

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: DAN COHEN, Petitioner V. COWLES MEDIA
COMPANY, dba MINNEAPOLIS STAR AND
TRIBUNE COMPANY, ET AL.

CASE NO: 90-634

PLACE: Washington, D.C.

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1 P R O C E E D I N G S

2 (10:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 now in No. 90-634, Dan Cohen v. the Cowles Media Company,
5 doing business as Minneapolis Star and Tribune Company.

6 Mr. Rothenberg.

7 ORAL ARGUMENT OF ELLIOT C. ROTHENBERG

8 ON BEHALF OF THE PETITIONER

9 MR. ROTHENBERG: Mr. Chief Justice, and may it
10 please the Court:

11 This case is on writ of certiorari from the
12 Minnesota Supreme Court which held that promises of
13 confidentiality from newspapers to a source of information
14 were unenforceable because it would violate the First
15 Amendment rights of the newspapers. Cohen v. Cowles Media
16 presents the question of whether newspapers have the right
17 to inflict injuries by dishonoring voluntary promises used
18 to obtain information.

19 Honoring promises of confidentiality is critical
20 in ensuring the free flow of information to the public.
21 An expert witness in the trial to this case testified that
22 at least one-third of all newspaper stories and 85 percent
23 of news magazine stories come from sources promised
24 confidentiality by the media organizations involved.

25 QUESTION: Well, why should the desirability of

1 keeping the promise of confidentiality on the part of a
2 media organization be subject to our decision here?

3 MR. ROTHENBERG: Because, Your Honor -- because,
4 Mr. Chief Justice, the Minnesota Supreme Court ruled that
5 the First Amendment barred enforceability of these
6 promises.

7 QUESTION: Yes, and if -- if the Minnesota
8 Supreme Court was wrong on that point, we would say, or if
9 we thought so, we would say that the First Amendment did
10 not bar the enforcement of those promises. But I doubt
11 that we would express any views on the merits as whether
12 it's desirable as to public policy to enforce them or
13 not.

14 MR. ROTHENBERG: Mr. Chief Justice, I was really
15 raising this issue to point out the First Amendment values
16 that are involved that to ensure the free flow of
17 information to the public, news media consider it
18 necessary to make these promises and it's also necessary
19 to keep these promises to avoid drying up the flow of
20 information from sources.

21 QUESTION: The First Amendment requires that
22 these contractual obligations be enforceable.

23 MR. ROTHENBERG: Yes --

24 QUESTION: You're taking the polar view from the
25 view that the Minnesota Supreme Court took.

1 MR. ROTHENBERG: Yes, Justice Scalia --

2 QUESTION: I --

3 MR. ROTHENBERG: -- there is no conflict in this
4 case.

5 QUESTION: Isn't it conceivable that the First
6 Amendment neither requires nor prohibits? Is that a
7 possible resolution?

8 MR. ROTHENBERG: That is a possible resolution,
9 Your Honor. Justice Scalia, it's been the position of the
10 trial court and the Minnesota court of appeals and also of
11 course the petitioner in this case that the First
12 Amendment simply ought not to allow the news media
13 organizations who are parties to this case to break
14 promises they voluntarily made in order to obtain
15 information, that the media organization should be subject
16 to the same law as everyone else --

17 QUESTION: But --

18 MR. ROTHENBERG: -- every other business, every
19 other individual in keeping their promises.

20 QUESTION: Well, then what you're saying is that
21 the First Amendment doesn't accord them any special
22 protection when they break their promises.

23 MR. ROTHENBERG: Yes, Mr. Chief Justice.

24 QUESTION: Well, what would be the result if a
25 State passed a statute which said, as a matter of the

1 public policy of this State, no contract in -- for
2 confidential source material shall be enforceable? What
3 result?

4 MR. ROTHENBERG: Your Honor, Justice Kennedy, it
5 would be our position that that would violate the
6 constitutional provision regarding the impairment of
7 contracts. If --

8 QUESTION: No, no, it wouldn't, because it's
9 future.

10 MR. ROTHENBERG: Future. Well, we don't know of
11 any -- it would -- it would be bad public policy -- it
12 would be our position that this -- this type of statute
13 ought not to be --

14 QUESTION: Well, I -- it --

15 MR. ROTHENBERG: -- adopted. It would be the
16 equal protection -- possibly an equal protection argument.
17 Possibly --

18 QUESTION: Would there be a First Amendment
19 problem?

20 MR. ROTHENBERG: It would certainly violate
21 values of the First Amendment that would be involved in
22 the --

23 QUESTION: Well, if it violates values of the
24 First Amendment, does it violate the First Amendment? I'm
25 just following on your answers to Justice Scalia where he

1 said, well, you're taking the position that the First
2 Amendment requires it.

3 MR. ROTHENBERG: Justice Kennedy, it's -- that
4 -- he was bringing it out to point out there was no
5 necessary conflict between the First Amendment and rules
6 of contract law as applied to this case. The Minnesota
7 Supreme Court seemed to believe that the First Amendment
8 required that these promises not be enforceable. It's our
9 position that the First Amendment does not require this.
10 And not only that but that there are certain values of the
11 First Amendment which are enhanced by promoting these
12 promises -- by honoring these promises rather than
13 allowing newspapers to violate these promises (inaudible).

14 QUESTION: Mr. Rothenberg, the -- I have a
15 little difficulty with the opinion that we're asked to
16 review. As I read it, the court first rejected a contract
17 theory as a matter of State law.

18 MR. ROTHENBERG: Yes, Justice O'Connor.

19 QUESTION: And then it went on to address
20 whether there was promissory estoppel. That theory was
21 not presented, I take it, to the jury by the plaintiff
22 below?

23 MR. ROTHENBERG: Yes, Your Honor.

24 QUESTION: Is that correct?

25 MR. ROTHENBERG: Yes, Your Honor.

1 QUESTION: Did you argue promissory estoppel?
2 Why did the court even address it?

3 MR. ROTHENBERG: In Minnesota, Your Honor,
4 promissory estoppel is closely related to the law of
5 contracts. It implies a contract where a contract might
6 not otherwise exist. That was pointed out in the opinion
7 below. And the Minnesota Supreme Court discussed this
8 issue -- pointed out that promises of confidentiality from
9 newspapers to sources of information could constitute an
10 implied contract under rules of promissory estoppel. But
11 then went on to say that such a promise would be
12 unenforceable in this case because it would violate the
13 First Amendment rights of the newspapers.

14 QUESTION: The problem I have is that I didn't
15 understand how the court could address it at all if it was
16 never urged below.

17 MR. ROTHENBERG: It isn't necessary, Justice
18 O'Connor, in Minnesota, to specifically plead promissory
19 estoppel apart from general contract law. Minnesota is a
20 notice pleading State. And in this case before the court
21 and in another case which was cited in the opinion below,
22 the Christianson v. Minneapolis Municipal Employees, in
23 both of these cases the parties did not specifically plead
24 or argue promissory estoppel or implied contract as
25 distinct from conventional contract --

1 QUESTION: And as a matter of State law, it's
2 possible to sustain a jury verdict that was presented on a
3 different theory --

4 MR. ROTHENBERG: Yes.

5 QUESTION: -- by concluding there was promissory
6 estoppel? That's the Minnesota State law?

7 MR. ROTHENBERG: Uh-huh. This -- Your Honor,
8 there is no -- there is not this fine or close distinction
9 between implied contracts on a promissory estoppel or
10 conventional contracts. It's based upon section 90 of the
11 restatement of contracts. And in both this case and the
12 Christianson case where in fact the lower court held
13 against the plaintiff, and then the Minnesota Supreme
14 Court reversed the decision on the basis of an implied
15 contract through promissory estoppel when the issue had
16 not been raised below.

