ORIGINAL

In the

# Supreme Court of the United States

ANTHONY HERBERT,

Petitioner,

v.

BARRY LANDO ET AL.,

Respondents.

No. 77-1105

Washington, D. C.
October 31, 1978

Pages 1 thru 61



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IN THE SUPREME COURT OF THE UNITED STATES

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| ANTHONY HERBERT, | : | |
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| Petitioner, | : | |
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| v. | : | No. 77-1105 |
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| BARRY LANDO ET AL. | : | |
| | : | |
| Respondents | : | |
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Washington, D.C.
Tuesday, October 31, 1978

The above-entitled matter came on for argument at 11:39 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM BRENNAN, Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JONATHAN W. LUBELL, ESQ., Cohn, Glickstein, Lurie, Ostrin & Lubell, 1370 Avenue of the Americas, New York, New York 10019; on behalf of the Petitioner.

FLOYD ABRAMS, ESQ., Cahill Gordon & Reindel, 80 Pine Street, New York, New York 10005; on behalf of the Respondents.

# C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 77-1105, Anthony Herbert against Barry Lando, et al.

Mr. Lubell, I think you can safely proceed now and be heard.

ORAL ARGUMENT OF JONATHAN W. LUBELL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LUBELL: Mr. Chief Justice, and may it please the Court:

This is an appeal from a decision of the Court of Appeals for the Second Circuit, reversing a discovery order of the district court and establishing an absolute privilege of non-disclosure of the editorial process.

This is a Sullivan defamation case. It arises from a CBS 60 Minutes program produced by Barry Lando and Mike Wallace.

In that program the plaintiff, Colonel Herbert, was portrayed as a liar, as one capable of committing acts of brutality in Vietnam, as an opportunist who had used the war crimes charge to cover up his own relief from command, and as a perpetrator of a hoax on the American public.

Plaintiff, after the broadcast, brought the libel action which is now before this Court.

During the course of pretrial, plaintiff sought to discover what the defendants had done and learned in the

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course of their investigation preparing for the program, and what the defendants' state of mind was on the matters which they had investigated and learned about during that investigation.

Questions were posed within that context to Mr. Lando and Mr. Wallace as to what their state of mind was as to matters actually presented on the program as well as matters not presented on the program and contradictory to matters presented on the program.

QUESTION: Counsel, you say their state of mind as to matters.

MR. LUBELL: Yes.

QUESTION: Could you be a little more precise. What issue were you directing -- would those answers have been relevant?

MR. LUBELL: The issue, the legal issue we were directed to was the issue of the subjective state of mind of the defendants, whether in fact they entertained serious doubts as to the truth of matters presented on the program.

Specifically, it arose in various contexts. For example, during the deposition of Mr. Lando we ascertained that he had interviewed -- one example -- a group of five different soldiers who had served with Colonel Herbert in Vietnam. Four of those soldiers told him certain things about Colonel Herbert's treatment in regard to the Vietnamese population.

w 5

A fifth soldier told him a contrary story. Mr. Lando presented on the program only the statements of the fifth soldier, and failed to include on the program any reference to the statements of the four other soldiers which indicated the care and concern that Colonel Herbert had shown while he served in Vietnam.

QUESTION: And the point of this is directed at what, at the presence or absence of malice?

MR. LUBELL: Yes, it is.

QUESTION: That should be our focus, should it not?

MR. LUBELL: Yes, within the absence of actual -- presence or absence of actual malice within the reckless disregard branch of that actual malice definition.

As this Court has developed that --

QUESTION: You mean there was no inquiry on the other arm of knowing falsehood?

MR. LUBELL: Knowing falsehood issues, we have asked questions of Mr. Lando regarding knowledge of certain things which were directly contrary to matters presented on the program which indicate a knowledge of the falsehood of certain matters.

In fact, Mr. Lando has answered those questions. The concrete posture of the questions which have not been answered is, all of those questions appear to regard the reckless disregard branch, although our same arguments would

apply to his state of mind on the knowledge of the falsity --

QUESTION: Yes, but are you telling us that he did answer questions directed to knowing falsity of some of the things that were shown on the program?

MR. LUBELL: He answered questions --

QUESTION: But you can illustrate, for example?

MR. LUBELL: He answered questions -- for example, on the program Mike Wallace stated that nobody that they interviewed told them that Colonel Herbert had reported any of the war crimes while in Vietnam.

He produced, during the depositions, sworn statements of a Captain Jack Donovan, which stated that Captain Donovan was present at brigade headquarters when Colonel Herbert was reporting the killings of the Vietnamese at Cu Loi on February 14th, 1969.

He produced those documents. We asked him questions about those documents. We did not specifically ask the question, did he know that what was stated on the program was false.

So that question is not before the Court as such.

In terms of questions that he did answer during the depositions, Mr. Lando as well as Mr. Wallace did answer a number of questions involving their state of mind.

In addition, I should point out to the Court that --

QUESTION: Excuse me. Can you illustrate just that? Do you have one? I don't want to take all your time, but --

MR. LUBELL: Yes, yes.

For example, as to the question -- as to the questions of whether there was a conflict in the -- in what he had obtained from interviews between a colonel and a major who were in Hawaii early in February --

QUESTION: Are you speaking now of Mr. Lando?

MR. LUBELL: Yes, Mr. Lando -- in terms of whether he had interviewed a Colonel Nicholson and a major who had been in -- a Major Crouch -- who had been in Hawaii. And one of the questions that was involved is, when did Franklin return from Hawaii to Vietnam.

Questions were asked in his interviews of these two people without -- when Mrs. Franklin had left Hawaii. I asked Mr. Lando whether he thought there was a conflict or contradiction between the information he got from these two interviewees.

He said that he thought that their statements regarding Mrs. Franklin's leaving Hawaii were contradictory.

So he did give us certain answers regarding his state of mind.

There is no consistency as to which answers he did give regarding his state of mind and which he did not. Perhaps the only consistency is that as the deposition proceeded, Mr. Lando's counsel and counsel for CBS decided to take a firm position that they would answer no questions

regarding his state of mind.

QUESTION: Mr. Lubell, could you give us perhaps the most persuasive example you can think of of a question that you asked and that he refused to answer?

One of the things I have trouble with in this case is, it's awfully general.

MR. LUBELL: Yes, yes. The question, for example -- the example that I posed before. He had interviewed a number of soldiers who had given him detailed information as to Colonel Herbert's treatment of the Vietnamese. He puts none of that information on the program. He does not refer to the fact that there was information that Colonel Herbert had shown particular care that war crimes not be committed in Vietnam.

We asked him questions as to the basis on which he did not include any reference to those interviews in his program, and nevertheless included a quote from General Barnes to Colonel Herbert --

QUESTION: Specifically, you question then -- is this a fair paraphrase? -- why did you not include any reference to such and such an interview? And he refused to answer any such questions?

MR. LUBELL: Yes. Actually, we didn't say -- we said, what was the basis for not including any excerpts from those interviews?

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QUESTION: And that question he refused to answer?

MR. LUBELL: Yes.

In addition, we asked him for his opinions of the credibility and veracity of persons whose statements he did include on the program. We think that was directly relevant to whether he entertained serious doubts as to matters included on the program.

QUESTION: Those he also refused to answer?

MR. LUBELL: Those he refused to answer too, your Honor.

