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presents

WHAT IS THE "FREE PRESS"?

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MR. LEO: Well, we are all here, so I guess we can start. The topic is, "What is the Free Press," obviously triggered by the CIA case.[1] I must tell you that in New York, where I'm from, the major media are in high dudgeon, and about this, not even medium dudgeon. The almost mandatory view is that this is an infringement on the press, that as tribunes of the people, they should not be interfered with. There's a whiff of sanctimony in all this, complicated by the fact that there's a lot of resentment about press bi-

1 *See*, *e.g.*, David Johnston & Richard W. Stevenson, *Cheney Aide Charged With Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1 (reporting on indictment for lying to investigators and misleading the grand jury of Lewis Libby, Jr., the Chief of Staff of Vice President Dick Cheney); David Johnston, *Another Time Reporter is Asked to Testify in Leak Case*, N.Y. TIMES, Nov. 28, 2005, at A1 (describing reporter's testimony before grand jury for case against Mr. Libby).

as these days that gives extra heat to this issue.

My own opinion, and I'm not going to come all the way down here and not impose it on you, is that journalists are citizens too, and like everybody else, if there are no alternative sources and it's a serious criminal matter, journalists like everybody else have to testify. The idea that we are somehow apart from the rest of America doesn't sound right to me. We'll see if everybody on the panel is wise enough to agree with me.

The press is amazed that reporters have been turned into investigative agents of the prosecutor in the CIA case. And although a lot of the outrage has been hidden behind the soap opera of the Judy Miller case, it's coming out now—and even more outraged that it turns out that one to three journalists may be the chief witnesses for prosecution, which has never happened before. So, we've assembled this distinguished panel. I'll read their bios in the order in which they will speak to you.

Eugene Volokh teaches free speech law, criminal law, copyright law, and the law of government and religion at UCLA. He's the author of a casebook on the First Amendment and Religion Clauses.[2] Before coming to UCLA, he clerked for Sandra Day O'Connor on the Supreme Court, and Alex Kozinski on the Ninth Circuit Court of Appeals. He is the founder and co-author of the Volokh Conspiracy, which is, in my opinion, one of the five or six best blogs produced in this country so far.[3] Those of you who follow the legal blogs know that every time there's a judicial opening of any note, the name of Alex Kozinski is instantly floated, but that's changed now. Because Eugene is such a success, they float the name of Alex and Eugene for almost any—of course, the electronic trail is too large.

Carol Darr became Director of the Institute of Politics, Democracy and the Internet in 2001. She is an associate research professor at the Graduate School of Political Management at George Washington University. During the Clinton Administration, she served as Acting General Counsel for the U.S. Department of commerce and an associate administrator of the Office of International Affairs and the National Telecommunications and Information Administration—big title. She has been General Counsel to the Democratic National Committee, Chief Counsel to the Dukakis/Bensen Presidential Committee, and Deputy Counsel to the Carter/Mondale Committee.

Next, we have Lillian BeVier, David and Mary Harrison Distinguished Professor of Law at the University of Virginia. She's taught constitutional law, with special emphasis on the First Amendment, intellectual property, real property, and torts. She has taught at Santa Clara and Stanford University Law Schools. She was nominated by President Bush and

2 Volokh's First Amendment and Related Statutes: Problems, Cases, and Policy Arguments (2d Ed.) (Foundation Press 2005)

3 Eugene Volokh, Volokh Conspiracy, http://volokh.com (last visited Sept. 28, 2007).

confirmed by the Senate to the Board of Trustees of the Legal Services Corporation, of which she is now Vice-Chair. She is on the Board of Visitors of the Federalist Society.

David Anderson holds the Marshall and Emily Wolf Centennial Chair in Law at the University of Texas Law School. He has written many articles on defamation, privacy, newsgathering, and freedom of the press. He's been a visiting scholar at Columbia, Cambridge, and many distinguished universities in the U.S., Europe and Australia. Oddly, for a panel put together by lawyers, he has actual media credentials. He was a newspaper and wire service reporter before coming into the law. He has written a casebook on mass media law.

Now, we've agreed to this order, with Eugene going first, because he has volunteered to lay out the issues that we are going to talk about today. Eugene.

PROFESSOR VOLOKH: I'd like to frame the discussion by asking, "Who counts as the press?" Part of the answer is pretty clear: when it comes to the First Amendment, anybody who writes is the press. In the *Reno v. ACLU*[4] case in 1997, the Court made clear that the First Amendment covers both online and off-line media. Likewise, the Court has long recognized that the amateur media (for instance, the traditional street-corner leaf-letter) is protected by the First Amendment together with the professional media. Thus, there's no need to draw lines between a web-blog—such as instapundit.com or Volokh.com—and Slate.com, which is an all-online magazine, or WashingtonPost.com, which has some purely online material as well as the *Post*'s printed text.

But things are far less clear as to what I call "optional speech protections"—protections that are not required by the First Amendment but are voluntarily implemented by legislators, common-law-making judges, or state constitution drafters.

There are many kinds of such protections, but I want to focus here on the ones that are relatively content-neutral but medium-specific. Libel retraction statutes are one such example. State law could throw the book at anyone found guilty of defamation. It could authorize all constitutionally permissible damages (including punitive damages and presumed damages), assuming the actual malice standard is satisfied.

But many state laws say that if a newspaper doesn't receive a prompt retraction demand, or receives a prompt retraction demand and then promptly retracts the original allegation, then it's off the hook for punitives and presumed damages. These statutes provide *optional* speech protection. Nothing says the legislature *has* to provide such protection. The question is

4 521 U.S. 844 (1997).

whether the legislature should extend protection only to newspapers and not web-blogs, or only to newspapers and magazines and not television stations, or otherwise discriminate on a medium-specific basis.

Journalist privileges are another example of optional speech protection. I very much agree with John Leo that journalists aren't *constitutionally* entitled to a privilege not to testify about confidential communications. However, if you look at the law of privilege, a variety of professions and relationships have been given optional—not constitutionally mandatory—legislatively-granted privileges not to testify about confidential communications. Psychotherapists get such privileges; doctors get privileges in some measure; lawyers get privileges, which may be dictated by the Sixth Amendment in some cases, but most lawyer privileges go beyond that. So some states—over half the states at this point—have created statutory journalist privileges. What happens if the privilege covers people who, for example, work for "newspaper[s], magazine[s], or other periodical[s]"?[5] Are blogs covered? Who counts as press, for purposes of this particular optional statutorily defined press privilege?

Likewise, what about media exemptions from campaign finance laws? Campaign finance law, as we will see, provides special treatment to the media, but who is the media? Is a blogger like me the media? As it turns out, there was an answer given to this question by the FEC yesterday, and we'll get to that in a moment.

Let me step back from this and suggest that there are three kinds of questions in play here, of which I'll discuss the first two kinds. First, is it a good idea to discriminate based on medium, and especially against blogs?

Second, do the laws as currently written indeed discriminate based on medium? It's an interesting question of statutory construction. As you lawyers—as opposed to us law professors—may know, for every case in which the Court looks to the Constitution or to abstract policy arguments, there are dozens of cases where the courts simply ask what the statutes say. Or at least the courts *should* ask what the statute says.

Third, is it constitutional to discriminate based on medium when it comes to optional speech protections? It's an interesting question, but, as is common with constitutional questions, not the most interesting one. I will save it for another day, but my short answer is that, given the Court's current case law, the answer is probably "yes."

So let's begin with whether it's good to discriminate against blogs; and to answer that, let's begin by looking at blog readership statistics (or the best guess about blog readership statistics that we get from the "unique visitor count per day" estimates that various software tools provide). If you look at the list of the top blogs by late 2005 traffic, here's what you see.

5 CAL. CONST. art. 1, § 2(b); *see also* NEB. REV. STAT. § 20-145 (1999).

First up is a big left-wing blog, DailyKos; it gets almost 800,000 views per day. Gizmodo,[6] a blog about gadgets, is number two on the list, with almost 300,000 a day. The libertarianish politics and public policy blog Instapundit[7] (run by law professor Glenn Reynolds) gets 150,000.

