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THE YEAR OF LEAKING DANGEROUSLY: SHADOWY SOURCES, JAILED JOURNALISTS, AND THE UNCERTAIN FUTURE OF THE FEDERAL JOURNALIST'S PRIVILEGE

Anthony L. Fargo*

INTRODUCTION

After the *Washington Post* revealed in November 2005 that the Central Intelligence Agency (CIA) maintains a series of secret prisons in foreign countries where terrorist suspects are held and interrogated,¹ members of Congress and the CIA called for an investigation into the identity of the source or sources for the story.² *Post* media critic Howard Kurtz wondered in a subsequent column whether the uproar over the prison story would culminate in the reporter and/or the newspaper being subpoenaed and threatened with heavy fines or imprisonment if they did not identify the sources.³

Kurtz's concern was not merely speculative. Shortly before the *Post* story appeared, *New York Times* reporter Judith Miller left a Virginia jail after serving more than twelve weeks for civil contempt of court.⁴ *Time Magazine* reporter Matthew Cooper narrowly escaped the same fate when he agreed to cooperate with a grand jury investigation into who might have identified an undercover CIA operative to Miller, Cooper, and other reporters.⁵ Cooper said his source released him from his promise to keep the source's identity confidential shortly before the hearing at which Miller was sentenced.⁶ The dramatic events of July 6, 2005, followed months of legal wrangling over whether journalists have a constitutional or common law privilege protecting them from being forced to disclose confidential information.⁷

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¹ Dana Priest, *CIA Holds Terror Suspects in Secret Prisons*, WASH. POST, Nov. 2, 2005, at A1.

² David Johnston & Carl Hulse, *C.I.A. Asks Criminal Inquiry Over Secret-Prison Article*, N.Y. TIMES, Nov. 9, 2005, at A18.

³ Howard Kurtz, *A Story of Déjà Vu; Some Critics See a Flame Parallel*, WASH. POST, Nov. 14, 2005, at C1.

⁴ David Johnston & Douglas Jehl, *Times Reporter Free from Jail; She Will Testify*, N.Y. TIMES, Sept. 30, 2005, at A1.

⁵ Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

⁶ *Id.*

⁷ See *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005), *reh'g en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied sub nom.*, *Miller v. United States*, 125 S.

Meanwhile, four reporters from various news organizations were considering their next moves after the U.S. Court of Appeals for the District of Columbia ruled against them in another privilege case.⁸ The reporters were held in civil contempt of court after they refused to name their sources for stories linking Wen Ho Lee, a scientist who worked at the United States' Los Alamos nuclear weapons laboratory, to the alleged sale of nuclear secrets to China.⁹ Lee was suing the United States Departments of Justice and Energy for violating the Privacy Act¹⁰ by leaking information about the investigation to the press.¹¹ A fifth reporter, Walter Pincus of the *Washington Post*, was found in civil contempt in November 2005 for refusing to cooperate with Lee.¹² His appeals were still pending at this writing.

A few months before Miller was sent to jail and the D.C. Circuit first ruled in the *Lee* case, a television reporter in Providence, Rhode Island, was released early for good behavior from a six-month home confinement sentence for criminal contempt.¹³ Reporter James Taricani defied an order to tell a special prosecutor the name of his source for an FBI surveillance tape showing a city official allegedly taking a bribe, which his station aired while the official's corruption trial was pending in 2001.¹⁴ The special counsel's investigation focused on whether the source violated a judge's gag order by giving the tape to Taricani.¹⁵

From the summer of 2004 to the summer of 2005, two reporters, Miller and Taricani, entered federal custody, and one narrowly escaped joining them.¹⁶ By the end of 2005, five other reporters were facing the same fate in the *Lee* case unless they obeyed orders to answer deposition questions or prevailed in their dwindling appeal options.¹⁷ Meanwhile, eight journalists and news organizations subpoenaed

Ct. 2977 (2005) (along with *Cooper v. United States*, 125 S. Ct. 2977 (2005) (denying certiorari), upholding contempt citations against Miller, *Time Magazine*, and Cooper for refusing to reveal names of sources for identity of CIA operative Valerie Plame).

⁸ *Lee v. U.S. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005). Three of the four reporters have filed an appeal with the U.S. Supreme Court, and the fourth was expected to join them. See Gina Holland, *Supreme Court Urged to Consider Journalists' Anonymous Sources Case*, Associated Press, Jan. 31, 2006, WL 1/31/06 APALERTBUS 22:12:34.

⁹ *Id.*

¹⁰ 5 U.S.C. § 552a (2000).

¹¹ *Lee*, 413 F.3d 53.

¹² *Lee v. Dep't of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005).

¹³ Pam Belluck, *Reporter Granted Release from Sentence*, N.Y. TIMES, Apr. 7, 2005, at A21.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ Pam Belluck, *Reporter Who Shielded Source Will Serve Sentence at Home*, N.Y. TIMES, Dec. 10, 2004, at A28; Adam Liptak, *Reporter Jailed After Refusing to Name Source*, N.Y. TIMES, July 7, 2005, at A1.

¹⁷ Tom Hamburger, *Reporter in Contempt Over Source*, L.A. TIMES, Nov. 17, 2005, at A22; Adam Liptak, *Judges Affirm Decision that Found 4 Reporters in Contempt*, N.Y. TIMES, June 29, 2005, at A16.

in regard to another civil suit against the government were spared, at least temporarily, from being forced to comply when the plaintiff withdrew the subpoenas.¹⁸ Although the press won a rare victory during that time period when a federal judge ruled that the government could not subpoena the phone records of Judith Miller and fellow *Times* reporter Philip Shenon in another investigation,¹⁹ the prosecutor seeking the records filed notice that he planned to appeal that decision to the U.S. Court of Appeals for the Second Circuit.²⁰ In response to the apparently unprecedented²¹ number of journalist's privilege cases in such a short time, two United States senators and a representative introduced bills in Congress to create a federal shield law.²²

The events of 2004–2005 brought to a boil a long-simmering conflict between journalists' ethics²³ and the judicial branch's need for competent evidence.²⁴ The

¹⁸ See discussion *infra* Part III.A.5 (regarding Steven J. Hatfill's subpoenas to news organizations for his civil suit accusing the Justice Department of violating the Privacy Act by leaking information to the press linking him to the mailing of deadly anthrax to various people after the Sept. 11, 2001, terrorist attacks).

¹⁹ *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005) (ruling in part for newspaper in its attempt to stop a federal prosecutor from obtaining the telephone records of two reporters in an attempt to learn the identities of sources for information about the investigation of Islamic charities).

²⁰ REPORTERS COMM. FOR FREEDOM OF THE PRESS, *Global Relief Foundation Grand Jury Investigation*, in SPECIAL REPORT: REPORTERS AND FEDERAL SUBPOENAS, http://www.rcfp.org/shields_and_subpoenas.html (last visited Mar. 27, 2006) [hereinafter REPORTERS COMM. FOR FREEDOM OF THE PRESS, SPECIAL REPORT: REPORTERS AND FEDERAL SUBPOENAS].

²¹ Lucy Dalglish, spokeswoman for the Reporters Committee for Freedom of the Press, a group that provides legal information and advice to the news media, was quoted in one story as saying the number of journalists involved in subpoena cases was "unprecedented, it's crazy." *Taricani Pays Fine for Not Naming Source*, PROVIDENCE J., Aug. 20, 2004, at B3.

²² Free Flow of Information Act, S. 1419, 109th Cong. (2005), 151 CONG. REC. S8419 (daily ed. July 18, 2005); Free Flow of Information Act, H.R. 3323, 109th Cong. (2005), 151 CONG. REC. H5963 (daily ed. July 18, 2005) (identical to S. 1419); Free Flow of Information Act, S. 340, 109th Cong. (2005), 151 CONG. REC. S1199 (daily ed. Feb. 9, 2005) (amended by S. 1419); Free Flow of Information Act, H.R. 581, 109th Cong. (2005), 151 CONG. REC. H352 (daily ed. Feb. 2, 2005) (identical to S. 340 and amended by H.R. 3323); Free Speech Protection Act, S. 369, 109th Cong. (2005), 151 CONG. REC. S1344 (daily ed. Feb. 14, 2005). For a discussion of the shield law proposals, see *infra* Part IV.A.

²³ The ethics codes of most major organizations that represent the interests of journalists urge journalists to protect their confidential sources, although the organizations also admonish members not to promise confidentiality lightly. The Society of Professional Journalists (SPJ) urges its members to "[a]lways question sources' motives before promising anonymity. Clarify conditions attached to any promise made in exchange for information. Keep promises." SPJ Code of Ethics, available at http://www.spj.org/ethics_code.asp (last visited Jan. 18, 2006). The American Society of Newspaper Editors (ASNE) Statement of Principles urges members that "[p]ledges of confidentiality to news sources must be honored at all costs, and therefore should not be given lightly. Unless there is clear and pressing need to maintain confidences, sources of information should be identified." ASNE Statement of Principles, art. 6, available

results in some of the cases were predictable in light of precedent developed since the United States Supreme Court's only decision directly on point in regard to the journalist's privilege, *Branzburg v. Hayes*.²⁵ In that 1972 decision, a sharply divided Court determined that journalists have no First Amendment right to refuse to identify sources to grand juries acting in good faith when the journalists had direct evidence that the sources were involved in specific crimes.²⁶ Some of the recent cases also involved grand jury or special prosecutor investigations of possible criminal activity, so *Branzburg* itself was directly on point.²⁷ The *Lee* case, as will be discussed below,²⁸ was less predictable but still was decided in line with post-*Branzburg* precedent.

But it would be a mistake to dismiss the cases as merely a coincidental meeting of bad facts and solid precedent for three reasons. First, several of the cases raise new issues or call for clarifications of old ones, while the shield-law legislation and the expansion of the media through the Internet create new definitional challenges for legislators, journalists, and the courts. Second, while it probably is true that any one of the recent cases taken alone would not represent a major shift in privilege law, the accumulation of so much negative precedent in a short period of time may accelerate the erosion of legal protections for journalists. Third, the federal journalist's privilege, always on shaky ground, may be doing journalists the least good at a time when the press and public need it most to combat heightened government secrecy.²⁹

at <http://www.asne.org/index.cfm?ID=888> (last visited Jan. 18, 2006). The Radio-Television News Directors Association & Foundation (RTNDA) Code of Ethics and Professional Conduct urges members to "[i]dentify sources whenever possible. Confidential sources should be used only when it is clearly in the public interest to gather or convey important information or when a person providing information might be harmed. Journalists should keep all commitments to protect a confidential source." RTNDA Code of Ethics and Professional Conduct, available at <http://www.rtna.org/ethics/coe.shtml> (last visited Jan. 18, 2006).

²⁴ One of the leading figures in the development of modern evidence law in the United States, the late Harvard Law School Dean John Henry Wigmore, traced the tradition of testimony as legal evidence to the eighteenth century. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2192 (John T. McNaughton ed., rev. ed. 1961). Wigmore recounted the story of a member of the British Parliament who, seeking to end the practice of excusing witnesses who refused to reveal confidences as a point of honor, said in 1742 that the public "has a right to every [person's] evidence." *Id.*

²⁵ 408 U.S. 665 (1972).

²⁶ *Id.*

²⁷ See *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

²⁸ See *infra* Part III.A.3.

²⁹ See, e.g., Jennifer Elrod, *Protecting Journalists From Compelled Disclosure: A Proposal for a Federal Statute*, 7 N.Y.U.J. LEGIS. & PUB. POL'Y 115, 122 (2003) (stating that the need to protect journalists from subpoenas is "more urgent than ever" as the government tries to tighten security at the risk of damaging civil liberties); Lori Robertson, *In Control*, AM. JOURNALISM REV., Feb./Mar. 2005, at 26 (noting that reporters are often frustrated by the Bush Administration's success at tightly controlling information); Scott Shane, *Since*

This article will attempt to clarify the issues at stake in the recent controversies over subpoenas issued to journalists and look ahead to how new issues may affect the journalist's privilege. In Part I, the article will examine privilege development in federal law from the first case in which a journalist claimed a First Amendment right to challenge a subpoena through *Branzburg* and the judicial reaction to that case. In Part II, the article will examine federal appellate cases from the late 1990s to 2003 that, taken together, appeared to signal a trend away from expanding the privilege.³⁰ In particular, Part II will focus on *McKevitt v. Pallasch*,³¹ a Seventh Circuit decision from 2003 that threatened to do serious damage to the privilege's continued efficacy.

In Part III, this article will examine cases from 2004–2005 and highlight the issues raised, some of which have not been resolved. Among those issues are whether courts are now reinterpreting *Branzburg* as providing less protection to journalists than in the past; whether confidentiality waivers signed by suspected news sources weaken journalists' claims to privilege protection; and whether a civil litigant must exhaust all alternative sources of information before demanding that the press turn over confidential information. Part III also will examine whether erosion of the privilege may be coming at a particularly bad time for the media as it confronts heightened government secrecy and increased public concern over national-security issues.

In Part IV, attention will be turned to whether the proposed shield laws pending in Congress would strike an appropriate balance between the interests of law enforcement and journalism. Also, Part IV will look ahead to a new issue arising in regard to the journalist's privilege: who can claim the privilege in an age when anyone can publish her thoughts for a wide Internet audience without using the traditional media? Can a privilege for journalists survive when anyone can be a journalist?

2001, *Sharp Increase in the Number of Documents Classified by the Government*, N.Y. TIMES, July 3, 2005, at A14 [hereinafter Shane, *Since 2001, Sharp Increase*] (reporting that the classifying of government documents as secret has mushroomed since 2001, with some agencies even classifying information already publicly available).

³⁰ One must always be cautious about announcing that a "trend" has developed in court decisions, particularly in this instance. Because most of the recent decisions seem to be in line with precedent, they may represent nothing more than bad facts colliding with relatively settled law. But my point in Part II of this article is that cases that went against the media in the late 1990s through 2003 at the federal appellate level were not so predictable and together seemed to turn the tide away from expansion of the journalist's privilege.

³¹ 339 F.3d 530 (7th Cir. 2003).

I. THE DEVELOPMENT OF THE FEDERAL JOURNALIST'S PRIVILEGE

A. Privilege Versus the Search for Truth

There is a long history of journalists claiming they should not have to reveal the identities of their sources for news stories.³² For a longer period of time, courts in England and the United States have expected those who have evidence relevant to court cases to testify or otherwise provide that evidence, either voluntarily or in answer to a subpoena. The late Harvard Law School Dean John Henry Wigmore, author of an enduring treatise on evidence rules, noted that the English tradition dated back to at least 1742, when a Lord Hardwicke said in Parliament "that the public . . . has a right to every [person's] evidence."³³

As Wigmore also noted, the practice of claiming a privilege not to provide evidence has a long tradition as well. Until the practice was effectively outlawed in the eighteenth century, British courts often excused as witnesses men who claimed they had "obligations of honor" to keep confidences with which they had been entrusted.³⁴ In both England and the United States, an attempt to balance the judicial system's need for competent evidence and witnesses' desire that their service be as painless as possible led to the recognition of privileges to protect some relationships.³⁵ Wigmore suggested that the number of privileges exempting people from giving evidence should be kept to a minimum and such privileges should meet four conditions:

- (1) The communications must originate in a confidence that they will not be disclosed.
- (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.
- (3) The relation must be one which in the opinion of the community ought to be sedulously fostered.
- (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.³⁶

³² See Aaron David Gordon, *Protection of News Sources: The History and Legal Status of the Newsman's Privilege* (1971) (unpublished Ph.D. dissertation, 2 vols., University of Wisconsin) (on file with Herman B. Wells Library, Indiana University) (tracing instances of journalists resisting subpoenas back to the mid-1800s).

³³ 8 WIGMORE, *supra* note 24, § 2192.

³⁴ *Id.* § 2286.

³⁵ *Id.* § 2285.

³⁶ *Id.*

According to Wigmore, the four conditions were present in the attorney-client privilege and, possibly, the clergy-penitent privilege, but not in any others based on occupational relationships.³⁷

Nevertheless, privileges have developed through common and statutory law in all or most states to protect relationships between medical doctors and patients,³⁸ psychotherapists and patients,³⁹ and, in a few states, even accountants and clients,⁴⁰ in addition to the widely recognized privileges for attorneys and clients,⁴¹ clergy and penitents,⁴² and spouses.⁴³ Federal privilege law often follows state law, and in 1975 Congress approved federal evidence rules that memorialized the non-statutory nature of federal privileges, directing that privileges should “be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.”⁴⁴ In other words, the federal courts were instructed to look to common law sources such as the states for guidance when federal law was undeveloped or unclear.⁴⁵

In most of the states that have addressed the issue of a journalist’s privilege, either legislatures have passed statutes known as “shield laws” to protect the news media from subpoenas or state appellate courts have interpreted common law or state constitutions as mandating such protection. Thirty-one states and the District of Columbia have created shield laws since 1896, when Maryland became the first state to do so.⁴⁶ All of the shield laws provide some protection from subpoenas, or

³⁷ *Id.*

³⁸ See 8 WIGMORE, *supra* note 24, §§ 2380–91.

³⁹ *Id.*

⁴⁰ *Id.* § 2286.

⁴¹ *Id.* §§ 2290–329.

⁴² *Id.* §§ 2394–96.

⁴³ *Id.* §§ 2332–41.

⁴⁴ FED. R. EVID. 501. For a history of the passage of the Federal Rules of Evidence, particularly Rule 501, see Edward J. Imwinkelried, *An Hegelian Approach to Privileges Under Federal Rule of Evidence 501: The Restrictive Thesis, the Expansive Antithesis, and the Contextual Synthesis*, 73 NEB. L. REV. 511 (1994).

⁴⁵ There is some confusion about whether Rule 501 supports or deters the recognition of a journalist’s privilege. While the rule appears to provide flexibility in the recognition of privileges, one recent commentator argued that the rule would have to be amended to allow recognition of a journalist’s privilege based on state law because Rule 501 would not allow such a recognition. Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 447 (2003); see also *Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 139 (D.D.C. 2005) (rejecting the creation of common-law journalist’s privilege).

⁴⁶ See ALA. CODE § 12-21-142 (2005); ALASKA STAT. §§ 09.25.300–.390 (2004); ARIZ. REV. STAT. ANN. § 12-2237 (West 2003 & Supp. 2004); Ark. Code Ann. § 16-85-510 (1987 & Supp. 2003); CAL. EVID. CODE § 1070 (West 1995 & Supp. 2005); COLO. REV. STAT. ANN. § 13-90-119 (West 2005); DEL. CODE ANN. tit. 10, §§ 4320–4326 (1999 & Supp. 2004); D.C. CODE §§ 16-4701–16-4704 (2001 & Supp. 2004); FLA. STAT. ANN. § 90.5015 (West 1999

the consequences of disobeying subpoenas, for journalists seeking to keep the identities of confidential sources secret. About twenty of the laws are written broadly enough that they appear to also protect journalists from having to disclose notes, unpublished photographs, video outtakes, or other nonconfidential information as well.⁴⁷ In the nineteen states without shield laws as of March 2006, state appellate courts in three — Mississippi, Utah,⁴⁸ and Wyoming — have not yet directly considered whether journalists have a privilege not to testify. Also, Hawaii appellate courts have not considered the issue since 1961, before the U.S. Supreme Court decided *Branzburg*.⁴⁹ Appellate courts in the fifteen other states mostly have supported some form of journalist's privilege protecting confidential information.⁵⁰

& Supp. 2005); GA. CODE ANN. § 24-9-30 (1995 & Supp. 2004); 735 ILL. COMP. STAT. ANN. 5/8-901–5/8-909 (West 2003 & Supp. 2004); IND. CODE ANN. §§ 34-46-4-1–34-46-4-2 (LexisNexis 1998 & Supp. 2004); KY. REV. STAT. ANN. § 421.100 (West 1992 & Supp. 2004); LA. REV. STAT. ANN. § 45:1452 (2006); Md. Code Ann., Cts. & Jud. Proc. § 9-112 (West 2002 & Supp. 2003); MICH. COMP. LAWS ANN. § 767.5a (West 2000 & Supp. 2005); MINN. STAT. ANN. §§ 595.021–.025 (West 2000 & Supp. 2005); MONT. CODE ANN. §§ 26-1-901–26-1-903 (2003); NEB. REV. STAT. §§ 20-144–20-147 (1997); Nev. Rev. Stat. Ann. § 49.275 (West 2002 & Supp. 2003); N.J. STAT. ANN. §§ 2A:84A-21–2A:84A-21.13 (West 1994 & Supp. 2005); N.M. CT. R. EVID. § 11-514; N.Y. CIV. RIGHTS LAW § 79-h (McKinney 1992 & Supp. 2005); N.C. GEN. STAT. ANN. § 8-53.11 (West 2000 & Supp. 2004); N.D. Cent. Code § 31-01-06.2 (1996 & Supp. 2003); OHIO REV. CODE ANN. §§ 2739.04, 2739.12 (West 2000 & Supp. 2003); OKLA. STAT. ANN. tit. 12, § 2506 (West 1993 & Supp. 2005); OR. REV. STAT. ANN. §§ 44.510–.540 (West 2003 & Supp. 2004); 42 PA. CON. STAT. ANN. § 5942 (West 2000 & Supp. 2004); R.I. Gen. Laws §§ 9-19.1-1–1-3 (1997 & Supp. 2005); S.C. CODE ANN. § 19-11-100 (1976 & Supp. 2005); TENN. CODE ANN. § 24-1-208 (2000 & Supp. 2004).