Now, when the defendants Lando and Wallace refused to answer questions in these areas of state of mind, plaintiff made a Rule 37 motion, which was brought before Judge Haight, the district court judge.

Judge Haight considered the Sullivan principles, and specifically considered the burden of proof of clear and convincing evidence, which applies in the Sullivan case; considered the subjective nature of the state of mind that must be proven; found that the questions which he had -- which Lando in particular and Wallace to some extent, because there were very few questions open around Mike Wallace that the questions that they had refused to answer were directly relevant to the subjective state of mind issue; that the issue of the subjective state of mind was a core issue in the case; and that the information as to the defendants' state

w 10 of mind could only be obtained from the defendants by the very nature of the subject matter.

QUESTION: Incidentally, Mr. Lubell, at that stage was there any controversy whether some of the matters shown on the "60 Minutes" program was or was not false?

MR. LUBELL: The defendants take the position that the matters presented --

QUESTION: No, I'm speaking at that stage of the --

MR. LUBELL: At that stage, no -- the issue -- at that stage before the district court judge the issue was whether the questions were privileged in terms of press' --

QUESTION: But the issue of falsity --

MR. LUBELL: Falsity --

QUESTION: -- is very much in the case, too, isn't it?

MR. LUBELL: The issue of falsity is in the case. It's very much in the case, your Honor.

QUESTION: It still is?

MR. LUBELL: Yes, I believe it is. I don't think the defendants have conceded that the statements made on the program were false.

QUESTION: And was there ever any suggestion that the issue of falsity should be determined before you got into the question of malice?

Because unless something was false, I gather you wouldn't have a case, would you?

w 11

MR. LUBELL: Right. There was no suggestion.

As a matter of fact the discovery process has proceeded in uncovering, trying to uncover, both issues simultaneously. And I'm sure your Honors appreciate, both issues are intertwined. Because as we learned the facts, we also learn what it was that CBS ascertained.

So we also learn what CBS -- we also learn some evidence of CBS' state of mind as we learn the facts in order to prove that the program contained serious falsehoods.

QUESTION: But on the issue of so-called editorial privilege, or whatever you're going to call it -- privilege -- I take it that wouldn't even be in the case unless there was first a finding of falsity of something about this program, would there?

MR. LUBELL: I'm not sure whether that is so, because what the circuit court did is take this entire range of media activity, which they call the editorial process, and immunized it from discovery by a plaintiff.

Now, it is possible that in our search for the facts --

QUESTION: Well, immunized it in the sense that it was privileged in some way.

MR. LUBELL: In the sense of privilege, we could not obtain what happened during that editorial process.

And I suggest that it is possible that during that editorial process certain things may have arisen which

12 relate to the question of truth and falsity as well.

QUESTION: Mr. Lubell, in an ordinary lawsuit in the discovery stage of the case, you have to do your discovery for all of the issues that you think will be necessary to prove at trial before you ever get to trial, don't you?

MR. LUBELL: Yes. Yes, your Honor. And that is the way we proceeded in this lawsuit that we have asked questions of Lando and Wallace and the other persons we've deposed directed to the issues of truth and falsity, to the issue of actual malice; both issues.

And I don't -- I might suggest I don't see in this type of case how it is --

QUESTION: How you can avoid it.

MR. LUBELL: -- as a practical matter ever able to be distinguished.

The court of appeals reversed Judge Haight's --

QUESTION: Forgive me; I shouldn't have taken so much of your time.

But I gather you have allegations -- I take it, do you not, on which you rely? -- of falsity.

MR. LUBELL: Oh, yes. Oh, yes.

QUESTION: Now, are they very -- about many, many matters --

MR. LUBELL: Yes, they are.

QUESTION: -- or only a few, or what?

13 MR. LUBELL: We maintain that the program as a whole as well as many specific matters presented in the program are false. And as I indicated in my opening comments that the falsity concerned whether Herbert was a liar; as to the cover up of war crimes in the 173rd Airborne Brigade; whether Herbert himself was capable of committing acts of brutality against the Vietnamese; whether Herbert had used the war crimes issue as an excuse for his own relief from command; and whether Herbert had perpetrated a hoax on the American people.

QUESTION: All of which -- as you say, falsehood.

MR. LUBELL: All of which --

QUESTION: Are depicted in the "60 Minutes" program?

MR. LUBELL: Yes, yes, we say they are; yes, your Honor.

I wanted to return for a moment to the question of the defendants discussing or disclosing parts of their state of mind.

There is another fact in this case which makes it unique in another way, and that is, after the program Barry Lando wrote an article for Atlantic Monthly. It is the other cause of action in this case, which is not before this court.

However, the article itself is a full discussion of what was the purported editorial process in producing the program.

14 Not only that, but the article time and time again speaks of Mr. Lando's state of mind on matters that he was looking at while he was preparing the program.

So we have a situation where the press has publicly gotten a shot at saying what its state of mind was, and now would prevent a plaintiff from examining the press in a lawsuit in which a district court judge can regulate whether there's any abuse of discovery; from examining the press as to that state of mind which is critical in a Sullivan defamation action.

QUESTION: Are you suggesting that the responses were forthcoming as to the state of mind when it helped the defendants' case, but not when conceivably it might harm the defendants' case?

MR. LUBELL: Yes, we are suggesting that.

QUESTION: That wouldn't be the first time in a deposition that that sort of thing had happened, would it?

MR. LUBELL: I don't believe so.

Now, the heart of our argument before this Court is that the Court of Appeals, by creating this editorial process privilege, has upset the balance struck by this Court in Sullivan and its progeny. Because what -- and succinctly what -- the Court of Appeals has done is deprive the plaintiff of the opportunity of ascertaining direct evidence of this subjective state of mind where the plaintiff has to satisfy

a clear and convincing burden of proof.

In substance, what the Second Circuit has done is by a rule which creates that privilege eliminated substantially all plaintiff's possibilities of recovery under the Sullivan principles.

And we submit that it was not the purpose of this Court in Sullivan and its progeny to preclude public officials or public figures from recovering for defamatory statements when those statements were maliciously made.

The Court of Appeals relies in part on this Court's decision in Branzburg as well the line of cases concerning confidential source disclosure.

We submit to the court that the decision of the Court of Appeals is in error when it relies on Branzburg and the confidential sources disclosure cases.

The decision of this Court in Branzburg has provoked a great deal of discussion both in lower courts and in learned journals. But there is one thing that is undisputed: Branzburg did not create an absolute privilege.

The decision of the Court of Appeals, on the other hand, creates an absolute privilege.

In addition, the plurality --

QUESTION: Mr. Lubell, what is the line that the Court of Appeals -- not the line that you draw, but where do you see the line?

w 16

MR. LUBELL: That the Court of Appeals drew?

QUESTION: Yes. You're conducting your questioning -- where did they say you went off?

MR. LUBELL: I think under the Court of Appeals decision, I think they would say any inquiry into what the media or the press did after obtaining the interview, from that time until the time that the finished product is broadcast, we could not inquire into.

We could not find out whether in fact during that time, for example --

QUESTION: Well, you see it as time and not subject matter?

MR. LUBELL: Well, we see it as both a period of -- I think there are two aspects of the Court of Appeals decision and it is difficult to ascertain which one is the more powerful aspect.

We submit both are powerful in terms of upsetting Sullivan completely.

