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Justice Talking Radio Transcript

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The presidential election is less than a year away and a Supreme Court ruling could change the kinds of advertisements we see and hear in the days running up to an election. Also, some are questioning whether reporters need a law to protect them from being forced to reveal their sources. On this edition of Justice Talking: how the First Amendment affects political campaigns, blogs, corporations and journalists.

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MARGOT ADLER: From NPR, this is Justice Talking. I'm Margot Adler. The presidential primaries are around the corner and candidates are on a mission to get your vote. TV and radio ads are hitting the airwaves with new federal guidelines.

HILLARY CLINTON: I'm Hillary Clinton and I approve this message.

FRED THOMPSON: I'm Fred Thompson and I approve this message.

MITT ROMNEY: I'm Mitt Romney and I approve this message.

BARACK OBAMA: I'm Barack Obama and I approve this message.

MARGOT ADLER: And we learn about campaign finance laws from a surprising source.

STEPHEN COLBERT: Today my election lawyers said using the show's website violates the law. [LAUGHTER] Uh, what a stickler. I knew I should've gone with Alberto Gonzalez!

MARGOT ADLER: Plus, do reporters need federal legal protection from being forced to reveal their sources? Coming up after the news.

MARGOT ADLER: This is Justice Talking, from the University of Pennsylvania's Annenberg Public Policy Center. I'm Margot Adler. Today we're casting a wide net and examining how various recent legal decisions affect free speech. From campaign finance regulations to shield laws that protect journalists from revealing their sources. We'll talk about campaign finance and we'll debate shield laws later in the show, but first we wanted to take a look at how technology is affecting the presidential campaign. So I checked in with someone who spends his time tracking how the candidates are using the web. Andrew Rasiej is the co-founder of the blog techPresident and the founder of the Personal Democracy Forum. I asked Andrew if any of the candidates are using the Internet to its full potential.

ANDREW RASIEJ: Well, unfortunately, no one is using to its full potential but most of the candidates have now recognized that they can't just have the Internet sit in a closet some place in their campaign office. They have to use it more forcefully and more regularly and that it's an actual opportunity for them. But the reason why it's an unfortunate situation right now is because they're still doing it from a very top-down perspective. It's sort of like direct mail for the 21st century. They create a message. They deliver it through their website. They deliver it through email. And they basically just ask people for money.

MARGOT ADLER: And I have to ask you, of the main candidates, who's using the Web best?

ANDREW RASIEJ: Well, there's actually two answers to that question. Of all the candidates sort of following the traditional perspective of politics and the Internet from a top-down perspective, Barack Obama is actually doing the most. He's got the most donors. They are small donors. He can go back to them on a regular basis. He's encouraging people to comment, people on his site. He's encouraging people to build social networks on his site. But it's still pretty tightly controlled.

As far as sort of outside of the traditional way, the surprising thing is a candidate from Texas by the name of Ron Paul. Ron Paul follows in a tradition very similar to other mavericks. Whether it be Ross Perot or Jesse Ventura or even Howard Dean who came up with a very clear and significant message that was a little different than all the other candidates in the race at the time. And in Ron Paul's case, he's a Republican who's claiming that the war is a mistake. And so people are rallying around his message. And because the Internet has produced far more tools for people to interact with each other, produce content, send content to each other, and because more people are online than they were in 2004, the Ron Paul campaign can be classified as the Howard Dean campaign of 2008.

But what's really, really interesting and significant between a Ron Paul campaign and all the other campaigns this cycle as well as Howard Dean's in 2004 is that they've added a measure of transparency, which seems to fuel a feedback loop back to the supporters themselves so they can actually see their own actions in real time. So if you make a donation to Ron Paul it's up on the Web, who made it, how much, instantaneously.

MARGOT ADLER: I noticed that on your site you have links to all the candidates' websites and even blogs, and I'm wondering, are the blogs written by the candidates themselves? And which blogs do you find most effective in reaching potential voters?

ANDREW RASIEJ: Well, let me just first say that most politicians, including the candidates running for president, don't know the difference between a server and a waiter, so they're not writing their own--

MARGOT ADLER: [LAUGHS] They're not--well, they're probably not writing their own speeches anyway, so why would they be writing their own blogs, right?

ANDREW RASIEJ: They're not writing their own blogs. That's for sure. Do some of them know what blogs are? Yes. And do each of--does each of the campaigns have a blogger or several bloggers writing for them and do they occasionally get the candidates to chime in? Of course. And the blogs are important. But what's more important is all the other tools that have come out in this cycle, like social networks and MySpace and Facebook and, of course, YouTube.

We actually recently launched a site called 10questions.com, which is intended to sort of show the way that you can actually use the Internet to create a better dialog between the citizens of our country and the candidates running for president. And the way that works is not unlike the CNN/YouTube debates. People can put video questions up on to the Web. But instead of a journalist choosing which questions to ask the people online vote on which question they want to ask. And so the top 10 get voted on over a period of time and once those are selected then they're presented to the candidates. And the candidates then get to respond not on television but also using online video. So that means that they can speak for as long or as short as they like and answer the question fully. And the reason why we're hopeful that they're going to actually answer the question is because the public is then asked to vote on whether the candidates actually answered the question or not.

