In the

# Supreme Court of the United States

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LANDMARK COMMUNICATIONS, INC.,
Appellant,
Vs.
COMMONWEALTH OF VIRGINIA,
Appellee.

No. 76-1450

Washington, D. C.
January 11, 1978

Pages 1 thru 51



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Wednesday, January 11, 1978

The above-entitled matter came on for argument at 10:25 a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

FLOYD ABRAMS, ESQ., Cahill, Gordon & Reindel, 80 Pine Street, New York, New York 10005, for the Appellant.

JAMES E. KULP, ESQ., Assistant Attorney General, Supreme Court Building, Richmond, Virginia 23219, for the Appellee.

# I N D E X

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear argument next in No. 76-1450, Landmark Communications against Commonwealth of Virginia.

Mr. Abrams, I think you may proceed.

ORAL ARGUMENT OF FLOYD ABRAMS ON BEHALF OF THE APPELLANT

MR. ABRAMS: Mr. Chief Justice, and may it please the Court: This is an appeal from the criminal conviction of the publisher of a newspaper. The crime for which it has been convicted and fined is the publication by the newspaper of the name of a judge, a judge against whom charges had been filed before the Virginia Inquiry and Review Commission. The article in question was printed in October 1975 by The Virginian-Pilot, a Norfolk newspaper, which is printed by Landmark. The report in the article was in all relevant respects accurate, that is, not disputed, and indeed that is the essence of the crime.

The article referred to had identified a judge who had been investigated by a commission, the Judicial Inquiry and Review Commission, established to investigate charges which could be the basis of retirement, or censure, or removal from the bench. The article stated that no formal charges had been --

QUESTION: You characterize them as charges. Is

not the process one of inquiry?

MR. ABRAMS: Yes, sir. There were accusations pending before the Commission, and the Commission was inquiring into the accusations which had been made.

QUESTION: The charges are complaints from various miscellaneous sources.

MR. ABRAMS: Yes.

QUESTION: But not from any official source.

MR. ABRAMS: That is correct.

QUESTION: Not a criminal charge.

MR. ABRAMS: That is correct.

The newspaper article stated that no formal complaint had been made by the Commission in the Supreme Court of Virginia and it stated that that indicated that the Commission either had found insufficient cause for action or that the case was still under review by the Commission itself.

A month after the article was printed, Landmark was indicted and charged under section 2.1-37-13 of the Virginia Code with the crime of having unlawfully divulged the name of a judge at a time when the judge was the subject of an investigation and hearing by the Commission. Under the section of law [illegible] which Landmark was accused of violating, all papers filed with the Commission and testimony before it are required to be confidential. Any person who divulges --

that is the statutory language -- information in violation of this section is guilty of a misdemeanor, a crime punishable in Virginia by a prison sentence of up to a year and up to a thousand dollars fine.

At trial the only evidence by the Commonwealth other than the article itself was a stipulation of evidence entered into by the Commonwealth and Landmark which stated that Landmark had printed the issue in question, that The Virginian-Pilot had published the October 4 article, that the article had identified a judge who had in fact been investigated by the Commission, and that at the time the article was published the Commission had not filed a formal complaint concerning the judge with the Supreme Court of Virginia. The latter part of the stipulation, I think it may be said, adverted to the fact that under Virginia law once a formal charge is filed with the Supreme Court of Virginia everything about the proceeding which is filed does become then public.

No other evidence was offered by the Commonwealth at trial. At the trial Landmark urged that properly and constitutionally construed, the statute should be held to apply to the first disclosure of information by a participant involved in the proceeding itself but not to the later publication by a newspaper of information learned by it. Landmark urged, as I urge today, that to apply the statute

to it for publication of a news article identifying a judge would violate the First and Fourteenth Amendments.

QUESTION: Mr. Abrams, is there anything in the record of which we may properly take cognizance of how Landmark learned of the facts that it published?

MR. ABRAMS: No, there is nothing in the record whatsoever.

On January 15 --

QUESTION: I suppose only the editor of the paper knows that. Would that be a reasonable assumption?

MR. ABRAMS: I think it is a reasonable assumption that the editor and the journalist involved know that.

QUESTION: And perhaps some others, but those two, of course, must know about it.

MR. ABRAMS: Yes, your Honor.

Landmark was convicted in January 1976 and fined $500. On appeal to the Supreme Court of Virginia, the conviction was affirmed by a 6-to-1 vote. I will, of course, be considering the opinion throughout the course of my argument, but I think it may fairly be said in summary that the opinion held that the statute applied to Landmark and that the statute as so applied was constitutional. Probable jurisdiction was noted by this Court in June of this year.

QUESTION: Mr. Abrams, under your reading of the Virginia Supreme Court opinion, do you think the statute would

apply to you if you told us the name of the judge? I notice the briefs are very careful not to tell us who it is.

MR. ABRAMS: Mr. Justice Stevens, I think it would unless there was some other privilege which protected me because I was in this courtroom. I have little doubt that it would apply to me if I were to walk outside and provide the name of the judge, with one caveat, that this Court has decided, of course, that once papers are publicly filed in court, the press may print with impunity what is contained in them. So I suppose in this particular case, since there was a criminal prosecution and since there is the stipulation which I adverted to earlier, that I could with impunity speak. If there had been no prosecution, if the newspaper article had been printed and no prosecution had followed, it seems to me that the Virginia statute must apply by the terms of the opinion of the Virginia Supreme Court if I were to repeat to someone else the information contained in the article.

In the interim between the ruling of the Virginia Supreme Court and this argument, three separate judges in Virginia have enjoined enforcement of the challenged portion of the statute for various periods of time as against one or another newspaper or television station in Virginia.

I think it useful at the outset that we turn to the scope of the statute, as I understand it as interpreted by the Virginia Supreme Court, and it is this: Unless and until

formal charges are filed by the Commission with the Supreme Court of Virginia, Virginia law now makes it a crime ever to publish any "information concerning a proceeding before the Commission," including the identity of a judge.

QUESTION: How would the statute apply, if it would apply, to the person who released the information?

MR. ABRAMS: It would apply to the person who released the information.

QUESTION: He or she would be guilty of the same crime.

MR. ABRAMS: Yes, your Honor.

QUESTION: Even if it was the chairman of the Commission.

