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Speak, and speak immediately : the risen subpoena, the executive branch, and the reporter's privilege

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SPEAK, AND SPEAK IMMEDIATELY: THE RISEN SUBPOENA, THE EXECUTIVE
BRANCH, AND THE REPORTER'S PRIVILEGE

A Thesis

Submitted to the Graduate Faculty of the
Louisiana State University and
Agricultural and Mechanical College
in partial fulfillment of the
requirements for the degree of
Master of Mass Communication

in

The Manship School of Mass Communication

by

Matthew L. Schafer

B.S., University of Illinois at Urbana-Champaign, 2005

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ABSTRACT

In 1972, *Branzburg v. Hayes* required the Supreme Court to consider whether the First Amendment to the United States Constitution conferred on journalists a right to quash grand jury subpoenas issued by the government. The Court held in a five-to-four opinion that it did not. Yet, in 2011, a federal district judge found that James Risen, a *New York Times* reporter, had a First Amendment reporter's privilege that protected him from having to reveal his source for a book chapter about a secretive CIA operation. This judge is not alone in finding such a privilege in spite of *Branzburg*; indeed, many judges have come to the same conclusion.

This thesis, through an analysis of post-*Branzburg* cases at the federal courts of appeals level, attempts to map the current landscape. It finds that *Branzburg* jurisprudence is in tatters, with some courts of appeals finding a reporter's privilege and others not. It further finds that the courts that do find a privilege fail to weigh the First Amendment interests in each case, opting instead for sweeping but vacuous pronouncements of the benefits of the First Amendment.

Taking this landscape under consideration, this thesis suggests that *Branzburg* is the problem – not the solution and offers a way for courts to escape from under *Branzburg*'s thumb by recognizing that subsequent case law has implicitly dismissed the presumption on which *Branzburg* is based. It further extrapolates from this subsequent case law the principle that the First Amendment is implicated when the government or a private party acts adversely to a speaker *because of* his speech. Having recognized that the First Amendment is implicated by subpoenas against journalists, it then argues that the only way to account for all of the interests involved is to identify and appraise the value of the First Amendment interests in light of First Amendment theory and weigh those interests against the countervailing interests. Finally, it suggests how this approach informs the Risen case.

CHAPTER 1. INTRODUCTION

James Risen, Operation Merlin, and the Source

“If you are in jail, how do we help you?”
“Send cards.”¹

“I am going to fight this subpoena,” James Risen, a *New York Times* (“*Times*”) reporter, said after being served with a subpoena approved by Attorney General Eric Holder, demanding that he reveal the identity of a confidential source.² “I will always protect my sources, and I think this is a fight about the First Amendment and the freedom of the press.”³

Risen is a 57 year-old veteran *Times* investigative reporter who specializes in national security matters⁴ and is well known in reporting circles.⁵ In 2002, he and a team of *Times* reporters won a Pulitzer Prize for 9/11 reporting.⁶ Four years later, Risen and Eric Lichtblau, also of the *Times*, won a Pulitzer for their work in uncovering the George W. Bush

¹ An exchange between, respectively, Lowell Bergman and James Risen on a pending subpoena and looming trial. The title of this thesis “Speak, and Speak Immediately” comes from Henry Anatole Grunwald, the former managing editor of *Time* magazine, who said, “Journalism can never be silent: that is its greatest virtue and its greatest fault. It must speak, and speak immediately, while the echoes of wonder, the claims of triumph and the signs of horror are still in the air.” BOB KELLY, WORTH REPEATING: MORE THAN 5000 CLASSIC AND CONTEMPORARY QUOTES 192 (2008).

² United States attorneys must seek permission under a Department of Justice guideline to subpoena reporters. See 28 C.F.R. § 50.10. The guideline requires that the government first exhaust all reasonable alternatives to obtain the information sought in the subpoena, and that the information sought is “essential” to the government’s case. See generally *id.* Even if the Department of Justice violates this guideline, however, the guideline does not confer any individual rights and therefore, a violation of the rule is of no moment to a court. See *In re Special Proceedings*, 373 F.3d 37, 44 (1st Cir. 2004) (“The regulations are not themselves binding on the special prosecutor[.]”); see also *In re Grand Jury Proceedings No. 92-4*, 42 F.3d 876, 880 (4th Cir. 1994) (“[T]he guideline ‘is of the kind to be enforced internally by a governmental department, and not by courts.’” (citing *In re Shain*, 978 F.2d 850, 854 (4th Cir. 1992)); *U.S. v. Treacy*, 639 F.3d 32, 43 (2d Cir. 2011).

³ Charlie Savage, *Subpoena Issued to Writer in C.I.A.-Iran Leak Case*, N.Y. TIMES, May 24, 2011, at A18.

⁴ See Notice and Motion of James Risen to Quash Subpoena and/or for a Protective Order at 1, U.S. v. Sterling, No. 10-cr-00485-LMB, (E.D. Va. June 21, 2011) [hereinafter *Mot. to Quash*].

⁵ He has twice won a Pulitzer Prize. See generally *Mot. to Quash* at 1.

⁶ 2002 Pulitzer Prize Winners, THE PULITZER PRIZES, <http://www.pulitzer.org/citation/2002-Explanatory-Reporting>.

administration's use of secret eavesdropping in the wake of 9/11.⁷ He is also the author of several books.⁸

Risen's success has come with a price. He is currently fighting a wave of subpoenas⁹ that the United States has issued against him.¹⁰ The most recent series of subpoenas stems from Risen's recent book: *State of War: The Secret History of the CIA and the Bush Administration*.¹¹ In researching the book, Risen relied on a confidential source who gave him information about a Central Intelligence Agency ("CIA") operation; the government's subpoenas demand that Risen identify his source for the book.¹²

The classified information allegedly disclosed related to Operation Merlin – an operation where the CIA “recruited a former Russian scientist . . . to provide Iranian officials with faulty nuclear blueprints.”¹³ In late 1998, the CIA assigned Jeffery Sterling, a CIA operations officer, to handle the Russian scientist involved in Operation Merlin.¹⁴ The operation was botched from the outset.¹⁵ Indeed, the blueprints the CIA gave the Russian scientist contained “flaws” too obvious to be subtle, as was intended.¹⁶ Despite these flaws, the CIA instructed the scientist to

⁷ 2006 Pulitzer Prize Winners, THE PULITZER PRIZES, <http://www.pulitzer.org/citation/2006-National-Reporting>.

⁸ See, e.g., MATT BEARDEN & JAMES RISEN, THE MAIN ENEMY: THE INSIDE STORY OF THE CIA'S FINAL SHOWDOWN WITH THE KGB (2003); JAMES RISEN & JUDY THOMAS, WRATH OF ANGELS: THE AMERICAN ABORTION WAR (1999).

⁹ Charlie Savage, *Ex-C.I.A. Officer Named in Disclosure Indictment*, N.Y. TIMES, Jan. 7, 2011, at A15 (“He was twice subpoenaed to divulge his source; once by the Bush administration, and, after the first grand jury investigating the case expired, again last year by the Obama administration.”).

¹⁰ *Id.*; see also Charlie Savage, *U.S. Gathered Personal Data on Times Reporter in Case Against Ex-C.I.A. Agent*, N.Y. TIMES, Feb. 26, 2011, at A14 (noting that “Mr. Risen has refused to talk about his sources”).

¹¹ See, e.g., Gov't's Mot. in Limine to Admit Testimony of James Risen, *Sterling*, No. 10-cr-00485-LMB, (E.D. Va. May 23, 2011) [hereinafter *Mot. to Admit*]; see also JAMES RISEN, STATE OF WAR: THE SECRET HISTORY OF THE C.I.A. AND THE BUSH ADMINISTRATION (2006).

¹² *Mot. to Admit*, *supra* note 11.

¹³ Mem. Op. at 1, *In re Grand Jury Subpoena to James Risen*, No. 08-dm-61-LMB (E.D. Va. June 28, 2011).

¹⁴ Brief for Petitioner at 5, *U.S. v. Sterling*, No. 11-5028 (4th Cir. Jan. 13, 2012).

¹⁵ Risen Declaration at 7, *Sterling*, No. 10-cr-485 (E.D. Va. June 21, 2011) (stating that “Merlin was deeply flawed and mismanaged from the start”).

¹⁶ June 28 Mem. Op., *supra* note 13, at 2.

deliver the plans to the Iranians in hopes that officials would rely on them to create useless weapons.¹⁷

After the operation concluded unsuccessfully, a CIA operative, alleged to be Sterling, who was familiar with the operation, explained the mismanagement to Risen.¹⁸ Shortly after Risen and the source exchanged phone calls and emails in 2003, Risen called the CIA Office of Public Affairs and asked if it wished to comment on the operation.¹⁹ On April 30, 2003, four weeks after Risen made the call to the CIA, he met with the then-*Times* Washington Bureau Chief Jill Abramson, National Security Advisor Condoleezza Rice, and CIA Director George Tenet.²⁰ Rice and Tenet convinced the *Times* not to publish the story under the auspices that doing so would “compromise national security.”²¹

Although the story remained off the front page of the *Times*, Risen continued to research Operation Merlin.²² That research led to Chapter Nine of his 2006 *State of War* book, “A Rogue Operation.”²³ In Chapter Nine, Risen described Operation Merlin’s problems – problems, of course, that were supposed to be classified and most definitely not in the hands of a journalist.²⁴ In March 2006, with the ink on Risen’s book still wet, the government convened a grand jury to determine whether sufficient evidence existed to indict the source who supplied Risen with classified information.²⁵ On January 28, 2008,²⁶ the government subpoenaed Risen for the

¹⁷ *Mot. to Quash*, *supra* note 4, at 5.

¹⁸ *Mot. to Admit*, *supra* note 11, at 1.

¹⁹ June 28 Mem. Op., *supra* note 13, at 3-4.

²⁰ *Id.* at 5-6.

²¹ *Id.* at 6.

²² *Id.*

²³ *Id.*

²⁴ *Mot. to Admit*, *supra* note 11, Ex. A.

²⁵ June 28 Mem. Op., *supra* note 13, at 9.

²⁶ *Id.* The government believed that Sterling was the operative who spoke with Risen, because Sterling was familiar with the operation and upset with the CIA after being fired in early 2002. *Id.* at 3-4. Moreover, the government knew that Sterling had a relationship with Risen, as Risen published an article about Sterling’s discrimination lawsuit against the CIA. *Id.*

identity of the source.²⁷ Initially, the district court disallowed several lines of government questioning, because the government's case was already so strong.²⁸ Nonetheless, the court did find that Risen must reveal the identity of the source because some evidence suggested that Risen had told another person the name of the source, destroying any confidentiality.²⁹ In many respects, then, the government and Risen won some and lost some.

Both parties asked the court to reconsider its split ruling.³⁰ While the court was considering the parties' motions to reconsider, the government again subpoenaed Risen, demanding that he testify in front of the grand jury within forty-eight hours.³¹ Risen protested to the court, which ordered that Risen need not appear before the grand jury.³² Eventually, these tactical gerrymanders cost the government time, and its 2008 grand jury expired without any indictment against Risen's alleged source.³³

While the Obama administration had the discretion not to pursue the action after it came into power, it decided to continue the action.³⁴ As a result, Risen was subpoenaed yet again on January 19, 2010.³⁵ Essentially, the government – while not demanding the name of Risen's source – asked for “the where, the what, the how, and the when” Risen learned about Operation Merlin.³⁶ Despite the government's insistence, the court, in sum and substance, quashed that

²⁷ *Id.*

²⁸ *Id.* at 9.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 10.

³² *Id.*

³³ *Id.*

³⁴ As the court would later summarize, “On August 5, 2009, the Court issued an order staying argument of the motions for reconsideration, to allow the new Attorney General an opportunity to evaluate the wisdom of reauthorizing the subpoena, given its significant First Amendment implications.” *Id.* The government decided to convene a new grand jury in mid-2009. *Id.*

³⁵ *Id.*

³⁶ June 28 Mem. Op., *supra* note 13, at 12. The subpoena did, however, ask for “all Rolodex and contact information [that Risen had] for Sterling, all notes related to Risen's reporting on Chapter [Nine], and drafts of book proposals.” *Id.* at 10-11.

subpoena also.³⁷ The court found that a general inquiry into how Risen acquired the information would “violate his confidentiality agreement [and] would essentially destroy the reporter’s privilege.”³⁸

On December 22, 2010, without Risen’s testimony, the grand jury brought an indictment against the man it believed to be Risen’s source – the CIA operative, Jeffrey Sterling. The grand jury based its decision on electronic communications between Sterling and Risen, as well as Risen’s past articles relating to Sterling’s employment lawsuit against the CIA.³⁹ The indictment charged Sterling under the Espionage Act⁴⁰ with two-counts of Unauthorized Disclosure of National Defense Information, Unlawful Retention of Classified Information, Mail Fraud, Unauthorized Conveyance of Government Property, and Obstruction of Justice.⁴¹

Soon after the grand jury indicted Sterling, Risen received a third subpoena – this time ordering him to appear at Sterling’s trial.⁴² This subpoena asked, in part, that Risen identify his source at Sterling’s trial.⁴³ As he did with the previous two subpoenas, Risen moved to quash the trial subpoena, arguing that he was protected by a constitutional reporter’s privilege found in

³⁷ *Id.* at 11.

³⁸ *Id.* at 34.

³⁹ Mem. Op. at 4-8, *U.S. v. Sterling*, No. 10-cr-485 (E.D. Va. July 29, 2011) (discussing the government’s evidence against Sterling, including his employment history at the CIA, a March 2, 2002 *New York Times* article about Sterling’s racial discrimination lawsuit against the CIA written by Risen, Sterling’s past attempts to publicize U.S. action in Iran, and telephone conversations).

⁴⁰ 18 U.S.C. §§ 793 *et seq.*

⁴¹ *Id.* at 10.

⁴² July 29 Mem. Op., *supra* note 39, at 10.

⁴³ *Id.*

the First Amendment's Speech and Press Clauses.⁴⁴ The trial court granted that motion,⁴⁵ and the government appealed to the Fourth Circuit, which has yet to issue an opinion in the case.⁴⁶

One Rule in Athens and Another in Rome

Forty years ago in *Branzburg v. Hayes*,⁴⁷ the Supreme Court, in a 5-4 decision, held that the constitutional reporter's privilege invoked by Risen in the district court did not exist.⁴⁸ At the time the decision was handed down, the *Times* recognized the intractable truth of its holding: "[*Branzburg*] contained a *firm rejection* of the theory that the First Amendment shields newsmen . . . from having to testify."⁴⁹

It is well understood that "lower courts are bound to follow [the Supreme] Court's decision[s] until they are withdrawn or modified."⁵⁰ This is true even of those decisions that lower court judges may find nonsensical⁵¹ or vehemently disagree with.⁵² Thus, conventional wisdom would suggest that after *Branzburg* courts would not recognize a reporter's constitutional right not to respond to a subpoena.⁵³

⁴⁴ *Id.* at 10-14.

⁴⁵ U.S. v. Sterling, 818 F. Supp. 2d 945, 960 (E.D. Va. 2011) ("Rather than explaining why the government's need for Risen's testimony outweighs the qualified reporter's privilege, the government devotes most of its energy to arguing that the reporter's privilege does not exist in criminal proceedings that are brought in good faith. Fourth Circuit precedent does not support that position.").

⁴⁶ Notice of Appeal at 1, U.S. v. Sterling, No. 10-cr-485 (E.D. Va. October 19, 2011); *see also* U.S. v. Sterling, No. 10-cr-485 (E.D. Va. July 29, 2011), *appeal docketed*, No. 11-5028 (4th Cir. Nov. 9, 2011).

⁴⁷ *Branzburg v. Hayes*, 408 U.S. 665 (1972); *see also* U.S. v. Smith, 135 F.3d 963, 968 (5th Cir. 1998) ("Any discussion of the newsreporters' privilege must start with an examination of *Branzburg* . . .").

⁴⁸ *Branzburg*, 408 U.S. at 665.

⁴⁹ *Press Loses Pleas to Keep Data from Grand Juries*, N.Y. TIMES, June 30, 1972, at A1 (emphasis added).

⁵⁰ *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 1307 (2012) (statement of Ginsburg, J.).

⁵¹ *C. A. Durr Packing Co., Inc. v. Shaugnessy*, 189 F.2d 260 (2d Cir. 1951) (Learned, J., dissenting) (stating in a different context, "Frankly, I have never felt sure that I understood the reasoning of the Supreme Court; but we are bound to treat the decision as authoritative . . .").

⁵² *W. Tradition P'ship, Inc. v. Att'y Gen. of Montana*, 271 P.3d 1, 34 (Mont. 2011) (McGrath, C.J., dissenting) ("While, as a member of this Court, I am bound to follow *Citizens United*, I do not have to agree with the Supreme Court's decision. And, to be absolutely clear, I do not agree with it." (internal footnote omitted)), *cert. granted, judgment rev'd sub nom.*, *Am. Tradition P'ship, Inc. v. Bullock*, 132 S. Ct. 2490 (2012).

⁵³ *Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996) ("The binding precedent rule affords a court no [] discretion where a higher court has already decided the issue before it.").