17 So, in Minnesota State practice, it is possible
18 to do this without specifically pleading promissory
19 estoppel as apart from conventional contract.

20 QUESTION: Now, one other question before I
21 finish if I may. Here, you -- the plaintiff sought
22 damages for the disclosure. Had the plaintiff known in
23 advance that there was a danger of disclosure, I take it
24 you would feel you could even go in and enjoin the
25 publication? Is that right?

1 MR. ROTHENBERG: Well, Your Honor, Justice
2 O'Connor, plaintiff did not ask that this publication be
3 enjoined. Plaintiff asked for damages for the violation
4 of the promise made by the newspapers.

5 QUESTION: Yes, I know. Is it your position
6 that an injunction could be sought before publication?

7 MR. ROTHENBERG: Plaintiff has not sought an
8 injunction. Plaintiff has not --

9 QUESTION: Yes, I know that. Is it your view
10 that an injunction could be sought?

11 MR. ROTHENBERG: Could it be sought? That
12 presents the issue of prior restraint, Your Honor, and it
13 would present a different issue than damages. No, because
14 this case does not involve any attempt for prior restraint
15 nor would I think any principle established by the
16 Minnesota Court of Appeals or the trial court involve any
17 issue of prior restraint on publication by newspapers. It
18 merely involves the issue of whether newspaper should be
19 liable for their promises and whether they should be
20 liable for damages caused by violations of their promises,
21 which in this case caused --

22 QUESTION: You think maybe only the Government
23 can get prior restraint of publication? Is that -- is
24 that it? The Snapp case is all right, but nobody else can
25 get prior restraint except the Government?

1 MR. ROTHENBERG: It's -- it's --

2 QUESTION: That may be the law.

3 MR. ROTHENBERG: Not necessarily, Justice
4 Scalia. It's our position that the Court doesn't have to
5 even reach the issue of prior restraint. It merely has to
6 allow a plaintiff to recover damages for a violation --

7 QUESTION: You seem very much worried about it.

8 QUESTION: Mr. Rothenberg, doesn't the State
9 court decision rest on the State supreme court's view of
10 good policy. It -- it points out that the -- that the
11 question arises in what it calls a classic First Amendment
12 context. It closes the discussion in that paragraph by
13 saying, "Considering the nature of the political story
14 involved, it seems to us the law best leaves the parties
15 here to their trust in each other." Then it goes on to
16 talk about First Amendment demands.

17 But doesn't the -- doesn't the Court rest its
18 decision on its own view of where the law best leaves the
19 parties. And isn't that the holding of the case?

20 MR. ROTHENBERG: Your Honor, the holding of the
21 case from the Minnesota Supreme Court we would submit was
22 purely based upon the First Amendment where it says
23 towards the end of the decision, "we conclude that the
24 enforcement of respondent's promises in this case would
25 violate that First Amendment rights --

1 QUESTION: Well, isn't the most that you can say
2 is that that was an alternative holding, and in fact the
3 second of the two pieces of reasoning expressed? Doesn't
4 it rest and wouldn't it rest with equal decisiveness on
5 the language that I just quoted, "seems to us the law best
6 leaves the parties to their trust in each other"?

7 MR. ROTHENBERG: Except, Justice Souter, that
8 was not the arrangement that the parties had made. In
9 fact, the Minnesota Supreme Court pointed out itself that
10 there was offer. There was acceptance. There was
11 consideration.

12 QUESTION: No, I realize that. But the court is
13 saying offer consideration contract theory is not the
14 basis upon which the parties ought to be left to deal.
15 They ought to be left to deal on matters of trust and if
16 that doesn't work, too bad. Isn't that the -- isn't that
17 an -- an independent holding of the case, if not the
18 principal holding of the case?

19 MR. ROTHENBERG: No, Your Honor, Justice Souter,
20 any fair reading of the decision would lead one to
21 conclude that this decision was in fact based on the First
22 Amendment in terms of the promissory estoppel where the
23 court says we conclude that violation of these promises
24 would violate --

25 QUESTION: Well --

1 MR. ROTHENBERG: -- would -- the enforcement of
2 the promises would violate the First Amendment rights of
3 the newspapers --

4 QUESTION: Let me just ask you one question. I
5 don't want to prolong this, but do you agree that if the
6 court had not gone onto the further language, "we conclude
7 that the" -- that the First -- "that there would be
8 violation of First Amendment rights in enforcing the
9 contract," do you agree that if the court had not gone on
10 to that further statement that the holding in the case and
11 the result in the case, rather, I should say -- the result
12 in the case would be exactly the same as it is now?
13 Because the result in the case would rest, as I understand
14 it, on the court's conclusion that the law best leaves the
15 parties to their trust in each other. So that the --
16 wouldn't the result be exactly the same if it had not gone
17 on to make the First Amendment point?

18 MR. ROTHENBERG: Justice Souter, we would submit
19 that that would not be the case, because the court, the
20 Minnesota Supreme Court, did find it necessary to examine
21 the First Amendment issues and to make that specific
22 holding --

23 QUESTION: Well, they did to go on to demand
24 them, but if the court had stopped right there and said,
25 it seems to us the law best leaves the parties here to

1 their trust in each other, what would the result in the
2 case have been? They wouldn't have gone on and said,
3 however, we think we'll enforce the contract. That would
4 have been the end of it right there, wouldn't it?

5 MR. ROTHENBERG: Well, Your Honor, the context
6 in which that statement was made wasn't the context of the
7 First Amendment discussion. That was about a sentence or
8 two after they pointed out that this case presents the
9 classic First Amendment situation of a source providing
10 information in connection with a political campaign which
11 they called the quintessential First Amendment situation.

12 And then they said that we think that in this
13 situation, the law best leaves the parties to the trust in
14 each other.

15 QUESTION: Mr. Rothenberg, I thought when they
16 said the law best leaves the parties to the trust in each
17 other, they included within the law the First Amendment.
18 Isn't the First Amendment part of the law?

19 MR. ROTHENBERG: Absolutely, Justice Scalia.

20 QUESTION: Oh.

21 QUESTION: May I ask you a variation of Justice
22 Souter's question? Supposing you had two statutes, one in
23 one State and one in another. One State had a statute
24 that just said, contracts of this kind or promises of this
25 kind shall not be enforceable, period. And the other

1 State the statute said the same thing, but it had a
2 preamble that said, because the members of the legislature
3 are convinced that it would violate the First Amendment Xto
4 have such a statute, contracts like this are
5 unenforceable. Would -- each of those be -- would they
6 both be -- have the same constitutional result? Would
7 they both be valid or invalid, or would you get one result
8 in one case and another in the other case?

9 MR. ROTHENBERG: If the one statute was
10 ostensibly based upon the First Amendment, Your Honor --

11 QUESTION: It said that because the members of
12 the legislature are all convinced that it would violate
13 the First Amendment, we therefore enact this statute.