MARGOT ADLER: So they have to create a video, basically, to do this? But there's still no process for follow up, right?

ANDREW RASIEJ: Sure. Well, there's no real process for follow-up this round. But because the candidates know that people are going to be able to vote on whether they actually answered the question, we're hopeful that 80 or 90 percent of the time they're going to make a reasonable attempt to answer the question that's actually being post.

MARGOT ADLER: Andrew Rasiej is the co-founder of the blog techPresident. Thanks for talking with me here.

ANDREW RASIEJ: Thanks for having me.

MARGOT ADLER: The complicated laws that govern campaign finance and political speech are serious business and the rules can read like the IRS tax code, but occasionally there is a humorous side to political regulation. Even lawyers laughed along with the brief and unsuccessful presidential campaign of comedian Stephen Colbert. And as NPR's Robert Smith reports sometimes even a joke can serve as a course in campaign law.

ROBERT SMITH: Call it "the 16 days that shook the political world." In October, Comedy Central host Stephen Colbert threw his satirical hat into the ring.

STEPHEN COLBERT: Well, after nearly 15 minutes of soul searching [AUDIENCE LAUGHTER], I've heard the call. Nation, I shall seek the office of the president of the United States! [CHEERING, MUSIC] I am doing it!

ROBERT SMITH: By November, though, it ended in tears. [AUDIENCE GROANS WITH DISMAY] Stephen Colbert was kept off the ballot by the South Carolina Democratic Party, who for some reason didn't think he was serious.

STEPHEN COLBERT: Why don't you want me in your race?

ROBERT SMITH: But during those brief, shining two and a half weeks, Colbert did raise a serious fuss. The Federal Elections Commission isn't known for its sense of humor and people started to question how a comedian employed by a giant corporation, Viacom, and supported by ads, could run without violating campaign finance law. Two days into the campaign, Colbert had to pull his petition off the Comedy Central homepage.

STEPHEN COLBERT: Today my election lawyers said using the show's website violates the law. [LAUGHTER] Uh, what a stickler. I knew I should've gone with Alberto Gonzalez. [LAUGHTER]

ROBERT SMITH: Then Colbert dropped his plans for Doritos to sponsor his candidacy, sort of.

STEPHEN COLBERT: So as the host of the show I can take Doritos money and enjoy the zesty blast of flavor you can only get from nacho-cheese Doritos. Yum. But as a candidate I'm simply enjoying the nacho-cheese-tastic taste-spllosion of Doritos because I happen to love them. That's all. There's a clear line.

ROBERT SMITH: And indeed Colbert drew a line down the screen with Colbert the Host on one side and Colbert the Candidate on the other. Colbert the Comedian had just summed up hundreds of pages of campaign finance theory.

RICK HASEN: Much of what Colbert did was a critique or a satire on the current byzantine system of our election laws.

ROBERT SMITH: Rick Hasen is a professor at Loyola Law School in Los Angeles. He explains that corporations are forbidden from expressly advocating for a candidate. Even having Colbert appear on Comedy Central every night might be considered an in-kind contribution from

Viacom. The law provides an exemption for news, including commentary programs, but Hasen asks:

RICK HASEN: Is shtick commentary? That's actually a legal question that a court would have to grapple with if this Colbert candidacy went further.

ROBERT SMITH: That court might want to review the history of campaign shtick. Exhibit one, the show "Laugh-In," 1968, candidate Richard Nixon looks into the camera and says:

RICHARD NIXON: Sock it to *me*? [AUDIENCE LAUGHTER]

ROBERT SMITH: Some said that Nixon's ability to poke fun at himself in front of a primetime audience actually might have made a difference in the election. The TV networks started to worry about the implications. That same year comedian Pat Paulsen started his joke presidential campaign on "The Smothers Brothers Show."

PAT PAULSEN: What people are really concerned about is the economy. We're the richest nation in the world and we'd be a lot richer if it weren't for poor people.

ROBERT SMITH: But when Paulsen got on the ballot in New Hampshire, CBS got spooked and took him off the program. Under equal-time laws they feared that every other candidate would demand the same access. Allison Hayward at George Mason University:

ALLISON HAYWARD: Back in the day of the robust equal-time fairness doctrine, it really, I think, chilled a lot of political content and other kinds of controversial content.

ROBERT SMITH: Even after the fairness doctrine was set aside in the 1980s, networks were still scared of giving any candidate an unfair boost. That's why broadcast stations didn't want to play old "Terminator" movies when Arnold Schwarzenegger ran for governor. That's why repeats of "Law and Order" on NBC don't feature Fred Thompson. Stephen Colbert ended his candidacy before he truly tested the limits of being both a candidate and a TV star at the same time. But Professor Rick Hasen says next time it might be more serious.

RICK HASEN: Choose your least favorite between Bill O'Reilly and Keith Olbermann. Imagine that a large corporation or a large union wants to in fact sponsor their campaign. Well, that wouldn't look very funny anymore. I think that would actually be quite troubling to a number of us.

