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Okay, good afternoon. We're here to talk for an hour today about whistleblowing law. It is, in my opinion, a completely confused area of the law. It is comprised mainly of statutes, not principles. But of course, the statutes are intended to express and guard the principles or implement the principles. But the principles underlying whistleblower law are contradictory. There is, on the one hand, a strong feeling about freedom of speech, freedom of conscience, freedom to act with integrity, and according to your beliefs, and then there is a strong principle about protecting the good of the public of the greater community. And these principles are in what seems to me to be irreconcilable conflict. And so although there are statutes as I'll get to in a little bit, there are statutes protecting whistleblowers, all kinds of statutes protecting whistleblowers. They all have exceptions spelled out. And then there are competing statutes, identifying things that must not be disclosed, must not be stolen must not be converted. And these statutes conflict constantly. And we'll talk about a few of the Supreme Court cases that analyze the question whether a person who works for the government has full freedom of speech, to say things or doesn't have full freedom of speech to say things. So what I hope to accomplish by our one hour interaction today, is not so much a development of a practice guide for whistleblowing law, because I don't think such a thing is really possible. But instead, I'd like to encourage you to discuss with me the various issues that come up when you start thinking about whistleblowing law. I want to think about it from the beginning. It occurs to me that unlike many areas of law with which I am familiar, I've been a business litigator for over 35 years. All the areas of law that I practice in, would exist if they were a small community stranded on a desert island. If a shipwreck had left 1000 people stranded on a desert island, they would very quickly implement law of contract, law of tort. They might even have some administrative law. And they would probably have some procedural law, although it would probably be rudimentary for a small group. But would they have whistleblower law? Would such a thing even occur to them? Would it even arise in their experience? Well, I tried to think through how it might Suppose, for example, that the community delegated a group of 15

people to work on the north shore of the island, in the hope of finding material to build a boat so that the community could escape and go back to the main continent. And this group, worked every morning from seven in the morning to six at night. And it was 30 people in the group. And one of the people in the group discovered that the chairman of the group, or the head of the group, was stealing jewels that were found on the north shore of the island, stealing valuable gold coins without telling anybody about it. And he happened to stumble on it, and he saw him doing it. And he thought to himself, this is not good. And he asked himself, do I have a duty to warn the rest of the people on the island about it? And he asked himself, do I have a duty to confront this man? And is that whistleblowing law in a, so something close to a state of nature? What does ethic what what do ethical principles dictate in that case? Well, it would be normal for him to walk up to the man and say, I see you're stealing jewels and gold coins. You shouldn't do that they belong to the whole community. And the men might say, Well, I'm the one who found them. And I'm discharging my duty to find a way off the island. I'm building the boat that I was mandated to build. Why shouldn't I take the gold coins that I happen to find? They're mine, Finders keepers. And he says, well, but your food is being provided by the rest of the community and your shelter is being provided by the rest of the community. And you are working for the community, aren't you? Yes, but only in connection with building a boat to escape to the mainland. And he says, Well, I'm sorry, I disagree. I'm going to go tell the chairman of the whole community back at the village hut

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and this fellow gets angry and He says, Well, in that case, I'm punching you in the nose, or I'm breaking your arm or I'm putting you in prison, or I'm killing you. I'm punishing you. In other words, how do the ethics in that situation play themselves out? And can we make a law? Could we articulate a law for this group of people that would clarify the way both of them are supposed to act? Or do we have to leave it as it seems to me, after reading a lot of cases, do we have to leave it dependent on individual cases, so that we can evaluate the significance of the accusation? The merit the the the proof for the accusation and the position of the person or persons involved? So let me go now to the question of what whistleblowing is. And I put in this etymological note for you, according to Wikipedia, where, by the way, there's a lot of information about whistleblowing. It was it was Ralph Nader, who coined the term. In 1971. He sponsored a conference on privacy and protection of privacy. And he was, as you know, a corporate critic, and he coined the term whistleblowing to avoid the word snitch, or tell tattletale or traitor. He said, No, no, not everybody who releases information is a snitch. Some of them are whistleblowers. And that term has a more favorable flavor to it. There are four elements in the whistleblower picture. The target group, the target item, the recipient and the whistleblower. Now, without a target group, there can be no whistleblowing, can there? Could I would blow the whistle on you. If you're not a member of any group, or if you don't represent any group or authority? Well, I could tell your wife that you're having an affair with somebody else in the room? Is that whistleblowing or gossiping? What is it? What's the difference? Why would it be different? If you were the President of the United States,