14 MR. ROTHENBERG: That would present -- that
15 would provide jurisdiction for this Court, Justice
16 Stevens, to consider whether the First Amendment actually
17 requires that the --

18 QUESTION: Did we review the reasoning that the
19 legislators adopt, do we? Or do we review the end product
20 of their work?

21 MR. ROTHENBERG: I would submit both, Your
22 Honor. That in fact, as is pointing out the beginning, if
23 there are values of the First Amendment involved in this
24 case, these values require that these promises be honored
25 to ensure the free flow of information to the public.

1 That's what the Minnesota State legislature did in this
2 case.

3 In fact, getting back to the issue of the
4 statute, it would be one thing if you had a statute saying
5 that these promises are unenforceable. Giving notice to
6 all potential sources that they could not trust promises
7 from newspapers, it would dry up these sources. I would
8 assume that the newspapers themselves would not support
9 such a statute.

10 In this type of situation, a solemn promise was
11 made to the source, Mr. Cohen, as is made to many other
12 sources on a daily basis. He believed that he could trust
13 the promise of the reporter, that the newspaper would
14 honor their promises. They did not do so. He had no
15 notice whatsoever. Had he had that notice, he wouldn't
16 have -- he wouldn't have offered the information to the
17 newspapers, he wouldn't have trusted the promises, and
18 this case wouldn't have arisen. He wouldn't have lost his
19 job as a result.

20 QUESTION: Well, I know, but of course in the
21 future the law will be clearer if this is affirmed. The
22 future is -- will be as though a statute like this was on
23 the books.

24 MR. ROTHENBERG: Yes, yes, yes, Your Honor. But
25 I think it's important to point out that in other cases

1 involving court orders of reporters to divulge
2 confidential sources before grand juries, newspapers and
3 other media organizations have taken the position --

4 QUESTION: Yes, we haven't always agreed with
5 them, though.

6 MR. ROTHENBERG: Right. But the positions they
7 took in those cases, Justice Stevens, was that if
8 newspapers are forced to expose their sources that sources
9 will dry up, that the public will be deprived of important
10 information it now gets from confidential sources, and
11 that will disserve the interest of the First Amendment.
12 That's exactly the position they took in the Branzburg
13 case about 20 years ago.

14 QUESTION: You seem to be posing the issue as
15 whether we -- which result we think will maximize the flow
16 of information. We should pick one result or the other on
17 the basis of our judgment as to which one will increase
18 the flow of information. Is that your argument?

19 MR. ROTHENBERG: Well, Justice Stevens, I was
20 pointing out that the positions of the media have been
21 inconsistent on this issue.

22 QUESTION: Well, I understand that. Very few
23 litigants come here who haven't taken other positions from
24 time to time.

25 MR. ROTHENBERG: But it's been our position,

1 Justice Stevens, if I could perhaps answer the question
2 that, as in the Minnesota Court of Appeals -- the First
3 Amendment really ought not to be applicable to this case.
4 You have a private -- you have an agreement between
5 private parties, a newspaper and a source of information,
6 that the First Amendment -- there was no governmental
7 compulsion involved in this case. That the case ought to
8 be decided on the common law, on issues of contract State
9 law, and that the First Amendment ought not to be a --
10 ought not to be interpreted to give newspapers or other
11 media organizations a right to violate their voluntary
12 promises with another private person.

13 QUESTION: Well, but the maximum your -- result
14 you can achieve here is not just that we remand it to the
15 court of -- the Minnesota Supreme Court and say, you're
16 really not required to reach this result by the First
17 Amendment. But you can reach the same result because you
18 believe in the policy of the First Amendment. That would
19 all right, wouldn't it?

20 MR. ROTHENBERG: No, Justice Stevens, because
21 the problem that we have if -- if you open the door for
22 State courts to say that, although we're not going to
23 judge a case on the amendment or the constitutional
24 provision itself, we're just going to consider the policy
25 of the amendment or the Constitution, that's going to give

1 State courts the opportunity to in effect reach final
2 judgments on constitutional issues without allowing
3 litigants the opportunity to appeal to this Court.

4 QUESTION: Well, certainly the Supreme Court of
5 Minnesota, if we were to reverse its judgment here, and
6 say that it was wrong. It had passed on a First Amendment
7 question and it had reached the wrong result. When it
8 went back, it could say that the supreme court -- that the
9 Minnesota constitution required the same result, could it
10 not?

11 MR. ROTHENBERG: Your Honor, that issue was
12 raised in the oral argument before the Minnesota Supreme
13 Court and also in briefs by the respondents, particular
14 respondent Cowles Media Company. The Minnesota Supreme
15 Court never accepted that argument at that time. They
16 never dealt with it. And --

17 QUESTION: Well, maybe they were saving it for a
18 situation like the one -- my hypothetical.

19 (Laughter.)

20 MR. ROTHENBERG: But it's -- Your Honor, again
21 we take the position that -- and I think it's clear from
22 the decision itself, which is of course all we have to act
23 upon, is that the Supreme Court of Minnesota did not refer
24 to any State constitutional provisions. It based its
25 decision saying that we conclude that enforcing these

1 promises would violate the newspapers' rights under the
2 First Amendment of the U.S. Constitution and refer to
3 several U. -- United States Supreme Court cases in that
4 regard.

5 Can do -- to continue, many arguments were made
6 in the briefs on the applicability of the First Amendment.
7 The issue generally is -- comes down to whether a private
8 agreement, an agreement between private individuals, a
9 newspaper on the one hand and a source of information on
10 the other, ought to implicate the First Amendment at all
11 and whether the Minnesota Supreme Court acted in error, as
12 we submit it did, in holding that the First Amendment
13 makes these promises unenforceable, because we have here,
14 again, a private agreement -- no State compulsion, no
15 governmental compulsion -- on the -- forcing the
16 newspapers to make this agreement with a private person.
17 But as a -- an ordinary business practice of the
18 newspapers, a practice that is indulged in frequently by
19 all --

20 QUESTION: You have government compulsion just
21 as you have in a liable case, don't you? I mean you --
22 you -- there's no government compulsion that a paper print
23 a story about someone that may libel them. But if a court
24 organized by the Government gives a judgment for damages,
25 that's sought -- thought sufficient to invoke the First

1 Amendment to -- for -- invoke the New York Times against
2 Sullivan doctrine.

3 And here, too, if the Court gives a judgment for
4 damages, that is sufficient government activity I would
5 think to raise the First Amendment question if the First
6 Amendment properly applies.

7 MR. ROTHENBERG: Mr. Chief Justice, we would
8 submit that there is a difference between the New York
9 Times v. Sullivan type of situation and this type of case.
10 New York Times v. Sullivan protected a newspaper from
11 inadvertently publishing defamation about someone else.
12 It did not involved a situation where a newspaper made an
13 agreement with a private person to obtain information. It
14 obtained this information and then the newspaper decided
15 that it was going to violate the agreement.

16 QUESTION: Well, there are many differences I
17 agree. But I don't think there's a difference in the
18 extent of government involvement in the two.

