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Floyd Abrams
Senior Counsel
Cahill, Gordon & Reindel, LLP

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Webinar

Moderator: Peter Coy
Economic Journalist

Introduction

President Barbara Van Allen

Good afternoon and welcome to the 619th meeting of The Economic Club of New York in our 114th year. I'm Barbara Van Allen, President and CEO of the Club. As many of you know, The Economic Club of New York is the nation's leading nonpartisan forum for discussions on economic, social and political issues. Our mission, we feel, is as important today as ever as we continue to bring people together as a catalyst for conversation and innovation. A special welcome to members of the ECNY 2021 Class of Fellows – a select group of very diverse, rising next-gen business thought leaders, and welcome also to the graduate students from Fordham University and Columbia University that are joining us today.

It is a pleasure for me now to welcome our special guest, Floyd Abrams, Senior Counsel, Cahill, Gordon & Reindel, LLP, litigation practice group. Floyd has a national trial and appellate practice and extensive experience in high-visibility matters, often involving the First Amendment, securities litigation, intellectual property, public policy and regulatory issues. He has argued frequently in the Supreme Court in cases raising important 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. His clients have included The McGraw-Hill Companies in a large number of litigations 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, *BusinessWeek, The Nation, Reader's Digest,* Hearst, AIG, and others in trials, appeals and investigations.

He has appeared frequently on television, on Nightline, on News Hour with Jim Lehrer, Charlie Rose, and other programs and has published articles and reviews in *The New York Times, The Washington Post, The Yale Law Review, The Harvard Law Review,* and elsewhere.

Thank you for being with us today, Floyd.

Floyd Abrams: Thank you.

President Barbara Van Allen: The format today will be a conversation, and we are very fortunate to have Peter Coy doing the honors for us. Peter is an economics writer for *The New York Time's* Opinion Section. Thank you, Peter, for joining us.

Peter Coy: Well, thank you, Barbara. People who know me may think that Barbara just made a mistake by saying I work for *The New York Times*, but I have a new job as of today. I spent almost 32 years with *BusinessWeek* under McGraw-Hill and then *Bloomberg Businessweek* under Bloomberg L.P. And today is my new job with *The New York Times* Opinion section covering economics. So this is...wish me luck...but this is, there is an economic aspect of course to what Floyd Abrams does because, of course, information is crucial, the free flow of information is crucial to a successful market economy and that means all kinds of information, including news.

It so happens that I've worked, I'm now working for *The New York Times,* which Floyd Abrams has represented in several important cases, including one we'll be talking about, which, of course, is the Pentagon Papers case, which was decided 50 years and one month ago. And, of course, I worked for *BusinessWeek* when Floyd Abrams was counsel for them as well. So, Floyd, thank you very much for joining us today.

Conversation with Floyd Abrams

PETER COY: I want to start out with a case that you were not involved in, but I want to start, going in chronological order back to 1964, which was *New York Times* v. Sullivan, a crucial case that established the standard for actual malice for First Amendment cases, and that standard is now under threat. Two justices of the Supreme Court,

Clarence Thomas and Neil Gorsuch have called for a review of that case, whether it should be overturned by the High Court. Can you talk about the importance of that 1964 decision and how you feel about the idea that it might be overturned?

FLOYD ABRAMS: That decision was really one of the most important First Amendment-rooted decisions in our history. It arose at the time when *The New York Times* and other, call them national publications, were really at risk of not being able to cover the civil rights revolution in the south because they were sued and sued again in front of southern White angry jurors who imposed very high judgments against them and I mean really the national press at that time.

And so when the case came up and it happened to be about an advertisement in the *Times* about the jailing of Martin Luther King and his treatment in prison and the *Times* was sued because of the ad by the sheriff of Birmingham, in Alabama. And there was a large judgment against the *Times*. And the question, when it got to the Supreme Court was, well, what sort of rules do we need to protect First Amendment rights at a time like this, in a country like ours?