MR. ABRAMS: Indeed. There is no --

QUESTION: Or a member of the Supreme Court of the State of Virginia, the Commonwealth of Virginia.

MR. ABRAMS: Yes, your Honor. There is no exception. And I should point out in that respect that the Virginia Supreme Court had argued to it various narrowing ways of reading this statute and did not adopt any narrowing way to read it. It seems to me that the statute must be read so as to apply to a statement by the chairman of the Commission and, indeed, to make criminal the publication by the newspaper of that statement even if it were a press conference. That I think is the de minimis holding of the Virginia Supreme Court.

QUESTION: Is your submission that the statute is unconstitutional as applied to anybody or just the press?

MR. ABRAMS: It is my submission today that it is unconstitutional as applied to anyone who is not the party before the Commission. We have a press case today. I think that has bearing on your Honors' decision, but I do not argue to you today that the statute is unconstitutional as it applies to a participant before the Commission itself. It does seem to me that there may be some problems with that, but that is not the heart of my argument.

QUESTION: Let's assume -- so your argument is that even if it is wholly constitutional to forbid the participants from disclosing anything, nevertheless, it is unconstitutional as applied to the press.

MR. ABRAMS: Yes, your Honor.

QUESTION: All you need to argue is that it is unconstitutional as applied to your client in this case.

MR. ABRAMS: Yes. I would say that the most of the arguments that I would make to you today would apply as well to someone that reads the newspaper and then repeats it to someone else, because the statute does go that far. But my argument to you today applies to my client, and it would apply to any other newspaper which had --

QUESTION: But none of your arguments would question the underlying validity of the statute as applied to

participants, is that it?

MR. ABRAMS: I have not gone that far, your Honor. That is correct.

QUESTION: Of course, you need not, as Justice Stewart suggested. But what if the judge who is the subject of the inquiry called a press conference and said, "I welcome this inquiry and, of course, I will be vindicated swiftly."

MR. ABRAMS: Your Honor, it seems to me that the only way to read the statute is that the judge would have violated the provisions of the statute; the newspaper, if it prints what the judge said, would have violated it; and any reader of the newspaper who repeats what the newspaper said would have violated it.

Let me take the case, if I may, that this Court heard yesterday. If the Stump case which this Court heard yesterday had arisen in Virginia, if the plaintiff in that case had filed charges before the Virginia Commission against Judge Stump and if that information had become known to the press, it would be a crime for the press to have printed it; if the individual, who was the plaintiff in the case, had made a public statement to that effect, it would have been a crime for her to have made that statement. The scope of the statute is that broad, and it seems to me necessarily that broad given the language of the statute and surely the language of the Supreme Court of Virginia.

QUESTION: Do you think your client's protection is in any way diminished by the fact that it's a corporation?

MR. ABRAMS: I don't think so, your Honor. Certainly to the extent that what we urge on you is premised on the press clause of the Constitution, and it is, I know of no case which suggests that a corporation which owns a newspaper is not entitled to full First Amendment rights as interpreted by this Court.

QUESTION: Corporations and individuals stand on an equal footing then.

MR. ABRAMS: I would so argue, your Honor.

QUESTION: That is at least so far as the protection of the press goes.

MR. ABRAMS: At least so far as the press. Certainly it has never been suggested otherwise in any of your press decisions. In New York Times v. Sullivan there was no less protection because it was a corporation.

QUESTION: Is there any reason to think that if it is so as to the press, it's different as to freedom of expression?

MR. ABRAMS: As a general matter, your Honor, it seems to me that this case could be decided as a freedom-of-expression case without necessarily relying on the press clause itself. As I suggested earlier to Mr. White, I do think that the statute is unconstitutional for many of the

same reasons we urge under the press clause under the speech clause as well if I were charged with a violation of the statute for repeating what I were to read in a newspaper. We do have a press clause case today. I think we are bolstered even more by the fact that it is that kind of case and that this kind of statute strikes so directly, as we view it, at press freedom. But if that were not so, I think most of the arguments that I am making to you today would also apply.

QUESTION: You are not suggesting the First Amendment protection reaches only to corporations which publish newspapers.

MR. ABRAMS: No, your Honor. But they certainly do reach corporations which publish newspapers.

We have already discussed some examples of the scope of the statute. I would just cite one more, which also arose in Virginia and which is adverted to in the briefs of the parties. When a Virginia judge allegedly dismissed a law clerk who had testified against him before the Commission, and that allegation was contained on the AP wire service dispatch which went throughout the country and into Virginia, that story could only be printed by Landmark because one Federal judge in Richmond had previously entered an order enjoining enforcement of the statute against Richmond newspapers on First Amendment grounds and because another Federal judge in Norfolk entered a temporary restraining order enjoining

prosecution of Landmark for printing what the Richmond papers printed with respect to this subject.

But again, without question, that story would have been forbidden within the scope of the Virginia statute.

It seems to me important to make clear also at the outset what this case does not involve. This is not an access case. The question is not raised before you today and we have made no claim in this case of a First Amendment right of access to the Commission proceedings for our client. This case does not relate to matters of personal privacy or of anything about private figures. It relates only to public officials. The case doesn't deal with sanctions imposed upon the press for the imposition of intentionally or recklessly false statements about public officials. The case, of course, does not deal, as this Court's recent Nebraska ruling did, with issues relating to a fair trial and the Sixth Amendment and First Amendment rights being kept in some kind of equipoise. And the case does not deal with any kind of limitation on conduct as opposed to free expression or any kind of limit as to time, place, or manner of expression.

This is, if the Court please, a classic or rather old-fashioned First Amendment case, in which I think we may return to first principles. It is a case which raises, at the outset at least, the question of whether a law does or does not abridge freedom of the press when it makes criminal

the truthful printing of facts about public officials relating to their public duties.

In our view, the very notion that such kind of publication may be made criminal is abhorrent to deeply rooted constitutional principles.

QUESTION: Of course, this is really not an old-fashioned First Amendment case because this isn't the Federal Government that's involved, is it?

MR. ABRAMS: No, it is not the Federal Government.

QUESTION: It's a Fourteenth Amendment case, isn't it?

MR. ABRAMS: It's a First through Fourteenth Amendment case, yes, your Honor.

QUESTION: That's pretty old-fashioned by now, isn't it?