ROBERT SMITH: For some, Colbert is a warning of the perils of a corporate-backed candidate. For others, hey, it was just an entertaining lesson.

UNIDENTIFIED MALE: Those who are here for the Stephen Colbert event, be aware that Stephen is on his way.

ROBERT SMITH: On the day that Colbert dropped out of the race, he had a book signing in New York City and a thousand of his fans lined up to see him. I found people there actually

debating the finer points of campaign law. Alex Paulsen from New Jersey says that perhaps Colbert showed us the future.

ALEX PAULSEN: You know, why not just have the Doritos candidate or the Pepsi candidate and then we could--it would be an easier choice. If you like Pepsi, you vote Democrat. If you like Coke, you vote Republican. RC Cola, you're an independent.

ROBERT SMITH: Nicholas Dididemo had never thought about campaign law before Colbert came along. Now he sounds like a lawyer.

NICHOLAS DIDIDEMO: You cannot have a corporation sponsor a candidate but you can have them sponsor the coverage of the campaign.

ROBERT SMITH: Look at that. This was like a civics class for you.

NICHOLAS DIDIDEMO: Yes it was. Every day is a learning opportunity with Dr. Colbert.

ROBERT SMITH: When Colbert finally arrived at the bookstore, he didn't shake hands. He didn't address the crowd. And he didn't talk to the media. This was Colbert the author, selling books. Colbert the baby-kissing, glad-handing candidate was nowhere to be seen. For Justice Talking, I'm Robert Smith in New York.

MARGOT ADLER: Coming up on Justice Talking, real presidential candidates might not be promoting snack chips to finance their campaigns, but just like with Colbert, regulations apply.

UNIDENTIFIED MALE: If you run an advertisement in the period just before the election, then you can, one, only use individual money for that ad if it mentions a federal candidate, and two, you have to disclose whose money it is.

UNIDENTIFIED MALE: The 30/60 day provision, and frankly other provisions in McCain-Feingold, very severely restrict independent speech that is critical of the same people who pass those laws.

MARGOT ADLER: The ins and outs of campaign advertising--stay with us.

MARGOT ADLER: This is Justice Talking, the public radio show about law and American life. I'm Margot Adler. The Federal Election Commission has just released new guidelines on campaign advertisements that air before an election. The commission's decision stems from a Supreme Court case decided last June allowing unions and corporations to spend their own money on political ads if the ads promote an issue, not a candidate. While Washington lawyers scramble to figure out the new rules, some say the decision will destroy previous attempts to keep corporate money out of elections. Others think this is a victory for free speech.

Trevor Potter and Robert Bauer are two lawyers wrangling with the complicated legalese of campaign finance reform. They joined me in Chicago at the National Communication Association Convention to discuss what the recent ruling means and what campaign ads we can expect to see and hear in the months ahead.

Trevor Potter is a former F.E.C. commissioner and chairman, president of the Campaign Legal Center, and a lawyer with Caplin & Drysdale. He's a general counsel for the John McCain presidential campaign. Bob Bauer is chair of the political law group at the firm Perkins Coie. Among other clients, Bob is a general counsel for the Obama for America presidential campaign. He's also the author of the blog [MoreSoftMoneyHardLaw](#). Both guests represented their own opinions and not that of their organizations or clients.

[AUDIENCE APPLAUSE]

MARGOT ADLER: In 2002, Congress passed significant campaign finance regulations. The law is best known as McCain-Feingold, after the senators who sponsored the legislation. It's also called the Bipartisan Campaign Reform Act or BCRA. Trevor, what was the original intention behind the law?

TREVOR POTTER: The intention was largely to put the system back together. The thinking was that the reforms enacted after Watergate, which were designed to insure that there were limits on how much individuals could give to federal candidates and party committees, and that corporations and unions did not use their money to give to candidates, or party committees, or spend on political advertising, that those elements of the reform laws after Watergate had really fallen apart, largely through the soft money idea, which was the -- in a nutshell -- the notion that you could give unlimited sums to party committees, often at the request of candidates, and that that money was not subject to the limits because it was for party-building and not specifically for federal election activity. Even though over time the parties used that money to run advertising featuring federal candidates in the middle of an election saying good things and bad things about them.

MARGOT ADLER: And briefly, just to be clear, explain the 30 day/60 day rule.

TREVOR POTTER: A piece of McCain-Feingold was a provision that was designed to deal with what are called by opponents "sham issue ads," and that's television advertising featuring a federal candidate, and I'm not really exaggerating when I say that those ads said things like "Call so-and-so and tell him to stop beating his wife." They were attack ads -- what they also were pejoratively called -- and those ads were being financed by corporations that were not supposed to be participating in federal elections. And that's been the law for a hundred years by labor unions that are not supposed to be spending their money directly in federal elections and by individuals who were often anonymous. So what the law said was if you run an advertisement in the period just before the election -- radio or television advertisements, so we're not talking newspapers, magazines, and so forth -- a broadcast ad in the period just before a federal election, and it's 60 days before the general, 30 days before the primary. Then you can, one, only use

individual money for that ad if it mentions a federal candidate and, two, you have to disclose whose money it is.

