.

He is the recipient of numerous awards, the namesake of Yale University's Floyd Abrams Institute for Freedom of Expression, a frequent commentator on television, and the author of articles and reviews in *The New York Times*, *The Washington Post*, *The Yale Law Journal*, *The Harvard Law Review* and elsewhere.

For 15 years, Floyd Abrams was the William J. Brennan, Jr. Visiting Professor of First Amendment Law at the Columbia Graduate School of Journalism. He has been a Visiting Lecturer at Yale Law School and Columbia Law School, and he is author of *Speaking Freely: Trials of the First Amendment*, published by Viking Press (2005).

Richard S. Salant Lecture
October 10, 2013

Mr. Jones: Welcome. I am Alex Jones. I'm director of the Shorenstein Center on Media, Politics and Public Policy and it is my great pleasure to welcome you tonight. We're very glad to have you here. This is a night in which we honor the First Amendment and look at the challenges free speech and free press face in these tumultuous times. Those challenges can come in many forms. In just a moment you'll hear from Floyd Abrams, perhaps the nation's preeminent and sometimes most controversial First Amendment lawyer, as well as one of the most outspoken ones.

But before I speak about Floyd, I want first to spend a moment or two on two men who make tonight's lecture possible and whose contributions to a free press were enormous. This is the sixth annual Richard Salant Lecture on Freedom of the Press. Richard Salant was considered the greatest-ever head of a network news division for his tenure at CBS during the time when CBS was truly the television news leader in the 1960s and '70s. When Richard Salant became president of CBS News, the keystone nightly program was 15 minutes long. There was no *60 Minutes*, no full-time unit assigned to covering elections, no *CBS Morning News*. He changed all that and made CBS the leader in raising television news to something respected journalistically in a way that it had never been before. He stood for high quality news and a willingness to fight for that high quality.

But I think it is important that I mention another great CBS icon and I speak, of course, of Frank Stanton. He was a great friend of the Shorenstein Center and of the Kennedy School and it is from a bequest in his will that the Salant Lecture was born. Frank Stanton was not a news man in the literal sense. To the best of my knowledge he never covered a story. But as president of the CBS network he was a champion of news and of press freedom. For one thing he was Dick Salant's ally and champion. He made it possible for Dick Salant to win the reputation of being the world's greatest news division chief and made it possible for CBS to become respected as the nation's Tiffany network for news.

The point is that this lecture could have been called the Frank N. Stanton Lecture on Freedom of the Press. That it is named instead for his friend Richard Salant was the decision of Dr. Stanton, who, among other things, was remarkably modest. He entrusted his great friend, Elisabeth Allison, with the task of making the Salant Lecture a reality and I would like you to join me in expressing our thanks to her and to Dr. Stanton. (Applause)

Floyd Abrams, though not a journalist, was someone that Dick Salant and Frank Stanton admired and, more important, listened to. Among the many news organizations that Floyd Abrams has counseled in legal actions, touching on the First Amendment, is CBS. But of course he has also represented ABC, NBC, CNN, not to mention *The New York Times* and many, many others. Senator Daniel Patrick Moynihan once called Floyd Abrams "the most significant First Amendment lawyer of our age." That was back in the 20th century. When Floyd was doing things like representing *The New York Times* in the Pentagon Papers case, he was then in his mid-30s.

This summer he was the principal author of a brief arguing on behalf of a First Amendment coalition that Google and Microsoft must be ungagged so that they can describe their role in the government surveillance of the Internet. And he told me just before we walked in here tonight that yesterday he filed a new brief asking for oral arguments on this. So I would say that Floyd Abrams is very much still engaged in these issues.

In the years between the Pentagon Papers and now, he's been a constant advocate for a First Amendment that is focused on a pure guarantee that the government should not control speech, especially political speech. I would like to say this is most likely the view of most everyone in this room. But in the case of Floyd Abrams, it is a view that goes beyond consideration of the content of the speech that is being protected with the impact that that speech is apt to have.

He believes, as I understand his writing and his words, that the First Amendment guarantees free speech. And that has made him also an advocate before the Supreme Court in the *Citizens United* case for putting no restrictions on free speech for corporations in the form of campaign contributions. He has specifically challenged the view that the proper view of free speech is whether or not the speech at issue in a case advances democracy. Let me repeat that because it's an important point about understanding Floyd as I understand Floyd myself. He has specifically challenged the view that the proper view of free speech is whether or not the speech at issue in a case advances democracy. In his words, "My view is that the suppression of speech, particularly but not exclusively political speech, is inconsistent with what the First Amendment is most clearly and importantly about."

He got in trouble with some of his friends over *Citizens United*. But he seems to have a very thick skin. Floyd was an undergraduate at Cornell, went to Yale Law School and has won such a long list of honors that I shall not recite them, but I shall mention one that seems to demonstrate how he is viewed. In 2011, Yale Law School announced the formation of the Floyd Abrams Institute for Freedom of Expression.

As a veteran myself of *The New York Times* I regard Floyd as my greatest weapon for getting things into the paper rather than heading off trouble by keeping them out of the paper. He is a stand-up guy, and you always want him on your side in an argument. It is my honor to present, to deliver the 2013 Richard Salant Lecturer on Press Freedom, Floyd Abrams. (Applause)

Mr. Abrams: Thank you. Thank you all for being here and thank you in particular for this invitation. It's a special honor for me to have been asked to speak at an event established by Frank Stanton to honor Richard Salant. I knew them both, Frank after he had retired, Dick during his tenure as president of CBS News. They were, both of them, great and continuing defenders of the First Amendment because they both cared deeply and were prepared to risk much in its defense. It's very easy now, all these years later, to congratulate them, even to honor them for their courage and devotion. But it's worth pausing for a moment just to recognize the dangers that they were prepared to endure in defense of the First Amendment. And perhaps the best known one was in 1971 when the the House Committee on Commerce subpoenaed all the out-takes of CBS's documentary, *The Selling of the Pentagon*, an extremely controversial documentary and one which remains for people in this area controversial to this day. The times were dangerous then. There was intense White House criticism and threats aimed at CBS.