19 MR. ROTHENBERG: Except, Mr. Chief Justice, that
20 again involves the voluntary agreement. But we submit
21 there are many other ways of looking at the issue as well.
22 For example, the issue of waiver. When a newspaper makes
23 a promise of confidentiality to a news source or makes a
24 voluntary promise of any sort, does it then have the right
25 to say that we're going to violate that promise because we

1 have a First Amendment right to do that so? We submit
2 that once that promise is voluntarily made, the newspaper
3 has in effect waived the right to make any First Amendment
4 claim of a right to violate the promise. Otherwise,
5 promises of newspapers or media organizations would be
6 virtually worthless, not only to news source
7 confidentiality but at any individuals or businesses that
8 newspapers deal with.

9 You had a similar type of situation in the Snepp
10 case Justice Scalia mentioned where a person promised not
11 to publish any information regarding his employment at the
12 CIA without first getting the approval. He broke the
13 promise. He claimed a First amendment right to do so.
14 The court ruled that he couldn't do it -- in fact,
15 establish a constructive trust on all the profits from the
16 publication in that case.

17 Again -- so in the other issues relating to this
18 is whether newspapers should have the right to violate
19 agreements, should be subject to the same law as applied
20 to everyone else, every other individual or every other
21 business who makes an agreement with another party.

22 Should newspapers and media organizations who
23 enter into such agreements willingly in exchange for other
24 types -- types of information they consider valuable --
25 shouldn't they be subject to the same law as applies to

1 everyone else who makes voluntary agreements without
2 having a special -- without being given a special First
3 Amendment right to violate those agreements?

4 Finally, in -- in Branzburg v. Hayes, the
5 journalist argue there that honoring promises of
6 confidentiality were so important to First Amendment
7 values as to require constitutional protection. The court
8 rejected that request at that point and ruled that these
9 -- the First Amendment was simply inapplicable to these
10 types of agreements.

11 This Court should not now accede to respond its
12 demand to create a special First Amendment right to
13 dishonor their agreements.

14 Mr. Chief Justice, I would like to reserve any
15 time for -- remaining time for rebuttal unless there are
16 further questions from the Court.

17 QUESTION: Very well, Mr. Rothenberg.

18 Mr. French, we'll hear now from you.

19 ORAL ARGUMENT OF JOHN D. FRENCH

20 ON BEHALF OF THE RESPONDENTS

21 MR. FRENCH: Mr. Chief Justice, and may it
22 please the Court:

23 The issue before this Court on the merits -- if
24 the Court reaches the merits -- is whether a reporter's
25 oral promise to a source is sufficient reason to punish

1 the publication of truthful information on a matter of
2 public significance where the promise does not satisfy the
3 standards for waiver of a constitutional right, and as a
4 matter of State law does not even amount to a legally
5 binding contract.

6 Two facts in the case are clear beyond dispute.

7 QUESTION: Well, would you be making the same
8 argument that you're going to make if the contract was in
9 writing and there was consideration on both sides?

10 MR. FRENCH: Yes, I would, Your Honor.

11 QUESTION: All right.

12 MR. FRENCH: I would be making the same
13 argument, but this is an easier case, I think.

14 QUESTION: Right.

15 MR. FRENCH: The two facts that I believe are
16 beyond dispute is that the publications at issue are
17 entirely true, and that they involved matters of public
18 significance. As the Minnesota Supreme Court observed,
19 this was the quintessential public debate in our
20 democratic society. The four news organizations which
21 received the information from Mr. Cohen --

22 QUESTION: Well, are you -- again, are you
23 suggesting that the result would be any different if it
24 weren't -- just a low-level news story which may or may
25 not be in the public interest -- no public officials

1 involved? It's the same principle, isn't it?

2 MR. FRENCH: It's the same principle, but the
3 decisions of this Court say, Your Honor, that it is clear
4 that there should be protection accorded to the
5 publication of truthful information about matters of
6 public significance. The point I'm making here is plainly
7 it was truthful information. And the Minnesota Supreme
8 Court said part of the quintessential debate in our
9 society, therefore, obviously a matter of public
10 significance.

11 QUESTION: May I ask what is public
12 significance? About the candidate or about the person who
13 gave the information?

14 MR. FRENCH: The election campaign in toto, Your
15 Honor.

16 QUESTION: So that you could have published the
17 information that she'd been arrested or whatever it was
18 and that would have satisfied that requirement without
19 identifying the source, couldn't you?

20 MR. FRENCH: The information about Mr. Cohen was
21 information that was a part of a story about matters of
22 public significance. It is possible for news
23 organizations to print the name of Mr. Cohen in a
24 situation like this or to leave it out.

25 As the Court knows from the briefs, our two

1 clients here today printed his name. The Associated Press
2 did not print his name. WCCO Television didn't carry the
3 story at all. That's the point, Your Honor. This is not
4 only the area of quintessential debate --

5 QUESTION: Apparently, that indicates that
6 reasonable news editors could differ as to the public
7 significance of the information.

8 MR. FRENCH: Absolutely right. And those are
9 the people --

10 QUESTION: And we should say -- we should choose
11 between the two views on that.

12 MR. FRENCH: You should choose to allow
13 reasonable editors to differ, Your Honor. That is our
14 point. This is subject for editorial judgment -- I --

15 QUESTION: No, but you're saying that you sort
16 have got a heightened scrutiny, because it is a matter of
17 public significance, not that whenever editors may differ
18 as to whether it's a matter of public significance, then
19 you get the heightened scrutiny or is that your point?

20 MR. FRENCH: No, my point, Your Honor, is that
21 if there is any basis for a challenge such as that leveled
22 at these two newspapers by Mr. Cohen, that basis pales to
23 insignificance when the subject is truthful information
24 about a matter of public significance.

25 QUESTION: Such as there was involved in the

1 Snepp case.

2 MR. FRENCH: Such as there was involved in the
3 Snepp case, but in the Snepp case what the Court had
4 before it was, number one, protecting national security,
5 and number two, as the Court said, a fiduciary
6 relationship of the highest order. Also, in Snepp, the
7 Court did not hold that the information could not be
8 published. It simply held that the prepublication review
9 agreement was valid.

10 QUESTION: He had to pay the consequences for
11 what he did. But you -- this is not a prepublication
12 case. You could go ahead and publish and pay damages and
13 publish anything you wanted to.

14 MR. FRENCH: It's not a prepublication case,
15 Your Honor, but I think the case reveals why it comes so
16 close to being prepublication. These newspapers have had
17 to live now for 9 years with a lawsuit which at the trial
18 stage appeared to be going to cost them \$700,000 in
19 compensatory and punitive damages. And of course, has
20 over the course of 9 years cost them countless thousands
21 in attorneys' fees. That kind of sanction can be just as
22 chilling on free speech as the sanction imposed by
23 prepublication injunction.

24 QUESTION: It's still something that he could
25 weigh in the balance when they decide whether or not to

1 breach their agreement.

2 MR. FRENCH: It's still something they can weigh
3 in the balance, but it's something in my judgment they
4 should not have to weigh in the balance.

5 QUESTION: Mr. French, any number of large
6 concerns which have the potential for doing damage to
7 people, whether they're trucking companies or products --
8 making asbestos and newspaper companies have the potential
9 for doing damage by -- have to live with a certain threat
10 of litigation. That's part of doing business in our
11 economy, isn't it?

12 MR. FRENCH: That's absolutely right, Mr. Chief
13 Justice. And these newspapers live with it. They live
14 with it under the antitrust laws. They live with it under
15 the labor laws. They live with it under the laws of
16 taxation. Here we are talking about the core business
17 protected by the First Amendment, the business of
18 publishing the truth. And in that area, they should not
19 have to live under this.