MARGOT ADLER: Bob, some people think that presidential campaigns should be paid for with money that's from public coffers, that corporate monies have no place in elections. Unless we go to a system that is completely publicly funded, isn't regulating advertising the best way to keep corporate money and, therefore, influence out of our elections?

ROBERT BAUER: I certainly am sympathetic to the notion that we ought to find a way to rebuild our current public financing system. I think that's a laudable goal that's going to take some time, because as you know the public tends to resist any suggestion that it should share its taxpayer dollars with campaigns. It's oftentimes derided as welfare for politicians. But since we're here to talk about the effects on speech, let me get to the second part of your question, which is: Is the alternative to clamp heavily down on all sorts of speech in the interest of allegedly permitting maligned influences from working their way through the government?

I would have to challenge Trevor's history here about the campaign finance laws and in particular how McCain-Feingold developed. There are pieces of McCain-Feingold which are not really loophole-closing pieces. They may function in part that way, but they're meant to address speech that people happen to think is unsavory. And if you look, for example, at the floor debate on McCain-Feingold, you have member after member rising to the microphone to say that they're uncomfortable with negative campaigns. They don't like attack advertising. They want more control over their campaigns. And so the 30/60 day provision, and frankly other provisions in McCain-Feingold, very severely restrict independent speech that is critical of the same people who pass those laws.

I'll give you one other example really quickly. In the "stand by your ad" provision, you now have advertisements in which candidates are forced by federal law to say "I am Bob Bauer and I approve this message." Incidentally, Tom Tancredo added a little twist this week in one of his ads, in which he says "I'm Tom Tancredo and I approve this message because somebody had to say it." [LAUGHTER] But one way or the other, here you have a situation where a candidate is compelled to say something and the reason for it is very simple. They wanted to shame candidates into cleaning up their speech.

MARGOT ADLER: In June, the Supreme Court ruled on *Federal Election Commission v. Wisconsin Right to Life*. Wisconsin Right to Life, or WRTL, is an incorporated nonprofit that placed ads on radio and television asking people to contact Senator Feingold to stop a filibuster on Capitol Hill. Let's listen to one of the radio ads.

[BELL TOLLING]

MINISTER: And who gives this woman to be married to this man?

FATHER OF THE BRIDE: Well, uh, as father of the bride I certainly could. But, um, instead, I'd like to share a few tips on how to properly install drywall. Now you put the drywall up. You--

ANNOUNCER: Sometimes it's just not fair to delay an important decision. But in Washington it's happening. A group of senators is using the filibuster delay tactic to block federal judicial nominees from a simple yes or no vote, so qualified candidates aren't getting a chance to serve. Yes, it's politics at work, causing gridlock and backing up some of our courts to a state of emergency.

FATHER OF THE BRIDE: And then you get your joint compound and your joint tape. And you put the tape up over the--

ANNOUNCER: Contact Senators Feingold and Kohl and tell them to oppose the filibuster. Visit BeFair.org, that's BeFair.org. Paid for by Wisconsin Right to Life BeFair.org, which is responsible for the content of this advertising and not authorized by any candidate or candidate's committee.

MARGOT ADLER: So the Federal Election Commission, or F.E.C., said that since Feingold was running for re-election and his name was mentioned in the ad, which was paid for by a corporation, the ads were illegal, tantamount to electioneering. So I'd like to ask both of you, do you think an ad simply mentioning a candidate's name near the election is electioneering? I'll start with you, Bob.

ROBERT BAUER: Well, to the terms of McCain-Feingold then, as the government wanted to enforce it, the answer was yes. The government argued strenuously that context should also be considered. It may be that the added self didn't expressly ask for the candidates to feed or election, but context might matter. And what the Wisconsin Right to Life Committee was really trying to do ought to be considered. And the Supreme Court rejected that and I think rightly so. In the period before elections officeholders are still officeholders. Federal elected officials ought still to be available, quite frankly, for petitioning even in very strong terms by constituents and others on major public policy matters. And this statute as it was being applied in this instance was plainly overbroad and that's what the Supreme Court held.

MARGOT ADLER: Trevor?

TREVOR POTTER: Well, a couple of things. First, the fact that it mentioned a federal candidate did not make it illegal. What it meant is it couldn't be paid for with corporate money. Any individual could've paid for that ad without any problem. Wisconsin Right to Life could've paid for that through their P.A.C. had they chosen to do so. Now, Bob mentions the context. I mean, part of the context is you all heard the ad referring to BeFair.org, go visit our website. Well the website said terrible things about Feingold that weren't said in the ad. Do we care? No, except that it's paid for by a corporation. Wisconsin Right to Life, which sponsored the ad, had opposed Feingold, had asked for his defeat. So what you had again is an ad being paid for with corporate money that we thought was part of a campaign to defeat a federal candidate. They could do it with individual money. They could've done it if it wasn't right before an election.

