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**CRIMINAL LAW: CRIMINAL LAW
ENFORCEMENT V. THE FREE PRESS**

*Panelists: Eugene Volokh, Adam Liptak, Michael Mukasey, Eric M.
Freedman*

Moderator: Hon. A. Raymond Randolph¹

12:00 p.m. to 2:00 p.m.

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Mayflower Hotel, Washington, D.C.

JOHN G. MALCOLM: I am John Malcolm. I am the Chairman of the Criminal Law Practice Group, so I welcome you all here today for what should be a really interesting and provocative program.

I really just wanted to take a moment to put in a plug for our practice group. Those of you who are here, who would like to find out more about our activities, who would like to be engaged, I would encourage you to reach out to Dean Reuter. You can contact me, again, John Malcolm at the Heritage Foundation. We would love to get you involved in our activities.

Now, without further ado, let me turn it over to our moderator, Judge Ray Randolph of the D.C. Circuit.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Thank you. I wonder if I should be called a “navigator.”

[Laughter.]

¹ Eugene Volokh, Gary T. Schwartz Professor of Law, University of California, Los Angeles School of Law; Adam Liptak, Supreme Court Correspondent, New York Times; Michael Mukasey, Partner, Debevoise & Plimpton LLP, and former United States Attorney General; Eric M. Freedman, Maurice A. Deane Distinguished Professor of Constitutional Law, Hofstra University School of Law; Moderator: Hon. A. Raymond Randolph, United States Court of Appeals, District of Columbia Circuit.

JUDGE A. RAYMOND RANDOLPH: I kind of like that better than “moderator.” It has visions of Magellan and Christopher Columbus, and all the rest of it.

But anyway, the subject of our discussion today is an old one, but it’s a recurring one. There are interests of the press in gathering information and reporting on the operations of the government, and there are the interests of the government in preserving national security and enforcing the criminal law. I think all of you have access to the topic itself, as described, and I am not going to go any further.

I said it’s an old problem, and I just want to share with you one thing. That in 1971, I was in the Solicitor General’s office when an important case arrived. The Supreme Court granted certiorari on a Friday morning in late June and ordered the briefs to be filed by nine o’clock Saturday morning, and then held the argument at eleven o’clock on Saturday in an extraordinary session. The case was the Pentagon Papers case, and I wrote part of the brief without having seen the forty-seven volumes.² But the issue, one of the issues that our panelists will be discussing, is an issue that was left open in Pentagon Papers, and that is, even though you can’t get an injunction because of the prior restraint doctrine to prevent the newspapers, in that case, the *New York Times* and the *Washington Post* from publishing, that didn’t necessarily mean that the publishers could not be prosecuted under—at that time, it was the Espionage Act—for revealing classified information.³ And that question has recurred again and again and again, sometimes in cases in our court and certainly in the headlines with people like Mr. Snowden and Private Manning, most recently.⁴

Anyway, our first speaker is probably familiar to all of you. Eugene Volokh is a frequent participator in the Federalist Society programs, and among other subjects, he teaches free speech at UCLA Law School. He is the author of numerous articles and a First Amendment casebook and also the most extraordinary teacher’s manual I have ever seen.⁵ It accompanies his casebook. I think it’s twice as long as the casebook, isn’t it?

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: Anyway, Professor Volokh clerked for Judge Alex Kozinski and then for Justice Sandra Day O’Connor, and he’s probably more well known as the founder of The Volokh

² See *New York Times Co. v. United States*, 403 U.S. 713, 759 (1971) (Blackmun, J., dissenting).

³ 18 U.S.C. § 793 (2006).

⁴ See, e.g., Patricia L. Bellia, *WikiLeaks and the Institutional Framework for National Security Disclosures*, 121 YALE L.J. 1448, 1479-81 (2012).

⁵ See generally EUGENE VOLOKH, THE FIRST AMENDMENT AND RELATED STATUTES: PROBLEMS, CASES, AND POLICY ARGUMENTS (4th ed. 2011); Eugene Volokh, *The First and Second Amendments*, 109 COLUM. L. REV. SIDEBAR 97 (2009); Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791 (1992).

Conspiracy, a Web blog that attracts some 20,000 visitors every single working day.⁶

Professor Volokh.

EUGENE VOLOKH: Thank you. I should have some PowerPoints, and there they are.

So I was told that there are two things going on here, and I'll talk about them both. Legally speaking, they're very separate. Practically, they come up often in very, very similar contexts.

The first thing is the news gatherer's privilege question. Now, the leading case on this at the Supreme Court level is *Branzburg v. Hayes*, although it turns out the law of the news gatherer's privilege ends up being quite a bit different than you would expect from reading just the case.⁷ The question in *Branzburg v. Hayes* was whether journalists should have a privilege to refuse to reveal their confidential sources; the journalists said, "Look, we need to have this privilege, because otherwise it would burden our communication of the news to the public, because people would be much more reluctant to talk to us."⁸ And the court said, "No."⁹ The majority—five out of nine, but five is all it takes—said, "No." You have the same duties as any citizen does to testify about possibly relevant information, especially in the context of a grand jury subpoena, which was the issue there. You have no privilege not to testify.¹⁰

Now, the dissent said there should be a privilege.¹¹ Actually, the one justice dissenting, Douglas, called for pretty much an absolute privilege, and three other justices, Stewart, Marshall, and Brennan, called for a privilege that basically sounds in strict scrutiny.¹² Disclosure is required only if there is a compelling interest, and there is no less restrictive means of getting the information needed to serve that interest.¹³

You'd think that would be it, but there was this concurrence, not a concurrence in the judgment, just a concurrence of somebody who joined the majority fully, Justice Powell. Justice Powell essentially said, "Well, I just want to repeat what the majority is saying" (and it did say something like this towards the end of its opinion, although Powell elaborated on it)

⁶ See Volokh, UCLA SCHOOL OF LAW, <http://www2.law.ucla.edu/volokh/> (last visited Aug. 13, 2014) (noting the number of daily visitors to *The Volokh Conspiracy*). See generally Eugene Volokh, *The Volokh Conspiracy*, THE WASHINGTON POST, <http://www.washingtonpost.com/news/volokh-conspiracy/>.

⁷ See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁸ *Id.* at 682.

⁹ *Id.* at 685–86.

¹⁰ *Id.* at 682.

¹¹ *Id.* at 737–47 (Stewart, J., dissenting).

¹² *Id.* at 712 (Douglas, J., dissenting); see also *id.* at 743 (Stewart, J., dissenting).

¹³ *Branzburg*, 408 U.S. at 678.

“that there are protections for newsmen.”¹⁴ There is to be “no harassment of newsmen,” which sounded in the context of the opinion like no going after newsmen just in order to, for example, identify a source who might be a government employee whom you want to fire or somebody else who might want to retaliate against—or for that matter, harassing a newsman because you don’t like what he is saying about you, so you called him in front of the grand jury as a kind of punishment to take up his time, to ruin his relations with the sources, and the like.¹⁵

Investigation must be in good faith and with legitimate need.¹⁶ The connection to the investigation must be more than remote and tenuous.¹⁷ Note that these are the kinds of things that in principle you can get without First Amendment scrutiny under just normal standards related to subpoenas; you could quash such subpoenas based on these kinds of factors.

And, finally—this is where the concurring opinion got even more potentially confusing—Justice Powell said that the proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct must be struck on a case-by-case basis.¹⁸

So you might say “Well, that’s still somebody who joined the majority opinion, so there is no privilege,” or you might say, “Well, because he was a necessary vote for the majority opinion, there is some kind of modest privilege sounding like a slightly more aggressive enforcement of subpoena standards.” Yet several circuit courts basically said that Powell’s opinion calls for something like strict scrutiny, which is funny because that’s what the dissent called for, and the one thing we know about Powell’s opinion is that he dissented from the dissent.¹⁹

Justice Powell could have given the dissenting justices the necessary fifth vote to basically make it a majority, subject to Douglas’ more aggressive view, but he didn’t. He had more in common with the majority than the dissent. Yet for quite a while, the dominant view among circuit courts was, “Yes, there is a privilege, notwithstanding that.” Surprising, and in some measure there has been a retreat from that: Some recent opinions have cut more in favor of taking the view that in fact there is no news

¹⁴ *Id.* at 709–10 (Powell, J., concurring).

¹⁵ *Id.*

¹⁶ *Id.* at 710.

¹⁷ *Id.*

¹⁸ *Id.* (“The asserted claim to privilege should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”).

¹⁹ *Id.* at 709–10; *see, e.g.*, *LaRouche v. Nat’l Broadcasting Co., Inc.*, 780 F.2d 1134, 1139 (4th Cir. 1986).

gatherer's privilege.²⁰ So that's the issue at the First Amendment level.

Note, incidentally, that even under a strict scrutiny approach, the news gatherer's privilege might be actually quite modest in scope in those cases we have been hearing most about where the person is being—the journalist is being asked to testify about a source of a leak, of an allegedly illegal leak.