then it would be whistleblowing, perhaps. But if you're just a private individual, it's just gusset. What is the difference between gossiping and whistleblower? What is the difference between spying and whistleblowing? Before I go further? Are you all lawyers in this room? Full of you, I think, yeah. All right. But and I wonder I do all of you or any of you practice in the whistleblowing area? Because I'm going to come to that in a minute. What is it to practice in the whistleblowing area? Well, it's to pursue qui Tom claims, that would be one area of practice. It's to represent employees who have been discriminated against in response to their legitimate whistleblowing. That's another area of practice. But for most of us, it's not an area of practice, we generally get into is it most, most of you in the room familiar with whistleblowing law, from your practice? Not really. Anyway, what's the difference between spying and whistleblowing? Can anybody articulate that difference? Yet not on the same side as the target? If you're a spy, you're on a different side. Okay, you were gonna say something, sir. You're acting for a third party and you're not publishing your results, either, are you? The Spy usually is delivering his results to the third party who retained him or her. But he's not publishing them. Whereas the whistleblower is publishing. Although we'll come back to the modulations of what publishing involves, is it to publish to go to the complaints division of your own company, to go to the overseeing agency and the tax office? Is that publishing a complaint? Or in order to publish? Do you have to put it in the newspaper, or on the radio or on the internet? But spying is different because the spy keeps the information secret? And is retained by a third party group? What about somebody a whistleblower who gives information to an congressional committee? Is that spying? He goes directly to his own congressional commit to a congressional committee in his own country, not spying, it is whistleblowing. It's taking information that the congressional committee would not have had, and giving them that information.

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And what about litigating and that's another area where we should think about Joseph Dunn is suing the former the state bar for terminating him And he thinks his termination was illegitimate and in violation of Whistleblower Protection statutes. So he's suing for wrongful termination, and violation of whistleblower rights. But he's suing. He didn't publish anything. He was just dismissed for incompetency alleged in competency of various sorts. Have you read that in the newspapers? Joseph Dunn, former executive director of the State Bar, we don't care about those things. But I happen to notice it. And that's, that's a suit that's going on right now. So is litigation per se, whistleblowing. And I cited you to the ancient story, I think I did it here of the eloquent peasant. I don't know if any of you are interested in ancient Egypt, or Middle Kingdom or ancient early kingdom, I studied it for a while, there's this old story of a peasant who is who's pulling his barrel of produce along a path. And a nasty farmer is sitting on the path and refuses to let him pass unless he pays a fine. And the peasant says, I don't have to pay a fine, this is a public path, you shouldn't have things here that are blocking my access. And the peasant says we'll do something about it. So he goes to the High Steward. And he tells his story. And the reason the story is famous

in ancient Egyptian literature is that the peasant is so eloquent, in presenting his case, that the steward listens to him with open eyes and rushes to the Pharaoh. And says, You got to hear this guy, apparently, the first successful lawyer, first impressive lawyer, and so the case is taken to the court. And at the end of it, the nasty peasant who was blocking the path is punished. And this guy has given helped to go through along the path was that whistleblowing or merely litigating? When he took his case to the High Steward, or when it was moved to the past the palace? What's the difference? When you litigate? It's public, generally? Or is it always public, we're going to talk a little bit about sealed cases, and trials that are conducted in camera without access to reporters or the public. But is all litigation a form of whistleblowing? Or is a complaint merely a complaint? So it's not obvious what whistleblowing even is? in the first place? Or do you find all these things obvious? Do you think that these questions are easily answered? The the let's go back now to the four elements are the fourth players in the whistleblower picture. There's the target group. Now, there are differences in the law, depending on whether the target group is a government, a governmental agency, or a private group, like a company, a bank, a stock brokerage, and investment firm. The prohibitions and the consequences may be different in all those situations. So when you start thinking about what a whistleblower is, and what a whistleblower case involves, you have to ask yourself, who is the target group?

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Next, you have to ask yourself, what is the target the target item. And of course, there are going to be big differences. If it's defense related, related to the security of the country, related to the defense of the country, it's one category of thing. If it's merely a crime that's being exposed or corruption, it's another thing during the Civil War, the government, Abraham Lincoln's government ordered supplies for the troops. These supplies included donkeys and horses. And it turns out that many of the donkeys that were delivered were sick, and three steps away from death. So when the army tried to use them to carry military supplies from one place to another, they ran into problems. Lincoln was furious, and the Congress was furious. And so they passed the first False Claims Act. Back in 17 1863. I think it was, first of all False Claims Act, which said, anybody who reports abuse of this sort to the government is protected. And in fact, we'll recover 15% of whatever we recover. And please go out and and tell us about it. Go spy on your neighbors spy on your employers spy on people you're in contact with and tell us when they're cheating us this way. So the government encouraged whistleblowing of that sort. Now is this logical is this proper during During World War Two in Japan, everybody was encouraged to spy on his neighbor during the war. My wife grew up in that time and experience that. That was the government's encouragement to all the citizens. You were being a hero. If you spied on your neighbor and reported What? He's talking to an American, he's reading a Western novel. He's listening to Ragtime jazz. I mean, what it was that you were reporting is not even part of the law. But you were encouraged to report. And we see similar things going on in the United States today. People who frequent Islamic websites, or who read books in Arabic, are targeted by certain law