Michelle Malkin, a prominent conservative columnist—who is actually a member of the press in her own right, even setting aside her blog[8]—gets 100,000. That brings us down to number thirty-two—a high-quality thirty-two—27,000 views a day, which is not chopped liver, and that's us at the Volokh Conspiracy.[9] Compare these numbers to newspaper readership statistics, and you see that while blogs aren't as widely read as the top papers, many are in the same ballpark as many substantial newspapers. Number 100 in the newspaper list—this is 2002 data—is at about 100,000 views a day; and quite a few blogs have more than 100,000 readers.[10]

So many blogs are pretty widely read; they thus have the potential to be important participants in public debate. To begin with, more opinion sources are generally better than fewer. But beyond this, blogs are probably better than most newspapers at covering niche interests, from tax law to physics to other things that many mass-market newspapers don't cover. It's often hard to build enough of a constituency for these interests to justify writing about them in a local newspaper. But a blog can be read throughout the whole country (or the world), and can be distributed very cheaply without regard to geography. In fact, the leading case involving a blogger who claimed a journalist's privilege involved a niche blog about Apple products.[11]

Blogs can also often better provide expert commentary than traditional media. It's no accident that many top blogs involve people who are experts in their field, whether academics or others. Most experts don't want to go out there and try to get their own newspaper columns; that format may be too stifling, and experts may want to be able to speak in somewhat more technical terms than would be welcome in a newspaper. If you're interested in news about sentencing law and policy, it's hard to beat the Sentencing Law & Policy blog.[12]

Blogs also do more media criticism than the media does, and thus help hold the mainstream media accountable. Mainstream media generally doesn't see media criticism as a high-value, high reader-interest story. The *New York Times* will never run on the front-page, "*Washington Post* Screws Up," because that's seen as too much of an industry insider story, which most readers don't want to read. And this judgment might be

6 Gizmodo.com, http://www.gizmodo.com (last visited Nov. 10, 2007).
7 Instapundit.com, http://www.instapundit.com (last visited Nov. 10, 2007).
8 MichelleMalkin.com, http://www.michellemalkin.com (last visited Nov. 10, 2007).
9 The Truth Laid Bear, http://truthlaidbear.com/ecotraffic.php (last visited Sept. 28, 2007).
10 *Id*.
11 O'Grady v. Superior Court, 44 Cal.Rptr.3d 72 (Cal.App. 2006).
12 Sentencing Law & Policy, http://sentencing.typepad.com (last visited Mar. 11, 2008).

right—but it's still useful to have a place that features "*Washington Post* Screws Up" stories, and keep the *Washington Post* (and any other media) on its toes. Many blogs are that sort of place. So blogs are both complements to mainstream media and its rivals—which makes it good to keep them on a level playing field.

Nor is it helpful to try to distinguish blogs on the grounds that they aren't edited or fact-checked, and are thus more likely to be inaccurate. To begin with, many op-eds and newspaper columns are at most lightly edited and fact-checked, if that much. Some magazines maintain professional fact-checking staff, but most newspapers don't.

Moreover, what many bloggers lack in editors or fact-checkers they make up for in expertise. When it comes to criminal procedure, I'd trust my colleague Orin Kerr, who is a leading criminal procedure scholar (even though he, like all of us, can make an error in off-hand writing that an editor would have caught), over a journalist who is not a criminal procedure expert and who is edited by an editor who is not a criminal procedure expert.

But beyond this, even if leading bloggers tended to make more errors than newspapers of comparable circulation, that would have little bearing on whether they should get the media exemption from campaign finance law—an exemption that extends to media "commentar[ies] [and] editorial[s]," and not just media factual reporting.[13] Likewise, comparative accuracy analysis should have little bearing on whether bloggers are entitled to the journalist privilege. It's usually precisely when journalists are reliable that people most want the journalist to testify about what they had learned—if bloggers are less reliable, then that just means that testimony from them will generally be less valuable.

My argument, then, for protecting blogs goes beyond just "all media speakers should be treated alike." That's a good First Amendment argument, but it's not clear whether it's a good argument as to optional speech protection, because the legislature is not required to grant *everyone* protection. If blogs either lacked value because they had very low readership, or lacked value because they didn't provide useful commentary, there would be no particular reason for the legislature to provide this optional protection. But they do have value, much like newspapers and magazines have value, and should thus be protected.

Now let's move to what the law in this field actually is, and let me focus on two examples—the journalist privilege and campaign finance law.

How do journalist privilege statutes actually treat bloggers? Well, it depends on the statute. The Nebraska statute, for instance, provides absolute protection against being required to disclose sources of information ga-

13 11 C.F.R. § 100.7(b)(2) (1998).

thered for "any medium of communication to the public."[14] (This is much broader than any First Amendment claim that the Court is likely to accept, if it is likely to accept anything). And it pretty clearly covers all media of communications, including blogs: "Medium of communication shall include, but not be limited to, any newspaper, magazine, other periodical, book, [or] pamphlet . . . ."[15]

Now compare the California Constitution's express absolute protection for a "publisher, editor, reporter, or other person connected with or employed upon"—so far quite broad—"a newspaper, magazine, or other periodical publication . . . ."[16] Is a blog a "periodical"?

Well, an active blog is a periodical in the sense that it's updated periodically, rather than just once. But on the other hand most blogs don't have a fixed period between publications, which some definitions of "periodical" require.[17] For economic reasons, newspapers have a fixed period—once a day—as do magazines (generally once a week or once a month). Blogs don't have to be published at fixed intervals, and since we don't have to, we don't. If there's a new story, why should we wait until the next day to post? One of the advantages of blogs is their timeliness. But maybe that strips us of the privilege because it means a blog isn't a periodical.

Here's another oddity. It turns out that, according to some dictionaries, a periodical requires a period of more than one day, so that a daily is not actually a periodical.[18] If that's so, then our blog would not be covered as a "periodical" because we publish too often. I don't see much of a policy justification for such a distinction in treatment; but if I'm going to assert rights drawn from the text of the statute, I've got to pay attention to the text of the statute.

I think that when it comes to rival definitions of periodical—requiring a period of more than one day, requiring a fixed period, or requiring publication that is fairly regular rather than once-only or highly intermittent[19]—the policy arguments can make a difference, and I think they cut in favor of the last definition.[20] But this interpretive question is thorny, and the likely

14 NEB. REV. STAT. § 20-144 (1999).

15 NEB. REV. STAT. § 20-145 (1999).

16 CAL. CONST. art. 1, § 2(b).

17 *E.g.*, Merriam-Webster Online, http://www.m-w.com/dictionary/periodical, defn. 2a ("published with a fixed interval between the issues or numbers") (last visited Sept. 17. 2007).

18 *See, e.g.*, American Heritage Dictionary, http://www.bartleby.com/61/43/P0194300.html, defn. 2a ("Published at regular intervals of more than one day.") (last visited Sept. 17, 2007).

19 *See, e.g.*, O'Grady v. Superior Court, 44 Cal.Rptr.3d 72, 104 (Cal.App. 2006) (suggesting that publications that are not "published in distinct issues at regular, stated, or fixed intervals" but have articles "added as and when they become ready for publication" might qualify as publications).

20 *See, e.g.*, *id.* at 104 (taking the view that "Given the numerous ambiguities presented by 'periodical publication' in this context, its applicability must ultimately depend on the purpose of the statute," and that here, given the goals of the journalist's privilege, the legislature likely intended "periodical publication" "to include all ongoing, recurring news publications while excluding nonrecurring publications such as books, pamphlets, flyers, and monographs").

result is thus not trivial to predict.

But maybe blogs are not periodicals; maybe we're magazines instead. True, blogs certainly don't look like magazines. But how many people, before they got into this room, if asked whether a Slate.com is an online magazine, would have said yes? How many would say that it is not an online magazine? [Show of hands.] Yes, so most people say that it is; you might add the qualifier "online," but it's still seen as a magazine, though it isn't printed on glossy paper and distributed every week or month through the mail and on newsstands.

Now our blog is not exactly like Slate.com; for instance, we're not as professional (though magazines have been known to be published by relative amateurs). But maybe we're kind of the online equivalent of a magazine. As it turns out, a recent opinion letter from the General Counsel's Office of the FEC dealt with the media exception to election law by saying that blogs are the online equivalent of newspapers or magazines.[21] So maybe this argument is another way blogs can qualify for the exemption. Again, it's an interesting interpretive question.