⁴⁷ See *supra* note 46, (citing statutory provisions in California, Colorado, Delaware, Florida, Georgia, Louisiana, Maryland, Michigan, Minnesota, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Oregon, South Carolina, and Tennessee).

⁴⁸ But see Edward L. Carter, Comment, *Reporter's Privilege in Utah*, 18 BYUJ. PUB. L. 163, 163 (2003) (discussing trial court decisions in Utah that have dealt with journalists' privilege claims by examining federal law).

⁴⁹ See Appeal of Goodfader, 367 P.2d 472 (Haw. 1961).

⁵⁰ See, e.g., *In re Contempt of Wright*, 700 P.2d 40 (Idaho 1985); *Sierra Life Ins. Co. v. Magic Valley Newspapers*, 623 P.2d 103 (Idaho 1980); *Waterloo/Cedar Falls Courier v. Hawkeye Cmty. Coll.*, 646 N.W.2d 97 (Iowa 2002); *State v. Sandstrom*, 581 P.2d 812 (Kan. 1978); *John Doe Grand Jury Investigation*, 574 N.E.2d 373 (Mass. 1991); *Sinnott v. Boston Ret. Bd.*, 524 N.E.2d 100 (Mass. 1988); *State ex rel. Classic III Inc. v. Ely*, 954 S.W.2d 650 (Mo. Ct. App. 1997); *State v. Siel*, 444 A.2d 499 (N.H. 1982); *Opinion of the Justices*, 373 A.2d 644 (N.H. 1977); *Hopewell v. Midcontinent Broad. Corp.*, 538 N.W.2d 780 (S.D. 1995); *State v. St. Peter*, 315 A.2d 254 (Vt. 1974); *Brown v. Commonwealth*, 204 S.E.2d 429 (Va. 1974); *State v. Rinaldo*, 689 P.2d 392 (Wash. 1984) (en banc); *Clampitt v. Thurston County*, 658 P.2d 641 (Wash. 1983) (en banc); *Senear v. Daily Journal-Am.*, 641 P.2d 1180 (Wash. 1982) (en banc); *State ex rel. Green Bay Newspaper Co. v. Circuit Court*, 335 N.W.2d 367 (Wis. 1983); *Zelenka v. State*, 266 N.W.2d 279 (Wis. 1978); *State v. Knops*, 183 N.W.2d 93 (Wis. 1971).

Not all of the states' appellate courts have considered privilege issues directly, however. For example, the Connecticut Supreme Court quashed a subpoena for a reporter because it found that a city council did not have subpoena power.⁵¹ The approaches the other states without shield laws have taken to privilege issues have varied widely. The Maine Supreme Judicial Court has twice said there is no privilege for nonconfidential information but has not confronted the issue of confidential source protection since *Branzburg*.⁵² The highest court in West Virginia also has not confronted since 1972 the issue of whether journalists have a privilege to protect the identities of confidential sources, but the court has twice upheld the quashing of subpoenas for nonconfidential information.⁵³ Appellate courts in Iowa⁵⁴ and Wisconsin⁵⁵ have extended the journalist's privilege to nonconfidential information in addition to confidential sources; appellate courts in Idaho,⁵⁶ Massachusetts,⁵⁷ and Missouri,⁵⁸ in addition to Maine, have specifically ruled out the existence of a privilege protecting nonconfidential information from disclosure. Also, Texas appellate courts have rejected the existence of any privilege when journalists are called to testify or give evidence in criminal cases.⁵⁹ The most recent decision from a Texas appellate court has cast doubt on whether there is a privilege if journalists are subpoenaed relative to a civil case.⁶⁰

In the federal system, journalists have an additional safeguard against subpoenas issued by the Justice Department. Since 1970, the Justice Department has had a policy, codified in federal law, that restricts the ability of department officials to subpoena members of the news media without the Attorney General's approval.⁶¹ Also, federal rules of procedure protect all persons called as witnesses, including journalists. Federal Rule of Criminal Procedure 17(c) allows courts to quash subpoenas if compliance would be "unreasonable or oppressive."⁶² Federal Rule of

⁵¹ *City Council v. Hall*, 429 A.2d 481 (Conn. 1980).

⁵² *In re Letellier*, 578 A.2d 722 (Me. 1990); *State v. Hohler*, 543 A.2d 364 (Me. 1988).

⁵³ *State ex rel. Charleston Mail Ass'n v. Ranson*, 488 S.E.2d 5 (W.Va. 1997); *State ex rel. Hudok v. Henry*, 389 S.E.2d 188 (W.Va. 1989).

⁵⁴ *Bell v. Des Moines*, 412 N.W.2d 585 (Iowa 1987); *Lamberto v. Bown*, 326 N.W.2d 305 (Iowa 1982).

⁵⁵ *Kurzynski v. Spaeth*, 538 N.W.2d 554 (Wis. Ct. App. 1995).

⁵⁶ *State v. Salsbury*, 924 P.2d 208 (Idaho 1996).

⁵⁷ *Commonwealth v. Corsetti*, 438 N.E.2d 805 (Mass. 1982).

⁵⁸ *CBS Inc. (KMOX-TV) v. Campbell*, 645 S.W.2d 30 (Mo. Ct. App. 1982).

⁵⁹ *Burnette v. State*, No. 01-00-00403-CR, 2001 Tex. App. LEXIS 3944 (Tex. App. June 14, 2001); *Coleman v. State*, 966 S.W.2d 525 (Tex. Crim. App. 1998) (en banc); *State ex rel. Healey v. McMeans*, 884 S.W.2d 772 (Tex. Crim. App. 1994) (en banc).

⁶⁰ *In re Union Pac. R.R. Co.*, 6 S.W.3d 310 (Tex. App. 1999).

⁶¹ 28 C.F.R. § 50.10 (2005); see also Adam Liptak, *The Hidden Federal Shield Law: On the Justice Department's Regulations Governing Subpoenas to the Press*, 1999 ANN. SURV. AM. L. 227.

⁶² FED. R. CRIM. P. 17(c).

Civil Procedure 26(c) authorizes federal courts to issue protective orders if compliance with a subpoena would cause a witness "annoyance, embarrassment, oppression, or undue burden or expense."⁶³ But federal law also gives judges broad leeway to fine and/or incarcerate recalcitrant witnesses for criminal⁶⁴ or civil contempt.⁶⁵

B. The Privilege and the First Amendment — Beginnings

Because privileges generally are created and fostered for public policy reasons, they rarely raise the types of constitutional questions that cry out for answers from the Supreme Court. To the extent that the Court has entered discussions about the wisdom of privileges, it has grudgingly accepted the existence of the attorney-client privilege even when finding some assertions of it illegitimate.⁶⁶ The Court has rejected the assertion of an accountant's privilege in federal courts on two occasions⁶⁷ while endorsing a common law privilege preventing social workers licensed as psychotherapists from being forced to testify about their clients.⁶⁸

The journalist's privilege raises different questions than other privileges, however, which may explain why the Supreme Court had a particularly hard time with it in *Branzburg*. Privileges claimed by attorneys, medical doctors, psychotherapists, and clergy members are designed to protect the client's or patient's private statements from disclosure. With the journalist's privilege, however, it is the *journalist* who is seeking protection for the right to publish or broadcast the source's information while keeping the source's identity secret. Although secrecy may also protect the source, the privilege's primary aim is to protect the journalist's First Amendment right to publish the news without government interference.⁶⁹

The idea that the First Amendment should protect journalists from being forced to reveal sources to grand juries or in court is relatively recent. Journalists for decades argued, usually unsuccessfully, that they should be excused from naming sources because of professional or personal codes of ethics.⁷⁰ Marie Torre is credited with being the first reporter to assert that forcing her to reveal her source would violate the First Amendment by costing her the trust of other sources and thus restricting the flow of news.⁷¹ In 1958, Torre sought to protect the source of an unflattering

⁶³ FED. R. CIV. P. 26(c).

⁶⁴ 18 U.S.C.S. §§ 401–02 (LexisNexis 1993).

⁶⁵ 28 U.S.C.S. § 1826 (LexisNexis 2003).

⁶⁶ See, e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343 (1985); *Upjohn Co. v. United States*, 449 U.S. 383 (1981); *Fisher v. United States*, 425 U.S. 391 (1976); *Hickman v. Taylor*, 329 U.S. 495 (1947).

⁶⁷ *United States v. Arthur Young & Co.*, 465 U.S. 805 (1984); *Couch v. United States*, 409 U.S. 322 (1973).

⁶⁸ *Jaffee v. Redmond*, 518 U.S. 1 (1996).

⁶⁹ See *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

⁷⁰ See 1 Gordon, *supra* note 32, at 184–287.

⁷¹ *Garland v. Torre*, 259 F.2d 545, 550 (2d Cir. 1958).

statement she published about actress Judy Garland after the actress sued the CBS network over a failed television deal.⁷² Torre lost, in part because Garland was suing for defamation as well as breach of contract.⁷³ The identity of the source went “to the heart” of Garland’s claims against the network, the U.S. Court of Appeals for the Second Circuit said.⁷⁴

Although neither journalists nor judges have said as much explicitly, this idea that the relationship between sources and journalists must be protected in order to maintain a “free flow of information” to the public appears to spring out of two theories about the First Amendment and public discourse. One is the view that citizens need to be well-informed about public issues and the people who represent them in places of power so they can make wise decisions in governing themselves.⁷⁵ The second is that the public has a “right to know” what its government is doing.⁷⁶ Both these ideas were developed before Marie Torre made her historic stand, but how much they influenced her or her counsel is unclear.⁷⁷

The privilege issue began to take on new urgency in the late 1960s and early 1970s as journalists covered social unrest and developed sources in groups opposed to U.S. policies on war, economics, race, treatment of the sexes, and other issues.⁷⁸ These contacts with activists who advocated radical changes in American society and, sometimes, violent means to achieve them attracted increasing government interest.⁷⁹ In order to learn more about individuals and groups involved in radical organizations, the government began to issue more subpoenas to reporters and news organizations for testimony, tapes, and other material gathered about these groups.⁸⁰ A study of the journalist’s privilege issue in the early 1980s cited statistics showing that while the number of subpoenas issued to journalists nationwide averaged about 1.5 a year from 1960 to 1968, the average rose to seventy-five in 1969–1970.⁸¹ (In

⁷² *Id.* at 545.

⁷³ *Id.*

⁷⁴ *Id.* at 550.

⁷⁵ See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948).

⁷⁶ See generally KENT COOPER, *THE RIGHT TO KNOW* (1956); Thomas I. Emerson, *The First Amendment and the Right to Know: Legal Foundations of the Right to Know*, 1976 WASH. U. L.Q. 1.

⁷⁷ See MARIE TORRE, *DON’T QUOTE ME* (1965) (discussing her case and the ten days she spent in jail for contempt without discussing legal strategy in any detail).

⁷⁸ See generally MICHAEL SCHUDSON, *DISCOVERING THE NEWS: A SOCIAL HISTORY OF AMERICAN NEWSPAPERS* (1978).

⁷⁹ See, e.g., Margaret Sherwood, Comment, *The Newsman’s Privilege: Government Investigations, Criminal Prosecutions and Private Litigation*, 58 CAL. L. REV. 1198, 1198 n.2 (1970) (describing government subpoenas for records of journalists’ meetings with members of the Black Panthers and Students for a Democratic Society).

⁸⁰ See *id.*

⁸¹ Achal Mehra, *Newsman’s Privilege: An Empirical Study*, 59 JOURNALISM Q. 560, 561 (1982).

comparison, periodic surveys by the Reporters Committee for Freedom of the Press since 1991 have found that news organizations receive hundreds of subpoenas annually now.⁸²) An empirical study by law professor Vincent Blasi in 1971 indicated that the subpoena issue was particularly sensitive for reporters covering radical groups.⁸³ While most reporters responding to Blasi's survey said the threat that they might be subpoenaed did not bother their sources,⁸⁴ interviews with reporters showed that some had lost sources in radical groups for answering subpoenas, even when they revealed no more during grand jury testimony than what they had published.⁸⁵

C. *Branzburg v. Hayes*

The issue of whether the First Amendment protected journalists from being forced to reveal the identities of confidential sources to grand juries thus became ripe for Supreme Court review. In *Branzburg v. Hayes*,⁸⁶ the Court was confronted by the case of a Kentucky newspaper reporter who was ordered to testify before two grand juries after he wrote stories about drug dealers and users whose identities he masked; the case of a Rhode Island television reporter who spent time with Black Panther members after a disturbance in nearby Massachusetts; and the case of a *New York Times* reporter in California who regularly wrote about the Black Panthers, whose national headquarters was in Oakland.⁸⁷ Paul Branzburg, the Louisville *Courier-Journal* reporter, lost in the Kentucky Court of Appeals despite the existence of a state shield law.⁸⁸ Paul Pappas, a reporter for a Providence, Rhode Island, television station, also lost his appeal in the Massachusetts Supreme Judicial Court; Massachusetts did not have a shield law, and the court did not recognize a common law privilege at that time.⁸⁹ But Earl Caldwell of the *New York Times* won a ruling in the U.S. Court of Appeals for the Ninth Circuit saying that he did not have to appear before a grand jury investigating Black Panther activity because such an appearance likely would cause his sources to dry up.⁹⁰

⁸² See, e.g., REPORTERS COMM. FOR FREEDOM OF THE PRESS, AGENTS OF DISCOVERY: A REPORT ON THE INCIDENCE OF SUBPOENAS SERVED ON THE NEWS MEDIA IN 2001, at 4 (2003) (reporting that 319 news organizations responding to a survey reported receiving a total of 823 subpoenas in 2001).

⁸³ Vince Blasi, *The Newsman's Privilege: An Empirical Study*, 70 MICH. L. REV. 229, 262 (1971) ("[A] substantial number of newsmen believe that subpoenas are used in some instances as a conscious device to drive a wedge between reporters and their radical sources.").

⁸⁴ *Id.* at 264-65.

⁸⁵ *Id.* at 262-63.

⁸⁶ 408 U.S. 665 (1972).

⁸⁷ *Id.*

⁸⁸ *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971).

⁸⁹ *In re Pappas*, 266 N.E.2d 297 (Mass. 1971).

⁹⁰ *Caldwell v. United States*, 434 F.2d 1081 (9th Cir. 1970).

The Supreme Court's majority opinion in the consolidated cases made short work of the reporters' constitutional claims. The opinion, written by Justice Byron White, said that reporters did not have a First Amendment right to refuse to do what other citizens were required to do, namely testify before grand juries when called and when they had witnessed criminal activity or had direct knowledge that their sources had committed crimes.⁹¹ The majority in the 5–4 decision said that while newsgathering deserved “some” First Amendment protection, that protection did not extend to the privilege sought by the reporters in this case.⁹² Providing such protection, the Court said, would entangle trial courts in proceedings to determine whether a subpoena to a journalist was acceptable every time the issue came up.⁹³ The privilege would also be a hindrance in the search for truth that is at the heart of any judicial proceeding, the Court said.⁹⁴

Had all the justices agreed and had the Court stopped there, it is unlikely that there would be any controversy about the existence of a privilege anchored in the First Amendment. But Justice Lewis Powell added a brief but critical concurring opinion citing the narrowness of the majority opinion.⁹⁵ If journalists were harassed or called to testify about irrelevant matters just to interfere with their source relationships, they could go to the courts for relief, Justice Powell wrote.⁹⁶

In dissent, Justice William O. Douglas argued that journalists should have an absolute privilege barring any government subpoena.⁹⁷ Justices Potter Stewart, William Brennan, and Thurgood Marshall, in a dissent written by Justice Stewart, argued instead for a qualified privilege. Justice Stewart wrote that in order to protect the free flow of information to the public and to keep the press from being forced into becoming an investigative unit of government, the government should have to show that it had a compelling need for a journalist's information; that the information was relevant to the case; and that the information was not available elsewhere.⁹⁸ If those three conditions were not met, the dissenters said, then a judge should quash a grand jury subpoena to a journalist.⁹⁹

D. Reaction to Branzburg

The political and social unrest that led journalists to seek out unofficial — sometimes radical — sources and thus led, indirectly, to *Branzburg* reached its climax

⁹¹ *Branzburg*, 408 U.S. at 690.

⁹² *Id.* at 681.

⁹³ *Id.* at 703–05.

⁹⁴ *Id.* at 686–88.

⁹⁵ *Id.* at 709 (Powell, J., concurring).

⁹⁶ *Id.* at 709–10.

⁹⁷ *Id.* at 712–13, 721, 722 (Douglas, J., dissenting).

⁹⁸ *Id.* at 743 (Stewart, J., dissenting).

⁹⁹ *Id.*

with the Watergate scandal and the end of the Vietnam War. Not surprisingly, First Amendment theory came to reflect an edgier view of the relationship between government, the public, and the press. Vincent Blasi, author of an empirical study on the journalist's privilege¹⁰⁰ that was largely ignored by the Supreme Court in *Branzburg*, developed the idea that the First Amendment as a whole, including the press clause, was designed to act as a check on government.¹⁰¹ Professor Blasi suggested that the speech, press, assembly, and petition clauses all contributed to the public's ability to fulfill its duty to keep government officials from abusing their power.¹⁰²

Professor Blasi did not suggest that journalists had a special place, constitutionally speaking, in the public effort to keep the government in check. He did, however, suggest that the press was "the institution best suited" to arouse opposition among the populous to official misconduct.¹⁰³ To protect the press's ability to ferret out information that would allow it to sound the alarm about official misconduct, Blasi recommended that the press be afforded an unqualified privilege to protect relationships between journalists and government-employee sources and a "minimally qualified" privilege protecting other reporter-source relationships.¹⁰⁴

However, the Supreme Court since the 1970s — a particularly active decade for press clause cases — has routinely rejected the idea that the press clause gives the news media any extraordinary rights. In *Branzburg*, Justice White's majority opinion stated that one reason the Court could not recognize a First Amendment press privilege was that such a privilege would inevitably engage courts in defining who is a journalist.¹⁰⁵ The Court said that this would be "a questionable procedure in light of the traditional doctrine that liberty of the press is the right of the lonely pamphleteer . . . just as much as of the large metropolitan newspaper publisher . . ."¹⁰⁶ Press freedom, Justice White wrote, was a "fundamental personal right" and not just a right of newspapers and other periodicals.¹⁰⁷ So it is perhaps not surprising that the Court subsequently rejected the claims of journalists that they should be afforded access to state prisons,¹⁰⁸ federal prisons,¹⁰⁹ or county jails¹¹⁰ beyond the access afforded other members of the public. The Court also rejected journalists'

¹⁰⁰ Blasi, *The Newsman's Privilege*, *supra* note 83.

¹⁰¹ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521.