And the position taken by CBS was that they would not comply with the subpoena issued by Congress demanding the production of their outtakes. A finding of contempt seemed likely with the very real possibility of jail for Frank Stanton and great punishment for CBS. There was a book written by Cory Dunham entitled *Fighting for the First Amendment: Stanton of CBS versus Congress and the Nixon White House*, in which he said this: "There were risks at CBS which were peculiar to the broadcast industry because of its station licenses, a tenet of the FCC and Congress had always been that a broadcast licensee must disclose fully any information required and that failure to do so reflected on the character of the licensee and was the one action for which there was no defense." "Certainly," Dunham wrote, "CBS would have had trouble renewing its broadcast licenses if the network was charged with deliberate deception, let alone refusal to cooperate with, even defying a Congressional investigation into that deception."

And if CBS went into contempt and failed in its judicial review, that would imperil its station licenses and its network as well, a risk of many billions of dollars in today's dollars. Yet Stanton said no and Salant went so far as to bar those who had prepared the program from even defending the editing decisions they had made because of his view that what was really at issue was their right to make the decisions, not the correctness of

them. The House of Representatives in those long ago days of legislative sanity ultimately overrode the views of the House Commerce Committee and decided not to issue the contempt citations. So the battle was won, but we should remember the risks that were run by both of them and their willingness to do so.

Tony Lewis...played an enormous role in defending the First Amendment by using it, writing about it, by explaining it.

I should say the last time I came to Harvard at Alex Jones's behest was that most horrible and unforgettable day of September 11, 2001. I was to give a speech that evening at the Kennedy School on a topic called Private Fact and Public People or something like that. A congressman had had an affair with an aide, the aide was murdered, the congressman was suspected or not suspected, it was a very big deal at the time and between the time I got on the Acela train in New York at 8:00 a.m. to come here and the time we arrived the world had changed. So Alex and I spent our day commiserating about the country and life in general.

The only moment that day that was one which I must say I could not resist a smile was when Alex introduced me to a Harvard professor who said to me, and I'm quoting, "If they wanted to send a message, I'm surprised they didn't bomb here." And I thought to myself, well, now I understand. (Laughter)

...what we have not lost is the power of his prose, the seriousness of his approach and his explanations of why we protect speech that we hate under the First Amendment; why the press, which Tony frequently criticized, must be free for a free society to exist.

It reminded me of the old, old Harvard story when the then-president of Harvard, President Lowell went to visit President Roosevelt at the White House and his secretary was heard on the phone saying the president is in Washington talking to Mr. Roosevelt. (Laughter)

I want to say a word or two before I go on, just to pay tribute to Tony Lewis, who delivered the first Salant speech in 2008 and played an enormous role in defending the First Amendment by using it, writing about it, by explaining it. Tony passed away about half a year ago and his loss to all of us who knew him, all of us who read his work and to the country is very great indeed. But what we have not lost is the power of his prose, the seriousness of his approach and his explanations of why we protect speech that we hate

under the First Amendment; why the press, which Tony frequently criticized, must be free for a free society to exist.

One of Tony's observations that he offered in that first Salant Lecture in 2008 that still resonates with me was this, he said, "These last few days have made me understand more acutely than ever how much we depend upon the press to resist the abuses of power-hungry governments. The guarantees of the Constitution avail us not, if we do not know how power is being accumulated and mis-used. Especially is that true in times of fear…Here again Madison can be our guide. In a letter to Jefferson in 1978 he said, 'Perhaps it is a universal truth that the loss of liberty at home is to be charged to provisions against danger, real or pretended, from abroad.'"

Tony and I did not agree all the time about the First Amendment or about the behavior of the press. I think he thought I was a bit too absolutist in my view of the First Amendment and insufficiently critical of some of the press' performance. So I like to think that this talk, which is not really about First Amendment law or even about threats to the First Amendment, but about journalistic practices and decision making, would not displease him. Tony well understood the difference between what may lawfully be printed and what should be printed. The First Amendment, by its terms, may all but totally ban prior restraints on speech in the absence of what Justice Potter Stewart in the Pentagon Papers case referred to as proof that publication will surely result in direct and immediate and irreparable harm to the nation or its people. But editors may make such decisions based on far less demanding standards.

In the new Manning/Assange/Snowden age, I speak tonight about what is not fit to print, with respect to topics implicating national security.

On one level then you could say what I want to talk about tonight is a sort of reverse of Tony's subject, how editors and journalists should think about the decision—and it is a decision—about whether to publish what may be highly sensitive national defense or intelligence-related information. I think this is an especially appropriate topic in a world of leaks or torrents, one could say, of classified, sometimes highly classified, information being offered to the press. In the new Manning/Assange/Snowden age, I speak tonight about what is not fit to print, with respect to topics implicating national security. It may occur to you to wonder why a lawyer should be heard to pass upon such topics, but given as you've heard from Alex, that Dick Salant was appointed the head of CBS News with a legal background rather than a journalistic one, I hope that will not be disqualifying.