MR. ABRAMS: It's pretty old-fashioned to me.

This Court has made clear that truth is a defense, a constitutionally required defense in libel cases. "Truth," the Court said in the Garrison case, "may not be the subject of either criminal or civil sanctions where the discussion of public affairs is concerned." And the Court has made clear, of course, in a number of very recent decisions that even truthful commercial speech receives a very wide degree of First Amendment protection.

How then can a truthful report about an official

proceeding relating to the confidence of the public official be made a criminal offense? According to the Commonwealth brief the expression at issue here may be deemed unprotected or made unprotected by virtue of the statute in question because it may "undermine the confidence of the people in the institutions of our free society."

Such an explanation, if I may respectfully say so, would be an all too familiar one throughout most of the world. It is an unfamiliar one, I suggest, for a State to offer in this Court. And it is one which might be made in defense of any seditious libel statute in just so many words, including the alien sedition laws themselves. And even that disasterous relic of our history permitted truth to be stated as a defense.

The reasons offered by the Supreme Court of Virginia for requiring confidentiality are real ones. They may well be proper as regards participants before the Commission itself, but they fall far short of any which could conceivably permit incursions into First Amendment rights by way of criminal punishment for publication.

The Supreme Court of Virginia relies first on the question of the reputation of the judge who is accused by a complainant before the Commission and the reputation of the judiciary in general. But this Court has already included in New York Times v. Sullivan and elsewhere that injury to official reputation affords no more warrant for repressing speech that

would otherwise be free than does factual error. And in fact the Virginia statute, as the Chief Justice's question earlier suggests, does permit as much harm as assistance to judicial reputation since it makes criminal publication of the fact that a judge's reputation has been cleared.

There is also the need asserted in the opinion of the Supreme Court of Virginia to protect complainants and witnesses from retribution by judges against whom they offer testimony. And this case, I should say, does not involve such a situation at all since all that is involved here, the only claim made here in the indictment, is that Landmark unlawfully revealed the name of a judge under investigation. Moreover, the statute does not even provide full protection for witnesses. Surely, and indeed under the statutory language, once a claim is filed, once a complaint is filed before the Supreme Court of Virginia by the Commission, the judge against whom it is filed receives full access to the testimony against him, as he should, at least I would argue constitutionally --

QUESTION: It's public; anybody can use it.

MR. ABRAMS: Yes, sir, at that point it's public and anybody has full access to it. But if the purpose, if the justification for the kind of suppression, as we view it, or the punishment at least of the press in this case is said to be that the witnesses need to be protected, my point is that

once the charge is filed with the Supreme Court of Virginia, everything does become fully public.

QUESTION: I don't understand the argument, Mr. Abrams. If no charge is filed, wouldn't the need for protection remain for the same period of time that the statute requires confidentiality?

MR. ABRAMS: If no charge is filed --

QUESTION: The judge may never even know about it.

MR. ABRAMS: It is possible that the judge may not know about it.

Now, we do have an instance which I referred to earlier of a court clerk -- at least this is what is alleged in the papers in the case filed by the court clerk -- in which the court clerk has alleged that as a result of her making charges against the judge for whom she worked, she was dismissed. I think the question does arise as to whether a court clerk or witness is better protected by being able to have the benefits of publicity in a situation in which she feels retribution, or alleges retribution, than to be deprived of the chance to have anything said about her.

In short, what I am saying is that I understand that there is an argument that a statute such as this, by keeping things confidential, helps to protect witnesses in that period prior to the charge's being filed, that there is a counterargument that there are situations in which witnesses

are as well protected by publicity, at least when they want it, and this statute prevents that kind of publicity. In any event, as I have said, that is not really raised, as I view it, by this case since that justification for the criminal punishment on Landmark is no justification for criminal punishment of Landmark since what is involved here is not the disclosure of a witness' name.

If this case did involve the disclosure of a witness' --

QUESTION: Isn't it entirely possible that if there were total confidentiality, the judge never knew about it and the Commission decided there was no merit to a charge, it was dismissed, he would never have any reason to retaliate against anyone. Whereas if the name of the judge is disclosed, he knows there has been an investigation, he knows there is one likely person who has been his enemy throughout his life who probably said something to the Commission, there is then created a danger of retaliation. I think it is at least possible --

MR. ABRAMS: Mr. Justice Stevens, that is possible, and I do not deny that the statute could have in this and other ways a salutary effect. It does seem to me even with respect to this particular area of inquiry, that one may properly ask, as one does in any First Amendment case, whether there are less restrictive ways of going about that task even

of protecting witnesses, and we have suggested in our briefs that there may well be, that there may be monitoring programs of judges, that it may be made a crime, could be made a crime, for a judge so to act which would have a desired chilling effect, I suppose, upon a judge in that type situation.

We would submit to you that whatever standard is used to adjudge this statute, it cannot withstand the First Amendment scrutiny provided by this Court. The statute punishes the accurate reporting of news. It does so in the name of interests which, as I have observed here, are not specifically raised here in this case or are not protected under the statute, but which in any event cannot under any standard override First Amendment interests.

Now, there is much in the briefs filed before you with respect to the clear and present danger doctrine. That is not, we submit, a doctrine which commends itself to you for application in this case or perhaps any other. But even if it did, we submit that the interests involved here do not approach that raised in the other cases in which the clear and present danger has been applied.

QUESTION: Why do you say this clear and present danger doctrine is not one which should commend itself to us generally?

MR. ABRAMS: Well, it seems to me, Mr. Justice

Rehnquist, that the doctrine has been eroded by a variety of decisions by this Court -- Brandenburg v. Ohio has been one of the more recent ones, and indeed in New York Times v. Sullivan, the very recent one, at least of applicability in the press area if no other. It seems to me that the problem with the clear and present danger doctrine as often applied, at least as applied in the Dennis case, is that it was changed so significantly from what I perceive to be its initial meaning by the adoption of Judge Hand's test of the probability of the harm discounted by the likelihood of its appearance and the like, that at least as a First Amendment test it doesn't provide an awful lot of protection.

QUESTION: Would you adhere to your same position if we were talking about J stice Holmes' initial formulation of it in Schenck?