Judge Leona Brinkema, the Southern District of New York judge assigned to Risen's case, has challenged this conventional wisdom. In Risen's case, she unambiguously held, "The Fourth Circuit recognizes a qualified [constitutional] reporter's privilege."⁵⁴ Surprisingly, Judge Brinkema's conclusion is not an aberration; multiple circuits have arrived at similar conclusions.⁵⁵ This has left those judges who decline to recognize a reporter's privilege in light of *Branzburg* to accuse judges who find the privilege as being "less faithful in adhering to the explicit decision in *Branzburg*"⁵⁶ and "skating on thin ice."⁵⁷ Quite simply, *Branzburg* jurisprudence is a mess.⁵⁸

Perhaps confusion below can be excused, however, as even the Supreme Court seems unsure of *Branzburg*'s meaning. In some instances, justices have indicated that *Branzburg* requires that a court "balanc[e the] interest in effective grand jury proceedings against [the] burden on reporters' news gathering from requiring disclosure of sources."⁵⁹ In others, justices have found that *Branzburg* foreclosed the applicability of such a balancing test: "[T]he First

⁵⁴ *Id.*

⁵⁵ See, e.g., *U.S. v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000) (recognizing a constitutional reporter's privilege that required a balancing test); *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1181 (1st Cir. 1988) (balancing First Amendment interests in the criminal context); *U.S. v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986) (adopting, in the criminal context, the Fifth Circuit's approach to balancing First Amendment interests in the civil context); *U.S. v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983) (adopting for criminal cases its language from civil cases that recognize a reporter's privilege); *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) (noting that *Branzburg*'s assertion that newsgathering is protected by the First Amendment supports a reporter's privilege in criminal trials); *U.S. v. Steelhammer*, 561 F.2d 539, 540 (4th Cir. 1977) (adopting language from the lower court's dissent that used Justice Powell's concurrence to find a reporter's privilege); *Farr v. Pitchess*, 522 F.2d 464, 467 (9th Cir. 1975) (recognizing a First Amendment privilege in criminal trials); see also *In re Williams*, 963 F.2d 567 (3d Cir. 1992) (affirming a lower court's finding that a reporter had a constitutional privilege not to testify at a grand jury).

⁵⁶ *U.S. v. King*, 194 F.R.D. 569, 580 (E.D. Va. 2000).

⁵⁷ *McKevitt v. Pallasch*, 339 F.3d 530, 533 (7th Cir. 2003) (Posner, J.); see also *U.S. v. Smith*, 135 F.3d 963, 966 (5th Cir. 1998).

⁵⁸ As one commentator wrote, "*Branzburg* . . . [has] caused great confusion in the lower federal courts" Scott J. Street, *Poor Richard's Forgotten Press Clause: How Journalists Can Use Original Intent to Protect Their Confidential Sources*, 27 LOY. L.A. ENT. L. REV. 463, 477 (2007).

⁵⁹ *Butterworth v. Smith*, 494 U.S. 624, 631 (1990); see also *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 859-60 (1974) (Powell, J., concurring) (stating that "a fair reading of . . . *Branzburg* makes plain that the result hinged on an assessment of the competing societal interests involved").

Amendment does not provide newsmen with [a] testimonial privilege to be free of relevant questioning about sources by a grand jury.”⁶⁰

This confused state of the law has resulted in “‘one rule in Athens, and another rule in Rome,’” where the resolution of a case turns largely on where the case is brought.⁶¹ This split is especially “awkward” as it requires “persons present in several circuits [to] conduct themselves in accordance with varying rules.”⁶² Moreover, with efforts to pass a federal shield law failing in the wake of the WikiLeaks saga, the existence of a reporter’s privilege is more important than ever as journalists are defenseless to subpoenas at the federal level.⁶³ The recent “uptick” of subpoenas against journalists further elevated the importance of this issue.⁶⁴

It is this motley state of affairs that propels this look back at the jurisprudence following *Branzburg* in hopes of looking forward to a more cohesive reporter’s privilege doctrine. In order to define a more workable rule than *Branzburg*, it is necessary to explore the various nuances of past cases, including their procedural posture and factual circumstances. To that end, this thesis first explains *Branzburg*, the only Supreme Court case to discuss comprehensively a constitutional reporter’s privilege. It then frames this discussion with a description of First Amendment theory. Broadening the discussion, it describes literature and case law regarding journalists’ newsgathering right. Next, it explains its method for gathering and analyzing post-*Branzburg* cases concerning subpoenas against journalists. Finally, it surveys controlling courts

⁶⁰ *In re Roche*, 448 U.S. 1312, 1314-15 (1980) (Brennan, J., in chambers).

⁶¹ *Laird v. Tatum*, 409 U.S. 824, 838 (1972) (Rehnquist, J., in chambers).

⁶² *U.S. v. Stauffer Chem. Co.*, 464 U.S. 165, 179 (1984).

⁶³ J.C. Derrick, *Federal Shield Law Introduced in House Once More*, REPORTERS COMMITTEE FOR THE FREEDOM OF THE PRESS, Sept. 19, 2011, <http://www.rcfp.org/node/98369> (describing the seventeen-year effort to pass a federal shield law).

⁶⁴ “One lawyer for a national media company said he has noticed a ‘significant uptick’ in the number of confidential-source subpoenas in the past five years, especially in federal cases, and Associated Press General Counsel Dave Tomlin reported a ‘slight uptick’ in all subpoena activity, but particularly in federal cases.” Erik Ugland, *The New Abridged Reporter’s Privilege: Policies, Principles, and Pathological Perspectives*, 71 OHIO ST. L.J. 1, 60 (2010) (describing the number of subpoenas issued in the five years preceding 2010); *see also* Letter from Carmen L. Mallon, Chief of Staff of the Office of Information Policy, Dep’t of Justice, to author (Sept. 27, 2012) (on file with author) (describing the Department of Justice’s issuance of subpoenas to reporters).

of appeals' decisions regarding a reporter's privilege and concludes that the current, contradictory status quo is unmanageable and ignores basic First Amendment tenants and offers one potential way to change the status quo in an academically and jurisprudentially honest way.

CHAPTER 2. BACKGROUND

Branzburg v. Hayes, The Fountainhead

Branzburg placed the Court in the uncomfortable position of having to choose between two conflicting constitutional values: the freedom of the press secured by the First Amendment and the requirement of grand jury proceedings secured by the Fifth Amendment.⁶⁵ This collision of constitutional values created an internal conflict that is palpable in the Court's opinion, and especially, in Justice Powell's concurring opinion.⁶⁶ In an attempt to reconcile these two values by giving precedent to the Fifth Amendment's Grand Jury Clause,⁶⁷ the Court penned an opinion that was at once unambiguous and ambiguous.⁶⁸

The Facts

On November 15, 1969, the *Louisville Courier-Journal* printed Paul Branzburg's article titled "The Hash They Make Isn't to Eat."⁶⁹ The article described a meeting between Branzburg and hashish manufacturers and included a photograph of a drug manufacturer's hands working

⁶⁵ *Branzburg v. Hayes*, 408 U.S. 665, 682-84 (1972).

⁶⁶ *Id.* at 707 (finding that although the journalists in the cases before it had no privilege, in some cases journalists may have a privilege as "news gathering is not without its First Amendment protections"); *see also id.* at 710 (Powell, J., concurring) (concurring that there is no First Amendment reporter's privilege but nonetheless noting that "the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection").

⁶⁷ "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a *Grand Jury*, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . ." U.S. CONST. amend. V (emphasis added). The basic purpose of the grand jury "is to limit [a man's] jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge." *Stirone v. U.S.*, 361 U.S. 212, 218 (1960).

⁶⁸ Richard B. Kielbowicz, *The Role of News Leaks in Governance and the Law of Journalists' Confidentiality*, 1795-2005, 43 SAN DIEGO L. REV. 425, 454 (2006) (noting that the majority's otherwise clear ruling that there is no reporter's privilege under the First Amendment is subject to the limiting language in the majority, concurring, and dissenting opinion).

⁶⁹ *Branzburg v. Pound*, 461 S.W.2d 345, 345 (Ky. 1970). Branzburg also wrote another article about narcotics use in Frankfurt, Kentucky. *Branzburg*, 408 U.S. at 669. For that story, Branzburg "had 'spent two weeks interviewing several dozen drug users in the capital city' and had seen some of them smoking marihuana." *Id.*

with hashish.⁷⁰ In order to report on drug manufacturing in the area, Branzburg promised the drug manufacturers that he would keep all identities confidential.⁷¹

Just ten days after the story ran, a grand jury subpoenaed Branzburg, demanding that he identify his sources.⁷² Branzburg appeared before the grand jury but refused to name names.⁷³ With contempt charges looming, the trial court stayed the grand jury proceedings due to the “intrinsically important [First Amendment] issues” presented.⁷⁴ After reviewing the case though, the court concluded that Branzburg had waived any First Amendment argument when his counsel conceded that “the general weight of authority seems to hold that there is no constitutional guarantee to such a privilege.”⁷⁵ The Kentucky Court of Appeals affirmed.⁷⁶

The “Plurality” Opinion⁷⁷

In the Supreme Court’s view, the “sole issue” before it⁷⁸ was “whether requiring newsmen to appear and testify before state or federal grand juries abridges the freedom of speech and press guaranteed by the First Amendment.”⁷⁹ The Court concluded curtly: “[I]t does not.”⁸⁰

⁷⁰ *Branzburg*, 408 U.S. at 667.

⁷¹ *Id.* at 667-68. Obviously, the drug manufacturers were nervous and did not want to be arrested; the article quoted one manufacturer as saying, “I don’t know why I’m letting you do this story[.] To make the narcs [sic] mad, I guess. That’s the main reason.” *Id.* at 668 n.1.

⁷² *Id.* n.2; *see also Branzburg*, 461 S.W.2d at 346.

⁷³ *Branzburg*, 461 S.W.2d at 346.

⁷⁴ *Id.*

⁷⁵ *Id.* at 346 n.1. The court also found that Branzburg was not protected by Kentucky’s shield law. *Id.* at 348.

⁷⁶ *Branzburg v. Meigs*, 503 S.W.2d 748 (Ky. 1971) (“The speculation that the mere appearance of a news reporter before a grand jury might jeopardize his rapport with . . . the drug culture, causing its loss of confidence in him and . . . inhibiting his ability to obtain information, is so tenuous that it does not . . . present an issue of abridgement of the freedom of the press . . .”), *aff’d sub nom. Branzburg*, 408 U.S. 665.

⁷⁷ As will be explained, Justice Powell joined the Chief Justice and Justices White, Blackmun and Rehnquist. *See generally Branzburg*, 408 U.S. 665. Justice Powell also wrote a concurring opinion that, at first blush, does not appear to be in line with the majority opinion that he joined. *Id.* at 709 (Powell, J., concurring). This has caused some courts to describe what would normally be considered the majority opinion as a plurality instead. *See, e.g., U.S. v. Smith*, 135 F.3d 963, 968-69 (5th Cir. 1998) (“Although the opinion of the Branzburg Court was joined by five justices, one of those five, Justice Powell, added a brief concurrence. For this reason, we have previously construed Branzburg as a plurality opinion.”); *see also Newsmen’s Privilege: Hearing on H.R. 837, H.R. 1084, H.R. 15891, H.R. 15972, H.R. 16527, H.R. 16716, and H.R. 16542 Before Subcomm. No. 3 of the H. Comm. on the Judiciary*, 92nd Cong. 2 (1972) (statement of Irwin Karp, Authors League of America) (“Actually it is four-and-a-half to four-and-a-half under the Powell opinion, because when you read Justice Powell’s opinion you find him opening the door after the alleged majority opinion shuts it.”)

Justice White, writing for the Court, began by summarizing in broad strokes Branzburg's arguments.⁸¹ First, Branzburg asserted that confidential sources were necessary for him to gather and disseminate news.⁸² And second, he claimed that requiring him to name his sources would result in sources refusing to speak to journalists about sensitive matters, which would impede the gathering and disseminating of news.⁸³

⁷⁸ There were also companion cases. The companion cases to *Branzburg*, *In re Pappas* and *Caldwell*, arose under similar circumstances. Both reporters in those cases were in the process of investigating the inner workings of the Black Panther Party. See *In re Pappas*, 266 N.E.2d 297, 298 (Mass. 1971); *Caldwell v. U.S.*, 434 F.2d 1081, 1083 (9th Cir. 1970). In *Caldwell*, the *Times* hired Caldwell, a black reporter, to write stories about the Black Panther Party's activities. BILL TURNER, WILLIAM BENNETT TURNER, & ANTHONY LEWIS, *FIGURES OF SPEECH: FIRST AMENDMENT HEROES AND VILLAINS* 83 (2010). According to some legal historians, Caldwell was the *Times*' "emissary to the black radical movement." *Id.* at 84. Using his position, Caldwell covered the Black Panther movement, eventually writing sixteen articles about the movement. *Id.* at 83. One of Caldwell's articles quoted a Black Panther as saying that whites who agreed with the Panthers' stance should "[g]ive [the Panthers] some money and some guns." *Id.* at 84. After the Federal Bureau of Investigation conducted several failed interviews with Caldwell, the government subpoenaed him on February 2, 1970. *Id.* at 85.

Caldwell, like Branzburg, moved to quash the subpoena. *Application of Caldwell*, 311 F. Supp. 358, 362 (N.D. Cal. 1970), *vacated sub nom. Caldwell*, 434 F.2d 1081, *rev'd sub nom. Branzburg*, 408 U.S. 665. While the lower court did not quash the subpoena, it did, among other things, state that Caldwell could "not be required to reveal confidential associations, sources or information received, developed or maintained by him as a professional journalist." *Caldwell*, 434 F.2d at 1083. Despite this limitation on the subpoena, Caldwell appealed. *Id.* at 1086. On appeal, the Court of Appeals for the Ninth Circuit ruled that there was a constitutional reporter's privilege. *Id.* at 1083-86. Having found a privilege, the court went on to balance the interests of Caldwell, the public, and the Black Panthers against the government's interest. It held that if a journalist can show "that the public's First Amendment right to be informed would be jeopardized by requiring a journalist to submit to secret Grand Jury interrogation, the Government must respond by demonstrating a compelling need for the witness's presence before judicial process properly can issue to require attendance." *Id.* at 1089.

In *In re Pappas*, Pappas, a television newsman, went to cover a Black Panther meeting that police were intending to raid. *In re Pappas*, 266 N.E.2d at 298. Unfortunately, when Pappas arrived in the early afternoon, he was met by a barricade in front of the store where the meeting was to be held. *Id.* Pappas waited outside the barricaded store until he gained access in the mid-afternoon, after which he covered the reading of a statement prepared by the Black Panthers. *Branzburg*, 408 U.S. at 672. Pappas would later return to the location to cover the impending police raid and was admitted entrance on the condition that he would keep certain information confidential. *Id.* While the raid never occurred, that same night "there was gunfire in certain streets" as a result of civil disorder. *Id.* at 674.

Like Branzburg, Pappas was later subpoenaed to appear in front of a grand jury. *Id.* He refused to testify as to the identities of the people in the store. *Id.* Pappas moved to quash the subpoena insofar as it required him to divulge information he gained as a result of his confidentiality agreement. *Id.* The trial judge found that Pappas did not enjoy a reporter's privilege. *Id.* More specifically, the Supreme Judicial Court found that "it is the duty of all citizens having relevant knowledge to assist in such inquiries when called upon to do so." *Id.* at 614.

⁷⁹ *Branzburg*, 408 U.S. at 667.

⁸⁰ *Id.* Justice White wrote the opinion of the Court and was joined by Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist.

⁸¹ *Id.* at 679-80. In fact, the court was summarizing Branzburg's arguments, as well as the arguments of the reporters in the two companion cases. For readability, this thesis discusses the disposition of the case by referring principally to Branzburg.

⁸² *Id.* at 679.

⁸³ *Id.* at 679-80.

In order to protect these concerns, Branzburg argued that the forced disclosure of confidential sources was prohibited by a constitutional reporter's privilege unless "sufficient grounds are shown for believing that the reporter possesses information relevant to a crime . . . , that the information the reporter has is unavailable from other sources, and that the need for the information is sufficiently compelling to override [sic] the claimed invasion of First Amendment interests occasioned by the disclosure."⁸⁴ To buttress this argument, Branzburg relied on First Amendment theory that held dear self-realization and self-governance values:

Principally relied upon are prior cases emphasizing the importance of the First Amendment guarantees to individual development and to our system of representative government, decisions requiring that official action with adverse impact on First Amendment rights be justified by a public interest that is 'compelling' or 'paramount,' and those precedents establishing the principle that justifiable governmental goals may not be achieved by unduly broad means having an unnecessary impact on protected rights of speech, press, or association.⁸⁵

In short, the basis of Branzburg's privilege claim rested on the newsgathering interests at stake outweighing the public's interest in effective law enforcement.⁸⁶

Even though Justice White accepted Branzburg's assertion that "news gathering does . . . qualify for First Amendment protection,"⁸⁷ he nonetheless found against him. He did so by relying on two related categories of cases in the Court's First Amendment jurisprudence. The first category rested on the conclusion that "valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed [on

⁸⁴ *Id.* at 680.