New York has a still different kind of privilege, covering only those "who, for gain or livelihood, [are] engaged in . . . writing . . . news intended for a newspaper, magazine . . . or other professional medium or agency which has as one of its regular functions the processing and researching of news intended for dissemination to the public," when "such news com[es] into such person's possession [in confidence] in the course of . . . obtaining news . . . for public dissemination."[22] That excludes the purely noncommercial blogs, but it looks like making even a modest amount of advertising revenue will let the regular blogger be covered. Delaware is odd because it requires that you spend twenty or more hours a week in the course of actually writing stuff for public dissemination, which many bloggers are probably embarrassed to admit that they do. However, the advantage is that once you satisfy that twenty-hour minimum, the statute exempts every sort of reporter, journalists, editor, or "polemicist."[23] So, if anything, I think we're clearly polemicists, so we qualify for the exemption in Delaware.

Of course, there are problems with such broad protection. Imagine that Joe tells me about a crime he committed. Called to testify at Joe's trial, I say, "Look, I'm a journalist; I might have ended up posting something based on Joe's account on my blog. I sometimes do these sorts of things." A traditional journalist would get protection in this situation if Joe was one of his or her sources. Can it be possible, though, that anyone who has a

21 *See* Brian Faler, *FEC Considers Restricting Online Political Activities*, WASH. POST, Mar. 21, 2005, at A17; *see also* FEC Advisory Opinion 2005-16 [hereinafter Opinion 2005-16], *available at* http://saos.nictusa.com/saos/searchao.

22 N.Y. CIV. RTS. § 79-h (McKinney 2000).

23 DEL. CODE ANN. tit. 10, § 4320 (1999).

blog gets protection from testifying against their friends?

I think probably the better approach would be to narrow the privilege in a way that neither journalists nor others get protection in that kind of situation, though it's an interesting question how we distinguish things that we get from bona fide investigations from things that our buddies just tell us. It is undeniably the case that if you extend the journalist privilege to bloggers, you're going to have a lot more people trying to invoke it.

Now, let me close with campaign finance law, especially because Lillian and Carol are going to be talking about it. Campaign finance law limits expenditures in various important ways. First of all, it basically bans corporate expenditures related to candidates, with some exceptions. The result is that individuals can speak about candidates, but corporations can't. But, you might say, the *New York Times* is run by a corporation, right? How can it say anything about candidates? Aha—that's because of the special media exception to campaign finance law.

Independent expenditures coordinated with candidates are also dramatically limited: They're treated as contributions, and thus aren't allowed if the coordinating spender spends more than a couple thousand bucks on them. An example of a coordinated expenditure would be the *New York Times* calling a candidate and saying (expressly or implicitly), "we want to know where you stand because if you stand the way we stand, then we're going to endorse you." That would be coordination, and illegal if GM did it. But the *New York Times* is entitled to do that—again, because of the media exemption.

Also, expenditures of a sufficient size must be disclosed, which is a pretty substantial procedural burden, though not an outright ban. But the *New York Times* doesn't have to disclose every time it publishes something or has spent money on something having to do with the candidate—again, because of the media exemption. And the exemption covers every news story, commentary, or editorial distributed through facilities of newspaper, magazine, or other periodical publication. So we encounter the same question: is a blog another periodical publication?

As I alluded to earlier, the FEC General Counsel's letter says that blogs are online "magazine[s]," and are therefore entitled to this kind of protection.[24] The FEC took the view that because the statute was written long before there were blogs, it should be read in light of modern technological circumstances—sort of like the way we read the Constitution's provision for an army as including authorization for the Air Force. We don't require a new constitutional amendment to recognize the Air Force, because it's a modern aspect of an army. Similarly, a blog is the modern online magazine, according to the FEC—though again we have to recognize that if bloggers get the media exemption and anybody can be a blogger, then

24 *See* Opinion 2005-16, *supra* note 21.

this will become a very broad exemption indeed.

So with that, I close, and turn things over to my fellow panelists.

MR. LEO: Now that Eugene has laid out the parameters of the discussion, I should remind the panel that we all agreed to limit statements to twelve minutes. After everyone has spoken for twelve minutes, we will go directly to questions from the floor. If you wish to rebut, you have to simulate a response to someone's question.

Carol Darr.

PROFESSOR DARR: Thank you. What Eugene was just talking about is the great segue into what I want to expand upon, which is the campaign finance implications of treating bloggers as the media.

The FEC just put on its website a draft advisory opinion, the one Eugene alluded to, that gave the media exception to a law established by former U.S. Senator Gene Carnahan and several political operatives in Missouri. The blogosphere will probably be delighted with this exemption, but I see it as a case of "be careful what you ask for" and I want to tell you why, and I want to make three points.

The first point, I think we can all agree on. The landscape of politics and journalism have changed profoundly. As Meetup CEO Scott Heiferman has said, the Internet has democratized democracy. It has lowered the barriers to entry. Now, anybody who wants to report or comment on the news of the day can do so, and their voice can be heard around the country and even around the world. In fact, some of the bloggers have audiences bigger than some of the midsize newspapers, as the statistics that Eugene just showed you point out.

The second point is nobody really wants to interfere, including me, with the free-speech rights of these bloggers. They have asked to be treated the same as any other media by the Federal Election Campaign laws, and it's hard not to be sympathetic. Today, the FEC issued a draft advisory opinion regarding a blog called FiredUp.com. This blog basically is no different than any of the other top ten, top fifteen blogs you see on the Democratic liberal side of the Republican conservative side, so it's going to have wide applicability. And not surprisingly, as Eugene said, the FEC stated that the blog was entitled to the media exemption. The legislative history of the FECA and the Commission's past precedents are so broad that I don't see how they could have come to any other conclusion. This is not a big surprise.

The third point I want to make is that even though asking for that media exemption was an easy ask, we are going to find out that it's going to be a very expensive gift. The system of campaign laws that we have

known for the last thirty years, including the prohibition on corporate contributions that has been in effect for almost 100 years—since the Tillman act in 1907—that system of laws cannot accommodate a widely granted media exemption. This draft opinion, if it becomes official—and I'm assuming it will—will have the effect of absolutely destroying the limitations and prohibitions on corporate money, union money, big money, and even foreign money.

It comes down to this. The FEC and Congress can widely grant a media exemption to anyone with a blog, or almost anyone. Or they can regulate money in politics. They cannot do both. Let me explain why. Campaign finance laws limit what individuals can contribute to candidates, political parties, political candidates. The federal laws prohibit corporations and unions from using their treasury money and their dues money, respectively, in making contributions. And essentially anything of value counts, unless there is a specific exemption. And as we all know, for people involved in politics, there are lots of exemptions.

One of the biggest exemptions, and I think the best exemption, is the media exemption, which was obviously put in to the statute so as not to interfere with the free press. Let me give you that definition again: The media exemption exempts from the definition of contribution and expenditure, "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcast station, cable station, newspaper, magazine, or any other periodical publication, unless it is owned or controlled by candidate or party or political committee."[25]

The effect of the media exemption is this. A press entity can spend an unlimited amount of their own money promoting, attacking, supporting, or opposing a candidate. They could even use the magic words; they can advocate the election or defeat of a candidate in their broadcasts and publications. Publications like the *New York Times* do this all the time. They use their corporate money to produce editorials and news stories, and then publicly distribute their views. Now, anybody who has that media exemption, including the bloggers, can do the same thing.

Further, the FEC has said that the current media exemption allows the media to distribute its content in any manner that is consistent with industry practice. So in keeping with this, what this means is that a blogger with a media exemption can distribute its political editorials or political solicitations by putting them on a website, in emails, in RSS feeds, or listservs. Like broadcasters, a blogger can produce expensive videos that political operatives can use for their own purposes, such as the network footage of Michael Dukakis that you all remember, in the army tank looking like the Red Baron, that was used in the 1988 election.

And here's the good part. They can do all of this while their em-

25 11 C.F.R. § 100.7 (1998).

ployees coordinate with the campaigns. We don't call it this. We call the employees reporters or editorial writers, or we call them political cartoonists. But essentially, they are employees and they can coordinate with the campaign. They would call it covering the campaign. But essentially, it's the same activity; activities that, if these people were employees of, say, Procter & Gamble, it would count as coordination. In other words, as long as the media are pursuing their journalistic function, for all practical purposes they are exempt from campaign finance laws.