I want to put to the side some of the issues which are most debated in this area. I'm not going to talk to you about how accurate or inaccurate the press is in its reporting. Although I can't quite put aside Thomas Jefferson's wonderfully edgy letter in which he said that newspapers ought to be divided into four parts: truths, probabilities, possibilities and lies. He said the first part would be the slimmest. (Laughter)

I'm also passing over the sort of evergreen issue of who is a journalist or what is a journalist. For our purposes tonight let's just assume WikiLeaks and anything else that says it's a journalist or plays a journalistic role is. And I'm not dealing with government conduct, misconduct, folly or the like, including the sometimes scandalous and self-defeating over classification of information (I refer you to Senator Pat Moynihan's really great book, *Secrecy*, on this) nor about how much leaking the government itself engages in from the highest to the lowest levels. The ship of state, President Kennedy memorably said, is the only ship that leaks from the top. But as we learn from Private Manning, and I want to say this in italics, *Private* Manning, it can leak from the bottom as well.

I want to start with a hypothetical situation, one that I didn't make up and one that is not from law school, but which was on American television some years ago. It was one of those superb exchanges in the Fred Friendly series some of you may recall called Ethics in America. Fred was formerly the head of CBS News and the program I'm going to talk about was taped in 1987 and broadcast on PBS. With the Vietnamese War still reasonably fresh in the minds of all participants, Fred addressed a number of issues, including torture on the battlefield and the behavior and views of the press about its own role of covering the war in which the United States was a participant.

The panel was filled with luminaries. General Westmoreland, the former commander of American forces in Vietnam was on the panel. General Brent Scowcroft, the former National Security Advisor to President Ford and President Bush the first, and journalists Mike Wallace of *60 Minutes* and Peter Jennings, then the anchor of *World News Tonight* on ABC, were four of the best known. The moderator—interrogator—was Charles Ogletree, professor at Harvard Law School then and now. After raising a number of questions about torture during warfare as to former officers and enlisted men from the Vietnamese conflict, Ogletree turned to the two journalists, two of the best known men in the country. The hypothetical involved war in a hypothetical country called Kozan, in which the United States had sided with and was fighting with the South Kozanese against the North Kozanese.

The American media, in the hypothetical, had been asking for some time for access to North Kozan. And the response to Peter Jennings, after

long delays, was finally that they could go. He could bring his film crew and they would show him, they said, areas where American and South Kozanese troops had engaged in war crimes. Ogletree asked him, "would you go?" "Sure," he said, "absolutely." When he arrived there, the North Kozanese changed the focus of what they were offering. They said, "you know what, we're going to do an ambush tonight of South Kozanese troops. Would you like to accompany us? Bring your cameras, show your public what's going on here." Ogletree asked Jennings, "would you go?" "Sure." The ambush was set, the North Kozanese troops awaited the arrival of the soldiers they would ambush, and as the other troops got closer and closer, Jennings could make out that it was not just South Kozanese, but South Kozanese and American troops on a joint mission together.

Ogletree asked him, "what would you do? Would the filming proceed as you had planned?" Jennings sat silently for 11 seconds, a television eternity. He finally said, I'm quoting, "I guess I wouldn't. I'm going to tell you now what I am feeling. If I was with a North Kozanese unit that came upon Americans, I think I would do what I could to warn the Americans." "Even if you lost the story?", Ogletree asked. "Even though it would almost certainly mean losing my life," he answered. "But I just don't think I could bring myself to participate in that act. That's purely personal and other reporters might have a different reaction." Mike Wallace did. He said, "I think some other reporters *would* have a different reaction." They would view it as a story they were there to cover.

Wallace turned to Jennings and went further. "I'm astonished," he said. "Peter, I am astonished. You are a reporter. Granted, you're an American, but I'm at a little bit of a loss to understand why because you're an American [he happened to be Canadian] but why you're an American you would not have covered that story." Ogletree asked Wallace, "Don't you think you have some sort of higher duty in a situation in which American troops are involved to warn them?" "No," Wallace said, "you don't have a higher duty." These are quotes. "No, no, you're a reporter." Jennings retreated.

"I chickened out. I wish I'd made another decision. I wish I had made Wallace's decision."One of the panelists was a Marine colonel who had served in Vietnam. Glaring at the journalist, his voice filled with scorn. He expanded the hypothetical. He said something like the following: "A few days after the ambush you guys are going to be back on our side. And one of you may get wounded walking around there and I'm going to be asked to send out our troops. This is what I do," he said. "I'm going to send out our troops to save you, so you don't bleed to death on the battlefield. I would do it," the colonel said. "And that is what makes me so contemptu-

ous of you. Marines will die," he said, "to get"—and he paused—"to get a couple of journalists."

It was an exchange that led to James Fallows writing in a book 10 years later to observe that it was a nice symbol of what Americans hate about their media establishment. Now it's over 25 years since that was broadcast and the exchange is still as gripping and revealing as it was then. If you want to read more, just Google Mike Wallace and Peter Jennings and see what you find if you do so. You'll find a piece when Mike Wallace died saying "Mike Wallace, don't R.I.P." You'll find another piece saying "Mike Wallace, journalist first, American second" and many more.

The Friendly program was a wrenching one, one that as Friendly himself often repeated, that made the agony of decision making so great that one could escape it only by thinking, How should Wallace have answered? Put aside that maybe Jennings shouldn't have accompanied the North Kozanese soldiers at all in the midst of a war, embedding American journalists with foreign troops at a time when they are at war with American troops certainly raises some serious issues, but ones which would allow participants in a Friendly seminar to escape too easily. Fallows in his book, *Why America Hates the Press*, faults Wallace for not answering in a more detailed, thoughtful manner, for not saying, by way of example, that in combat reporters must be above country or that they have a duty to bear impartial witness on either side, or that he had implicitly made a promise not to betray the North Kozanese when he agreed to accompany them.