enforcement agencies for further study and investigation. So the government the concept that whistleblowing would be something the government would encourage, was back in the 1860s, the name of the game. But today, the name of the game includes telling on whistleblowing on the government, not for the government, but on the government. Anyway, the the target item could be something as simple as corruption. For example, your supplier, one of the cases we'll deal with Layne versus Frank's I think it is a guy was working for an aircraft parts manufacturer, and realize that the parts that were being given to the government to put in the planes, military planes were not being manufactured according to the highest standard of quality. And so he reported it, okay, corruption, or abuse, or they're raping all the female employees in the warehouse constantly. report to the government abuse. Those are things each of those has a different kind of law governing it, which is one of the reasons it's almost impossible to get on top of this whole topic. So abuse of power, and then there are the Mila massacre. Stories. Do you remember those? We were all alive during that period. And the shocking stories were released that showed how American forces were committing torture and unrestrained murder. And the government didn't like to have that information out there. That was embarrassing, remains embarrassing to this very day, who grave Guantanamo waterboarding, it all remains embarrassing to the United States government, they would rather not have it out there. But having it out there may be important for the whole concept of democracy. We'll come to that in a minute. Anyway, that was the abuse of power and employment settings, systematic abuse. So the target item, depending on what it is that's being released, it makes a difference. The next thing is the question of the whistleblower, himself or herself? Is the whistleblower, an insider in the group or an outsider? What's the main ethical difference between being an insider and an outsider?

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The is the whistleblower, a member of the group or not a member of the group? What is the ethical difference? What's the consequence? Well, if the whistleblower is a member of the group, who was an employee, for example, or a consultant or an attorney, a member, that person has undertaken certain ethical obligations towards the group has he not loyalty, obedience? Those are ethical obligations that he undertakes. And can we imagine groups without those ethical obligations around them? Can we imagine a world in which I could be a member of a group, but not owe it any particular sense of allegiance, or any particular loyalty or obedience? That makes a difference in the whistleblower law because the insider in the group who wants to blow the whistle? First of all, he has the right to go to the internal complaint mechanism of the group. Does the group have an internal complaint mechanism? Almost always. Yes. And in the last 10 years, internal complaint mechanisms have been upgraded and updated to include anonymity provisions. So if you think we're something bad is going on in our company, go to the x office, online, you don't have to put in your name. Just give us the information. Not too different from a suggestion box, which is also anonymous or may not be anonymous. You can put in a suggestion box and sign it and then if you get a reward, you're a happy camper. But the whistleblowing box is

anonymous to protect you against retaliation. So when your boss finds out that the bad conduct was revealed to the world, but that boss doesn't know who did it unless the revelation is of such a nature that only one person or two persons could possibly have known. And then the boss calls you into the office and says you're fired, or From now on, you're in the mailroom, putting stamps on letters, that's all you're gonna do from now on. So the internal versus the external whistleblower makes a difference? What if the whistleblower is a journalist, as happened in the case of Snowden, or Julian Assange and the Bradley Manning, and Chelsea Manning stuff? So Julian Assange releases the information on WikiLeaks? And can the government find out under subpoena where Assange got the information? Can a journalist be made to reveal his or her sources? Just because it was whistleblowing? Is Assange a journalist? Who is a journalist? What if I have a blog, Raphael's blog, and every day I just published something. And one day, I'm dumping government records. And I say, Well, I'm a journalist, you can't ask me to disclose where I got these records from? Can you? Or can't you? Should you be able to? Or should you not be able to? So it makes a difference whether the whistleblower is a journalist or not a journalist, an insider or not an insider, and then the recipients of the leak, we may never know who they are, entirely. We know that one person got the information. But did he share that information with 10 other people? And did they share it with 10 other people, and because that could even be short of actual publication on the internet or in a newspaper. So the recipients can be very hard to identify. So now let's go back to my example of the desert island and the small community. And let's reflect on the history of whistleblowing. So we think of it as a 20th century post industrial development, because employment settings mushroomed during the Industrial Revolution, and the occasion for abuses of all kinds grew up in the 19th century. But how about this? What about the prophet Nathan? In the second book of Samuel, chapters 11 and 12. David is watching Bathsheba take a bath. He falls in love with her. He calls her to the palace he sleeps with her she gets pregnant. And he sends her husband Uriah off to battle with instructions that you right Uriah be placed on the frontlines, so that he's in maximum danger of his life. And he is killed, Uriah is killed.