But one is, you cannot inquire into the subjective state of mind which --

QUESTION: Well, Mr. Lubell, would you think that any question that started out, did you know, would be barred by this ruling?

MR. LUBELL: Yes.

QUESTION: Did you know a particular fact?

MR. LUBELL: Yes, we believe that that would pertain to the state of mind of the reporter.

QUESTION: So you couldn't inquire whether a particular fact was true or not?

MR. LUBELL: We could inquire as to who he interviewed. We could not inquire as to whether he knew --

QUESTION: You could find out what he was told?

MR. LUBELL: What he was told. But we could not inquire, for example, as to whether he knew that the person he was interviewing had --

QUESTION: But you could ask --

MR. LUBELL: I'm sorry.

QUESTION: Couldn't you ask, did you ever learn that so-and-so?

MR. LUBELL: I believe that when Chief Judge Kaufman talks about any intrusion into the mental process of the press, I believe that he speaks of --

QUESTION: I didn't -- you really read it to mean that you cannot inquire of the reporter the state of his knowledge about whether he knew certain facts or not?

MR. LUBELL: We can inquire as to -- I believe we can inquire as to what he did, but I do not believe we can --

QUESTION: You interviewed John Jones? I did. What did he tell you? He told me so-and-so. Didn't you know

that John Jones had said not that but this to somebody else?

Couldn't you ask that question?

MR. LUBELL: It is my opinion that Chief Judge Kaufman's opinion is not clear as to whether that question is permissible when he states that any intrusion into the mental process of the reporter is precluded.

QUESTION: You mean you couldn't say, were you ever told by anybody else to the contrary?

MR. LUBELL: That you could ask, I believe, your Honor.

QUESTION: Well, couldn't you go on and say did you ever learn from any other source to the contrary?

MR. LUBELL: I think your Honor you get closer to an inquiry regarding the state of mind -- I must say that I believe Chief Judge Kaufman's decision as it stands now creates several different interpretations on that issue.

CHIEF JUSTICE BURGER: Mr. Lubell, let me interrupt you.

You can reflect on that during lunch hour and resume there at 1:00 o'clock.

MR. LUBELL: Thank you.

W 19

AFTERNOON SESSION

[1:01 p.m.]

CHIEF JUSTICE BURGER: Mr. Lubell, you may continue.

MR. LUBELL: Thank you, your Honor.

ORAL ARGUMENT OF JONATHAN W. LUBELL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LUBELL: In answer to the open question, so to speak: It's difficult to give a precise answer as to what the court of appeals decision means in connection with whether questions of whether the defendants knew of certain things would be permitted.

QUESTION: Well, you don't have any court opinion anyway, do you.

QUESTION: No.

MR. LUBELL: I'm sorry?

QUESTION: There's no court opinion from the court of appeals.

QUESTION: No majority.

MR. LUBELL: No, no majority opinion. There's an opinion by Chief Judge Kaufman who seems to indicate that perhaps you can ask questions --

QUESTION: Now, which opinion are you talking about in what you're about to say? Judge Kaufman's or Judge Oakes?

MR. LUBELL: Well, I think the Chief Judge's opinion at page 22a of the Appendix describes what plaintiff has

already done in the course of discovery, and states that he has already discovered what Lando knew, saw, said and wrote during his investigation.

Then subsequently he states, now, Herbert wishes to probe further and inquire into Lando's thoughts, opinions and conclusions.

QUESTION: Well, doesn't that imply that you can ask anything -- ask him whether he knew something?

MR. LUBELL: Yes, it does. Yes, it does.

However, when you get into the question of the editorial process issue, and look not only to the Chief Judge's opinion but the concurring opinion of Judge Oakes, where he states at 42a, it is quite another -- I'm sorry, it starts off: Thus it is one thing to tell the press that its end product is subject to the actual malice standard, and that a plaintiff is entitled to prove actual malice; it is quite another to say that the editorial process, which produced the end product in question, is itself discoverable.

Now, if during the editorial process --

QUESTION: Yes, but if either -- if there are only two people supporting the judgment of the court of appeals, and either one of them says that something is discoverable, it's discoverable under that judgment.

MR. LUBELL: However, if it's discoverable in a time period that might be described as the editorial process

w 21 time period, which both of the opinions say cannot be inquired into -- for example, if we were to ask whether during the --

QUESTION: Well, you can ask -- I would think it would be a fair implication from what you read a moment ago that you could say when you went into this process, did you know it, and when you came out of the process did you know it?

MR. LUBELL: What -- I don't -- I think we possibly could ask that.

However, what we could not ask is what it is he knew or came to know during that process. For example --

QUESTION: Well, I know, but if he came out of it knowing it, he learned it somewhere.

MR. LUBELL: The problem is we wouldn't know what it is he came out with knowing.

QUESTION: Well, you would ask him a particular question. Did you know so-and-so? Or did you not know so-and-so?

MR. LUBELL: We would have to ask him every -- knowing every issue under every aspect of the case. We would not be able to --

QUESTION: Well, how else do you prove a lawsuit?

MR. LUBELL: But we would not be able to find out what -- how it is that he came to know something. For example, what if during the process Mike Wallace said to Barry Lando, or somebody else from CBS said to Barry Lando, I ran into this

w 22 person who was involved in your program who you've interviewed and he tells me something which is contrary to what he told you.

This is during the editorial process; conversation within CBS.

QUESTION: Then you think the -- you think that under this judgment you could not ask, were you ever told something to the contrary?

MR. LUBELL: I think it's possible that the defendants could raise the question that if it was told to the defendant during the editorial process --

QUESTION: By somebody on the -- within the editorial process.

MR. LUBELL: In the course of the editorial process, yes, your Honor. I think.

QUESTION: But if it were told by some outsider, you could inquire into that.

MR. LUBELL: It may well -- I can't -- I would argue obviously if it came up in the district court, I would argue that you could.

QUESTION: Oh, sureyou could.

MR. LUBELL: But I don't -- I cannot say with confidence that that answer is supported by these two decisions which form the majority --

QUESTION: Well, assuming now, Mr. Lubell, that the

23 question suggested by Justice White had been answered, and that he has had two statements made to him which are not consistent.

Under this opinion, or these collective opinions, do you think can then ask, why did you publish this and why did you omit that?

MR. LUBELL: No, I do not think, and I will be quite clear on this, I don't think we could ask that. What we cannot ask is what did he think about what he learned, or what he knew.

For example -- and this is a concrete example from this case --

QUESTION: You can't ask whether he thought it was true or false?

MR. LUBELL: That's right. That's right. I do not think we can ask that question.

For example, he interviewed --

QUESTION: And you can't ask whether he thought some witness was truthful or not, or whether he was telling a falsehood or not?

MR. LUBELL: We can't -- that's right. And also we can't ask whether --

QUESTION: In other words, you can't say, did you believe him?

MR. LUBELL: Or did you think you had to check it

further.

For example, he interviewed a witness -- a soldier by the name of Bob Stemmies. Defendant produced notes which say, have to check with Stemmies further.

QUESTION: Incidentally, you had no problem about sources here, did you, in this case?

MR. LUBELL: No, in fact there was a question of sources which was then waived by CBS. There is no source problem in this case.

I would like to say -- I see that the white light is on. I want to reserve a little time for rebuttal.