ROBERT BAUER: The corporation in question here is a nonprofit corporation. It is a mistake for people to think that the campaign finance law simply curbs mega commercial corporations, large oil companies, or pharmaceutical companies. The campaign finance laws have been applied across the board to so-called corporate speech. They may collect corporate money, but they spend it for a nonprofit, ideological purpose, and that includes nonprofit corporations operating under 501c of the Internal Revenue Code, tax exempt, operating for educational purposes on both the left and on the right. And one of the things that we have seen in the law is that increasingly the court has been presented with outcries by these corporations over the fact that McCain-Feingold is applied to them, as if in fact they were a trust in 1907 being pursued across the landscape by Teddy Roosevelt.

MARGOT ADLER: That's Robert Bauer, a lawyer with the firm Perkins Coie. Bob is a general counsel for the Obama for America presidential campaign. Also with me is Trevor Potter, a lawyer for the firm Caplin & Drysdale. He's a general counsel for the John McCain presidential campaign.

So let's get specific. Bob, you're an advisor to the Barack Obama campaign for president. Does the Wisconsin Right to Life ruling create a new opportunity for the Obama campaign?

ROBERT BAUER: Well, let me say a couple of things in response to that. First of all, I'm not here on behalf of any client. Secondly, I will tell you that Senator Obama, and there are other clients that I represent, don't share my views on this at all, by the way. I don't view this, although that's how the press covers it generally speaking, as a loophole exploitation exercise. Candidates do not have the opportunity to access corporate, and frankly for that matter, union money. And by the way, I should mention, when we talk about the history of campaign finance reform, let's consider that unions have always been lumped together with corporations, which I found, frankly, a travesty for a whole host of reasons. And so I don't think any candidate, frankly, any serious candidate, for federal office, comes to the table with lawyers and says: How do I get my hands on a pot of corporate or union soft money? Maybe some of Trevor's clients do. I doubt it, because he represents John McCain and he would be taken to the woodshed over that. But I certainly know that that is not my experience.

MARGOT ADLER: And so now I'm going to turn to Trevor. You're an advisor to John McCain's presidential campaign, and an ad that ran in South Carolina put McCain in an awkward position. It's supporters funded TV ads urging people to contact lawmakers in support of an act to improve healthcare for veterans. The commercial included flattering images of McCain. No one appeared to be worried whether this act would pass. Presumably the ad was really an attempt to boost McCain's standing in South Carolina. So as I understand it, as a critic of this kind of soft money support, McCain asked that these commercials be pulled. But supporters can do whatever they want, and so will less regulation be a blessing or a curse for the campaign?

TREVOR POTTER: Well, I will now remove the caveat I started with, which is I'm not here speaking on behalf of any client, including the McCain campaign, to answer that, to say I think that illustrates a couple of the problems in this area. One is of course that John McCain and his campaign had nothing to do with the ads. They read about them in the newspaper. They proved

embarrassing to Senator McCain even though they didn't say anything bad about him, because it looked as if Senator McCain was trying to get around the campaign finance laws, because there was an ad running in South Carolina paid for by unknown sources that had his picture in it and said he was a veteran. This ad does illustrate, as Bob was pointing out, why federal candidates try to stay as far as possible away from this sort of thing, because it has the potential either to make them look as if they're hypocrites when they're not, or to injure them when it's a vicious ad, and this frequently happens. People say go ahead and take it down and the people running the ad say, you know, it's not your ad. You have no control over it. So the candidate gets blamed for something they didn't do.

MARGOT ADLER: You both contribute to blogs. So we wanted to ask you a question about a more recent ruling by the F.E.C. A blog called Daily Kos came under scrutiny because it advocates for the election of Democrats. The F.E.C. ruled that it should be considered media, therefore not subject to campaign finance regulation. I'd like you both to weigh in about this ruling, and should blogs be considered media? Should blogs have to report the source of their funding? We'll start with you, Bob.

ROBERT BAUER: Well, let me step back and say two things. First of all, I had hoped that the Internet could be taken completely outside of the range of campaign finance regulation. That was my view. I expressed it a number of places, including the blog. The F.E.C. didn't feel it could go that far, but it definitely created space for blogging. It did permit online publications, and very partisan ones, to be treated as media. And the Daily Kos complaint was rightly dismissed. And I think that the Internet is probably the leading indicator of the eventual fade of McCain-Feingold, because in this ruling you see a recognition that the law has reached a certain limit. But when it reaches a certain limit for a certain kind of speech, then the question is raised: Why is that the only favored speech? Why is it, for example, that an incorporated blogger or an incorporated group of individuals who engage in Internet activity, who are also protected under the F.E.C. rules, why are they entitled to be as partisan in their speech? To expressly advocate for candidates? To raise money for candidates and a nonprofit corporation like Wisconsin Right to Life cannot? But at the end of the day people are going to approach this in a practical, common-sense way, and they're going to wonder what possible gain there is from this. And is the gain such that it offsets the complex, very draining and costly burdens on everyday speech on issues?

MARGOT ADLER: Trevor?