⁸⁵ *Id.* at 680-81 (internal footnotes omitted). This approach amounted to Branzburg citing, somewhat indiscriminately, fifteen of the Court's First Amendment decisions. *Id.* at 680-81 nn.17-19. For example, Branzburg cited *Talley v. California*, 362 U.S. 60 (1960), a case striking down as unconstitutional under the First Amendment, a Los Angeles ordinance that required handbill distributors to, among other things, list their names on the handbill. *Id.* Branzburg also cited *Thomas v. Collins*, 323 U.S. 516, 530 (1945), a case where the Court struck down as unconstitutional under the First Amendment a statute that required union organizers to apply for an "organizer's card" from the Secretary of State before making a speech. *Id.*

⁸⁶ *Id.* at 681.

⁸⁷ *Id.* at 682.

the press's ability to gather news].”⁸⁸ The other class of cases rejected the idea that the press has a special right of access greater than the public.⁸⁹ Bringing these two categories of cases together, Justice White saw no support for the argument that the press should have a *special* – an unequal – right in relation to the public: “It is . . . not surprising that the great weight of authority is that newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.”⁹⁰

Justice White also found support for this conclusion in history.⁹¹ Few courts had ever found that reporter's had an exclusive special right not to testify⁹²: “Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that ‘the public . . . has a right to every man's evidence,’ . . . is particularly applicable to grand jury proceedings.”⁹³ Even in modern U.S. law, the reporter's privilege was “uniformly rejected.”⁹⁴ Justice White concluded in an often-repeated passage:

[W]e cannot seriously entertain the notion that the First Amendment protects a newsman's agreement to conceal the criminal conduct of his source, or evidence thereof, on the theory that it is better to write about crime than to do something about it. Insofar as any reporter in these cases undertook not to reveal or testify about the crime he witnessed, his claim of privilege under the First Amendment presents no substantial question.⁹⁵

Justice White next cast aside several of the arguments Branzburg put forward to support the proposition that within the First Amendment a reporter's privilege exists.⁹⁶ First, he noted

⁸⁸ *Id.* at 682-83.

⁸⁹ *Id.* at 684.

⁹⁰ *Id.* at 685.

⁹¹ *Id.*

⁹² *Id.*

⁹³ *Id.* at 688. The Justice was reaffirmed of his conclusion, because, even at that time, the majority of states had declined to pass shield laws protecting journalists from having to divulge confidential sources. *Id.* at 689. For an extensive discussion of modern day shield laws see Sandra Davidson & David Herrera, *Needed: More Than A Paper Shield*, 20 WM. & MARY BILL RTS. J. 1277, 1329 (2012).

⁹⁴ *Id.* at 685-86 (citing *Garland v. Torres*, 259 F.2d 545 (2nd Cir. 1958)).

⁹⁵ *Id.* at 692.

⁹⁶ *Id.*

that while a belief in the potential chilling effect alleged by Branzburg was “not irrational,” “the evidence fail[ed] to demonstrate that there would be a significant constriction of the flow of news to the public.”⁹⁷ Moreover, even if sources did not come forward for fear of being identified, the Court thought that the government’s interest in ferreting out crime outweighed the public interest in the unrestricted flow of news.⁹⁸ Indeed, “it [was] obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.”⁹⁹

In one last salvo, Justice White rejected Branzburg’s remaining argument that the “refusal to provide a First Amendment reporter’s privilege will undermine the freedom of the press to collect and disseminate news.”¹⁰⁰ The Court was unconvinced for numerous reasons. First, journalists historically never benefitted from a constitutional privilege, and, nonetheless had been able to disseminate news.¹⁰¹ Second, the mere changing culture of journalism – the increasing use of subpoenas, new styles of reporting, and a greater need for confidential sources inside the administrative state – alone could not justify a new constitutional privilege created from whole cloth.¹⁰² Creating such a privilege would, according to the Court, place it on “treacherous ground.”¹⁰³

From a pragmatic perspective, the Court also expressed its concern over the practicality of enforcing a reporter’s privilege that would require courts to engage in an *ad hoc* balancing of interests.¹⁰⁴ According to the Court, recognition of a reporter’s privilege would enmesh courts in trials within trials: first, a court would have to decide whether a crime had been committed, then

⁹⁷ *Id.*

⁹⁸ *Id.* at 695.

⁹⁹ *Id.* at 696.

¹⁰⁰ *Id.* at 698.

¹⁰¹ *Id.* at 698-99.

¹⁰² *Id.* at 699.

¹⁰³ *Id.* at 700.

¹⁰⁴ *Id.* at 703.

whether the government had shown a compelling interest for a reporter's testimony, and finally whether the government could discover the information via alternate avenues.¹⁰⁵ In addition, the Court was unwilling to try its pen at the "questionable procedure" of defining who would qualify as a "reporter" for the purposes of this "reporter's" privilege.¹⁰⁶

¹⁰⁵ *Id.* at 705.

¹⁰⁶ *Id.* at 703 ("Sooner or later, it would be necessary to define those categories of newsmen who qualified for the privilege."). In many ways, Justice White's concern as to *who* qualifies as a reporter was quite prescient. With the rise of the Internet and blogs, answering this question has become especially pressing. Anne M. Macrander, *Bloggers As Newsmen: Expanding the Testimonial Privilege*, 88 B.U. L. REV. 1075, 1108 (2008) (arguing that as new media chips away at the market share of traditional media, "there is less and less reason to omit [bloggers] from the protections that newsmen in the traditional mediums enjoy"); *see also* Matthew L. Schafer, *Are Bloggers Journalists? Judge Says Don't Confuse 'New Media' with 'News Media'*, LIPPMANN WOULD ROLL (July 16, 2010), <http://www.lippmannwouldroll.com/2010/07/16/dont-confuse-new-media-with-news-media-judge-says/> (discussing the controversy as it pertains to shield laws).

In the most recent attempt to pass a federal shield law to protect journalists from having to divulge certain information, one of the most controversial aspects of the law was who exactly it would protect. *See* Matthew L. Schafer, *Subpoenas Against Media Recently Top 3,000, It's Time to Pass the Shield Bill SPJ Says*, LIPPMANN WOULD ROLL (July 21, 2010), <http://www.lippmannwouldroll.com/2010/07/21/subpoenas-against-media-topped-3000-its-time-to-pass-the-shield-bill-spj-says/>. Under an almost successful, recent version of the bill, the law would have protected "anyone 'who regularly gathers, prepares, collects, photographs, records, writes, edits, reports, or publishes news or information.'" *Id.* At first blush then, because the law takes a functional approach to protection by giving it to people who are actually engaged in newsmaking – whether or not they are affiliated with a traditional news organization – it would have arguably covered bloggers. *Id.*

For better or worse as a matter of constitutional law, however, the Court has never held that the press as an institution has a stronger claim of protection under the First Amendment than any single citizen. *See, e.g.,* *Nixon v. Warner Commc's, Inc.*, 435 U.S. 589, 609 (1978) ("The First Amendment generally grants the press no right to information about a trial superior to that of the general public."); *Houchins v. KQED, Inc.*, 438 U.S. 1, 12 (1978) ("The issue is a claimed special privilege of access which the Court rejected in *Pell* and *Saxbe*, a right which is not essential to guarantee the freedom to communicate or publish."); *Saxbe v. Wash. Post Co.*, 417 U.S. 843, 850 (1974); *Pell v. Procunier*, 417 U.S. 817, 834 (1974) ("[N]ewsmen have no constitutional right of access to prisons or their inmates beyond that afforded the general public."); *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972) ("It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally."), 703 ("[L]iberty of the press is the right of the lonely pamphleteer who uses carbon paper or a mimeograph just as much as of the large metropolitan publisher who utilizes the latest photocomposition methods . . ."); *Estes v. Texas*, 381 U.S. 532, 589 (1965) (Harlan, J., concurring) ("[A] reporter's constitutional rights are no greater than those of any other member of the public."); *Associated Press v. Nat'l Labor Relations Bd.*, 301 U.S. 103, 132-33 (1937) ("The publisher of a newspaper has no special immunity from the application of general laws. He has no special privilege to invade the rights and liberties of others."). *But see* Randall Bezanson, *The New Free Press Guarantee*, 63 VA. L. REV. 731 (1977) (arguing that the Supreme Court actually treats the Free Speech and Press Clauses differently). In light of this, it would seem that anyone who is engaged in newsmaking would be entitled to a reporter's privilege if one were to be adopted by the Supreme Court or lower courts; essentially, if lower courts were attempting to stay true to Supreme Court precedent while also finding a privilege, they would have to adopt a functional approach to deciding who would be able to claim the privilege.

Setting this aside for the moment, even though the Supreme Court has never held as much, some Justices have argued that the press does have a special right over the "lonely pamphleteer," because it acts essentially as the public's intelligence gathering agent. *See, e.g.,* *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 397 (1979) (Powell, J., concurring). In *Gannet Co. v. DePasquale*, Justice Powell in a concurring opinion explained that the press should have special protections, because "[i]n seeking out the news the press . . . acts as an agent of the public at large, each

The Court concluded its opinion by once again asserting that “news gathering is not without its First Amendment protections.”¹⁰⁷ As such, there was a distinction between grand jury investigations conducted in good faith and those conducted in bad faith, which “would pose wholly different issues for resolution under the First Amendment.”¹⁰⁸ Justice White wrote, “Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter’s relationship with his news sources would have no justification.”¹⁰⁹ And, similarly certain: “[C]ourts will forget that grand juries must operate within the limits of the First Amendment as well as the Fifth.”¹¹⁰

The Concurring Opinion

Justice Powell wrote a separate concurring opinion that attempted to rein in the broad language of the majority: “I add this brief statement to emphasize what seems to me to be the limited nature of the Court’s holding.”¹¹¹ Quixotically, he read the Court’s opinion as “not hold[ing] that newsmen, subpoenaed to testify before a grand jury, are without constitutional rights with respect to the gathering of news or in safeguarding their sources.”¹¹²

Justice Powell’s conception of bad faith was broader than the majority’s; indeed, he would have recognized a privilege that would kick in when reporters were asked to testify as to “information bearing only a remote . . . relationship [to an] investigation, or if [they have] some

individual member of which cannot obtain for himself the information needed for the intelligent discharge of his political responsibilities.” *Id.* at 397 (citation and internal quotation marks omitted).

Justice Stewart famously made the case for special protections of the press as an institution in a speech before Yale Law School. *See* Potter Stewart, *Or of the Press*, 26 Hastings L.J. 631 (1975). In that speech, Stewart explained his enduring belief that “[t]he primary purpose of the constitutional guarantee of a free press was a similar one: to create a fourth institution outside the Government as an additional check on the three official branches.” *Id.* at 634.

¹⁰⁷ *Id.* at 707.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 707-08.

¹¹⁰ *Id.* at 708.

¹¹¹ *Id.* at 709 (Powell, J., concurring).

¹¹² *Id.* This came despite the Court rejecting any weighing of interests that would “embroil[the courts] in preliminary factual and legal determinations.” *Id.* at 704.

other reason to believe that [their] testimony implicates confidential source relationships without a legitimate need of law enforcement, [they] will have access to the court on a motion to quash.”¹¹³ Each case, he concluded, “should be judged on its facts by the striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct.”¹¹⁴

The Dissenting Opinions

Justice Stewart wrote a dissent, in which Justices Brennan and Marshall joined, where he lambasted the Court’s “crabbed view of the First Amendment.”¹¹⁵ While the majority mainly focused on a reporter’s right to a special privilege, Justice Stewart concentrated on the right of society to the privilege so that it may be informed.¹¹⁶ This communal right, he argued, existed to fulfill the important mission of the press in informing the electorate:

Enlightened choice by an informed citizenry is the basic ideal upon which an open society is premised, and a free press is thus indispensable to a free society. Not only does the press enhance personal self-fulfillment by providing the people with the widest possible range of fact and opinion, but it also is an incontestable precondition of self-government.¹¹⁷

In order to achieve this “basic ideal” of an educated choice, the Court had previously recognized a right of the press to publish information, he said.¹¹⁸ Corollary to this right, Justice Stewart believed, was the right to gather news for publication.¹¹⁹ The Court had implicitly recognized this corollary right in the past, he argued, when the Court found a right to be free to

¹¹³ *Id.* at 710. The Harvard Law Review aptly noted that Justice Powell’s good faith test was different from the majority’s. *Newsman’s Privilege to Withhold Information from Grand Jury*, 86 HARV. L. REV. 137, 143-44 (1972). “This discrepancy,” the Law Review argued presciently, “may have important consequences for the test’s application in the federal courts.” *Id.*

¹¹⁴ *Branzburg*, 408 U.S. at 710.

¹¹⁵ *Id.* at 725 (Stewart, J., dissenting).

¹¹⁶ *Id.* at 725-26.

¹¹⁷ *Id.* at 726-27 (internal footnote omitted).

¹¹⁸ *Id.* at 727.

¹¹⁹ Indeed, “[t]he full flow of information to the public protected by the free-press guarantee would be severely curtailed if no protection whatever were afforded to the process by which news is assembled and disseminated.” *Id.*

publish without prior government approval, the right to distribute news, and the right to receive news.¹²⁰ Relying on these precedents, Justice Stewart thought the First Amendment must necessarily protect the right to be free from having news “unnecessarily cut off at its source.”¹²¹

Justice Stewart’s main concern was that the Court’s failure to recognize a privilege would prevent sources from confiding in journalists and, as such, deprive the public of potentially important information.¹²² As he put it, “The deterrence may not occur in every confidential relationship between a reporter and his source[, b]ut it will certainly occur in certain types of relationships involving sensitive and controversial matters.”¹²³ Accepting the potential constriction of First Amendment rights as a result of the subpoenas, the Court, according to Justice Stewart, should do what it had always done when First Amendment rights are impinged: examine competing interests with a special sensitivity to the First Amendment.¹²⁴

In this case, Justice Stewart believed that the interest in effective grand juries could not overcome the potential damage to First Amendment freedoms.¹²⁵ For Justice Stewart, he saw no irreparable damage by recognizing the privilege where other privileges had already been recognized.¹²⁶ As the Court had previously noted, “[S]ome confidential matters are shielded

¹²⁰ *Id.* (citing *Near v. Minnesota*, 283 U.S. 697 (1931); *New York Times Co. v. U.S.*, 403 U.S. 713 (1971); *Lovell v. Griffin*, 303 U.S., 444 (1938); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); *Lamont v. Postmaster General*, 381 U.S. 301 (1965)).

¹²¹ *Id.* at 728 (“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.”).

¹²² *Id.*

¹²³ *Id.* at 735-36. Justice Stewart also noted that even the Justice Department had recognized the potential chilling effect resulting from subpoenaing sources. *Id.* at 733.

¹²⁴ *Id.* at 735 (citing *Nat’l Ass’n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 461-66 (1958); *Tally v. California*, 362 U.S. 60, 64-65 (1960)).

¹²⁵ *Id.* at 725.

¹²⁶ *Id.* at 737. For example, both constitutional privilege found in the Fourth and Fifth Amendment and evidentiary privileges like the spousal privilege were already widely recognized. *Id.* at 737 n.21-23.

from considerations of policy, and perhaps in other cases for special reasons a witness may be excused from telling all that he knows.”¹²⁷ Similarly, Justice Stewart argued, a reporter had a “very real interest” protected by the First Amendment in not telling all he knows because the privilege exists in the First Amendment to protect both journalists *and* society’s interest in effective newsgathering.¹²⁸

The interest was especially keen, Justice Stewart continued, in newsgathering cases, because “First Amendment rights require special safeguards.”¹²⁹ Relying on precedent, he noted that the Court had previously concluded that “[t]he Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. . . . Nor can the First Amendment freedoms of speech, press . . . or political belief and association be abridged.”¹³⁰ As such, the government faced a “heavy burden of justification” when seeking to restrict First Amendment freedoms by requiring journalists to testify as to the identity of their confidential sources.¹³¹ Distilling from this a rule, Justice Stewart would have required the government to “show that the inquiry is of ‘compelling and overriding importance’ [and] . . . also ‘convincingly’ demonstrate that the investigation is ‘substantially related’ to the information sought.”¹³²

Having established his own test, Justice Stewart began cutting down the majority’s reasoning.¹³³ First, he rejected the notion that the result of the majority’s position applied only to

¹²⁷ *Id.* (internal citation and quotation marks omitted).

¹²⁸ *Id.* at 737-38.

¹²⁹ *Id.* at 738.

¹³⁰ *Id.* at 739 (quoting *Watkins v. U.S.*, 354 U.S. 178, 188 (1957) (alteration in original)).

¹³¹ *Id.*

¹³² *Id.* at 739-40. More specifically, Justice Stewart offered a three-part test that where “the government must (1) show that there is probable cause to believe that the newsman has information that is clearly relevant to a specific probable violation of law; (2) demonstrate that the information sought cannot be obtained by alternative means less destructive of First Amendment rights; and (3) demonstrate a compelling and overriding interest in the information.” *Id.* at 743 (internal footnotes omitted).