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And Nathan comes to the court. Presumably The court is not empty. Nathan doesn't have a private conversation with King Trump. He has a private conference, a public conversation with King David. And he said, What would you think about a man who would steal one sheep from his neighbor when he himself already has 100 sheep? And the king says such a man should be put to death immediately. And Nathan points a finger enema says Thou art the man whistleblowing. And this is in what 800 BC, roughly when this is written about? What about Socrates? Should we include historical figures like Socrates, or Jesus, or Martin Luther, who goes and posts his principles on the door of the church? The 30? What was the 32 principles that Luther posted? 95 was it and was that whistleblowing? Or was it merely advocacy? public advocacy? He wasn't revealing information Exactly. Except that anybody who walked by the church would look at that

and say, hey, are we already doing that? Or are we doing that now? Are we taking payment for our indulgences and what's going on here? So it's kind of like whistleblowing, but it's not exactly the same. And Jesus, what about him? Was he whistle blowing or merely preaching? asserting positions, asserting dogmas or doctrines? As he took silver? Yeah, he took 30 pieces of silver, and he betrayed Jesus. Is that what you mean? He was sort of a whistleblower, a bad one. A bad one. And he he betrayed the trust that Jesus had in him. But he, but he didn't do it for any idealistic purpose. He did it for the 30 shekels for 30 pound coins of silver. So we have old examples. What about Hamlet? Hamlet, who stages a play in the castle, the plays the thing to catch? the conscience of the king. So he wants to expose the king as the murderer of his father, the king's brother, whistle blowing, of course, whether the other people in the theater would realize that this was a whistle blowing event, or would realize that the king was the guilty party, not unless the king turned white and threw up or had to leave the room. But Hamlet thought that might happen. So he wanted to blow the whistle that way. And then there's this guy in the 16th century by colonnaded las cosas, who wrote books about the abuses of the Spaniards, against the Native American people. In the countries they were colonizing. And then there were these two sailors in this revolutionary war, who reported on the torture of British prisoners, by their commander, Commodore Hopkins. And He punished them and he wanted to sue them for libel and everything. And the Congress got angry. And they said, Wait a minute, we're going to defend the we're going to pay for the defense of these sailors. We're not going to allow you to do that. They're whistleblowers, but we're for them, we're going to help them and they fired Hopkins, and they defended. So there's a history of whistleblowing that predates the 19th century. But if you are a lawyer today and are interested in or involved in whistleblowing issues, chances are it has to do with either government agencies or private employers, big companies, that's where whistleblowing generally arises these days. But the whole idea came into prominence in the 19th century, late in the 19th century,

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the False Claims Act and then employees of government contractors could also Sue their employers. But the original act that protected them the False Claims Act of 1863, so called the Lincoln law, did not prevent employer retaliation against those employees. And that brings us to another question that we have to ask, Is it possible to legislate against retaliation? Or to protect the whistleblower completely from all consequences of blowing the whistle? Is that even feasible? If I betray you, if you're my boss, and I report on your bad conduct? can I expect to be friends with you? Can we go out to the bar afterwards and have a beer together? Probably not. Snowden quit and ran away as part of his whistleblowing activity, because he believed he had to do that. Is that necessary? And if there's a law that says you can't fire me, or you can't demote me, and if you do, I can sue you for a law salary. And even for reinstatement? Is that feasible? reasonable? I don't know how many cases have been brought successfully in that genre. And I don't know how many former whistleblowers, or whistleblowers are happy with the remedies that have been provided to