MR. ABRAMS: I would argue that if the Schenck case were here now and we didn't have all the history that we had, the Court could have gone quite a bit farther than it did in Schenck itself. The clear and present danger doctrine as set forth in Schenck did not provide, at least on the face of the Schenck ruling, anything like the kind of First Amendment protection which this Court has since come to award to the parties accused.

I do want to make clear that even the Dennis holding of this Court, which from a parochial First Amendment point of

view, if you will, is not generally celebrated, is one which we can live under in this case because at first what Judge Hand did and what the Court did in the Dennis case was to start with a notion of the gravity of the harm discounted by the probability of the harm apparent. And what I would urge on you is that an espionage act case or a national security case is a very different level of gravity than what we have here and, indeed, the Bridges case and cases essentially involving Sixth Amendment rights or the right to fair trial or the right to a judge who is not placed in a position where he simply can't function, issues such as that raised in Bridges, are not raised in this case.

QUESTION: What would you say about this case if there were proof that this judge could not function effectively if his name were disclosed right on the eve of a trial or something?

MR. ABRAMS: Mr. Justice Stevens, I would say then that for the other reasons I asserted earlier, that that was a social price which the First Amendment requires us to pay. People are attacked in the press, sometimes very unjustly, and sometimes are less able to function because of it.

QUESTION: What is your test? I am puzzled, as Mr. Justice Rehnquist is, by your saying we shouldn't look at the clear and present danger. I take it you do accept the possibility that it might be a national security type of fact

situation which might justify suppression even of publication by the press. What kind of limit would you say would be appropriate for that sort of exception, if there is one?

MR. ABRAMS: What I would suggest is that, first of all, the way the Court ought to approach such issues is to try to do it so far as is possible in terms of categories of speech which are or are not protected speech and then deal with the question of what kind of test to apply to speech or expression which may not be protected. But it seems to me that the starting place is is this the kind of area in which there can be any limits of speech or free expression at all?

Now, what we urge to you at the outset is that at least with respect to truthful speech about public officials in the course of their public functions is that there is no area, none, for the imposition of criminal sanctions for publication.

QUESTION: Then you disagree with that part of the Schenck case which talks about a substantive evil which the Government has a right to prevent.

MR. ABRAMS: I think that that has been much eroded through the years, Mr. Justice Rehnquist, at least that is dependent upon one's notion of what a substantive evil is. But as recently as Elrod v. Burns the Court made clear that a reasonable kind of danger, a reasonable kind of State interest is not enough, it has to be at least a compelling.

QUESTION: Was there a Court opinion in Elrod?

MR. ABRAMS: No, there was not a Court opinion in Elrod, but there was a Court opinion in the Buckley case which used very similar language as to that.

I do think it is fair to say that, at least as I read this Court's opinions, that the Court as a body has come to the view that the kind of presumption of constitutionality of a State statute in this area that used to be applied, is no longer applied, and that something more than a reasonable State interest must exist so as to permit the imposition of sanctions.

QUESTION: Mr. Abrams, did the State at any time rely on the clear and present danger doctrine?

MR. ABRAMS: Did the State do what, sir?

QUESTION: Rely on that in this case?

MR. ABRAMS: The State did -- let me say this, Mr. Justice Marshall. Both sides argued in court on the basis of the clear and present danger doctrine. Landmark argued in part below that the clear and present danger doctrine could not be met in any event because there was no factual proof adduced by the State and that that at least was one of the requirements, a minimal requirement of application.

QUESTION: My question was what did the State show about clear and present danger?

MR. ABRAMS: The State showed nothing. The State

put in no evidence other than that which I --

QUESTION: As we have it here.

MR. ABRAMS: All that you have is the stipulation of evidence. There was a stipulation of evidence which was no more than that the article was printed by Landmark and that that was what it said. The only findings of clear and present danger are contained in the opinion of the Supreme Court of Virginia itself.

QUESTION: But the Supreme Court of Virginia did make that finding.

MR. ABRAMS: Yes, your Honor, that is correct.

QUESTION: They based it on the legislative history and the obvious purpose of the legislation and the general background. There was no evidence produced at the trial.

MR. ABRAMS: The Supreme Court of Virginia made a finding that sanctions were indispensable to the prevention of a loss of confidentiality.

QUESTION: And the purpose was to protect the administration of justice.

MR. ABRAMS: Yes, sir. It made that finding. It did not base it on legislative history since there was none as such save the language of the Virginia Constitution which required confidentiality and the language of the statute which I adverted to earlier.

QUESTION: Would it be fair to say they indulged in

a presumption that that was the reason the legislature enacted the statute?

MR. ABRAMS: I think that is very fair to say, Mr. Chief Justice.

QUESTION: Mr. Abrams, are there other laws around the country against the publication of grand jury proceedings?

MR. ABRAMS: I believe there are some such laws, your Honor. There is no Federal law to that effect.

QUESTION: Are there State laws against the press publishing confidential information from grand juries?

MR. ABRAMS: There may be. There is none in Virginia or in New York. I don't know of any, but I could certainly --

QUESTION: But anyway, I would take it that situation would be involved in the decision in this case.

MR. ABRAMS: It could be, your Honor. It depends on whether, for one thing, the Court were to view the grand jury at least as possibly different because of the historic role of secrecy in grand jury proceedings. But I would say, your Honor, that it would be our submission to you at least that a law which made it a crime to print a leak from a grand jury would be unconstitutional for some of the same reasons that we urge upon you in this case.

QUESTION: Isn't there a difference in that a grand

jury is concerned exclusively with criminal conduct whereas a commission of this kind is inquiring into fitness for duty. Isn't that an important difference?

MR. ABRAMS: Yes, that is one very relevant difference.

QUESTION: Which way does it cut?

MR. ABRAMS: Well, I think it would cut at least in favor of us in this case and make the grand jury case, if anything, a little bit harder.

I do want to say, Mr. Justice White, that it would be our argument to you that the press serves the public well on occasion and is protected by the First Amendment.

QUESTION: Do you think it would be hard for you to win this case and lose the grand jury case?

MR. ABRAMS: I hope so, your Honor.

QUESTION: You hope.

MR. ABRAMS: I think so. One really could distinguish it if you believe that either because of the historic nature of the secrecy and the reasons for it and the peculiar reason for the existence of the Commission here adverted to by the Chief Justice that those were differences. I certainly didn't mean to run from your question and suggest that if you were to rule in our favor in this case that it would not have any bearing on a grand jury case.