TREVOR POTTER: Well, I think the Internet is a prime example of the sort of speech that we all applaud. It's individuals engaging in making their political arguments. I think the commission was absolutely right in its rulemaking to say that individuals operating over the Internet ought to be able to say what they want without any form of campaign finance regulation. And so the commission has said that, you know, sending emails, having a blog, etc., is one of two things: either not an expenditure of funds regulated by the law or a covered media activity exempt from the law because it's media. And I think that's the right outcome, so I thought the complaint was frivolous. The commission dismissed it very quickly. The bigger issue of whether the Internet ends up changing all of the election laws, I think, you know, is a very interesting one. One of the arguments that it won't is that the low cost of speaking through the

Internet actually means you don't need campaign finance laws for the Internet because you're not spending millions of dollars to communicate.

MARGOT ADLER: Trevor Potter is head of the political activities practice at the law firm Caplin & Drysdale. He is a general counsel for the John McCain presidential campaign. Robert Bauer is chair of the Political Law Group at the firm Perkins Coie. Among other clients, Bob is general counsel for the Obama for America presidential campaign. Thank you both for joining me on Justice Talking. [APPLAUSE]

MARGOT ADLER: Coming up on Justice Talking: Should there be a special federal law to protect the media and their sources?

UNIDENTIFIED MALE: Thirty-one states do have a reporter's privilege, and it can mean something more than and including keeping sources confidential. It also has do with the ability to go out and report and talk to sources and not have the government get the information from you as if you were like anybody else.

MARGOT ADLER: Stay with us.

MARGOT ADLER: This is Justice Talking, where we make the connection between law and American life. I'm Margot Adler. If Congress passes legislation now under consideration, journalists and their sources would have federal protection for the first time. The Supreme Court ruled in 1972 that newsgathering is not without First Amendment protections, but how far those protections go has been an issue of much debate. While most states have their own legal protections for journalists known as "shield laws," there is no federal privilege that would allow journalists to keep their sources confidential. But a bill currently before Congress called the Free Flow of Information Act could change that.

My guests disagree on whether a federal shield law is a good idea. Patrick Fitzgerald is a U.S. attorney for the Northern District of Illinois. He was special counsel in the Scooter Libby case. In that case, former New York Times reporter Judith Miller spent 85 days in jail for refusing to reveal which Bush administration official told her that Valerie Plame Wilson was an undercover CIA agent. Jack Doppelt is a professor at Northwestern University's Medill School of Journalism. He's also an editor and publisher of On the Docket, a website devoted to the U.S. Supreme Court. They joined me at the National Communication Association Convention in Chicago.

[AUDIENCE APPLAUSE]

MARGOT ADLER: The Supreme Court in the case *Branzburg v. Hayes* said that it could not seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, and it goes on to question the theory that it's better to

write about crime than to do something about it. I'd like to ask both of you: In your view, does the First Amendment give reporters the right to protect sources? Jack first.

JACK DOPPELT: No, because I know how to read an opinion and those four Justices said that it doesn't, and Justice Powell, who was the fifth vote in the plurality in what makes the law, said you just can't harass journalists. But generally, the First Amendment doesn't give them that right, period. So now we have to as a society figure out how to legislate it and whether it should be legislated. And 31 states do have a reporter's privilege and we'll be talking about what a reporter's privilege really means. And it can mean something more than and including keeping sources confidential. It also has to do with the ability to go out and report and talk to sources and not have the government get the information from you as if you were like anybody else.

MARGOT ADLER: Patrick?

PATRICK FITZGERALD: I would say that in the run-up to that decision by the Supreme Court, many people thought the sky would fall if the Supreme Court said that the First Amendment doesn't protect sources, and the sky didn't fall. A lot of great journalism came forward after that. In fact, I believe Deep Throat gave up the Watergate scandal weeks after the Branzburg scandal. So I think we have to bear in mind that journalism has thrived in the 35 years since Branzburg. I would note that--Jack does point out that many states have shield laws. One thing that's important to note is that states have responsibilities to enforce the laws. The federal government has some laws that the states do not address, namely the need to protect national security and classified information that states don't have. I bring that up because that's an important area where these subpoenas do come up. And that's something that states don't have to address, which puts the federal government in a different box than the state government.

And one last point: Jack made the point should reporters be treated as if they're anybody else, and they're not. Even on the current law, the attorney general regulations, the attorney general has to sign off on a subpoena to a reporter. The number of subpoenas to reporters is really very, very small compared to the thousands of leaks that occur every year. Reporters are not treated like everyone else. They are not given a constitutional right, but they are treated very differently under the attorney general regulations.

MARGOT ADLER: Are you saying, Pat, that you actually don't have a problem with state shield laws but only with a federal shield law?

PATRICK FITZGERALD: What I'm saying is not my--I don't have an opinion on the state shield laws and the federal government. What I'm saying is if it--whether or not it works in the state system, and we can discuss that, for people to say if states can have it, why not the federal government, the federal government is responsible for protecting classified information.

MARGOT ADLER: I think that there is a lot of confusion in our society because most people think that priests, doctors, spouses have certain protections from having to reveal confidential information. So I guess my first question, Jack, is what protections do they have and what's the difference between the protections that they might have and that reporters have?