But I did want to just focus on the Branzburg analysis by the plurality of this Court, plus Justice Powell's concurrence in Branzburg as it was further elucidated by the Justice in footnote 3 in Gertz that the proper approach to questions of discovery where the First Amendment is implicated is a case-by-case approach where questions of specificity, relevance and materiality, importance to the core issues of the case, are explored by the district judge.

And District Judge Haight in this case did explore thos issues and did attempt to -- and came to conclusions giving due care and consideration for the First Amendment values.

What he did not do -- and apparently what the court -- what the respondents complain of -- he did not establish

:w 25 a privilege by which the defendant can refuse to answer questions involving their subjective state of mind, the very issue in a Sullivan case.

I will reserve the rest of my time.

Thank you.

CHIEF JUSTICE BURGER: Mr. Abrams.

ORAL ARGUMENT OF FLOYD ABRAMS, ESQ., ON BEHALF OF RESPONDENTS

MR. ABRAMS: Mr. Chief Justice and may it please the Court:

I would like to start, if I may, by outlining briefly what we considered at the time, and still consider, the vice of the district court opinion, and then proceed to the opinion of the court of appeals and some of the questions which members of this Court have addressed with Mr. Lubell.

The crux of the district court opinion, Mr. Lubell to the contrary, was not that the questions asked went to the core of the case, and it was not that the questions asked provided information which could only be obtained from the journalists. Those are not findings of the district court, and indeed, as I read the district court opinion, they are inconsistent with the findings of the district court.

The district court concluded as a matter of law that the concept of editorial process which we urged upon

w 26 him stemming from cases of this Court, such as the Miami Herald case, had nothing to do with the question of the scope of pre-trial discovery in the Sullivan case.

QUESTION: How does Miami Herald bear on this case?

MR. ABRAMS: Our argument, Mr. Chief Justice, is this: We think that what the court established in the Tornillo case was, at its narrowest, of course, that the right of reply statute was unconstitutional.

But broader than that, we think it established a First Amendment proposition that at least too close inquiry into the editorial process of a newspaper, or in this case a broadcaster, is itself barred, or at least presumptively barred, under the First Amendment.

If I can give you a hypothetical: If Florida had responded to this Court's ruling in the Tornillo case by passing a new statute requiring that a newspaper which did not print an answer had to disclose why it didn't print an answer.

QUESTION: Yes, but that wasn't involved in the Miami Herald --

MR. ABRAMS: Absolutely not. Your Honor, I'm not urging --

QUESTION: We're going beyond --

MR. ABRAMS: Without question we're going beyond that case, but what I am saying is that it does seem to us

us that the underlying theory of that case ought not to be limited to the right of reply statute any more than you would limit, I think, Mills v. Alabama to limitations to what occurs on election day and what can be printed by a newspaper on election day.

We think what the Court should do, what it has not yet done -- and this is the first case since Tornillo in which this is raised -- and what we think the Second Circuit concluded as well, is that the underlying -- the underlying basis of Tornillo is not alone that right of reply statutes are unconstitutional, but that the choice of materials by editors to go in newspapers or on broadcasts, the treatment of material to go in, the nature of contents, is at least presumptively protected, just as I think it would be if in the Florida case, the Florida legislature -- again, a hypothetical -- if the Florida legislature after your ruling had subpoenaed the editor of the Miami Herald and asked him the very questions, the very questions, asked of Barry Lando in this case; in effect, why did you print this and not that? What was the nature of your editorial decision-making?

I do not suggest that this is what the Court held in Tornillo. Of course it did not. But we do think that it is consistent with Tornillo, and that the kind of dedication to the notion of editorial process protection, which is embodied in Tornillo itself, outght to be embodied here as

28 well.

I think I can best illustrate it by reference to Mr. Lubell's answer to Mr. Justice Stevens earlier, in which he was asked, what's the best example that you've got, what is it that you're really losing, what kind of questions aren't being answered here.

And Mr. Lubell gave an example, which I think is a fair example, of a situation in which a particular individual was interviewed on the program, on the page reference, if the Court wishes to see it later, is at 53a of the Appendix.

And this person, who had served with Colonel Herbert in the Army, Bruce Potter by name, said on the program that he was in a helicopter with Colonel Herbert and that in the helicopter next to Colonel Herbert, Colonel Herbert had suggested by thrusting a prisoner of war toward the open door of the helicopter that he might throw him out. And that Colonel Herbert had as well thrown sandbags out to suggest to people on the ground, a prisoner on the ground, that there were people being thrown out of planes, and that therefore, they should talk.

That's what Bruce Potter said.

QUESTION: You think that's an unfair stratagem in war?

MR. ABRAMS: Your Honor, I don't think it's defamatory. It is their position that that is defamatory per se.

:w 29 I don't think that it even states a cause of action to say that Colonel Herbert is, quote, capable of brutality, unquote.

QUESTION: Well, unless the statement were false, and it was known that it was false. Then it might be, would it not?

MR. ABRAMS: I don't think it would be defamatory even then in times of war.

QUESTION: That's a question of New York law?

MR. ABRAMS: I'm sorry.

QUESTION: That's a question of New York law.

MR. ABRAMS: Yes, yes.

That's a question of New York law, and I think New York law, to some extent at least, has been constitutionalized as to what is defamatory. This Court hasn't yet ruled on the scope of First Amendment protection, if any, in terms of a definition of what is defamatory, but there is a Second Circuit ruling which so holds --

QUESTION: Would you agree, Mr. Abrams, that under New York Times v. Sullivan, malice is a state of mind?

MR. ABRAMS: Your Honor, I fully agree that in order to prevail, a plaintiff in a New York Times v. Sullivan case must either prove that -- in this case -- CBS knew what it was broadcasting was untrue, or broadcasting with reckless disregard of truth or falsity, meaning with serious doubts as to -- I don't dispute that at all.

QUESTION: The question is -- is the question, then, in the case is, how the plaintiff finds that out? Is that not so?

MR. ABRAMS: I think the plaintiff finds it out, your Honor, first of all by the kinds of materials he was given. He was -- there was an extraordinary amount of production in this case. I don't want to limit our argument today just to this case, but I think Judge Kaufman's opinion is clearly informed by what it is that the plaintiff had in this case.

And if I may say so, there's no suggestion at all in any opinion of any court in this case that there was a selective production for the purpose of making CBS look any better.

And what Judge Kaufman said --

QUESTION: I gather from that -- from what Judge Kaufman said, that he wasn't indicating that the plaintiff would be limited in finding out what information the newspaper had?

MR. ABRAMS: Exactly, Mr. Justice White.

QUESTION: Except perhaps what the individual reporter might have learned during the process.

MR. ABRAMS: Perhaps that, and even that was not --

QUESTION: But in terms of -- what information he had from outside --

MR. ABRAMS: All questions that were asked --

QUESTION: What did you learn? Or what did you know?

MR. ABRAMS: Yes. What did you learn? Or what did you know? Who did you talk to? Who did you interview?

Judge Kaufman said the form and frequency of communications with sources, including transcripts of interviews.

QUESTION: What about -- a question: What did you believe, as Mr. Justice Brennan said a moment ago, when you were told that? Or what was your reaction?

MR. ABRAMS: Well that, I think, Mr. Justice Rehnquist, gets a lot closer to what answers were not given in this case.