QUESTION: I don't quite see why you responded to

the Chief Justice and Justice White's question that the difference in the nature of the Commission as opposed to a grand jury cuts in your favor rather than the other way.

MR. ABRAMS: To the extent what is involved in the Commission is a determination of the fitness of public officials for their public service, it seems to us that, if anything, that cuts more in favor of fuller freedom to publish.

QUESTION: What about the facts presented to a grand jury that say a high public official or well-known private businessman is guilty of a crime?

MR. ABRAMS: Your Honor, the fact that President Nixon was an unindicted co-conspirator was printed in the press. I want to make clear that I do think that that case, if there were a Federal statute, as there is not, that that case would be close to this but not quite the same as this. All I am saying is that if the question is whether grand jury secrecy in general -- sorry, if the question is whether a decision in our favor in this case would necessarily govern the question of the constitutionality of the statute with respect to publication by the press of information from grand juries regardless of what the information was, that I think if one must distinguish between them, that we had the stronger case because we are only dealing here with the fitness of public officials.

QUESTION: Isn't it also true you made at the

outset of your argument that that sort of publication might implicate interests in the fair trial of the person being investigated by the grand jury?

MR.ABRAMS: Yes.

QUESTION: You might have an independent policy reason for saying that should be confidential.

MR. ABRAMS: Absolutely, and that is, of course, one of the main reasons in favor of grand jury secrecy.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Kulp.

ORAL ARGUMENT OF JAMES E. KULP ON BEHALF OF APPELLEE

MR. KULP: Mr. Chief Justice, and may it please the Court: On behalf of the Commonwealth of Virginia I would not try to tell this Court that the questions and issues in this Court are easy or ones which the Commonwealth have not wrestled with. But I would say that the circumstances and the facts of this case come to this Court under quite different circumstances than other cases which have been ruled upon by this Court.

I speak, for example, of cases, such as Oklahoma Publishing Company and Cox Broadcasting Company, where this Court has said, and we do not make any contention otherwise, that once information is placed in the public domain there is absolutely no prohibition to it being made public or being

published in the newspapers. Also, additionally, in those cases where the Court has, in Bridges v. California and Pennekamp v. Florida, in Craig v. Harney, in Wood v. Georgia, where there were statements or criticisms printed about judges in the newspapers, we again say that the factual situation of this case is gravely different from that on the basis that the information which was published in those articles occurred in the public domain and this Court said specifically that there were no legislative prior enactments which would give this Court any guidance as to the legislative intent.

We submit to the Court that in this case we have not only a legislative intent, but we have the intent manifested by the vote of the people of the Commonwealth of Virginia.

I would like to go into just a little bit of history as to the reasons for the enactment of this particular statute under consideration today.

Prior to the enactment of the Constitution in 1971, Virginia had the ways of removal of an unfit judge or one who was guilty of misconduct, the provisions of impeachment. There was also the situation in Virginia that judges are elected by the legislature for differing periods of time, depending on whether they are justices of the State Supreme Court and on down, so at each time when the legislature would meet to consider the reappointment of a judge, of course,

that presented an opportunity for information to be given as to his character, his fitness for his position.

For over 200 years in the Commonwealth of Virginia there is not a single reported case wherein a judge was removed from office by impeachment. The citizens of the Commonwealth of Virginia recognize that there must be some better way in order to effectively and efficiently deal with errant judges, judges who are becoming senile, or other physical incapacities. Virginia then looked to what other States were doing. California, I think, is the leading State in this area, where they enacted legislation setting up a Judicial Inquiry and Review Commission.

One of the cornerstones and the hallmark of that legislation was cited to be by Judge Neely, of California, who was a former chairman of the California Commission, that the confidentiality of these proceedings is a necessary component in order to effectively administer the system.

Forty States, including the Commonwealth of Virginia, and Puerto Rico and the District of Columbia all have made provisions either by constitutional mandate or by statutory mandate to set up a review commission of the nature and type of the Commonwealth of Virginia.

QUESTION: How many of them have a statute comparable to Virginia's on the disclosure aspect?

MR. KULP: I think, Mr. Chief Justice, to answer your

question first, each of the 42 require confidentiality. The only other statute that compares exactly, I think , or I would say comparatively with Virginia is Hawaii. Hawaii makes it a felony to make a disclosure of confidential information. There are three other States --

QUESTION: On the disclosure in terms of the internal function or on the publisher of the disclosed material, or both?

MR. KULP: I would have to say I think it is both, but we really don't have a case which has construed that. The only case, as I pointed out in my brief, is pending presently in the Supreme Court of Hawaii, and in that case it actually was a disclosure by a complainant, which is a little bit different from the case we have today.

QUESTION: What would you think if the judge who was under inquiry called a press conference and said he welcomed the inquiry and he was sure he would be vindicated?

MR. KULP: Mr. Chief Justice, I believe that a question similar to that was answered by the State of California in McCartney v. the Commission. In that case the judge under investigation made a request that the Commission open up the hearing to the public, I assume for the same very reasons that your Honor is suggesting, that he thought that he would be vindicated. But the Supreme Court of California found that while it might be argued that

the confidentiality has one of its main purposes to protect the judge from unfounded allegations and that if he so desired that he could himself waive that privilege, they found, nonetheless, that that was not the only reason. They gave other reasons, for the protection of witnesses and complainants, and that was the reason, in addition to the protection of judges, that they therefore held that the Commission had not violated any constitutional provision by not allowing the hearing to be open.

QUESTION: Is one of your reasons for a justification of this statute that if confidentiality is not guaranteed, that witnesses, complainants, will not come forward?

MR. KULP: If it please the Court, Mr. Chief Justice, I don't think there is any question about that. History and experience has so shown. All of the legal writers, every court that has decided a case, every State that has taken a look at it has come up with the same exact conclusion. There was a recent study of attorneys, for example, and they said without equivocation that they would not make complaints against sitting judges if they had any question that their names would be divulged as the original complainant.

I think it goes without saying that it would be very difficult for a judge who is sitting in the same circuit with another judge to make a complaint and that his name be brought into the matter. And under the provisions of the

Virginia statute, the original complainant's name is never divulged even in those situations where the case goes to the Supreme Court of Virginia, because the Commission never makes the name of a complainant a matter of public record.