¹⁰² *Id.* at 527.

¹⁰³ *Id.* at 605.

¹⁰⁴ *Id.* at 606–07.

¹⁰⁵ *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* (quoting *Lovell v. Griffin*, 303 U.S. 444, 450 (1938)).

¹⁰⁸ *Pell v. Procunier*, 417 U.S. 817 (1974).

¹⁰⁹ *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974).

¹¹⁰ *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978).

claims that questions from libel plaintiffs about defendant media organizations' vetting of allegedly defamatory stories would unconstitutionally invade the editorial process.¹¹¹ The Court also rejected giving the press any special protection from tort claims arising from newsgathering techniques or decisions.¹¹² In the latter case, *Cohen v. Cowles Media Co.*, the Court created a potential Catch-22 for journalists. The Court determined that a source whose identity had been published despite promises of confidentiality could sue the media under the doctrine of promissory estoppel.¹¹³ Combined with *Branzburg*, this meant that journalists had no constitutional right to protect source identities and no constitutional shield against being sued for revealing source identities voluntarily.

The Court's record in press clause cases has not prevented some scholars, journalists, and jurists from questioning whether the press should have special protections not afforded to all citizens under the First Amendment. Much of this discussion has focused on whether the First Amendment's authors intended for "freedom of the press" to entail protection for the institutional media or for individuals.¹¹⁴ While the Court reached its own conclusion on that question, historians and other scholars have noted that the historical record is inconclusive on exactly what the Framers meant by "the freedom of speech, or of the press."¹¹⁵ Other scholars have suggested that the Framers' intent may not be all that important if we assume the Constitution is a document amenable to changing interpretations over time. Melville Nimmer, for example, has said that freedom of expression serves three major functions: (1) it acts as a conduit for democratic dialogue; (2) it is a source of self-fulfillment for the speaker; and (3) it provides a safety valve for people who would react violently if their expression of ideas were suppressed.¹¹⁶ Nimmer suggests that free speech as an individual right better serves the interests of self-fulfillment and providing a safety valve, while freedom of the press as an institutional right better serves the interest of democratic dialogue.¹¹⁷ This would suggest that free speech and freedom of the press are separate concepts to some extent. However, Nimmer is careful to note that there is nothing in the historical record to suggest that the Framers conceived of speech and press rights as separate entities.¹¹⁸ And while Nimmer, among others, has

¹¹¹ *Herbert v. Lando*, 441 U.S. 153 (1979).

¹¹² *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991).

¹¹³ *Id.*

¹¹⁴ See, e.g., Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 204–10 (2005).

¹¹⁵ See, e.g., LEONARD W. LEVY, *EMERGENCE OF A FREE PRESS* (1985).

¹¹⁶ Melville B. Nimmer, *Introduction — Is Freedom of the Press a Redundancy: What Does It Add to Freedom of Speech?*, 26 HASTINGS L.J. 639, 653 (1975).

¹¹⁷ *Id.* at 653–54.

¹¹⁸ *Id.* at 640.

suggested that contemporary scholars and jurists are not bound by the Framers' intent,¹¹⁹ others disagree.¹²⁰

One particularly interesting commentary supporting the idea that the First Amendment singled out the institutional press for protection came from Supreme Court Justice Potter Stewart. Justice Stewart, in a law school speech shortly after President Nixon resigned in the wake of Watergate, argued that the press had performed exactly the function the Framers intended in exposing the scandal.¹²¹ Justice Stewart argued that the press clause was a "*structural*" provision that extended protection to an institution, while most other provisions in the Bill of Rights extended protections to individuals.¹²² The press, the justice said, should be thought of as a "Fourth Estate," as "a fourth institution outside the Government" that could serve as a check on the three official branches.¹²³ That said, however, Justice Stewart said the Constitution did not guarantee that the press would win all its battles with government.¹²⁴ The First Amendment allowed the press great freedom to probe government secrets and publish what it learned, but it did not require government officials to cooperate.¹²⁵ "The Constitution itself," Justice Stewart wrote, "is neither a Freedom of Information Act nor an Official Secrets Act."¹²⁶

E. Federal Courts Fashion a Privilege

Given the divided nature of the *Branzburg* opinion and the varying ideas about what is protected by the First Amendment's press clause, it is not surprising that *Branzburg* caused a great deal of head-scratching in the lower federal courts. Over time a consensus emerged in most federal circuits and districts that the combination of Justice Powell's concurrence and the dissents amounted to a 5-4 endorsement of a journalist's privilege when subpoenas were not connected to grand jury investigations

¹¹⁹ *Id.* at 641; see also LEVY, *supra* note 115, at 348; David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455 (1983); Frederick Schauer, *Towards an Institutional First Amendment*, 89 MINN. L. REV. 1256 (2005).

¹²⁰ See, e.g., WALTER BERNS, *THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY* (1976); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* (1990).

¹²¹ Potter Stewart, "*Or Of the Press*", 26 HASTINGS L.J. 631, 631 (1975).

¹²² *Id.* at 633 (emphasis in original).

¹²³ *Id.* at 634. Justice Stewart credited the "Fourth Estate" metaphor to Thomas Carlyle's quotation of noted British statesman Edmund Burke in Parliament. *Id.* In an 1840 essay, Carlyle wrote that Burke, during a speech, "said there were Three Estates in Parliament; but, in the Reporters' Gallery yonder, there sat a *Fourth Estate* more important far than they all." Thomas Carlyle, *The Hero as Man of Letters* (1840), in *ON HEROES, HERO-WORSHIP & THE HEROIC IN HISTORY* 133, 141 (Michael K. Goldberg, Joel J. Brattin & Mark Engel eds., 1993).

¹²⁴ Stewart, *supra* note 121, at 636.

¹²⁵ *Id.*

¹²⁶ *Id.*

of specific crimes. All the federal appellate courts except the Sixth Circuit that dealt with the privilege issue between 1972 and 2003 found that journalists were protected by a qualified First Amendment or common law privilege modeled after Justice Stewart's three-part test.¹²⁷ In the Sixth Circuit, a three-judge panel determined that *Branzburg* foreclosed the existence of any journalist's privilege in the federal system.¹²⁸

The degree to which other federal appellate courts embraced the privilege varied considerably. One of the first post-*Branzburg* federal appellate decisions to discuss the privilege came in a ruling that quashed a subpoena for a reporter called to testify about his confidential source in regard to a civil suit in which he was not a party.¹²⁹ In the opinion, the Second Circuit's three-judge panel resoundingly embraced the First Amendment as the basis for its ruling:

It is axiomatic, and a principle fundamental to our constitutional way of life, that where the press remains free so too will a people remain free. Freedom of the press may be stifled by direct or, more subtly, by indirect restraints. Happily, the First Amendment tolerates neither, absent a concern so compelling as to override the precious rights of freedom of speech and the press. We find no such compelling concern in this case.¹³⁰

But many of the federal appellate courts have considered the issue only once or have recognized a First Amendment or common law privilege in dicta while deciding the case on other grounds.¹³¹ For example, in the Seventh Circuit, the issue arose indirectly only twice until 2003. In *Desai v. Hersh*,¹³² an appellate panel determined that a trial judge in a libel suit erred in allowing the defendant, investigative reporter Seymour Hersh, to testify about the reliability of his sources without identifying them.¹³³ In a book, Hersh stated that the plaintiff, former Indian Prime Minister Morarji Desai, was a paid CIA informant.¹³⁴ But the court also determined

¹²⁷ See, e.g., *United States v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *LaRouche v. NBC*, 780 F.2d 1134 (4th Cir. 1986); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975); *Baker v. F & F Inv.*, 470 F.2d 778 (2d Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).

¹²⁸ *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

¹²⁹ *Baker*, 470 F.2d 778.

¹³⁰ *Id.* at 785.

¹³¹ See, e.g., *Caporale*, 806 F.2d 1487 (upholding the lower court's decision not to compel two reporters to testify for the defense because interrogatories were filed late for one reporter and citing privilege claim for the other reporter).

¹³² 954 F.2d 1408 (7th Cir. 1992).

¹³³ *Id.* at 1412.

¹³⁴ *Id.* at 1410.

that Desai had failed to preserve the issue for appeal and upheld the district court's decision.¹³⁵ In *United States v. Lloyd*,¹³⁶ the Seventh Circuit affirmed a felon's conviction for firearm possession.¹³⁷ Among other things, Willie Lloyd argued that the trial court erred in quashing a subpoena for a newspaper reporter who may have overheard police officers talking about a "lottery" on how long Lloyd would live.¹³⁸ Lloyd hoped to show that the police were biased against him.¹³⁹ The district court quashed the subpoena on privilege grounds, finding that both the First Amendment and Illinois' shield law protected the reporter from being forced to reveal a confidential source.¹⁴⁰ While the appellate court agreed that the subpoena should have been quashed, however, the Seventh Circuit panel never explicitly endorsed the journalist's privilege.¹⁴¹ The appellate court instead noted that whether police had a lottery on Lloyd's life was irrelevant to the case.¹⁴² Even if the district court erred in quashing the subpoena, the appellate panel said, the error was harmless because the testimony would have been worthless to Lloyd.¹⁴³

Even in circuits with more case law on the journalist's privilege, the precedent is sometimes cloudy. For example, in the U.S. Court of Appeals for the District of Columbia, which has been active in some of the recent controversies,¹⁴⁴ privilege decisions have been mixed. In *Carey v. Hume*¹⁴⁵ in 1974, the appellate court said that while a journalist's privilege might exist in relation to a civil case despite the holding in *Branzburg*, the libel defendant in this case could be required to reveal the identity of confidential sources when that information went to the heart of the plaintiff's case.¹⁴⁶ A few years later, the court rejected an attempt by a Church of Scientology official to quash a grand jury subpoena by relying on *Branzburg*. In *In re Possible Violations of 18 USC 371, 641, 1503*,¹⁴⁷ the court found the church official's suggestion that *Branzburg* endorsed a qualified privilege wholly without merit.¹⁴⁸ A

¹³⁵ *Id.* at 1412–13.

¹³⁶ 71 F.3d 1256 (7th Cir. 1995), *cert. denied*, 517 U.S. 1250 (1996).

¹³⁷ *Id.*

¹³⁸ *Id.* at 1268.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1262.

¹⁴¹ *Id.* at 1269.

¹⁴² *Id.* ("Lloyd's counsel was engaging in nothing more than an evidentiary fishing expedition . . .").

¹⁴³ *Id.*

¹⁴⁴ See *Lee v. Dep't of Justice*, 413 F.3d 53 (D.C. Cir. 2005), *reh'g en banc denied*, 428 F.3d 299 (D.C. Cir. 2005); *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964 (D.C. Cir. 2005), *reh'g en banc denied*, 405 F.3d 17 (D.C. Cir. 2005), *cert. denied*, 125 S. Ct. 2977 (2005).

¹⁴⁵ 492 F.2d 631 (D.C. Cir. 1974).

¹⁴⁶ *Id.*

¹⁴⁷ 564 F.2d 567 (D.C. Cir. 1977).

¹⁴⁸ *Id.*

year later, the court declined to order American Telephone & Telegraph (AT&T) to protect journalists' phone records from government subpoenas to a greater extent than it protected other customers' records.¹⁴⁹ But in a case with some similarities to the recent *Wen Ho Lee* case,¹⁵⁰ the court in 1981 found that a district court acted properly in quashing a subpoena for journalists' sources in a civil suit arising from an alleged Privacy Act violation. In *Zerilli v. Smith*,¹⁵¹ the court said the plaintiffs, identified in news stories as organized crime figures, had failed to show that the journalists had relevant information that was not reasonably available elsewhere.¹⁵² Most recently, in *United States v. Ahn*,¹⁵³ the appellate court said a district judge did not err in quashing subpoenas for reporters who aired stories about a police officer's arrest on bribery charges.¹⁵⁴ The appellate court agreed with the district court that the defendant did not show that the information he sought was essential to his case or relevant to his guilt or innocence.¹⁵⁵

So while most federal appellate circuits have recognized that a journalist's privilege exists, the support for that privilege is a bit shaky. Even shakier is the support for extending the privilege to protect nonconfidential information, such as unpublished photographs, video outtakes, or reporters' notes. A district court in Florida in 1975 became the first federal court to extend the privilege to nonconfidential information in ruling on a civil litigant's subpoena to a reporter. The judge in *Loadholtz v. Fields*¹⁵⁶ determined, without significant explanation, that forcing journalists to respond to subpoenas for nonconfidential information would have the same detrimental effects on journalism as subpoenas for confidential source identities.¹⁵⁷ At the appellate level, the Second, Third, and Ninth Circuits also have extended the privilege to nonconfidential information.¹⁵⁸ The First Circuit has suggested that the arguments in favor of the privilege for nonconfidential information are compelling, although not compelling enough to quash a criminal defendant's subpoena in the one case in which the court directly confronted the issue.¹⁵⁹ And the Fourth Circuit, while declining to extend the privilege to nonconfidential information in criminal

¹⁴⁹ *Reporters Comm. for Freedom of the Press v. AT&T Co.*, 593 F.2d 1030 (D.C. Cir. 1978).

¹⁵⁰ *See infra* Part III.A.3.

¹⁵¹ 656 F.2d 705 (D.C. Cir. 1981).

¹⁵² *Id.*

¹⁵³ 231 F.3d 26 (D.C. Cir. 2000).

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 37.

¹⁵⁶ 389 F. Supp. 1299 (M.D. Fla. 1975).

¹⁵⁷ *Id.* at 1302-03.

¹⁵⁸ *See Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *United States v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980).

¹⁵⁹ *United States v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988) ("No one or all of NBC's asserted First Amendment interests can be said to outweigh these very considerable interests of [criminal] defendants [in a fair trial].").

cases,¹⁶⁰ upheld the quashing of a subpoena for what appeared to be nonconfidential information in a civil case without explicitly addressing the confidentiality issue.¹⁶¹

II. EROSION OF THE FEDERAL PRIVILEGE

A. *The Early-Warning Signs*

For a while in the early- to mid-1990s, it appeared that the trend developing in federal appellate courts was to extend the qualified constitutional or common law journalist's privilege to nonconfidential information. But in 1998, a panel of the U.S. Court of Appeals for the Fifth Circuit ruled in *United States v. Smith*¹⁶² that there was no federal privilege protecting nonconfidential information subpoenaed in a criminal case.¹⁶³ In that same year, the Second Circuit also ruled that no such privilege existed under federal law before reversing itself in part on reconsideration in *Gonzales v. NBC*.¹⁶⁴ Although the Second Circuit on reconsideration upheld earlier precedent that appeared to favor a privilege for nonconfidential information, the *Gonzales* decision also established a test that weakened the privilege. Instead of requiring, as it did in earlier cases,¹⁶⁵ that a party subpoenaing the press show that the information sought was highly relevant, critical to the case, and unavailable elsewhere, the court said it would require in cases involving nonconfidential information only a showing of "likely relevance" and lack of "reasonably obtainable" alternatives.¹⁶⁶ The court did not explain why it weakened the test for overcoming the journalist's privilege in cases involving nonconfidential material.

In *Smith*, the Fifth Circuit rejected journalists' claims that their nonconfidential materials should be protected from subpoenas.¹⁶⁷ After a district court quashed prosecution and defense subpoenas for the outtakes of television interviews with an arson suspect, the Fifth Circuit reversed.¹⁶⁸ It rejected journalists' claims that a privilege would protect them from being annexed as an investigative arm of government; that a lack of privilege would discourage the work of news sources and reporters; that without a privilege journalists would be swamped with discovery requests; and that without a privilege journalists would be forced to destroy valuable archival material

¹⁶⁰ *In re Shain*, 978 F.2d 850 (4th Cir. 1992).

¹⁶¹ *Church of Scientology Int'l v. Daniels*, 992 F.2d 1329 (4th Cir. 1993).

¹⁶² 135 F.3d 963 (5th Cir. 1998).

¹⁶³ *Id.*

¹⁶⁴ 155 F.3d 618 (2d Cir. 1998), *rev'd in part*, 194 F.3d 29 (2d Cir. 1999) (recognizing a qualified journalist's privilege to protect both confidential and nonconfidential materials in a civil case).

¹⁶⁵ *See, e.g., United States v. Burke*, 700 F.2d 70 (2d Cir. 1983).

¹⁶⁶ *Gonzales*, 194 F.3d at 36 (emphasis added).

¹⁶⁷ 135 F.3d at 972-73.

¹⁶⁸ *Id.*

to avoid subpoenas.¹⁶⁹ The court said the television station had failed to show any empirical evidence that it would be harmed by complying with the subpoenas, and the panel said that any First Amendment claims the station might have were weak, at best, when the information sought was nonconfidential.¹⁷⁰ The court also said that the news media were not “differently situated” from other businesses that might possess relevant evidence in a criminal case.¹⁷¹ The court therefore appeared to discount the notion that the press might have any special status in First Amendment law.

Courts that have decided privilege cases since *Gonzales* and *Smith* have cited both cases about evenly but rarely at the same time.¹⁷² *Smith* has been cited most often to support decisions that reject journalists’ privilege claims.¹⁷³ In fact, the Fifth Circuit cited *Smith* in a later unpublished decision in which it rejected the privilege claim of freelance book author Vanessa Leggett that her notes, tapes, and other information should not be subpoenaed by a federal grand jury investigating a professional sports bookmaker who had been acquitted in state court of killing his wife.¹⁷⁴ Leggett continued to withhold the information she had gathered for a book about the murder case and ended up serving the longest prison term for contempt on record among

¹⁶⁹ *Id.* at 969–70.

¹⁷⁰ *Id.* at 970–71.

¹⁷¹ *Id.* at 970.

¹⁷² Exceptions include *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005) (referencing *Smith* but relying in part on *Gonzales v. NBC* in holding that federal prosecutor could not subpoena journalists’ phone records to aid in leak investigation), *United States v. Foote*, No. 00-CR-20091-01-KHV, 2002 U.S. Dist. LEXIS 14818, at *6 & n.9, *7 (D. Kan. Aug. 8, 2002) (finding that federal journalist’s privilege exists and extends to nonconfidential information despite holdings in *Smith* and first *Gonzales* decisions, but finding that government had overcome burden of qualified privilege and was entitled to reporter’s testimony), *United States v. Hively*, 202 F. Supp. 2d 886, 891–92 (E.D. Ark. 2002) (noting that *Smith* concluded that nonconfidential information is not privileged and *Gonzales* found that it was, but with a lesser burden to overcome for the subpoenaing party), and *People v. Combest*, 828 N.E.2d 583, 587 n.3 (N.Y. 2005) (citing *Smith* and *Gonzales* as cases rejecting or limiting, respectively, the right of a journalist to withhold nonconfidential information sought in a criminal case).

¹⁷³ *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *In re Special Counsel Investigation*, 332 F. Supp. 2d 26 (D.D.C. 2004); *United States v. King*, 194 F.R.D. 569 (E.D. Va. 2000); *United States v. Jennings*, No. 97 CR 765, 1999 U.S. Dist. LEXIS 9534 (N.D. Ill. June 16, 1999); *In re Application of Ramaekers*, 33 F. Supp. 2d 312 (S.D.N.Y. 1999); *People v. Pawlaczyk*, 724 N.E.2d 901 (Ill. 2000); *State v. DiPrete*, C.A. No. 94-1000 A&B, 1998 R.I. Super. LEXIS 101 (R.I. Super. Ct. Sept. 15, 1998); *In re Union Pac. R.R. Co.*, 6 S.W.3d 310 (Tex. App. 1999). *But see* *Builders Ass’n of Greater Chi. v. Cook County*, No. 96 C 1121, 1998 U.S. Dist. LEXIS 2991, at *18–19 (N.D. Ill. Mar. 10, 1998) (quashing subpoena for Chicago Urban League’s confidential survey materials in reverse discrimination suit while noting that *Smith* held that there was no privilege for nonconfidential material); *People v. Slover*, 753 N.E.2d 554, 559 (Ill. App. Ct. 2001) (Cook, J., dissenting) (citing *Smith* in dissent of the opinion in which the majority upheld the quashing of a subpoena to a journalist); *In re Napp Tech., Inc. Litig.*, 768 A.2d 274, 281 (N.J. Super. Ct. Law Div. 2000) (citing *Smith* as an exception to the general rule that there is a qualified federal journalist’s privilege).