QUESTION: But that's a real problem for plaintiffs in cases like this, having in my own practice been a party on both sides of fraud cases and defamation cases. You don't get admissions out of defendants' mouths that they lied. You have to be -- go after them in tangential ways.

MR. ABRAMS: Your Honor, if to refer to the questions involved her, I will assert to you, at least, that they are set-up questions for our side. These are not difficult questions to ask. We may be right or wrong on the principle that we assert to you today about First Amendment protection. But these are not difficult questions to answer. These are questions where, quote, were you interested in showing a

balanced viewpoint of Colonel Herbert's treatment of the Vietnamese?

Now, no -- at least in my experience, your Honor, I don't know anybody who would have much trouble responding to that kind of question.

Now, that may or may not implicate editorial process. Editorial process may or may not be protected. We think it is, and we think that's it.

But I think it's very important -- and I've just been asked as well -- how does a plaintiff prove his case? What is the plaintiff to do? What kind of evidence can he have?

Our answer to that question is that the plaintiff is to prove his case first by all the facts, all the objective facts. What happened? Who did he interview? What did he know? And what was really happening?

If the program was wrong, if there are people on the outside who will come in and testify that it is not true that certain things occurred, and for some reason CBS knew it wasn't true, what could be more probative than that?

And that's the way you prove a securities case.

QUESTION: How do they find out? How do they find out what CBS knew except by asking them?

MR. ABRAMS: Those questions have all been answered, your Honor. There is really not dispute in this case --

QUESTION: You concede, then --

MR. ABRAMS: Yes, sir, that there is --

QUESTION: -- that when you ask the CBS representative when you said this, did you know A, B, C, D?

MR. ABRAMS: All the questions about what CBS knew have been answered. What has not been answered are questions that Judge Kaufman characterized as a small number of questions relating to his beliefs, opinions, intent and conclusions in preparing the program.

QUESTION: Well, then you would say, he shouldn't be asked, he shouldn't be required to answer, do you know he was a liar?

MR. ABRAMS: That's right, Mr. Justice White.

QUESTION: Or did you know he was telling a falsehood?

MR. ABRAMS: Let me say that if he were asked a question, and he was not, did you believe what was on the program -- there are no such questions at issue here -- we would not have objected, and I do not read the opinion --

QUESTION: Would you have objected --

MR. ABRAMS: No, sir.

QUESTION: -- to a question, at the time you had this interview with this particular source, did you believe him?

MR. ABRAMS: I think that that falls within the area of protected information, your Honor.

34 Let me say that I think one could make -- rather easily make some gradations of protection here. To the extent that one takes as one's lodestar here a notion of -- and I appreciate the fact that it is necessarily an amorphous developing concept of editorial process -- what is most important is, what was on the program and what was off the program.

And it seems to me the single most protected thing in this area are questions such as Mr. Lubell referred to earlier, which is, why didn't you put the four people on who had good things to say about Colonel Herbert?

Now that, it seems to me, goes to the absolute core of what should be protected in this area.

QUESTION: Well, why -- if you believe him, why does that also go to the absolute core?

MR. ABRAMS: I'm sorry, Mr. Justice Brennan?

QUESTION: Why does that go to the absolute core?

MR. ABRAMS: It -- let me say --

QUESTION: Did you believe him?

MR. ABRAMS: I meant to distinguish between the example I just posed, and the did you believe question, which it seems to me is necessarily a step away.

As I said, we have not urged --

QUESTION: No, but didn't I understand you to answer my brother White that did you believe him would be --

:w 35

MR. ABRAMS: We think that should fall as well --

QUESTION: Why?

MR. ABRAMS: -- within the area.

QUESTION: Why?

MR. ABRAMS: Because it seems to me that to probe that deeply into the mind of the journalist is first of all not necessary in order to allow the plaintiff to prove its case. It is not the kind of question which has historically led, so far as I know, any plaintiff to win a libel case governed by New York Times against Sullivan.

And I think that -- and this question before you -- I think to make the journalist answer the question, not did you believe what was on the program --

QUESTION: Well, how about the question, Mr. Abrams, not did you believe him; didn't you know that he had told a different story to John Smith? How about that?

MR. ABRAMS: That question wasn't asked.

QUESTION: No, I say, what about it? Is that within or outside the protected clause?

MR. ABRAMS: I would think that questions as to what the journalist knew are protected -- are questions which he ought toanswer.

QUESTION: Even though "knew" involves some sort of cognition.

MR. ABRAMS: Some sort. But it seems to me that on

:w 3:6

any kind of graded scale, as you go down that road, at the end of it at least is, why didn't you put these four people on who said something good about Colonel Herbert?

QUESTION: But at least you think -- I gather you would think that he could be asked, well, were you told something to the contrary by somebody?

MR. ABRAMS: Yes, there would be no objection to that.

QUESTION: And you could say -- and you did not put this on the program.

MR. ABRAMS: Yes, and there was no --

QUESTION: Mr. Abrams, assume this went to trial. You couldn't then ask him whether he believed it or not?

MR. ABRAMS: If an objection were made, Mr. Justice Marshall, by the defense in this case, any question that was objected to, it seems to me, could not be testified affirmatively to by the press.

QUESTION: I'm talking about at the trial. You say, did you believe it when he told you that?

MR. ABRAMS: I think that if we object to any question on this basis at pre-trial, we could hardly be the ones to introduce evidence to that effect at the trial.

QUESTION: I didn't say -- I said, this same man --

MR. ABRAMS: Yes.

QUESTION: Mike Wallace is on the witness stand.

MR. ABRAMS: Yes.

QUESTION: And he's answering a particular phase in your program: Did you believe that man was telling the truth?

MR. ABRAMS: We have taken the position, Mr. Justice Marshall, that all questions are proper as to what was on the program; that is to say, did you believe so-and-so insofar as what he said on the program, we think is a proper question, and we would not have objected to such questions --

QUESTION: No, but I'm talking about, did you believe it when he told you.

I can't get this line between the two.

MR. ABRAMS: If it was broadcast on the program my answer to you is yes.

QUESTION: For example, I know what the answer would be, but I assume you say he couldn't answer a question, did you do this with reckless disregard?

MR. ABRAMS: Well --

QUESTION: You'd have to say you couldn't ask him that question.

MR. ABRAMS: We think, Mr. Justice Marshall --

QUESTION: You wouldn't object because you know what the answer would be.

MR. ABRAMS: I know what the answers would be to all these questions.

dkw 38

QUESTION: Well, but that's the ultimate issue in the case in New York Times v. Sullivan, what Justice Marshall said, isn't it?

One of the ultimate facts the jury has to determine is whether he did it with reckless disregard of the truth.

MR. ABRAMS: That's right, and what I said is that we have not -- Mr. Lubell has not asked these questions -- but we would not have objected, and we do not maintain that the privilege we seek here protects against a response to the question about whether anything that was on the program was believed by the journalist or was known by the journalist to be untrue.

That, it seems to me, if nothing else, is waived by the very fact of putting it on the program.

What we are concerned with here are questions as to the selective process of inclusion and exclusion, and particularly, the material that was excluded from the program.

QUESTION: I thought a moment ago you said a question about belief in the truth of something could not be asked.