20 Justice Frankfurter has a nice phrase in his
21 concurring opinion in Associated Press where he talks
22 about the business of the press being truth and
23 understanding, not the sale of wares like peanuts and
24 potatoes.

25 This is a case in which Mr. Cohen and his

1 counsel are arguing that it is appropriate by agreement to
2 suppress the publication of truthful information about a
3 matter of public significance. They are not suing because
4 they sold a product or a service to these newspapers and
5 didn't get paid. They are suing because a piece of
6 truthful information came to light in the course of a
7 heated political campaign.

8 QUESTION: Well, in that light was it wrong for
9 the newspaper reporter to guarantee confidentiality?

10 MR. FRENCH: It was not wrong at the level of
11 the newspaper reporter, Your Honor.

12 QUESTION: Suppose the newspaper reporter had
13 known that her editor would countermand her promise, and
14 made -- but the newspaper reporter made the promise
15 anyway?

16 MR. FRENCH: You'd have a different case,
17 because I think you'd get closer to fraud and there would
18 be more to weigh in the balance on Mr. Cohen's side.
19 There's nothing in the balance on his side right now.

20 I do not suggest that I think Mr. Cohen ought to
21 win that case. What I -- what I -- my main theme that I
22 want to assure the Court that I am advancing throughout my
23 argument is this. You heard Mr. --

24 QUESTION: Well, then it's the degree of wrong,
25 the egregiousness of the press misrepresentations that

1 controls the case?

2 MR. FRENCH: No, they do not control the case.
3 The controlling issue --

4 QUESTION: How would -- how should the case come
5 out, the case that I put to you?

6 MR. FRENCH: The case that you put to you --
7 that you put to me, should in my judgment still be a case
8 in which the First Amendment is relevant. Let me say that
9 first, before I get to the direct answer to your question.
10 Mr. Rothenberg argued here today before this Court, as he
11 argued in his briefs, that the First Amendment is
12 irrelevant. It has no weight. It doesn't count.

13 All this Court has to do in order to affirm the
14 Minnesota Supreme Court is to decide that's wrong. And
15 plainly that has to be wrong. I mean, if this Court's
16 decisions protect under the First Amendment the utterance
17 of defamatory speech, surely this Court must find some
18 room under the First Amendment to protect the utterance of
19 honest, accurate speech.

20 QUESTION: Mr. French, on that word "honest,"
21 did you publish that you promised not to publish that?

22 MR. FRENCH: The two reporters gave Mr. Cohen a
23 promise that they wouldn't --

24 QUESTION: Did you publish that the deal was
25 made not to release it?

1 MR. FRENCH: They did not, Your Honor.

2 QUESTION: Well, now you're talking about truth.
3 You didn't publish the truth.

4 MR. FRENCH: The entire truth about everything
5 did not get published.

6 QUESTION: You did not publish.

7 MR. FRENCH: But what this Court has said --

8 QUESTION: You didn't publish all the truth.

9 MR. FRENCH: That's absolutely right, Your
10 Honor. What the Court has said, however, on that score is
11 that that is a subject to be left to editorial judgment.
12 This Court has said that editorial judgment is a part of
13 the free press publication process that is entitled to
14 constitutional protection.

15 QUESTION: So what you're asking us to vindicate
16 is publication of the truth as truth is determined by the
17 editors.

18 MR. FRENCH: What I am asking the Court to do is
19 to conclude that the editors are the repository of First
20 Amendment bestowed rights to make judgments about what to
21 publish and not to publish. There's -- there was so much
22 to publish in this case, Your Honor. They could have
23 published, but the contact was made with the candidate,
24 Marlene Johnson, and she announced it was smear campaign.
25 They could have published, but they then contacted the

1 Whitney campaign, and the Whitney campaign said, we had
2 nothing to do with it. And on and on and on.

3 But what this Court has said is that whether the
4 decision is fair or unfair, the decision belongs to the
5 editors, not to judges.

6 QUESTION: You're saying more than that. You're
7 saying contract obligations can't stand in way. What if a
8 reporter for a -- for a newspaper in violation of his
9 contractual obligations to his employer is for money
10 leaking scoops to a competing newspaper. Don't you think
11 that the -- that the newspaper that hires him should be
12 able to sue him for that -- for that breach of his
13 agreement?

14 MR. FRENCH: Yes, yes, I do, Your Honor.

15 QUESTION: Even though he's turning over the
16 most newsworthy material in the world.

17 MR. FRENCH: I do believe it should be able to
18 sue, and it can sue under precedence of this Court.
19 First, what that reporter is doing is turning over
20 proprietary information. And this Court has said that
21 people who create proprietary information have a right to
22 reap the reward of having created it.

23 Second is --

24 QUESTION: Well, wait, wait, wait -- excuse me.
25 Why is that proprietary information? I mean it is

1 confidential information that the paper received. Right?

2 MR. FRENCH: Yes, that's correct.

3 QUESTION: Well, why is that any different from
4 the confidential information that was transmitted to the
5 reporter here?

6 MR. FRENCH: The reporter obtained that
7 information in the course of performing services for the
8 newspaper. The right to his services belongs to the
9 newspaper. Moreover, there is a -- there is a fiduciary
10 relationship between the reporter and his newspaper, which
11 is another area which that this Court said deserves -- has
12 said deserves protection.

13 QUESTION: All important contract rights.

14 MR. FRENCH: Important contract rights which do
15 not suppress publication of the truth. The difference
16 here is that -- is simply the difference in whose
17 newspaper will the truth be published? What Mr. Cohen --

18 QUESTION: It's a very odd calculus that the
19 person closest to the truth -- in this case the source --
20 cannot protect his ability to divulge or not to divulge
21 but that as you get further away from the sources of
22 truth, i.e., in the newspaper room, you say, oh, then the
23 newspaper has a right to protect its information by a
24 contract suit. I -- it seems to me the calculus should be
25 just the other way around.

1 MR. FRENCH: I think not, Your Honor. The --
2 the press in our country stands in the role of the
3 surrogate for the public. The public has no way of
4 knowing many things that it ought to know. The press goes
5 and ferrets out the information and publishes it. In the
6 course of that process, reporters find facts, evaluate
7 them, and write stories. Editors decide what to print and
8 what not to print. And in the end, what we're -- what
9 we're trying to do is to protect the public's right to
10 know. And that's what this case is about. Mr. Cohen
11 wants, by contract, to restrict the ability of editors to
12 do their job and decide what is important to convey to the
13 public as part of its right to know.

14 QUESTION: Mr. French --

15 QUESTION: But Mr. French -- excuse me. Go
16 ahead.

17 QUESTION: It seems to me that your argument
18 would lead the Court to reach a different result in
19 Branzburg v. Hayes as well, where the Court held that
20 reporters are not exempt from a generally applicable duty
21 to appear and respond to questions before a grand jury
22 even though they might be asked to reveal confidential
23 information. You would say that decision rests with the
24 editors, and apparently that case would have to come out
25 the other way.

1 MR. FRENCH: No, I would not say that, Your
2 Honor. That would not be my conclusion. What I am trying
3 to say here is that when a private citizen attempts to
4 assert a right under contract law -- which by the way, the
5 Minnesota Supreme Court said doesn't exist -- to suppress
6 publication of a piece of information. And that
7 information is truthful and has to do with a matter of
8 high, public significance, then under all the decisions of
9 this Court decided under every other rubric defamate --
10 pardon me -- right of privacy, protection of emotional
11 distress, and so forth, the press prevails in that
12 situation.