¹⁷⁴ *In re Grand Jury Subpoenas*, 29 Media L. Rep. (BNA) 2301 (5th Cir. 2001).

United States journalists.¹⁷⁵ By contrast, *Gonzales* is often cited in cases in which journalists are granted protective orders from subpoenas or successfully move to quash subpoenas,¹⁷⁶ although that is not always the case.¹⁷⁷

*B. McKevitt v. Pallasch*¹⁷⁸

In short, the trend among federal appellate courts by 2003 appeared to be heading away from protecting journalists from subpoenas for nonconfidential information. In that respect, the decision in *McKevitt v. Pallasch* was not revolutionary. What was surprising was the Seventh Circuit's detour into questions about the federal journalist's privilege generally.

The case that led to the Seventh Circuit's ruling had its roots in violence-torn Northern Ireland and efforts to prosecute terrorists there. Michael McKevitt was accused of being the leader of the "Real IRA," a group that broke away from the Irish Republican Army after the IRA agreed to participate in peace negotiations with the British government.¹⁷⁹ McKevitt was accused of directing terrorism in

¹⁷⁵ Ross E. Milloy, *Writer Who Was Jailed in Notes Dispute Is Freed*, N.Y. TIMES, Jan. 5, 2002, at A8.

¹⁷⁶ *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998) (citing first *Gonzales* decision, before reconsideration, and disagreeing with it in quashing subpoenas for book authors); *Concerned Citizens of Belle Haven v. Belle Haven Club*, Civil No. 3:99CV1467 (AHN), 2004 U.S. Dist. LEXIS 27335 (D. Conn. June 21, 2004); *Carter v. City of N.Y.*, No. 02 Civ. 8755, 2004 U.S. Dist. LEXIS 1308 (S.D.N.Y. Jan. 30, 2004); *Tripp v. Dep't of Defense*, 284 F. Supp. 2d 50 (D.D.C. 2003); *In re DaimlerChrysler AG Sec. Litig.*, 216 F.R.D. 395 (E.D. Mich. 2003); *Persky v. Yeshiva Univ.*, No. 01 Civ. 5278, 2002 U.S. Dist. LEXIS 23740 (S.D.N.Y. Dec. 9, 2002); *Hutira v. Islamic Republic of Iran*, 211 F. Supp. 2d 115 (D.D.C. 2002); *Astra USA, Inc. v. Bildman*, No. 1998-580, 2001 Mass. Super. LEXIS 251 (Mass. Super. Ct. June 22, 2001); *In re Investigation of March 1999 Riots in E. Lansing*, No. 220790, 2000 Mich. App. LEXIS 72 (Mich. Ct. App. Mar. 28, 2000), *aff'd*, 617 N.W.2d 310 (Mich. 2000).

¹⁷⁷ *In re Fitch, Inc.*, 330 F.3d 104 (2d Cir. 2003) (citing *Gonzales* as one of several cases in the Second Circuit upholding the existence of the privilege but relying on New York shield law in determining that a financial rating agency is not entitled to claim the journalist's privilege); *Mandal v. City of N.Y.*, Nos. 02 Civ. 1234, 1367 & 6537, 2004 U.S. Dist. LEXIS 21209 (S.D.N.Y. Oct. 20, 2004) (applying the *Gonzales* test in denying the reporters' motions to quash subpoenas for testimony about published stories quoting named sources); *Richardson v. Sugg*, 220 F.R.D. 343 (E.D. Ark. 2004) (citing *Gonzales* favorably but requiring the reporter to show up for a deposition in a civil case and assert the privilege on a question-by-question basis, if needed); *Hade v. City of Fremont*, 233 F. Supp. 2d 884 (N.D. Ohio 2002) (noting that *Gonzales* lowered the bar for overcoming the journalist's assertion of privilege, and finding that a civil litigant could compel the reporter's testimony); *Inside Radio, Inc. v. Clear Channel Commc'ns, Inc.*, 208 F.R.D. 537 (S.D.N.Y. 2002) (citing *Gonzales* favorably but finding that the defendant could compel disclosure of source identities when the identities went to heart of case).

¹⁷⁸ 339 F.3d 530 (7th Cir. 2003).

¹⁷⁹ Mike Robinson, *Judge Studies Suspect's Bid for Reporters' Transcripts*, CHI. SUN-

connection with a car bombing in Omagh, Northern Ireland, in 1998 that killed twenty-nine people.¹⁸⁰ He was eventually convicted in a Dublin court.¹⁸¹ The chief witness against McKevitt at his trial was David Rupert, an American who reportedly became an "FBI mole" in the Real IRA through its fundraising arm in the Chicago area.¹⁸² Rupert's activities as a spy inside the terrorist group got the attention of three reporters: Flynn McRoberts of the *Chicago Tribune*, Abdon Pallasch of the *Chicago Sun-Times*, and Robert C. Herguth of the *Sun-Times*, who eventually replaced McRoberts on the book project that sprang from the reporters' taped interviews with Rupert.¹⁸³

McKevitt's attorneys took an interest in the taped interviews shortly after his trial began and subpoenaed them, hoping they would prove damaging to Rupert's testimony for the government.¹⁸⁴ U.S. District Judge Ronald A. Guzman of Chicago rejected the three reporters' motion to quash the subpoena, saying the interest in making sure the McKevitt trial was fair outweighed any interest the reporters might have in shielding the tapes from disclosure.¹⁸⁵ The Seventh Circuit rejected the reporters' appeal the day after Judge Guzman's ruling without comment, but the court promised to explain the ruling later.¹⁸⁶

In that explanation, Judge Richard Posner, writing for a unanimous three-judge panel, said that the Seventh Circuit had not "taken sides" on the issue of whether journalists enjoy a privilege in federal courts.¹⁸⁷ This would seem to clear up any confusion about whether *Desai v. Hersh* and *United States v. Lloyd* represented a recognition of the privilege by the Seventh Circuit.¹⁸⁸ Judge Posner noted that many cases, "surprisingly in light of *Branzburg*," recognize a federal privilege but do not agree on its scope or origin.¹⁸⁹ The opinion said that "some [courts] treat the 'majority' opinion in *Branzburg* as . . . a plurality opinion, . . . some audaciously declare that *Branzburg* . . . created a [federal] reporter's privilege," and others appear to ignore *Branzburg* completely.¹⁹⁰ "The approaches that these decisions take to the issue of privilege can certainly be questioned," Judge Posner wrote.¹⁹¹

TIMES, June 26, 2003, at 10.

¹⁸⁰ Brain Lavery, *Head of IRA Splinter Group Guilty*, INT'L HERALD TRIB., Aug. 7, 2003, at 1.

¹⁸¹ *Id.*

¹⁸² See Robinson, *supra* note 179.

¹⁸³ *Id.*

¹⁸⁴ *Reporters Ordered to Give Up Tapes of IRA Witness*, CHI. SUN-TIMES, July 3, 2003, at 18.

¹⁸⁵ *Id.*

¹⁸⁶ McKevitt v. Pallasch, 339 F.3d 530, 530 n.1 (7th Cir. 2003).

¹⁸⁷ *Id.* at 532.

¹⁸⁸ See *supra* notes 132–43 and accompanying text.

¹⁸⁹ McKevitt, 339 F.3d at 532.

¹⁹⁰ *Id.* (citations omitted).

¹⁹¹ *Id.*

Judge Posner said that the federal interest in cooperating with friendly nations' criminal proceedings was obvious, but it was also "obvious that the newsgathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality."¹⁹² The judge added, however, that the Supreme Court had already rejected similar arguments by the press in *Branzburg*, which he said made it clear that any interest the press had in maintaining source confidentiality "is not absolute."¹⁹³ In the *McKevitt* case, the judge wrote, there was "no conceivable interest in confidentiality" because the source was known and did not object to the interview tapes being disclosed.¹⁹⁴ Judge Posner noted that opinions extending the privilege to nonconfidential information "express concern with harassment, burden, using the press as an investigative arm of government, and so forth," but because those same press concerns were rejected in *Branzburg* in the context of confidential sources, Judge Posner wrote, "these courts may be skating on thin ice."¹⁹⁵

After stating that the Illinois shield law had no application to this case because the dispute was a federal question, Judge Posner appeared to question the existence of any journalist's privilege in federal courts:

It seems to us that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena duces tecum, is reasonable in the circumstances, which is the general criterion for judicial review of subpoenas. We do not see why there need to be special criteria merely because the possessor of the documents or other evidence sought is a journalist.¹⁹⁶

Judge Posner noted that the panel's stance was supported by *Branzburg*, in which the majority opinion said that press harassment by grand juries acting in bad faith would not be tolerated.¹⁹⁷

In regard to information that does not come from a confidential source, the panel said that it was "difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure."¹⁹⁸ In fact, Judge Posner wrote, it seemed in this case that the parties were reversed in regard to press freedom: the source wanted the information he gave the reporters disclosed while the reporters wanted it withheld.¹⁹⁹ The purpose of press freedom, the judge wrote, was "to

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 532–33.

¹⁹⁶ *Id.* at 533 (citations omitted).

¹⁹⁷ *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 707–08 (1972)).

¹⁹⁸ *Id.* at 533.

¹⁹⁹ *Id.*

encourage publication rather than secrecy.”²⁰⁰ In this case, the judge suggested that the reporters’ desire to keep information out of the public domain was borne from a concern that disclosure might reduce the marketability of their book.²⁰¹ From there, the opinion launched into a speculative discussion about whether the reporters had any legitimate intellectual property concerns before determining that they did not.²⁰² After more than twenty news organizations joined to file a friend of the court brief asking for a reconsideration of the appellate panel’s decision,²⁰³ the court declined to rehear the case in October 2003.²⁰⁴

C. Why McKevitt Is Important

The decision of the U.S. Court of Appeals for the Seventh Circuit in *McKevitt v. Pallasch* seems to have settled the question of whether the circuit will recognize a journalist’s privilege that extends to subpoenas for nonconfidential information. However, it also has raised the question of whether the circuit would recognize a privilege protecting journalists from disclosing confidential sources. The panel’s opinion refers to other federal courts’ decisions recognizing a privilege for confidential material as “surprising[]” or “audacious[]” in light of *Branzburg*.²⁰⁵

Lower courts in the Seventh Circuit have not confronted directly whether the *McKevitt* decision bars recognizing a journalist’s privilege when confidential material is being sought. So far, only four federal district court opinions involving journalist’s privilege issues have cited *McKevitt*, all in the Seventh Circuit. In the first, *Solaia Technology, LLC v. Rockwell Automation, Inc.*,²⁰⁶ a district judge in Illinois said that under federal law after *McKevitt*, a specialty publisher subpoenaed in connection with an antitrust case in which it was not a party could not refuse to comply with the part of a subpoena that sought nonconfidential information.²⁰⁷ However, the court reserved judgment on the issue, including whether the publisher could quash the part of the subpoena seeking the identity of a confidential source, until a procedural matter could be cleared up.²⁰⁸

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 533–35.

²⁰³ Kirsten Murphy, *Appealing for a Privilege*, NEWS MEDIA & L., Fall 2003, at 15, available at <http://www.rcfp.org/news/mag/27-4/con-appealin.html> (last visited Mar. 18, 2006).

²⁰⁴ *McKevitt v. Pallasch*, Nos. 03-2753 & 2754, 2003 U.S. App. LEXIS 21058 (7th Cir. Oct. 16, 2003).

²⁰⁵ See *supra* text accompanying notes 189–91.

²⁰⁶ No. 03 C 6904, 2003 U.S. Dist. LEXIS 20196 (N.D. Ill. Nov. 10, 2003).

²⁰⁷ *Id.* at *5–6.

²⁰⁸ *Id.* at *8–10.

In *United States v. Hale*,²⁰⁹ a federal magistrate judge in Indiana denied a CNN reporter's motion to quash a subpoena from a federal prosecutor.²¹⁰ The reporter, Jeff Flock, was ordered to testify about an interview with Matthew Hale, an associate of Benjamin Smith.²¹¹ Smith went on a racism-inspired shooting spree in Indiana and Illinois in 1999 before killing himself.²¹² Hale faced several charges, including one for obstruction of justice for allegedly telling his father to lie to a grand jury by saying that Hale broke off an interview with Flock when Hale began crying over Smith's actions.²¹³ Turning aside the reporter's arguments that the subpoena was unreasonable and that the information sought was available elsewhere, the magistrate judge, citing *McKevitt*, noted that the information sought was not confidential and that the fact that Flock was a reporter "[did] not automatically render the subpoena unreasonable."²¹⁴

But in September 2004, a Chicago federal magistrate judge took great care to limit *McKevitt* while ruling partly for and partly against a journalist subpoenaed in a civil case in which he was not a party. In *Hobley v. Burge*,²¹⁵ Magistrate Judge Geraldine Soat Brown ordered *Chicago Reader* reporter John Conroy to comply with the part of a subpoena duces tecum requiring that he turn over letters sent to him by Hobley.²¹⁶ Hobley claimed that he confessed to a crime because he was beaten and tortured by Jon Burge of the Chicago Police Department, a defendant in Hobley's lawsuit.²¹⁷ However, the judge quashed the part of the subpoena that would have required Conroy to turn over his notes from conversations with Hobley.²¹⁸

The judge noted that *McKevitt* was "the law in this Circuit, which this court is bound to follow,"²¹⁹ and she wrote that Hobley's letters to Conroy were very much like the tapes possessed by the *McKevitt* reporters in that they came from a known source who actively sought press attention for his abuse claims.²²⁰ While also noting

²⁰⁹ No. 03 CR 11, 2004 U.S. Dist. LEXIS 8905 (N.D. Ind. Apr. 6, 2004).

²¹⁰ *Id.*

²¹¹ *Id.* at *1-2.

²¹² Natasha Korecki, *Hale Praises Spree Killer on Tape*, CHI. SUN-TIMES, Apr. 15, 2004, at 22.

²¹³ *Hale*, 2004 U.S. Dist. LEXIS 8905, at *1-2. The facts as reported in the court opinion are a bit murky. According to news reports, however, Hale was the leader of a white supremacist group to which Smith apparently belonged. Korecki, *supra*, note 212. Smith killed two people and wounded nine before killing himself. *Id.* An informant for the government taped Hale laughing about Smith's shooting spree. *Id.* Hale was also charged with trying to arrange for the slaying of a federal judge who had ruled against him in another matter. *Id.*

²¹⁴ *Hale*, 2004 U.S. Dist. LEXIS 8905, at *6-7.

²¹⁵ 223 F.R.D. 499 (N.D. Ill. 2004).

²¹⁶ *Id.* at 506.

²¹⁷ *Id.* at 500-01.

²¹⁸ *Id.* at 505.

²¹⁹ *Id.* at 502.

²²⁰ *Id.* at 504.

that the reporter's notes involved conversations with a named source, however, the judge said they were a different matter.²²¹ Producing them would create an undue burden on Conroy, the judge said, and nothing in *McKevitt* said a reporter's notes were less protected now than they had been in previous cases.²²²

In a similar case, *Patterson v. Burge*,²²³ a federal judge in Chicago quashed subpoenas to three news organizations for audio and video tapes of interviews with plaintiff Aaron Patterson.²²⁴ In that case, the judge said that *McKevitt* precluded her from considering constitutional or statutory arguments of the press and only allowed her to consider reasonableness.²²⁵ But, the judge said, it was unreasonable to subject the press to subpoenas from civil litigants based solely on possible relevance of the subpoenaed material.²²⁶

So far, at least, district courts in the Seventh Circuit seem to be interpreting *McKevitt* as disallowing any special First Amendment or common law protection for journalists' nonconfidential material, but not as disallowing protection for confidential information entirely. Two judges have limited *McKevitt* by finding it applies only to subpoenas for tapes or does not preclude finding that a subpoena to the press is unreasonable.

Outside the Seventh Circuit, citations to *McKevitt* have approached it cautiously and from several angles. For example, one federal appellate court did not follow *McKevitt* so much as note its existence. In the case of James Taricani, the Providence television reporter who refused to tell a special federal prosecutor who gave him a government surveillance tape of a city official, the U.S. Court of Appeals for the First Circuit ruled against the reporter.²²⁷ In the June 2004 opinion, the First Circuit panel referred to Judge Posner, who wrote the *McKevitt* opinion, when it noted that "[o]ne distinguished judge has questioned whether *Branzburg* now offers protection much beyond what ordinary relevance and reasonableness requirements would demand."²²⁸ But the panel determined that the First Circuit's own cases had been more protective of journalists.²²⁹ The First Circuit panel left open the question of how much protection the First Amendment or common law afforded to subpoenaed journalists.

²²¹ *Id.* at 505.

²²² *Id.*

²²³ No. 03 C 4433, 2005 U.S. Dist. LEXIS 1331 (N.D. Ill. Jan. 5, 2005).

²²⁴ *Id.*

²²⁵ *Id.* at *4-5.

²²⁶ *Id.* at *9-10.

²²⁷ *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004), *cert. denied*, 126 S. Ct. 421 (2005); *see also infra* Part III.A.1.

²²⁸ 373 F.3d at 45 (citing *McKevitt v. Pallasch*, 339 F.3d 530, 532 (2003)).

²²⁹ *Id.*

In the case of Judith Miller and Matthew Cooper, subpoenaed in connection with the revelation of a CIA operative's name in the press,²³⁰ one of the judges on a District of Columbia appellate panel noted that the government relied in part on *McKevitt* to argue that the journalist's privilege could be waived by the source, not the reporter.²³¹ But the judge dismissed the suggestion, noting that *McKevitt* involved nonconfidential material, not confidential sources.²³²

In a New York federal district court case, a judge ruled in favor of the *New York Times* in its attempt to quash a subpoena for the telephone records of reporters Judith Miller and Philip Shenon.²³³ The government hoped to discover Miller's and Shenon's sources for information about Islamic charities under investigation for terrorism ties.²³⁴ The judge cited *McKevitt* for dicta indicating that perhaps the Powell concurrence in *Branzburg* should be read as the majority opinion,²³⁵ even though that position appears to have been rejected later in the *McKevitt* panel's opinion.

In a New York Court of Appeals case, *People v. Combest*,²³⁶ the state's highest court cited *McKevitt* in stating that the Seventh Circuit was one of three federal appellate circuits that did not recognize "any journalist's privilege in the context of a criminal case."²³⁷ The decision, however, turned on whether the television production company could rely on the state shield law to quash a subpoena for tapes of police interrogation of a murder suspect.²³⁸ The court ruled the company could not because the tapes were the only unbiased record of the interrogation.²³⁹

Given the ways in which *McKevitt* has been cited, it would be easy to write it off as only significant to journalists in the Seventh Circuit seeking to protect non-confidential material from disclosure. But Paul J. Boyle, senior vice president of the Newspaper Association of America, and Sandra Baron, executive director of the Media Law Resource Center, both have suggested that the *McKevitt* decision was a major turning point in privilege law.²⁴⁰ Baron suggested that Judge Posner's decision may have helped "free[] some of his colleagues" to take a narrower view of the privilege.²⁴¹ Boyle and Baron may be overestimating Judge Posner's influence,

²³⁰ See *infra* Part III.A.2.

²³¹ *In re Grand Jury Subpoena* (Miller), 397 F.3d 964, 999–1000 (D.C. Cir. 2005) (Tatel, J., concurring), *cert. denied*, 125 S. Ct. 2977 (2005).

²³² *Id.* at 1000.

²³³ *N.Y. Times v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005).

²³⁴ *Id.* at 464.

²³⁵ *Id.* at 485.

²³⁶ 828 N.E.2d 583 (N.Y. 2005).

²³⁷ *Id.* at 587 n.3.

²³⁸ *Id.* at 587.

²³⁹ *Id.* at 587–88.

²⁴⁰ Katharine Q. Seelye, *Journalists Say Threat of Subpoena Intensifies*, N.Y. TIMES, July 4, 2005, at C1.