¹³³ *Id.* at 744.

those cases where a journalist's source had information regarding a crime.¹³⁴ Instead, he feared that a grand jury's broad investigative powers would also require journalists to reveal information about sources who neither were criminal nor possessed information about a crime.¹³⁵ Second, he asserted that often times subpoenaing a journalist would be unnecessary, because the government could discover the information it sought from a reporter through other means.¹³⁶ Third, he criticized the majority for its "absolute rejection of First Amendment interests," which, he believed, would actually prevent the administration of justice, because "[p]eople entrusted with law enforcement responsibility, no less than private citizens, need general information relating to controversial social problems."¹³⁷ As a result of the chilling effect, he feared, police would no longer be able to gather information that would otherwise be launched into the public sphere.¹³⁸

In addition to Justice Stewart's dissent in *Branzburg*, Justice Douglas wrote a dissent in a companion case, *United States v. Caldwell*.¹³⁹ Justice Douglas would have gone further than any other Justice by recognizing a broad reporter's privilege.¹⁴⁰ As opposed to the rest of his colleagues, he would have found that "there is no 'compelling need' that can be shown which qualifies the reporter's immunity from appearing or testifying before a grand jury, unless the reporter himself is implicated in a crime."¹⁴¹ He reiterated his stance on an absolute privilege: "[The defendant reporter's] immunity in my view is . . . quite complete, for, absent his

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 745.

¹³⁷ *Id.* at 746.

¹³⁸ *Id.*

¹³⁹ *Caldwell*, 408 U.S. at 711; *see also supra* note 78 (explaining the facts of *Caldwell*'s case).

¹⁴⁰ *Caldwell*, 408 U.S. at 712.

¹⁴¹ *Id.*

involvement in a crime, the First Amendment protects him against an appearance before a grand jury and if he is involved in a crime, the Fifth Amendment stands as a barrier.”¹⁴²

Having set forth his view, Justice Douglas turned to the arguments counsel made.¹⁴³ The Justice did not think too much of the *Times*’s argument, writing, that it took “the amazing position that First Amendment rights are to be balanced against other needs or conveniences of government.”¹⁴⁴ In his opinion, the *Times* conceded too much by admitting that First Amendment interests must be balanced against government interests.¹⁴⁵ Instead, he believed, as already revealed, that “all of the ‘balancing’ was done by those who wrote the Bill of Rights[, who also] cast[ed] the First Amendment in absolute terms, . . . [and] repudiated the timid, watered-down, emasculated versions of the First Amendment which both the Government and the *New York Times* advance.”¹⁴⁶

Relying on First Amendment scholar Alexander Meiklejohn,¹⁴⁷ Justice Douglas explained the logic of finding an absolute privilege. First, he cited Meiklejohn’s assertion that “people . . . must have *absolute* freedom of, and therefore privacy of, their individual opinions and beliefs regardless of how suspect or strange they may appear to others.”¹⁴⁸ Moreover, “an individual must also have absolute privacy over whatever information he may generate in the course of testing his opinions and beliefs.”¹⁴⁹ Thus, he saw First Amendment protections as extending to the expression of opinions and beliefs and the process by which the individual

¹⁴² *Id.*

¹⁴³ *Id.* at 713.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ As explained *infra* at notes 205-210, Meiklejohn believed that the First Amendment protected a citizen’s absolute right to speak about information related to democratic self-governance. See generally ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948). On his death, the *Times* recounted Meiklejohn’s self-described view of freedom of speech: “[N]o matter what a person believes in, we must hear it” N.Y. TIMES, Dec. 17, 1964, at 41.

¹⁴⁸ *Caldwell*, 408 U.S. at 714 (emphasis added).

¹⁴⁹ *Id.*

developed those beliefs.¹⁵⁰ The concern for an individual's independence from government in forming those opinions and beliefs was paramount, Justice Douglas argued, when they related to governance:

[S]elf-government can exist only insofar as the voters acquire the intelligence, integrity, sensitivity, and generous devotion to the general welfare that, in theory, casting a ballot is assumed to express, and that [p]ublic discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents.¹⁵¹

Under this view, opinions and beliefs could only be developed suitably if individuals' associations were unencumbered – allowing the freest sharing of ideas.¹⁵²

In short, Justice Douglas reframed the reporter's privilege issue by reference to a right to free speech or free press and also a right to "privacy of association."¹⁵³ In this way, Justice Douglas broke little new ground by relying on the well-established principle that the "[g]overnment is . . . precluded from probing the intimacies of . . . intellectual relationships in the myriad of such societies and groups that exist in this country."¹⁵⁴ Therefore, a reporter cannot, consistent with the First Amendment, be brought in front of a grand jury and forced to explain his "own preconceptions and views about" his current subjects.¹⁵⁵

As a result of the Court's decision, Justice Douglas saw two potential effects on freedom of expression.¹⁵⁶ First, he argued that sources would be less likely to communicate with

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (quoting Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (1961)) (internal quotation marks omitted) (second alteration in original).

¹⁵² *Id.* at 715.

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 716 (quoting *Gibson v. Fla. Legislative Investigation Comm.*, 372 U.S. 539, 565 (1963); *see also* *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 462 (1958) ("It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved.")).

¹⁵⁵ *Caldwell*, 408 U.S. at 720.

¹⁵⁶ *Id.* at 721.

journalists.¹⁵⁷ Second, he asserted that journalists would “write with more restrained pens” out of fear that they would find themselves in front of a grand jury and potentially subject to contempt charges.¹⁵⁸ These effects would impermissibly inhibit both the reporter’s right to gather news and the public’s right to receive that news.¹⁵⁹

Justice Douglas also had policy concerns. He believed that press subpoenas were indicative of the growing influence of government, which increasingly invaded both public and private spheres: “The intrusion of government into this domain is symptomatic of the disease of this society. As the years pass the power of government becomes more and more pervasive. It is a power to suffocate both people and causes. Those in power, whatever their politics, want only to perpetuate it.”¹⁶⁰ He went on to lament, “Now that the fences of the law and the tradition that has protected the press are broken down, the people are the victims. The First Amendment, as I read it, was designed precisely to prevent that tragedy.”¹⁶¹

Diametrically Opposed Views

Placing the majority’s views next to the dissents’ shows a stark disagreement. More to the point, it shows that the Justices could not even agree on what the issue was let alone what the right result was. As explained, the majority viewed *Branzburg* and the companion cases as criminal law cases.¹⁶² This view is defensible, as the only issues in *Branzburg* and the very similar companion cases was whether a reporter could protect a source who was *committing a*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 724; *see also id.* at 722 (“A reporter is no better than his source of information. Unless he has a privilege to withhold the identity of his source, he will be the victim of governmental intrigue or aggression. If he can be summoned to testify in secret before a grand jury, his sources will dry up and the attempted exposure, the effort to enlighten the public, will be ended. If what the Court sanctions today becomes settled law, then the reporter’s main function in American society will be to pass on to the public the press releases which the various departments of government issue.”).

¹⁶² *See supra* notes 85-86 and accompanying text.

crime with no other purpose apart from the crime itself. On the other hand, the dissents viewed the cases as raising important questions about the reach of the First Amendment because the journalists were, in fact, *informing* the public about criminality.¹⁶³ Justice Powell, perhaps unsure as to which perspective should take precedence, fell somewhere in the middle, recognizing that important questions as to both issues must be resolved. Unfortunately, because the majority and the dissent viewed the cases from fundamentally different perspectives, neither opinion attempted to resolve the hard question: the clash between the competing interests.

This has left lower courts to sort out competing interests in cases where law enforcement and First Amendment concerns may weigh more or less heavily as a result of the facts of a specific case than they did under the facts of *Branzburg*. Depending on the facts of any given case and their similarity to the facts of *Branzburg*, a court may be more or less likely to lean on the majority or dissent in *Branzburg*. And, as will be shown, that is exactly what has happened in the lower courts. Indeed, if *Branzburg* is the bones of the reporter's privilege, these lower court decisions have put meat on those bones. As such, these cases, informed by both the majority and the dissent in *Branzburg*, are the most important cases relating to the reporter's privilege as they explain how *Branzburg* applies in cases that are not equivalent to the facts of *Branzburg*.

¹⁶³ See *supra* notes 125-128 and accompanying text.

CHAPTER 3. LITERATURE REVIEW

How “Uninhibited”? How “Robust”? How “Wide-Open”?

It is, I think, impossible to conceive of liberty, as secured by the Constitution against hostile action, whether by the Nation or by the States, which does not embrace the right to enjoy free speech and the right to have a free press.¹⁶⁴

The First Amendment reads, “Congress shall make no law . . . abridging the freedom of speech, or of the press”¹⁶⁵ Speaking of this Amendment, I.F. Stone, the famed investigative reporter who took Senator Joseph McCarthy to the mats for his dogmatic pursuit of alleged communists, once wrote, “The [free speech] philosophy to which we are indebted runs in a great line from Madison, the Father of the Constitution, to Brandeis, and from them to Black and Douglas.”¹⁶⁶ He was right.¹⁶⁷

In 1799, James Madison, the drafter of the First Amendment, explained that “the [A]mendment is a denial to Congress of *all power* over the press.”¹⁶⁸ Justice Louis Brandeis

¹⁶⁴ Patterson v. Colorado, 205 U.S. 454, 465 (1907) (Harlan, J., dissenting).

¹⁶⁵ U.S. CONST. amend. I.

¹⁶⁶ I.F. STONE, THE BEST OF I.F. STONE 55 (2007) (quoting I.F. Stone, *The Crisis Is Coming for a Free Press*, I.F. STONE’S WEEKLY, (JULY 9, 1971)).

¹⁶⁷ Mostly. None of these First Amendment absolutists wrote on a clean slate, but rather built on a tradition of First Amendment thinkers who believed in varying levels of freedom of speech. See JOHN STUART MILL, ON LIBERTY, 35 (1863) (“But the peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”); JOHN MILTON, AREOPAGITICA, 51-52 (1874) (“And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let he and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter? Her confuting is the best and surest suppressing.”); THE WORKS OF DR. BENJAMIN FRANKLIN, BEFORE THE REVOLUTION, 319 (William Duance ed., 1809) (“Freedom of speech is a principal pillar of a free government; when this support is taken away, the constitution of a free society is dissolved, and tyranny is erected on its ruins. Republics and limited monarchies derive their strength and vigor from a popular examination into the actions of the magistrates; this privilege in all ages has been; and always will be abused.” (quoting Benjamin Franklin, *On Freedom of Speech and the Press*, PENN. GAZETTE, Nov. 1737)); Letter from Thomas Jefferson, former President of the United States, to Marie Joseph Paul Yves Roche Gilbert du Motier, Marquis de Lafayette, former Major General of the Continental Army (1823) (“The only security of all is in a free press. The force of public opinion cannot be resisted when permitted freely to be expressed. The agitation it produces must be submitted to. It is necessary, to keep the waters pure.”).

¹⁶⁸ JAMES MADISON, THE KENTUCKY-VIRGINIA RESOLUTIONS AND MR. MADISON’S REPORT OF 1799 60 (1960) (emphasis added). While the words of the Amendment only admonish that Congress “make no law,” by the

summarized Madison's and the other Founders' views as he saw them, writing, "Those who won our independence . . . believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile."¹⁶⁹ Justices Black and Douglas carried an expansive view of the First Amendment into the latter half of the Twentieth Century, writing, "[The First Amendment] leaves, in [our] view, *no room* for governmental restraint on the press."¹⁷⁰

The Court, though, has never accepted Madison, Douglas, and Black's absolutist view of the First Amendment that would prohibit the government from ever passing a law that abridges

late 1920s, the Supreme Court had presumed that this admonition extended not only to Congress and other branches of the federal government, but to state governments as well. *See Gitlow v. New York*, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States."). Justice Harlan suggested this was the case almost twenty years beforehand. *See Patterson*, 205 U.S. at 464 (Harlan, J., dissenting) ("As the 1st Amendment guaranteed the rights of free speech and of a free press against hostile action by the United States, it would seem clear that, when the 14th Amendment prohibited the states from impairing or abridging the privileges of citizens of the United States, it necessarily prohibited the states from impairing or abridging the constitutional rights of such citizens to free speech and a free press.").

¹⁶⁹ Unlike Madison, Black, and Douglas, Brandeis was not an absolutist. *See, e.g., Whitney v. California*, 274 U.S. 357, 376 (1927) (explaining that speech could only be suppressed when there were "reasonable ground[s] to fear that serious evil will result if free speech is practiced"). While it is unclear, it is likely that Stone added Brandeis to his list of First Amendment torchbearers as a result of Justice Brandeis's eloquent language in *Whitney*. *See generally id.* In that case, one of the several criminal syndicalism cases the Supreme Court heard, Justice Brandeis famously wrote:

Those who won our independence believed that the final end of the State was to make men free to develop their faculties, and that, in its government, the deliberative forces should prevail over the arbitrary. They valued liberty both as an end, and as a means. They believed liberty to be the secret of happiness, and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that, without free speech and assembly, discussion would be futile; that, with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.

Id. at 375.

¹⁷⁰ *New York Times Co. v. U.S.*, 403 U.S. 713, 720 (Douglas, J., concurring, joined by Black, J.) (emphasis added). Black's absolutist convictions were well known. During oral argument in *New York Times v. United States* (the *Pentagon Papers* case), then-Solicitor General Erwin Griswold in response to questioning by Justice Black stated somewhat exasperatedly, "Now Mr. Justice Black, your [absolutist] construction of that [Amendment] is well known and I certainly respect it. You say that no law means no law and that should be obvious. And I can only say Mr. Justice that to me, it is equally obvious that no law does not mean no law and I would seek to persuade the Court that that is true." Oral Argument at 118:51, *New York Times v. U.S.*, 403 U.S. 713 (No. 70-1873), available at http://www.oyez.org/cases/1970-1979/1970/1970_1873.

in any way freedom of speech or press.¹⁷¹ No doubt influenced by these views, however, the Court has proclaimed that the history of the United States demonstrates “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.”¹⁷² This “national commitment” has led the Court to strike down, again and again, state and private action that finds itself in the long shadow of the First Amendment.¹⁷³

First Amendment Theories and Their Relation to a Reporter’s Privilege

Having rejected an absolutist approach, the challenge for the Court became defining exactly how “uninhibited, robust, and wide-open” debate should be.¹⁷⁴ How committed is the

¹⁷¹ *Miller v. California*, 413 U.S. 15, 29 (1973) (stating that “no amount of ‘fatigue’” resulting from defining the outer bounds of the First Amendment “should lead [the Court] to adopt a convenient ‘institutional’ rationale – an absolutist, ‘anything goes’ view of the First Amendment – because it will lighten our burdens.”); *see also* JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 109 (1980) (“[W]e should face the validity of such an ‘absolutist’ approach head-on and recognize that one simply cannot be granted a constitutional right to stand on the steps of an inadequately guarded jail and urge a mob to lynch the prisoner within.”); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 22 (1972) (“Any [absolutist] reading is, of course, impossible. Since it purports to be an absolute position we are entitled to test it with extreme hypotheticals. Is Congress forbidden to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors’ gallery during its own deliberations or to provide any rules for decorum in federal courtrooms?”); William J. Brennan, Jr., *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 *HARV. L. REV.* 1, 4 (1965) (noting that the absolutist view has never persuaded a majority of the Court).

¹⁷² *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁷³ *See, e.g.*, *U.S. v. Alvarez*, 132 S. Ct. 2537, 2551 (2012) (concluding that even false facts are protected by the First Amendment); *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (striking down a jury verdict in favor of inflammatory protestors at a funeral); *U.S. v. Stevens*, 130 S. Ct. 1577, 1592 (2010) (striking down as unconstitutionally overbroad a federal law aimed at suppressing animal cruelty); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 246 (2002) (finding unconstitutional a federal statute that “proscribe[d] the visual depiction of an idea – that of teenagers engaging in sexual activity”); *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001) (finding that a third party’s illegal conduct in acquiring information does not affect an innocent party’s First Amendment rights to disseminate the same); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 874 (1997) (striking down law attempting to prohibit the dissemination of obscenity and indecent material); *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992) (striking down a content-based ordinance that punished cross-burning); *U.S. v. Eichman*, 496 U.S. 310, 319 (1990) (upholding a citizen’s right to desecrate the flag); *Texas v. Johnson*, 491 U.S. 397, 420 (1989) (same); *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 570 (1976) (finding broad prior restraint unconstitutional); *Cohen v. California*, 403 U.S. 15, 26 (1971) (holding that a state cannot make the act of expressing oneself with offensive words a criminal one).