QUESTION: Mr. Kulp, are you talking about confidentiality or criminal prosecution when you say that you can't do it and that these witnesses insist on. What do they insist on? Confidentiality or the prosecution of the newspaper?

MR. KULP: Well, I think, Mr. Justice Marshall, that what they are asking for is confidentiality.

QUESTION: And that's not involved in this case.

MR. KULP: No, sir, well, I think it is to a great extent because the fact is --

QUESTION: This case is a criminal prosecution.

MR. KULP: That's right, sir.

QUESTION: And that's a little different from confidentiality.

MR. KULP: Well, if it please --

QUESTION: It's a little step forward, isn't it?

MR. KULP: Well, we don't think so.

QUESTION: Or backward then.

MR. KULP: No, sir; I think that it's a necessary measure. I think it was found by the Supreme Court --

QUESTION: I know, but my only point is, am I correct that Virginia is the only State that has this criminal

provision --

MR. KULP: No, sir, the State of Hawaii.

QUESTION: -- other than Hawaii.

MR. KULP: Yes, sir.

QUESTION: Those are the only two.

MR. KULP: Yes, sir. And there are three other --

QUESTION: So any broad statements you make about the other 48 States is just not true.

MR. KULP: I never said that except for the fact that they feel that the foundation for the Commission itself must be and rest around confidentiality. And it appears to me, Mr. Justice Marshall, that if the citizens around the country, and I would submit that the Federal Government even today is considering a similar type statute and in that they are making a requirement of confidentiality, I submit that it just simply doesn't follow, if we say that the very essence --

QUESTION: Is there any confidentiality when you investigate a member of the General Assembly in Virginia?

MR. KULP: No, sir. I think that --

QUESTION: Or is there any confidentiality in any other branch of government other than the judges?

MR. KULP: No, sir, but I think we have --

QUESTION: Why is a judge entitled to that special treatment?

MR. KULP: I don't think it is just the judge. That's not what the Supreme Court of Virginia said.

QUESTION: Who else is covered by this?

MR. KULP: I think -- they are allegations made only against judges, I agree with that.

QUESTION: That's what I am saying. Why is that particular phase of government deserving of this special protection? I am not sure whether it is right or wrong. There must be a reason for it.

MR. KULP: I think that because of the fact that I think we have a difference between the administration of justice, which the Supreme Court of Virginia found is the reason, on the one hand, and on the other hand where you have legislative and executive situations, particularly in Virginia, they are purely political. They are used to the rough and tumble. They have ways to defend themselves. But if we said that the confidentiality in this case, as several of the Justices have indicated, that if it were limited to witnesses, then, you see, the newspapers when they print the information, first of all, will not give us the information as to who broke their oath of secrecy and who breached the confidentiality. We asked them for the information and they refused to give it to us. So we have no viable protection. And I submit to the Court that the whole history shows that in this case -- I agree with Mr. Abrams as far as the Landmark case is

concerned, which is the case before this Court, that there hasn't been any printing in the article here giving the name of any complainant nor giving the name of any witness. But I do contest their contention in the brief that that has been the theme of publication in Virginia because it simply has not. As I indicated in the appendix to the Commonwealth's brief, page 41, the Richmond newspaper printed not only the name of the judge that was under investigation but it printed the names of the witnesses and additionally gave the name of the attorney who was the original complainant and his law firm.

QUESTION: Which would never be released under normal circumstances.

MR. KULP: That's correct.

No, sir, I would have to go back on that because this particular article, Mr. Justice Marshall, dealt with a judge which in fact did go to the Supreme Court of Virginia where the name of the complainant would not be released even in the public papers. The names of the witnesses would.

As I have indicated, the Supreme Court of Virginia said that what this statute attempts to do is to protect the complainants and witnesses until such time as the Commission has found sufficient background and sufficient justification to bring a formal complaint.

As Mr. Justice Stevens was mentioning a moment ago,

we know, for example, the reports are from California that well over, I think, about two-thirds, 50 percent to two-thirds, somewhere in that neighborhood, of the complaints are found to be initially frivolous. Now, if we didn't have and didn't provide the confidentiality, the names of these people who made these complaints in good faith, the names of any people who may have been called upon to give witness, to give testimony, in the preliminary stages, all of their names would be subject to being released. And we submit to the Court that that's what we are attempting to, and the people of Virginia are attempting to, avoid.

QUESTION: Mr. Kulp, isn't another very important reason for confidentiality that you want to be able to persuade the judge to resign before the matter becomes public.

MR. KULP: I don't think there is any question about that, Mr. Justice Stevens. That has been certainly the practice in California particularly. They make a report and they have shown that prior to the time they have ever had any formal hearings.

But once the Commission -- and I want to make that clear. It's the Commission that makes a complaint against the judge. The initial complainant simply files his papers with the Commission. The Commission at that point then makes its investigation. If they find that the complaint is justified or at least has merit, then they are the ones that do the

contacting of the judge. So they take it over at that point.

So I would say to the Court, also in this case, while Virginia does not normally publish the results as they do in California about how many complaints have been filed and how many judges may have resigned prior to the time of coming to the Supreme Court of Virginia, in the report, which is the subject of this particular case, the report filed by Landmark, the publication, they do have from Mr. Bateman, who is one of the members -- it's page 47a of the appendix shows the original news article. And it does show that Mr. Bateman did indicate. It says, when asked why only one case had ever been referred to the Supreme Court, Bateman said -- Mr. Bateman being a member of the Commission -- "Several(judges) did resign, a number have retired or something like that." So we know that even in Virginia, on that information, that the Commission has had its impact.

QUESTION: I'm not sure you have made the point, but isn't one of your strong points that the purpose of the legislature is to try to encourage people to come forward to give evidence against unfit judges and make complaints against them, and that the protection of the judge is simply a parallel consideration?

MR. KULP: Indeed it is, Mr. Chief Justice. In other words, the studies which have been made indicate that the complaints will not come forward if you do not ensure them

of confidentiality. So, of course, that is one of the whole essence of the confidentiality provision itself is to encourage the complaints.

QUESTION: What provisions do you have in the Commonwealth of Virginia for the disqualification of a judge on motion of counsel?

MR. KULP: We do have that, but, of course, it's at his discretion.

QUESTION: Discretion of the judge himself.