²⁴¹ *Id.*

but it is true that in addition to his work on the bench, the judge is one of the most prolific and oft-cited legal writers in the United States.²⁴²

Aside from the question of Judge Posner's influence on other judges, there are two other reasons why *McKevitt* needs to be taken more seriously by scholars and legal practitioners than it has been so far by the few commentators who have condemned the panel's decision.²⁴³

1. The Swing-Vote Factor

In rejecting the privilege for nonconfidential information, the Seventh Circuit joined the Fifth Circuit in finding no justification for shielding journalists from the burdens, both psychological and physical, of subpoenas for notes, outtakes, and the like. In *United States v. Smith*,²⁴⁴ the Fifth Circuit said that news organizations were not "differently situated" from other businesses that might have information relevant to a criminal trial.²⁴⁵ Similarly, the Seventh Circuit in *McKevitt* questioned why journalists should even speak of a privilege instead of just accepting the safeguards that all potential witnesses enjoy from harassment or bad-faith investigations.²⁴⁶

In *McKevitt*, Judge Posner's opinion cited both *Smith* and *Gonzales v. NBC*,²⁴⁷ in which the Second Circuit found that the federal journalist's privilege extended to nonconfidential information but that the test for overcoming the privilege would be easier in such circumstances.²⁴⁸ By rejecting the privilege for nonconfidential information completely and mimicking language from *Smith*, the Seventh Circuit chose to be persuaded by the Fifth Circuit's harder line toward the privilege rather than leave the door open for journalists, as *Gonzales* did. If the decisions in *Gonzales* and *Smith* represented two possible alternatives for other federal appellate courts that have not yet decided whether there is a federal privilege for nonconfidential information, then the Seventh Circuit in *McKevitt* provided a vote in favor of the *Smith* interpretation.

²⁴² A 1999 article in *American Lawyer* stated that Judge Posner was the most-cited legal authority in articles written in the previous forty years. *Published but Not Perished*, AM. LAW., Dec. 1999, at 107.

²⁴³ See Erik W. Laursen, Note, *Putting Journalists on Thin Ice: McKevitt v. Pallasch*, 73 U. CIN. L. REV. 293 (2004); Heather Stamp, Case Note, *McKevitt v. Pallasch: How the Ghosts of the Branzburg Decision Are Haunting Journalists in the Seventh Circuit*, 14 DEPAUL-LCA J. ART & ENT. L. & POL'Y 363 (2004).

²⁴⁴ 135 F.3d 963 (5th Cir. 1998).

²⁴⁵ *Id.* at 970; see also *supra* text accompanying note 171.

²⁴⁶ *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003); see also *supra* text accompanying notes 196–97.

²⁴⁷ *Gonzales v. NBC*, 194 F.3d 29 (2d Cir. 1999).

²⁴⁸ *Id.* at 36; see also *supra* text accompanying note 166.

Of course, it should be noted that reasonable people can disagree, and have,²⁴⁹ about whether journalists should have a privilege that protects information gathered without a promise of confidentiality from disclosure to a grand jury, criminal prosecutor or defendant, or civil litigant. Most privileges recognized by courts are based on the presumption that the communication between the parties is confidential,²⁵⁰ so extending the journalist's privilege to nonconfidential information seems to give journalists an especially favored status among those who can claim they do not have to testify in various proceedings.

2. The "Whose Privilege Is It?" Factor

In *Branzburg*, the Supreme Court noted a difference between journalists and the people who were thought to have legitimate claims to privileges based on professional or occupational relationships, such as attorneys, doctors, and ministers. The Court noted that the privilege the reporters claimed was theirs, not their informants'.²⁵¹ Although attorney-client and similar widely recognized privileges prevent attorneys and other professionals from being called to testify, the privileges are designed to protect clients or patients in those circumstances. But when a reporter claims a privilege, the Court said, there is nothing to stop authorities from independently discovering the source's identity and questioning that person.²⁵² In other words, the privilege carries no enforceable right of source protection apart from the extent to which the reporter's silence protects the source.

While the federal privilege belongs to the press, not its sources, the *McKevitt* case demonstrated that a source's statement that he does not object to the reporter testifying can undermine the reporter's attempt to quash a subpoena. In *McKevitt*, the source was already known before the reporters were called to testify, so the effect of the source's reported willingness to have the reporters turn over their tapes may have been minimal.²⁵³ But reporters have raised doubts about whether the source in *McKevitt* was really willing to have reporters turn over information.²⁵⁴ Abdon

²⁴⁹ See, e.g., Kevin J. Baum, Note, *The Journalist's Privilege: Ensuring that Compelled Disclosure Is the Exception, Not the Rule*, 3 VILL. SPORTS & ENT. L.J. 557 (1996) (praising the decision of the U.S. Court of Appeals for the Ninth Circuit in *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995), to extend the journalist's privilege to nonconfidential information); Julie M. Zampa, Note, *Journalist's Privilege: When Deprivation Is a Benefit*, 108 YALE L.J. 1449 (1999) (arguing that the Second Circuit was correct in the first *Gonzales* decision because denying the existence of a privilege for nonconfidential information would allow the press to concentrate on defending the privilege for confidential information).

²⁵⁰ See *supra* text accompanying notes 36-45.

²⁵¹ *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972).

²⁵² *Id.*

²⁵³ Michael Miner, *A First Amendment Showdown*, CHI. READER, Sept. 12, 2003, at 4.

²⁵⁴ *Id.*

Pallasch of the *Chicago Sun-Times*, one of the reporters subpoenaed in the *McKevitt* case, has said he suspects the source did not feel he had a choice because objecting to the subpoena issued to the reporters would have made him appear to have something to hide.²⁵⁵

The question of whether a statement from a source whose identity is known can sink a journalist's privilege claim is one thing, but what if the source is confidential but agrees to sign a waiver of confidentiality? In a concurring opinion in the Valerie Plame decision, Judge David Tatel of the U.S. Court of Appeals for the District of Columbia raised questions about the use of confidentiality waivers, rejecting a government argument that sources signing such waivers had in effect made reporter Judith Miller's privilege claim moot.²⁵⁶ Judge Tatel stated that it was clear under federal law that the privilege belonged to the reporter, not the source.²⁵⁷ But the distinction was not clear to Judge Posner in *McKevitt* and may not be clear to other judges who follow his lead. In fact, it is not clear even to proponents of protection for journalists. During a Senate Judiciary Committee hearing on shield legislation in July 2005, law professor Geoffrey R. Stone argued in favor of an absolute privilege for journalists but also stated that the journalist's privilege, like the privilege for attorneys and clients, would belong to the source.²⁵⁸

The period from 1998 to 2005 was not entirely dark for journalists. Three appellate courts rather tepidly and indirectly reaffirmed their commitment to the journalist's privilege.²⁵⁹ But the *Smith*, *Gonzales*, and *McKevitt* opinions were much stronger and more direct in their limitations on the privilege. Together the three opinions raised formidable questions about the privilege's continued existence that were reinforced by the more recent decisions discussed below.

²⁵⁵ *Id.*

²⁵⁶ *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 999–1000 (D.C. Cir. 2005) (Tatel, J., concurring).

²⁵⁷ *Id.*

²⁵⁸ *Reporters' Shield Legislation: Issues and Implications: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (testimony of Geoffrey Stone, Harry Kalven, Jr., Distinguished Service Professor of Law, University of Chicago Law School), available at http://www.judiciary.senate.gov/testimony.cfm?id=1579&wit_id=4509.

²⁵⁹ See *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005), *reh'g denied*, 425 F.3d 1292 (11th Cir. 2005) (finding that a magazine reporter was not covered by the Alabama shield law because it did not mention magazines, but the reporter could protect a confidential source under the First Amendment privilege); *Donohue v. Hoey*, 109 Fed. App'x. 340 (10th Cir. 2004) (finding that incomplete record indicated district court did not abuse its discretion in quashing subpoenas for reporters in connection with civil suit), *cert. denied*, 125 S. Ct. 1641 (2005); *Gray v. St. Martin's Press, Inc.*, 221 F.3d 243 (1st Cir. 2000), *cert. denied*, 531 U.S. 1075 (2001) (finding that the district court's decision to quash a subpoena for the defendant author's confidential source in a libel case was not an error given that the jury found for the defendant on grounds unrelated to the identity of the source).

III. ISSUES RAISED BY RECENT CASES

A. Summary of Recent Press Subpoena Cases

Before examining the various issues raised by the recent privilege cases, it would be helpful to briefly examine the facts of each case. Some of the subpoena controversies involving reporters have worked their way through to the appellate level, while others have not yet produced any judicial opinions. For the latter, news media and trade group accounts will be used to provide a sketch of the pending issues.

1. The Taricani Case

James Taricani, a Providence, Rhode Island, television reporter, refused to tell a special federal prosecutor his source for a government surveillance tape showing a city official apparently accepting a bribe.²⁶⁰ The tape aired in 2001, before the city official's trial on corruption charges.²⁶¹ Three years later, the special prosecutor filed a motion to compel Taricani to reveal who had given him the tape in apparent violation of a judge's gag order.²⁶² After Taricani refused to answer questions about his source at a deposition, he was found in civil contempt and ordered to pay \$1,000 per day until he complied with the subpoena, but that order was stayed pending appeal.²⁶³

In upholding the contempt order, a panel of the U.S. Court of Appeals for the First Circuit found that a special prosecutor's investigation was similar to a grand jury investigation, and *Branzburg v. Hayes*²⁶⁴ had specifically ruled out the existence of a privilege when journalists were called before grand juries.²⁶⁵ The panel also determined that the government had shown that the information sought from Taricani was relevant to the investigation and unavailable elsewhere.²⁶⁶ News reports said that Taricani and/or his station began paying the \$1,000-per-day fine in August 2004.²⁶⁷

However, when the fine failed to provoke Taricani to tell the special prosecutor who broke the gag order by giving him the tape, Taricani was told to appear again before the judge on a criminal contempt charge.²⁶⁸ Meanwhile, Taricani's source,

²⁶⁰ *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

²⁶¹ *Id.* at 40.

²⁶² *Id.* at 40–41.

²⁶³ *Id.* at 41.

²⁶⁴ 408 U.S. 665 (1972).

²⁶⁵ *In re Special Proceedings*, 373 F.3d at 44–45.

²⁶⁶ *Id.* at 45.

²⁶⁷ *Taricani Pays Fine for Not Naming Source*, PROVIDENCE J., Aug. 20, 2004, at B3.

²⁶⁸ See Katie Zezima, *Lawyer Says He Gave Convicted Reporter Videotape in Corruption Inquiry*, N.Y. TIMES, Dec. 2, 2004, at A26.

an attorney who represented another city official accused of corruption, came forward and publicly admitted he was the source.²⁶⁹ The source, Joseph Bevilacqua, Jr., said he did not ask Taricani to keep his identity secret, but Taricani denied that he had urged Bevilacqua to remain quiet to further Taricani's career.²⁷⁰ Taricani was convicted in a brief non-jury trial and was sentenced in December 2004 to up to six months of home confinement, a concession to Taricani's fragile health after a heart transplant some years ago.²⁷¹ Taricani was released from his sentence early for good behavior.²⁷² Bevilacqua was convicted of criminal contempt, disbarred, and sentenced to eighteen months in a federal prison.²⁷³

2. The Valerie Plame Wilson Case

In July 2003, syndicated columnist Robert Novak wrote that a former United States ambassador, Joseph Wilson IV, who had recently been critical of the Bush Administration's statements in support of going to war with Iraq, was married to a CIA operative.²⁷⁴ Novak, who printed the operative's maiden name, Valerie Plame, said his sources were two Administration officials.²⁷⁵ It later came to light that members of the Bush Administration might have given the same information to several other reporters who had not used Plame's name.²⁷⁶

The motive for the leak was unclear. Wilson suggested that the Administration wanted to get back at him for publicly criticizing President Bush's justifications for going to war with Iraq.²⁷⁷ Wilson had gone to Africa at the request of the CIA to check out reports that Saddam Hussein had tried to buy ingredients needed to make nuclear weapons.²⁷⁸ Wilson found rumors of Hussein's efforts to be unfounded,²⁷⁹ but President Bush suggested in his 2003 State of the Union Address that Hussein

²⁶⁹ *Id.*

²⁷⁰ *Id.*; Pam Belluck, *TV Reporter Facing Jail Says Source Rejected Plea*, N.Y. TIMES, Dec. 7, 2004, at A18.

²⁷¹ *In re* Special Proceedings, C.A. No. 01-47 (D.R.I. Dec. 9, 2004), available at http://www.rid.uscourts.gov/opinions/torres/2004/unpublished/12092004_1-01MSC0047T_senstencing.pdf.

²⁷² Belluck, *Reporter Granted Release*, *supra* note 13.

²⁷³ Mike Stanton, *Bevilacqua Gets 18 Months for Leaking Tape*, PROVIDENCE J., Sept. 10, 2005, at A1.

²⁷⁴ Robert Novak, *Mission to Niger*, WASH. POST, July 14, 2003, at A21.

²⁷⁵ *Id.*

²⁷⁶ *In re* Special Counsel Investigation, 332 F. Supp. 2d 26, 26-27 (D.D.C. 2004).

²⁷⁷ See Scott Shane, *Private Spy and Public Spouse Live at Center of Leak Case*, N.Y. TIMES, July 5, 2005, at A1 [hereinafter Shane, *Private Spy*].

²⁷⁸ *Id.*

²⁷⁹ Joseph C. Wilson IV, Op-Ed, *What I Didn't Find in Africa*, N.Y. TIMES, July 6, 2003, § 4 (Week in Review), at 9.

had or soon would have nuclear weapons,²⁸⁰ shortly before the United States invaded Iraq and ousted Hussein from power. Others have said the leak was designed to show that Wilson's trip was a junket of low importance that resulted from nepotism.²⁸¹

Patrick Fitzgerald, a federal prosecutor from Chicago, was appointed to determine the identity of the person or persons who leaked Plame's name to the press.²⁸² It is illegal to knowingly disclose the name of an intelligence officer to anyone not authorized to have such information.²⁸³ Fitzgerald empaneled a grand jury and eventually issued subpoenas to journalists other than Novak who had received the same leak about Plame.²⁸⁴ In July 2004, a federal district judge in Washington denied motions to quash grand jury subpoenas for *Time Magazine* reporter Matthew Cooper and NBC correspondent Tim Russert.²⁸⁵ The district court found, as the First Circuit had in Taricani's case, that *Branzburg v. Hayes* rejected the notion that journalists had a privilege not to testify before grand juries investigating criminal activity.²⁸⁶ After Cooper continued to refuse to testify, the same district judge found him in civil contempt of court and ordered *Time* to pay \$1,000 per day and ordered that Cooper be jailed until he agreed to testify.²⁸⁷ However, the judge stayed the order pending appeal,²⁸⁸ and Cooper later agreed to testify after his source released him from his promise of confidentiality regarding their conversation.²⁸⁹ Russert also agreed to testify under similar conditions.²⁹⁰

However, in September 2004, the same judge ordered Judith Miller of the *New York Times* to testify before the grand jury investigating the leak of Plame's name.²⁹¹ Walter Pincus, a *Washington Post* reporter, agreed to testify about what a source told him without revealing the source's name after the source apparently revealed his or her identity to Fitzgerald.²⁹² Shortly afterward, a second subpoena was issued to Cooper for testimony about any conversations about Plame or Wilson that he had

²⁸⁰ President George W. Bush, State of the Union (Jan. 28, 2003), available at <http://www.whitehouse.gov/news/release/2003/01/20030128-19.html>.

²⁸¹ See Shane, *Private Spy*, *supra* note 277.

²⁸² *In re Special Counsel Investigation*, 332 F. Supp. 2d 26, 27 (D.D.C. 2004).

²⁸³ Intelligence Identities Protection Act of 1982, 50 U.S.C. § 421 (2000).

²⁸⁴ *In re Special Counsel Investigation*, 332 F. Supp. 2d at 27.

²⁸⁵ *Id.* at 32.

²⁸⁶ *Id.* at 28–29.

²⁸⁷ *Id.* at 33–34.

²⁸⁸ *Id.* at 34.

²⁸⁹ Jacques Steinberg, *Threat of Jailing Is Lifted with Reporter's Testimony*, N.Y. TIMES, Aug. 25, 2004, at A16.

²⁹⁰ *Id.*

²⁹¹ *In re Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004); see also Adam Liptak & Robert Pear, *Times Reporter Ordered to Testify in Leak Case*, N.Y. TIMES, Sept. 17, 2004, at A18.

²⁹² Susan Schmidt, *Post Source Reveals Identity to Leak Probers*, WASH. POST, Sept. 16, 2004, at A2.

with government officials before the Novak column appeared.²⁹³ Miller and Cooper both refused to testify and were found in contempt of court, as was *Time Magazine*, which had been ordered to turn over documents.²⁹⁴ They appealed to the Court of Appeals for the District of Columbia, which in February 2005 ruled against them.²⁹⁵ Although all three judges on the appellate panel agreed that Fitzgerald had shown ample need for the reporters' testimony, the judges split on whether a federal privilege existed, its origin, and its scope.²⁹⁶ The court denied a motion for a rehearing en banc,²⁹⁷ and the Supreme Court denied certiorari in June 2005,²⁹⁸ despite a plea from thirty-four state attorneys general that the Court hear the case and uphold the privilege.²⁹⁹

After Judge Hogan told the reporters and *Time* to cooperate with the grand jury or face up to four months in prison and hefty fines,³⁰⁰ *Time's* editor announced that the magazine would turn over documents, including Cooper's notes and copies of his e-mail messages, to the court.³⁰¹ Editor Norman Pearlstine said he made the decision over Cooper's objections after determining that it was fruitless to continue fighting after the Supreme Court denied certiorari.³⁰² Pearlstine said in a statement "that once the Supreme Court has spoken in a case involving national security . . . , we are not above the law and we have to behave the way ordinary citizens do."³⁰³ On the day the reporters were to return to Judge Hogan's court for sentencing, Cooper announced that he would cooperate with investigators because his source had released him from his promise of confidentiality.³⁰⁴ Miller, however, again refused to testify, and Judge Hogan sentenced her to a Washington, D.C., area jail until she changed her mind or until the grand jury's term ended in October 2005.³⁰⁵

In late September, however, Miller was released from jail after she received what she felt was an adequate assurance from her source that he did not hold her to

²⁹³ *Id.*

²⁹⁴ *In re Special Counsel Investigation*, 346 F. Supp. 2d 54 (D.D.C. 2004); *In re Special Counsel Investigation*, 338 F. Supp. 2d 16 (D.D.C. 2004).

²⁹⁵ *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005).

²⁹⁶ *Id.* (containing separate concurring opinions from each judge).

²⁹⁷ *In re Grand Jury Subpoena* (Miller), 405 F.3d 17 (D.C. Cir. 2005).

²⁹⁸ *Miller v. United States*, 125 S. Ct. 2977 (2005); *Cooper v. United States*, 125 S. Ct. 2977 (2005).

²⁹⁹ Adam Liptak, *State Attorneys General Ask Supreme Court to Hear 2 Reporters' Case*, N.Y. TIMES, May 28, 2005, at A8 [hereinafter Liptak, *State Attorneys General*].

³⁰⁰ Adam Liptak, *Judge Gives Reporters One Week to Testify or Face Jail*, N.Y. TIMES, June 30, 2005, at A18.

³⁰¹ Adam Liptak, *Time Inc. to Yield Files on Sources, Relenting to U.S.*, N.Y. TIMES, July 1, 2005, at A1.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ Liptak, *Reporter Jailed*, *supra* note 5.