13 QUESTION: Because of the First Amendment.

14 MR. FRENCH: Because of the First Amendment.

15 QUESTION: And so you think this -- we really do
16 have a First Amendment question before us?

17 MR. FRENCH: I think the Court --

18 QUESTION: And that the -- when we -- and that
19 the we certainly have jurisdiction to decide it, is that
20 it?

21 MR. FRENCH: I think the Court could have,
22 Justice White, had the First Amendment before it if that's
23 what the Minnesota Supreme Court had decided.

24 QUESTION: Well, I know, but that's only been
25 argued now is that -- is that the -- is that the paper has

1 a First Amendment right not to live up to this contract.
2 I don't -- I don't know why you're arguing it if the issue
3 isn't here.

4 MR. FRENCH: I believe the issue is not here,
5 but Mr. Rothenberg says the issue is here, and I think I'm
6 obliged to respond to Mr. Rothenberg. I think --

7 QUESTION: Why don't you -- why don't you tell
8 us why we don't have to decide it?

9 MR. FRENCH: I would be delighted to.

10 QUESTION: Tell us why we don't have
11 jurisdiction to decide it.

12 MR. FRENCH: I would be delighted to do that,
13 Your Honor.

14 QUESTION: Well, that's always usually the first
15 part of a question.

16 MR. FRENCH: It is indeed.

17 The petitioner in this case had two theories at
18 trial, breach of contract and fraudulent
19 misrepresentation. The court of appeals took away the
20 fraudulent misrepresentation claim on the ground that it
21 didn't apply to the facts of this case.

22 The Minnesota Supreme Court also took away the
23 breach of contract recovery. In both instances at both
24 levels, those decisions were made under State law. And
25 the Minnesota Supreme Court makes it very clear that the

1 First Amendment had no part to play in those rulings.
2 Under those circumstances, the claims that petitioner
3 plead and tried and briefed and argued have been lost to
4 him under Minnesota State law, and there is no way that
5 they can be retrieved. It is --

6 QUESTION: Well, how is it that the court got
7 into its discussion of promissory estoppel? Is there some
8 Minnesota State law principle that enables the plaintiff
9 to rely on that even though it wasn't directly raised
10 below?

11 MR. FRENCH: There is not, Justice O'Connor, and
12 with respect I have to -- I have to dispute Mr.
13 Rothenberg's representation of Minnesota State law. I
14 think the Court can consult the Cowles Media brief. I
15 believe footnote 3 at page 13 on this subject.

16 What happened -- in response to your question --
17 not only to me but to Mr. Rothenberg, Justice O'Connor, is
18 that no one thought about promissory estoppel until, on
19 rebuttal argument in the Minnesota Supreme Court, Justice
20 Yetka, one of the dissenting justices, raised it as a
21 possibility -- isn't it possible that estoppel might apply
22 to this set of facts.

23 The Minnesota Supreme Court then did indeed
24 address it, but it is not essential to the decision to
25 vacate the judgment that petitioner won at the trial court

1 level on contract and fraud.

2 QUESTION: But surely there's a strong
3 intimation in the part of a majority opinion in the
4 Supreme Court of Minnesota dealing with promissory
5 estoppel that that theory could sustain the judgment,
6 other -- otherwise why would they talk about it?

7 MR. FRENCH: It is difficult in the context of
8 Minnesota State law to understand why Justice Simonett
9 talked about it, Your Honor.

10 QUESTION: No, it was the court talking about
11 it, wasn't it?

12 MR. FRENCH: It was the court, Your Honor. It
13 was the court talking about it.

14 QUESTION: And they talked about it. I wouldn't
15 think that there was any principle of Minnesota law that
16 would prevent them from doing that. We'd have to second-
17 guess the Minnesota Supreme Court, and they've -- the
18 court said we decide that -- because we decide that
19 contract law does not apply, we have not up 'til now had
20 to consider the First Amendment implications, but now we
21 must.

22 MR. FRENCH: That's correct.

23 QUESTION: Under a promissory estoppel analysis
24 there can be no neutrality towards the First Amendment.
25 Then they said -- they just held that to uphold -- to

1 enforce the promise under a promissory estoppel would
2 violate the defendant's First Amendment rights.

3 MR. FRENCH: May I --

4 QUESTION: I would think you're defending that
5 -- you've been defending that judgment most of the
6 morning.

7 MR. FRENCH: May I focus, Justice White, the
8 Court's attention on this sentence. I believe this
9 sentence in the opinion of the court describes what the
10 court was doing. In deciding whether --

11 QUESTION: Can you tell us where you're reading
12 from, Mr. French?

13 MR. FRENCH: I had it in my notes here in front
14 of me.

15 QUESTION: It's A-13.

16 QUESTION: Page A-13.

17 (Laughter.)

18 MR. FRENCH: Thank you, Justice Scalia. That's
19 correct. It is A-13. In deciding whether it would be
20 unjust not to enforce the promise -- now that's the
21 framework of promissory estoppel -- the court must
22 necessarily weight the same considerations that are
23 weighed for whether the First Amendment has been violated.

24 Now, that is -- that sets forth the thought
25 process of a court thinking about Federal principles and

1 incorporating them into its analysis of State law. That
2 is looking to Federal principle for guidance rather than
3 compulsion. And that is why we believe --

4 QUESTION: Yes, Mr. French, but the next
5 sentence they use the word "must."

6 MR. FRENCH: I agree, Your Honor. And I -- and
7 what -- what I would ask the Court to do is -- is as
8 follows. First, keep in mind, as Justice Souter said,
9 that at most you do not get to the First Amendment unless
10 you arrive there as a alternative holding. The case could
11 still have been decided under Minnesota promissory
12 estoppel law, as I believe the opinion said it was,
13 without a decision on the First Amendment but with a
14 decision that concepts germane under the First Amendment
15 should inform the decision.

16 QUESTION: Well, suppose the Supreme of Arizona
17 -- of Minnesota has said, we don't think there's any
18 protection for newspapers for confidential sources, and
19 therefore, we apply promissory estoppel. Could you have
20 appealed?

21 MR. FRENCH: Absolutely, Your Honor.

22 QUESTION: Well, isn't it the same principle?

23 MR. FRENCH: If the Supreme Court of Minnesota
24 had said there is no First Amendment protection and Mr.
25 Cohen prevails, that decision under promissory estoppel in

1 my judgment would have infringed our client's First
2 Amendment rights and we certainly would have appealed.

3 All I'm trying to describe is what the supreme
4 court did. We have -- in the Northwest Publications brief
5 at page 25 what I think is a useful recitation of the
6 decisions of this Court with respect to the need to avoid
7 constitutional questions if possible if the decision below
8 is ambiguous. And that would be my second point. First,
9 Justice Souter's point that the holdings are alternative
10 if they are that.

11 Second, it is at most ambiguous and that to
12 avoid the constitutional issue, this Court should conclude
13 that the decision on State law grounds predominates.

14 QUESTION: By the way did you defend in the
15 trial court on the grounds of the First Amendment?

16 MR. FRENCH: Yes, absolutely, Justice White.
17 The trial court did not allow it, Your Honor. The trial
18 court ruled that our First Amendment arguments were not
19 relevant. There was no First Amendment issue in the case.