My own reaction, 25 years later, is more critical. Wallace was not wrong in failing to speak more thoughtfully, it was the response itself. There is of course no fault in an American reporter reporting on a battle in which Americans are killed. Coverage of war, especially ones in which Americans are involved, is not only appropriate but necessary to inform the public. And I can certainly understand in the hypothetical (or in real life) Jennings staying silent in circumstances in which his own death was a likely result of speaking. But I do have trouble understanding or accepting the absence of any feeling of solidarity, of fellowship, by Wallace, with the imperiled American soldiers. For him, the issue, indeed the only issue, was whether Jennings would or would not cover the story. For me, it was whether Jennings should stand mute and watch fellow Americans be killed.

This is not an easy sort of issue. The notion of patriotism is used too loosely and too often to stifle controversial and sometimes valuable information or views. And far more often than not, when journalists are accused of being unpatriotic, as some viewers of Wallace, certainly not I, concluded, it's because they are reporting truthfully about matters of genuine interest and importance. When the Pentagon Papers were published in 1971,

The New York Times and other publications were accused by many of being unpatriotic. Indeed, so was I for representing *The Times*.

When the Abu Ghraib scandals were revealed, journalists were accused by many people of being unpatriotic for doing so. When an American Marine killed an unarmed captive in Fallujah in 2004, Edward Litwack referred in an article he wrote in *The Wall Street Journal* to those journalists who revealed the information as a "pool of unpatriotic American television reporters." All of this mistakes journalism for cheerleading and nationalistic cheerleading along the lines that Theodore Roosevelt did in 1918 when he said, "There can be no 50/50 Americanism, only for those who are Americans and nothing else is there room here."

It's easy to reject this sort of crude flag waving, and journalists are right to do so. But there are situations, rare but real, in which the revelation of information could truly compromise national security and/or threaten lives.

It's easy to reject this sort of crude flag waving, and journalists are right to do so. But there are situations, rare but real, in which the revelation of information could truly compromise national security and/or threaten lives. I'm well aware that that cry of wolf has been shouted so often and so often wrongly that to some journalists may have discredited the very need to assure that real wolves are kept at bay. But real they sometimes are. And the journalistic mission to reveal information cannot, I think, serve as some sort of absolution for the need even to think about the consequences of publishing. Even great American radicals who have treasured, advocated and engaged in the most controversial speech have rejected this approach.

Patrick Henry, one of our great revolutionary firebrands, in the course of observing that "the liberties of a people never were or never will be secure when the transactions of their rulers may be concealed from them," then added that, "transactions as relate to military operations or affairs of great consequence, the immediate promulgation of which might defeat the interests of the community, I would not wish to be published, till the end which required their secrecy should have been effected." Daniel Ellsberg, who has vigorously supported the conduct of Manning, Assange and Snowden, offered in his book about leaking the Pentagon Papers: "Of course there are circumstances, such as diplomatic negotiations, certain intelligence sources and methods of various time-sensitive military operational secrets that warrant strict scrutiny." Ellsberg acted on that view when in giving *The New York Times* access to the Pentagon Papers case, he refrained from doing so from the three volumes that dealt with negotia-

tions to end the war for fear that it might interfere with the very process of a diplomatic resolution.

So what should we make of the following defense by Julian Assange of releasing a classified report describing radio frequency jammers used in Iraq by American soldiers to cut off signals to remotely detonated explosives? When criticized for making public such information at a time when some such jammers may still have been in use, Assange said, "WikiLeaks represents whistleblowers in the same way that lawyers represent their clients—fairly and impartially. Our 'job' is to safely and impartially conduct the whistleblower's message to the public, not to inject our own nationality or beliefs." For me, everything in that statement is unpersuasive. Most obviously the role of lawyers, unless I'm completely mistaken for the last 50 years, is not to represent their clients fairly and impartially. We are their advocates, not their judges. We are not supposed to be impartial, a role set aside for judges and jurors.

There's nothing wrong, incidentally, with journalists playing an advocate's role, so long as it is clear that they're doing so.

Indeed, we are supposed to be zealous in presenting and defending their positions to the full extent the law permits. There's nothing wrong, incidentally, with journalists playing an advocate's role, so long as it is clear that they're doing so. That is one of the reasons that I think the criticism of Glenn Greenwald, who writes for *The Guardian* and has been the primary scribe of and commentor about Mr. Snowden's releases, has been so unpersuasive. The notion that he cannot fairly be described as a journalist or is outside the realm of journalism is wholly without merit. As for Assange, if he really means what he said, his role is simply that of a courier without regard to the impact of the information he releases. And for me that's simply not acceptable.

There was a WikiLeaks release of a classified cable that listed sensitive facilities around the world, ranging from underseas communication lines to a laboratory in Denmark that makes a smallpox vaccine. There was the release by WikiLeaks of over a quarter of a million State Department cables, apparently obtained from Bradley, now Chelsea Manning, which included the names of over 150 human rights whistleblowers who had been promised confidentiality. So clear was the threat to these individuals that in an unprecedented public rebuke of their own sometimes source, *The New York Times*, *The Guardian*, *El Pais*, *Der Spiegel* and *Le Monde*, all of which had obtained documents from WikiLeaks in the past, issued a joint statement deploring and condemning its reckless conduct.

The issue of what information should not be published by entities that are dedicated to revealing information is inevitably a contentious one. Reporting on matters relating to national security, national defense, intelligence and the like is essential to an informed public. The presumption must always be to publish. That presumption must always mean that the arguments—and there are always such arguments that can be arrayed against publication, even of truthful and important information—must be resisted. And in the national security area, government officials too easily conclude that the nation's safety would be better served if hardly anything other than government press releases were published. Whether that's because they choose to shield errors of the government or themselves because their definition of what revelations truly hurt national security is overbroad, or most likely, I think, because they simply don't accept that there is any real public interest in the disclosure of such information, remains important that such entreaties generally be rejected.