And the court really shifted gears. When I was in law school, libel was a separate area of law, no First Amendment side to it. There were rules about what was libelous and what not. *The New York Times* against Sullivan, the court – in a sense – took a deep

breath and said, look, in order to assure that there can be free writing about controversial issues, controversial people and the like, we need more than just to say is it true or is it false, in part because we really just can't trust juries, at least then, to make those decisions. And what the court said was if the press publishes things in good faith, if they publish the articles about people in power, believing what they were saying was true, and without a high degree of awareness of probable falsity, that that's protected speech.

That was 1964. That has been the law since then. It's been expanded beyond public officials, like the sheriff in Birmingham, to prominent public people. And it has become, more recently, under the gun of some of the more conservative jurists who, Justice Thomas' view was that it was wrong from the start. That was not what the first amendment means or says. It doesn't say anything about libel as such one way or the other. And Justice Gorsuch wrote an opinion just a few weeks ago joining Justice Thomas in saying that the opinion should be reconsidered in light of a variety of new factors, the enormity of Facebook, social media and the like, the impact on American society. And some jurists...often the Supreme Court have said that because the largest media entities tend to be more liberal, that the public isn't getting a fair depiction of the news and therefore we ought to go back to the law as it was pre-*New York Times* against Sullivan.

A final thought, this is a case which has been cited around the world as the quintessential American and uniquely American First Amendment decision. There's no doubt that one of its results is that books are published here, which simply cannot be safely published elsewhere. The Cambridge University Press a few years ago commissioned a biography of Putin, and when they finally got it, they said, we're sorry, we can't publish it. We believe. We can't publish it in England because he could sue us here and we don't have enough basis to be sure we would win.

The book was published here and, of course, there was no lawsuits. So we have fewer litigation now because of that. Indeed, that's one of the things Justice Gorsuch mentioned in his opinion. He was saying there are so few libel cases now that that is a reason, or at least a cause, for suspicion that the court had gone too far in protecting the press or writers or publishers.

PETER COY: Okay, you know, obviously I tend to be sympathetic of this point of view as a journalist, but I feel an obligation to push back a little bit on this and question the decision and your advocacy of it. One of the things you sometimes hear is that too many people are wrapped in under the category of public figures, people who really are not truly public in any kind of way, and that there's almost like a presumption that if you raise your head in any way to participate in the democratic process, that you're then exposed to the full gale force winds of, you know, of investigative journalism in whatever

kind of headlines.

So I want to ask you that and then the second part is whether, as some people say, and this was said by Laurence Silberman of the D.C. Circuit Court of Appeals, that it kind of seems to enable journalists to feel that they have sort of cloak of invincibility and maybe encourages bad behavior because they feel they can get away with anything knowing that the Supreme Court decision is behind them. How do you feel about those two thoughts?

FLOYD ABRAMS: Well, first, on the subject of who is a public figure, I'm not unsympathetic to the notion that maybe the court has gone pretty far down the line in treating anyone who is really, really publicly known as a public figure in the same way as a public official who, for better or worse, is doing the public's business. I'm not so sure that, you know, every Hollywood star or professional football player, when that person says something or something is said about them, that we really have to wheel in the First Amendment as a level of protection. I mean there are arguments about that, but from my perspective, that is a closer call.

That said, I really don't agree with Judge Silberman in an opinion of his, also quite recent, which I thought was an intentionally political opinion. I mean he really is upset at what he views as the too liberal or too left or too pro-democratic views of the press,

which – it seems to me - ought to be off-limits as a basis for making or changing law. Because I don't think, and this is something I think I know something about, I don't think that the large American publications feel so immune and are so morally corrupt that they purposely publish things they don't think are true or purposely don't engage in serious efforts to determine what is truth or falsity.