You can think of there being two general classes of cases involving news gatherer's privilege. The first class is when somebody calls a reporter and says, "Look, I'm not involved in a crime, but I know something about it. I'm a government employee. I've seen evidence of fraud. I'm going to pass this along to you, but you've got to keep my name out of it, because otherwise I'll lose my job, otherwise I might be harassed in various ways. I am not going to be prosecuted, because I am not involved in the crime. I'm just a witness, but I don't want to get involved any more than I need to." That's one class of cases, and in those cases, maybe strict scrutiny would provide quite substantial protection for the reporter and for the source.

But the second class of cases is when somebody is leaking something to the reporter, so the reporter is really the only percipient witness, assuming the leak is criminal or even tortious, to the underlying bad act. So there, under strict scrutiny applied, at least in a nonfatal-in-fact way, you might say there is a compelling interest in enforcing the law banning the leaks. And while in principle you might be able to find other evidence about the leak, very little evidence is going to be as persuasive to the jury as the other side of the leak coming forward and saying, "Yep. He called me. He told me. That's what happened." So in principle, for the second set of cases, this qualified privilege—even if you read Powell's concurrences as endorsing it or even if you adopt the view of the principal dissent—wouldn't actually amount to much.

So that's the First Amendment picture. Some circuits accept a qualified privilege, although again not clear how much weight it would carry in the leak persecution cases.²¹ Other courts, I think with a more correct reading of *Branzburg*, reject it.²²

But if you step back from this and look at it as a matter of broader First Amendment law, this question of when the government is entitled to every person's evidence is actually pretty complicated.

²⁰ See *In re Grand Jury Subpoena (Miller)* 438 F.3d 1141 (D.C. Cir. 2005); *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003).

²¹ See, e.g., *In re Madden*, 151 F.3d 125, 128–29 (3d Cir. 1998); *United States v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998); *Shoen v. Shoen*, 5 F.3d 1289, 1292–93 (9th Cir. 1993); *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992); *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181–82 (1st Cir. 1988); *von Bulow v. von Bulow*, 811 F.2d 136, 142 (2d Cir. 1987); *United States v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986).

²² See *supra* note 20; *In re Grand Jury Proceedings*, 810 F.2d 580, 584–86 (6th Cir. 1987).

So for example—and this is what the dissent in *Branzburg* stressed—there is a long line of cases involving expressive association, membership and association, which said that actually, yes, strict scrutiny is what’s required in order to get information about your First Amendment activity in the form of joining the NAACP or joining any other association.²³ Likewise, as to expenditures in support of political groups, the Court has routinely said that the strict scrutiny is required for such disclosures, although this strict scrutiny has often been satisfied, sometimes over Justice Thomas’s dissent.²⁴

When it comes to reading material, there are only a couple of lower court cases involving subpoenas of books people have read; both courts have actually also applied strict scrutiny.²⁵

Now, when it comes to other situations, though, it’s quite different. When it comes to identifying anonymous commenters, lower courts have generally applied some kind of heightened scrutiny, but when it comes to other things, for example, tenure review letters, *EEOC v. University of Pennsylvania* rejected any heightened scrutiny in that kind of situation. And that is so even though there, too, the concern was that revealing the identity of confidential speakers and the content of their speech is going to interfere with speech and deter speech, just as was the case in NAACP cases.²⁶

Likewise, in the newspaper editorial board discussion case, *Herbert v. Lando*, the court rejected a privilege, even though the concern likewise was that if you can’t communicate confidentially, people will communicate less candidly or perhaps not at all.²⁷

Likewise, say somebody wants to subpoena your communications with your friends. For example, say you’re being prosecuted for some crime and the government wants to show motive, so they call your friend to the stand to testify about what you told him about it. And he says, “Well, I don’t want to testify. That would chill speech between me and my friends.” Sure, it would chill speech between him and his friends. But he has to testify, in any case. So that’s what makes it actually a little complicated to figure out where to fit the newsgatherer-source communication case. *Branzburg*, I think has resolved that question, but I can see why it was a 5-to-4 case.

There remains the question about whether there should be a common-law privilege (not a First Amendment-mandated privilege) for

²³ See, e.g., *NAACP v. Alabama*, 357 U.S. 449, 462 (1958).

²⁴ See, e.g., *Citizens United v. FEC*, 130 S. Ct. 876 (2010); *id.* at 980 (Thomas, J., concurring in part and dissenting in part).

²⁵ See *Tattered Cover, Inc. v. City of Thornton*, 44 P.3d 1044 (Colo. 2002); *In re Grand Jury Subpoena to Kramerbooks & Afterwords Inc.*, 26 Med. L. Rptr. 1599 (D.D.C.1998).

²⁶ *Univ. of Pa. v. EEOC*, 493 U.S. 182, 201 (1990).

²⁷ *Herbert v. Lando*, 441 U.S. 153, 175 (1979).

communications between journalists and confidential sources.²⁸ Remember in federal court, privileges—by federal rules of evidence adopted by act of Congress—are a matter for continuing development of the common law: Congress has specifically required courts to develop (and perhaps even create) privileges through the common law method.²⁹

In *Branzburg*, the court rejected this argument, and some recent courts have said, “well, *Branzburg* disposed of it,” and I think that’s a reasonable point. But there is still the question of whether that should be revisited, common law being something that can change over time.

Today, statutes in thirty-three states provide for such a privilege.³⁰ And even in the remaining states, at least some courts have recognized such a privilege as a matter either of state constitutional or common law.³¹

Of course, the privileges are quite different. Some are absolute. Some are qualified. Some are for all speakers. Some are limited to professional journalists, however one defines that.

Moreover, there are some possible analogies justifying a journalist-source privilege: the attorney-client privilege, psychotherapist-patient privilege, clergy-penitent, and spouse-spouse privileges. Of course, how far those analogies go, it’s hard to tell. These are only analogies. They are not identities. We are not talking about attorneys. We are not talking about psychotherapists. At the same time, you can make plausible arguments that there are similar societal interests in fostering candid communication that yield a justification for a privilege in the journalist source context as in the others.

Note, though, that most of those other privileges are not absolute. For example, there is a crime fraud exception from many such privileges. And it seems to me that if you are trying to leak documents in violation of the criminal law and you are calling up a journalist to help you commit that crime, that would fit very neatly into a crime-fraud exception if there is to be such an exception to any common law journalist privilege.

Likewise, more broadly, the journalist is the only percipient witness in many of those cases of the leak cases, and that, it seems to me, cuts in favor as a common law matter of carving out an exception in those situations.

Now let me turn to the second category of questions, which often

²⁸ See, e.g., *In re Williams*, 766 F. Supp. 358, 367–68 (W.D. Pa. 1991) (discussing the common law privilege at length).

²⁹ FED. R. EVID. 501.

³⁰ Henry Cohen, *Journalists’ Privilege to Withhold Information in Judicial and Other Proceedings: State Shield Statutes* (Cong. Research Serv. 2007).

³¹ *Id.*

arise in the same situation. Let's say that something has been leaked to the journalist. One question is, "Can the journalist keep the source out of jail, in a sense, by not revealing his identity?" The second question is, "Can the journalist keep himself out of jail?"

This often comes up when there are leaked government secrets, perhaps related to national security or perhaps to other matters. But it could also arise for corporate secrets, violation of a duty of confidentiality, or duty of loyalty. It could arise for trade secrets. Trade secret law, at least in principle, if you look at black letter summaries, penalizes downstream distributors and not just those who violate their own duty of confidentiality.³²

Breach of a professional confidence is what happens if a journalist publishes something that was wrongly leaked to him by a lawyer or by a psychotherapist. The publication of illegally recorded cell phone conversations is not exactly the same issue, but closely analogous. This, of course, arose in the *Bartnicki v. Vopper* case, in which the Court held that downstream distributors who weren't involved in the original illegal recording (a tape just showed up in their mailbox)³³ are immune, at least when the matter is of public concern (or maybe of exceptionally great public concern, if you listen to the concurrence).³⁴

You could imagine a similar issue arising with regard to publication of unconstitutionally gathered evidence—where the underlying violation is not of criminal law or civil law, but of the Constitution. What if there's something that's gathered in violation of the Fourth Amendment, and a newspaper learns about that and publishes that? Could that lead to a criminal prosecution or a civil claim?

Now so far I've spoken of situation in which the reporter gets documents out of the blue. That's what seems to have happened to *Bartnicki v. Vopper*.³⁵ Even then, there might in principle be liability, especially if it's an original document and not just a copy—that could be literally receipt of stolen property. But there could also be liability even when there is no tangible stolen property; in *Bartnicki v. Vopper*, the publication of illegally intercepted material was civilly actionable, and sometimes criminally actionable (though the Court held that the First Amendment trumps that cause of action).³⁶

But, at the other extreme, imagine a reporter solicits documents from a source—calls up the source and says, "Hey, you know, I hear you

³² See, e.g., CAL. CIV. CODE § 3426.2 (Deering 2014).

³³ *Id.* at 517, 519.

³⁴ *Id.* at 535–56 (Breyer, J., concurring).

³⁵ *Bartnicki*, 532 U.S. at 519.