The presumption must always be to publish. That presumption must always mean that the arguments—and there are always such arguments that can be arrayed against publication, even of truthful and important information—must be resisted.

Only information which appears highly likely to compromise significant national interest should be withheld. But such information does exist. And it does sometimes come into the hands of journalists. Sometimes the decision is or should be a close one. Sometimes not. I recommend to you in that respect, Gabriel Schoenfeld's thoughtful study of that question in his book, *Necessary Secrets: National Security, the Media and the Rule of Law*.

Consider this very recent example. On August 2, 2013, *The New York Times* published an article revealing that the global travel alert to American citizens that had just been issued came about as a result of "intercepted electronic communications this week among senior operatives at al-Qaeda in which the terrorists discussed attacks against American interests in the Middle East and North Africa." *The Times* in its initial article about this and CNN in its initial reporting withheld the identities of the al-Qaeda leaders whose conversations were intercepted after American intelligence officials told the publications that publication could "jeopardize their operation."

The next day the *McClatchy Newspapers* reported the names of al-Qaeda, Iman El Zoheiry and Nasser Al-Wahishi, the Yemen-based leader of al-Qaeda in the Arabian Peninsula. According to the *McClatchy* Wash-

ington Bureau Chief, James Asher, the information had been obtained in Yemen and was "pretty much common knowledge." More interesting and, for me, more disturbing, was Mr. Asher's general statement. He said, "It's not unusual for CNN or *The New York Times* to agree not to publish something because the White House asked them. And, frankly, our democracy isn't well served when journalists agree to censor their work. As I've told our readers in the past, *McClatchy* journalists will report fairly and independently. We will not make deals with those in power, regardless of party or philosophy."

The same day *McClatchy*'s Chief of Corespondents, Mark Seibel, was quoted as saying that the information had come from Yemen and no one had asked them not to run it. He then said, "And as you know, we wouldn't be disposed to honor such a request anyway." *McClatchy* has deservedly received plaudits for its skeptical and too lonely reporting on the justifications for American involvement in the war in Iraq. But if *McClatchy*'s general ongoing policy was fairly set forth in these statements, I find it disturbing. I know that there is a certain joyous braggadocio that journalists sometimes choose to affect, a sort of rouge-ish take no prisoners, devil may care swagger.

But I think it's appropriate to take the *McClatchy* statements at face value and to reject them, because they simply do not take the real perils of the real world seriously. I say this without relying on a later *New York Times* article, on page one, all but accusing *McClatchy* of actually compromising national security by naming the two al-Qaeda leaders, a charge denied by *McClatchy* and later criticized by *The Times*' own public editor. Whatever the actual impact of the revelations in this case may or may not have been, the notion that it is censorship, illicit deal making or supinely caving in to those in power to hear out intelligence officials and on occasion to agree to withhold for a time publication of highly classified information that those officials had concluded could do serious harm seems to me indefensible.

I find more persuasive as a guide what I take to be the sounder view of Jack Fuller, the Pulitzer Prize–winning long-time editor and publisher of *The Chicago Tribune*, who summed it up this way in his book, *News Values*: "When a newspaper does pierce the secrecy of government and discover information that the government has a legitimate interest in keeping secret, the reporter and editor should take those legitimate interests into account in deciding whether to publish. An effort must be made to predict the consequences of disclosure and non-disclosure. Appeals by the government that the newspaper suppress the information should be listened to and not dismissed out of hand."

The issue of how journalists should treat matters related to American national security is at the heart of much of the criticism voiced by some

journalists of others. Criticism that led David Carr, writing in a much-discussed piece in *The New York Times* in late August of this year to decry just such criticism. I agree with some of Carr's thesis, that the revelations of NSA snooping within the U.S. revealed by Edward Snowden in articles mainly written by Glenn Greenwald in *The Guardian* and the attack on journalists and other civilians in Iraq by an American Apache helicopter, first revealed by WikiLeaks in a film provided by Manning, do deserve journalistic kudos, rather than condemnation.

But when Carr questions how Assange and WikiLeaks can be condemned by American journalists, notwithstanding their valuable revelation of the Apache attack, I think he misses the point. That criticism at its best relates to Assange and WikiLeaks' persistent recklessness in dealing with American national security issues, examples of which I have cited earlier. And as for Snowden, who had access to far more sensitive and much more highly classified material than Manning and who appears to have taken much greater care in deciding what materials should be made public, I would distinguish between his revealing what I will loosely call domestic as opposed to international spying. The former seems to me worthy of praise.

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The revelation of the latter, the NSA listening in to calls of American allies, ranging from Brazil to Germany, raises what I think are fundamentally different and more serious issues than the disclosure of NSA activities within this country. I don't believe many of our publications would have commissioned articles aimed at revealing American spying abroad and these revelations seem to me little different than that.

These are hard choices. I was reading recently the memoirs of the great *New York Times* columnist James Reston and was struck by how many decisions that he was involved in years before left him uncertain scores of years later about what *The Times* should have done. He writes that in the 1950s—writing his book in the 1990s, but in the 1950s—*The Times* was aware that the CIA was sending U-2 spy planes over the Soviet Union and determined not to publish that information, a decision Reston supported, but later

came to doubt. He writes about something which is now very well known, that *The Times* was aware, prior to the U.S.-funded and directed invasion of Cuba in 1961, an occasion that was surely incurred, but downplayed its story discharging the eminence of the invasion, a decision that left Reston unsure 40 years later of just what the paper should have done. Reston himself had criticized the then-forthcoming invasion in columns he wrote and *The Times* published before it occurred, but he remained of the view that it was, as he put it, one thing to report that the anti-Castro legions were mobilizing, but quite a different thing to inform Castro of the timing of the invasion.