The real question about *The New York Times* vs. Sullivan, I think, is suppose they do engage in serious efforts, supports they do believe what they publish, in England, in Canada, that would not be a basis for protecting the speech. We do protect the speech, and we protect it on a policy level at least because we think it's so important that that sort of speech, speech about public policy, a biography of Putin for example, that it's really important that we lean in the direction of more freedom rather than less and fewer lawsuits rather than more.

PETER COY: Yes. So with two justices already having weighed in with a view that *New York Times* vs. Sullivan should be reviewed, is there a chance that that might actually happen considering the makeup of the court today?

FLOYD ABRAMS: I don't think so. I think Justice Alito might be inclined to join the two based on some things he has said occasionally and his opinions. I don't think that Chief Justice, Justice Roberts, is at all inclined to do that. I mean he has rather proudly

described himself as the single most First Amendment-oriented member of the court. And I think he's also really disinclined to reverse the most important First Amendment case perhaps in our history, I would say the most important majority opinion. We have a lot of great dissents from Justice Brandeis and Holmes. But majority opinion, I think the most important one is *New York Times* v. Sullivan. So I don't see him, I don't see Justice Cavanaugh, who wrote a number of very – what should I say – vibrant opinions when he was on the Court of Appeals protecting speech. I just don't think he'd be there. So, you know, with the court as it is, I think the opinion is probably safe, but you never know.

PETER COY: I know that Amy Coney Barrett clerked for Silberman so some people have said she might be a vote for...

FLOYD ABRAMS: Yes, yes, look, you never know. Justice Kagan 30 years ago, who wrote an article – she wasn't on the bench then – she wrote an article raising the very first question you raised to me, do we really need all this protection for public figures, especially with a very broad definition of who a public figure is? So you never know, but I really don't think that they're close to taking on this truly landmark decision, which again defines us around the world.

PETER COY: Yes. Great. I meant to mention when I started that we do have a chat

function within this Zoom, and we welcome your questions. They'll appear to me and Mr. Abrams, and I'll pick out some and ask them, so go ahead and fire. I understand from Barbara Van Allen that there are a bunch of attorneys on this Zoom conference who know a lot about this stuff and can probably answer, ask much more sophisticated questions than I can. So please, please weigh in.

I want to jump ahead seven years to *The New York Times* vs. United States, the famous Pentagon Papers case for which you were co-counsel. That was another big victory for the press. That was not an actual malice case. It was a prior restraint case. And can you talk about, maybe talk a little bit about the human side of things, Daniel Ellsberg, the environment around the Vietnam War at the time. One thing I, in reading up on this, hadn't really remembered that there was this close connection between the Pentagon Papers case and the Watergate break-in. These two seminal events were actually closely connected. So I just want to hear from somebody who was there what it was all about, what it was like.

FLOYD ABRAMS: Well, all this started in 1968. Secretary of Defense Robert McNamara looking around and like everyone else couldn't think of a way out of the war in Vietnam, which was raging and raging and endless, so it seemed. No way to win unless we were to do things that we were never prepared to do. We're not going to drop an atomic bomb in Vietnam or something like that. A lot of American soldiers getting

killed every day.

McNamara asked the Department of Defense to write up for him a sort of, what are we doing there? How did we get into Vietnam? Write a history for me of how we got into Vietnam and who said what to whom. And so they wrote a historical study, starting with World War II and the French and Indochina, and did we start to help them a little bit back as far as that, and going up until 1968 when the study was completed.

It was based entirely on Defense Department documents, many of them classified at the highest level, top secret. As a result, when the report was finished, given the way the classification system works, every page had on it stamped Top Secret, Sensitive. There were 17 volumes and more, 7,000 pages of which 3,000 were text. And every text page had Top Secret stamped on it.