This legal right to spend an unlimited amount of money advocating the election or defeat of a candidate, and also coordinate with them at the same time, is open not only to corporations but to individual, independent journalists, and to foreigners and foreign money. Rupert Murdoch, *Pravda*, *Al Jazeera* all have the same rights as the *Washington Post*. This media exemption allows all of them, for understandable reasons, a lot of leeway because to do otherwise would interfere with their rights as journalists. The exemption is open to all—foreign and domestic, good, bad, hacks, crazies, everybody. Everybody from the *L.A. Times* to the independent journalist in a basement distributing work on a mimeographed piece of paper gets the exemption.

Bloggers have said, quite rightly, what about us? What's the difference between everybody else and what they do, and what we do? And they've said we fall squarely within the Act's definition of media. We cover stories. We issue commentary and editorials. And we're periodic. That being the case, we are also entitled to the media exemption. And the FEC, at least in the draft opinion, seems to be agree with that.

However, if you give the media exemption to twenty million bloggers, or even 200 of them, then all somebody has to do to be exempt from the campaign laws is to establish a blog. The entry costs are nil. Democracy has become democratized, and so has the press. We can all be media; we can all be press; and therefore, anybody who wants to be exempt from the campaign laws can do so.

It gets better. The media does not have to disclose where its money comes from. Unless they are a publicly held company, they don't have to tell anybody who their investors are, who their sponsors are, who their partners are, who their advertisers are, if it's not otherwise apparent. They can take any kind of money from anybody, and it is all hidden from view. To those who argue that we can rely on real-time public disclosure to clean up federal elections, I would say think again. There are as many ways to get around disclosure as there are the campaign act itself, and the media exemption is just one of those. Think of the possibilities in the next election: no disclosure; no limits on any kind of money, including foreign money; and you get to coordinate with the candidates. Think of swift boats on steroids. You will be able to do anything.

I do not bemoan the democratization of the media. It was long over-

due. But I do fear that our fragile, very flawed system of campaign finance laws is about to be completely destroyed by the media exemption.

(Applause.)

My next line was going to be, there are those who would applaud that result—but let me say, only if you think that the system we have now cannot possibly get any worse than it is. I've been involved in campaign finance for thirty years, and it is full of loopholes. You're about to see no laws whatsoever. You're about to see—

(Applause.)

PROFESSOR DARR: —it's a basic fundamental difference, and I disagree.

You know, the FEC is still going to regulate the nickel-and-dime stuff. But the game is over, and I guess I would say, your side won. The Hundred Years War against political money—in that war, Big Money has won. Congratulations.

Thank you.

MR. LEO: Lillian BeVier.

PROFESSOR BeVIER: I want to respond first to just the simple fact that I'm talking after Eugene Volokh and Carol Darr. But talking after you Eugene, I feel that if I talk that fast, my tongue will get twisted around my—and I can't think that fast either, so I'll just go a little bit slower.

Eugene talked a bit about the statutory interpretation questions with respect to all of these various state statutes that give reporters privileges. One of the issues, of course, that one would confront in those statutes is who is a journalist and who qualifies. These are statutes of both inclusion and exclusion; who is not qualified? You have to, of course, decide what the rationale is for those journalists' privileges.

What I want to do today is actually change the subject a little bit with respect to both that and of the media exemption, and go to something which, in my view, is more fundamental and goes to the heart of why these questions are hard, now that the blogosphere seems to be sort of coming into its own.

Many, and I have reason to believe most of those who were in this room and who love freedom, are inclined to read those provisions, both the

media exemption and the journalist privilege, broadly so as to include as many people as possible, and certainly to include bloggers. Bloggers are very salient at the moment. They seem to fit completely within the rationale of journalist privilege, for example, as well as perhaps the rationale for the media exemption.

But my position is a little—I want to take a point of view that's a little bit different from, we should read those provisions broadly so as to protect bloggers, and be somewhat iconoclastic. And it leads me to ask, well, how did the press get these privileges in the first place? I suppose I'd pick up on your notion that journalists ought to be citizens like everyone else, and we might want to worry about reporter's privilege, despite the fact that therapists and clergymen and so forth have it. Those people have it in order to enable them to provide the service that they are hired by their clients or their penitents or whatever to give. And so, the rationale for those privileges I think is quite different.

We came to the view, or seemed to be willing to come to the view after Watergate and the *Washington Post* breakthroughs there, that the press can do no wrong, that the press is the agent of the public, and without the press we wouldn't know anything, and we have to count on them to be our agent and bring us the news, and they wouldn't be able to bring us the news if they couldn't keep their sources confidential. All that's true, but usually when you have an agent, you have a principal. And very often, when you have an agent and a principal—we're supposed to be the principal—you are inclined to have problems of what we in the Academy call agency slippage, where the interests of the agent are very different from the interests of the principal, and the principal has no means of holding the agent to account, no means of making sure that the agent is covering the right stories, is talking to the right people, is bringing the truth to light.

So, this leads me to just add a kind of caveat about the whole idea of journalist privilege, the caveat having to do with the accountability of journalists, both to the public—i.e., us, the people that they allegedly serve, as our agent, to bring us the news—and of course to the criminal justice system. I worry about that. I think that, of course, any time you have a law that is going to mandate disclosure at some point, you are likely to have what the journalists would say is true; you're likely to have a little as communication. In other words, people are going to be more guarded when they talk to the press. So I understand there's a trade-off with saying I'm not completely with you on the journalist privilege, a trade-off in the sense perhaps of somewhat less information from confidential sources. Personally, I'm not sure the press privilege gives us the best of the bargain with respect to what that trade-off is and what it should be.

I have many thoughts and little time. So let me start in the campaign finance and the media exemption, telling you that I come at this issue—it sounds like the way a lot of you do. I'm not a fan of campaign finance

regulation generally, and I have long been a critic of the regulations, and I've long been a critic of the restrictions recently passed, in particular those on corporate and union electioneering communications, those that say if you're a corporation, you can't spend corporate funds and you can't mention the candidate's name. I have thought that those are transparently incumbent-protective. We have enough problems in our democracy, what with gerrymandering and so forth, and incumbents have enough protection that I think the electioneering communications restrictions are very problematic.

Consider, however—and we say, well, there's a media exemption for those and so the media corporations are going to be able to talk about candidates and write their editorials and give us their commentary. And all that is true. But I don't know whether you remember this vividly as I do who was on the side of campaign finance regulation. Well, the *New York Times* and the *Washington Post*, of course, were going to be exempt from it, and guess who was the biggest fan of campaign finance regulation—sort of the mainstream media, the people who would remain in control of the public agenda and would simply be able to continue their dominance, if you will, of what the issues are going to be on the public debate.

It's worth pointing out, by the way, in response to what Carol said, that the campaign finance movement is itself a product of big money in politics, to the tune of $123 million in the last decade, by such nonpartisan foundations as the Ford Foundation and the George Sorrell's Open Society Institute. Among the funding that they gave in favor of campaign finance regulation was $1.2 million to NPR for news coverage of financial influence in political decision-making, a fact I learned by reading a blog on Tech Central Station.[26]

Not only did the media publish stories about money and politics and how corrupt we all are, but they never engaged with any degree of seriousness in the First Amendment problems, that regulating corporate speech and speech about politics were raised. They talked about the First Amendment issue as if it were a sham, as if it were—well, some people think this violates the First Amendment but we don't think so. My point is not that expenditures by the media for talking about candidates and putting their points of view across should be regulated. My point, rather, is that expenditures by anyone for engaging in that activity should not be regulated; that the media is no different in that respect and in the respect of asking for and being entitled to the freedom of political debate, than you or I, certainly no more entitled to it than bloggers.

Most of you probably know that during the 2003-2004 election cycle, the FEC had interpreted the campaign finance statute to exclude communi-

26 Tapscott's Copy Desk, http://tapscottscopydesk.blogspot.com/2005_03_01_archive.html (March 11, 2005).

cations over the Internet from the BRCA, McCain-Feingold—sorry, BCRA. So, we had an election cycle where, in effect, blogs had not been regulated. And I think it's fair to say that the sky didn't fall. Well, maybe it fell some places, but it didn't seem to fall for the entire country. I think it's fair to say that we got along just fine, and indeed it was a very vigorous, very intense campaign and the blogs did indeed democratize democracy, speaking about candidates, taking positions on issues and the like, in a way that was quite invigorating for many people, and really a wonderful, I think, invigoration of the political process.