JACK DOPPELT: Well, the privileges that you're mentioning are really the privilege of the person who goes to the lawyer, to the doctor, to the clergy, to their spouse, and the idea is we have a societal interest in making sure that those conversations continue to take place in our--under the greatest confidentiality. Okay, so now you go into journalism, and to me it's a very--it's not identical, but it's a very similar idea. The goal here is not to protect the journalist anymore than it is to protect the doctor.

The goal here is to protect something that society has an interest in, and it is to have this free flow of information--a very clever title for the law, for the bill, and I actually think it's right.

So that's very--as we talk about this, I think it's very important to remember that, even, or it may be even particularly, in the context of national security and classified information, actually.

MARGOT ADLER: Patrick, did you want to say anything about that?

PATRICK FITZGERALD: Yes, I'd like to say two things. In the context where a person has an attorney-client privilege, they can actually decide to waive it. They can walk into court and say, you know, I'm charged with cheating on my taxes, and I went to see my tax lawyer, and my tax lawyer told me that this was perfectly okay, so I want my tax lawyer to tell the jury why it is that I thought I could deduct these very expensive items. In the cases we've seen when people walk into a grand jury and say, "I'm not afraid of anything I said to the reporter; in fact, they will corroborate my story," they did this in an innocent fashion. Reporters have said even though there is no constitutional privilege that they're going to refuse to testify.

The point that Jack made about the title I actually think is important. We have to worry about titles of laws because there is a free flow of information and there's a very valid interest in having a free press. But what we're balancing on the other side is a different version of the public's right to know. The public has the right through the court system to have the truth come out in court. And if you wanted to pass a law that says we shouldn't have a shield law and you said the free flow of truth through the court system, that would sound like a good thing. I think we have to step back and recognize that that there are two very valid interests, the public's right to know through the press or the public's right to know the truth in its court system.

And that's why there is a tension. And the people who support a shield law, like Jack, are not trying to deprive the court system of the truth. They're not trying to encourage people to hide behind laws. Just as the people who want to make sure that we have access to every man's evidence aren't trying to kill the press. And that's why we have such a great tension.

MARGOT ADLER: Support for a federal shield law has transcended party lines. Here's what Republican Representative Mike Pence from Indiana said on the House floor in October.

MIKE PENCE: As a conservative who believes in limited government, I believe the only check on government power in real time is a free and independent press. The Free Flow of Information Act is not about protecting reporters. It's about protecting the public's right to know.

MARGOT ADLER: So I want to ask both of you if you think that the legislation that Congress is dealing with right now is as much about reigning in the Bush administration as it is about protecting reporters and their sources. In other words, would we be seeing this legislation now if there wasn't so much activity about the whole question of the unitary executive and executive power and so forth? I'll start with you, Patrick.

PATRICK FITZGERALD: Well, I always duck political questions, but I will say this. I think that the press, when it wants to lobby for its own laws, hasn't always been completely honest about how to describe this law. Let me give you an example. As you hear about the Balco case in California, their defense attorneys leaked confidential information about a court proceeding and then went around and tried to dismiss the case saying the government must have leaked the information. And we almost had a great miscarriage of justice where people are leaking the information, then having the case dismissed. And if there were a shield law that barred that I think that would be a travesty.

One of the things that I'm concerned about with a shield law is the pitch is made to people to let a judge balance what's going on. We have the press, which has a valid interest. We have the government, which has a valid interest, and the executive branch. Let's let a judge decide. Well, I don't think the judges should decide what laws we enforce. They have lots of power, but the executive branch is a cannibal. If people don't like what we do, then change the administration or not. But if you look at it, it's not as if when we go into court to enforce these subpoenas the government shows the judge what we're looking at and what we think we need the information for. Under these shield laws the press would not show the other side.

The cases that are--where this is coming up, don't involve protecting whistleblowers. And I think that we haven't had a need since 1972 in the 35 years. The press has functioned. We have a lot of danger in a shield law that we either define the press so narrowly to keep it restricted that we favor mainstream media over bloggers, or we define it so broadly that we protect everyone, but then lots of people who are criminals can now open up webpages and pretend to be journalists. So I think it's been very, very complicated. But I have to say the editorial pages have portrayed it in a simplistic view because it's not popular to stand up and oppose the shield law and look like you're against a free press, when what you really want to see is a free press balanced by a truthful court system. And I think we need to look at the attorney general regulations and recognize that there's a lot in place right now that limits the issuance of subpoenas.

MARGOT ADLER: Jack?

JACK DOPPELT: Oh gosh, there's so much to think about in that. First, let me start by agreeing with the bottom line that Pat said, and almost nothing else though. The bottom line for me is that I really do agree that you have to watch out for journalism covering this story. You really do. Now to me--well the original question, Margot, he had, is interesting, too, because, you know, it was a political question. And I don't know the answer to that either. You know, is it maybe the excesses or the perceived excesses to the Bush administration that are actually giving this a chance in Congress or even bringing it up? Maybe. But I think more than that, and I think this is even more real, is that we're paying more and more attention to the vast power of both

prosecutors, even when you've got absolutely sensational ones like Pat. They have incredible power. It's scary what power they have in some ways. But I don't even want to put it all on federal prosecutors.