³⁶ *Id.* at 531.

know something about this; tell me”—and it’s perfectly clear that reporter knows the revelation would be illegal, either criminal or tortious.

Such a request could constitute soliciting crime. It could be conspiracy to create a crime. It could be aiding and abetting crime. It could be intentional inducement of breach of contract or civil conspiracy. There could be pretty serious risk of liability there.

And of course there are lots of scenarios in between. You get a document. You call the person to confirm. Then you have a conversation. In the conversation, other things come out. How much of that is induced or solicited misconduct?

So these are the issues that can come up. And a lot of them are the bread and butter of everyday news gathering, and the question is what should be done about it.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Thank you. You know, one time I was moderating a panel. A noted Harvard law professor was speaking, and I kept handing him notes, and unlike Gene, he didn’t sit down. And he finally turned to me and said, “The judge is getting nervous. He is looking for a gavel,” and I said, “Actually, I was looking for a U.S. Marshal.”

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: Our next speaker is Adam Liptak. He’s been the *New York Times* Supreme Court reporter since 2008. He’s a graduate of the Yale College and Yale Law School. He’s practiced law. He’s taught media law at UCLA Law School, at the Yale Law School, and the Columbia School of Journalism. In addition to covering the Supreme Court, he’s written many articles in law reviews and publications such as *Businessweek*, *Vanity Fair*, *The New Yorker*, and other national publications, and we’re very happy to have Mr. Liptak with us.³⁷

[Applause.]

ADAM LIPTAK: Thank you, Judge.

So I did. It was a while ago, but I used to practice in this area, and I remember once being on a panel back at the New York City Bar probably in the ‘90s. Judge Mukasey was still on the bench, and I had looked up, did a little research, and I saw that Judge Mukasey had been a press lawyer back in the day. Patterson Belknap, am I right about that, representing the *Daily*

³⁷ See, e.g., Adam Liptak, *The Hidden Federal Shield Law: On The Justice Department’s Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227 (1999); Adam Liptak, *Deciding if Inmates Get to Know How They’ll be Executed*, N.Y. TIMES, Mar. 11, 2014, at A10; Adam Liptak, *Justices May Limit Securities Fraud Suits*, N.Y. TIMES, Mar. 6, 2014, at B1.

News? And I said to him at the little dinner beforehand, “God, it must be so good for us in the press to appear before a wise judge like you who really understands our arguments.” He said, “Wrong. Wrong question. The question is, “How much does it hurt you?”

[Laughter.]

ADAM LIPTAK: And I fear I have a little bit of the same thing, because if you really know your arguments, you know the weak spots in your arguments, and I think I will start with Eugene’s topics in reverse order, and on some of them, I will say just what you’ll expect me to say, and on some of them, I might make some admissions against interest.

So, I think there are three basic propositions here. In the great press cases of the ‘60s and ‘70s, at a time when the press really had a lot of power, prestige, authority, and was thought to be responsible, mature, someone you could deal with—you may not like what the editors did on every occasion, but you could talk to the *New York Times* Washington Bureau chief. We weren’t living in a WikiLeaks era but in an era where there was somebody on the other side of the discussion who was part of your milieu, and in those cases, we almost ran the table on everything we cared about.

In *Pentagon Papers*, we, more or less, established the proposition that you cannot stop the publication of truthful, newsworthy information that citizens might like to hear about in order to govern themselves in a democracy. So no prior restraints, and I understand there’s always a little bit of give and always a little balancing, but that’s certainly the message we took away from *Pentagon Papers*, no prior restraint.³⁸

Other cases leading up to *Bartnicki* seem to say, more or less, that there could also be no subsequent punishment of press publication of truthful and newsworthy information, even if somebody violated the law somewhere, so long as you were something like the passive recipient of the information. So no prior restraint, no subsequent punishment so long as you were—Eugene used the word “innocent”—passive. You didn’t go and break into somebody’s office and steal the stuff. You didn’t hack somebody’s phone. Somebody violated some obligation of that other person, gave it to you.

Then in *Branzburg*, amazingly, we got within one vote of running the table of establishing what the First Amendment doesn’t seem to me to say, that we have a special privilege against subpoenas not available to others.³⁹ So I think the First Amendment does say this: it says no government censorship of at least speech about politics that’s truthful and useful in self-governance. But to go further than that and say that the First

³⁸ *New York Times Co. v. United States*, 403 U.S. 713, 725–26 (1971).

³⁹ See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972).

Amendment has in it a privilege that we don't have to obey subpoenas when we are sometimes the sole eyewitness to a crime, that's a bold proposition. You can really congratulate the press lawyers, myself included, for baffling the courts with this proposition for decades, for really, essentially, turning the dissent.

Plus, everyone talks about the Powell concurrence, and it is a little confusing, but it's very, very brief.⁴⁰ It's two or three paragraphs, and to build on that foundation, the idea that there's constitutional protection, it was quite an achievement, and sooner or later we were going to be called on it, and it was partly a function of the decline of our power and prestige that we were called on it, but I don't think that it was wrong.

I do think that as a matter of prosecutorial discretion, as in the Justice Department guidelines, the statutes that Eugene described, federal common law as Judge Tatel sketched out in the *Judy Miller* case, where at least you get some balancing, and where what you really want in these cases is to get before a judge and make your case.⁴¹ This was a really important publication, and as Tatel put it, you balance how much harm the leak caused versus how much good the publication did. And in some cases, the good will outweigh the harm. So anyway, I think it would be wise to allow a sensible balancing and to avoid needless confrontations between the press and the government.

And I think the place to look for how this works and how messy and unruly it is, but how this really ought to work is in Alexander Bickel's great book *The Morality of Consent* where he welcomed what he called the "contest between press and government."⁴² The basic idea is it's the government's job to keep the government's secret, and if somebody violates an oath to keep a secret, by all means punish that person; but the press, if it finds out what it can, without itself committing a criminal violation, and publishes what it believes will aid citizens in a democracy to govern themselves should be left alone.⁴³ And here's what Bickel says: "This is not an arrangement whose justification is efficiency, logic, or clarity. Its justification is that it accommodates power to freedom and vice versa. It reconciles the irreconcilable."⁴⁴ He acknowledges that this is, "an untidy accommodation."⁴⁵ But he goes on to say the accommodation works, but it "works well only when there is forbearance and continence on both sides. It threatens to break down when the adversaries turn into enemies, when they

⁴⁰ *Id.* at 709–10 (Powell, J., concurring).

⁴¹ *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1163-73 (D.C. Cir. 2005) (Taft, J., concurring).

⁴² ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 81 (1975).

⁴³ *Id.*

⁴⁴ *Id.* at 86.

⁴⁵ *Id.* at 87.

break diplomatic relations with each other, gird for and wage war.”⁴⁶

Thanks.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Adam mentioned Alexander Bickel who was truly a great constitutional law professor. As an historical aside, he argued for the *New York Times* in the Pentagon Papers case. I was there, and I remember one exchange where he was pressed again and again and again with a hypothetical, and the hypothetical was: let’s suppose that what the *New York Times* is printing would result in the deaths of many servicemen. Do you still say that the courts can’t enjoin the *New York Times* from printing it? He finally was backed to the wall, and his reply was something to the effect—he said, “I have to admit that my humanitarian instincts in that type of a situation overcome my devotion to freedom of speech,” which I thought was a great answer.⁴⁷

EUGENE VOLOKH: And so offensive to some. The ACLU filed an after-argument brief objecting to that answer.⁴⁸

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: Our next speaker is well known to all of you, I’m sure. Michael Mukasey is now a partner at the Debevoise firm in New York City. He served as a distinguished Attorney General of the United States from 2007 to January 2009. Before that for 18 years, he was a District Judge in the Southern District of New York, becoming Chief Judge in 2000. During his tenure on the court, he presided over many notable trials, including the terrorism trial of the blind sheik, Omar Abdel Rahman. Among his many awards, he has received the Federal Bar Council’s Learned Hand Medal for Excellence in Federal Jurisprudence.

General Mukasey.

MICHAEL MUKASEY: Thanks.

[Applause.]

MICHAEL MUKASEY: Before I get into where all of this has wound up today, I think maybe it is useful to go back a little bit and figure out what the Founders who wrote the document on which folks base all these arguments for openness were really all about. You may recall that the Constitution itself was drafted during the span of a baseball season in Philadelphia with the doors closed. Not only did they close the doors against outside inquiry,

⁴⁶ *Id.*

⁴⁷ Oral Argument at 47:9–11, *New York Times v. United States*, 403 U.S. 713 (No. 1873), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB48/argument.pdf>.

⁴⁸ Kenneth P. Nolan, *Interview with Floyd Abrams*, 23 No. 1 LITIGATION 28 (Fall 1996).

but they barred any report of what was going on inside, and they well understood the need for secrecy. Even in the document itself when it came to drafting a section relating to the obligation of both houses of Congress to publish their reports, they carved out an exception for those matters that it was necessary to hold confidential.⁴⁹

Even Patrick Henry, who was an anti-federalist and felt that not enough—the new government was not characterized by enough openness, even with the Bill of Rights in place, wrote, “I am not an advocate for divulging indiscriminately all the operations of government. Such transactions as relate to military operations or affairs of great importance, the immediate publication of which might defeat the interest of the community, I would not want to be published, till the end which required their secrecy should have been effected.”⁵⁰ That sounds almost quaint today, but in point of fact, there have been virtually no prosecutions. There have been actually no prosecutions for publication of leaks certainly in recent memory and I don’t believe ever.