Movements are afoot in Congress as well as the FEC to put that exemption for the Internet and for—I'm sorry—to put that exemption into the statute itself and to continue to exempt communication on the Internet from being covered by the BCRA. Now, you'll be surprised to learn, I'm sure, that the *Washington Post* and the *New York Times* and Representative Shays and Representative Meehan and Senator McCain are against these measures. They say that—they're not worried, of course, about competition from blogs; the newspapers are not worried about preserving a declining readership from further erosion. They're worried about corruption and about the continuing influence of big money in politics.

Well, one of the things I think we have to ask is whether these kind of Chicken Little predictions about what's going to happen to campaign finance regulation, well, if only they would come true, but I'm afraid they're not going to. Campaign finance regulation is not put at substantial risk by extending the media exemption to bloggers, for example. It is still true that all of the previous regulations about corporate contributions and about corporate expenditures discussing candidates soon before an election are going to stay in place. So, to say that bloggers are going to have free speech is going to bring the campaign finance regulation house down, I think is a bit of an overstatement about the consequences.

I would just like to suggest that I was stunned to hear Carol Darr say that it's okay for reporters and the media to coordinate their expenditures with candidates. The media exemption is not designed to coordinate or have reporters coordinate their reporting with campaigns. If it does, then I think it should be repealed. I mean, I think that's really a distortion of the political process.

But I think with respect to the Internet and blogs, what we should be realizing is that the democratization of democracy is a wonderful thing. Blogs are, as Carol noted, very easy to start. Nobody visits a blog who doesn't know where they're going and doesn't want to go there. There's unlimited bandwidth so that anyone can start a blog. It's not as though we are going to have anybody drowning out anybody else. These are the basic arguments that have been made in favor of campaign finance reform.

So, blogs are very unlikely to corrupt the process. Blogs are very unlikely to make the process further unequal. In fact, there's nothing more

equalizing than a blogosphere. And with those thoughts, I will leave you.

Thank you.

MR. LEO: Your ten seconds are over.

David Anderson.

PROFESSOR ANDERSON: My answer to the question that Eugene raised at the outset is very simple. The press is whoever the political branches say it is, with some rare exceptions. And I think we ought to try to keep it that way. Freedom of the press actually owes them very little to the Press Clause, at least as far as positive law is concerned. The Supreme Court has never recognized any rights that are exclusive to the press, no First Amendment rights that are exclusive to the press. Of course, freedom of the press depends on a lot of non-legal forces, such as tradition and the political power of the press, its financial might and so on. The existence of the Press Clause probably reinforces some of those things, but so far as establishing constitutional principles that protect the press, the Press Clause just really hasn't played any role.

The constitutional principles that are pillars of press freedom are things like protection against the use of contempt to punish publication, protection against prior restraints, the constitutional protections in libel law, the presumption against content-based regulation—those all came from the Speech Clause, not from the Press Clause. And that, in my mind, is a very salutary thing. That makes those freedoms available to everybody; bloggers and dissidents of every stripe, and so on, as well as to the press. They are freedoms that were won by the press, but they apply equally to all speakers.

The fact that it hasn't been necessary to use the Press Clause to protect the press up to now seems to me to suggest that it probably isn't necessary now to use the Press Clause to protect new forms of communication that may clamor to be treated as press. The Speech Clause, in most instances, gives them all the constitutional protection they need, just as it does for the old media.

Now, the second legal source for freedom of the press today is what Eugene called the optional protections. I would just call them non-constitutional protections. In addition to the ones Eugene identified, there are all the access—the preferential access arrangements are made, whether it's access to the White House or access to City Hall or to disaster areas or war zones, or whatever. There are statutes protecting newsrooms from police searches. There are a great many exemptions, news media exemptions, from all kinds of regulations; securities regulations, from tax, from campaign finance, of course, as has been mentioned. There are good subsidies, direct and indirect; low postal rates, free use of spectrum by broadcasting.

These are all things that I think were thought by the legislature to enhance freedom of the press, and they're not constitutional. And because they're not constitutional, it's not necessary to identify the press in order to decide who is the press in order to decide who gets the benefit of those.

You'll notice in the examples that Eugene had on the screen, not one of those statutes described the beneficiaries in terms of press. They were all described in other ways. Now it may well be that those descriptions are obsolete, and indeed I shouldn't say may well be; clearly they are obsolete in many respects. The statutes ought to be changed. If they're not changed, courts will interpret them more broadly or more narrowly, perhaps, in some instances.

But, I think it's right to keep those decisions in the political branches and to not constitutionalize them. They're the kind of decisions that are not suited for constitutional resolution. For example, somebody has to decide who gets to ask the President questions in a news conference at the White House. The prison administration has to decide whether to take resources away from the prison library or health care or security and use it to facilitate press access to the prison, for press news coverage.

If you say that the press has a constitutional right to do any of these things, then those rights can be invoked by anyone who claims to be press and each of those decisions of exclusion becomes a constitutional challenge. Even if you thought that was desirable theoretically, you would have to think twice about the costs that that imposes. What government agency would want to get involved in making these kinds of dispensations available, if it knew that it was going to have to litigate every disgruntled applicant who is denied the benefit?

As long as these perquisites are not constitutional, they can be more or less inclusive in different circumstances. For example, I think the legislature might be more willing to include bloggers in provisions granting access to Congress than it is in granting access to war zones or prisons, where the security considerations are greater than they are in other contexts.

Now, I mentioned that I think there are some exceptions to this proposition that everything can be protected by something other the Press Clause. There may be circumstances in which freedom of the press requires reliance on the Press Clause. For example, suppose that the President decided to ban all press from the White House, to hold no news conferences, to hold no press briefings, and to forbid everybody in the White House from speaking to the press. I think that might be a threat to freedom of the press. It is not a threat that you can meet with the Speech Clause because the courts cannot hold that everybody, because we are all speakers, have a right of access to the White House.

Or, suppose that the military prevents all direct coverage of a war. No press is allowed in the theater operations, no briefings from commanders,

no access to troops who have returned from battle, no information about casualties. At some point, it seems to me that there's a Free Press claim that arises there. And again, I think it's one that cannot be addressed under the Free Speech Clause because we can't all have a right of access to the war zone. Those seem to me to be two examples of government actions that would be inconsistent with the idea of a Free Press.

How can freedom of the press be protected in situations like that, without giving a constitutional right to individual journalists or organizations? Well, I think it's possible to do that, but it requires some sort of innovative thinking. The answer is it can be done by holding that the Press Clause doesn't create individual rights. It only prohibits restrictions that are so pervasive that they prevent the press from doing its job. Now, if we ever got to that point, yes, there would be some questions about, is something called the press being prevented from doing its job? I don't have a definition for press for those purposes, and I don't think I should, or you should, or the courts should.

If you think about speech, it is still being defined. What is speech? Even though everything depends on the characterization of the First Amendment, we're still evolving what the meaning of speech is. And I think the meaning of press, if and when the Press Clause becomes constitutionally relevant, that too has to develop by evolution.

My point is that a challenger should not be able to succeed just by showing that he or she is prevented from covering the war or prevented from asking the President a question. The challenge should have to be that the press as an institution, whatever that institution is and however broad you want to make the press, that its institutional role is being denied. That's a very unfamiliar concept to First Amendment thinkers because we have come to take it as an article of faith that the Speech Clause protects everybody equally and that any free speech right may be asserted by any person. I think that managing this idea of an institutional First Amendment right of the press would require some unconventional thinking about standing, who has standing to challenge the kind of restrictions that I have described, and forms of relief, what kind of relief would be granted and who would be entitled to it and so on.

But I think those are the exceptional situations, and for the most part it's not necessary to define the press for constitutional purposes, for purposes of campaign finance and confidential sources of all these other things. It's a political thing. I very much accept virtually everything Eugene said about bloggers, and it seems to me those are persuasive arguments to be addressed to the legislature. Now, it doesn't mean you'll win. Legislatures do stupid things and they make mistakes and they get things wrong, but that doesn't mean there ought to be a constitutional remedy for it.

So, I guess my point is before we get into a tizzy about defining the

press, we ought to be asking for what purpose is it necessary to define it. And as long as it's not necessary to define it, let's not do it.

Thank you.

MR. LEO: Okay. Time for questions. Please tell us who you are and which panelist you'd like to respond, and no speeches, please. We're looking for questions.