Daniel Ellsberg had been a marine in Vietnam, an intellectual, who had been in favor of the war and came to view it as not just a mistake but a war crime. He had been involved, he was involved in drafting a section or two of the Pentagon Papers. And his view was that it would help end the war if the papers were known because most of all, the most sort of incriminating or dangerous from the perspective of the government point of view was that it showed that American presidents had not been upfront, had lied in many cases to the public about why we were in Vietnam and how well things were

going when they weren't going well and even when the presidents knew they weren't going well, etc.

Those 4,000 pages also included one section called, the Negotiating Volumes, dealing with efforts to end the war by the use of our allies and Australia, Canada and elsewhere to help get us out of it or to end the war. Ellsberg tried to interest CBS and other publications in it. They said no. And then after a long process that I won't go into, *The New York Times* obtained a copy, which they literally copied page by page. Remember that there were no computers to speak of in those days. There were mimeograph machines and the like. So the *Times* got a copy. It did not get a copy of the Negotiating Volumes because Ellsberg thought that might be harmful to ending the war if that was published. But they got just about everything else.

And they spent three months in the most secret circumstances, rented rooms in the Hilton Hotel where they did all their work so that if the government came into *The Times*, it wouldn't be there. Didn't tell other people what they were working on. Interviewed former CIA, Department of Defense, etc., people to make sure what they would publish wouldn't be harmful and began to publish on June 13, 1971, a Sunday *New York Times*, an article, which they indicated there would be more of, about the case.

Their lawyers, outside counsel, had told them not to publish, had told the-then new publisher of the *Times*, Arthur Ochs Sulzberger, that he would go to jail. They would lose their television licenses, etc. etc. Great internal conflict within the *Times.* The decision was made to publish. The *Times* called its lawyers, who at that point refused to represent them. That's how, in my good fortune, in the middle of the night, after the attorney general had sent a telegram to the *Times* telling them the government would go to court unless they stopped publishing. And the *Times* answered that they would not stop.

By pure chance, pure chance, that very day that the telegram arrived, it was the next day, June 12th, I hosted a lunch for media counsel, who together had retained a professor of mine from Yale Law School, Alexander Bickel, to write for us a brief about confidential sources of journalists, which was before the Supreme Court. So that was the second day of publication. Everyone wanted to talk about that, not what Bickel came to talk about. And he, and I to a lesser extent, he was the star of the show, but both of us were heard to say the government will never go to court. This doesn't hurt the Nixon administration. It makes Johnson look bad, but not Nixon. And so they won't go to court, we said, with all the assurance – I've often thought – of lawyers without clients. So we just let them know that.

And, of course, we were wrong. And that night, the *Times* said no to the government.

The government said we're suing the next day. The *Times* called its outside counsel who refused to represent them after 60 years of representing them. And so, as one author later put it, they were like a vicar found in a house of ill-repute at midnight with no lawyer. And they asked Professor Bickel to lead the team that would represent the *Times* in the case and that I, and my firm, Cahill, Gordon, would back him up and I would do whatever Bickel wanted me to do on it. He was chief counsel.

So that's how it all began. The whole case from beginning to end took 15 days, from the time the government sued until the time the Supreme Court decided, with briefing and argument in the Lower Court before a judge who had been sworn in one day earlier. Murray Gurfein had never had a case. His first case was the Pentagon Papers. An appeal to the Second Circuit, an appeal to the Supreme Court, Judge Gurfein had entered an order barring the *Times* from publishing. That's when *The Washington Post* obtained its copies of the papers from Ellsberg.

And so the cases went up together to the Supreme Court. And by a 6 to 3 vote, the Supreme Court said the near ban on prior restraint, court orders barring in advance what the press could print, was so great that except in the most extraordinary case, the government would not be able to meet its burden of showing that it needed the prior restraint that badly. And six judges signed on to that, three dissented.