I cite you both these examples, not in support of the proposition that *The Times* was right or wrong, but simply to illustrate their difficulty. I had some personal involvement in one such matter during the Pentagon Papers case. When the hearings ended in the District Court and we had prevailed, Judge Murray Gurfein called in myself and a senior partner of mine to his chambers. He said to us, I want to talk to you as a private citizen. The case, he said, is over, so I can talk to you in that capacity. And he said he wanted to tell us that a few of the documents he had examined in the Pentagon Papers, in particular portions of a SEATO, a Southeast Asian Treaty Organization, contingency plan seemed to him potentially dangerous to publish. He was not entering any order, he said, that was for the press to decide. But he told us that he "wished"—and that was the word he used—that *The Times* would give special consideration before publishing that material.

We told him we would advise *The Times* of his views and we did so. A decision, in fact, had already been made not to publish some of the documents. On further review they determined to publish a few more and to continue and to not publish some others. I've always thought that was a good example of how the system ought to work. From a First Amendment perspective, it was perfect. We won, the good guys, our team.

In the Pentagon Papers case, as in most in which the Supreme Court has addressed the First Amendment, it read it broadly, expansively, the way you might expect, with a document with language saying Congress shall make no law abridging the freedom of speech or of the press. The press was held to have virtually carte blanche freedom to decide what to print. But that left the press with another decision: what to print? The First Amendment provides no answer to that question. It never does. Perhaps all we can say is what Walter Cronkite, an old friend and colleague of Frank Stanton and Dick Salant, once observed, he said, "Freedom is a package deal, with it comes responsibilities and consequences."

It's appropriate to ask, I think, in conclusion whether the changed journalistic landscape in an Internet age makes this topic less relevant.

After all, in today's world, Daniel Ellsberg could probably have posted the entirety of the Pentagon Papers anonymously. I put the word "probably" in after reading more about the NSA's activities. But I think that for the same reason that he sought out *The New York Times* in 1971, the validation of the importance of the document, the interest in publicity, he would probably have done the same today. It's no coincidence that Julian Assange sought publication of the materials he received from Manning in the "old" media, or that Edward Snowden did the same with his revelations. Leakers don't leak in the abstract. They want the information they are leaking to be public in the widest sense, to be discussed, to be taken account of.

It's no coincidence that Julian Assange sought publication of the materials he received from Manning in the "old" media, or that Edward Snowden did the same with his revelations.

And so we wind up as Steve Brill recently pointed out in a column in Reuters that *The Guardian—The Guardian* itself, no trumpeter of the need for protection of government secrets—published a 32-page NSA training manual obtained from Edward Snowden, four pages of which were redacted, as *The Guardian* wrote, "because it reveals specific NSA operations."

The world is rich in irony. As I conclude this talk I can't help but wonder, it may sound a bit discordant to hear all this from me, someone who has spent the better part of my life trying to expand or at least preserve the right of the press to publish just about anything. I don't think so. And I don't think Dick Salant would think so either.

In an interview of him by Richard Heffner, the host of *The Open Mind*, Dick put it this way. He said, "I think everybody, everybody can look over the shoulders of press people, everybody but the government. That's the price we pay for getting the First Amendment, the free press guarantee. We're the only free press enterprise in the United States that gets a special constitutional protection. There is no other business that happens to. In return, I think we're obligated as best we can to be fair, to be accurate, to be responsible and to be accountable to the public in terms of explaining what we do, being willing to admit when we're wrong when we're wrong." Thanks Dick Salant, and thanks to all of you for the chance to give this talk in his honor. (Applause)

Mr. Jones: Thank you very much, Floyd. Let me ask the first question of you. You talked about not passing over things quickly or lightly or easily. And my sense is that you passed over the digital change a little perhaps too easily about what it's going to mean in this kind of area. I don't

know what the place of *The New York Times* and other iconic news organizations is going to be 10 years from now, 30 years from now, but my sense is that there is going to be certainly a mechanism for publishing instantaneously and everywhere, which already exists, but also perhaps a culture that is going to be much more like the Julian Assange vision of the world for simply putting things out there. When you look forward, do you think that this kind of gatekeeping role, which is one of the things that seems to be most in jeopardy, will be able to persist in this kind of area?

Mr. Abrams: I don't have any doubt that we're moving in the direction of more information being made more available with less constraints, whatever the harm the information may do or whatever the social impact of the information may be. That is where we're going. I do think, though, that without passing on whether the press will still be around in 30 years, that there will still, for reasons I indicated at the end of my talk, be a desire on the part of those people who have access to information which they've either promised to keep secret or there is some reason beyond the promise to keep secret, but who want to release it, to want to do so in a way that gets the widest dissemination and the most validation. At this time, that is through the establishment press, with the imprimatur of being on page one of *The Washington Post* or *The Wall Street Journal* or *The New York Times* or whatever.

And one of the realities with new technology is this: one of the great "scandals" of the Pentagon Papers case is that we're talking about 23 volumes, 7,000 pages. Private Manning turned over 700,000 pages. We don't even know the scope of the documents that Edward Snowden had access to and continues to have access to.