them. I just don't know. But it's a question, isn't it? So it arose largely on page four of my outline. whistleblowing arose largely as a response to industrialization, employees reported abuses by their employers, and there was gradual expansion of protection for whistleblowers. So the False Claims Act was amended in 1986. And it offers protection to whistleblowers, whether or not they are employees, and the whole conflict between employers and unions. Now, this is another whole interesting thing. This was all part of the the conflict between employers and unions. You may remember before most of us were born, employers didn't like the idea of unions. They thought unions were an infringement of basic principles. You can't join a union, we don't want you to join a union, we have a rule that says no unions here. And some people said, Well, you know, we have a right to associate, we have a right to bargain collectively. And that was a big fight. And little by little protections for unions came about. And part of the protection for unions is you can't punish people for advocating joining a union or for joining a union. And you can't have a rule that prevents them from joining. And by the way, the later rule said, You can't have a rule that requires them to join. As employer you must abstain from taking either side and that dispute. But Whistleblower Protection came about and protected employees. And later during the 1960s aggressive government regulation of business in the 1960s and forward civil rights laws, worker safety laws, environmental protection laws, I'm reading on page five now, Clean Water Act, Water Quality Act, all of those things came into existence. And which insisted that employers recognize those principles and advanced them. And then the civil service Reform Act of 1978, and Sarbanes Oxley in 2002, I think one of you in the room is already familiar with Sarbanes Oxley people have, there was a lot of litigation under Sarbanes Oxley to show or expose securities firms abuse. And Sarbanes Oxley encouraged that and protected people who did it. Anyway, we have a long history of individual whistleblowers and I on this point, I want to show you something. I when I started to prepare for this talk, I got these books, and I find them interesting look at this book. This is allegedly a compilation of all the whistleblower stories in the United States. Allegedly, it's very ill organized and it was self published in San Bernardino. Never heard, it doesn't have a name, publisher or anything, or even the date of publication, but you can tell by reading the contents. But there are a lot of whistleblowers and a lot of stories of whistleblowing. And to catalog them all and organize them all would be a major tasks which might be worth doing, if you were involved in something that requires that kind of thing. But we're all familiar with Karen Silkwood, who talked about the nuclear abuse of her employer, and then was killed mysteriously in an auto accident shortly thereafter. And it raised eyebrows at the time and still raises eyebrows today.

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Here are the names of four whistleblowers who revealed that the National Security Administration was and the military were conducting surveillance on the citizens of the United States. Daniel Ellsberg who released the Pentagon Papers showing that the whole Vietnam War was predicated on lies and falsehoods. And people were feared government people were furious

that Ellsberg immediately charged him with criminal offenses. And then they I don't know the exact form of prosecutorial misconduct, which was involved, but apparently there was some so that the court dismissed the charges very early within two years. And Ellsberg was never punished, never convicted. But he was a famous whistleblower, and he's still talking about things like this today. And then rod, right, and how are you Thompson? Two different whistleblowers, one an outsider, one an insider, on the me Lai Massacre, which was embarrassing to the United States government. And then Bradley, Chelsea, now Chelsea Manning, through Wikileaks, US abuses in wartime, a whole catalogue of abuses in wartime. And then Snowden. We don't know exactly what Snowden revealed. The point of what he revealed that we read about is and that we believe is what he revealed proved that the National Security Administration is spying on American citizens, systematically. Not to mention on heads of state, including uncle Americal, and other friendly heads of other friendly states. This was all allegedly unknown to the public at the time. But Snowden released documents which proved it is Snowden. There's a lot of debate about this. I don't know if you guys have strong feelings about it. But is Snowden a traitor? Is he a hero? Is he both? Is it possible to be a whistleblower without being a trader? Was it even possible? Well, if the target is governmental information, I mean, is it possible to whistle blow without being a trader? Do you have any thoughts? Yes, sir. I don't like I would call a claim that Allah whistleblower

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he signed a promise of secrecy. He did not, I think sets those cases, puts them in a separate class, ethically, legally, legally and ethically. Well, there's nothing wrong with legal ethics being similar. But what is the ethics of a person who joins a group undertakes secrecy and confidentiality obligations, and while he's a member of the group, the chairman of the group, takes them into the torture chamber in the basement and says, Hey, take a look at this. This is what we do on Wednesdays. What's he supposed to do? Is he does He say, Oh, my God, I'm bound by my promise. So I'm just getting out of here. I'm leaving. I'm not saying a word about it. But then he thinks, wait a minute. This guy is bringing in American citizens one by one every single week and torturing them. Don't I have a duty to warn the public. He thinks So that was Snowden conflict or dilemma, and he resolved it the way he resolved it. That brings us to other questions about. Well, let me go on to this. One of the things that has been said in response to the Snowden revelations is, the National Security Agency is spying on the citizens for the good of the citizens. In other words, this kind of intelligence is necessary to protect the United States citizenry, against bad things of all kinds. If you watch the recent hearings, I saw an interview with the head of the security agency talking about the rocket question hacking. And the whole 30 minute interview was about the United States is under constant threat from the Islamic world, from Afghanistan, from Russia, from places in South America, from the Middle East, from the Southeast Asian countries, constant threats, and our job is to monitor those threats. Well, is that something that Snowden was required to agree with? The National Security Agency, what we're doing is nothing wrong. We need to do this to protect the United States, when the question is, well, what it's note

and do that was wrong? Why are you complaining against Snowden? If all he did was reveal what you contend was good action on your part? Why punish him? Why worry about it? These questions in my way of thinking are not being answered. Well, either in the media, or in any of the books I've read so far, maybe you guys have better answers. Do you have thoughts about this? Do you think that the spying on the citizenry is legitimate? Is it legitimate? Because they say it's legitimate? Or is it legitimate for some other reason?