MR. ABRAMS: What I excluded from that, Mr. Justice Rehnquist, was a question as to the belief of material which was actually broadcast on the program. And what I said is that which is broadcast on the program, or printed in a newspaper, it seems to us is material which the journalists

39 ought to be prepared to respond to.

Where we start to differ is that material that was either not broadcast on the program or beliefs, conclusions about witnesses in general -- not about particular material --

QUESTION: Well, what that amounts to is the soft pitches you can hit, and the hard ones you can duck.

MR. ABRAMS: Your Honor, there are no -- I ask you to look at the questions here. There's not a question I couldn't answer.

QUESTION: I know. But in -- but the kind of questions that you say are not answerable, the ones that go further back in the process. Certainly no producer is going to say, I didn't believe what I put on the program.

But if you go further back in the process, what did you think after you learned that X had said such and such, you may get a string of answers that may permit a jury to infer that he didn't believe it.

MR. ABRAMS: Well, it seems to me, Mr. Justice Rehnquist, that it would be a very rare libel case indeed that the kind of answers you would get to the kind of questions that you raise, or the kind of questions asked here -- did you consider doing something that you didn't do? -- these are not difficult questions; at least in my experience.

I think in the St. Amant case, this court indicated by way of illustration, I think, but indicated the kinds of

40 ways to prove reckless disregard. And the kind of examples that the Court gave there were where the story is fabricated, where the story is a product of the reporter's imagination, where the story is based on an unverified, anonymous telephone call, where the publisher's allegations is so inherently improbable that only a reckless man would have put them in circulation, where there are obvious reasons to doubt the veracity of the informant and the accuracy of his reports.

We are providing all the objective information from which those kinds of things, and more, can be determined.

QUESTION: Now you've emphasized -- you've emphasized objectives on a number of your responses.

At least three places I observe in the Sullivan case the Court refers to malice as a state of mind. And I gathered earlier you did not -- you have no quarrel with that, that malice is a state of mind.

MR. ABRAMS: That's correct.

QUESTION: How do you probe for the presence or absence of malice if you can't ask what was the state of mind at the time this or that was done?

MR. ABRAMS: It seems to me, your Honor, that the way it has been done in libel cases, and the way it is routinely done in criminal cases, and security act cases, and anti-trust cases, is for a jury to infer a particular state of mind from

kw 41 a particular set of facts.

QUESTION: Well, now let's take a criminal case, for an example, and the defense is self defense. You wouldn't suggest, would you, that you can't ask the prosecutor -- once the defendant has taken the stand asserting self defense -- that he can't cross-examine without limit on his state of mind which is --

MR. ABRAMS: I think once the defendant takes the stand in that type situation, and to the extent that that's a relevant issue, he certainly can.

But the fact --

QUESTION: Wouldn't the state of mind be relevant to self defense?

MR. ABRAMS: Yes, sir, it would. What I'm saying is that in a more standard -- another criminal example -- would be where the defendant doesn't take the stand --

QUESTION: Well, of course, you can't probe his state of mind if he isn't there.

MR. ABRAMS: But the question before you is: Are we entitled not to respond to certain questions? And I think that that is the analogy to the defendant who as respects to -- does not make a self defense argument, but simply puts the prosecution to its proof. And in that type of situation --

QUESTION: But in a civil case, you can't do that,

:w 42

can you? You must take the stand.

MR. ABRAMS: Unless you are -- you must take the stand. But unless you are privileged not to respond to certain questions, and that indeed is the question before you.

QUESTION: Well, do you suggest the privilege of a reporter is different from the privilege of some other witness?

MR. ABRAMS: Well, it seems to me, your Honor, that -- this will take a moment or two, because it seems to me that the Court is yet to rule on whether the Gertz case, first of all, applies alone to the press or the media, or to other entities. And so that would be a threshold ruling for the Court to make as to whether there is any different treatment under libel law, or under slander law.

If the treatment is the same, it seems to me, your Honor, that there are special reasons why reporters need this protection.

I do not take the position that individual speakers cannot get the protection. I don't think that's before you. But it does seem to me that in fact the only people that engage in the kind of process we're talking about here tend to be jounralists.

I suppose I could conceive a situation where that were not true. But certainly on a regular basis --

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QUESTION: But there are many libel cases brought against people who have nothing to do with journalism, aren't there?

MR. ABRAMS: There are many libel cases, and your Honor, it is our position that the only open question is whether this protection ought to go to the quote, press, unquote, including a lot more than journalists, or to the press and speakers as well.

QUESTION: Well, narrow it down -- let's narrow it down to two different kinds of defendants in libel cases: one is a media reporter and one is just another taxpayer who happened to --

MR. ABRAMS: Write a book?

QUESTION: No, just make some bad statements about someone. Not a writer.

MR. ABRAMS: Oh, I'm sorry.

QUESTION: Just another citizen who is not -- doesn't purport to be a professional writer.

MR. ABRAMS: Right.

QUESTION: Do you think there is a difference in the scope of probing the mind of the one from the other?

MR. ABRAMS: I'm saying the first thing I would have to know, your Honor, is whether New York Times against Sullivan protects the individual in that type situation. And what I was observing is that I don't think this Court has yet ruled

on the question of whether the Sullivan case does afford that protection.

If it does, it seems to me that there are particular reasons why the press needs this protection, because of the nature of the process it is engaged in, the regularity of it and the like; but that I certainly wouldn't oppose it for anyone else.

It seems to me that you often get cases before you which have peculiar applicability to one or another body of life in the country. The Tornillo case is one. It may not suggest a press case, but it is unlikely to arise in the context of a statute requiring individuals to speak in reply to things that other people have said.

And I think that that's the same proposition here. You need not say, and we don't urge you to say, that the First Amendment protection that we think exists here, and should exist here, is limited to the press. But in all candor, I have to tell you, I don't know that it will often arise in situations which don't involve the press or writers or people who engage in the kind of process which CBS News, in this case, has in fact engaged in.

QUESTION: Do you know of any cases -- none in this court of course -- but any cases in any court which has put a limit on the cross-examination of the witness when the issue is malice, whether it's a murder case or whatever kind

w 45 of case it may be?

MR. ABRAMS: Well, the only type situations that -- I mean, I'm trying to think of cases where malice is in fact at issue. Our case here is the first libel case on one side or another which relates to this question.

Insofar as criminal cases are involved, they wouldn't really involve malice.

I can't think of offhand --

QUESTION: Well any kind -- where intent -- any kind of a fraud case, civil fraud case.

MR. ABRAMS: Yes.

QUESTION: A 10(b)(5) case, what about that?

MR. ABRAMS: Well, a 10(b) -- I was limiting my answer to a question of malice. But in terms of intent --

QUESTION: Well, state of mind.

MR. ABRAMS: State of mind or intent is routinely proved in 10(b)(5) cases by reference to what the person did, and what the person knew.

QUESTION: But you wouldn't suggest that there shouldn't be cross-examination about his state of mind?

MR. ABRAMS: No, I would not suggest that. And I have no reason to think --

QUESTION: Mr. Abrams -- while I've got you interrupted -- I take it that your submission here is not just that the state -- that there should be no inquiry into

w 46 state of mind, but there shouldn't be any inquiry into the editorial process, the decision-making process. And for, example, you would say it would be an improper question to say, what did another one of your editors tell you?

MR. ABRAMS: I think as a general matter, certainly.