¹⁷⁴ John Hart Ely succinctly explained that the brevity of the First Amendment’s language leaves much to be desired. *See* ELY, *supra* note 171. Indeed, the Court’s broad interpretation of the First Amendment beyond its express language, which on its face only applies to Congress, “requires a theory to get us where the Court has gone.” *Id.* Moreover, with the Court’s rejection of the absolutist approach, it is necessary to look to other theories to define the still undefined reach of the Amendment. *See generally* ANTHONY LEWIS, *FREEDOM FOR THE THOUGHT WE HATE: A BIOGRAPHY OF THE FIRST AMENDMENT*, 157-67 (2007).

nation to its own commitment? This is the question the Court has tried to answer in the last ninety-four years.¹⁷⁵ Absent an absolutist view, the size of the First Amendment's shadow is determined by First Amendment theory.¹⁷⁶ As such, scholars have offered a variety of theories to explain the contours of the First Amendment's protections; indeed, First Amendment doctrine is rife with numerous theories attempting to explain the reasons for protecting some speech while not protecting other speech.¹⁷⁷ There is the marketplace of ideas theory,¹⁷⁸ the liberty theory,¹⁷⁹

Two famed free speech scholars have aptly summarized the difficulties of defining the outer limits of First Amendment protections. Melville Nimmer recognized that absent an absolute stance, courts will be engaged in the questionable procedure of deciding what speech merits protection and what speech does not merit protection:

If we may not cling to the anchor of an absolute, unqualified rule, is not the alternative no rule at all? If the judges are not required to protect all speech, doesn't this mean that the only speech which will be protected is that which, on an *ad hoc* basis, the judges may from time to time approve? That this fear is not fanciful is all too clearly illustrated by a line of cases in which the Court engaged in what has been called *ad hoc* balancing.

Melville Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 938 (1968). Alexander Meiklejohn expressed similar concerns attendant to adopting a rule that was not absolute in nature:

To take an absolutist position is no more than to try to define precisely the command of the Constitution and to stand by that definition. The critical question is: What does the first amendment mean us to protect? It has long been contended that an explicit answer is unavailable and that the only possibility is a pragmatic case-by-case method in which speech and other constitutional objectives are continually, yet never definitively, adjusted to one another. But surely, we need to investigate how far this process can be transcended and how precisely we can interpret the Constitution.

Alexander Meiklejohn, *Public Speech and the First Amendment*, 55 GEO. L. J. 234, 235 (1966).

¹⁷⁵ *Schenck v. United States*, an espionage case where the petitioner distributed anti-draft materials, was the first case where the Supreme Court had been called on to decipher the meaning of the First Amendment. *Schenck v. U.S.*, 249 U.S. 47 (1919). But see *Patterson v. Colorado*, 205 U.S. 454 (1907) (refusing to reach the First Amendment question, but noting that "the main purpose of [the right to free speech and the press] is 'to prevent all such *previous restraints* upon publications as had been practiced by other governments.'"). Since then, the Court has undertaken carefully to define that Amendment's scope. See *Miller, e.g.*, 413 U.S. at 23 ("We acknowledge . . . the inherent dangers of undertaking to regulate any form of expression.").

¹⁷⁶ See, e.g., SUSAN DENTE ROSS, *DECIDING COMMUNICATION LAW: KEY CASES IN CONTEXT* 19 (2004) (comparing and contrasting the reach of the First Amendment under one theory and under another theory).

¹⁷⁷ I reiterate the words of Harry Wellington, who wrote apologetically in the 1970's, "Those to whom nothing which I am about to say will be new may I hope, excuse me, if on a subject which for now three centuries has been so often discussed, I venture on one discussion more." Harry Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1105 (1979) (quoting MILL, *supra* note 167, at 1105 (internal alterations omitted)). For a general discussion of widely accepted First Amendment theories see LEE LEVINE, ROBERT C. LIND, SETH D. BERLIN & C. THOMAS DIENES, *NEWSGATHERING AND THE LAW* § 1.02 (4th ed. 2011).

¹⁷⁸ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas . . ."); see also MILTON, *supra* note 167.

¹⁷⁹ See *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) ("[T]he right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all."); *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 446 (1950) (Black, J., dissenting) (discussing the "inviolable" nature of realizing and acting on one's own chosen beliefs and chastising the majority for falling victim

the checking value theory,¹⁸⁰ the self-governance theory,¹⁸¹ the prior restraint theory,¹⁸² the absolutist theory,¹⁸³ the moral theory,¹⁸⁴ the market failure theory,¹⁸⁵ and so on and so forth.¹⁸⁶

Despite the wide variety of theories put forward, the Court and scholars consistently invoke three theories more than any others.¹⁸⁷ The self-governance theory, the liberty theory, and the marketplace of ideas theory comprise this theoretical trinity.¹⁸⁸ While less widely

to their own “[f]ears of alien ideologies”); C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978) (“The liberty model holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions.”); Martin Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982) (noting that, at bottom, most free expression values are sub-species of the broader self-realization value).

¹⁸⁰ Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521 (1977). But see Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1, 108 n.86 (1990) (criticizing Blasi for basing his theory on “a number of questionable premises,” including the presumptions that citizen access to speaking platforms, an antagonistic populace, and an informed populace exist).

¹⁸¹ See MEIKLEJOHN, *supra* note 147, at 25 (describing the democratic town hall where voters both express themselves and form opinions through entertaining others’ ideas); see also *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (“Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”).

¹⁸² *Near v. State of Minnesota ex rel. Olson*, 283 U.S. 697, 713 (1931) (“In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”); see also *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))).

¹⁸³ See *supra* notes 170 and accompanying text.

¹⁸⁴ David Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 69 (1975) (“[I]t is clear that strong moral ideas are implicit in the [F]irst [A]mendment and that moral analysis may clarify the proper constitutional interpretation and application of those ideas.”).

¹⁸⁵ See Baker, *supra* note 179, at 981 (“Critics of the classic marketplace of ideas theory, relying either on the failure of the [theory’s] assumptions . . . or specifically on failures of the economic market (such as monopolization of communication channels or difficulties of organizing interest groups), have advocated various forms of governmental intervention to improve market functioning.”).

¹⁸⁶ For explanations of several other First Amendment theories see JEROME BARRON & C. THOMAS DIENES, *FIRST AMENDMENT LAW IN A NUTSHELL* 14-17 (2008) and Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1786 (2004). This abundance of First Amendment theories has actually done less to explain the Amendment than to confuse its understanding altogether. As Professor Schauer puts it,

[I]f there exists a single theory that can explain the First Amendment’s coverage, it has not yet been found. Yet if all of the historically recognized and judicially mentioned normative theories are available – self-expression, individual autonomy, dissent, democratic deliberation, the search for truth, tolerance, checking governmental abuse, and others – then their collective coverage is so great as to be of little help in explaining the existing state of First Amendment terrain.

Id. at 1786.

¹⁸⁷ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177 at § 1.05.

¹⁸⁸ See generally Baker, *supra* note 179.

acknowledged, a fourth theory, the checking value, also merits discussion here.¹⁸⁹ These theories merit discussion because from time to time the Court has invoked these theories to find protection for speech,¹⁹⁰ and, at other times, the Court has invoked these theories to deny protection for speech.¹⁹¹ These theories are especially important in the context of a reporter's privilege because some may support a constitutional reporter's privilege and other's may not.¹⁹²

At the same time, these theories are not the end-all-be-all when it comes to defining First Amendment protections. These four theories, as understood today, are largely after-the-fact rationales to explain how far the First Amendment was intended to reach (or, more honestly, the progenitors of the theories think it should reach).¹⁹³ As Professor Blasi explained, "The theory underlying a clause of the Constitution often depends more on the claims that have been pressed over the years in the name of the clause than on the grievances and value judgments that originally induced its adoption."¹⁹⁴ Simply then, no theory answers as many questions as its

¹⁸⁹ See generally Blasi, *supra* note 180.

¹⁹⁰ See, e.g., *Snyder v. Phelps*, 131 S. Ct. 1207, 1215 (2011) (asserting constitutional protection from tort liability for funeral protest, "because 'speech concerning public affairs is more than self-expression; it is the essence of self-government.'" (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74–75 (1964))); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 896 (2010) (discussing the marketplace of ideas theory in the process of overturning political speech restrictions); *Herbert v. Lando*, 441 U.S. 153, 185 (1979) (Brennan, J., dissenting) (making an appeal to the checking value to support his contention that an editorial privilege does protect journalists from being required to divulge their editorial processes); *New York Times, Co. v. Sullivan*, 376 U.S. 254, 282 (1964) (invoking the self-governance theory to find constitutional protections for citizens who criticize government officials).

¹⁹¹ *New York v. Ferber*, 458 U.S. 747, 762–63 (1982) ("We consider it unlikely that visual depictions of children performing sexual acts or lewdly exhibiting their genitals would often constitute an important and necessary part of a literary performance or scientific or educational work."); *Roth v. U.S.*, 354 U.S. 476, 484 (1957) ("But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance."); *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 572 (1942) ("It has been well observed that [some] utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.").

¹⁹² Professor Ugland has explained, for example, that those judges who view the First Amendment as intended to protect merely "expressive freedom" are more likely not to find a reporter's privilege. See Ugland, *supra* note 64, at 41.

¹⁹³ See Blasi, *supra* note 180, at 523 ("For in Anglo-American law, theories are typically rationalizations for desired or decreed adjudicative results – rationalizations which come to have a life and integrity of their own and which do influence future perceptions and decisions, but rationalizations nonetheless.").

¹⁹⁴ *Id.*

advocates would suppose, and every theory is, at times, selectively invoked to protect challenged speech in any single case.¹⁹⁵

For this reason, it would be wrong to argue that a reporter's privilege should be foreclosed merely because it fails to find support in any one theory.¹⁹⁶ Instead, the prominent theories should be read as evincing different rationales for protecting speech – separate chapters of a grander First Amendment book that value speech for its own sake on the individual level and speech for its ends on the societal level.¹⁹⁷ In short, the reach of the First Amendment should not be limited based on the label one gives a theory, but should rather be informed by the theories taken together.

The Self-Governance Theory

The Preamble to the Constitution reads, “We the People of the United States, in Order to form a more perfect Union . . . do ordain and establish this Constitution for the United States of America.”¹⁹⁸ In other words, the citizens of the various states established the federal government by outlining in the Constitution what power the new government enjoyed.¹⁹⁹ It was the people's government: “The government of the Union . . . is emphatically and truly, a government of the people. In form, and in substance, it emanates from them. Its powers are granted by them, and are to be exercised directly on them, and for their benefit.”²⁰⁰

Because U.S. citizens retain power over a government that is, first and foremost, an agent

¹⁹⁵ *Id.* at 526 (“The result [of the Supreme Court's First Amendment jurisprudence] has been a pattern of aborted doctrines, shifting rationales, and frequent changes of position by individual Justices.”).

¹⁹⁶ Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) (noting that “the Court has been generous about the range of values relevant in [F]irst [A]mendment theory, and unreceptive to those who ask it to confine [F]irst [A]mendment values to a particular favorite”).

¹⁹⁷ Thomas Emerson was a main advocate of this position, arguing that the First Amendment existed to protect self-expression, reveal truth, and protect social and political participation from being squelched, among others. See Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 878-79 (1963).

¹⁹⁸ U.S. CONST. pmbl.

¹⁹⁹ Meiklejohn, *supra* note 174, at 256; see also *New York Times, Co. v. Sullivan*, 376 U.S. 254, 275 (1964) (describing Madison's view that “[t]he people, not the government, possess the absolute sovereignty”).

²⁰⁰ *M'Culloch v. Maryland*, 17 U.S. 316, 404-05 (1819) (Marshall, C.J.).

of the people,²⁰¹ it makes sense that people should be informed so that they can effectively exercise that power.²⁰² To be informed for the purposes of self-governance, it is generally agreed that citizens must be, at least, “minimally competent.”²⁰³ Therefore, many have argued that the First Amendment protects the people’s right to discuss information about their government as a means toward achieving “minimal competence.”²⁰⁴ This is the self-governance theory.

The self-governance theory can be defined narrowly, speaking only of the right of the people to share opinions that relate to democratic decision making, or broadly defined, encompassing the right of the people to share ideas and thereby shape their culture both socially and politically.²⁰⁵ The breadth of the theory depends on the emphasis placed on the values underlying the theory. At least five values underlie the self-governance theory: participation in democratic government, the attainment of political truth, efficiency in majority rule, restraint on corruption, and the promotion of government stability.²⁰⁶ But, however one describes the breadth of the theory’s application, these values stand support the proposition that it is “the right

²⁰¹ *Id.*; see also U.S. CONST. amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

²⁰² MEIKLEJOHN, *supra* note 147, at 3 (“We Americans think of ourselves as politically free. We believe in self-government. If men are to be governed, we say, then that governing must be done, not by others, but by themselves. So far, therefore, as our own affairs are concerned, we refuse to submit to alien control.”).

Surprisingly, whatever Meiklejohn may think about normative principles of self-governance, a body of literature acknowledges not only that citizens do not need to be ultra-informed for a democracy to run smoothly at all. MICHAEL X. DELLI CARPINI & SCOTT KEETER, WHAT AMERICANS KNOW AND WHY THAT MATTERS 23 (noting that “many believe that the need for a generally informed citizenry is overstated”), 49 (“The strongest argument against the need for an informed public draw on liberal, protective theories of democracy. Because it is assumed that there is little that a citizen is required to do, it follows there is little a citizen is required to know.”) (1997). Yet, still others have come to the opposite conclusion that “civic education . . . [is] the keystone to democracy.” *Id.* at 39. Delli Carpini and Keeter argued that only a threshold level of *minimal competence* is necessary for democracy to function. In spite of this pragmatic view, even Delli Carpini and Keeter conceded that “[p]olitical information is to democratic politics what money is to economics: it is the currency of citizenship.” *Id.* at 8.

²⁰³ DELLI CARPINI & SCOTT KEETER, *supra* note 202, at 53.

²⁰⁴ *Sullivan*, 376 U.S. at 269 (“The general proposition that freedom of expression upon public questions is secured by the First Amendment has long been settled . . .”).

²⁰⁵ See Emerson, *supra* note 197, at 883 (noting that the theory “embraced the right to participate in the building of the whole culture, and included freedom of expression in religion, literature, art, science and all areas of human learning and knowledge”).

²⁰⁶ RODNEY SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 10-12 (1992).

of all members of [a democratically-organized] society to form their own beliefs and communicate them freely to others.”²⁰⁷

This type of speech is protected not for its own sake, but for the ends it serves: “The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.”²⁰⁸ In this way then, the First Amendment, under a self-governance ideal, operates more as a procedural restraint on government than as a substantive guarantee to the product of speech like the truth.²⁰⁹ As the philosopher Alexander Meiklejohn explained, “[The First Amendment] is a device for the sharing of whatever truth has been won. Its purpose is to give to every voting member of the body politic the fullest possible *participation in*,” not substantive “understanding of those problems which the citizens of a self-governing society must deal.”²¹⁰

While self-governance is a simple idea, its realization has been hard fought. It grew out of Britain’s system of suppression through the use of “constructive treason, seditious libel, and prior restraints.”²¹¹ Under this system, until 1694, publishers were required to apply for licenses

²⁰⁷ See Emerson, *supra* note 197, at 883.

²⁰⁸ *Sullivan*, 376 U.S. at 269 (internal citations and quotation marks omitted) (emphasis added).

²⁰⁹ MEIKLEJOHN, *supra* note 147, at 88.

²¹⁰ *Id.* (emphasis added). While Meiklejohn is often credited with expounded the theory of self-governance, some have argued, in my opinion correctly, that the self-governance principle can be traced to Judge Learned Hand’s opinion in *Masses Publishing Co. v. Patten*. See Vincent Blasi, *Learned Hand and the Self-Government Theory of the First Amendment*: *Masses Publishing Co. v. Patten*, 61 U. COLO. L. REV. 1 (1990). As Judge Hand explained in his opinion enjoining the Postmaster General from not mailing circulars protesting, among other things, the draft, “[The circulars] fall within the scope of that right to criticize either by temperate reasoning, or by immoderate and indecent invective, which is normally the privilege of the individual in countries dependent upon the free expression of opinion as the ultimate source of authority.” *Masses Pub. Co. v. Patten*, 244 F. 535, 539 (S.D.N.Y.), *rev’d*, 246 F. 24 (2d Cir. 1917).

²¹¹ William Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 97-98 (1984).

to print – a prior restraint²¹² on publishers’ freedom of expression.²¹³ While formal licensing did not find its way to colonial America,²¹⁴ constructive treason and seditious libel did.²¹⁵ Under constructive treason statutes, a citizen could be thrown in jail for advocating war against the Crown, aiding and abetting the Crown’s enemies, or making threats on the life of the King.²¹⁶ Perhaps more influential in the history of self-governance, however, was the development of seditious libel in England and America.²¹⁷

In England, “a publication was considered seditious if it defamed the government or undermined its authority.”²¹⁸ Thus, for example, one man was sentenced in 1664 for “deliver[ing] a handwritten message to a [priest] requesting him to bewaile . . . those wickednesses which go unpunished by the magistrate.”²¹⁹ Although the rate of prosecutions varied, by the turn of the century, the Crown began to invoke seditious libel laws more vigorously.²²⁰ It expanded the definition of libel to cover both attacks on individuals within the government and the government itself: “If men should not be called to account for possessing the people with an ill opinion of Government, no Government can subsist; for it is very necessary for every Government, that the people should have a good opinion of it.”²²¹

²¹² *Alexander v. U.S.*, 509 U.S. 544, 566 (1993) (Kennedy, J., dissenting) (“In its simple, most blatant form, a prior restraint is a law which requires submission of speech to an official who may grant or deny permission to utter or publish it based upon its contents.”).

²¹³ *See* Mayton, *supra* note 211, at 98.