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Yes, sir. If the good is the protection of the country and its citizens, perhaps that should be effective protection, and not interfere with some of its actions. Maybe somebody else may make those programs and then the citizen is okay.

37:16

So

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the proposition that secret activities, whatever they are, are necessary for the protection of the people are in their nature unprovable? Because once you ask to have proof, they're no longer secret. So why do we believe that it's necessary for the protection of the people? Do we have good reason for believing that? Well, because they say so. By the way, I was surprised to learn in the Hillary Clinton kerfluffle that there were 17 agencies in the intelligence community 17, they all came to the same conclusion within three or four days. I seem to remember that five years ago, there were 16. And I still don't know what all the agencies are in the intelligence community, maybe you have looked into that. We have an awful lot of intelligence community things going on. And it's a little bit of a mystery. And I've also read a lot of articles, but I don't know anything about this. But I've read articles that say, none of this really protects the people at all. It's all ineffectual, even if kept secret, totally secret. And how do we know? How do we know? and obedience obedience as an ethical virtue? Is obedience, an ethical virtue? Or is it a failing? Does obedience while appropriate to a child? Is obedience a sin on the part of an adult? because it involves an abdication of personal responsibility? Whether it's obedience to a religious dogma, or to a governmental dogma? I think that's an unsolved question. And this is why whistleblowing implicates deep questions regarding the relationship between the individual and the group. Do you all know the story of the experiments? I'm trying to remember the name of the Milgram Stanley Milgram experiments. Are you familiar with Stanley Milgram experiments? he had, he was a scientist at Stanford. And he got students to roleplay one student was going to roleplay a criminal who was being punished or tortured in order to gain information about where a bomb was placed, if they remember details, where a bomb was placed, that would blow up the whole

town. And the other students were observing they were wearing white coats and looking through the glass while the prisoner was tied in a chair. And Milgram was standing by and he said, okay, apply the shock. So they would turn a dial and electric shock would go to the victim. And he would do this. And the set apply to dial further, further further, and they all obeyed, even though the victim was screaming and in contortions, and then ultimately died, allegedly, in the experiment. And Milgram published his findings that once they were in that position, the students who were being told to turn up the electrical shock, obeyed. They were obedient, even to commands that were patiently cruel and inhuman. And he wrote about whether this is a an unfit nature of human nature. It cared about the Nazis. And they defended gret based on I was following orders. That's all I was doing. And it's astonishing to many people, Hannah Arendt has written and other people have written about what happened to Germany, great country, great people. And yet they all cooperated in the concentration camps in the mass exterminations. What's going on here? And when we have governmental agencies complaining about whistleblowing, and when we think through the ethical dimension of the whistleblowing problem, we say, okay, there's disobedience involved here, for sure. But is that bad? Or is that good? And what about so called civil disobedience? Isn't America founded on the notion of civil disobedience? Isn't civil disobedience one of our great values? It's part of what quote makes America great, or is it not? Is the Boston Tea Party? Yeah. Boston Tea Party? Yes, sir.

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It seems to me going back. Yes, several issues that have to be explored. One of them's for example, does he have any alternative other than to go to the Greenwald, the two journalists and as well as to Assange, basically solidly and provide the information? Okay. Maybe had he provided it to somebody in charge in the United States would have resolved the issue without basically you train a whole bunch of information that could be very damaging to the United States?

42:27

Well, that's a very good point. And we should go over that, because the whistleblower, and under many of the new statutes that have been passed in England and India, in other countries, there are whistleblower statutes all around the globe. Did you know that Whistleblower Protection statutes, they become fashionable? And one of the things they provide many of them is the three tier whistleblowing activity, you have to go first, to your own superior and complain? Well, that makes sense, doesn't it? Of course, you might be afraid of being assassinated before you go to the second step. And in snowdens, case, that might not have been an unreasonable fear, I don't know. But it would be nice to say, okay, go first to your own supervisor, complain. If he doesn't do something within 60 days, that's the time limit provided in some of the statutes, then you can go to the next tier, which is either somebody higher up in your company, or governmental oversight