The thing that Pat's leaving out, and we have to get back to the Justice Department regulations, because they're very important, is that the--it's not just prosecutors who have the opportunity to get information from the world, including journalists. It's everyone involved in the federal system. Civil cases, lawyers, in the smallest civil case in the federal system, a journalist if treated like anybody else would have turned over whatever information is available to them by going about doing their reporting. And journalists are being subpoenaed more and more over this last couple of years. And I think we are focusing--I don't know if we're focusing as much on it's scary the journalist are being subpoenaed as we are on it's a little scary how much power the system has to get that information.

MARGOT ADLER: Patrick, do you think that the current federal shield law that's being discussed in Congress was inspired by the Scooter Libby case?

PATRICK FITZGERALD: I'm not going to delve into other people's minds as to what motivates them. I do think people should recognize that under--that when they look at the Plame case that that went to every judge who reviewed it, from different political backgrounds, different views of things. Every judge who reviewed the subpoenas that were issued that people talk about said that under any balancing test that would be applied on the facts of that case, the reporter should testify. And the Supreme Court let that stand.

MARGOT ADLER: And do you think that if the federal shield law had been in place when Judith Miller was subpoenaed, would she have gone to jail?

PATRICK FITZGERALD: I'll answer in two parts. Every judge made clear that with a shield law in place they still would have enforced the subpoena. The question is would she have followed the order which still would have followed with the shield law in place? And I don't know that answer. I can tell you two things that concern me. Why a reporter thinks they can defy the Supreme Court, and one of the concerns I have is that some of the groups lobbying for the shield law have said the shield law in its current version doesn't give us everything we want. But we'll rely upon reporters to, you know, defy it if the case goes against them.

Shouldn't we have a commitment from reporters that if we're going to have a judge act as the balancing person in this case that, number one, we will share the information with the judge that the reporter has even without the government seeing it? The government shares the information without the reporter seeing it, so the judge makes the fully informed decision that they balance the scale knowing what's on it. And then when the balance comes out both sides walk away and respect the result. And I haven't heard that.

MARGOT ADLER: Jack?

JACK DOPPELT: You can hear it from me. I am willing to absolutely commit to that. Here's why I think that happened. Without the federal shield law, which didn't exist and doesn't yet,

there really was a lot of indecision and confusion about what the law of the land was. We're presenting it so far here as if that Branzburg case was very clear and therefore journalists knew they had to give over that information at the time they did, and that's not the case. I mean it's really, it's one of those contestable things and I do think you're right in a way that it's given journalists, individual journalists, a kind of weird sense of impenetrability, which the federal shield law wouldn't do, by the way, and whatever notion of Branzburg was, it didn't do. In other words, "journalists are different" is the notion of the federal shield law, or should be -- and I believe that strongly -- not immune.

MARGOT ADLER: Let's imagine for a moment that the bill passes and then President Bush vetoes it. There's been pressure for a reporter shield law for decades. This is the farthest it's ever come. What do you think is pushing this issue right now? Let's start with you, Pat.

PATRICK FITZGERALD: I think the press is doing a good job of marketing some situations that have come up. And I think, for example, the press in 1972, when Branzburg was decided, the Supreme Court said to three different sets of reporters go ahead and testify. How it took 30 years later for people to realize that the Court ruled go ahead and testify was a testament to the creativity of First Amendment lawyers who kept saying that, gee, the result here is unclear. And that's when Judge Posner said, in the McKevitt case, he said what's unclear here? You know, the press lost in Branzburg. They said there's no reporters' privilege. And for 30 years people in court tried to tell judges that the Supreme Court ruled other than it did. And finally we've had a couple of judges say no, the judges meant what they said.

MARGOT ADLER: Jack, quick response.

JACK DOPPELT: I don't like that scenario. And I think it's a very possible scenario. And I think the result would probably be since we still have courts, federal courts divided on whether journalists are supposed to be treated differently or not, and we have this Justice Department regulation in place that treats journalists differently if federal prosecutors are involved, I think there will be a case that will get to the United States Supreme Court and that's not where I want to see this go, actually. Mostly because -- and I don't want to be really negative -- I just think they'll cut the issue and say journalists aren't to be treated any differently. You know, we exported this to the world over those 20 or 30 years. The European Union, France, England, the International Criminal Courts, all now treat journalists differently because of the notion of what emerged from the United States, which included Branzburg. It's peculiar. And now we're going to be different in the federal system, and the state systems are still going to state that journalists are treated differently because almost every state does that. I don't like it. I hope that doesn't evolve. I think it would be a bad thing.

MARGOT ADLER: Patrick Fitzgerald is a U.S. Attorney for the Northern District of Illinois. He was special counsel in the Scooter Libby case. Jack Doppelt is a professor at Northwestern University's Medill School of Journalism. He's also editor and publisher of *On the Docket*, a website on the U.S. Supreme Court. This is Justice Talking. I'm Margot Adler. Thank you all for joining us. [APPLAUSE]

MARGOT ADLER: Should journalists be forced to give up their sources? Join our discussion on this issue at justicetalking.org and tell us what issues are important to you as the campaign for president kicks into high gear. Thanks for listening. I hope you'll tune in next week. I'm Margot Adler.