Not that there haven’t been leaks that threaten national security. During World War II, one of our newspapers leaked the fact that there were plans by the Roosevelt administration to come in on the side of the allies, and Germany acted on those plans by declaring war on the United States shortly after Pearl Harbor and saved us the trouble of waiting for a German attack.⁵¹ You might say that was actually a salutary leak.

A potentially non-salutary leak involved a leak that we had read the Japanese code. A grand jury was actually convened to investigate that leak and never returned an indictment because the Japanese apparently either didn’t subscribe to the *Chicago Tribune* or else, and more likely, were so hubristic about the validity of their code that they couldn’t believe that we could have solved it, and so the government declined to prosecute.⁵²

We’ve come a long way since then, and I’m not sure we’ve come in a useful direction. Professor Bickel talked about what happens when the two sides become, among other things, incontinent, and that, I think aptly describes the nature of what goes on today.⁵³ If you look at the Snowden leaks, that is a working definition of incontinence, and yet there is in the atmosphere kind of an unwillingness to go ahead and prosecute people who do that, I think in large measure because the people who would be doing the prosecuting—and who, by the way, are prosecuting at a rate that is more

⁴⁹ U.S. CONST. art. I, § 5 (“Each House shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy . . .”).

⁵⁰ DAVID A. MCCANTS, *PATRICK HENRY: THE ORATOR* 136 (1990) (quoting Patrick Henry’s speech to the Virginia Ratifying Convention on June 9, 1788).

⁵¹ Thomas Fleming, *The Big Leak*, 38 *AMERICAN HERITAGE MAGAZINE* 8, Dec. 1987.

⁵² Jess Bravin, *Echo From a Past Leak Probe*, *WALL ST. J.*, Aug. 7, 2013, at A4.

⁵³ See Bickel, *supra* note 46, at 87–88.

substantial than any in any administration before, I think they've got, what, six or seven leak cases pending now, which is six or seven more than we had. And I frankly envy them. I would have liked to have had that record.

The trouble is that all of this is being done by an administration that, for example, at the time of the bin Laden killing went out and boasted about the trove of information that had been discovered in bin Laden's hideout and of course warned anybody who had been in touch with him that they would have to alter their method of operation, identified SEAL Team Six as those who would carry out the operation and thereby put a target on SEAL Team Six and may very well have been responsible for the fact that several members of that team were killed in a subsequent terrorist operation—disclosed that there had been a Pakistani physician who had participated in an attempt to gather intelligence about bin Laden's residence, with the result that that doctor is now doing life in jail.⁵⁴

Fast forward to the Stuxnet virus where we got leaks of information about conversations in the Situation Room in the White House disclosing that the United States was involved in putting the Stuxnet virus into the Iranian centrifuges, a piece of timing that was really unfortunate because it came only a few days after a U.S. military officer said that a cyber-attack on the United States would warrant a kinetic response when you put those two things together.⁵⁵ What he was saying essentially was that the United States had committed an act of war against Iran.

The operation that resulted in this more recently in the seizure of Abu Anas al Libi was leaked to a fare-thee-well to the point where people were getting calls the night before it went down asking whether something was up in Libya. Under those circumstances, I think there is what we lawyers call a “standing problem” for an administration to press leak prosecutions. It's not a legal defense by any manner or means, but it makes the atmospherics a good deal more difficult.

That said, I don't think that we have any need for any of the shield statutes that have been proposed.⁵⁶ I notice that Adam stayed away from that. Thank you. Because what they ultimately come down to is a set of determinations by a judge as to a balance between the harm that could be caused by the leak as compared to the good that could be done by it, which is a balance that involves comparing complete imponderables, and the comparison is being done by somebody who's got absolutely no training, no background in it, and in the end, of course, under all of these statutes, the

⁵⁴ Ismail Khan, *Prison Term For Helping C.I.A. Find Bin Laden*, N.Y. TIMES, May 24, 2012, at A6.

⁵⁵ See Ken Allard, *Who Leaked the Stuxnet Virus Attack on Iran?: The CIA Nominee Must be Grilled About this Damaging Disclosure*, THE WASHINGTON TIMES, Jan. 18, 2013, at B1.

⁵⁶ S. REP. NO. 113-118, at 25–53 (2013) (referencing the minority views of Senators Sessions and Cornyn).

reporter gets to do exactly what the reporter gets to do now, which is to refuse to disclose the information if he decides that the judge has struck the balance the wrong way. There is no requirement that the information be disclosed to the court before the litigation proceeds. So I think we don't need those statutes.

So far as prosecutions, there is in force an espionage statute that I think fills the bill nicely.⁵⁷ It says that whoever with intangible reason to believe that it is to be used to the injury of the United States or the advantage of a foreign nation—and that would include an entity that is not a nation—discloses information relating to the national defense shall be punished by death or by imprisonment for any term of years or for life.⁵⁸ And, in an appropriate situation, there is absolutely no reason why that can't be used. I don't think we need more statutes. I don't think we need a shield section. I think what we need is some common sense and some discretion on both sides.

At the Justice Department, I will tell you that there is a whole set of procedures, including a requirement that the Attorney General approve any subpoena for a reporter before it's served.⁵⁹ So in essence, the position of the dissent in *Branzburg* has been carried through administratively by actual practice within the Justice Department. I think what we don't need is more statutes, more procedures. I think what we need is common sense and restraint on both sides.

Thanks very much.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Thank you, General.

Our next speaker is Eric Freedman. He is the Maurice A. Deane Distinguished Professor of Constitutional Law at the Hofstra Law School in New York. He is a graduate of Yale College and Yale Law School. He clerked for Judge Irving R. Kaufman of the Second Circuit and practiced law in Washington and New York. He is the author of numerous scholarly articles, mainly dealing with the writ of habeas corpus, and I have read several of them, and they are outstanding.⁶⁰ He is currently Director and Of Counsel to the National Coalition Against Censorship and is former Chairman of the Communications Media Committee of the ACLU.

Professor Freedman.

⁵⁷ 18 U.S.C. § 793 (2006).

⁵⁸ 18 U.S.C. § 794(b) (2006).

⁵⁹ 28 C.F.R. § 50.10(e) (2013).

⁶⁰ Eric M. Freedman, *Habeas Corpus in Three Dimensions Dimension I: Habeas Corpus as a Common Law Writ*, 46 HARV. C.R.-C.L. L. REV. 591 (2011); Eric M. Freedman, *Panel Discussion and Collected Essays: Are Journalists Privileged?: Reconstructing Journalists' Privilege*, 29 CARDOZO L. REV. 1381 (2008).

[Applause.]

ERIC M. FREEDMAN: Now, with that introduction, it's particularly interesting that I find myself in the position of the rabbi who had a couple come to see him, and the wife said, "You know, my husband is absolutely terrible," blah, blah, blah, and the rabbi said, "You're right." The husband said, "My wife, she's absolutely terrible," and the rabbi said, "You're right." Then the wife came back and said, "Now, hang on a second. We can't both be right," and the rabbi said, "You're right."

[Laughter.]

ERIC M. FREEDMAN: I find myself here – and it's one of the great pleasures of the Federalist Society why you get so many unusual suspects enjoying coming to these programs – in a somewhat mushy middle, agreeing with some parts of what's been said and disagreeing with others.

I start by saying that I absolutely agree with Judge Mukasey. Balancing tests, whether they come from judicial doctrine or are incorporated into statutes, are completely useless in doing what we're trying to do.⁶¹ Now, I reach a different conclusion about the consequences of that, but he is completely right. The judges not only don't have any particular training or expertise, but in particular have an institutionally flawed perspective because of course the judge always wants more information relevant to this case and this matter, and that's perfectly understandable. No one who is presiding over a real case is likely to take the perspective of the longer term interests which are being served, namely half a loaf is better than none; we want the information at least to be out, even if we don't know the name of the source, because the next time you're going to get neither the information nor the source. It's exactly like you're trying hard to control your weight, and the waiter brings some very tempting dessert, and you're supposed to say, "Well, I understand that the long-term consequences are very bad, and so I am sending the dessert back." And at least in that case, you would be feeling the long-term consequences; whereas, here, we're talking that the long term is that in some other future case information is not going to come out. And therefore, as far as I'm concerned, the solution is that any statutory privilege that's created must be absolute in the area that it covers, and balancing tests go away. And absolute to me means absolute, just like any of the privileges that Professor Volokh mentioned. In attorney-client for instance, what absolute means is the government does not get it, much as they would like it, much as it's very relevant and so on, unless the attorney is a participant in the crime, meaning shares the criminal intent of the client, which is rarely the case, of course, for ordinary journalists but, as has been suggested, is a major problem in leak investigations, because

⁶¹ Eric M. Freedman, *Panel Discussion and Collected Essays: Are Journalists Privileged?: Reconstructing Journalists' Privilege*, 29 CARDOZO L. REV. 1381, 1388-89 (2008).

giving the material to the reporter is itself the crime. And so you have the government always being able to say, “Well, the reporter is a participant, if not at least a witness.”