AUDIENCE PARTICIPANT: James Young, National Right to Work Legal Defense Foundation. And I would direct this to any or all of the panelists. I'm delighted that Congress has already made sure that people can't use the wealth they earned to express opinions that are opposed to mine. George Soros comes to mind. And I'm particularly interested—particularly delighted that they banned the use of union dues money for contributions to candidates. We all know that that works very well in preventing unions from using forced dues for political activities, as in California last week.

I guess the question that I would ask and I would have the panelist address is, why are we spending so much time limiting the use of voluntary funds in politics, and virtually no one is addressing the issue of forced union dues used for politics?

MR. LEO: Carol, I think it's for you.

PROFESSOR DARR: I'm afraid that's true. You know, I think the answer is obvious. You know why the Democrats don't take that issue on; because most of the unions favor the Democrats. But let me tell you kind of the best one sentence I ever heard about campaign finance laws that I think sums it up. Somebody said, after a war called Watergate, the great powers got together and hammered out a treaty, and that treaty was the election laws. And if you look at the laws as a treaty, there's something in it for big labor, there's something in it for big unions, there's something in there for incumbents, there's something in there for Democrats and Republicans. That's the treaty. When you look at it that way, it makes sense. That's what big labor got. That's why it's there, the same way—that's why corporations can spend money in similar ways with their corporate money.

PROFESSOR BeVIER: There was a price to be paid for that treaty in political freedom. So I mean, basically—

MR. LEO: Your mic's not on.

PROFESSOR BeVIER: —there's a price to be paid for that treaty, and that is a price in political freedom. But with respect to the question of why the forced contributions are not salient, I think Carol has a very good point. It is not constitutional for unions to spend their employees' money. If their employees ask for it back, they're entitled to get it back. But we all know that the check-off is something that the unions have fought, and so they do it with the implicit acceptance by their members, and it's not a politically salient issue, certainly in mainstream political discussions, because without that money the unions would have a really hard time being as effective as they are in the political realm. And they are very powerful, as you know, for Democratic candidates, and I suppose for some Republicans as well.

MR. LEO: Anyone else on that question? Alright. We'll move to the next question now.

AUDIENCE PARTICIPANT: Jennifer Barnett. I am a staff attorney with the Institute for Justice, and I'm from the Phoenix Lawyers Chapter. First, I guess I'm curious if anyone on the panel is familiar with the recent decision of the Seattle or Washington state trial courts—Mr. Volokh, you may be familiar with it—holding that two talk radio show hosts, their commentaries supporting an initiative to repeal a gas tax had to be declared as in-kind contributions to that initiative process because they supported the initiative on air.

And it's slightly different from the blogosphere, but there is a rise in talk radio programs, particularly with satellite radio, and I'd be curious to hear any of the panel members' thoughts on what kind of national implications this has, if you are going to have talk radio hosts and perhaps a wider net cast of anybody who expresses an opinion in favor of a particular initiative having to declare those as in-kind contributions subject to campaign finance reform laws.

PROFESSOR DARR: You know, that's going to be a matter of state law, what counts as a contribution and a referendum. One point I would make with regard to the federal law. If you can't distinguish between individuals and individual journalists, between corporations and media corporations, between foreign money and foreign media, you have a couple of choices. You can either not regulate any of them or you can regulate all of them, and since we don't want to regulate the media, where this is going to go is that I think you're going to see laws across the board, including state laws, just down a rat hole. You're not going to see any laws.

PROFESSOR VOLOKH: Carol, you presented a powerful argument that this would allow the spending of money for political speech in ways that the existing system does not permit. But I'm wondering what you would propose as a solution.

Let's just take a concrete example. I actually don't blog much about candidates on my blog, but assume I find there's some candidate whom I really like, or whom I really oppose. Suppose I start posting things criticizing him or her, and then you figure out that I spend $50 a month or $600 a year on bandwidth, or even more. Eventually, at some point, we will hit the level where fair accounting would lead to disclosure obligations. Do you think I should have to file expenditure reports whenever I comment about candidates?

Personally, I have no idea how to file these reports, and I have no desire to find out how to file these reports. I suspect it would take me a good deal of time to file each report. Should I be filing these reports? Should the law require me to file such reports, because I'm not really the media?

PROFESSOR DARR: You'll be real surprised to know that, no, I don't think you should have to.

PROFESSOR VOLOKH: But if that's right, then I shouldn't have to file expenditure reports because I'm part of the media. I thought you said it would be horrible if bloggers were seen as part of the media—no?

PROFESSOR DARR: No, you know, I think what you can do within the law we have now is you can raise a lot of the exemptions. You know, for example, you've got an exemption in federal law. You can now have parties in your own home and spend up to about $1000, and it just doesn't count. Just ignore it. You know, you can spend a thousand—

PROFESSOR VOLOKH: But for reporting purposes? I thought you need to report anything past a certain—

PROFESSOR DARR: —no, past $1,000. You can spend an unlimited amount of your money on food and lodging when you're traveling around. You can put similar exemptions in there for bloggers, for their server costs, for other things.

PROFESSOR VOLOKH: What if I decide, for example, that we are getting enough money from advertising that we can hire a research assistant. It sounds like you are saying that if I've got $10 million and can start

a newspaper—that's probably not enough to start a newspaper these days, but assuming I've got a lot of money—I can start a newspaper, and of course once I start the newspaper, both the Website and the newspaper will be protected. And if I spend zero money, or maybe up to thousand dollars, I'd probably be okay, so long as I don't have to hire a subcontractor.

But say people tell us, "Your design stinks; you need to get a good web designer," or "You should get a research assistant," or whatever else. If I listen to them and I want to spend $1,000 or $5,000, then all of a sudden I'm out of the safe harbor, and I've got all of these other reporting responsibilities. But again, if I have so much money that I spend it on starting a full-fledged newspaper, then I'm back in the media safe harbor and I'm okay. That's a weird system.

I could see a system that says we actually don't want the $10 million plus publisher to get the exemption. That makes sense to me, though I still wouldn't support it: if you have enough money to start a newspaper, you're the ones we're worried about, because this is big, big money, which might be corrupting or inegalitarian or whatever else should trigger restrictions. I could see a situation where it doesn't matter if you spend less than $10 million; under $1,000, or even $1,000 to $10 million.

But it makes little sense to say that it's okay if you have a little bit of money, and it's also okay if you have a huge amount of money because you are entitled to start a newspaper and nobody can doubt that your media, but if you're "in-between" media—a blogger who has a research assistant or a blogger who hires a computer consultant—then you're out of the media exemption. Am I understanding that proposal right?

PROFESSOR DARR: It depends on how the FEC does it. You know, what I think they ought to do is—let me back up a little bit. You know, what the Internet has done is it's brought a lot of people into politics and into political commentary who weren't there before. You know, fifteen or twenty years ago everybody involved in federal politics for the most part had access to expert law through the candidates, through the political parties, and so this issue didn't come off much. But now, you have a lot of people who are only peripherally, you know, connected to candidates who are spending money. And the law has got to be changed to accommodate that so that plain old ordinary people don't get caught up in a web that they didn't even know existed.

The point I want to make about bloggers and this media exemption is that, you know, I do worry about big money in politics. That's a point of view different from you all's. And my point was that if you go down this route, it has a cost that you can't regulate money at all. At a point when you are spending $5,000, $10,000 on a candidate, you know, why should you not have to file any reports when I, as a political committee on the ground doing bumpers stickers and yard signs—

PROFESSOR VOLOKH: But if I only put in $5 million into starting a newspaper or a magazine, then I wouldn't have to file these reports, right?

PROFESSOR DARR: That's right.

PROFESSOR VOLOKH: So you're analogizing bloggers to political candidates, where I think I'm actually more like a newspaper. This is a weird situation. The new technologies have made speech cheaper, so there's no need to invest a million dollars; you can get away with just investing $10,000. But now, because you're not spending as much money, it's like you've committed the sin of not spending the right amount of money, and for that sin you are punished by being denied the media exemption.

That's the difference between me and the *L.A. Times*—I suppose there are many differences between me and the *L.A. Times*—but one difference between us is that they've got a lot of money, and they're home free. However, if I want to spend only a modest amount of money, I'll be subject to these restrictions. Granted, assume I'm spending more than zero money, but only a modest amount of money—why does that make sense?

PROFESSOR DARR: Well, you know —

PROFESSOR ANDERSON: Can I attempt to jump into that? I think—

PROFESSOR DARR: —but I want to say something, too. But go ahead.