20 QUESTION: Was it -- was it because there was no
21 State action? Was that -- was that the ground?

22 MR. FRENCH: No, he just said -- he -- there is
23 no First Amendment issue in this case is what the trial
24 judge thought.

25 QUESTION: Well, the intermediate appellate

1 court seemed to think that there was no -- First Amendment
2 was out of the case because there was no State action.

3 MR. FRENCH: No State action and waiver both,
4 Your Honor.

5 QUESTION: What your view about the State action
6 issue?

7 MR. FRENCH: Oh, I think the State action is
8 easy under New York Times against Sullivan. It seems to
9 me --

10 QUESTION: Well, that's because -- it's because
11 it's a -- would involve a claim of damages against the
12 paper.

13 MR. FRENCH: Yes, Justice White, and in addition
14 beyond that, I think Mr. Rothenberg's invocation of
15 voluntary agreement is a bit of a red herring. You don't
16 know whether the agreement does or does not have force.
17 You do not know what its content is. You do not know what
18 the remedies are until you apply State law. So the law of
19 the State of Minnesota first creates the right, and then
20 the courts enforce it. That seems to me to give rise to
21 State action.

22 QUESTION: Thank you.

23 QUESTION: Mr. French, Judge Yetka's dissent at
24 least seemed to think that the decision of the majority of
25 the court was based upon the First Amendment. And his

1 dissent was joined by the other dissenter, Justice Kelley.
2 He said the First Amendment is being misused to avoid
3 liability under the doctrine of promissory estoppel.

4 MR. FRENCH: He could have said that, Justice
5 Scalia --

6 QUESTION: What page is that?

7 MR. FRENCH: I'm -- I'm --

8 QUESTION: Page A-14.

9 (Laughter.)

10 MR. FRENCH: Yeah. Thank you again, Justice
11 Scalia.

12 (Laughter.)

13 MR. FRENCH: He could have said that two ways is
14 what I was -- is about to suggest, Your Honor. He could
15 have said the First Amendment is misused or it is a misuse
16 of the First Amendment to think about First Amendment
17 principles when you're thinking about promissory estoppel.
18 So it's not clear to me that he is there saying this is a
19 Federal First Amendment case or we're not thinking about
20 the First Amendment right when we're applying State law.

21 The last suggestion I would like to make on this
22 issue of jurisdiction of the Court, which Justice White
23 invited me to do. We pointed out in the cert. papers that
24 the question presented by the petitioner wasn't in the
25 case. The petitioner's question -- as the Court will

1 recall -- is whether or not an immunity should be
2 conferred on the press with respect to breaking its
3 promises to sources.

4 Now, in the petitioner's reply brief at page 13
5 -- I have that one on my own, Justice Scalia, without any
6 assistance, thank you. At page 13 of the reply brief, the
7 petitioner finally acknowledges that the Minnesota Supreme
8 Court did reserve to itself the opportunity, perhaps
9 sometime in the future, to enforce a promise under the
10 doctrine of promissory estoppel.

11 What that means to me is the question that was
12 presented to this Court by the petitioner, the question of
13 immunity is -- by the petitioner's own words -- not before
14 the Court. And there are cases of this Court which
15 indicate that if it becomes apparent after briefing an
16 oral argument, that the question upon which certiorari was
17 granted is not the question before the Court, the writ
18 will be dismissed. So that is another basis I would
19 suggest for dismissal here.

20 QUESTION: Mr. French, assuming we get to the
21 First Amendment issue, there's one thing you said a little
22 while ago that I'm not -- I may have misunderstood. Would
23 the result be any different in this case or would the --
24 would the First Amendment's significance be any different
25 in this case if the editors of the newspaper had said, we

1 agree that the promise ought to be kept and yet the
2 reporter had changed his own mind, and said, you know, I
3 shouldn't have made that promise, the informant is a rat
4 and I -- and I should expose him and such. And the -- and
5 the reporter then went out, contrary to the newspaper's
6 judgment, and revealed the identify. Would the -- would
7 the First Amendment protect the reporter against damages,
8 too?

9 MR. FRENCH: You're -- you're saying, Justice
10 Souter, the reporter does this on his own as a private
11 citizen?

12 QUESTION: That's right. Contrary to the
13 editorial judgment of the principal for whom he was
14 working as a -- as a disclosed principal for whom he was
15 working.

16 MR. FRENCH: I suppose the reporter would have
17 an argument that the First Amendment applies to me. If I
18 were judge, it would be very thin. I do not see what the
19 reporter's decision here --

20 QUESTION: Well, how can you say it would be
21 very -- he goes to another newspaper and sells the
22 information and they publish it.

23 MR. FRENCH: Well, I'm back to the other
24 hypothetical.

25 QUESTION: Yes, you're exactly -- you get

1 exactly the same situation, don't you?

2 MR. FRENCH: If he goes to another newspaper and
3 publishes it, then once again, he has acted contrary to
4 his fiduciary duty to his employer and he has sold a piece
5 of information that doesn't belong to him. He obtained
6 the information in the course of performing services for
7 the first employer.

8 QUESTION: Does -- does it make it easier for
9 you to answer if we assume also that the newspaper is
10 liable for the misdeeds of its agents, so you're stuck for
11 the damages. Does that change your answer?

12 MR. FRENCH: The newspaper is stuck for the
13 damages?

14 QUESTION: Yes, because of the misdeeds of its
15 agent.

16 MR. FRENCH: I believe that in this context
17 since we are talking about assessing damages with respect
18 to the act of publication, the newspaper should not be
19 stuck for the damages, as you put it, Your Honor.

20 QUESTION: I don't -- and -- but the reporter
21 is?

22 MR. FRENCH: No, I'm -- the First Amendment
23 always counts. I -- I have to come back to that. Mr.
24 Rothenberg --

25 QUESTION: But most of all when it's the

1 newspaper that's involved.

2 MR. FRENCH: When -- what this Court has said is
3 that it is protecting the public's right to know and it is
4 protecting the process of editorial judgment. What I am
5 defending here is the right of these editors in the
6 context in which they found themselves, having received
7 substantial additional information that the reporters did
8 not know --

9 QUESTION: But you're not sure as to what
10 happens with the reporter. You're also not sure as to
11 what happens in the hypothetical of where the reporter
12 deliberately misleads, knowing that his promise is going
13 to be countermanded. And it seems to me that that's a
14 very, very difficult position. We're asking what the
15 First Amendment consequences are --

16 MR. FRENCH: Your Honor --

17 QUESTION: And you haven't -- and it seems to me
18 that you haven't explained this in a coherent theory.

19 MR. FRENCH: This -- what I -- I'll try again,
20 Your Honor. What this Court must do I think is at a
21 minimum say that the Minnesota Supreme Court was right in
22 concluding that First Amendment interest should be
23 balanced.

24 Now, the Court could go far beyond that and
25 erect a much more absolutist rule that says the First

1 Amendment right -- the First Amendment interest is so
2 paramount that we cannot think of a circumstance in which
3 the promise must be kept. I don't ask the Court to do
4 that here today, because I think I don't have to. I think
5 if the Court will apply its own prior holdings that with
6 respect to the publication of truthful information of
7 matters of public significance, the First Amendment
8 interest is paramount. And it is possible to balance
9 something against it. It is possible as this Court said
10 -- has said many times -- to balance a State interest of
11 the highest order. But I haven't seen one of those yet.