You wouldn’t say that if the facts were that the lawyer’s client led him to where the victim’s body was buried. In fact, there’s a pretty famous case in which the lawyers got ethics awards for keeping precisely that information confidential.⁶² So I would certainly say that the privilege has to be absolute in situations where the only crime is the revelation of the information itself by the source, and I’m not sure law enforcement would lose much by that, because the truth of the matter is that technology at the moment is making much of this part of the discussion irrelevant. It used to be the U.S. Government was very big. It was very hard to know where the leak came from. Nowadays, NSA knows everything about everything. It’s not very difficult to find out the information flow, at least not nearly as difficult as it used to be.

Journalist’s privilege is analogous to attorney-client privilege because it’s the system that’s being protected. We talk sort of vaguely about the public interest in the information. Let’s be a little more concrete. If there were no leaks, Congress would be out of business in terms of executive branch oversight, or at least 100 percent vulnerable to whatever the people briefing them choose to tell them or not tell them. In fact, John Kennedy, subsequent to the Bay of Pigs, said he wished the administration had not put pressure on the *New York Times* to keep the planned invasion out of the paper, because, “Maybe if you had printed more about the operation you would have saved us from a colossal mistake.”⁶³ Much of what the President learns, he reads in the newspapers. Again, John Kennedy used to say that, “I hear more from the *New York Times* than I learn from my CIA briefing.”⁶⁴ I know some of you people believe in a unitary executive. Ask any President of the United States whether there is a unitary executive. There are thousands and thousands and thousands of people pursuing their own agendas, much of which the President finds out by reading the newspapers.

Now, regarding Judge Mukasey’s remarks to the effect that it’s terrible how the Obama administration has leaked all its successes. Assuming that to be true, it’s not something that was invented by the Obama administration. In fact, one influential document in the Pentagon Papers case was the very long affidavit of Max Frankel describing at length the

⁶² *People v. Belge*, 372 N.Y.S.2d 798, 803 (NY County Ct. 1975).

⁶³ See FRED W. FRIENDLY & MARTHA J.H. ELLIOTT, *THE CONSTITUTION: THAT DELICATE BALANCE* 61 (1984).

⁶⁴ Arnaud De Borchgrave, *Commentary: Intelligent Intelligence*, UNITED PRESS INTERNATIONAL, INC., July 24, 2007, http://www.upi.com/Business_News/Security-Industry/2007/07/24/Commentary-Intelligent-intelligence/UPI-66171185311264.

practice of government leaks for the purpose of advancing the agenda of the incumbent administration.⁶⁵ Again, more information on public affairs is better than less.

And that's not just true about public affairs. The President of General Motors is better off knowing that there is a problem than not knowing it. If there is an environmental violation or if there is harassment or if there is some other problem in that empire half loaf is better than none. It's too bad you don't know the source. You want the information. And so I think because judges balancing in all those situations is likely to put the balance the wrong way, absolute privilege is the way to go.

And there is a second reason, which Judge Mukasey also mentioned. I know we're lawyers, and we think that legal formulations matter, but we delude ourselves. At the end of the day, the source is either going to trust the reporter or not, and this is not going to depend on whether there is a three-part test or three-and-a-half-part test that has one prong and two forks. Without an absolute privilege, the only real protection is that the source believes that the reporter will go to jail for the cause and stay there.

Well, going to jail for the cause, as with Martin Luther King, has power if there is sympathy on the part of the public for the underlying principle and the underlying cause. In that respect, a public climate of unhappiness with government spying, government secrecy and so on is good because it's not the lawbreakers who are supposed to be the heroes of the story. It's the number of public spirited and innocent people, as Professor Volokh suggested, whose desire for anonymity is perfectly legitimate, as the Supreme Court has recognized in protecting the anonymous pamphleteer against a proposed regulation that the source of the speech has to be disclosed. And the reason Supreme Court recognized that protection is because truth will come from many voices.⁶⁶

Journalists' choices about what parts of the Pentagon Papers to publish may be controversial and may even be wrong in some objective sense, but the aggregate social costs of moving the decision-making power from the individual to the government are too high in totality, regardless of what you might think about any particular decision. And to that statement, I hear the answer coming, "Hang on a second, weren't the government officials elected?" Well, fortunately, I've got a Founder on my side by the name of James Madison who said a faction is a group, whether amounting to a minority or majority of the whole, whose decisions are contrary to the long-term aggregate interest of the community.⁶⁷ That is to say, we've got

⁶⁵ See MAX FRANKEL, *THE TIMES OF MY LIFE AND MY LIFE WITH THE TIMES* 339 (1999). The text of the affidavit is accessible at <http://www.pbs.org/wgbh/pages/frontline/newswar/part1/frankel.html>

⁶⁶ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995).

⁶⁷ *THE FEDERALIST* NO. 10 (James Madison).

to protect the minority voices because the underlying policy, though approved by the majority, may just happen to be wrong. And very often that's precisely the conclusion that comes from leaks.

So what's the path forward here? As everyone agrees, the current Supreme Court is completely unsympathetic to the concept of a First Amendment privilege, and so will all future courts. They're judges. The common law privilege has power because there's a lot of state and lower federal court law supporting the privilege, but it's the wrong kind of privilege. That's balancing test all over again, and so even if the common law argument had not been wrongly dismissed with the back of the hand in the recent James Risen case, I don't think it's got a long-term future.⁶⁸ And that does leave a statute, which makes sense, because often the reason you have a statute is to do something that you can't get under the Constitution or the common law, but it's got to be the right kind of a statute. It shouldn't be going for breadth. It should be going for strength. Whatever it covers, it's absolute. Otherwise, as with the various bills in Congress now, you have just made a bad situation worse, because Congress will announce that it solved the problem and go off to do other things, while the judges will just keep doing what they're doing, exactly as Judge Mukasey said, which at this moment means acting like government officials and panicking when they sense that power may be dispersed and information may be getting out of control.

So that leads me to the final minute-and-a-half, which is on prosecution of reporters – as Adam put it, not keeping their sources out of jail, keeping themselves out of jail. And there, I actually have no problem agreeing with Judge Mukasey. If the government wants to prosecute the publication and undertake the legal-political-public-opinion-and-jury problem of proving criminal intent on the part of the publication, it should go right ahead. And in that respect, there is already a layer of protection, as was briefly alluded to by Adam. There are a number of cases involving leaks from confidential judicial disciplinary proceedings, confidential juvenile proceedings, release of records of a rape case that ought not to have been released, in all of which you could not hold the reporter liable for what was an innocent disclosure, innocent in the sense that the reporter may know perfectly well that the source acted illegally but the reporter was not acting with any malicious intent.⁶⁹ And the Espionage Act says with intent to harm the United States.⁷⁰ If you want to prosecute the *New York Times* under the Espionage Act for leaking the Pentagon Papers with intent to harm the United States, go right ahead. I have no constitutional law problem with it.

⁶⁸ *United States v. Sterling*, 724 F.3d 482, 505 (4th Cir. 2013).

⁶⁹ Please contact author for clarification of this source. *See e.g., In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2005).

⁷⁰ 18 U.S.C. §§ 792–99 (2006).

It may seem a little strange to be challenging the government to hit you with a nuclear weapon, but there's something to be said for nuclear weapons—which is neither side uses them. So here the existence of that nuclear weapon keeps the press on a certain side of the line, and keeps the government somewhat backed off. I do agree with what everybody has said that the situation over the last 35 years or so has been a kind of rough accommodation of work it out and we'll give a little, you give a little. And that has frayed so badly in recent years that we may be better off acknowledging that, in fact, the two sides are at war with each other and at least get the restraints on use of force in war rather than a set of agreements which neither side is now keeping.

[Applause.]

JUDGE A. RAYMOND RANDOLPH: Before we take questions, would any of our panelists like to comment? General Mukasey.

MICHAEL MUKASEY: Just two small points with regard to the last points that were made. The espionage statute says, “With intent or reason to believe,” so you don't need specific intent to harm.⁷¹ All you need is reason to believe that harm will result, and I would suggest that there have been a number of disclosures that were made with a reason to believe that harm would result.

I also agree that there is no way that a prosecution would be undertaken in those cases, except in the most extreme situations which we haven't faced.

So far as an absolute privilege is concerned, you then get to the issue of defining what constitutes a journalist, and that in itself is something I would not want to see either legislators or courts do, in large measure, because not only would they be overly inclusive and not inclusive enough, not inclusive enough by not including people who like to publicize things and devote a great deal of attention and effort to it, although they may not earn their living doing it, and over-inclusive by including, for example, correspondence of Fars, the Iranian news agency; Xinhua, the Chinese news agency; and to date myself, TASS, the old Soviet news agency, who were intelligence agents. They were regularly credentialed to come to the United States as journalists, because it was known that they would occupy a privileged position with respect to information gathering.