MR. KULP: Discretion of the judge, yes, sir. And, of course, I assume you could, if he refused to excuse himself, that you could file a petition for mandamus. But, of course, there you are faced with a situation of whether there has been an arbitrary and capricious action on his part.

QUESTION: Mr. Kulp, am I correct that the other side does not object to the confidentiality of the law?

MR. KULP: I am sorry, Mr. Justice Marshall. I am not sure I follow you.

QUESTION: Am I not correct that the petitioner does not object to the confidentiality of the law? It only objects to being prosecuted for publishing what they find out?

MR. KULP: I would say that is their position, yes, sir.

QUESTION: So the confidentiality is out of it.

MR. KULP: I couldn't agree with that, sir, because

I think it has to be all taken together. If it weren't for the violation of the confidentiality, then there would be no criminal prosecution in the first place.

And I would also like to say to the Court that I think that, as I indicated, the circumstances in this case are entirely different from any case that I am aware of that has ever been to this Court before. The Supreme Court of Virginia in its opinion indicated that they had not found any case similar to the one here. I have not found any in my research. Landmark has not cited any to the Court, so I am assuming fairly honestly that there is no such case.

QUESTION: Well, it's not far away from the New York Times case, not the Sullivan case, but the Pentagon Papers case, which sought that this does not involve a prior restraint.

MR. KULP: That is correct, sir. I think that that is one thing. And I think also that in the New York Times case several of the Justices on this Court indicated, first of all, that there was no guidance from Congress as to whether there should be any restraint on the publication of those particular materials and it was for Congress to set the --

QUESTION: Wasn't somebody subsequently prosecuted in a prosecution, that aborted, to be sure, for violating some Federal law in divulging those Pentagon Papers to the --

MR. KULP: I think, though, if I am thinking of the

same case, if it was Elsberg, I think it was aborted, not though because of any failure in the law, but because --

QUESTION: Because there was a law, that's the point. You say that by contrast in the New York Times case there wasn't a law and here there is, but in the New York Times case there was a law sanctioning the violation of confidences.

MR. KULP: Yes, sir, but I think that the point that I am trying to make is that the Court found that there was no law which sanctioned the prior restraint, and that was the issue, as I read the New York Times case, that was before the Court.

QUESTION: The action was not a criminal prosecution; it was an effort by the Government to enjoin --

QUESTION: Prior restraint.

MR. KULP: That's why we say that this is an entirely different matter. And when you look at it in that context, we think that you get a different result. We don't disagree, as we have taken the position in brief, with the New York Times case, a prior restraint case. As conceded by Landmark in this case, that is not the case here. It is not a prior restraint. We are talking about subsequent punishment. And I think the law in regard to that is different because while the presumption of the validity of a statute of prior restraint is very hard to overcome, as this Court in its prior opinions have certainly indicated, it is almost a situation

where you can't overcome it. But the Court has not said that when you are talking in situations of subsequent punishment.

QUESTION: General Kulp, I take it you are saying that the protection of the judge and the protection of the legal system generally against insult are secondary justifications for this statute, that you are saying that it is necessary to have an effective system to offer confidentiality. Is that your submission?

MR. KULP: Yes, sir.

QUESTION: So you wouldn't contend, I take it, then that a Virginia statute that said no one may publish a report that a judge is incompetent or that he is not doing his job right until they have filed a complaint with the Commission and the Commission itself investigated and filed a formal complaint --

MR. KULP: Yes, sir.

QUESTION: Would you defend that kind of a statute?

MR. KULP: No, sir, I don't think that is what the Supreme Court of Virginia, as well as the statute, has indicated that it is merely drawn --

QUESTION: If it was protection for the judge and protection for the judicial system generally that was involved, I would think you would defend that kind of a statute.

MR. KULP: No, sir. I think the cases from this Court have been clear in that respect, that, in other words, a judge, as any public official, may certainly be criticized, the administration of justice may be criticized, and we don't have any argument about that.

All we are saying is, and as the Supreme Court of Virginia found in its opinion, it says, "Considering these matters, we believe it can be said safely without need of hard in-court evidence that absent a requirement of confidentiality, the Judicial Inquiry and Review Commission could not function properly or discharge effectively its intended purpose. Thus, sanctions are indispensable to the suppression of a clear and present danger posed by the premature disclosure of the Commission's sensitive proceedings -- the imminent impairment of the effectiveness of the Commission and the accompanying immediate threat to the orderly administration of justice."

So it is only as an incidental matter, I think, that one of the reasons that the Supreme Court gave was to protect the judge. I don't think that --

QUESTION: Or to protect against insult to the judicial system generally.

MR. KULP: Or the insults against the judicial system in general. I don't think that that is the purpose of this statute.

QUESTION: General Kulp, do you have in our common State, the Commonwealth of Virginia, districts where there is only one judge?

MR. KULP: We do not now, Mr. Chief Justice.

QUESTION: There is always more than one.

MR. KULP: There used to be -- there was a reorganization several years ago in order to have more than one judge in every circuit, so that they wouldn't have to be appointing someone if the judge for some reason could not --

QUESTION: Now, suppose a lawyer, the lawyer to whom reference is made in your exhibit to page 41, instead of going to the Commission, had called a press conference and said to the assembled press, if he could get an assembly of them, all the things that he said to the Commission. Now, laying aside the question of whether he would be open to a civil complaint for damages in some way, could there be any action against the press for publishing that?

MR. KULP: No, sir. The statute would not prohibit that.

QUESTION: What if he then said at the end of his press conference, "Tomorrow I will file all these statements that I have made to you with the Commission, and here is a copy of what I am going to give the Commission," and he handed it out to all the press.

MR. KULP: I believe that part of it would be a

violation of the statute.

QUESTION: If it is done in advance of the filing?

MR. KULP: Well, I think perhaps not, Mr. Chief Justice, but I think that if he did carry forth and make the filing, then I would have to assume that it probably would come under the provisions of the statute because it would be telling the press in advance that I am going to file it tomorrow and that would be disclosing information which is not confidential at that moment but would take on confidentiality at the time of filing.

QUESTION: Just a little point, it would depend on him filing it.

MR. KULP: Yes, sir.

QUESTION: If he didn't file it, it would be printed.

MR. KULP: Yes, sir, and the statute doesn't prohibit that.