QUESTION: Or what did you tell one of your senior editors? Any conversations in that process. It's sort of similar to sort of an executive privilege claim.

MR. ABRAMS: Yes, it is indeed one of the analogies that we urge on you in our brief is that of executive privilege, is that indeed, as the court observed in the Nixon case, that human experience teaches us that people will speak less freely in that type of situation if they know that what they're going to say is going to be exposed to public dissemination.

And there are similar rulings with respect to far lower level people in the executive branch, the mental processes of which are at least generally barred from disclosure. Similar rulings under the speech and debate clause.

QUESTION: Well, sometims what happens with the government when they claim the privilege is what the government's interest -- if they want to claim the privilege, they must give the interest.

In a criminal case, for example --

MR. ABRAMS: In a criminal case, that is correct.

QUESTION: -- if they claim -- they want to claim

a privilege, they may have to dismiss the prosecution.

And if the government wants to pursue someone civilly and still claim a privilege for some information that they have, they may not be able to press their claim.

MR. ABRAMS: I appreciate that. I think that would be a high price to put on this privilege if you should sustain the privilege.

QUESTION: It's true in civil cases, is it not, in federal tort claims cases against the government, one of the classic cases in this court. The government said it could not respond about all the gadgetry and things that were in the experimental plane, because this would give away national secrets. And so the courts said, if you can't respond, then the court will presume the worst and enter judgment against the government.

MR. ABRAMS: Our position here, Mr. Chief Justice, is not that we cannot respond, but that you ought to rule that we need not respond, and --

QUESTION: Well, of course, theoretically, the United States could have told the court in Philadelphia in that case that no we will not respond because this is a national security matter, which is about what it did. Then the court said, if you don't respond, we'll enter judgment against you. We'll presume the worst. That's the effect of it.

MR. ABRAMS: If that were the nature of any privilege

granted by the Court in this area, it would not be very expansive.

QUESTION: Mr. Abrams, let's get way away from this case.

The reporter has a transcript of a trial in California. And he selects out of it portions to read on his television show.

Could you ask him about what discussions he had with people about which one of those portions he should read?

MR. ABRAMS: You can certainly have the whole transcript at the outset, in order to make judgments based on that.

QUESTION: Well, and he picks and chooses.

MR. ABRAMS: Yes, and if the process --

QUESTION: And he does that with discussion with other people in his office.

MR. ABRAMS: It seems to me, Mr. Justice Marshall, that those kinds of discussions in the office, as opposed to the facts of what he had, what he knew, and what he did, should indeed be protected. And it seems to me that the precise analogy to that is, in fact, executive privilege cases and the variety of other cases about the nature of discussions in situations like that.

At the very least, it is our view, that they should presumptively be protected, and that if they're to be

overcome, they should be overcome in very rare circumstances.

One of the worst problems with this case is that the effect of it is --

QUESTION: Well, where do you get the chilling there? Who gets chilled?

MR. ABRAMS: Well, it seems to me that what is --

QUESTION: Who gets chilled?

MR. ABRAMS: What is chilled are the people who speak to each other in the newsroom, aware --

QUESTION: They get chilled? Reporters get chilled?

MR. ABRAMS: Oh, Mr. Justice Marshall, I am not suggesting that this has happened.

On the other hand, I know of no case in which discovery has gone on for 26 days and 2900 pages in a libel case.

If this case is lost, Mr. Justice Marshall, or if I may say so, if there is no protection at all here, I think it's fair to predict that questions like this will, for the first time, become routine, that public officials and public figures, the very people set out by this court in Sullivan as being, for a variety of societal reasons, people who will receive less protection against defamatory falsehoods than other people, will be able to commence libel actions and immediately plunge into thecore questions at issue here: Why did you write these bad things about me?

w 50 Why didn't you put on some good things about me?

QUESTION: This never happened under the old libel law.

MR. ABRAMS: It never did. I don't want to follow that up, but it never did.

QUESTION: Well, before 1965, it happened all the time. Before New York Times v. Sullivan.

MR. ABRAMS: Not state of mind inquiry. At that point it was wholly truth or falsity -- was it privileged --

QUESTION: How about under punitive damages?

MR. ABRAMS: For punitive damages it sometimes came up in very specific and narrow circumstances. Not questions as to why certain material was included and excluded. Punitive damage questions were historically the questions about, what did you think of him? What was your --

QUESTION: Was there actual malice?

MR. ABRAMS: Yes. Actual malice in a nonconstitutional sense.

QUESTION: Mr. Abrams, what of Mr. Lubell's comment on editorial process. All of that's been revealed in Mr. Lando's article in the Atlantic Monthly.

MR. ABRAMS: Well, first --

QUESTION: As it applies to this case.

MR. ABRAMS: -- I don't think it's so. I have read the article.

kw 52

QUESTION: I haven't seen it. Is it in the record here?

MR. ABRAMS: Yes, sir. There's been no finding by any lower court that that is the case. If there is a waiver problem here at all, either by virtue of the Atlantic Monthly article, or by virtue of any answers which were inadvertently given in the course of the 26 days over which this was spread, it seems to me that that's something for the district court to deal with.

We are not taking the position that there is no such thing as waiver.

QUESTION: Let me ask you just one more question about your reference to discussions within the publisher's establishment.

I was just focussing on the language of the opinion in New York Times against Sullivan, and let me read it to you:

Finally, there is evidence that the Times published without checking its accuracy against the news stories in the Times' own files. Remember that was an ad; not a news story. The mere presence of the stories in the files does not, of course, establish that the Times knew -- and the Court put that word in quotation -- knew that the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication.

54] Now how would you get at that if you couldn't ask these people what was in their minds at the time?

MR. ABRAMS: You would ask the person in charge of advertising acceptability at the New York Times what did you know? Did you look at the files? What was in the files?

QUESTION: How about the editor, to ask him what was in the files?

MR. ABRAMS: Well, let me say first, your Honor, that the files here have been turned over. So insofar as the files as such are concerned, and they objectively reflect what is at issue, that can be obtained.

What cannot be obtained, directly by way of questions, in our view -- and I think in view of both Judge Kaufman and Judge Oakes -- are the individualistic tentative probing conclusions, musings, whatever, of journalists as they go about their job.

But all the objective questions as to what was there, what happened, what happened next, what didn't they look at, what did they look at, that's what was lacking in New York Times against Sullivan. But for the plaintiffs to have--

QUESTION: Or any conversations --

QUESTION: -- in the editorial process.

MR. ABRAMS: Are what? I'm sorry.

QUESTION: Or any conversations in the editorial process may not be inquired into.

54] MR. ABRAMS: It seems to us that conversations --

QUESTION: That's a considerably different kettle of fish than just talking about state of mind.

MR. ABRAMS: Well, that -- it is a different area, your Honor, it is. And it seems to us that that also should be privileged, but that the policy basing for some of these are somewhat different as I tried to set forth. But they are.

QUESTION: I get a hint from some of the things -- just between the lines of your argument, Mr. Abrams -- that perhaps some misreading of the opinions has taken place.

Is that a reasonable conjecture on my part?

MR. ABRAMS: Misreading of the opinions by --

QUESTION: By the Second Circuit. That some people may be misreading them.

MR. ABRAMS: I think that to the extent -- yes, yes. I think that that is true. That it is certainly misread if it is read as an end to libel law, and it is misread if it is read as a total, absolute privilege in every case which could conceivably be characterized as, quote, editorial process, end quote.