And so far as whether the Obama administration leaks, I willingly acknowledge that they did not, but when it comes to leaking information that is potentially injurious to national security, I think it has reached an absolutely unprecedented level, at least in my experience.

⁷¹ *Id.*

EUGENE VOLOKH: I sympathize with a lot of the arguments for openness, but I sympathize with a lot of the arguments for secrecy, too. There are a lot of things—

PANELIST: Says a law professor.

[Laughter.]

EUGENE VOLOKH: There are a lot of things that we rightly expect the government to keep secret. It's a federal crime to leak tax information; I'm not saying necessarily this means that a reporter who gets some tax information and decides to publish it should be liable.⁷² I'm not sure there is a federal statute that covers the reporter in that situation. But say a reporter were to call up an IRS agent saying, "You got anything for me on politician so-and-so or actor so-and-so or my online critic so-and-so?" "Yeah, sure, here it is." Do we think that openness is so valuable that that should be protected and that the reporter should not have to reveal the name of the person who leaked that? I am skeptical about that.

Likewise, we are all lawyers, and if somebody were to call, if somebody were to try to get information from our staff or our paralegals or our secretaries about some famous client, I think we'd be screaming bloody murder, and I think we'd be right. And I think we'd be right in trying to go after this person for trying to get this information, even if he is arguing that (a) it's of public interest, and (b) maybe even he thinks—and we disagree—that this reveals some sort of shenanigans on the part of the trial team that's not properly disclosing certain information or what have you in a criminal case or for that matter a civil case. (There are all sorts of allegations of such shenanigans levied against law firms, rightly or wrongly, all the time.)

So I would like to think that there would be some continuing protection against that. We should be able to go after a person who deliberately solicits the revelation of information that he knows would be either criminal or tortious. And if we are going after the suspected leaker, we should be able to get the only other witness to the crime—that is to say, the reporter—to actually testify about that. Now maybe that's impossible without shutting off too much valuable information about all sorts of important things. I don't know, but I don't think we can dismiss the confidentiality interest that easily.

ERIC M. FREEDMAN: May I? I'm sorry. Adam—

JUDGE A. RAYMOND RANDOLPH: I think Adam is next.

ADAM LIPTAK: So I, first of all, want to disassociate myself with Eric's suggestion that the Obama administration should please prosecute the *New*

⁷² 26 U.S.C. § 6103 (2006).

York Times.

[Laughter.]

ADAM LIPTAK: Don't bring it on.

I also want to make a pitch for half a loaf. I understand that in the pure good of theory and absolute privilege, it would be a wonderful thing: (a) it will never happen, (b) it can't be absolute because it will at least be overcome by a Sixth Amendment fair trial right.⁷³ And (c), there's a lot to be said for being able to make your pitch not only to a prosecutor as a matter of prosecutorial discretion but a judge on some balancing basis. And even the prospect of satellite litigation over this question can be very valuable. Time is your friend. The underlying case may plead or settle out, and publicity will be brought to bear, and that can influence conduct. So I think there's more than a little to be said for getting something rather than nothing out of a shield law.

ERIC M. FREEDMAN: On Adam's point, we'll have to agree to disagree as to balancing. On Judge Mukasey's point about defining "journalist," that's an absolutely serious concern that every statute or proposal has to face. All I can say is that it has been confronted and dealt with one way or another in the thirty-five states and, whatever it is, eight circuits that do recognize the privilege, so it's not irresolvable.

And then on Professor Volokh's tax example and the example of people trying to get information from your paralegal and so on, that is what we mean by the dispersion of power. If the reporter calls the IRS agent and tries to get the tax returns, first of all, Justice Brandeis would say, "Prosecute the IRS agent."⁷⁴ After that under our system we are, yes indeed, relying on the good sense of the journalist to choose what to publish, and the journalist may make wrong decisions, but that's the balance that's been struck.

Gene's paralegal example actually closely resembles the facts of a real case in which some paralegal in gross violation of duty of confidentiality to the firm revealed all kinds of purported misconduct of the tobacco firms.⁷⁵ That was outrageous behavior on the part of the paralegal and rightly got the law firm outraged and the client outraged and coming down like a ton of bricks on the paralegal. That doesn't mean that the reporter did anything wrong by publishing allegations of gross wrongdoing that never would have come to light, nor that the public in fact didn't benefit

⁷³ U.S. CONST. amend. VI.

⁷⁴ *Whitney v. California*, 274 U.S. 357, 378 (Brandeis, J., concurring) ("Among free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law.").

⁷⁵ Douglas Martin, *Merrell Williams Jr., 72; Bared Big Tobacco*, N.Y. Times, Nov. 16, 2013, at B17.

from it, and those are very much two different ideas which I think we need to keep separate.

JUDGE A. RAYMOND RANDOLPH: I think we will take questions. The floor is open.

ATTENDEE: I am curious to get your views about how far one goes in terms of being a journalist, whether a blog or whatnot might fit into that category. And I am also curious: you made this distinction between somebody who is a passive recipient of information versus somebody who goes out of their way to procure it in some way, although I think, Eugene, you said it's the bread and butter of reporters to call up and flatter people and cajole them into, they are not paying them a bribe or extorting the information, but they are doing an awful lot of stroking to get that information. And I'm curious to get people's views about when you cross that line.

EUGENE VOLOKH: Let me turn to the first question about who is a journalist and how that can be defined. I actually wrote a long article talking about the way this relates to First Amendment protection, and I think I have demonstrated that from basically before the Framing, up until 1970, there is no authority whatsoever for the proposition that the freedom of the press somehow specially belongs to institutional members of the press.⁷⁶ All the authority was that freedom of the press belongs to anybody who uses the device called the "press," and by extension, other similar devices—could be the Internet and a wide variety of other things.⁷⁷

Then starting 1970, there have been a handful of lower court cases that have said, "oh, well, the institutional press gets better protection," and a few hints about the possibility of that from Supreme Court opinions, though many more holdings to the contrary from Supreme Court opinions.⁷⁸ So it seems pretty clear as to First Amendment protection that there can be no distinction between professional journalists and others. And indeed the circuit courts that have recognized the privilege as a First Amendment matter—and that have then been asked, well, who is covered?—have all made clear that you don't have to be employed by a newspaper. You could be a political organization. You could be a freelance book writer. You could be a couple of academics trying to make a documentary.

However, as a statutory matter, it turns out that some statutes define the scope of journalist-source protection very broadly. The California statute is one of them.⁷⁹ But some define it much more narrowly.

⁷⁶ See generally Eugene Volokh, *Freedom for the Press as an Industry, or for the Press as a Technology?: From the Framing to Today*, 160 U. PA. L. REV. 459 (2012).

⁷⁷ *Id.* at 508–09.

⁷⁸ *Id.* at 522–23.

⁷⁹ CAL. CIV. PROC. CODE § 1986.1(d) (West 2014); CAL. CONST. art. I, § 2.

Delaware, I believe has very specific rules that require that you have made money from this for at least 3 of the last 10 weeks or something along those lines.⁸⁰ And statutes are entitled to draw those kinds of distinctions.

The question is, “What is a sensible distinction?” I mean, to draw the distinction between a journalist and a blogger is a funny thing these days, given how many journalists have blogs, how many bloggers become journalists, and how many blogs are bigger than many a newspaper and more useful than many a newspaper.

[Laughter.]

EUGENE VOLOKH: So I am completely unbiased in this.

[Laughter.]

EUGENE VOLOKH: So I think as a statutory matter, one could draw the distinction, but it’s just very hard to come up with really plausible distinctions, especially ones that are written today as opposed to some 20 or 30 years ago where the lines seem to be a little bit sharper.

As to the line defining what is traditionally just criminal solicitation, I was a little puzzled by Eric’s point—maybe I misunderstood Eric’s point, but as I understood it—that the reporter shouldn’t be held liable even for calling the person and asking him to leak things. Under standard criminal law, that’s solicitation of a crime. It’s just hard for me to see what would be the distinction under ordinary criminal law between soliciting that crime and other crimes as opposed to, say, matter of prosecutorial discretion or as a First Amendment matter if what you are soliciting is constitutionally unprotected conduct, which by hypothesis the leak is going to be.

But I agree that, once one gets away from the clear solicitation, it does become a very hard line to draw, because of the way conversations often go, setting aside the situation where you just get something in your mailbox and you publish it and you never once talked to the suspected source.

JUDGE A. RAYMOND RANDOLPH: Adam.

ADAM LIPTAK: So Eugene’s constitutional analysis about the meaning of the press clause seems right to me. I do think that it’s possible to define through some kind of functional way who is gathering and disseminating information for the purpose of informing the public. It is the case that as a practical matter, the Supreme Court decides who is and is not the press, who gets to sit in the good seats. So it’s not that it hasn’t happened, and it’s inconceivable to happen. So I think that can be overcome.

⁸⁰ DEL. CODE ANN. tit. 10, § 4320(4) (2006).