PROFESSOR ANDERSON: No, go ahead.

PROFESSOR DARR: You know, what's happened is the Internet has upended everything. You know, twenty or thirty years ago we all knew who the media were. And the campaign laws were willing to give them wide berth, whether they were partisan, nonpartisan, or whatever. It just kind of wasn't a problem, you know, because you could put them off to the side. And now, when everybody is media, my point is you can't have everybody be media and the media be exempt, and have any kind of semblance of campaign finance law that works that I can think of. That's my point.

PROFESSOR ANDERSON: I think the argument that Eugene is making is simply that Congress drafted the exemption too narrowly, that it should be a broader exemption and not just the media but include lots of other people. That's fine.

PROFESSOR VOLOKH: No, no, no—it said newspaper, magazine, or other periodical. The FEC quite plausibly said that a website is an online magazine. Slate.com is an online magazine, even though it's corporately funded. I think I'm not that different from Slate.com.

I could even set up my blog so that all of my posts were batched so they would be published every three hours—not very good from a reader's perspective—and so I would think I'm a periodical. If Congress had said, "Only if you invest at least X million dollars will you be entitled the media exemption," then that might be a different story. But Congress didn't say that, so we're actually not even talking about a congressional judgment that needs to be respected. It said newspaper, magazine, or other periodical. Why am I not another periodical?

PROFESSOR ANDERSON: Well, you're just arguing against the FEC's interpretation of the statute.

PROFESSOR VOLOKH: I'm arguing in favor of the FEC interpretation. The FEC is on my side; it says blogs are online magazines, and are therefore covered.

PROFESSOR ANDERSON: In a situation like the Seattle case, which we started with, there may well be a First Amendment problem there. The rationale of *McConnell*[27] was that the threats to democracy that are posed by corporate treasury money and union money are so great that Congress has a compelling interest in regulating that speech. I don't know whether that rationale covers radio talk show people in Seattle or not. I don't know whether it covers bloggers. But you know, there is—in this instance, I think there is a First Amendment argument to be made, and it may well be that the First Amendment forbids the application of these regulations to the talk show hosts. Maybe it forbids it to bloggers.

AUDIENCE PARTICIPANT: My name is Brad Smith. I'm a professor at Capital University Law School in Columbus, and I'm a former Commissioner of the Federal Election Commission, until about two months ago.

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

The exchange that Eugene and Carol just had with Professor Anderson, chiming in as well, has largely taken away my point of being at the mic because that was the exchange that I to some extent wanted to have. But I do want to raise a couple of quick points.

I guess first, Carol, I think you made a statement that I think was simply inaccurate. It may reflect your views, but it's just inaccurate. And that is, you said nobody wants to regulate individual bloggers, and that is just not true. If anybody here has questions about that, all you have to do is read the briefs filed in court by Senator McCain and Senator Feingold and Representative Shays and Representative Meehan, and it is very obvious that they want to regulate individual bloggers. The briefs reek with hostility toward the Internet. They describe it as a loophole, and many, many more negative terms than that.

PROFESSOR DARR: Can I ask a question about that? Do you think that McCain wants to regulate bloggers, or do they want to regulate large expenditures of money through bloggers?

AUDIENCE PARTICIPANT: I think McCain wants to regulate bloggers, and I think he's made that pretty clear. He won't say that statement in those terms, but he has repeatedly indicated, again with a great deal of hostility, and he is not willing to support even the most modest things that would offer any kind of protection to the bloggers. And a look at what people do, and when people are unwilling to offer protection to folks who feel threatened and have a reason to feel threatened because of complaints are filed against them with the FEC, and they would like some clarity of the law, I have to take that as an indication that these people want at a minimum to preserve the right to regulate that type of activity.

One could also, of course, point to numerous statements Senator McCain has made over the years that he does want to regulate negative attacks on politics, on politicians, and that he doesn't do it only because of the First Amendment. But that would be his pleasure. That would be his preference within the political system.

PROFESSOR DARR: Some people would disagree with that. I just want to make that point.

AUDIENCE PARTICIPANT: Now, so people very clearly want to regulate, I think, bloggers' activities. Maybe you don't want to, but I think that many people quite clearly do.

The second point that I would make is that I would just emphasize that people do need to understand the nature of the press exemption with the

FEC. You only get the press exemption while you were being press, whatever that entails. That is to say, you cannot, simply because you start a blog and have the press exemption, if the press exemption were extended to blogs, start a get out the vote apparatus that includes numerous phone calls and driving people to the polls and putting up billboards, or whatever else it might be. The press exemption extends only to the activity that you are doing that is covered as press activity.

So, the idea that—I sense some people might have gotten the misimpression that once you are a newspaper, you could therefore contribute $6 million to the John Kerry for President Campaign in cash or something, or you could set up a get out the vote operation for him, but you can't. Now you can, if you're the *Philadelphia Inquirer* editorializing the front page that your main goal for the coming year is to elect John Kerry. You can put things in your newspaper telling people how to contribute to the John Kerry Campaign, and you could relentlessly bias your news sources and your reporting to try to get people to vote for John Kerry. But, you have to be operating within that function.

Within that, that leads to the point that I think Ms. Darr has made. She has made an excellent argument against allowing the free press to cover campaigns, that it allows large amounts of corporate contributions to get into the system, and in very hostile ways. We've seen it in Sinclair Broadcasting, a large corporation that spends millions, as Eugene pointed out, and wanted to force all of its stations to air an anti-Kerry documentary right before the campaign. We saw all kinds of campaigns like that.

So I guess the question I'm left with, or comment, is it seems to me is what we've hit is a question of line-drawing, and where do we draw the line, whether we defined it as constitutional lines or merely some type of statutory line? And the real question becomes, how do we draw a line that makes sense? I think what we're seeing is the sort of intellectual dead-end of campaign finance reform. The question I would pose, which I guess most directly to Carol, is if you agree that the *New York Times* website would be protected under the statutory press exemption, so we'll take it out of the constitutional issue, then would InstaPundit be protected? And if InstaPundit would be protected, why? And what value is served by not protecting InstaPundit? If InstaPundit is protected, then is a smaller blog such as the Volokh Conspiracy protected. And if not, why? And it seems to me that the most obvious answer we're getting to is that the bigger you are, the more you look like a big corporate sponsor of traditional media, the more likely you are get the press exemption.

So it seems to me, we have turned the purposes of campaign finance law on its head. We're now telling you, if you have big money, go ahead; if you have small money, you have a problem. I do want to point out, for Eugene's sake, if you're spending $50 a month on bandwidth and you are expressly advocating candidates, you already have reporting obligations

with the FEC, and people can file a complaint against you for failing to file those reports.

PROFESSOR VOLOKH: Rats. I wish I hadn't heard that.

PROFESSOR DARR: Can I respond to one thing Brad said? I absolutely agree when he says you have reached a dead end in campaign finance law with this media exemption. I agree with that. That is essentially my point. You can't have it both ways. You can't regulate big money under the current system and have this media exemption. If you believe, as I do—and a lot of people do—that having some limits on big money in politics is a good thing, then you've got to start all over. And I swear I have no idea where to go. I don't know how you do it.

PROFESSOR VOLOKH: But Carol, I'm not sure that that's an adequate answer. It seems to me that there are several possible answers. One is a recognition that, indeed, the system is broken, and partly because of the media exemption. So we need to get rid of the media exemption, which—

PROFESSOR DARR: —we could cover a lot of reasons, but that's one.

PROFESSOR VOLOKH: —fair enough. So therefore, the *New York Times* cannot editorialize in favor of a candidate because it's a corporation and because, under any reasonable accounting system, the contribution is going to be large enough that it will be above whatever the threshold ought to be for permissible corporate expenditures.

If you say, "No, the *New York Times* has to maintain this right," then it seems to me that you do have part of an answer. By saying that, you would have committed yourself to maintaining a media exemption, and then up comes Brad's question, which recognizes that if you commit yourself to maintaining a media exception, you have to be able to explain its boundaries.

PROFESSOR DARR: No.

PROFESSOR VOLOKH: No?

PROFESSOR DARR: No—

PROFESSOR VOLOKH: No, you don't have to explain it?