²¹⁴ The closest thing to a form of licensing that came to the American shores was the Stamp Act of 1765. As one author explained, “There was little doubt about the destructive intention of the measure, and vehement protests came from many quarters.” *See* Edward A. Bloom, “*Paper Wars*” for a Free Press, 56 THE MODERN LANGUAGE REV. 481, 486 (1961).

²¹⁵ *See* Mayton, *supra* note 211, at 98.

²¹⁶ *Id.* at 99.

²¹⁷ *See* New York Times, Co. v. Sullivan, 376 U.S. 254, 273 (1964) (explaining that the history of seditious libel in Britain and the United States informed the “central meaning of the First Amendment”).

²¹⁸ MICHAL R. BELKNAP, AMERICAN POLITICAL TRIALS 27 (1994).

²¹⁹ Philip Hamburger, *The Development of the Law of Seditious Libel and the Control of the Press*, 37. STAN. L. REV. 661, 698 (1985) (internal quotation marks omitted).

²²⁰ *Id.* at 735.

²²¹ *Id.* (quoting *Queen v. Tutchin*, 90 Eng. Rep. 1133, 1133-34). William Blackstone, a consistently quoted source of the Supreme Court, believed that prosecutions for seditious libels were entirely appropriate: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon

Eventually, seditious libel found its way to the shores of colonial America²²² and later into the federal and state statutes of the United States of America.²²³ Most famously, in an attempt to hold on to power in the late 1700s, John Adams's Federalists took a page out of the Crown's book and passed the Alien and Sedition Acts with the aim to suppress opposition.²²⁴ In part, the Sedition Act "provided for the punishment of anyone who unlawfully combined to oppose the laws of the United States."²²⁵ Republicans vehemently opposed the Acts at the time on the basis that they contravened the First Amendment's guarantee of citizens' right to associate and share ideas to hold government officials accountable:

[The Alien and Sedition Acts] exercise[] . . . a power not delegated by the Constitution, but, on the contrary, expressly and positively forbidden by one of the amendments thereto, – a power which, more than any other, ought to produce universal alarm, because it is levelled against the right of freely examining public characters and measures, and of free communication among the people thereon, which has ever been justly deemed the only effectual guardian of every other right.²²⁶

Luckily for the Republicans, the Act was short lived; originally passed in 1798, it was set to – and did – sunset on March 3, 1801.²²⁷ While in force though, ten men were convicted of

publication, and not in freedom from censure for criminal matter when published." William Blackstone, *Commentaries* *152-53.

²²² Most famously, in November of 1734, John Peter Zenger, a printer in colonial New York, was arrested and tried for seditious libel after he published the texts allegedly disparaging the Crown. Livingston Rutherford, *JOHN PETER ZENGER: HIS PRESS, HIS TRIAL, AND A BIBLIOGRAPHY OF ZENGER IMPRINTS* 45 (1904). Zenger was later found not guilty. *Id.* at 125.

²²³ See An Act for the Punishment of Certain Crimes against the United States (Sedition Act), ch. 74, 1 Stat. 596 (1798).

²²⁴ See Walter Berns, *Freedom of the Press and the Alien and Sedition Laws: A Reappraisal*, 1970 SUP. CT. REV. 109, 111 (1970) ("As a defense measure, designed to protect the country against alien opinion and the aliens themselves . . . , . . . the Federalists enacted, over the intense opposition of the Republicans, the Alien and Sedition Laws, which Federalist prosecutors and Federalist judges proceeded to use in an effort to silence their opponents.").

²²⁵ *Id.* at 113; see also Brennan, *supra* note 171, at 15 ("[I]f any person shall write, print, utter or publish . . . any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress . . . or the President . . . , with intent to defame . . . or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States" (quoting 1 Stat. 596 (1798))).

²²⁶ 4 Elliot's Debates 528-29 (1798).

²²⁷ See Berns, *supra* note 224, at 113.

violating its prohibitions and were subjected to fines and jail time.²²⁸ After the Act expired, President Thomas Jefferson pardoned the convicted men.²²⁹

President Jefferson's actions would later lead Justice Holmes to the conclusion that "the United States through many years had shown its repentance for the Sedition Act of 1798 by repaying fines that it imposed."²³⁰ Other justices agreed,²³¹ and Justice Black later denounced the Act, writing, "I cannot now agree to an interpretation . . . which gives a new life to the long repudiated anti-free speech and anti-free press philosophy of the 1798 Alien and Sedition Acts."²³² The Supreme Court as a whole, however, refused to address the constitutionality of the Sedition Act until the mid-1960s – over 150 years after Congress passed the Act.²³³

In *New York Times v. Sullivan*, Justice Brennan, writing for a majority of the Court, finally declared that although the Act "was never tested in this Court, the attack upon its validity has carried the day in the court of history."²³⁴ In fact, he used the repugnance for the Act to

²²⁸ *Id.* at 114.

²²⁹ *Letter from Thomas Jefferson to Judge Spencer Roane*, (Sept. 6, 1819), found in Thomas Jefferson, *The Writings of Thomas Jefferson*, (Paul Leicester Ford, ed. 1899).

²³⁰ *Abrams v. U.S.*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

²³¹ *Beauharnais v. People of State of Ill.*, 343 U.S. 250, 289 (1952) (Jackson, J., dissenting) ("[E]ven in the absence of judicial condemnation, the political disapproval of the Sedition Act was so emphatic and sustained that federal prosecution of the press ceased for a century.").

²³² *Ludecke v. Watkins*, 335 U.S. 160, 183 (1948) (Black, J., dissenting); *see also* *Communist Party of U.S. v. Subversive Activities Control Bd.*, 367 U.S. 1, 155 (1961) (Black, J., dissenting) ("The enforcement of these statutes, particularly the Sedition Act, constitutes one of the greatest blots on our country's record of freedom."); *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 66 n.23 (1961) (Black, J., dissenting) (characterizing the Act as "a weapon to suppress the political opposition of the Jeffersonians"); *Am. Commc'ns Ass'n, C.I.O., v. Douds*, 339 U.S. 382, 453 (1950) (Black, J., dissenting) ("Fears of alien ideologies have frequently agitated the nation and inspired legislation aimed at suppressing advocacy of those ideologies. At such times the fog of public excitement obscures the ancient landmarks set up in our Bill of Rights. Yet then, of all times, should this Court adhere most closely to the course they mark." (footnote omitted)).

²³³ *See generally* *New York Times, Co. v. Sullivan*, 376 U.S. 254 (1964); *see also* *Stromberg v. People of State of Cal.*, 283 U.S. 359, 367 (1931) ("[W]e do not find it necessary, for the purposes of the present case, to review the historic controversy with respect to 'sedition laws' or to consider the question as to the validity of a statute dealing broadly and vaguely with what is termed seditious conduct . . ."); *Gitlow v. People of State of New York*, 268 U.S. 652, 672 (1925) ("We need not enter upon a consideration of the English common law rule of seditious libel or the Federal Sedition Act of 1798, to which reference is made in the defendant's brief." (footnote omitted)).

²³⁴ *Sullivan*, 376 U.S. at 276. Notably, the presently enforced Espionage Act adopted in the early twentieth century has been attacked as similar to the Alien and Sedition Act and also unconstitutional. *See, e.g.*, *Grooms v. Caldwell*, 806 F. Supp. 807, 809 (N.D. Ind. 1991) ("This court is all too familiar with the Holmesian doctrine of free

illuminated the “central meaning of the First Amendment”: citizens could not be punished for criticizing their elected officials.²³⁵ As a result, criminal libel laws were held unconstitutional as they imposed “the pall of fear and timidity . . . upon those who would give voice to public criticism[, which would create] an atmosphere in which the First Amendment freedoms cannot survive.”²³⁶ And, therein lies the irony: the Acts intended to limit free expression and association would later come to define that speech deserving of the most protection.

By placing political speech at the center of the First Amendment, *Sullivan* is the quintessential self-governance case.²³⁷ As Henry Kalven summarized, “The Amendment has a ‘central meaning’ – a core of protection of speech without which democracy cannot function, without which, – in Madison’s phrase, ‘the censorial power’ would be in the Government over the people and not ‘in the people over the Government.’”²³⁸ Since *Sullivan*, the Court has repeatedly reaffirmed this view.²³⁹

The self-governance theory supports providing strong protections for a confidential reporter-source relationship if that source is handing over information related to self-governance.²⁴⁰ In fact, Justice Stewart’s spirited dissent in *Branzburg* relied on this theory:²⁴¹ his entire opinion was centered around the belief that “[e]nlightened choice by an informed citizenry

speech that emanated out of the jurisprudence following the Espionage Act of 1917 and the Sedition Act of 1918, both of which were far more egregious than anything that John Adams may have attempted in the Alien and Sedition Acts of 1798.”); see also William Brennan, *The Quest to Develop a Jurisprudence of Civil Liberties in Times of Security Crisis*, 18 ISR. Y.B. ON HUM. RTS. 11 (1988) (discussing the Espionage Act as an extension of the Alien and Sedition Acts that infringed on civil liberties).

²³⁵ *Sullivan*, 376 U.S. at 278.

²³⁶ *Id.*

²³⁷ Henry Kalven, *The New York Times Case: A Note on “the Central Meaning of the First Amendment,”* 1964 SUP. CT. REV. 191, 209 (1964) (explaining that “the opinion almost literally incorporated Alexander Meiklejohn’s thesis that in a democracy the citizen as ruler is our most important public official”).

²³⁸ *Id.*

²³⁹ See, e.g., *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech, of course, is at the core of what the First Amendment is designed to protect.”) (quotation marks omitted)).

²⁴⁰ *Branzburg v. Hayes*, 408 U.S. 665, 725 (1972) (Stewart, J., dissenting).

²⁴¹ *Id.*

is the basic ideal upon which an open society is premised.”²⁴² He believed that an unfettered press advanced the “self-fulfillment” of the people by providing important information, which was a precondition of self-governance.²⁴³ “The press ‘has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events,’” he wrote.²⁴⁴ In short, Stewart argued that the Court had relied on the self-governance theories in other cases to recognize accessory rights to speech – like the right to receive information – and should have done the same in reporter’s privilege case.²⁴⁵

Justice Douglas, also dissenting, agreed with Justice Stewart: “[E]ffective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting”²⁴⁶ Douglas saw at least two deleterious effects on the public’s ability to self-govern under the *Branzburg* Court’s ruling: first, sources will be less likely to come forward, and, if they do come forward, they will not be as candid; and second, reporters will be more likely to temper their stories to avoid landing in front of the grand jury.²⁴⁷ Taken together, Douglas feared that the Court’s ruling prohibited the press from doing exactly what the Constitution contemplated that it do: “explore and investigate events, inform the people

²⁴² *Id.* at 726.

²⁴³ *Id.* at 727.

²⁴⁴ *Id.* (quoting *Estes v. Texas*, 381 U.S. 532, 539 (1965)). The press was especially important in an age of a confluence of private and public power. *Id.*

²⁴⁵ *Id.* Invoking the self-governance theory, the recognition of a constitutional reporter’s privilege was an easy question for Stewart:

[The need for a privilege] 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 [sic] process – will either deter sources from divulging information or deter reporters from gathering and publishing information.

Id. at 728.

²⁴⁶ *U.S. v. Caldwell*, 408 U.S. 665, 715 (1972) (Douglas, J., dissenting).

²⁴⁷ *Id.* at 721.

what is going on, and . . . expose the harmful as well as the good influences at work.”²⁴⁸

Most recently, in the Court’s only other case touching (indirectly) on the press’s rights vis-à-vis its sources, four Justices also relied on the self-governance theory.²⁴⁹ In *Cohen v. Cowles Media Co.*, the Court found that a news organization could be held liable for damages under a contract theory if that news organization violated a promise of confidentiality to a source.²⁵⁰ Dissenting from the Court’s holding, Justice Souter urged a view of the First Amendment that protected not just the speaker, but also considered the “importance of the information to public discourse.”²⁵¹ Finding the disclosure of the anonymous source’s name itself was extremely newsworthy to a state gubernatorial race, he invoked the self-governance theory: “[F]reedom of the press is ultimately founded on the value of enhancing [political] discourse for the sake of a citizenry better informed and thus more prudently self governed.”²⁵²

Setting aside cases where the source’s identity is newsworthy in and of itself, history supports the view that, in most cases, anonymity is necessary to self-governance.²⁵³ Indeed, many leaks relate to political speech if not, strictly speaking, government information.²⁵⁴ The *Pentagon Papers Case* is perhaps the most famous example.²⁵⁵ There, Daniel Ellsberg, a government intelligence contractor, secretly delivered a damaging report regarding progress (or the lack thereof) in Vietnam to the *Times* and the *Washington Post* under the guarantee of anonymity.²⁵⁶ More recently, the *Times*, relying on confidential sources, revealed that President

²⁴⁸ *Id.* at 723.

²⁴⁹ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991) (Souter, J., dissenting). Justice Souter was joined by Justices Marshall, Blackmun, and O’Connor.

²⁵⁰ *Id.* at 672 (majority opinion).

²⁵¹ *Id.* at 678 (Souter, J., dissenting).

²⁵² *Id.*

²⁵³ See Kielbowicz, *supra* note 68, at 483 (“At bottom, most leaks are a form of political speech.”).

²⁵⁴ *Id.*

²⁵⁵ See *New York Times Co. v. U.S.*, 403 U.S. 713 (1971).

²⁵⁶ DANIEL ELLSBERG, *SECRETS: A MEMOIR OF VIETNAM AND THE PENTAGON PAPERS* 372, 392 (2002) (explaining that one of the preconditions to giving the *Post* the papers was a promise of anonymity).

Obama has an active role in deciding which alleged terrorists should be targeted and killed by drones in the Middle East.²⁵⁷ The reporters behind that revelation used confidential sources to report this story, which went on to receive wide publicity.²⁵⁸ Other famous uses of confidential sources to report on governmental activity include President Jimmy Carter's wish to develop a "neutron bomb," the conditions of the Walter Reed Army Medical Center, and Enron.²⁵⁹

In confidential source cases where the information leaked relates to self-governance, the self-governance theory operates in two ways. First, the reporter has a greater right to refuse to disclose source information because the reporter has an interest in keeping the path to confidential source information free from legal debris so that he may continue to inform the public. Second, the public, as an interested party, has a right to receive the information. The self-governance theory views the First Amendment as guaranteeing that government will not interfere with the exchange of political information. If a reporter were required to divulge his source, then the government would not be respecting the procedural limits that the First Amendment was intended to establish under the self-governance theory.

The Marketplace of Ideas Theory

Judges, scholars, and practitioners have invoked the marketplace of ideas theory with such frequency that it has become a constitutional cliché.²⁶⁰ The classical understanding of the marketplace of ideas theory comes from John Stuart Mill's *On Liberty*, an inquiry into the

²⁵⁷ Jo Becker and Scott Shane, *Secret 'Kill List' Proves a Test of Obama's Principles and Will*, N.Y. TIMES, May 29, 2012, at A1.

²⁵⁸ *Id.* (noting the use of anonymity for at least one source who divulged information about the still classified drone program).

²⁵⁹ These cases are summarized in *Free Flow of Information Act: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Lee Levine, Partner, Levine, Sullivan, Koch, & Schulz L.L.P.).

²⁶⁰ Simply, the marketplace of ideas metaphor "has had as major an impact as any Supreme Court decision on popular and academic thinking about the First Amendment." Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L.J. 821, 829 (2008).

“struggle between Liberty and Authority.”²⁶¹ In *On Liberty*, Mill rejected the idea that the government could suppress citizens views, even if the majority sanctioned the suppression.²⁶² According to Mill, even a citizen’s erroneous facts and harmful beliefs were important in the marketplace because they had the potential to increase the contrast between right and wrong.²⁶³ In Mill’s words, “If the [suppressed] opinion is right, [society is] deprived of the opportunity of exchanging error for truth: if wrong, [society loses] what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”²⁶⁴ This theory rests then, for better or worse, on the assumption that “[w]rong opinions and practices gradually yield to fact and argument.”²⁶⁵

Beyond increasing the contrast between right and wrong, Mill believed that the majority must not censor a minority view for two other reasons.²⁶⁶ First, it is impossible for the majority to know whether the idea it suppressed was wrong or dangerous:²⁶⁷ “Those who desire to suppress [an opinion], of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means

²⁶¹ See MILL, *supra* note 167, at 8.

²⁶² *Id.* at 35-36.

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.* at 41. Some thought that this assumption, among others, was for the worse. See Jerome A. Barron, *Access-the Only Choice for the Media?*, 48 TEX. L. REV. 766 (1970). Professor Jerome Barron, for example, argued, “[The marketplace of ideas theory is] romantic because it builds a system of legal rights and duties on the assumption that there is a self-operating and self-correcting mechanism in the communication of ideas that is called somewhat hopefully the ‘marketplace of ideas.’ But there is no marketplace of ideas.” *Id.* at 780. Because the marketplace is not perfect, Barron suggested that the government set up a correcting communication structure that was more “hospitable” to differing viewpoints. *Id.* at 781.

