

## Counterterrorism and the Media

**Moderator:** Carol Heckman, Harter Secrest & Emery LLP

**Panelists:** Dina Temple-Raston, National Public Radio  
Barton Gellman, Journalist  
Randy L. Shapiro, Global Media Counsel, Bloomberg LP  
Honorable William J. Hochul, Jr., United States Attorney, Western District of New York



This panel explored the sometimes difficult balance between secrecy and accountability and featured topical insights on these issues from a federal prosecutor, a media lawyer and two reporters. Carol Heckman, a former federal magistrate judge and now an attorney in private practice, served as moderator. She began the discussion with a simple, direct question to the Honorable William J. Hochul, Jr.: How do you balance the public's right to know with the need for secrecy in prosecutions involving classified information?

Mr. Hochul began by pointing out that disclosure in terrorism cases is sometimes desirable. For example, in the case of the "Lackawanna Six" involving six Yemeni-Americans convicted for having attended Al-Qaeda training camps in Afghanistan, the community itself provided key initial leads. He added that the prosecutors in the Western District of New York consider the press as a partner and have a strong relationship with the local media.

Ms. Heckman then turned to the reporters on the panel to ask a related question: "Are you satisfied with letting the prosecutors decide what classified information or what sensitive information gets out to the public when there's a prosecution of this nature?"

Barton Gellman, a reporter perhaps best known for having been among the three journalists who received and reported on information directly from former National Security

Agency contractor Edward Snowden, responded that he considers information designated "classified" by the government to be a "yellow light, not a red light" in his reporting. Security requires some measure of secrecy, he said, but secrecy "often is in tension with the fundamental ideas of self-government." Mr. Gellman said that there were extensive materials from Mr. Snowden that he never had any intention to publish and that he took extensive measures to keep the information secure.

Dina Temple-Raston added that she considers it her job to reveal when the government is doing something wrong. She gave an example of having reported on FBI training materials that were offensive to Muslims. This was important information to disclose, and it resulted in changes in FBI training.

Ms. Heckman asked Mr. Hochul about the process that the U.S. Attorney's Office employs when it learns that the media has information relevant to an investigation.

Mr. Hochul said that the first step would be to attempt to get voluntary cooperation. He mentioned a domestic terrorism case in which a *Buffalo News* reporter was able to interview the defendant, who made several admissions. The reporter was willing to testify in multiple proceedings. If the government cannot get voluntary cooperation, there is a new, cumbersome procedure that requires the personal approval of the Attorney General of the United States before issuing compulsory process to a reporter.

Ms. Temple-Raston noted that it is important for journalists not to be part of the story and asked Randy Shapiro whether she would have advised the *Buffalo News* journalist to testify. Ms. Shapiro said that Bloomberg LP has a policy about not reporting on itself, but that having a reporter testify about being a witness to a crime is not *per se* a problem. She said, however, there is a slippery slope that arises when the questions involve discussions with sources. Bloomberg LP will sometimes allow a reporter to submit an affidavit repeating under oath what has been published in a news story, but generally will not go any further.

Mr. Gellman added that there is an important concern in these situations that reporters not be viewed by the public as arms of the government because that can impair the public's trust in the role of the press as a watchdog over the government.

Ms. Heckman then turned back to Mr. Gellman's reporting on Edward Snowden and asked him to discuss his process for dealing with classified information. Mr. Gellman said he has extensive experience reporting on national security and classified matters. He starts with the proposition that, in the context of foreign policy or national defense, anything that is not in a press conference or news release has probably been deemed "classified" by the government. It is also important to recognize, Mr. Gellman said, that so-called "classified" information is routinely leaked deliberately so as to advance the agenda of the leakers. These types of leaks are usually authorized by political appointees or other top officials.

What Mr. Gellman found with Mr. Snowden, however, was not the typical leak of a government official promoting a government agenda. It was top secret material that was highly compartmentalized even within the government, and Mr. Gellman knew immediately that there was much information he would never reveal publicly.

The first story that Mr. Gellman published involved PowerPoint slides showing how the government obtained substantial information from internet service providers under Section 702 of the Foreign Intelligence Surveillance Act. The program was called "Prism." Mr. Gellman reached out to three government officials and asked them to find the PowerPoint document on their own, and then to call him back to discuss. He started the conversations by conceding that certain operational information — essentially how bad guys were caught — would never be published. In the course of the discussions, he and the government agreed as to what else would be too sensitive to publish, with one exception. The government did not want Mr. Gellman to publish the names of the companies participating in the Prism program out of concern that they would be less likely to cooperate in the future. Mr. Gellman responded: "That we cannot accept as a valid harm, that the public will react wrongly and try to direct you and the company differently by the way that they vote with their dollars and their votes. That's not harm we can accept as a reason not to publish."

Ms. Heckman then asked Ms. Temple-Raston how she balances the competing issues of secrecy and the public's right to know, and also why the journalist, rather than the government, should be the one to decide.

Ms. Temple-Raston said that there is a common misperception that journalists are motivated primarily by getting "scoops," when in fact they often work closely with the government to strike the right balance. She gave an example from her investigation of a story relating to Somali-Americans in Minneapolis traveling back to Somalia to join the terrorist group Al-Shabaab. Ms. Temple-Raston visited a hookah bar and was chatting with high school students who described how they were recruited to travel to Somalia to join Al-Shabaab. When she approached the FBI with the information she learned, the FBI said it was in the middle of an ongoing investigation that would be compromised by a media story. NPR and the FBI eventually agreed that NPR would write various parts of the story prior to the arrests and save other parts for after the arrests.

Mr. Gellman then addressed the second part of Ms. Heckman's question — who elected the journalist to make these decisions? He said that there has to be a role for the press because of the government's fundamental conflict of interest: government officials cannot use their power to affect the public, while at the same time deciding how much information the public ought to have in holding those officials accountable for that use of power.

By way of example, Mr. Gellman said he has in his possession, and has reported on, the entire secret intelligence budget (the so-called "black budget") for the prior fiscal year. He told the Director of National Intelligence that, from these thousands of pages, he was going to publish about 25, with redactions. The Director had no objection. Mr. Gellman noted that someone had made the decision within the government that all of this information — even the top line numbers — should be marked classified, but then did not actually object to its publication and never claimed that any harm flowed from its publication.

Mr. Gellman added that another key element to the discussion was that the government is not only over-classifying matters, but is also often deceiving the public. He said: "There are times the U.S. government behaves as though it accepts Churchill's famous wartime dictum that

in war times secrets are so precious they need to be attended by a bodyguard of lies." One example was Section 215 of the Patriot Act, which authorized the government secretly to request business records and other tangible things relevant to terrorism investigations. The discussion around its passage concerned the risk the government would abuse the authority to find out private information by serving, for example, requests on libraries to find out what people were reading. The government assured the public that the Section 215 tool was limited. In 2009, the government said that it had used Section 215 only 21 times. That was about the only thing known about the use of Section 215, so it appeared that concerns about its abuse were unfounded. But thanks to what Mr. Snowden's materials have revealed — and *only* from those disclosures — we know that 12 of those 21 orders allowed the government to obtain substantially all the phone call records of all Americans.

Mr. Gellman gave one further example of how secrecy reduces accountability. He published a story in August 2013 about an internal National Security Agency accounting of its compliance with its own rules. The top level numbers, just the number of incidents, were marked "secret," which is a very low level of classification for the government. When the identical table was given to Congress, however, it was given a substantially higher classification, so that fewer than one in ten members of Congress had a staffer with sufficient clearance to review it. This was just another example, Mr. Gellman said, of why a classified designation alone should not dictate whether the media should publish.