PROFESSOR DARR: No, I'm trying to explain it. I guess I'm not going as good as I thought I was. My point to all of this is, you know, this used to not be a problem. Twenty years ago this issue would never have come up because, you know, you had media; we all knew there were; they had this big exemption. Now, when everybody can be media, you can't do that anymore and since nobody wants to take away the press exemptions of the mainstream media, what you're going to have to do—well, there's a great phrase I heard the other day, "the media formerly known as mainstream." You know, you don't want to take away from them. You also can't deny it to the new media.

PROFESSOR VOLOKH: So what's your solution? That is why I'm puzzled.

PROFESSOR DARR: I don't have a solution. That's my point. I don't see how you do it.

PROFESSOR VOLOKH: So let me ask you this. Assume that my bloggers and I want to hire a research assistant, and we want to do other things that will lead us to spend a tiny fraction of what the true big money—the *New York Times*, I think it's fair to say, is big money, as is Slate.com—spends. We want to spend a small fraction of what they spend, but we want to spend several thousand dollars because, thankfully, we're getting enough in advertising and it would be really nice to have a research assistant. Should we be allowed to do that?

PROFESSOR DARR: Under the current laws now, you would have—depending on whether you're a corporation or not, but the law would certainly ensnare you. I don't think it should.

PROFESSOR VOLOKH: So you do think that there ought to be media exemption.

PROFESSOR DARR: Of course.

PROFESSOR VOLOKH: Okay, now—

PROFESSOR DARR: And I think you ought to get it.

PROFESSOR VOLOKH: —so who shouldn't get it?

PROFESSOR DARR: I can't—you know, how do you distinguish—

PROFESSOR VOLOKH: So you—

PROFESSOR DARR: —yeah, you go down the kind of the food chain. You know, do you deny it just to the little ones? Of course not. That doesn't make any sense. Do you deny it to the big ones? I don't see how you can. I think you have to give it to virtually all of them.

PROFESSOR VOLOKH: So your solution is to have the media exception, and to have it cover all bloggers.

PROFESSOR DARR: Yes.

PROFESSOR BeVIER: Carol, could I ask a question. I'm not exactly certain why it is you say that the—this is the end of campaign finance regulation. I mean, what about the limits on individual contributions and, you know, corporate expenditures, and so forth? Are those just—do you think that nobody's going to pay attention to them anymore? Are they just already so loose that there are so many avenues for political speech that the contribution limitations and the expenditure restrictions don't keep big money out? I mean, I don't understand what you think is going to happen with the rest of the—what the rest of the restrictions in BCRA.

PROFESSOR DARR: You will have some little restrictions in the law. But my point is, you know, if you're a blogger and you can't distinguish between bloggers/media and blogger/individual, how do you regulate money, if you can't distinguish between corporate media and corporations? Because anybody can be media, I don't see how you can regulate politics the way we have been doing it for thirty years. It doesn't work anymore.

PROFESSOR ANDERSON: Well, what's wrong with the explanation that the Supreme Court gave in *McConnell*,[28] which was that media don't pose the threat that corporate union treasury money poses in elections? Now, that leaves a problem about who is media, but unless there's

28 *McConnell*, 540 U.S. 93.

an equal protection problem, nonetheless that somebody is the Press Clause claim, which I—

PROFESSOR VOLOKH: How can media not pose a threat, if media are corporations? Media money is corporate money.

PROFESSOR BeVIER: That's one answer. Another answer is, how many corporations in this country do you think there are? There are millions of corporations in this country. Some of them have huge corporate treasuries, but so many, many, many do not. I mean, there are tons of corporations, millions of corporations in this country that don't come within the rationale of big corporate treasury. And how you deal with—I mean, the Court wasn't talking about reality when they talked about the threat of big corporate treasuries. They were talking about something quite different. I'm not sure what, but I just don't see how their picture matches with corporate America.

PROFESSOR ANDERSON: Well, you know, Congress, like all other legislatures, often has to deal with questions that are matters of degree. And you know, I think they looked at the realities of American political life, and they said the expenditures from corporate treasuries pose a threat that is different in kind than the threat that's posed by commentary, editorials, or news stories.

Now, Eugene's proposed solution was—I think, maybe—was to say the *New York Times* should be barred from editorializing. Well, I don't know that that would be a big problem, if you could confine it to that. I don't know that editorializing is a necessary adjunct of the First Amendment. Lots of people don't do it, and there are lots of questions about whether it has any effect. But you couldn't stop with a prohibition against editorializing because people would simply accomplish the same thing through commentary. Well, you stop commentary. Well, then, how about news stories? Because, then the same thing would be done through news stories. So, it does not seem to me that there's a solution that's as easy as saying, well, just prohibit the *Times* from editorializing.

So, it seems to me that you have—this really is what Carol is getting at, that if you're going to regulate corporate money in campaigns, you either have to exempt some form of media or you have a constitutional problem. Now, maybe it's a Press Clause problem. The Court didn't seem to think so in the last case. You either have to exempt them or you have a constitutional problem; or, you simply can't do it. That, I think, is the dead end that she's talking about. She is saying that if you can't maintain a workable exemption for news media, then you can't regulate campaign finance altogether. Now, most of you—that's the result you want.

But once you—if you're willing to accept the proposition that Congress accepted, that there is a particular problem with corporate money, and if you're willing to accept the Supreme Court's judgment about that, that yes, that Congress could rationally make that determination. That's really all the Court has to say. Congress could rationally think that there is a sufficient threat from corporate money that it provides a compelling interest for Congress to regulate it. I think that's all that's been said.

And then, the rest of it is all just to say, well, who else can show—or with respect to whom else can Congress show a sufficient compelling interest.

MR. LEO: Can we let a couple of questioners speak now.

AUDIENCE PARTICIPANT: My name is Ray Loginess. I'm Vice President and Legal Director of National Right to Work Legal Defense Foundation. My question is for Professor Anderson. I think I heard you say that the Free Speech Clause of the First Amendment would be violated if the President refused to hold press conferences or allow reporters access to the White House. I don't see how that could be the case under the Supreme Court precedent in the case that we brought, called *Knight v. Minnesota Community Colleges*.[29] Minnesota had a system whereby only the exclusive bargaining representative could meet with the college faculty administration to discuss matters of education policy. The Supreme Court upheld that statute on the ground that it was just like a member of the Congress closing his door to lobbyists. Well, if a member of Congress under the Petition Clause could close the door to lobbyists, why can't the president refuse to hold press conferences?

PROFESSOR ANDERSON: My statement was not that the Speech Clause would prevent it. It's that the Press Clause does. I don't think the Speech Clause does. The reason the Press Clause does, and this is my exceptional situation, in my view, there was a case involving a particular reporter's access to the White House, *Sherrill v. Knight*.[30] The Secret Service denied Bob Sherrill a press pass to the White House. The D.C. Circuit held, erroneously I believe, that he had a constitutional right to a White House press pass. That's a mistake, and I think your Minnesota decision agrees with that.

What I was trying to posit was a situation where the interference with freedom of the press, whatever that means in the Constitution—it is a constitutional concept—was so great that the courts would have to say, okay,

29 571 F. Supp. 1, 13 (Minn. 1982), *aff'd*, 460 U.S. 1048 (1983).
30 569 F.2d 124 (D.C. Cir. 1977).

whatever freedom of the press means, it doesn't permit this. So I think that any other examples we could come up with, *Sherill v. Knight* or whatever, they don't come close to the kind of massive, complete interference with freedom of the press that I was positing.

PROFESSOR BeVIER: Excuse me. I think David is probably correct about that. What I think is really the case, however, is that the two hypotheticals he posed are hypotheticals in which the press has at its command resources of complaint and distress that would prevent, politically, those kinds of door closings to occur. I think that, you know, the government knows that it's got to try to get the press on its side, and certainly politicians know that. That's why there are so many confidential sources telling somebody delicious secrets to so many news people. But I think we can say that the press itself has wonderful resources of self-protection, much more than do I or do you.

PROFESSOR ANDERSON: I certainly do agree with that. And I think that's a very good reason to be skeptical about press claims that are brought under the Press Clause. I very much agree with that. I'm not so sure that my hypotheticals are completely unthinkable. The war, the complete exclusion from war, we came close to that in the Afghanistan War, the first six weeks of the Afghanistan War. There was no coverage. No coverage—nobody on the ground; nobody speaking to commanders; no reports from anybody about what was going on, except from Rumsfeld in Washington. So, it's not at all clear to me that it's impossible for the press to be unable to resist certain of these governmental intrusions.

(Panel concluded.)