³⁰⁵ *Id.*

her promise of confidentiality.³⁰⁶ She also obtained a promise from Fitzgerald that he would limit his questions to what she was told by that source.³⁰⁷ After Miller testified to the grand jury about her conversations with I. Lewis "Scooter" Libby, Vice President Dick Cheney's chief of staff, Libby was indicted in October 2005 on charges of obstruction of justice and making false statements to investigators and the grand jury.³⁰⁸ Soon afterward, Miller retired from the *Times* after questions arose about possible ethical lapses in her relationships with sources and co-workers and whether she could have testified sooner without going to jail or violating her promise to Libby.³⁰⁹

One curious aspect of the Plame case involves Novak's part in the ensuing investigation after he printed Plame's name. Novak consistently has refused to say whether he was subpoenaed or whether he talked to Fitzgerald.³¹⁰ Before Cooper changed his mind and Miller went to jail, Novak said he regretted that the two reporters might go to prison for protecting their sources and promised to explain his part in the controversy after the case was settled.³¹¹ As of this writing, he has not done so.

3. The Wen Ho Lee Case

Six reporters from various news organizations were held in contempt of court by district judges for refusing to give depositions naming confidential sources to scientist Wen Ho Lee. Lee had worked at the government's Los Alamos nuclear weapons laboratory in New Mexico until he was investigated in regard to allegations that someone at Los Alamos was passing nuclear secrets to China.³¹² He was cleared of all but one felony charge after being held in isolation in a federal prison for several months.³¹³ He then sued the U.S. Departments of Justice and

³⁰⁶ Johnston & Jehl, *supra* note 4.

³⁰⁷ *Id.*

³⁰⁸ David Johnston & Richard W. Stevenson, *Cheney Aide Charged With Lying in Leak Case*, N.Y. TIMES, Oct. 29, 2005, at A1.

³⁰⁹ Katharine Q. Seelye, *Times Reporter Agrees to Leave the Paper*, N.Y. TIMES, Nov. 10, 2005, at A20.

³¹⁰ See David Margolick, *What About Novak?*, VANITY FAIR, Apr. 2005, at 160.

³¹¹ Jacques Steinberg, *Writer in Sources Case Laments Threat to Jail 2*, N.Y. TIMES, June 30, 2005, at A18.

³¹² See James Risen, *Los Alamos Scientist Admits Contacts with Chinese, U.S. Says*, N.Y. TIMES, Mar. 16, 1999, at A8; James Risen, *Though Suspected as China Spy, Scientist Got Sensitive Job at Lab*, N.Y. TIMES, Mar. 24, 1999, at A1; James Risen, *U.S. Fires Scientist Suspected of Giving China Bomb Data*, N.Y. TIMES, Mar. 9, 1999, at A1; James Risen & Jeff Gerth, *China Stole Nuclear Secrets for Bombs, U.S. Aides Say*, N.Y. TIMES, Mar. 6, 1999, at A1; James Sterngold, *Atom Scientist Is Denied Bail, But Possibility Is Held Out*, N.Y. TIMES, Dec. 30, 1999, at A18.

³¹³ Vernon Loeb, *Physicist Lee Freed, With Apology*, WASH. POST, Sept. 14, 2000, at A1.

Energy, among others, alleging that they violated the federal Privacy Act of 1974³¹⁴ by leaking information about him to the news media.³¹⁵

Five of the reporters failed to comply with an order to give depositions regarding their confidential government sources for stories linking Lee to espionage and were ordered to pay \$500 per day until they complied.³¹⁶ However, the judge stayed imposition of the fines until the reporters had a chance to appeal.³¹⁷ In June 2005, the U.S. Court of Appeals for the District of Columbia rejected the appeals of four of the five reporters — Bob Drogin of the *Los Angeles Times*, Josef Hebert of the Associated Press, James Risen of the *New York Times*, and Pierre Thomas of ABC, formerly of CNN.³¹⁸ The appellate panel determined that Lee had exhausted reasonable alternative sources when he deposed twenty people working for the Energy Department, Justice Department, and FBI.³¹⁹ However, the appellate court said the district court had insufficient evidence to find one of the five reporters, Jeff Gerth of the *New York Times*, in contempt because he apparently had no information that would be helpful to Lee.³²⁰ In November 2005, the full court declined to rehear the case en banc on a 4–4 vote, with two judges not participating.³²¹ In January 2006, Drogin, Herbert, and Risen filed an appeal with the U.S. Supreme Court.³²² Thomas was expected to join the appeal.³²³ As of this writing the Court has not ruled on whether to grant certiorari.

The sixth reporter, Walter Pincus of the *Washington Post*, was subpoenaed later than the other reporters and was not part of their case.³²⁴ Pincus also refused to answer deposition questions about his sources, however, and was found in civil contempt of court in November 2005.³²⁵ In an unusual twist, Judge Rosemary M. Collyer ordered Pincus to contact all of his confidential sources for the Lee stories and inform them of her decision so that they could have the opportunity to release him from his pledges of confidentiality.³²⁶ Pincus responded by asking the judge to reconsider her order.³²⁷ As of this writing, the judge has not responded, and Pincus's other appeal options are still pending.

³¹⁴ 5 U.S.C. § 552a (2000).

³¹⁵ See *Lee v. U.S. Dep't of Justice*, 287 F. Supp. 2d 15, 16–17 (D.D.C. 2003).

³¹⁶ *Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26, 27–28 & n.1 (D.D.C. 2004).

³¹⁷ *Id.* at 33.

³¹⁸ *Lee v. U.S. Dep't of Justice*, 413 F.3d 53, 55–56 (D.C. Cir. 2005).

³¹⁹ *Id.* at 60.

³²⁰ *Id.* at 64.

³²¹ *Lee v. U.S. Dep't of Justice*, 428 F.3d 299 (D.C. Cir. 2005).

³²² Holland, *supra* note 8.

³²³ *Id.*

³²⁴ *Lee v. U.S. Dep't of Justice*, 327 F. Supp. 2d 26, 27 n.1 (D.D.C. 2004).

³²⁵ *Lee v. U.S. Dep't of Justice*, 401 F. Supp. 2d 123 (D.D.C. 2005).

³²⁶ *Id.* at 144.

³²⁷ Charles Lane, *Post Reporter Asks Judge to Rethink Order*, WASH. POST, Nov. 18, 2005, at A2.

4. The Islamic Charities Case

Patrick Fitzgerald, the same federal prosecutor who subpoenaed Cooper and Miller in the Plame case, obtained a subpoena for the phone records of Miller and fellow *New York Times* reporter Philip Shenon in another investigation.³²⁸ Fitzgerald reportedly was investigating whether anyone in the government leaked information to the reporters about an upcoming raid and asset seizure of charities believed to have ties to the al Qaeda terrorist group.³²⁹ Investigators believe that calls from reporters to the charities seeking comment about government accusations of terrorist ties may have tipped off the charities to upcoming raids and led to the destruction of documents.³³⁰ In response, the *New York Times* sued the government in September 2004 to stop the prosecutor from inspecting the telephone records.³³¹

The subpoena for phone records was served on the phone company and not the journalists, making the *Times*' suit a bit tricky. Although journalists have sometimes succeeded in getting federal and state investigators to abandon attempts to subpoena journalists' phone records or promise never to do it again,³³² that has not always been the case.³³³ Justice Department guidelines state that the Attorney General must approve a subpoena for journalists' phone records and require that the person whose records were subpoenaed be notified, but the notification can occur before or after the subpoena is issued, depending upon the sensitivity of the investigation.³³⁴

In February 2005, shortly after Miller and Cooper lost their appeal in the D.C. Circuit, a federal district judge in New York ruled in the *Times*' favor on most of the issues raised in its suit.³³⁵ Fitzgerald has filed notice that he intends to appeal to the U.S. Court of Appeals for the Second Circuit.³³⁶

³²⁸ Susan Schmidt, *Reporters' Files Subpoenaed*, WASH. POST, Sept. 10, 2004, at A16.

³²⁹ *Id.*

³³⁰ *Id.*

³³¹ Adam Liptak, *Times Sues Prosecutor on Phone Records*, N.Y. TIMES, Sept. 29, 2004, at A19.

³³² See Mark Hansen, *P&G Looks for a News Leak: Police Bypass Shield Law in Search of Phone Records for Calls to Reporter*, 77 A.B.A. J. 32 (1991) (reporting that Procter & Gamble admitted it got the police to subpoena a reporter's phone records to see who had been leaking "trade secrets" to the *Wall Street Journal*); Allan Wolper, *Justice Dept. Admits Violation*, EDITOR & PUBLISHER, Sept. 27, 1997, at 10 (indicating that the Justice Department officials said they violated their own policy in not getting Attorney General Janet Reno to approve a subpoena for the phone records of a journalist who had been investigating the crash of TWA Flight 800 in New York).

³³³ See Todd Shields, *Feds Stir Double Trouble Using Subpoena Power*, EDITOR & PUBLISHER, Sept. 3, 2001, at 5 (reporting that the Justice Department refused to explain why it subpoenaed phone records of an Associated Press reporter who had written about a federal investigation of New Jersey Senator Robert Torricelli's campaign finances).

³³⁴ 28 C.F.R. § 50.10 (2003).

³³⁵ *N.Y. Times Co. v. Gonzales*, 382 F. Supp. 2d 457 (S.D.N.Y. 2005).

³³⁶ See REPORTERS COMM. FOR FREEDOM OF THE PRESS, SPECIAL REPORT: REPORTERS AND FEDERAL SUBPOENAS, *supra* note 20.

5. The Hatfill Case

In October 2004, the United States Department of Justice agreed to send dozens of its investigators a release form.³³⁷ The forms would release journalists from any pledges they made to the investigators to keep their identities confidential.³³⁸ The Justice Department sent the forms to investigators at the request of Steven J. Hatfill, who was suing the government for leaking information to the media linking him to anthrax poisonings in the months after the terrorist attacks of September 11, 2001.³³⁹ Hatfill's attorney said he wanted the promises of confidentiality waived so that he could depose reporters to find out who leaked them information rather than deposing investigators.³⁴⁰ Noting that similar waivers were given to possible sources of the Valerie Plame leak, Hatfill's attorneys referred to the waivers they sought as "Plame waivers."³⁴¹

According to the Reporters Committee for Freedom of the Press, which is keeping track of the various press subpoena cases on its website, at least eight news organizations or journalists — ABC, CBS, NBC, Gannett, *Newsweek*, the *Washington Post*, the *Los Angeles Times*, and Scott Shane of the *New York Times* — received subpoenas from Hatfill.³⁴² The news organizations were challenging the subpoenas in federal court, but Hatfill withdrew the subpoenas and began to depose Justice Department officials first.³⁴³ However, he could still refile the subpoenas if he does not learn from the Justice Department the identities of those who leaked information about the investigation to the press.³⁴⁴

6. Other Cases

Two other cases in which members of the press faced subpoenas were settled with little fanfare, although one may only be dormant.

³³⁷ Scott Shane, *Anthrax Figure Wins a Round on News Sources*, N.Y. TIMES, Oct. 22, 2004, at A12 [hereinafter Shane, *Anthrax Figure*].

³³⁸ *Id.*

³³⁹ *Id.*; see also William J. Broad & Kate Zernike, *In Second Move, Germ Attack Training Center Fires Director*, N.Y. TIMES, Sept. 6, 2002, at A15; David Johnston, *Apartment Searched Anew in F.B.I.'s Anthrax Inquiry*, N.Y. TIMES, Aug. 2, 2002, at A18; David Johnston, *Scientist Fired After Warning on U.S. Funds*, N.Y. TIMES, Sept. 5, 2002, at A18; Iver Peterson, *Anthrax Finding Prompts Questions in Princeton About Scientist*, N.Y. TIMES, Aug. 14, 2002, at B5; Eric Schmitt, *Scientist Denies Being Involved in Anthrax Plot*, N.Y. TIMES, Aug. 12, 2002, at A1.

³⁴⁰ Shane, *Anthrax Figure*, *supra* note 337.

³⁴¹ *Id.*

³⁴² See REPORTERS COMM. FOR FREEDOM OF THE PRESS, SPECIAL REPORT: REPORTERS AND FEDERAL SUBPOENAS, *supra* note 20.

³⁴³ *Id.*

³⁴⁴ *Id.*

In June 2004, three reporters for the *New York Times* and the Reuters news service went to court in New York to fight subpoenas from government prosecutors ordering them to testify about statements made by Lynne Stewart, an attorney accused of conspiring to aid terrorists.³⁴⁵ A subpoena for a fourth reporter, from *Newsday*, was later withdrawn because she was covering the trial.³⁴⁶ In September, a reporter for Reuters based in Egypt testified in Stewart's trial, but the judge did not force the two *New York Times* reporters to take the stand.³⁴⁷ Stewart was eventually convicted.³⁴⁸

Also in September 2004, it was revealed that the *San Francisco Chronicle* and the *San Jose Mercury News* in California had received letters from federal prosecutors asking for information about confidential sources.³⁴⁹ Apparently prosecutors wanted to know who gave the newspapers transcripts of grand jury testimony regarding the use of illegal steroids by several sports celebrities.³⁵⁰ The California cases have not resulted in subpoenas as of this writing.

All of the subpoena cases discussed above raise issues related to the journalist's privilege, some of them new, some of them variations on old themes. Those issues will be discussed below.

B. What Does Branzburg Mean?

In the Valerie Plame case, U.S. District Judge Thomas Hogan noted, in ruling against Tim Russert and Matthew Cooper on motions to quash, that journalists subpoenaed by a grand jury investigating a specific crime face the "inevitable holding" in *Branzburg* that journalists are not protected by the First Amendment from subpoenas for grand jury testimony.³⁵¹ Russert tried to argue that *Branzburg* was about reporters who had witnessed criminal activity rather than reporters who had spoken to confidential sources, but Judge Hogan shot down that argument.³⁵² The judge found that it was the proceeding, not the type of information that was sought, that mattered in distinguishing *Branzburg*'s clear holding regarding grand jury testimony

³⁴⁵ Pete Bowles, *Hearing Today; Effort on to Prevent Reporters' Testimony*, *NEWSDAY*, June 18, 2004, at A22.

³⁴⁶ Pete Bowles, *Terror Trial; Subpoena for Reporter Withdrawn*, *NEWSDAY*, June 19, 2004, at A12.

³⁴⁷ Patricia Hurtado, *Reporter Testifies Radical Cleric's Lawyer Phoned*, *NEWSDAY*, Sept. 14, 2004, at A21; REPORTERS COMM. FOR FREEDOM OF THE PRESS, SPECIAL REPORT: REPORTERS AND FEDERAL SUBPOENAS, *supra* note 336.

³⁴⁸ Julia Preston, *Lawyer Is Guilty of Aiding Terror*, *N.Y. TIMES*, Feb. 11, 2005, at A1.

³⁴⁹ Joe Strupp, *Now Feds Target 'Merc' Reporters in BALCO Probe*, *EDITOR & PUBLISHER*, Sept. 13, 2004, http://www.editorandpublisher.com/eandp/news/article_display.jsp?vnu_content_id=1000629042 (last visited Feb. 17, 2006).

³⁵⁰ *Id.*

³⁵¹ *In re* Special Counsel Investigation, 332 F. Supp. 2d 26, 31 (D.D.C. 2004).

³⁵² *Id.*

from other courts' holdings regarding other legal proceedings.³⁵³ Similarly, in the Taricani case, the First Circuit panel determined that a special prosecutor's investigation was the same, for all practical purposes, as a grand jury investigation. Therefore, the court said, Taricani had the nearly impossible task of avoiding the holding in *Branzburg*.³⁵⁴

But is the *Branzburg* holding so inevitable? Russert had a point. In fact, there are two passages in *Branzburg* that suggest that Russert's interpretation is correct. The first, in the majority opinion, says that the ruling is unlikely to affect most reporter-source confidential relationships:

Grand juries address themselves to the issues of whether crimes have been committed and who committed them. *Only where news sources themselves are implicated in crime or possess information relevant to the grand jury's task need they or the reporter be concerned about grand jury subpoenas.* Nothing before us indicates that a large number or percentage of *all* confidential news sources falls into either category and would in any way be deterred by our holding that the Constitution does not, as it never has, exempt the newsman from performing the citizen's normal duty of appearing and furnishing information relevant to the grand jury's task.³⁵⁵

The second passage is Justice Powell's concurring opinion, in which he emphasized that the Court's holding was "limited" and that journalists could still petition the courts for relief if they believed they were being harassed by investigators.³⁵⁶

So Russert's suggestion that not all grand jury subpoenas are treated equal in *Branzburg* may have some merit. Russert's arguments failed to help him or Cooper and Miller, however, because their sources may have broken the law by speaking to the press about Plame, thus making the reporters witnesses to their crimes. Still, media attorneys may want to note Russert's argument in future cases in which reporters are being pressured to testify before grand juries about more indirect evidence of crime.

C. Exhaustion of Sources

Many federal courts follow the Stewart dissenting opinion in *Branzburg* to some degree and require that a subpoena to the press should be quashed unless the subpoenaing party can show that the information sought is relevant and important

³⁵³ *Id.*

³⁵⁴ See *supra* text accompanying notes 264–66.

³⁵⁵ *Branzburg v. Hayes*, 408 U.S. 665, 691 (1972) (first emphasis added).

³⁵⁶ *Id.* at 709–10 (Powell, J., concurring).

to the case and unavailable elsewhere. However, just how “unavailable” does the information have to be before the court will order the press to comply with a subpoena?

In the *Lee* case, there are no Sixth Amendment issues of the sort that arise when a criminal defendant seeks exculpatory evidence in a journalist’s possession,³⁵⁷ and there is no direct link to the “inevitable holding” in *Branzburg* concerning grand juries. However, the very first case in which a reporter claimed a First Amendment privilege not to reveal a source involved a subpoena in a civil case in which the reporter was not a party.³⁵⁸ Marie Torre lost because the U.S. Court of Appeals for the Second Circuit determined that the information she possessed went to the heart of Judy Garland’s claim against CBS.³⁵⁹

Likewise, U.S. District Judge Thomas Penfield Jackson found in the *Lee* case that Lee had exhausted every other *reasonable* avenue for discovering the identity of government agents who disclosed information about him to the media.³⁶⁰ During oral arguments before the Court of Appeals for the District of Columbia, attorneys for the media argued that Lee needed to *exhaust* alternative sources for uncovering the leakers before turning to the reporters.³⁶¹ Charles Tobin, an attorney for one of the reporters, said that Lee not only had not exhausted all other sources, he had not even fatigued them.³⁶²

But is exhaustion of *all* other sources necessary? It depends upon the court. In the Second Circuit, for instance, a subpoenaing party must exhaust “other available sources” of information before forcing the press to provide confidential information.³⁶³ However, if the information sought is not confidential, the party issuing the subpoena must only show that it has looked in every *reasonable* alternative place for the information.³⁶⁴ Other federal courts are split on how far a litigant has to go before turning to the press for information. The D.C. Circuit had said in *Zerilli v. Smith* that all “reasonable” alternative sources must be exhausted before a civil litigant may demand confidential information from a journalist.³⁶⁵ In *Lee*, the appellate court said that twenty depositions were enough to satisfy reasonableness

³⁵⁷ For a discussion of the federal privilege in criminal cases, see Karl H. Schmid, *Journalist’s Privilege in Criminal Proceedings: An Analysis of United States Courts of Appeals Decisions from 1973 to 1999*, 39 AM. CRIM. L. REV. 1441 (2002).

³⁵⁸ *Garland v. Torre*, 259 F.2d 545, 547 (2d Cir. 1958); *see also supra* text accompanying notes 71–74.

³⁵⁹ *Garland*, 259 F.2d at 550.

³⁶⁰ *Lee v. U.S. Dep’t of Justice*, 287 F. Supp. 2d 15, 23 (D.D.C. 2003).

³⁶¹ Richard B. Schmitt, *Reporters Insist Others, Not They, Be Targeted in Leak Case*, L.A. TIMES, May 10, 2005, at A9.

³⁶² *Id.*

³⁶³ *See In re Petroleum Prods. Antitrust Litig.*, 680 F.2d 5, 7 (2d Cir. 1982).

³⁶⁴ *Gonzales v. NBC*, 194 F.3d 29, 36 (2d Cir. 1999).

³⁶⁵ *Zerilli v. Smith*, 656 F.2d 705, 713 (D.C. Cir. 1981); *see also supra* text accompanying notes 151–52.

and suggested that what is or is not reasonable is a case-specific determination, not the result of an arbitrary blanket rule.³⁶⁶ While a case-by-case analysis of reasonable exhaustion of alternative sources is rational given the wide variety of possible facts in civil cases, it does not help journalists predict whether they are likely to be able to keep promises to sources without going to jail or paying fines.