agency, and then you can go to the press, if nothing happens. So yes, there's an ethical requirement, it seems for Snowden to have done something first, his you know what he says about that? It would have been futile. And it would have endangered my life. He says, Now, tough luck. There's one thing we could say to him. If you want a whistle blow, you take the risks, but he answers Look, what did you want for me, I've given up my whole life, I'm hiding in a cellar in Russia. I gave up my life, I took the risks. I did what I thought was necessary for the public good, chose a different kind of monitoring, a different kind of martyrdom, a different kind of martyrdom. And by the way, he's still feeding information out even today. But the ethics of whistleblowing are complicated. And that brings me to section three on page five, the statutory framework. And there are two kinds of statutes involved statutes which prohibit whistleblowing, and statutes which protect whistleblowers. both kinds of statutes are all over the place. So prohibiting, we have the Espionage Act, we have the conversion of government property act, we have the False Claims Act, which by the way, the False Claims Act originally allowed qui Tom actions, but then we have civil but didn't include protection. effective protection for the actors. Then we have the civil service Reform Act and whistleblower protection in California Health Care, section 12 78.5. Labor Code 11. Oh 2.5 General protection. Every state has its own different statutes, protecting whistleblowers, and all the statutes talk about the kinds of targets involved. You have protection a, but if it's government secrets that were secrets that endanger the the welfare of the country, you have protection be limited protection, all kinds of complicated statutes. Now, one of the things that bugs me about this area of the law is how totally wrapped up it is in statutes. For most of the areas of law that I deal with, I could do without statutes. statutes, merely reiterate and affirm ethical principles that I think I my adversary and the judge all agree on, like fiduciary duty that I talked about a month ago. Everybody agrees on the basic ideas. But in the whistleblower area, we don't have any agreement. And the reason we don't have agreement is we have irreconcilable conflict between the freedom to speak, and the necessity to quote, not well, to not speak, to not reveal classified information. Speaking of classified information, by the way, how much classified information is there in the United States? Today,

46:34

we could count the number of documents, we could count the number of people with security clearances, I read someplace that a 1,250,000 people have security clearances from the United States government of various types. Top secret is a smaller number, maybe a quarter of imaging, but still we're talking about a huge number. And we're talking about a relatively relaxed procedure for the government to stamp a document classified. See, Hillary released see documents we learned in the her emails. So the government has essentially discretion, perhaps unfettered discretion to classify something. I read a joke in one of these books that when doctors make mistakes, they bury their mistakes. But when governments make mistakes, they classify them. And, you know, we have this enormous number of classified documents, and any one of them becomes the basis, the target information for a whistleblower prosecution or an Espionage

Act. prosecution. So that brings me to Snowden. One second. When Snowden released the documents in July of 2013, if I remember correctly, he was immediately charged with criminal offenses, but the charges were kept secret. But now you can find them on the internet. And here is the cover page of the criminal complaint. These are the three statutes he is alleged to have violated, violated. Now, even reading this one page. Again, I'm not. I'm not sufficiently expert in these areas to voice meaningful opinions. But something comes to my mind as a lawyer. theft of government property doesn't sound right. Because making copies of things is not stealing. It's infringing copyright. But if he made copies or took copies, and the government retained its originals or its own copies, then there's no theft is there? We'll go ahead. Well,

48:49
okay.

48:54
It doesn't matter that the owner retains, also retains possession of the information, you can be just as guilty of that.

49:02
Good argument. good argument. So the owner has private has exclusive access to it. And now you go and you give it to the owners competitor. I don't think it's conversion, but it is theft of intellectual property. You're completely right. But this statute, talks about plans. Let me see if I can pull this up for you. This particular statute one second. Left of government property 681. Was it 641 that I was talking about? You remember the number but let me go back I'm sorry. 641. Okay, let me go back to 641. Let's see if I can show it to you.

49:52
Here we are.

49:56
Whoever embezzles steals promotions or not Only converts to his use, or the use of another or without authority, sells, conveys or disposes of any record voucher money, or thing of value of the United States, or of any department or agency thereof, or any property made or being made under contract for the United States, or any department or agency thereof, or whoever receives conceals, or retains the same with intent to convert it to the use to his use or gain. Knowing it is to have been knowing it to have been embezzled, stolen, purloined or converted shall be punished.

Is that quite like intellectual property theft? Sounds like it's more like you stole my typewriter? Sort of. But it's one of the charges against Snowden. Can you read it? Or it's big enough? Yeah, my screen is very small here but and converts to his use or the use of another? Did Snowden convert something to his own use? Or the use of another? Or did he really release information? I like your point. But I mean, I think that these things are to me, none of this is clear. Yes, sir. throwaway account? Very, very likely, very likely. And what are the two and three are? Let's see what I've got their two and three. Forgive me. Yeah. So 793 is unauthorized communication of National Defense Information. Now, here again, I'm not sure what Snowden what Defense Information was communicated? I just don't know. I don't know if you know, I don't know if any newspaper has ever said, What Defense Information was communicated. I read in some reports that the NSA was monitoring bin Laden cell phone. And when one of these dumps occurred, bin Laden realized, Oh, my God, my cell phones being monitored, I better stop using the cell phone. And the NSA said our whole effort to under undermine bin Laden was set back months or years. I've heard that.