Barron was not alone. As discussed, below, Professor Baker also rejected the marketplace of ideas theory and the idea that it “find[s] or creat[es] societal ‘truth.’” See Baker, *supra* note 179, at 966. Professor Frederick Schauer also rejected the theory. See Frederick Schauer, *Language, Truth, and the First Amendment: An Essay in Memory of Harry Canter*, 64 VA. L. REV. 263 (1978). Schauer thought the marketplace of ideas theory should not be viewed as a theory at all, but rather as explaining certain “guiding principles” of First Amendment theory. *Id.* at 269 n.19.

²⁶⁶ See MILL, *supra* note 167, at 36.

²⁶⁷ *Id.*

of judging.”²⁶⁸ Second, allowing the ideas into the marketplace would force citizens to test their existing beliefs.²⁶⁹ Indeed, “[h]owever unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.”²⁷⁰

Justice Holmes pulled Mill’s theory into the twentieth century in the 1919 case *Abrams v. United States*.²⁷¹ In *Abrams*, the Supreme Court was presented with the question of whether Jacob Abrams, a Russian sympathizer, could be sent to jail for twenty years for tossing leaflets out of New York City windows.²⁷² The Court upheld the conviction under the Espionage Act,²⁷³ finding that the twenty-year sentence did not violate the First Amendment as the language used in the pamphlets “was obviously intended to provoke and to encourage resistance to the United States in the war.”²⁷⁴

Holmes dissented in *Abrams*.²⁷⁵ He stood by his previous stance that in a time of war government could punish speech that amounted to a “clear and imminent danger” likely to cause

²⁶⁸ *Id.*

²⁶⁹ *Id.* at 70.

²⁷⁰ *Id.* at 68.

²⁷¹ *Abrams v. U.S.*, 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

²⁷² *Id.* at 618.

²⁷³ 18 U.S.C. §§ 793 *et seq.*

²⁷⁴ *Abrams*, 250 U.S. at 623. Among other things, the circulars stated:

‘Socialists, Anarchists, Industrial Workers of the World, Socialists, Labor party men and other revolutionary organizations *Unite for Action* and let us save the Workers’ Republic of Russia!

‘*Know you lovers of freedom that in order to save the Russian revolution, we must keep the armies of the allied countries busy at home.*’

Id. at 623.

²⁷⁵ *Id.* at 624 (Holmes, J., dissenting). Interestingly enough, in affirming the conviction of Abrams, the Court principally relied on four of its previous Espionage Act cases: *Schenck v. U.S.*, 249 U.S. 47 (1919); *Baer v. U.S.*, 249 U.S. 47 (1919); *Frohwerk v. U.S.*, 249 U.S. 204 (1919); and *Debs v. U.S.*, 249 U.S. 211 (1919). *Abrams*, 250 U.S. at 619. In all three cases, the Court upheld the defendants’ convictions under the Espionage Act. In all four cases, Justice Holmes wrote the opinions upholding the convictions. Justice Holmes had a change of heart over the summer of 1919 after, among other things, reading Zachariah Chafee’s well-received article in *Harvard Law Review*, *Freedom of Speech in War Time*, which was released a month after Holmes’s original Espionage Act cases. See Fred D. Ragan, *Justice Oliver Wendell Holmes, Jr., Zechariah Chafee, Jr., and the Clear and Present Danger Test for Free Speech: The First Year*, 58 J. AM. HIST. 24, 44 (1971) (“Amid protestations that *Schenck*, *Frohwerk*,

“substantive damage” to the state.²⁷⁶ In *Abrams* though, he did not believe anyone could “suppose that the surreptitious publishing of a silly leaflet by an unknown man, without more, would present any immediate danger that its opinions would hinder the success of the government arms or have any appreciable tendency to do so.”²⁷⁷

Holmes’s dissent has importance beyond the facts of *Abrams*. The real contribution Holmes made in his dissent was his invocation of marketplace of ideas.²⁷⁸ Holmes’s dissent is,

and *Debs* ‘were rightly decided,’ Holmes abandoned his earlier position and adopted Chafee’s.”); see also Zachariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932 (1919).

²⁷⁶ *Id.* at 628.

²⁷⁷ Justice Holmes was belittling Abrams contributions to the national debate in order to bring those contributions under the protection of the First Amendment – and, more specifically, Holmes was attempting to distinguish the speech at issue in *Abrams* from the speech in other Espionage Act cases, where he and the Court had upheld convictions for similar speech. At one point Holmes characterized the writings at issue as “poor and puny.” *Id.* at 629. Yet, it is unclear how these writings differed in any meaningful way from the writings in the previous cases except for the writings being untethered from the draft.

Thus, Holmes’s observation that he had “never . . . seen any reason to doubt that the questions of law that alone were before this Court in the Cases of *Schenck*, *Frohwerk*, and *Debs* were rightly decided,” *id.* at 627 (internal citations omitted), is curious to say the least. Compare *Schenck*, 249 U.S. 47 (six-month sentence for circular suggesting that “conscription was despotism”); *Baer*, 249 U.S. 47 (ninety-day sentence for the same); *Frohwerk*, 249 U.S. 204 (ten-year sentence for the circulation of twelve articles suggesting, among other things, that it was improper for the United States to send troops to France); and *Debs*, 249 U.S. 211 (ten-year sentence for circular advocating “[s]ocialism, its growth, and a prophecy of its ultimate success”) with *Abrams*, 250 U.S. 616 (twenty-year sentence for distributing pamphlets describing the “hypocrisy” of the United States).

It is strange then that Holmes’s role in *Abrams* is often remembered as that of a First Amendment stalwart espousing romantic visions of the value of freedom of speech to the marketplace of ideas, see, e.g., Blasi, *supra* note 210, at 16 (describing Holmes’s dissent as “majestic”), when, in fact, he found apparent comfort in distinguishing the *Abrams* case only because the speech and speaker were inconsequential. In this way then, Holmes’s role in *Abrams* was more that of a cautious soldier attempting to complete a discrete about-face from his own past holdings, see, e.g., Edward J. Bloustein, *Criminal Attempts and the “Clear and Present Danger” Theory of the First Amendment*, 74 CORNELL L. REV. 1118 (1989) (“Although he denied it, there is reason to believe that . . . Justice Holmes had changed his mind about the protection afforded speech under the first amendment to the Constitution.”), than that of a First Amendment stalwart. *Abrams*, 250 U.S. at 629 (Holmes, J., dissenting) (admitting that some punishment “could be inflicted” on Mr. Abrams).

Compare *Patterson v. Colorado*, 205 U.S. 454, 462 (1907) (Holmes, J.) (“[T]he main purpose of [the First and Fourteenth Amendments] is ‘to prevent all such previous restraints upon publications as had been practised by other governments,’ and they do not prevent the subsequent punishment of such as may be deemed contrary to the public welfare.” (citation omitted)) and *Schenck*, 249 U.S. at 51-52 (Holmes, J.) (“It well may be that the prohibition of laws abridging the freedom of speech is not confined to previous restraints, although to prevent them may have been the main purpose . . .”) with *Abrams*, 250 U.S. at 630-31 (“Only the emergency that makes it immediately dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, ‘Congress shall make no law abridging the freedom of speech.’”). For a more comprehensive discussion of the Espionage Act cases and Justice Holmes’ role in them see Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 835 (2008).

²⁷⁸ Indeed, Justice Kennedy, adopting Justice Holmes’s almost ninety-year-old language, recently wrote for the plurality in *United States v. Alvarez*, “The theory of our Constitution is ‘that the best test of truth is the power of the

arguably, one of the most important contributions to First Amendment theory that any single justice has made and is worth reviewing verbatim. Holmes began his discussion of the marketplace by admitting:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole heartedly for the result, or that you doubt either your power or your premises.²⁷⁹

Essentially, Holmes opened by establishing a baseline: the natural response to opposition is to suppress that opposition in order to protect your own speech.²⁸⁰ Holmes was not faulting those advocating suppression because that seemed to be a perfectly logical course of action to take.²⁸¹

With the baseline set, Holmes turned to his normative proposition:

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution.²⁸²

Here, Holmes suggested that, on reflection, men would eventually realize that the best way forward was a “free trade in ideas” that would lead to “truth.”²⁸³ Some have taken this to mean

thought to get itself accepted in the competition of the market.” U.S. v. Alvarez, 132 S. Ct. 2537, 2550 (2012) (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting); see also *Curtis Pub. Co. v. Butts*, 388 U.S. 130, 148 (1967) (calling Holmes’s *Abrams* dissent a “fountainhead” for the Court’s First Amendment jurisprudence).

²⁷⁹ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁸⁰ This approach tracks that of Mill’s in *On Liberty*. See MILL, *supra* note 167, at 36-68.

²⁸¹ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

²⁸² *Id.*

²⁸³ *Id.*

that the underlying rationale for guaranteeing an open marketplace was to ensure that truth win out over falsity by consistently testing ideas against other ideas.²⁸⁴

Blasi, however, has suggested that Holmes's own view of the marketplace of ideas was not based on guarantee of truth, but anchored in the idea that – truth aside – the process of competition was a valuable.²⁸⁵ One can find slivers of support for this idea in the closing paragraphs of the dissent:

It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.²⁸⁶

²⁸⁴ See, e.g., Baker, *supra* note 179, at 967 (“According to classic [marketplace of ideas] theory, truth is discovered through its competition with falsehood for acceptance.”); see also EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 8 (1989) (explaining under Justices Holmes’s and Brandeis’s view, “speech is normally the means relied on to eliminate error, suppression should not be allowed unless the danger of speech is ‘clear’”).

²⁸⁵ Justice Holmes’s theory was idiosyncratic. As Professor Blasi explained, Justice Holmes was shaped by empiricist literature standing for the idea that “all propositions are subject to perpetual testing. And that process of testing, . . . must always hold out at least the possibility that prior understandings will be displaced.” Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 19 (2004). Blasi views Holmes’s theory as one based not on some search for truth in the market, but on competition among ideas: “Holmes, the old soldier and proud Darwinist, thought that one of the valuable functions of dissenting speech, including speech that advocates violent revolution, is its capacity to generate some of the grievances, aspirations, and mobilizations that force political adaptation and transformation.” *Id.* at 45 (emphasis added); see also Melville B. Nimmer, Nimmer on Freedom of Speech § 1.02[B] (1984) (“It may be concluded, then, that if freedom of speech does not produce absolute ‘truth,’ it is nevertheless a necessary condition to an enlightenment which will direct us toward as close an approximation of truth as nonomniscient humanity can reach.”).

Others have recognized this “competition view” of the marketplace of ideas theory as well. As the famed Pulitzer Prize winning writer and journalist E.B. White said in a letter defending the conception of journalism as a marketplace for ideas in competition:

The press in our free country is reliable and useful not because of its good character but because of its great diversity. As long as there are many owners, *each pursuing his own brand of truth, we the people have the opportunity to arrive at the truth and to dwell in the light.* . . . For a citizen in our free society, it is an enormous privilege and a wonderful protection to have access to hundreds of periodicals, each peddling its own belief. There is safety in numbers: the papers expose each other’s follies and peccadillos, correct each other’s mistakes, and cancel out each other’s biases. The reader is free to range around in the whole editorial bouillabaisse and explore it for the one clam that matters – the truth.

Letter from E.B. White to W.B. Jones, Dir. of Commc’ns, Xerox Corp. (Jan. 30, 1976) *available at* <http://www.lettersofnote.com/2012/03/e-b-white-on-free-press.html>.

²⁸⁶ *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

Holmes recognized then that society is often left to make important decisions based on “imperfect knowledge.”²⁸⁷ Despite this failing, he thought that competition in a free and open marketplace of ideas was pivotal to a democratic society *in* search of truth (even though it did not guarantee that truth would ever be found).²⁸⁸ For this reason, he rejected the idea that seditious libel laws, which by definition suppressed some unpopular ideas, comported with the First Amendment:

I wholly disagree with the argument of the Government that the First Amendment left the common law as to seditious libel in force. History seems to me against the notion. I had conceived that the United States through many years had shown its repentance for the Sedition Act of 1798 (Act July 14, 1798, c. 73, 1 Stat. 596), by repaying fines that it imposed.²⁸⁹

Holmes, however, did not entertain the idea that the government could *never* regulate speech under the marketplace of ideas theory.²⁹⁰ Instead, he conceded that the government could punish

²⁸⁷ *Id.*

²⁸⁸ The truth-seeking version of the marketplace of ideas theory is more criticized than the competition version, which is less well recognized. It is widely criticized for the assumptions that it rests on. *See* BARON & DIENES, *supra* note 186, at 8-9; *see also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 15 (1984) (explaining that the marketplace of ideas theory is based on several assumptions, namely the idea that truth can defeat falsity and that people rationally process new information and incorporate it into their pool of knowledge).

Professor Baker argued against the truth-seeking version of the marketplace of ideas theory, writing that “[t]he assumptions on which the classic marketplace of ideas theory rests are almost universally rejected today. Because of this failure of assumptions, the hope that the marketplace leads to truth, or even to the best or most desirable decision, becomes implausible.” *See* Baker, *supra* note 179, at 974. Among other things, Baker argues that the marketplace of ideas theory is not helpful, because it is based on the idea that there is an objective truth, that people act and consider new evidence rationally, and that the market will not be poisoned by those with the most power and money. *See id.* at 974-81.

These legal conclusions about the marketplace of ideas are also supported by mass communication studies and sociology and psychology studies. *See, e.g.,* Regina Lawrence & Matthew Schafer, *Debunking Sarah Palin: Mainstream News Coverage of ‘Death Panels,’* 13 JOURNALISM 766 (2012) (explaining that despite relatively forceful debunking of the claim that the Affordable Care Act did not contain panels that decide who lives and dies, public belief in the existence of these panels remained relatively unchanged throughout the healthcare debates); Monica Prasad, Andrew J. Perrin, Kieran Bezila, Steve G. Hoffman, Kate Kindleberger, Kim Manturuk, Ashleigh Smith Powers, “*There Must Be a Reason*”: *Osama, Saddam, and Inferred Justification*, 79 SOCIOLOGICAL INQUIRY 142, 157 (2009) (noting that “when presented with correct information about the lack of a link between Iraq and Al Qaeda from a trusted source, most of [test subjects] deflected this information”); Ziva Kunda, *The Case for Motivated Reasoning*, 108 PSYCHOLOGICAL BULLETIN 480, 495 (1990) (explaining that “[p]eople are more likely to arrive at those conclusions that they want to arrive at”).

²⁸⁹ *Abrams*, 250 U.S. at 630-31 (Holmes, J., dissenting).

²⁹⁰ *Id.* at 627.

speech if it would create a “clear and imminent danger that it will bring about forthwith certain substantive evils.”²⁹¹

While the Supreme Court has not defined the reach of the marketplace of ideas theory, it is clear that Holmes’s pen left a mark on the Court’s First Amendment jurisprudence.²⁹² The Court has repeatedly invoked the marketplace of ideas theory to strike down bars to false speech,²⁹³ anonymous speech,²⁹⁴ flag burning,²⁹⁵ political commentary,²⁹⁶ silent protest,²⁹⁷ and political advocacy,²⁹⁸ among other things. As Justice Brennan recounted in *New York Times Co. v. Sullivan*, “The constitutional safeguard [protecting freedom of speech] . . . ‘was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.’”²⁹⁹

Like the self-governance theory, the marketplace of ideas theory weighs in favor of recognizing a constitutional reporter’s privilege. If there was no privilege, a confidential source might not disclose information out of fear of reprisal or prosecution thereby depriving the

²⁹¹ *Id.* In other instances, the Court has employed Holmes’s theory to deny protection to other “valueless” speech. See Baker, *supra* note 179, at 970-74 (citing, for example, *Roth v. U.S.*, 354 U.S. 476 (1957); *Paris Adult Theatre I v. Slaton* 413 U.S. 49 (1972)).

²⁹² As Justice Stevens noted in 2007, “Justice Holmes dissent . . . has emphatically carried the day.” *Morse v. Frederick*, 551 U.S. 393, 442 (2007) (Stevens, J., dissenting); see also *Norton v. Discipline Comm. of E. Tennessee State Univ.*, 399 U.S. 906, 907 (1970) (Marshall, J., dissenting from a denial of a petition for writ of certiorari) (explaining that “so much of [the Court’s] law of free speech” was based on Holmes’s dissenting opinion); see also Baker, *supra* note 179, at 968 (“The Supreme Court steadfastly relies upon a marketplace of ideas theory in determining what speech is protected.”). For a recent, comprehensive discussion of the marketplace of ideas theory see generally Blasi, *supra* note 285.

²⁹³ *U.S. v. Alvarez*, 132 S. Ct. 2537, 2550 (2012) (“The theory of our Constitution is ‘that the best test of truth is the power of the thought to get itself accepted in the competition of the market[.]’”).

²⁹⁴ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 357 (1995) (“But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”).

²⁹⁵ *Texas v. Johnson*, 491 U.S. 397, 418-19 (1989) (“To paraphrase Justice Holmes, we submit that nobody can suppose that this one gesture of an unknown man will change our Nation’s attitude towards its flag.”).

²⁹⁶ *Hustler Magazine v. Falwell*, 485 U.S. 46, 50 (1988) (“At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions . . .”).

²⁹⁷ *Brown v. Louisiana*, 383 U.S. 131, 146 n.5 (1966) (Brennan, J., concurring).