12 QUESTION: Mr. French, that depends on what you
13 mean by balancing. And there are two ways that this
14 opinion that this opinion might be understood. I suppose
15 you -- you might say that all it's saying -- and this is
16 your position -- all it's saying is that you have to take
17 into account First Amendment considerations. But it might
18 also be saying that the First Amendment, not in all
19 circumstances but in some circumstances, prohibits the
20 penalty for the contractual breach. I'm sorry if I went
21 over your time.

22 MR. FRENCH: That's all right, Your Honor. I'm
23 here at your disposal.

24 QUESTION: I think the Chief Justice will let
25 you --

1 QUESTION: By all means answer the question.

2 MR. FRENCH: Your Honor, there should I suspect
3 -- if we had 100 of these cases and we could see enough
4 fact situations, I think we would find some instances in
5 which we would say if this is the interest that the
6 claimant is trying to protect, it is insignificant in
7 comparison with the First Amendment interest, and the
8 First Amendment interest always overrides. But there
9 might also be some cases in which the interest advanced by
10 the claimant is regarded by this Court as an interest -- a
11 State interest of the highest order. And under the
12 particular facts of the case, it -- the Court might hold
13 it was appropriate for the press to honor the promise.

14 QUESTION: Thank you, Mr. French.

15 Mr. Rothenberg, do you have rebuttal? You have
16 5 minutes remaining.

17 REBUTTAL ARGUMENT OF ELLIOT C. ROTHENBERG
18 ON BEHALF OF THE PETITIONER

19 MR. ROTHENBERG: Mr. Chief Justice, and may it
20 please the Court again:

21 Your Honors, I would like to make a couple of
22 points on rebuttal. First regarding the issue of whether
23 the decision below was based on the First Amendment. We
24 would submit that any fair reading indicates that in fact
25 was based upon the First Amendment.

1 When you look at pages A-12 to A-14, you have
2 such language of the Minnesota Supreme Court saying we
3 have not, up to now, had to consider First Amendment
4 implications but now we must. Under a promissory
5 estoppel, there can be no neutrality towards the First
6 Amendment. The Court must -- must balance the
7 constitutional rights of a free press against the common
8 law interest in protecting a promise of anonymity, and
9 says that of critical significance to this case is the
10 fact that this promise was made in a classic First
11 Amendment context of the quintessential public debate in
12 our democracy.

13 And finally the court concluded that these
14 promises were unenforceable because of the First
15 Amendment.

16 We would submit, Mr. Chief Justice, that there
17 can be no question that the Minnesota Supreme Court
18 regarded that its decision was required by the First
19 Amendment.

20 Now, regarding the issue of promissory estoppel,
21 again, under this decision, and under the Christianson
22 decision referred to in the decision below, that under
23 Minnesota law when a party pleads a breach of contract
24 that under Minnesota law that court can decide on the
25 basis of promissory estoppel, which basically implies a

1 contract, that State law of Minnesota.

2 And finally the fact that the Minnesota Supreme
3 Court did consider First Amendment issues is sufficient to
4 give this Court jurisdiction under the several cases that
5 were referred to in the briefs under our longstanding
6 practice by the United States Supreme Court.

7 Mr. French says that the issue of whether -- if
8 the promise is kept -- this is going to prevent the
9 publication of truth. But the question is quite
10 different, Your Honor. As a matter of fact, to obtain the
11 truth in many cases up to 75, 80 percent of the cases in
12 terms of certain news media, their media organizations
13 must make these promises of confidentiality to induce
14 sources of information to give them information. Without
15 these promises, they would not have the truthful
16 information to convey to the public. The public would be
17 deprived of information. Now, that's a very --

18 QUESTION: Well, Mr. Rothenberg, that troubles
19 me a little, because Mr. Cohen could have sent the
20 information in an unmarked envelope presumably, and the
21 paper would still have had it, right?

22 MR. ROTHENBERG: Yes, Justice O'Connor, but Mr.
23 Cohen, as many other confidential sources, felt that he
24 could trust the promises of the reporters. He felt that
25 the promises would be honored, and therefore, he accepted

1 the promises of the reporters in this case.

2 Basically, the issue is --

3 QUESTION: Of course, you can't say it comes
4 from a reliable source if you get it in an unmarked
5 envelop, and I assume no responsible reporter would use it
6 if it just came -- you know, unless it was independently
7 verifiable somehow.

8 QUESTION: Well, I guess if it was -- the
9 question here was just a court record of an earlier
10 prosecution which then the paper could obviously check it.

11 MR. ROTHENBERG: Yes, Justice O'Connor. Yes,
12 Justice Scalia, on that one.

13 (Laughter.)

14 MR. ROTHENBERG: No, I'm sorry, I didn't mean to
15 -- but I think Mr. Cohen felt that, again, he could trust
16 the promises that -- as you pointed out, Justice Scalia,
17 that when delivered and trusting the promises -- perhaps
18 we carry a little bit more --

19 QUESTION: I thought you were making a more
20 general argument, Mr. Rothenberg, about the utility of
21 having contractual liability in general, not just in this
22 particular case. Just in this particular case, if that's
23 the argument you're making, it's not --

24 MR. ROTHENBERG: Your Honor, the issue that is
25 raised by Justice Yetka below, where he pointed out that

1 the real issue of this case is the fact that the
2 newspapers made a promise to Mr. Cohen. Mr. Cohen relied
3 upon that promise and provided information that the
4 newspapers consider valuable, in fact, published on the
5 first page of the Star Tribune newspaper. They violated
6 their promise to him. As a result of their violating
7 their promises to them, they caused him damage --
8 considerable damages in the force -- in the form of
9 getting him fired from his job and subsequent financial
10 damages.

11 Any other person, any other business, any -- in
12 a similar situation would be liable for damages for breach
13 of contract.

14 QUESTION: Why did he get fired from his job?
15 Why did he get fired from his job as a consequence?

16 MR. ROTHENBERG: Justice Blackmun, he got fired
17 from his job precisely because of the newspaper articles.
18 When those articles came out the next day, the Star
19 Tribune article not only identified Mr. Cohen, but also
20 named his employer -- gratuitously named his employer,
21 Justice Blackmun.

22 QUESTION: Who was his employer?

23 MR. ROTHENBERG: Martin Williams Company, a
24 major Minneapolis advertising company which of course does
25 work for political figures and for the Government. They

1 felt that because of what has happened -- because of their
2 being named -- that they had to fire Mr. Cohen, and that
3 of course is found by the jury and the Minnesota Court of
4 Appeals and the Minnesota Supreme Court pointed out in
5 their decisions that this is no longer an issue in the
6 case, that this was conceded by the newspapers.

7 Thank you, Mr. Chief Justice.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
9 Rothenberg.

10 The case is submitted.

11 (Whereupon, at 11:05 a.m., the case in the
12 above-entitled matter was submitted.)
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*Alderson Reporting Company, Inc., hereby certifies that
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Supreme Court of The United States in the Matter of: No. *91*

No. 90-634 DAN COHEN, Petitioner v. COWLES MEDIA COMPANY

dba MINNEAPOLIS STAR AND TRIBUNE COMPANY, ET AL.

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