52:18

Yes, sir. Well, my understanding I don't know, since I'm not with the NSA or as department, but how can I believe that? Basically, Mr. Snowden deadbolts information as identified various of persons who were assisting the United States government in Afghanistan, I've read that I've read that subjecting them to possible in fact, likely, early termination in their lives.

52:43

I've read that like Valerie Plame, for example, the wife of somebody who disagreed with Congress's assessment of whether Iraq was developing nuclear weapons, she was outed as an agent for the government. And that is Defense Information, which could be life threatening to her. I've read that Snowden did some of that. But you know, it's interesting to me that in stories of this type, real presentation of the real evidence isn't given to the public. I couldn't find it on the internet. I don't know if you've looked at it on the internet. It's just this label secret allows a lot to go on, without a lot of visibility. Yes, sir. I do understand that decided to come back to you. I do and itself, but he says he's writing his name. He says I'm afraid I would come back to United States if I could get a fair trial. But the trial procedures governing this secret information stuff are questionable, to say the least. They don't come up to the level of trials that we think are fair. There's something else we think I think he thinks, anyway, the ethical issues involved coming to the end. whistleblowing necessary involves a breach of loyalty and obedience. And then there's the whole issue of autonomy versus group membership, and individual integrity is orthodoxy of any type and application of autonomy and therefore personal responsibility, or is it an expression of the highest kind of integrity? I had to ask myself this question in my own life. My father was a rabbi. And I grew up intending to be a rabbi in my 20s. But I had to confront the question of whether obedience to Jewish law was a virtue or a failing. Was it an abdication of responsibility

or the highest form of integrity? It was, yes, sir.

54:45
Again, I would make the distinction between someone who has that imposed on them and someone who signs choose to take employment, knowing that they are going to be exposed to information that they may or may not this may be

55:01
yes. And they may or may not agree with. And by the way, they're making a choice and taking responsibility. So they made the bed now lie in it. And by the way, the Supreme Court has talked about this idea. We can't have groups, the employers, government agencies, which are at the beck and call and the women Caprice of every rebellious member. So just because Snowden thinks it's evil doesn't mean that the group has to change its behavior. And Snowden may or may not have a right to impose consequences on the group, because he has strong feelings about the behavior. I understand. On the other hand, in his defense, which I'm not really advocating, he has plenty of people who defend him, as you know, but in his defense, he joined up as a computer specialist, not as a secret purveyor or or keeper. But he signed this the confidentiality agreements. I think it's an important point. He did. All right, must the whistleblower first approaches superior internal monitor? And with regard to government secrets? Last question, before we close up the last question. No, I have one more thing to talk about. But the last question is, is it ever reasonable? And let's separate not in more time. More time might be an exception. But is it ever reasonable for the government to have any secrets? When there's no war going on? What is the justification for government secrets? Yes, sir.

56:37
You know, what the date of the oldest document in the National Archives? That is still secret? No, I don't have those dates back to 18. Relating to 1812. The War of 1812, related to the war of 1812. document cattle is still classified.

56:57
But what is the justification? I mean, we're paying their salary. Yes, sir. There's a challenge here because it's not clear what war is? Well, as Woodrow Wilson said about World War One, it was the war to end all wars. I think that was World War Two for the United States. After World War Two, we have things going on with military activity. But I would hardly we've never declared war. And it would hardly be cold war in the old sense. But in May, but I'd like to hear about why embarrassing. So why Why are secret if all secrets were open? Maybe it wouldn't embarrass. If we have

something embarrassing. We shouldn't do it. And if we know that it's going to be exposed, I mean, first of all diplomatic negotiate it is but is that is that reasonable? We don't all play by the same rules. True. Absolutely true. For example, whistleblowing laws in the Islamic world are very different from whistleblowing laws in our world. Even though they have them they have recently passed whistleblowing laws, but their attitude towards the group and towards the obligations of loyalty are different from ours. Anyway, there are three cases I want to talk to you about. I can't go into them in detail, but they are here on page seven, Pickering Gar setti versus Ceballos and Lane v. Frank's are three cases where the Supreme Court asked itself the question, is there a First Amendment right for a government employee to speak his mind out and to express his opinion? And the answer turns out to be a little bit nuanced. It depends whether he's speaking as an employee or as a citizen. And if you want to look at these cases, I gave you the sites they tell the story of how this doctrine has evolved. Okay, I gave you a list of Further reading. I mentioned some other cases where at the end of our hour, I will