As far as whether ordinary news gathering conduct amounts to solicitation, I don't think that's a serious problem. I was this morning just reading a federal judge's blog. Did you know there were such things? Judge Kopf in Nebraska has an excellent blog, and he wrote that one of the lessons of the back-and-forth between the Second Circuit and Judge Scheindlin in the stop-and-frisk case was that a good journalist's job is to make you say things you will regret.⁸¹

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: Well, a prime case, if I can just add a footnote to illustrate both of your points, is *New York Times v. Sullivan*, that people forget that there were individuals involved—

ADAM LIPTAK: Exactly.

JUDGE A. RAYMOND RANDOLPH: —who bought and composed the ad to heed their rising voices, and the opinion by Justice Brennan, one of the leading First Amendment cases, drew absolutely no distinction in terms of First Amendment between the *New York Times*, on the one hand, and the individual defendants on the other.⁸² Let me just throw out one other thing that's triggered by the solicitation comment. I have really never understood the—suppose the leakers in general commit not one crime but two. The first is acquiring whatever the document is which is in the nature of a theft, and the second is disclosing it. What I have never really quite understood is why if, for example, the document or whatever is a tape or a CD or a DVD, something that is physical rather than just word of mouth, physical, and somebody breaks into a government office and takes the DVD out and then gives it to a reporter knowing that the DVD is stolen, why the reporter is not guilty of receiving stolen property, I don't understand that. And there are many of the hypotheticals and actual cases that seem to fall within that particular hypothetical.

ADAM LIPTAK: That was very much the subject, wasn't it, of your decisions in *Boehner v. McDermott*, the en banc decision, which divided the D.C. Circuit quite closely, and I think Judge Sentelle's response might be, "Well, does that mean in every link of the chain?"⁸³ So somebody gives it to the reporter. The reporter publishes it. Somebody repeats what they read in the newspaper over the breakfast table. Each of those things is a crime?

JUDGE A. RAYMOND RANDOLPH: Yeah. Well, that's a line-drawing thing, and we have a solution for it in the criminal law in the Fourth Amendment cases, which is that the taint gets dissipated the further out you

⁸¹ RGK, *In Answer to Scott H. Greenfield Regarding The Second Circuit's Treatment of Judge Scheindlin*, HERCULES AND THE UMPIRE (Nov. 6, 2013), <http://herculesandtheumpire.com/2013/11/06/in-answer-to-scott-h-greenfield-regarding-the-second-circuits-treatment-of-judge-scheindlin/>.

⁸² See generally *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

⁸³ *Boehner v. McDermott*, 484 F.3d 573, 581 (D.C. Cir. 2007) (Sentelle, J., dissenting).

go.⁸⁴

ADAM LIPTAK: I say the taint gets dissipated when the material arrives to me.

[Laughter.]

ERIC M. FREEDMAN: Well, and he has support for that in the rape case, right?⁸⁵ The guy who handed over the court records was committing a crime, but the reporter was not.

JUDGE A. RAYMOND RANDOLPH: It doesn't, by the way, apply in—we hear cases all over the lot, as Judge Mukasey—we've had some child pornography cases where the individual who does the filming is obviously guilty, but every single person that downloads that image is also guilty of a crime.⁸⁶

EUGENE VOLOKH: But I would think that child pornography is special, in part because—while it's not an element of the child pornography test that it has to lack serious value—one of the reasons the court gave in *New York v. Ferber* for treating it this way is precisely that it lacked value.⁸⁷

JUDGE A. RAYMOND RANDOLPH: This is one of the areas that Gene just mentioned that makes so much of First Amendment law incoherent. The Supreme Court again and again tells the state legislatures and the Congress that if they draw a law that's not content-neutral, it's going to violate the First Amendment unless there are compelling interests the other way.⁸⁸ And then when the Supreme Court decides cases, they decide them on the basis of content.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: Is this of public value? Does this have artistic merit? I mean, all of that is content-based.

Anyway, next question.

ATTENDEE: Thank you. Thank you for your presentations. I am studying evidence right now. I am in law school, and my question is in regard, actually, to the principle that privilege stands on that every state—that the state has a right to the testimony of every man, individual, and that, I don't understand, and I was hoping you could enlighten me, because it seems like on what authority could the state make such a claim, because especially in light of our society now and how much privacy is emphasized,

⁸⁴ See, e.g., *Oregon v. Elstad*, 470 U.S. 298, 310–11 (1985).

⁸⁵ *Florida Star v. B.J.F.*, 491 U.S. 524, 541 (1989).

⁸⁶ *United States v. Sullivan*, 451 F.3d 884, 888 (D.C. Cir. 2006). See generally *United States v. Long*, 185 F. Supp. 2d 30 (D.C. Cir. 2001).

⁸⁷ *New York v. Ferber*, 458 U.S. 747, 755 (1982).

⁸⁸ See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001).

because what is more private than the thoughts of every man, and to think that the state has a right to them.

JUDGE A. RAYMOND RANDOLPH: Whoever has the best hearing will answer that question.

EUGENE VOLOKH: Well, the question was: what's the foundation for the principle that the law is entitled to every man's evidence?

JUDGE A. RAYMOND RANDOLPH: Oh.

EUGENE VOLOKH: Which I take it, the answer is history and practicality, but you could write books about it, and probably people have.

It's because that's the way it's always been.

[Laughter.]

ATTENDEE: I was going to say perhaps because there are the inverse canons that you don't have to testify in certain circumstances by implication. You have to in others.

I actually think that the point of the rape case incidence is very important, because other than many of these cases, which are cast as Article I actions that are being adjudicated by a purportedly independent Article III tribunal, there you have a potential breach, although it may be relevant to a law duly passed but not always. There, you have essentially a breach of confidentiality coming out of an Article III branch itself, if I understand how the case—

EUGENE VOLOKH: No, no. That was *Florida Star v. B.J.F.*⁸⁹ It was a police officer in Florida who—

ATTENDEE: Oh, it was a police officer. Okay, I apologize. I wasn't sure who did it. I only thought it helped my question to come more precisely on point here.

But we do hear this almost as if Article III tribunals would be abstracted wisdom, you know, applied, whether it's through a balancing test or an absolute statute guiding them. But I have observed in terms of people's access to criminal enforcement, which I think includes effectively adjudication, that sometimes access to court materials and court proceedings is very restrictive or effectively restrictive, in the sense that if you try to get the records—I mean, records continue to be kept as little transcribed things, and if you have a million bucks or there's an appeal, that little transcribed thing will be made into something that a reporter could read or that the public could read.

And when I saw the subject of criminal enforcement, you know, and

⁸⁹ *Florida Star*, 491 U.S. at 527.

reporting, I am very concerned that there's not more pressure from reporters. So maybe it is a question of Adam, where there doesn't appear to be—you know, to have access to these materials of the adjudication process. Unless you happen to be the reporter in the courtroom at the time it's happening, I found that it's very difficult to fight through the kind of bastion that the third branch actually erects in front of these materials.

ADAM LIPTAK: So you're making a couple of practical points, which I'll address in a second, but I actually think the basic legal principle goes the other way, where somewhat surprisingly the court has said that not only the Sixth Amendment, which guarantees open trials, but also the First Amendment, which really doesn't speak to access to information, guarantees a right of access to almost every part of every criminal and civil proceeding, so long as the materials are submitted for adjudication.

As to whether it's hard to get ahold of them, sometimes you have to go to the courthouse. It's also the case that the press, now that we're struggling to survive, is not a proxy for the public the way we were a couple of decades ago where we really pressed access issues as a matter of principle, even if there were not a story on the other side of it.

But I think this compared to other legal systems is actually a good news story. Materials submitted to courts and court decisions in the United States really are almost, without exception, open.

ATTENDEE: And I undertake this only because we've had to file FOIA requests to get them in the Southern District of Ohio in cases that had been very, very difficult. So I raise it. I realize I want to let other people ask questions.

EUGENE VOLOKH: I wonder how much of that has to do with the practice of transcripts being prepared after the fact by court reporters and court reporters having kind of quasi-proprietary rights, just so they get paid, so you can't really get the transcripts. I wonder how much that's the concern, because I do think it's true that often the transcript is actually not prepared until much later, and I don't think the original notes are a matter of public record, usually as a practical matter.

ADAM LIPTAK: Typically, on PACER, which itself requires the payment of a fee, which I think is problematic—PACER is the Federal Court electronic filing system. Transcripts are usually not available and usually require a separate fee to a private entity, and that strikes me, off the cuff, as deeply problematic.

Some courts do have a practice, though, of limiting in time and posting eventually the transcript, because the people who will pay for it are typically the parties, the lawyers, and at some point in time, nobody is going to pay for it anymore, and you might as well make it public then.

ERIC M. FREEDMAN: Well, I was just going to say that I think Adam may be a little too optimistic here, and I think that judges on the panel may support me about this. There do exist secret dockets in the courts, which was a long-term practice in terms of mafia and so on, which has expanded radically for national security purposes to the point where people are filing sealed cert. petitions in the United States Supreme Court. And there are more and more parts of judicial records, which not only are sealed and then the press can go to unseal them if they want, but whose existence isn't even known. I can't tell you about it, because I don't know about their existence. But I think some of the judges can tell you that that's correct.