Whether that will remain the case, I don't know, in the sense that I don't know which will be the entities that will be looked to in 30 years to provide that sort of validation. But I do think there will be such entities. They may be less responsible. They may not be what we would call newspapers, but I do think that they will be entities to which the public turns and, therefore, to whom the leakers will want some sort of emphasis, validation, discussion from. And one of the realities with new technology is this: one of the great "scandals" of the Pentagon Papers case is that we're talking about 23 volumes, 7,000 pages. Private Manning turned over 700,000 pages. We don't even know the scope of the documents that Edward Snowden had access to and continues to have access to. So when people are releasing hundreds of thousands, millions of pages of materials, to some degree they need even more,

someone out there saying this is important. This is what you ought to read. This is what matters. But more than that, I don't have any view on.

From the Floor: You answered part of my question. I'm sitting there thinking that since the passage of the Constitution in the late 1780s, we always had a powerful press and we've had one until the last five to seven years. A slightly weakened *New York Times* and maybe four or five other strong outlets are still there. We don't know that they will be there in 10 or 15 years. What does it mean if there was a world with no legitimate press, with no educated reporters who can't make a living wage to keep the government honest? It was important to the Founding Fathers. It's slipping away, I think.

Mr. Abrams: I don't have an answer to your question.

From the Floor: Neither do I.

Mr. Abrams: What you say is an accurate and obviously perceptive expression about the real dangers or perhaps the real likelihood of what may occur. Five years ago I probably would have made a joke about how dependent we were on just a few great press families, and now we have one. So that's gone as a sort of barrier of the sort you're talking about. Is there a reason for some—I don't want to say pessimism—concern that we are no longer going to have entities around that play the role, not just of intermediary, but of editing and of responsibly passing judgment on what is worth knowing and what not? And I don't have an answer to that. I do think, as I said earlier, we're not going to be in a situation where you just have a million pages out there. Someone, some thing is going to play the role, but whether it's going to be Matt Drudge or not, I don't know.

From the Floor: Thanks, Floyd. As the father of a U.S. Diplomat whose East Asian human rights sources were compromised by Assange and Manning and their lives thereby shattered, I want to congratulate you on the careful lines that you drew tonight and I think it's really especially important coming from you that these lines be drawn. But that's not what I want to ask you about and I hope you don't mind that I go off tonight's topic.

Mr. Abrams: Well, why don't we forget the rest. (Laughter) Thank you, very much. Go on.

From the Floor: What I want to ask you about is this. Do you have any second thoughts about *Citizens United*?

Mr. Abrams: No. I'm afraid for the same reasons that I was in favor of it at the time, and I have to say I'm so glad Professor [Charles] Fried is here shaking his head yes with me on this. I have to say, for me it's not a close case. We are talking about not just speech, but political speech, not just political speech, but political speech about who to elect and we're letting Congress pass laws sort of dividing it up as to who can say what and how much can be said. I just don't think that's an acceptable way for a demo-

cratic society to behave. I mean, Alex quoted me earlier in what may seem an anti-democratic articulation of my concern about the contrary—it's a very standard, almost orthodox First Amendment position that the First Amendment was designed to protect the public from the government and that allowing the government to become involved in these sorts of ways, deciding who or what can speak, making decisions about corporations or unions being outside the political process just seemed to me wrong headed. There are a lot of Supreme Court cases that are First Amendment cases that I think are closer, indeed, some very close, including ones where the First Amendment side had some big time dissent. And I could really strongly sympathize with the other side in terms of the social interests involved.

...it's a very standard, almost orthodox First Amendment position that the First Amendment was designed to protect the public from the government and that allowing the government to become involved in these sorts of ways, deciding who or what can speak, making decisions about corporations or unions being outside the political process just seemed to me wrong headed.

But it seems to me that this takes us back to the most fundamental sort of way of looking at the First Amendment, which at the least is, if there is some other way to deal with some social problem, don't do it by limiting speech. And we can play around the edges with what's corruption and what's not and we can look for other ways, public funding in a variety of ways is one, public exposure in a variety of ways is another, to deal with the genuine problems that we have here. But *Citizens United* seemed to me then and now a correct, and given my First Amendment views, an inevitable decision.

From the Floor: In your opinion, is broadcast regulation consistent with the First Amendment in that the compelling state interests offer is the legal fiction of the spectrum scarcity, whereas we now live in an era of super-abundance of portal and channel capacity?

Mr. Abrams: No, I don't think so. And I think as your question reveals, I think that it is less defensible every year. I think the only defense left comes right from Tevye singing about tradition. That's the way we did it and that's the way we're going to keep doing it, or Justice Scalia asking a question in the most recent case in which this subject arose by saying shouldn't there be some place where our children can watch freely with-

out concern about what they're going to see? I can't imagine a less First Amendment–sensitive approach. So, no, I don't think so. I'm sure Frank Stanton would agree, because I know he did back many years ago.

From the Floor: In the early 1970s I worked on the Ellsberg Defense Committee and oddly enough it was given the volumes that you described as the diplomatic volumes that Ellsberg withheld and read them through. And in fact what they revealed was simply that Romania, Poland and Canada had been involved as intermediaries in negotiations via the Russians with the North Vietnamese. Looking back, it's hard to imagine that deep national security interests were attached to that. So the question is, how is it that we decide what it is that is an issue of national security? And I raise it because I want to distinguish actually between the Assange case and the Snowden case, because what's striking about the Snowden case is that Snowden has not pressed the matter of releasing documents which the press, as intermediaries, have insisted on not leaking. And there's an interesting situation here, which is the gatekeeper function is being played dually, individually by Snowden and institutionally by these handful of papers.