I would say the critical moment in the case was when Bickel was asked by Justice Stewart, suppose when we read the Pentagon Papers, we decide that 100 young American men will die as a result of publication, men who had the bad luck to have high draft numbers in those days? And Bickel tried for a moment not to answer, the way good lawyers try not to answer terribly hard questions. And when pressed, he finally said that, well, if that was what you found – and you won't – but if that's what you found, then, he said, my humanitarian views would overcome my more abstract devotion to the First Amendment and then you could have a prior restraint. So that's what the case decided. No prior restraint even during war and even when the government was saying that publication would irreparably harm the country. The court said you've got to prove it to us that that is so because of the First Amendment, and this document just doesn't meet that sort of level of proof.

PETER COY: Right. I wish we could on talking about this for hours, but I'm just going to restrict myself to just one question about that. Compare the Pentagon Papers case to the Panama Papers case where it was leaked by a non-journalistic organization but later picked up by journalistic organizations, including the *Times.* How do you feel about a case like that and others that are presumably to come along those lines?

FLOYD ABRAMS: Well, look, the heavy burden in prior restraint cases, I think it's not as heavy in cases where it's a private party, not the government, but this is the government

because they're going to a court. You know when the government goes to court and wants the imprimatur of the United States to say you can't print that, the burden is and ought to be, in my view, very, very high indeed. And so, yes, there are situations in which either from a national security point of view or a personal privacy point of view or the like, you know something is published which does a lot more harm than any possible good it could do, that's the danger of leaning so far in the direction of protecting free press and freedom of speech in America. That's also what distinguishes us from really every other country in the world.

When the case was over, I happened to be in England and the English press was stunned. I mean the near ban on prior restraint started there. I mean in a lot of areas like *The New York Times* against Sullivan, we get much more protection. But it was in England that they initially said, you know, restraints on speech in advance are all but barred. But we applied that, and to this day apply that with much more rigor and we protect speech much more than anyone else does, even in national security cases.

PETER COY: Now, I think we have time for only one more topic, and we've covered '64 and '71. I'm going to jump ahead to the present day, and I'm going to read a question from one of the people on the call, Chad Pollock, and then I will boil it down to social media as a topic.

Given the prevalence of social online media and everyone's ability to freely share opinions online globally, publicly and within private isolated ecosystems, what are your thoughts on the moral role of media companies, traditional and emerging online outfits, algorithms? Moderation Regulation 1A writes continued propagation of online access across the globe into younger generations, e.g. Twitter shutting down accounts due to violation of music terms, for all of their platforms, encourage and enable diametrically opposing terms and conditions. And that's a complicated question.

I would just boil it down to you're a First Amendment lawyer, but a lot of the cases that deal with speech now aren't First Amendment cases because they involve actions by private players like Twitter, Facebook and so on where the First Amendment doesn't apply the same way. Is that part of a law that's still in turmoil? How is that settling out?

FLOYD ABRAMS: The distinction between public and private speech has always mattered and still matters, which is to say Facebook has First Amendment rights. It doesn't have a right to have two billion subscribers. It could be broken up under antitrust laws and limited in one way or another. But it is Facebook and its competitors that, as a First Amendment matter, yes, they have the right to say to a president, as they did, we won't carry what you write.

Twitter banned the president for life, President Trump. Facebook banned him

indefinitely. Facebook now has an internal sort of Supreme Court, which required them to say more and justify what they did more. But as a First Amendment matter, the law as it applies to Facebook is not unlike what it applies to *The New York Times.* Facebook can make the choice.

Now, that said, the question, I think, correctly and perceptively included the moral decision. And, in fact, how should the Facebooks of the world behave, without trying to make this sound simple because it's not at all simple? My own reaction is that when Facebook engages in what is called content moderation, the notion of that is, to me, entirely appropriate. *The New York Times* does that too. Facebook doesn't publish, they say they try not to publish certain racist speech and the like. They have standards, which are in some respect analogous to those that the press has.