I don't think that's what it says, and I don't think that's what either Judge Kaufman or Judge Oakes have to say.

QUESTION: Mr. Abrams, before you sit down, when you started, you called my attention to page 53a of the

w 55 Appendix.

MR. ABRAMS: Yes.

QUESTION: Why did you do that?

MR. ABRAMS: I started to respond to a question that you had asked Mr. Lubell.

QUESTION: I'd be interested in your response.

MR. ABRAMS: Starting about halfway down on page 53a there was an interview on the program with Bruce Potter, and that was, I think, what Mr. Lubell was averting to earlier. And I described it briefly about how Mr. Potter said that in his presence Colonel Herbert had thrown a sandbag out and as well had made threatening gestures toward a prisoner of war.

Mr. Lubell's example was that example, and what he said to you was that there were four people on the other side.

What I wanted to say in response to that was, first as a matter of fact, the four people were not on the helicopter and had nothing to say as such about what happened there.

But what they did say were good things about Colonel Herbert in terms of his desire to care for, to be compassionate towards, prisoners of war. And they were not on the program, although what was on the program was a statement of Mr. Wallace, saying in so many words, that there are people who they had interviewed -- who CBS had interviewed -- who took

dkw 56 the position that Colonel Herbert was not capable of brutality.

The point that I was going to make was only this: It seems to be that that is a very, very dangerous line for libel law to go down, either substantively or procedurally, as we're talking about procedure today, and allowing questions about that.

Because the nature of those questions is nothing less than, why didn't you put the good material on?

QUESTION: Well, do you think that the question would be proper if it were asked this way: In the light of what these other four persons had to say, did you have any doubt about the credibility of Mr. Potter?

MR. ABRAMS: We certainly wouldn't have objected to a question asking whether he had any doubt about the credibility of what Mr. Potter had to say on the program.

QUESTION: No, in --

MR. ABRAMS: I'm sorry.

QUESTION: -- your opinion, was Mr. Potter telling the truth.

MR. ABRAMS: In what he said on the program? We --

QUESTION: Well, supposing this wasn't on the program but it was just one that was slightly different -- you'd say that could not be inquired into.

MR. ABRAMS: Then it seems to me that that is a further step away. It seems to me that journalists ought to

w 57 be responsible for what they put on.

QUESTION: Why does one involve editorial process any more than the other?

MR. ABRAMS: Because it seems to me that when you put it -- I think they both involve, conceptually, the editorial process. But when the process is broadcast, it's out.

QUESTION: The process wasn't broadcast. The product of the process.

MR. ABRAMS: When the segment at page 53 and 54a is on the program, it seems to me, even though that is a result of the process, the journalist has to respond to the question as to whether he believes it or not.

QUESTION: It's permissible to ask why he put Potter's statement on, but it is not permissible to ask, why did you not put the other four statements on?

MR. ABRAMS: No, your Honor. It is our position that it is permissible to ask, did you believe the statement of Mr. Potter which you broadcast? And it is our position that the questions ought not to be allowed to the effect of, why did you put it on --

QUESTION: But if there were a second statement by Mr. Potter -- I just want to be sure I --

MR. ABRAMS: Yes.

QUESTION: A second statement by Mr. Potter was

cw 58 somewhat similar, but was not put on the air, it would not be permissible to say, did you believe that statement by Mr. Potter?

MR. ABRAMS: Yes, your Honor, that is our position that that should not be permissible.

We think that the product broadcast ought to be what is at issue, and that that can be inquired into, but not the process by which other things did not get put on.

Thank you.

MR. CHIEF JUSTICE BURGER: We have a few minutes left.

Mr. Lubell.

REBUTTAL OF JONATHAN W. LUBELL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. LUBELL: Very briefly, in regard to references to the Sullivan decision itself, the reference to the looking at the files:

The issue that gets raised now by the Second Circuit decision is, suppose an editor, at the time that the work product was being worked up, the editorial process was going on, went to the files and looked at the files during that editorial process.

The question is: Could we ask a question about what was done during the editorial process? I think that question is a serious question in light of the decision of the

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Second Circuit which appears to say that we can't inquire as to what was done during that process.

In addition, in the Sullivan case itself, in reference to whether the media are the only groups of people that are protected under the Sullivan principles, I'm sure, needless to say, the Court is aware that individuals were as well petitioners before this court in Sullivan, the ministers themselves, and they were afforded the protection of the Sullivan principles, as well as the New York Times.

So I think from Sullivan on, there has been at least an implied recognition that the Sullivan principles protect anyone who exercises his First Amendment right, first in regard to public officials, and subsequently in the decisions of this Court, in regard to public figures.

QUESTION: Mr. Lubell, let me ask you just one question.

At the end of Judge Oakes' opinion -- his last sentence -- he concurs in the general answer of Chief Judge Kaufman to the certified question. Was there a single question certified to the Court?

That's on page 46a of the --

MR. LUBELL: Yes, yes.

QUESTION: There was a single question? Where is it in the papers that have been filed?

MR. LUBELL: I believe what he is referring to,

60 your Honor, is the certification memorandum opinion and order. Because -- as to whether you can specify and focus upon a specific certified question, I don't find it.

QUESTION: The only certificate of the district judge would be under 1292(b) saying an interlocutory appeal is ordered.

Is that what he's talking about?

MR. LUBELL: I believe so, and that is in the Appendix to the petition, the second memorandum opinion and order of Judge Haight, beginning at 90a, to the petition in which he certifies under 1292(b).

QUESTION: I see.

QUESTION: Well, at the very beginning of the court of appeals opinion it says, appeal pursuant to 28 U.S.C. 1292(b).

MR. LUBELL: Yes, yes. Yes, your Honor. It came up on a certified -- on a certification procedure. And the certified question involved the same question that Judge Haight said was a question of first impression, which had to do with the state of mind, or whether there was a privilege for the editorial process of the press.

Further, in regard to the question that the Chief Justice posed to Mr. Abrams as to criminal cases where defendant does take the stand, or any civil case where defendant does take the stand, and the issue of state of mind

kw 61 is an issue, whether it would be because of malice or intent required, obviously, the defendant must answer those questions unless a testimonial privilege against self incrimination or one of the recognized testimonial privileges is asserted.

In this case, in fact, the defendant, in a pre-trial sense, took the stand. He submitted himself to a deposition. And questions were asked of him about his state of mind within concrete factual contexts, only because, by the decisions of this Court, the subjective state of mind has become the critical Sullivan issue.

In regard to the -- again, back to the question of what questions appeared to be allowable, or would not appear to be allowable -- I would not that the defendants have objected at the deposition stage, and have contended throughout the appeals here, that questions as to the defendants' view of the credibility and veracity of persons who appeared on the program, as well as persons who did not appear on the program, were not proper.

So that it's not limited to somebody who did not appear on the program.

I see both my lights are on.

And in conclusion, we contend that by precluding a plaintiff from obtaining any direct evidence of state of mind in a Sullivan case, or obtaining any evidence of what happened in the editorial process -- whichever way you

interpret the two aspects of the court of appeals decision -- completely unbalances the accommodation struck by this court in Sullivan and its progeny.

Thank you.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 1:50 p.m., the case was submitted.]