D. Privilege Waivers

In its brief on appeal in the Valerie Plame case, the government tried to argue that because various potential sources had signed waivers of their confidentiality agreements with reporters, the reporters no longer could claim privilege protection in regard to those sources.³⁶⁷ The government cited *McKevitt v. Pallasch*, noting that Judge Posner in that case said that if the source was known and had no objection to the reporter's testimony, the reporter's continuing protest seemed illogical.³⁶⁸ Two of the three appellate judges who heard Miller's and Cooper's appeals did not address the government's contention. In a concurring opinion, the third judge on the panel noted the government's contention but rejected it, finding that because the privilege belonged to the reporter, not the source, the source could not forfeit protection for the reporter.³⁶⁹

By the time the Court of Appeals ruled in the Plame case, however, the government had bowed to a request by attorneys for Steven J. Hatfill and sent confidentiality waivers to Justice Department investigators who might have talked to reporters about Hatfill's alleged involvement in mailing anthrax-tainted letters after the September 11th terrorist attacks.³⁷⁰ A Hatfill attorney said he wanted the promises of confidentiality waived so that he could go directly to reporters to depose them regarding sources rather than first deposing Department of Justice investigators to find out who leaked information about Hatfill to the media.³⁷¹ Although Hatfill decided to try deposing Justice Department officials before calling reporters, it is possible that, armed with the waivers, he may go back to the reporters for information if he does not learn what he wants to know from government employees.³⁷²

Indirectly, the *McKevitt* decision may have helped open the door for the use of confidentiality waivers to defeat journalists' privilege claims. The waivers are in the spirit of the *McKevitt* dicta questioning why journalists should be protected

³⁶⁶ Lee v. U.S. Dep't of Justice, 413 F.3d 53, 60–61 (D.C. Cir. 2005).

³⁶⁷ Brief of the United States, Appellee, at 46, *In re Grand Jury Subpoena* (Miller), 397 F.3d 964 (D.C. Cir. 2005) (No. 04-3138).

³⁶⁸ *Id.* (citing *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003)).

³⁶⁹ *In re Grand Jury Subpoena* (Miller), 397 F.3d at 999–1000 (Tatel, J., concurring), cert. denied, 125 S. Ct. 2977 (2005).

³⁷⁰ Shane, *Anthrax Figure*, *supra* note 337.

³⁷¹ *Id.*

³⁷² See *supra* text accompanying notes 342–44.

from testifying when their sources do not object. But legal experts and journalists have expressed concern about whether reporters should testify about conversations with confidential sources even if the sources have waived confidentiality agreements. After Judith Miller was ordered to testify about her conversations with confidential sources regarding Valerie Plame,³⁷³ George Freeman, an attorney for the *New York Times*, said he believed that the waivers had been “coerced” and therefore had no effect on Miller’s promise.³⁷⁴ Freeman said he believed that the officials who signed waivers were threatened with firing if they did not sign the forms.³⁷⁵ If this is true, it puts journalists in the awkward position of maintaining a confidence that the source may also want to maintain but is compelled to publicly disavow. If the journalist takes the confidentiality waiver at face value and reveals the source and/or what the source said, the journalist’s decision is unlikely to reassure possible future sources about the journalist’s commitment to protecting them.

Unfortunately, the issue has been further muddled by the Judith Miller case. After Miller was released from jail, a story in her newspaper raised questions about whether her source, I. Lewis Libby, had given her permission to identify him before she went to jail and she simply misunderstood what he and his lawyer said.³⁷⁶ Citing what she called “the Judith Miller imbroglio,” U.S. District Judge Rosemary M. Collyer took the unprecedented step of ordering Walter Pincus, a *Washington Post* reporter found in contempt in regard to the Wen Ho Lee case, to inform his government sources of her order and give them the opportunity to waive confidentiality.³⁷⁷ So in addition to the “Plame waivers,” we may now have the “Miller order.”

E. Is the Privilege Deserting Reporters When They Need It Most?

It would be easy to criticize James Taricani, Matthew Cooper, Judith Miller, and the reporters subpoenaed in the *Lee* case for pushing their cases to their inevitable conclusions. Taricani, Cooper, and Miller were facing subpoenas from special prosecutors and a grand jury, which put them on a collision course with the “inevitable holding” of *Branzburg*.³⁷⁸ The reporters whom Lee subpoenaed faced the task of showing that Lee had not exhausted all *reasonable* alternatives, not all *possible* alternatives. As the Court of Appeals noted in rejecting appeals of contempt citations by four of the six reporters Lee subpoenaed, Lee had sent 420 discovery requests to the government but had been rebuffed by claims of law enforcement

³⁷³ *In re Special Counsel Investigation*, 338 F. Supp. 2d 16, 19 (D.D.C. 2004).

³⁷⁴ Liptak & Pear, *supra* note 291.

³⁷⁵ *Id.*

³⁷⁶ Don Van Natta, Jr., et al., *The Miller Case: A Notebook, a Cause, a Jail Cell and a Deal*, N.Y. TIMES, Oct. 16, 2005, at A1.

³⁷⁷ *Lee v. Dep’t of Justice*, 401 F. Supp. 2d 123, 144 (D.D.C. 2005). *See also* text accompanying notes 325–27.

³⁷⁸ *See supra* Part III.B.

privilege in most of them.³⁷⁹ The twenty people Lee deposed were likely leak sources or could have been expected to know who the leaker or leakers were, but none were helpful to Lee's case.³⁸⁰ So it was not irrational that the Court of Appeals determined that Lee had exhausted all reasonable sources.

Before we blame the reporters and their attorneys for helping to create bad law, however, we need to consider both the nature of privilege law and the nature of journalism. *Branzburg v. Hayes*, the seminal case on journalist's privilege, was decided thirty-four years ago and was not a paragon of clarity. In those thirty-four years, journalist's privilege law has become a crazy quilt of conflicting levels of protection. It was reasonable for the reporters and their attorneys to hope that courts hearing their cases in 2004 and 2005 might find nuances in *Branzburg* and its progeny that would turn the decisions in their favor.

In regard to the nature of journalism, the recent cases are important in part because they come at a time when journalists — and the public — may need information from confidential sources more than usual. In the wake of the terrorist attacks of September 11, 2001, the federal government has been challenged to find ways to make the country more secure from terrorists without infringing civil liberties more than necessary. Questions about how well the government is meeting those challenges are matters of high public interest and concern, as are questions about how and why the government chose to go to war with Iraq in 2003 and how the war is being conducted.

As Vincent Blasi suggested more than twenty-five years ago, the press plays an important role in checking government power.³⁸¹ In the post-September 11th world, the press's job has become more complicated. Governmental attempts to keep information that might aid terrorists out of the public domain has led to a near-epidemic of documents being classified as secret, including information that has been widely publicized for years.³⁸² The government's decision to detain terrorism suspects without trial indefinitely³⁸³ and its treatment of war prisoners in Iraq³⁸⁴ have raised troubling questions that deserve public scrutiny. If the press is to do an adequate job of informing the public about how the government is battling terrorism and waging war at a time of increased secrecy and the Bush Administration's highly effective effort to control the flow of information,³⁸⁵ confidential sources may be more necessary than usual.

³⁷⁹ *Lee v. U.S. Dep't of Justice*, 413 F.3d 53, 56 (D.C. Cir. 2005).

³⁸⁰ *Id.*

³⁸¹ See Blasi, *The Checking Value*, *supra* note 101.

³⁸² See Shane, *Since 2001, Sharp Increase*, *supra* note 29.

³⁸³ See Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

³⁸⁴ See James Risén, *G.I.'s Are Accused of Abusing Iraqi Captives*, N.Y. TIMES, Apr. 29, 2004, at A15.

³⁸⁵ See Robertson, *supra* note 29.

In 1971, the Supreme Court determined that the government could not enjoin the press from publishing excerpts of a classified report detailing the history of the United States' involvement in Vietnam.³⁸⁶ In a concurring opinion, Justice Hugo Black, joined by Justice William O. Douglas, argued that the press was serving the function intended by the First Amendment's writers: "The press was protected so that it could bare the secrets of government and inform the people."³⁸⁷ Later in the same opinion, Justice Black also criticized the government for arguing that publication could be restrained in the name of national security:

The word "security" is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment. The guarding of military and diplomatic secrets at the expense of informed representative government provides no real security for our Republic. The Framers of the First Amendment, fully aware of both the need to defend a new nation and the abuses of the English and Colonial governments, sought to give this new society strength and security by providing that freedom of speech, press, religion, and assembly should not be abridged.³⁸⁸

More recently, the tensions created by national security concerns were perhaps best summed up by *Washington Post* reporter Walter Pincus before he testified to the grand jury, apparently with his source's blessing, in the Valerie Plame matter. Pincus, according to a press report, told special prosecutor Patrick Fitzgerald: "As someone who covers national security and intelligence, I depend on confidential sources more than most reporters My sources take a chance when they trust me with information that could cost them their jobs or have other serious consequences. In turn, I will protect them."³⁸⁹

But it would be naïve to say that the press always acts responsibly and in the greatest public interest when it reports on national security issues. *Newsweek* magazine had to retract a story in May 2005 stating that American interrogators had flushed copies of the Muslim holy book, the Koran, down toilets while questioning suspected terrorists.³⁹⁰ The Bush Administration blamed the story, based on information from a confidential government source, for causing deadly anti-American riots in Afghanistan.³⁹¹ In the wake of the *Newsweek* incident and polls showing

³⁸⁶ N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam).

³⁸⁷ *Id.* at 717 (Black, J., concurring).

³⁸⁸ *Id.* at 719.

³⁸⁹ Adam Liptak, *Reporters Face Scrutiny in C.I.A. Leak Inquiry*, N.Y. TIMES, Sept. 28, 2004, at A18.

³⁹⁰ Mark Whitaker, *The Editor's Desk*, NEWSWEEK, May 23, 2005, at 6.

³⁹¹ Katharine Q. Seelye & Neil A. Lewis, *Newsweek Says It Is Retracting Koran Report*, N.Y. TIMES, May 17, 2005, at A1.

that most Americans do not trust the credibility of the media,³⁹² many news organizations announced that they were tightening rules about the use of anonymous sources.³⁹³

At about the same time that *Newsweek* was backtracking from its Koran story, however, the public got a reminder of the public service that confidential sources can provide: Mark Felt, a former top FBI official, revealed in June 2005 that he was "Deep Throat," the famous source for Bob Woodward's and Carl Bernstein's Watergate reports in *The Washington Post*.³⁹⁴ Felt, along with dozens of other anonymous sources who were not blessed with sexy nicknames, helped Woodward and Bernstein uncover illegal activities in the Nixon White House.³⁹⁵ Their reporting helped create an outcry that forced President Nixon to resign from office in 1974.³⁹⁶

There have been other recent reminders that confidential sources often do more good than harm. The New York City Bar Association's Committee on Communications and Media Law published a position paper supporting journalists' right to protect confidential sources.³⁹⁷ In the position paper, the committee cited more than a half-dozen recent news stories that exposed public and private misdeeds, wastes of taxpayer money, and threats to public health and safety.³⁹⁸ All of the stories were made possible by tips or other information from confidential sources.³⁹⁹

The public service that journalists using confidential sources can perform also was made clear when Judith Miller and Matthew Cooper picked up unlikely allies in their Supreme Court appeal. Among the groups filing briefs on their behalf was a coalition of thirty-four state attorneys general who urged the Court to hear the appeal and rule in favor of protecting the journalist's privilege.⁴⁰⁰ News reports said

³⁹² Results of opinion polls by Gallup and Harris polling organizations since February 2005 show that the news media rank near the bottom of institutions in regard to public confidence, just ahead of Congress, big business, lawyers, and health maintenance organizations. See PollingReport.com, Major Institutions, <http://www.pollingreport.com/institut.htm> (last visited Jan. 13, 2006).

³⁹³ Lorne Manly, *Big News Media Join in Push to Limit Use of Unidentified Sources*, N.Y. TIMES, May 23, 2005, at C1; see also Katharine Q. Seelye, *Fewer Sources Go Nameless in the Press, Survey Shows*, N.Y. TIMES, Mar. 14, 2005, at C6.

³⁹⁴ Evan Thomas, *A Long Shadow*, NEWSWEEK, June 13, 2005, at 22. See also BOB WOODWARD, *THE SECRET MAN* (2005); Carl Bernstein, *Watergate's Last Chapter*, VANITY FAIR, Oct. 2005, at 290.

³⁹⁵ See generally CARL BERNSTEIN & BOB WOODWARD, *ALL THE PRESIDENT'S MEN* (1974). The reporters dedicated the book to "the President's other men and women — in the White House and elsewhere — who took risks to provide us with confidential information." *Id.*

³⁹⁶ See Thomas, *supra* note 394.

³⁹⁷ Comm. on Commc'ns & Media Law, *The Federal Common Law of Journalists' Privilege*, 60 REC. 214 (2005).

³⁹⁸ *Id.* at 225–27.

³⁹⁹ *Id.* at 227.

⁴⁰⁰ Liptak, *State Attorneys General*, *supra* note 299.

that the attorneys general believed that the benefits of protecting journalists' use of confidential sources outweighed any harm to law enforcement.⁴⁰¹

Not all sources are Deep Throat and not all news stories based on confidential sources are Watergate. As one reporter put it after Miller was sent to jail, "This is not a Pentagon Papers case."⁴⁰² Instead of uncovering a government scandal, Miller's source put her in the position of helping to cover one up. Telling reporters about a CIA operative, possibly to score political points against the operative's husband, is not the same as exposing high crimes and misdemeanors in the White House. The facts of Miller's case make it difficult to justify her actions to a public already highly critical of the press.⁴⁰³ One also could question whether allowing Wen Ho Lee and Steven Hatfill to learn the identities of those who leaked private information about them to the press is more in the public interest than protecting the sources. If government officials are revealing CIA operatives' names for political reasons or using the media to rally public opinion against people even as formal investigations collapse, should the public not know about it?

The problem for journalists, of course, is that it is hard to predict whether people who want to expose wrongdoing to the public will understand that some sources are "bad" and must be revealed while others are "good" and will be protected at all costs. How does a potential source know whether she will be considered "bad" or "good" when the heat is on the reporter to reveal her name?

Justice Potter Stewart explained the importance of protecting reporters' decisions to keep sources confidential in his *Branzburg* dissent. Although his explanation was logical and intuitively sound, it did not persuade the majority on the court in that case. Justice Stewart said:

The right to gather news implies . . . a right to a confidential relationship between a reporter and his source. This proposition follows as a matter of simple logic once three factual predicates are recognized: (1) newsmen require informants to gather news; (2) confidentiality — the promise or understanding that names or certain aspects of communications will be kept off the record — is essential to the creation and maintenance of a news-gathering relationship with informants; and (3) an unbridled subpoena power — the absence of a constitutional right protecting, in *any* way, a confidential relationship from compulsory process — will either deter sources from divulging information or deter reporters from gathering and publishing information.⁴⁰⁴

⁴⁰¹ *Id.*

⁴⁰² Jacques Steinberg, *Response from Journalists Is Not Unanimous*, N.Y. TIMES, July 7, 2005, at A18.

⁴⁰³ See *supra* note 392 (citing polls).

⁴⁰⁴ *Branzburg v. Hayes*, 408 U.S. 665, 728 (1972) (Stewart, J., dissenting).

If Justice Stewart was correct about the correlation between sources, the free flow of news, and the effects of subpoenas, then Miller, Taricani, and the reporters subpoenaed in the *Lee* case had little choice but to resist testifying.

After *Branzburg*, the federal courts tried to find ways to balance the conflicting interests of law enforcement, criminal defendants, civil litigants, and the press. While the ad hoc nature of privilege law since 1972 has made it less than predictable, the courts managed to create a reasonably workable system of qualified protection for journalists. Recently, however, journalists have lost far more often than they have won when they have taken challenges to subpoenas to federal appellate courts. While the results in some recent cases have been predictable in light of *Branzburg* and its progeny, the sheer weight of negative precedent may make it increasingly difficult for journalists to defend the privilege even when the facts are more in their favor.

Is there a way to shift the balance more toward journalists without denying the criminal and civil justice systems too much valuable information? Perhaps. Absent a Supreme Court decision clarifying *Branzburg*, one solution might be a federal shield law. As the next section will note, proposals for such a law are already pending in Congress. But even as Congress begins to debate varying proposals for shield laws, a new issue threatens to make Congress's job harder: how to define who is protected when anyone with a computer and an Internet connection can be a journalist.

IV. SHIELD LAWS AND BLOGS — NEW CHALLENGES AND OPPORTUNITIES FOR THE PRIVILEGE

Given the recent controversies over assertions of the journalist's privilege, it is perhaps not surprising that members of Congress have filed bills to create a federal shield law that would protect journalists' relationships with sources. Congress attempted to pass such a law shortly after the *Branzburg* decision but was never able to reach a consensus on key issues.⁴⁰⁵ As the bills make their way through the House and Senate, the issue of how to define "journalist" likely will be a sticking point. That issue is more complicated because of the growing popularity of web logs, or "blogs." If a blog performs basically the same function as a newspaper or television news program, should the person who writes it get the same protection as a newspaper or television reporter? Or would extending the privilege to so many people make it impossible to support the privilege any longer? This section examines the shield-law proposals and the emerging legal issues raised by blogs.

⁴⁰⁵ See AM. ENT. INST. FOR PUB. POL'Y RESEARCH, LEGISLATIVE ANALYSIS: NEWSMEN'S PRIVILEGE LEGISLATION (1973).

A. Shield Law Proposals

At issue in any dispute between a journalist seeking to quash a subpoena and a party seeking to enforce that subpoena is a delicate balancing act between two high-level public interests. One is the ability of courts to get at the truth in a criminal or civil context by compelling evidence production. The other is the ability of journalists to promise vulnerable sources of important information that the sources can rely on journalists' promises of confidentiality.

In the recent controversies over leaks to reporters of evidence, the status of investigations, or the identity of CIA operatives, the decisions against reporters may have been predictable in light of precedents. However, potential sources of sensitive information could not be expected to understand the nuances of privilege law. They could be expected to see the decisions against journalists as a disincentive to trust reporters with what they know for fear that they could be exposed. In such a circumstance, the balance may be tipped too far in favor of law enforcement and civil litigants. A shield law that creates clear, consistent, and strong protection for journalists could help restore balance to the relationship between the judiciary and the press.

Three shield bills have been introduced in the Senate and two in the House of Representatives. However, two of the Senate bills are identical to the two House bills and have the same sponsors. Senator Christopher Dodd (D-Conn.) introduced Senate Bill 369 (hereafter S. 369) in February 2005.⁴⁰⁶ It is called the Free Speech Protection Act of 2005.⁴⁰⁷ Senator Dodd had proposed the same bill toward the end of the 108th Congress in December 2004,⁴⁰⁸ but it was never acted upon. Senator Richard Lugar (R-Ind.) introduced Senate Bill 340 (hereafter S. 340), also in February 2005,⁴⁰⁹ which is identical to House Bill 581 (hereafter H.R. 581), introduced by Representative Mike Pence (R-Ind.).⁴¹⁰ However, in July 2005, in response to questions raised about the bills, Senator Lugar and Representative Pence introduced S. 1419 and H.R. 3323, respectively, which amended S. 340 and H.R. 581.⁴¹¹

The Dodd bill, S. 369, would provide absolute protection to journalists in regard to confidential sources in proceedings of all three branches of government.⁴¹² The

⁴⁰⁶ Free Speech Protection Act, S. 369, 109th Cong. (2005).

⁴⁰⁷ *Id.*

⁴⁰⁸ Free Speech Protection Act of 2004, S. 3020, 108th Cong. (2004).

⁴⁰⁹ Free Flow of Information Act of 2005, S. 340, 109th Cong. (2005).

⁴¹⁰ Free Flow of Information Act of 2005, H.R. 581, 109th Cong. (2005).