And we're actually in a generation where my students no longer have the respect for authority that was inculcated in our generation and no longer feel a binding attachment to the state, when in fact what you were preaching or what I would value are what we would think of as universal values situated within states, but which are nonetheless universal and at a time when the United States no longer has a unique hegemonic role to play and must think about negotiating the preponderance of values that we care about across states and the world. And one of those has to be about compromising the power of the state, given what the documents have revealed about what the United States has been doing. So it's a complicated question, but it's asking you to think beyond that relationship between press and state to think toward what Alex was suggesting, which is there are values beyond the state. The press represents for the people in a theory of democracy. Thank you.

Mr. Abrams: Yes, and as you rightly point out, we're talking about your students that, as the minds of different people approach it, younger, as a generational change takes hold, we simply may not be able to depend upon or expect anything like the model that I've been—everything that I've said is basically rooted in that model or some sort of expansion or continuation of the model. One subject I didn't touch on, because it was just too hard to do in an event like this, because I haven't fully thought it out, is suggested in a different way by your question. It's all very well for me to criticize Mike Wallace for his hypothetical thinking. I'm not quite sure what standard I should apply to Julian Assange who is not an American

in the first place. And I can't demand of him some sort of loyalty to the national security of this country. I can view him as dangerous in some ways to that national security, but it is not as if I can start out with the notion that he owes a duty that our citizens, in my view, owe to our country and to each other.

And I think that those lines are breaking down as well, sometimes for the good, certain national barriers collapse, but sometimes not so much for that.

From the Floor: What is your opinion of Eric Holder's performance relative to the press?

Mr. Abrams: Well, I think that the Obama administration has comported itself in a way which is significantly uncongenial to First Amendment interests. I'm not sure that they did it on purpose. That is to say, I don't view it as an agenda item for this administration to crack down on the press. But I do think that whatever the motivating factors or whatever the luck of the draw, some people in the administration would like to say that there were good cases there before they got there and there were some bad things that have happened since they got there. That's their view. Mine is that they have acted with an indifference to First Amendment interests and done so on a continuing basis.

...I think that the Obama administration has comported itself in a way which is significantly uncongenial to First Amendment interests.

I've had a personal political theory for some time, that Democratic presidents are not of a mind to mix it up with the national security establishment. They are not comfortable with them, they don't want to be accused of being soft. They don't understand them. They can't even salute correctly. So a lot of things may lie in the background, but no, I think their record is poor.

From the Floor: I want your opinion on a practice that sort of sets this on its head, which is *The New York Times* came up a few nights ago and aired a documentary about Christine Quinn, called *Hers to Lose*. And explained in the panel that they had been given terrific access to Christine Quinn with the understanding that this would not be aired until after the election, which is a practice common, I mean, *Time* and *Newsweek* used to make this deal with campaigns also. Obviously some book writers make this deal. But it's starting to really bother me, particularly if you're going to do it, if you're going to monetize it later. We're not going to tell you about the candidate before you vote, but we're going to sell it to you later. I'm getting very nervous about that whole deal. What do you think about it?

Mr. Abrams: The pressure for access has been growing in recent years in a variety of ways. Hollywood stars trade access for being on the cover.

From the Floor: I work for *People* magazine, I know all about that.

Mr. Abrams: I don't care about that stuff. I'm sorry people in the entertainment area do it, but my life goes on. But I think you make a serious point when you talk about people running for public office. I mean, I do think that we wouldn't have *The Making of a President*, Teddy White, or almost any of those great breakthrough analyses of presidential campaigns if promises couldn't have been made, but nothing would be published until it was over. But where you are talking about the competence of a candidate or how a candidate would behave or the qualities of a candidate, which would affect his or her behavior, I think it's difficult to justify and I share your concern about the prevalence of it at this time.

Mr. Jones: What about when the person who was doing the reporting for the book is also covering the campaign? Such as Bob Woodward, in some respects.

Mr. Abrams: There's a special body of journalism lore for Bob Woodward. One is not permitted not to comment, it is against the rules. I think that people that cover candidates during a campaign shouldn't be participating in arrangements with them, which keep significant newsworthy information from the public. But I have to acknowledge that if that were an unwavering rule, we just wouldn't get to learn it at all. I mean, the big justification of it is that if the real choice is never learning it or learning it after the campaign, it's better to learn it after the campaign. But is it troubling that they, the journalists who play in this league, know things and don't tell them to us when it's most important for us to know them before we vote. It's a problem.

Mr. Jones: One final question. If Mr. Snowden could call you from Russia and say, "I want to come home, will you be my lawyer and represent me?"

Mr. Abrams: Snowden is, for me, a much—as I have perhaps indicated—much easier case than Assange. Assange needs a lawyer who loves him. (Laughter) He needs a lawyer that is going to do PR for him. One of the roles lawyers play these days, for better or worse, is to appear out of court as well as in court in cases like these. That's just become the way of the world. There are some lawyers that won't do it and some great lawyers who don't do it. But more and more it has become almost part of a lawyer's responsibility to a client to stand up and defend the client's reputation out of court as well as in. And the only reason more lawyers don't do it is that some

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judges really mind it and in those situations the lawyer can say to a client, it's not a good idea for you, you don't want to ask me to do this. But I do think that Assange needs a believer. Snowden is a somewhat different case for reasons that a number of questions and some things I've said suggest.

He's made efforts not to reveal—he has not revealed, by any means, all that he knows. I can't help but wonder if there are people in Washington who either have thought of or who have already considered trying to work something out where he would agree not to reveal certain information and maybe he wouldn't have to live the rest of his life in a dacha somewhere in Moscow. Who knows? When he calls, I'll think about it. (Laughter) (Applause)

Mr. Jones: Thank you all for being with us tonight. I think that we've had an outstanding evening. Certainly I have really, really gotten a lot from it. Thank you all very much and on behalf of the Shorenstein Center, good night. (Applause)