The hard questions, and I think that are really difficult, comes up is where at one and the same time there is speech which Facebook decides or Dr. Fauci and other people, and now the president of the United States urge them, you know, not to carry articulations which are against vaccinations. So, I mean I think the direction that Facebook at least has gone in or has tried to go in is to distinguish between false statements or misleading statements of fact like the inoculations will kill you or it's more dangerous to have an inoculation than it is not to, and opinion, which are leave us alone, you know, we're Americans. You can't shoot things in our arms, and they're

misleading you, and they're misleading you for political reasons. I mean the more political the speech is, the more the Facebooks should try hardest not to get involved in a level of corporate censorship.

PETER COY: By the way, not because they're not allowed to, but because you just don't think, right, it's more of a moral issue?

FLOYD ABRAMS: In light of their power now, I mean there's no more source of information in the world today than Facebook. And if Facebook engaged, and in my view they have not, but some people would argue that it has, if Facebook engaged in a sort of partisan, even strong leaning in a partisan direction this way or that way, that would be very troubling precisely because so many viewers don't think of Facebook as a political entity, but a truth teller. There's a picture, someone's there, someone's telling me something. It must be so, they wouldn't allow, you know.

So I mean these are very difficult, this is a very difficult area. I mean when, and there's no area more difficult than public health. So when the topic is a life and death topic, at one and the same time the Facebooks of the world have to try to allow the most extravagant political criticism of the government or the like at the same time in my view. They ought not to carry things which are false and not just false but terribly damaging to public safety. And that line is not easy to draw and it never will be.

PETER COY: Sure. There is never, there never will be a bright line is what you're saying.

FLOYD ABRAMS: No.

PETER COY: So just the last couple of minutes here, just tell me on a personal level what your life is like these days. You're a senior counsel at the firm that you've been at for many, many years. Are you still working full-time?

FLOYD ABRAMS: I'm doing less, actually quite a bit less litigation. I am spending a lot of time representing the entity that is involved in artificial intelligence of people's faces. But I've been teaching at the Yale and Columbia law schools this last year. I've been writing and now and then I get asked to do something like this.

PETER COY: That's great. Well, it's a rewarding way to enter the final stage of a long and storied career.

FLOYD ABRAMS: Well, thank you, and welcome to *The New York Times.*

PETER COY: Oh, thank you. It looks like Barbara just popped up on the screen. Barbara, do you want to take over now?

PRESIDENT BARBARA VAN ALLEN: I think we're at a good point to wrap things up. I want to thank you both, what a great conversation. And thank you for bringing us forward and using that question from our member as well. So many thanks to you both. I really appreciate it.

Just in closing, tomorrow we're hosting Tony Malkin. Tony is the President, Chairman and CEO of Empire Trust Realty. And he will be interviewed by Gayle King, and they will be discussing the future of New York as well as the commercial real estate market in New York and around the country. And to close out our summer events, we have two really great events on August 2nd. Scott Gottlieb, the Resident Fellow at AEI, 23rd Commissioner of the FDA, will be interviewed by Becky Quick, CNBC's co-host of Squawk Box. He's going to share an update on Covid-19 and the implications of the fast-spreading Delta variant as we head into the fall. He also has a book coming out in September so I'm hoping he'll mention a little bit about that. Later that same day, we're going to host Steve Cadigan, who is the Founder of Cadigan Talent Ventures, and he'll be talking about his new book, *Workquake*, which is all about motivating and returning work forces in our new normal.

Additionally, we are pleased to say that we've started confirming a number of events for the fall. Just the first couple, Hans Vestberg, who is Chairman and CEO of Verizon, September 13th. He will speak on the future of telecommunications. And that will be

followed a couple of weeks later, September 27th, by John Williams, who is our Chairman of course of the Economic Club but also President and CEO of the Federal Reserve Bank of New York, and he will be given an outlook on the U.S. economy.

So I would also just to be sure I take a moment to recognize those of our 337 members of the Centennial Society that have joined us today as their contributions continue to be the financial backbone of support for the Club and help enable us actually to offer this programming. So thank you again and everyone please stay healthy and safe.