I would like to make one other --

QUESTION: May I just ask one other question on this prior restraint interpretation of the statute. Do I correctly understand that if a charge is filed and no formal complaint is subsequently filed, so you never release the confidential character, that that information is permanently made secret and if, say, 20 years later some historian stumbled upon this information and were then to divulge it, if we sustain this statute, he would then be guilty of a crime?

MR. KULP: Yes, I would have to say that that's true, because the statute provides that all confidential material of the Commission must be filed in confidential files.

But I would say this, Mr. Justice Stevens, that there is a provision in the statute -- and I think this answers some of the criticism of the statute by saying suppose that we had a corrupt Commission, which I find to be an extreme state of affairs to say that this Commission all would be corrupt, but assuming that they were for the moment, it does provide that members of the legislature may request and the Commission may release the information to the legislature when the reappointment of a judge is to be reconsidered by the legislature. And we take the position that if the legislature does in fact ask for the information and releases it, then it becomes in the public domain and it would not fall under the strictures of this particular section for the same reason, I believe, that the Court was talking about in Cox Broadcasting Company. In other words, once the State itself releases the information, it puts it into the public domain and there is no right to suppress it, and we would not intend to do it.

QUESTION: But the only way in which the statute permits the information to become in the public domain is through this legislative request. If the judge didn't run for re-election, if he resigned or whatever might have happened, he would be permanently protected, there would be a permanent

veil of secrecy on the --

MR. KULP: Yes, your Honor, I would have to say under the statute that would be true.

I would like to make two further points if I may. One is that we think that the Commission has answered the problem which Virginia citizens have foreseen. As I indicated previously, for 200 years where impeachment and other types of removal were available, there was not a single removal of any judge for any mental disability, any incompetence, any malfeasance in office. Since 1971, when the Constitution was enacted by the people providing for the Commission and since the Commission was specifically then thereafter set up by legislation in 1971, the Commission has taken action which has been reported to the Supreme Court of Virginia, which has been reported to the citizens of the Commonwealth, which has been reported by the press. One judge has been removed from office and three other judges have been publicly censured for activity which has an effect on the administration of justice.

So I would say that that is where the public interest lies. The public interest lies in being able to effectively handle these types of problems. And I think that history shows across the country that this is precisely why the States have gone to this procedure.

QUESTION: If all the participants in the procedure

had adhered to the statutory admonition to confidentiality, it would have remained confidential.

MR. KULP: Yes, sir, Mr. Justice Rehnquist.

And as I say, we are in sort of a dilemma here in certain respects because the press wants to print confidential information and on the other hand they want to protect the confidentiality of their source. We have asked them for the information, and they won't give us the names.

QUESTION: But that case isn't before us.

MR. KULP: No, sir, it's not. But as I say, I think it all evolves around the same ball of wax, so to speak.

QUESTION: That isn't unusual.

MR. KULP: No, sir, I wouldn't say it's unusual. I say, as I point out in my brief, I think it's a very untidy way for us to be trying to run a democratic society to be competing one with another on information of that nature.

I would also like to make one further comment.

QUESTION: The press doesn't believe in tidiness, does it?

MR. KULP: No, sir. I would have to concede that. I don't believe they do. I recognize it's not what my personal views might be, and I am sure they are not consistent with Mr. Abrams' and others. And I recognize the responsibility and the requirements of the First Amendment, but I think also that even as members of this Court indicated, that there is

a line of responsibility, and I would certainly hope that -- I know, for example, in California Judge Neely said that they have had the understanding of the press out there and they don't print this information.

I would like to make one further point, if I may, and it's at the way in which this information is obtained. Now, the record in this case, and it was found by the Supreme Court of Virginia, does not show exactly how the press first got the information. It doesn't show whether they went into private Commission files or some other way. And I don't really indicate, and I don't really think that the press did that.

QUESTION: Which doesn't make any difference, does it?

MR. KULP: No, sir, but I think, though -- the point I am trying to make, Mr. Chief Justice, is that here we have a situation in the article itself which was published and is in the appendix on page 47a shows that once they got this initial information, they went around to the Commission members, they went around to purported witnesses, they went around to the judge himself and attempted to cajole out of them information which they say that the State has -- at least I take it they are saying the State has -- a right to keep confidential. I see the position of the newspaper as saying, "Well, if we can get it, that's one thing. It's all right

for you to try to keep it confidential, but if we can get it, then it's all right for us to publish it." And I submit that that just flies in the face of what we think of as civilized society. We say on the one hand that the Government cannot go about inducing innocent people to commit crimes, such as entrapment, for example, but here in this case, and the article shows in fact they tried to do it, tried to get honest public citizens of the Commonwealth of Virginia to breach their confidentiality. And one witness says, "Don't even say that you have even talked to me, because I am not to tell you anything." And he didn't tell them anything. But apparently some did not.

QUESTION: But even if you could show that some newspaper reporter paid $50 or $100 to a clerk in the Commission's office to get it, it wouldn't have any bearing on the issue now before this Court, would it? That's another problem separate and distinct from this, isn't it?

MR. KULP: Well, Mr. Chief Justice, I don't know whether it is or not, because if you draw a distinction and say, well, if they didn't get it in an unlawful and criminal way, that may be one thing, but if they do, it's another thing. I do think there can be a distinction drawn.

QUESTION: Under the theory of your case, any means of getting it is unlawful because using it is made a criminal act by the Commonwealth of Virginia.

MR. KULP: But I believe, Mr. Chief Justice, it is because, in other words, if the complainant and the witnesses and those people who are involved in the proceedings and the Commission rules themselves, which are referred to and they are printed in 215 of Virginia Reports, say specifically that they advise every participant of the confidential nature of the matter and that it is a crime to divulge it. And all I am saying is that here we have the press going out, attempting to get otherwise honest citizens to breach an oath, to breach a confidentiality, and I submit that therefore it puts it in a different context.

And I would close by saying that I think in the last analysis, the issue in this case is whether the people of Virginia, in passing the Constitution of 1971, and their elected officials, by enacting the statutes in question, may constitutionally determine that certain matters of public interest are to be kept confidential. Or is that decision to be made by an unelected and unnamed editor of some newspaper?

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:35 a.m., the oral arguments in the above-entitled matter were concluded.]