MICHAEL MUKASEY: In my old court, the existence of a document had to be made known. Documents, however, were sealed. Transcripts were sealed, and proceedings were sealed. And I held a number of them myself and required a finding that there was a good reason, usually because somebody was likely to get killed if you didn't seal it.

JUDGE A. RAYMOND RANDOLPH: Yes, sir.

MICHAEL MUKASEY: I mean, just as an example, you have a mafia case, and one defendant pleads guilty. You enter an item on the docket that says Mr. X pleaded guilty, and you better believe that members of Mr. X's family are going to be in mortal danger if that docket entry gets out, gets out immediately. There is every good reason to seal it.

ATTENDEE: I was wondering what the thoughts of the panel were on—this seems to me to be intersection of kind of a right to anonymous publishing, being able to speak anonymously, and the fact that the Founders when talking politically like through the Federalist Papers or everything, almost every one of them was using a fake name or done without any name attached to it.

Secondly, do we know really that the person who gave the information in these leak cases to the reporter was breaking the law? Because obviously, someone broke the law when they disclosed it, but it could have gone through two or three hands, potentially, before it gets to the reporter. So we, at least in my opinion, don't really know that the person who gave it to the reporter was breaking the law.

EUGENE VOLOKH: I will save the second question for others, but the first question, I think conflates two separate issues. One is, "Can the government prohibit the publishing of certain things unless the published thing has a name attached to it?" There had been lots of such laws. They were struck down, first in *Talley v. California* in 1960.⁹⁰ That was reinforced in *McIntyre v. Ohio Elections Commission* (1995), where this

⁹⁰ *Talley v. California*, 362 U.S. 60, 65 (1960).

whole original meaning question was debated by Justices Scalia and Thomas.⁹¹

There's an exception to that in the election campaign context where the Court has upheld without a very deep discussion, the requirement that broadcast ads, if I recall correctly, include the name of the funder right in them.⁹² But as a general matter, you have the right to talk anonymously in that you can't be punished for talking anonymously.

It's a whole separate question whether you have the right to insist that your anonymity be retained. If I hand out leaflets that are defamatory of you, I can't be prosecuted on the grounds that I didn't sign my name to them. But if you wanted to sue someone for libel and you don't know whom to sue, but you think the printer might say, "Oh, that was Volokh that came in and ordered it," or the printer's records might reflect that I paid for it—or, these days, you go after the Internet Service Provider to try to track down the identity of the poster—I don't think any court has ever suggested there is some absolute privilege or any court has ever suggested there is an absolute privilege not to have your identity be disclosed even if there is a prima facie case that what you did is civilly actionable or criminal.

And I think that's got to be right, so long as you think there is any role for libel law or for threats law or for whatever else. If I publish something that is threatening, then presumably, the government could go and subpoena the service providers to get my identity.

So I think the right to anonymous speech, which the court has upheld, is just the right—not to be punished for the anonymity. It is not a right never to have that veil of anonymity pierced.

JUDGE A. RAYMOND RANDOLPH: You were very charitable when you mentioned the Supreme Court's opinion in *McCain-Feingold* saying they didn't give much.⁹³ They gave zero. You know, I am John Q. Smith, and I approve this ad requirement. There is a line of Supreme Court cases, *City of Stratton* comes to my mind, *McIntyre*, this line of cases that say you have a First Amendment right to speak anonymously.⁹⁴ In those cases, the Supreme Court never even attempted to distinguish any of them in *McCain-Feingold* upholding the disclosure statute.⁹⁵

I'm sorry.

ADAM LIPTAK: I was going to ask the same question of Eugene of how

⁹¹ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 359 (1995) (Thomas, J., concurring).

⁹² *McConnell v. FEC*, 540 U.S. 93 (2003).

⁹³ See generally *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).

⁹⁴ See *McIntyre*, 514 U.S. at 342. See generally *Watchtower Bible & Tract Soc'y of New York, Inc. v. Stratton*, 536 U.S. 150 (2002).

⁹⁵ *Citizens United*, 558 U.S. at 324.

does *Doe v. Reed* or *Citizens United*, which seems to say that some political speech can be conditioned on disclosure, fit into your analysis.⁹⁶

EUGENE VOLOKH: I think that *Doe* is a separate question. I'm actually with Justice Scalia on that, although he was not entirely in dissent but certainly not in the majority.⁹⁷

I think that the government can require that you identify yourself when you are signing a petition. In fact, you kind of have to identify yourself to the government, and at that point, I think if a government wants to say, "Look, if you want to take advantage of this procedure, we're going to reveal it to the public at large," I don't think that's a limit on your anonymous speech. It is a limit on your anonymously participating in this lawmaking process, but I don't think you have any right to anonymously participate in that.

That was Justice Scalia's point, which I think was correct.⁹⁸ The majority said, "Well, you have a conditional right, but it's easily trumped."⁹⁹ Query whether that's sound.

But as to the other point, the requirement that you identify yourself on certain kinds of political ads, that certainly is an interference with anonymous speech, but the Court has always justified that as an exception justified under strict scrutiny. I agree with the Judge that the Court didn't explain why strict scrutiny is passed here, but it certainly tried to cabin the no-anonymity rule to the campaign ad context. So as a general matter, the *Talley* line of cases still remains, just with this carve-out, I think.

JUDGE A. RAYMOND RANDOLPH: Yes, sir.

ATTENDEE: I see my government growing and my media with the good seats shrinking, and so I'm thinking more and more about what is the role of the press in these types of things. And what information I really want to know as a citizen, what do you all think about a safe harbor from prosecution relating to a reasonable belief and exposing a constitutional or criminal violation? This is materially different than, say, individual information that's just there for the sake of wanting to put stuff out there, but if there is a reasonable belief that a government actor or actors have engaged in criminal or unconstitutional activity, that could be a bar from prosecution.

ADAM LIPTAK: So that would seem to encompass Snowden. Yes? Or

⁹⁶ See generally *John Doe No. 1 v. Reed*, 561 U.S. 185 (2010); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

⁹⁷ *John Doe No. 1*, 561 U.S. at 219–20 (Scalia, J., concurring).

⁹⁸ *Id.*

⁹⁹ *Id.* at 218 ("[F]rom time to time throughout history, 'persecuted groups have been able to criticize oppressive practices and laws either anonymously or not at all'" (citations omitted)).

Manning or whoever leaked the warrantless wiretapping program to us in the early 2000s.

I welcome judicial comment on that.

[Laughter.]

JUDGE A. RAYMOND RANDOLPH: I'm not a prosecutor, so . . .

MICHAEL MUKASEY: I always thought that was what prosecutorial discretion was all about, and putting it in a statute, I don't think would enhance it substantially, other than to have it reviewed by a judge.

EUGENE VOLOKH: Don't some whistleblower statutes? I'm not at all an expert, but don't some whistleblower statutes try to draw that kind of line at least to certain kinds of revelations?

JUDGE A. RAYMOND RANDOLPH: They do, but the question-embodied-in-the-question is disclose to who, and if you disclose within the report within the government, actions that you consider fraudulent, that's one thing, but to spread it on the front page of the *New York Times* may be something quite different.

ERIC M. FREEDMAN: Well, there are employment discrimination statutes that contain that exception,¹⁰⁰ and this comes up from time to time, interestingly, in lawyers' ethics cases. You are fired from the law firm because you blow the whistle on the law firm for some misconduct. There are some cases in New York actually, I think, granting protection.¹⁰¹

ATTENDEE: But to answer your question about Snowden, the thing that I envisioned was if you would face prosecution, but in the event that he could convince a judge or jury that he acted in a reasonable fashion based on a reasonable belief, that he could not be prosecuted, that's different that prosecutorial discretion, because it could be reviewed.

ERIC M. FREEDMAN: Then he may not be guilty anyway.

JUDGE A. RAYMOND RANDOLPH: It is a curious thing, among other curious things, about the First Amendment that oftentimes, you have to—you as the speaker have to make a judgment about whether you're doing one of two things, giving the same speech, whatever it happens to be. You're either committing a criminal offense or you're engaged in a very highfalutin, sounding freedom of speech, and oftentimes, you won't know until you've given the speech and you are either indicted or not.

[Laughter.]

¹⁰⁰ N.Y. Labor Law § 740 (McKinney 2006).

¹⁰¹ *Wieder v. Skala*, 609 N.E.2d 105 (1992).

ERIC M. FREEDMAN: That's what Eugene V. Debs discovered.¹⁰²

JUDGE A. RAYMOND RANDOLPH: Yeah, yeah. And *Schenck* and *Frohwerk* and all the other cases that Holmes upheld convictions in.¹⁰³

Anything else? Any closing comments, gentlemen?

[No audible response.]

JUDGE A. RAYMOND RANDOLPH: Okay. I guess we're finished.

[Applause.]

¹⁰² Debs v. United States, 249 U.S. 211 (1919).

¹⁰³ See, e.g., Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919).