⁴¹¹ Free Flow of Information Act of 2005, S. 1419, 109th Cong. (2005); Free Flow of Information Act of 2005, H.R. 3323, 109th Cong. (2005). For the purpose of clarity, discussions of the pending bills will refer only to the most recent Senate versions, S. 369 and S. 1419, and to the Senate sponsors, Dodd and Lugar. For a more detailed examination of the shield law proposals in Congress, see Anthony L. Fargo, *Analyzing Federal Shield Law Proposals: What Congress Can Learn from the States*, 11 COMM. L. & POL'Y 35 (2006).

⁴¹² S. 369, §§ 3(a)(1), 4(b).

bill would provide a qualified privilege in regard to other information, such as unpublished notes and outtakes, and would allow discovery if the information was found to be critical and necessary to the underlying case, unavailable elsewhere, and if disclosure was of an overriding public interest.⁴¹³ By contrast, the Lugar bill, S. 1419, would give absolute protection against disclosure of confidential sources unless the information was needed in regard to a matter of national security.⁴¹⁴ In regard to unpublished material such as notes and outtakes, the Lugar bill would provide qualified protection, with the qualifications differing depending upon whether the underlying case was criminal or civil.⁴¹⁵ Unlike the Dodd bill, the Lugar bill would only limit the power of the executive and judicial branches to subpoena journalists, not Congress.⁴¹⁶

The two bills have significant differences. The Dodd bill says that the publication of a source of news or information or a portion of the news or information itself should not be construed as a waiver of the bill's protection.⁴¹⁷ The Lugar bill contains no such provision. However, the Lugar bill contains a provision that would bar executive or judicial branch entities from issuing subpoenas to telecommunications companies, information service providers, or operators of interactive computer services for records of business transactions between those companies or providers and covered persons.⁴¹⁸ Subpoenas for such records would have to meet the same requirements related to covered persons. A subpoena for such information could be enforced only if the covered person (journalist or company) is notified of the subpoena's issuance and is allowed to be heard in court before the information is disclosed.⁴¹⁹ However, the bill would provide an exception allowing a federal entity to skip the notice to the covered person if there is clear and convincing evidence that the notice would threaten a criminal investigation.⁴²⁰ Such a provision would provide extra protection to journalists such as Judith Miller and Philip Shenon of the *New York Times*, who went to court to fight a subpoena for their phone records.⁴²¹

Another key difference between the two bills is in how they define covered persons or institutions. Senator Dodd's bill would cover anyone who "engages in the gathering of news or information"⁴²² and "has the intent, at the beginning of the process of gathering news or information, to disseminate the news or information to the

⁴¹³ *Id.* §§ 3(a)(2), 4(a).

⁴¹⁴ S. 1419, § 2(a)(3).

⁴¹⁵ *Id.* § 2(a)(1)–(2).

⁴¹⁶ *Id.* § 5(4).

⁴¹⁷ S. 369, § 5.

⁴¹⁸ S. 1419, §§ 4(a), 5(1).

⁴¹⁹ *Id.* § 4(b)(1)–(2).

⁴²⁰ *Id.* § 4(c).

⁴²¹ *See supra* Part III.A.4.

⁴²² S. 369, § 2(1)(A).

public.”⁴²³ The bill defines “news or information” as “written, oral, pictorial, photographic, or electronically recorded information or communication concerning local, national, or worldwide events, or other matters.”⁴²⁴ The bill defines “news media” as a newspaper, magazine, journal or other periodical, radio, or television,⁴²⁵ as well as “any means of disseminating news or information gathered by press associations, news agencies, or wire services, (including dissemination to the news media . . .),”⁴²⁶ and “any printed, photographic, mechanical, or electronic means of disseminating news or information to the public.”⁴²⁷

The Lugar bill defines a “covered person” as any entity that “disseminates information by print, broadcast, cable, satellite, mechanical, photographic, electronic, or other means” through publishing a newspaper, book, magazine, or other periodical; through operating a radio or television broadcast station or network or cable system, satellite carrier, or providing programming via radio, television, cable, or satellite; the parent company of such an organization; or “an employee, contractor, or other person who gathers, edits, photographs, records, prepares, or disseminates news or information for such an entity.”⁴²⁸ The bill would apply to any document created by the covered persons in “writings, recordings, and photographs, as those terms are defined by Federal Rule of Evidence 1001.”⁴²⁹

The Dodd bill provides a more expansive definition of covered persons that could include Internet publishers and those who will use modes of communication not yet invented. But if the definition of “journalist” is stretched too far, could it sink the privilege altogether by allowing too many people to get out of the obligation to testify? Congress will find little guidance in the states that have shield laws. There has been relatively little litigation in the states with shield laws over definitions of “journalist,” and what litigation there has been has indicated that specificity in the definition can sometimes be a curse if the definition is too narrow.⁴³⁰ Senator Dodd’s definition does have the advantage of being similar to a definition that is already used by federal courts when nontraditional journalists claim privilege protection.⁴³¹

⁴²³ *Id.* § 2(1)(B).

⁴²⁴ *Id.* § 2(2).

⁴²⁵ *Id.* § 2(3)(A)–(E).

⁴²⁶ *Id.* § 2(3)(F).

⁴²⁷ *Id.* § 2(3)(G).

⁴²⁸ Free Flow of Information Act, S. 1419, 109th Cong. § 5(2)(A)–(C) (2005).

⁴²⁹ *Id.* § 5(3).

⁴³⁰ *See, e.g., Svoboda v. Clear Channel Commc’ns, Inc.*, 805 N.E.2d 559 (Ohio Ct. App. 2004) (finding that a radio station news director was not engaged in the work of gathering news when she discussed potentially libelous information about the plaintiff on a station phone — she was engaged in gossip); *In re Contempt of Stone*, 397 N.W.2d 244 (Mich. Ct. App. 1986) (holding that a broadcast journalist could not quash a subpoena under the Michigan shield law because the law did not specifically protect broadcasters).

⁴³¹ *See, e.g., In re Fitch, Inc.*, 330 F.3d 104 (2d Cir. 2003) (finding that a financial rating agency is not eligible to claim protection of New York shield law); *Cusumano v. Microsoft*

The task of defining who is or is not a “journalist” will not get any easier. A 2005 opinion poll indicated that the public has trouble distinguishing between conservative radio commentator Rush Limbaugh and Watergate reporter Bob Woodward when asked to identify whether someone is a “journalist.”⁴³² For its part, the Supreme Court declined to be drawn into the task of defining “journalist” in *Branzburg*, in part because of its belief that institutional differences between speakers or publishers should not be an issue. First Amendment scholar Frederick Schauer recently suggested that the Court should rethink its unwillingness to make rules based on institutional roles of speakers.⁴³³ Professor Schauer suggested that a Court unwilling to differentiate between bloggers, pamphleteers, and *New York Times* reporters was likely to accord fewer privileges to all rather than more privileges to some, even if the privilege would promote important First Amendment values.⁴³⁴ Professor Schauer’s point is interesting, but absent a major shift in the Supreme Court’s thinking in regard to First Amendment rights, such line-drawing is unlikely to come from the Court. If someone must draw lines, it might as well be Congress. How to draw the line is still a matter for debate unless or until the two houses of Congress agree on a shield law.

As of March 8, 2006, the Lugar-Pence bill appeared to have much more support than the Dodd bill. Senator Lugar had picked up twelve co-sponsors for his bill to Senator Dodd’s three, while Pence had sixty-six co-sponsors in the House.⁴³⁵ Whether a shield bill will pass and what it will say after Congress gets through with it are impossible to say. At this writing, the Senate Judiciary Committee had held two hearings on the Dodd and Lugar bills.⁴³⁶ The House Judiciary Committee had not yet scheduled hearings on Representative Pence’s version of the bill as of this writing.

Corp., 162 F.3d 708 (1st Cir. 1998) (extending privilege protection to book authors); *In re Madden*, 151 F.3d 125 (3d Cir. 1998) (denying privilege protection to the host of a talk show about professional wrestling); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (same as *Cusumano*); *Wright v. Fred Hutchinson Cancer Research Ctr.*, 206 F.R.D. 679 (W.D. Wash. 2002) (stating that a newspaper reporter did not lose the right to claim privilege when he shared information with plaintiffs in civil suit).

⁴³² Press Release, Annenberg Pub. Pol’y Ctr. of the Univ. of Pa., About One American in Four Considers Rush Limbaugh a Journalist, Roughly the Same Share as Identify Bob Woodward That Way, According to Annenberg Public Policy Center Survey (June 13, 2005) available at http://www.annenbergpublicpolicycenter.org/naes/2005_06_JournalistsSurvey.pdf (last visited Feb. 17, 2006).

⁴³³ Schauer, *supra* note 119, at 1259–60.

⁴³⁴ *Id.* at 1272.

⁴³⁵ For updates on the bills, see <http://thomas.loc.gov> (last visited Mar. 8, 2006).

⁴³⁶ See Lorne Manly, *Bill to Shield Journalists Gets Senate Panel Hearing*, N.Y. TIMES, July 21, 2005, at A13; Katharine Q. Seelye, *Journalists Testify in Favor of Shield Law*, N.Y. TIMES, Oct. 20, 2005, at A25.

B. Blogs and the Privilege

The issue of who would be able to seek protection behind the shield created by either bill pending in Congress looms larger as the Internet continues to open up a new universe of publication opportunities for both the institutional media and individuals. So far, Internet law is in its infancy. The Supreme Court has considered First Amendment issues raised by the Internet mostly in the context of legislation aimed at obscene or indecent material.⁴³⁷ In the first of those cases, *Reno v. ACLU*,⁴³⁸ the Court in 1997 praised “the vast democratic forums”⁴³⁹ of the Internet and its ability to allow anyone to become a “town crier” or pamphleteer at low cost and with a wide reach.⁴⁴⁰ At around the same time, web logs, or blogs, began to appear.⁴⁴¹

Blogs now vary widely in form, purpose, and authorship. Some are personal diaries while others are tied to corporations, politicians, and the media.⁴⁴² Some have one author while others are maintained by communities of writers; some are interactive and others are not.⁴⁴³ Blogs cover a wide range of topics, including media criticism and discussions of legal issues.⁴⁴⁴ In fact, bloggers are credited with pointing out problems in a CBS News story about President Bush’s military service that forced the network to retract the story.⁴⁴⁵

The wide variety of blogs makes them an attractive supplement or alternative to the institutional media, which critics say often do not operate in the public interest because their corporate structures make them more beholden to stockholders and advertisers than readers and viewers.⁴⁴⁶ Blogs and other Internet information

⁴³⁷ See, e.g., *United States v. Am. Library Ass’n*, 539 U.S. 194 (2003) (finding that Congress did not violate First Amendment in requiring libraries accepting government grants for computer purchases to install Internet filtering software on public-access computers); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234 (2002) (finding unconstitutional a federal law barring “virtual child pornography” that did not use or depict real children); *Reno v. ACLU*, 521 U.S. 844 (1997) (finding unconstitutionally vague and overbroad a federal law criminalizing the sending of “indecent” material to minors over the Internet).

⁴³⁸ 521 U.S. 844 (1997).

⁴³⁹ *Id.* at 868.

⁴⁴⁰ *Id.* at 870.

⁴⁴¹ For a concise definition, history, and description of blogs, see Wikipedia, Blog at <http://en.wikipedia.org/wiki/Blog> (last visited Jan. 13, 2006).

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ See Amy Kolz, *That’s Usin’ the Old Bloggin’; How Three Lawyers Posted Dan Rather Right Off the Evening News*, AM. LAW., Feb. 2005, at 20; Howard Kurtz, *After Blogs Got Hits, CBS Got a Black Eye*, WASH. POST, Sept. 20, 2004, at C1.

⁴⁴⁶ See, e.g., BEN H. BAGDIKIAN, *THE MEDIA MONOPOLY* (6th ed. 2000); ERIK BARNOUW ET AL., *CONGLOMERATES AND THE MEDIA* (1997); COMM’N ON FREEDOM OF THE PRESS, *A FREE AND RESPONSIBLE PRESS* (Robert D. Leigh ed., 1947) (arguing that the corporate structure of the news media was the biggest threat to press freedom); JAMES FALLOWS, *BREAKING*

sources are becoming increasingly popular as news sources even as the traditional media watch their audience numbers stagnate or decline.⁴⁴⁷

But the variety of blogs will also make it difficult to find a place to draw a line between protected and unprotected bloggers. Do some blogs look more like “journalism” than others? The trickiness of trying to strike the balance between fairness to all who practice journalism and ensuring that competent witnesses are available may explain why commentators in recent years have both suggested a narrower privilege for traditional journalists⁴⁴⁸ and a privilege that applies to more people but perhaps less information.⁴⁴⁹

The problem of defining “journalist” in the Internet age, whether through legislation or court interpretation, is more than speculative. Already, a California court has been confronted with determining whether proprietors of blogs can claim protection under the California shield law.⁴⁵⁰ In *Apple Computer Inc. v. Doe*,⁴⁵¹ bloggers who ran web sites devoted to Apple Computer products sought protective orders to avoid subpoenas in a trade secrets case.⁴⁵² The blogs had carried news about upcoming Apple products, including company-produced drawings and engineering specifications.⁴⁵³ Apple was seeking the identity of the person(s) who gave the bloggers the information but had not yet subpoenaed the bloggers.⁴⁵⁴

The Santa Clara County Superior Court judge who heard the case sidestepped the issue of whether bloggers are journalists by determining that the shield law would

THE NEWS: HOW THE MEDIA UNDERMINE AMERICAN DEMOCRACY (1996); ROBERT W. MCCHESENEY, RICH MEDIA, POOR DEMOCRACY: COMMUNICATION POLITICS IN DUBIOUS TIMES (1999); JAMES D. SQUIRES, READ ALL ABOUT IT! (1993).

⁴⁴⁷ See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, NEWS AUDIENCES INCREASINGLY POLITICIZED: ONLINE NEWS AUDIENCE LARGER, MORE DIVERSE 5–7 (June 8, 2004), available at <http://people-press.org/reports/display.pdf/215.pdf> (last visited Jan. 13, 2006) (reporting poll results showing that the percentage of respondents to biennial study on media use who reported regularly using the Internet for news had increased since 1995 from 2 percent to 29 percent while television, newspapers, and magazines showed declines).

⁴⁴⁸ Laurence B. Alexander, *Looking Out for the Watchdogs: A Legislative Proposal Limiting the Newsgathering Privilege to Journalists in the Greatest Need of Protection for Sources and Information*, 20 YALE L. & POL’Y REV. 97, 130 (2002) (proposing a shield law that would protect anyone gathering information of public interest or concern but would exclude those who gather information for personal use or for entertainment).

⁴⁴⁹ See Linda L. Berger, *Shielding the Unmedia: Using the Process of Journalism to Protect the Journalist’s Privilege in an Infinite Universe of Publication*, 39 HOUS. L. REV. 1371, 1375 (2003) (suggesting that non-traditional journalists must be protected by a privilege that varies protection based on the process of information-gathering used); Elrod, *supra* note 29 at 174–75.

⁴⁵⁰ CAL. EVID. CODE § 1070 (West 1995 & Supp. 2005).

⁴⁵¹ 33 Media L. Rep.(BNA) 1449 (Cal. Super. Ct. 2005).

⁴⁵² *Id.* at 1450.

⁴⁵³ *Id.*

⁴⁵⁴ *Id.*

not protect anyone who aided in committing a crime, such as stealing trade secrets.⁴⁵⁵ The judge left open the question of whether the bloggers, at least one of whom maintained several “fan sites” for Apple users, could claim to be journalists.

Only a month earlier, one of the judges who decided the Judith Miller case for the U.S. Court of Appeals for the District of Columbia raised the issue of who is or is not a journalist in his concurring opinion. Judge David Sentelle questioned, rhetorically, whether the court should create a privilege that would extend only to reporters for the established media or to bloggers as well.⁴⁵⁶ How would one make the distinction if the former path was chosen, given that the freedom of the press was a “broadly granted personal right”?⁴⁵⁷ Professor Schauer’s answer is that the First Amendment press clause is not necessarily about individual rights,⁴⁵⁸ but Judge Sentelle’s concern is closer to the Supreme Court’s First Amendment jurisprudence.⁴⁵⁹

Eugene Volokh, a UCLA law professor who also maintains a blog, has suggested that it would be unfair to protect journalists for the established news media and not bloggers if they perform the same function.⁴⁶⁰ His solution to the overbreadth problem would be to limit the privilege so that only sources who pass along lawfully acquired information would be shielded.⁴⁶¹ As he notes, similar limits apply to most other privileges, which are waived if a client involves an attorney or doctor in a criminal enterprise.⁴⁶² Volokh’s solution is in line with the judge’s decision in the *Apple* case.⁴⁶³

Volokh’s attempt to make privilege law fairer by applying it to all who publish news but in narrower circumstances has some appeal, but it also raises a concern. Often in journalist’s privilege cases, it is the passing of information itself that is the potential crime. Recall that James Taricani went to jail because his source violated a judge’s gag order, making the source subject to criminal contempt charges.⁴⁶⁴ If a government employee signed a confidentiality waiver and then denied, along with everyone else who signed the waivers, that she was a reporter’s source, could a prosecutor justify forcing a reporter to testify on the grounds that the source had committed perjury or obstruction of justice?

⁴⁵⁵ *Id.* at 1454.

⁴⁵⁶ *In re Grand Jury Subpoena (Miller)*, 397 F.3d 964, 979 (D.C. Cir. 2005) (Sentelle, J., concurring).

⁴⁵⁷ *Id.*

⁴⁵⁸ Schauer, *supra* note 119, at 1269.

⁴⁵⁹ See *supra* notes 108–13 and accompanying text.

⁴⁶⁰ Eugene Volokh, Op-Ed, *You Can Blog, But You Can’t Hide*, N.Y. TIMES, Dec. 2, 2004, at A39.

⁴⁶¹ *Id.*

⁴⁶² *Id.*

⁴⁶³ See *supra* notes 451–55 and accompanying text.

⁴⁶⁴ See *supra* Part III.A.1.

At this early stage in the development of Internet law, it may be too early to have a meaningful debate about the legal rights of bloggers as compared to journalists for traditional media. In the meantime, the Electronic Frontier Foundation has published a legal guide for those who operate blogs.⁴⁶⁵ Regardless of whether Congress passes a shield law, the issue of how to determine who may qualify for privilege protection is not likely to go away.

CONCLUSION

Since *Branzburg v. Hayes* was decided, a broad but shallow journalist's privilege has developed to strike a balance between journalists' concerns about being turned into government investigators and the judiciary's concerns about the search for truth in courts of law. In recent years, the privilege has taken a beating from a series of decisions — some of them highly predictable in light of *Branzburg* and other precedent — that, taken together, cast some doubt on the continued efficacy of the privilege. If one assumes that both the press and the judicial branch have compelling arguments on their sides, how can the balance be regained? One answer may be to wait and see if later cases with better fact patterns for journalists might result in decisions that keep the privilege alive. Another answer may be to pass a shield law, although there are dangers there, particularly in regard to defining who may claim protection. There is, in short, no perfect way to balance the needs of journalists and triers of facts.

Journalists using confidential sources have exposed corruption in government and threats to public health and safety. They also have ruined the career of a CIA operative for no apparent good reason and ruined the lives of investigation targets who may be innocent of the accusations against them. In a perfect world, journalists could keep the identities of "good" sources quiet without going to jail and expose the "bad" sources without discouraging others from coming forward with sensitive information. But in the real world, journalists may need protection for all of their secrets to keep "good" sources coming. Perhaps Congress can find a way to protect journalists and still catch the scoundrels who use the press for wicked purposes. Journalists can go a long way toward winning public support to that effort if they stick to their pledges to stop promising anonymity freely. The combination of shield legislation and a stronger journalistic commitment to naming news sources might go a long way toward encouraging future Deep Throats while discouraging people who want to hide their names out of shame, not fear.

⁴⁶⁵ Elec. Frontier Found., Legal Guide for Bloggers, available at <http://www EFF.org/bloggers/lg> (last visited Jan. 13, 2006).