²⁹⁸ *Fed. Election Comm’n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 257 (1986).

²⁹⁹ *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

marketplace of potentially information.³⁰⁰ Simply, requiring journalists to testify will cause sources to clam up, and, therefore, the marketplace will become starved and eventually emaciated.³⁰¹ On the other hand, if courts protect journalists, they protect sources, and, therefore, the marketplace will be enriched by the information contributed by confidential sources.³⁰² Unsurprisingly then, Justices Stewart and Douglas relied, in part, on the marketplace of ideas theory to support the recognition of a reporter's privilege.³⁰³ Between the two, Justice Douglas put it best, "Today's decision will impede the wide-open and robust dissemination of ideas and counterthought which a free press both fosters and protects."³⁰⁴

Setting legal arguments aside for a moment, the marketplace of ideas theory also is attractive from a journalism perspective, as studies have found that the use of anonymous sources in newsgathering results in diverse news.³⁰⁵ One study, for example, found that the use of confidential sources "permits not just more information but more antagonistic information."³⁰⁶ Others have summarized the "wealth of scholarship" as finding that confidential sources invigorate the public sphere by adding "scope and importance to a story," prompt sources who are otherwise uncomfortable with coming forward to come forward, act as a "tributary" for the broader public knowledge, and seem, in the eye of the public, more believable than named sources.³⁰⁷ In short, confidential sources lead to an "uninhibited, robust, and wide-open" public

³⁰⁰ See *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting); *U.S. v. Caldwell*, 408 U.S. 665, 720-21 (Douglas, J., dissenting).

³⁰¹ Joel G. Weinberg, *Supporting the First Amendment: A National Reporter's Shield Law*, 31 SETON HALL LEGIS. J. 149, 156 (2006).

³⁰² *Id.*

³⁰³ See *Branzburg*, 408 U.S. at 726 (Stewart, J., dissenting); *Caldwell*, 408 U.S. at 720-21 (Douglas, J., dissenting).

³⁰⁴ *Caldwell*, 408 U.S. at 720-21. Notably, this version of the marketplace of ideas theories is based on Blasi's interpretation of Holmes's theory – the competition version of the marketplace of ideas theory.

³⁰⁵ See, e.g., William Blankenburg, *The Utility of Anonymous Attribution*, 13 NEWSPAPER RES. J. 10 (1992).

³⁰⁶ *Id.* at 19.

³⁰⁷ 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, 97 n.4 (2002) (listing sources).

sphere, and, therefore, the marketplace theory cautions in favor of protecting those sources as conduits to the public.

The Checking Value Theory

Vincent Blasi's checking value theory is relatively new when compared to the marketplace of ideas and self-governance theories, but it is nonetheless influential.³⁰⁸ The checking value theory was conceived to address contemporary free speech problems by taking into account the relationship between big government and a professional, institutional press.³⁰⁹ As a result of the largess of the modern administrative state, Blasi believed that "well-organized, well-financed, professional critics . . . [must] serve as a counterforce to government."³¹⁰ Blasi found First Amendment protection for these type of "professional critics" in a line of Supreme Court jurisprudence holding that "free speech, a free press, and free assembly" are valuable because they "check[] the abuse of power by public officials."³¹¹ In common parlance, Blasi developed his theory to find protection for the institutional press so it could act as a "watchdog for society."³¹²

While the press, under this theory, is ultimately responsible for the collection and publication of important civic information, the theory does not allow the public to abdicate its responsibility.³¹³ The checking value simply redefines the public's responsibility, limiting it to demanding change when it believes that government official "misconduct" runs afoul of its

³⁰⁸ See Baron & Dienes, *supra* note 186, at 11.

³⁰⁹ See Blasi, *supra* note 180, at 648 ("To become a vital part of the living Constitution, a value must have more than a strong historical and analytical foundation.").

³¹⁰ *Id.* at 541.

³¹¹ *Id.* at 527. As Sir Edmund Burke exclaimed of the press gallery overlooking Parliament: "[Y]onder sits the Fourth Estate, more important than them all." See WILLIAM MORRIS, MORRIS DICTIONARY OF WORD AND PHRASE ORIGINS 229 (1988).

³¹² See Blasi, *supra* note 180, at 572.

³¹³ *Id.* at 542.

expectations.³¹⁴ As Blasi put it, “Under the checking value, that determination must be made by each citizen in deciding when the actions of government so transcend the bounds of decency that active opposition becomes a civic duty.”³¹⁵

Because of this relationship to self-governance, the question becomes whether Blasi’s theory is simply a restatement of the self-governance theory:

The checking value has much in common with Professor Meiklejohn’s self-government value. Both are exclusively concerned with the political consequences of speech and thus both support First Amendment doctrines that give special protection to communications that relate to the political system in certain specified ways. Both values emphasize the importance of communications for readers and listeners; neither is especially concerned with the benefits writers and speakers may derive from engaging in the act of self-expression.³¹⁶

Despite the similarities, he insisted that the concepts differed in several ways.³¹⁷ For example, the checking value is narrower than the self-governance theory; the checking value finds speech relating to “the particular problem of misconduct by government officials” as deserving special protection.³¹⁸ Thus, Meiklejohn’s self-governance theory is broader, as it reaches “all speech relevant to the process by which citizens decide how to vote.”³¹⁹

³¹⁴ *Id.*

³¹⁵ *Id.* at 543 (emphasis added).

³¹⁶ *Id.* at 557-58.

³¹⁷ *Id.* at 558. In addition to the differences explained above, Blasi also cited a few sub-differences. *Id.* at 563. For example, Blasi argued that his theory was based less on political argumentation and more on the “specific problem of politics for which the shortage of information is the most serious difficulty.” *Id.* Additionally, he explained that the theory rested on the view that citizens’ view “public officials as [their] potential oppressors rather than as [their] agents.” *Id.* at 564. Thus, while the self-governance theory views citizens’ involvement in political debate as a good, because it helps citizens and their political agents in Washington or in the town hall reach the “right” decision, *id.* at 563-64, Blasi’s theory pitted the two groups against each other. *Id.*

³¹⁸ *Id.* at 558. The Supreme Court has specifically addressed this type of speech on several occasions. In *Garrison v. Louisiana*, a case where a district attorney was prosecuted for, among other things, calling eight judges “lazy,” the Court explained, “[W]here the criticism is of public officials and *their conduct of public business*, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.” *Garrison v. Louisiana*, 379 U.S. 64, 72-73 (1964) (emphasis added).

Similarly, in *Mills v. Alabama*, a newspaper editor was charged under an election law for publishing an editorial that “strongly urged the people to adopt the mayor-council form of government.” *Mills v. Alabama*, 384 U.S. 214, 215 (1966). In overturning the conviction, the Court stated, “Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs.” *Id.* at 219; *see also* *Estes v. Texas*, 381

The checking value is different in another way as well: it incorporates balancing.³²⁰ In the self-governance model, if speech is related to self-governance – however that may be defined – that speech merits *absolute* protection.³²¹ The same cannot be said for the checking value.³²² Certainly, Blasi believed that political speech should be protected, but, as a consequentialist, Blasi believed that speech deserved protection only “if the good consequences of the speech outweigh the bad.”³²³ To merit protection under Blasi’s theory then, it must be shown that speech is related to governmental malfeasance and that it is a net gain for society.³²⁴

Unlike the self-governance, the checking value focuses on competing groups (as opposed to competing ideas).³²⁵ As Blasi explained, the checking value theory “sees political decision-making more as a product of contending forces and counterforces, with some groups continually pitted against other groups.”³²⁶ It further views these groups as unequal in their power.³²⁷ Public officials, for example, “have more political power” than ordinary voters, and “they have attitudes

U.S. 532, 539 (1965) (“The free press has been a mighty catalyst in awakening public interest in governmental affairs, exposing corruption among public officers and employees and generally informing the citizenry of public events and occurrences, including court proceedings.”).

While it is somewhat easy to define government misconduct as illegal actions taken by officials, some have pointed out that Blasi’s theory fails to provide any real guidance as to how far the terms like “official misconduct” should reach. *See* Redish, *supra* note 179, at 612 (“At different points, Blasi refers to speech concerning ‘abuse of power,’ the [‘]misuse of official power,’ and ‘breaches of trust by public officials,’” implying that these are the operative terms. But the meaning of these terms is by no means self-evident.”). In this way then, Blasi’s theory faces a similar challenge as Meiklejohn. Indeed, Meiklejohn was also criticized for offering only vague definitions of what constituted speech relating to self-governance. *See* Wellington, *supra* note 177, at 1111 (“What a wonderful faith Meiklejohn must have had in human abilities if he believed that any person could draw the public-private line sharply and clearly.” (footnote omitted)).

³¹⁹ *See* Blasi, *supra* note 180, at 559.

³²⁰ *Id.*

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* (“Thus, although the checking value might generate some absolute standards, it would not do so as a matter of inexorable logic, and certainly would not do so for as wide a range of speech disputes as would the self-government value.”).

³²⁴ *Id.*

³²⁵ *Id.* at 564.

³²⁶ *Id.*

³²⁷ *Id.*

and skills more attuned to the acquisition and retention of such power.”³²⁸ This imbalance begs for a counterweight with as much power as public officials.³²⁹

In the professional press, Blasi found a counterweight: “A theory based on the checking value might therefore *envision a special role for the professional press*, and thus in some instances treat journalists different than ordinary citizens in determining what rights are guaranteed by the First Amendment.”³³⁰ This theory, where the press as an institution is viewed as different than individual citizens, was alluded to years earlier in Justice Black’s concurring opinion *New York Times v. United States*, the *Pentagon Papers Case*:

The Government’s power to censor the press was abolished so that the press would remain forever free to censure the Government. The press was protected so that it could bare the secrets of government and inform the people. Only a free and unrestrained press can effectively expose deception in government. And paramount among the responsibilities of a free press is the duty to prevent any part of the government from deceiving the people and sending them off to distant lands to die of foreign fevers and foreign shot and shell.³³¹

While Blasi’s theory has achieved considerable exposure when compared to other contemporary First Amendment theories, it is not without its critics.³³² Professor Redish has argued that the checking value simply recasts existing free speech theory in a different light.³³³ “Because the checking function ultimately derives from the principle of democratic self-rule, and because that principle in turn follows from the self-realization value, the checking function is merely one concrete manifestation of the much broader self-realization value,” Redish argued.³³⁴ The critics aside, however, it is clear that Blasi’s theory has had some immeasurable pull on

³²⁸ *Id.*

³²⁹ *Id.* (“[O]ne might conclude that officials can be effectively checked only by other elite groups with similarly specialized powers, skills, and attitudes.”).

³³⁰ *Id.*

³³¹ *Id.* at 649 (quoting *New York Times, Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (Black, J., concurring)).

³³² *See, e.g.*, Redish, *supra* note 179.

³³³ *Id.* at 612.

³³⁴ *Id.* at 615-16.

modern First Amendment jurisprudence, and, of the theories mentioned, it is the only one attempting to fashion a theory around the press as an institution.³³⁵

In developing his theory, Blasi specifically contemplated what kind of protection his theory would provide to journalists attempting to protect their sources.³³⁶ That protection would be great: “I would interpret the First Amendment to grant an *unqualified* privilege protecting the identity of all confidential government-employee sources”³³⁷ According to Blasi, an unqualified privilege was necessary under the checking value theory because “information relevant to the abuse of power is frequently available only from insiders who stand to lose a great deal should their roles in the dissemination process be discovered.”³³⁸ To Blasi, the value of confidential sources was “a consideration that subordinates all others,”³³⁹ because those sources are – presumably – the only avenue to the information they hold about the government.³⁴⁰ In *Branzburg*, Justice Stewart leaned on much of the same logic:

As . . . public aggregations of power burgeon in size and the pressures for conformity necessarily mount, there is obviously a continuing need for an independent press to disseminate a robust variety of information and opinion through reportage, investigation, and criticism, if we are to preserve our

³³⁵ See, e.g., *Herbert v. Lando*, 441 U.S. 153, 185 (1979) (Brennan, J., dissenting) (“And the [First] Amendment shields those who would censure the state or expose its abuses.” (citing Blasi, *supra* note 180)); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1184 (3d Cir. 1986) (Adams, J., concurring) (“Madison’s control of abuse of governmental power justification has been referred to by a leading first amendment commentator as the checking value of the first amendment.” (citing Blasi, *supra* note 180)); *Nation Magazine v. Dep’t of Def.*, 762 F. Supp. 1558, 1572 (S.D.N.Y. 1991) (asserting that on at least one occasion the Supreme Court “devoted extensive attention to the importance of this ‘checking function’ against abuse of government power”) (citing Blasi, *supra* note 180)); *Zamora v. Columbia Broad. Sys.*, 480 F. Supp. 199, 203 (S.D. Fla. 1979) (citing Blasi, *supra* note 180); *Abrams v. Reno*, 452 F. Supp. 1166, 1171 (S.D. Fla. 1978), *aff’d*, 649 F.2d 342 (5th Cir. 1981) (explaining that the checking value of the First Amendment “must be emphasized” (citing Blasi, *supra* note 180)).

³³⁶ See Blasi, *supra* note 180, at 603-11. Blasi had the benefit of hindsight, as his theory was first developed just five years after the Court held that the First Amendment does not protect journalists from grand juries seeking information about confidential sources.

³³⁷ *Id.* at 606 (emphasis added).

³³⁸ *Id.* at 603. Thus, Blasi discarded the notion that a subpoena’s constitutionality should be dictated by whether the government brought it in good faith or bad faith as the Court in *Branzburg* suggested. *Id.* If the theory is premised on the idea that the institutional press is to act as a check on the government, then surely the government cannot be given the power to dictate what a reporter may or may not do within that sphere of reporting – whether the government does so in good or bad faith. *Id.*

³³⁹ *Id.* at 605.

³⁴⁰ *Id.* at 606.

constitutional tradition of maximizing freedom of choice by encouraging diversity of expression.³⁴¹

Much like Blasi then, Justice Stewart also saw the press as a necessary counterweight to the growing size of government.³⁴²

Blasi further viewed the checking value as making few exceptions to the reporter's constitutional right to keep his source confidential – even if the source broke the law by, for example, divulging classified information.³⁴³ The privilege could only be overcome if the information disclosed had the “demonstrable, immediate, and irrevocable effect of causing extremely serious harm to a criminal defendant's opportunity to receive a fair trial or to important diplomatic or military endeavors.”³⁴⁴ While it is unclear what constitutes a “demonstrable, immediate and irrevocable effect,” Blasi believed that the *Times* could not have been required to reveal the identity of Daniel Ellsberg, the source of the Pentagon Papers.³⁴⁵

Blasi even thought that under his theory the First Amendment would require the government to provide access to sources of information in some instances: “When the source [under control of the government] wants to cooperate with the press, the reporter-source relationship may produce the kind of in-depth coverage of government that is of the highest value to a proponent of the checking value.”³⁴⁶ Indeed, a prisoner, under the checking value, could not constitutionally be restricted from talking to the press – even if that meant the government must provide access to the prisoner.³⁴⁷

³⁴¹ *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting).

³⁴² *Id.*

³⁴³ *See* Blasi, *supra* note 180, at 607.

³⁴⁴ *Id.*

³⁴⁵ *Id.* at 607-08.

³⁴⁶ *Id.* at 608.

³⁴⁷ *Id.*

In sum, the purpose of the First Amendment according to the checking value theory is “the dissemination of information about the behavior of government officials.”³⁴⁸ Blasi’s checking value, then, is the theory most supportive of a powerful reporter’s privilege when that privilege is invoked in cases of confidential government sources. This must be the case because if the government was able to interfere with the reporter-source relationship, the press would be unable to act as a critical and independent check on the government.³⁴⁹

The Liberty Theory

“The liberty model holds that the free speech clause protects not a marketplace but rather an arena of individual liberty from certain types of governmental restrictions.”³⁵⁰ Protection is required under this theory “because of the way the protected conduct fosters individual self-realization and self-determination without improperly interfering with the legitimate claims of others.”³⁵¹ According to Edwin Baker, the proponent of the theory, it “bars certain governmental restrictions on noncoercive, nonviolent, substantively valued conduct, including nonverbal conduct,”³⁵² and its scope is defined by “by determining the purposes or values served by protected speech.”³⁵³

³⁴⁸ *Id.* at 609.

³⁴⁹ Anthony Fargo, *The Journalist’s Privilege for Nonconfidential Information in States Without Shield Laws*, 7 COMM. L. & POL’Y 241, 251 (2002) (noting that several scholars invoke the checking value when arguing for a recognition of the reporter’s privilege); see also Amanda S. Reid & Laurence B. Alexander, *A Test Case for Newsgathering: The Effects of September 11, 2001 on the Changing Watchdog Role of the Press*, 25 LOY. L.A. ENT. L. REV. 357, 362 (2005) (noting that confidential sources are necessary for the press to perform the checking value function effectively).

³⁵⁰ See Baker, *supra* note 179, at 966; see also *Procunier v. Martinez*, 416 U.S. 396, 427 (1974) (Marshall, J., concurring) (“The First Amendment serves not only the needs of the polity, but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual’s worth and dignity.”).

³⁵¹ See Baker, *supra* note 179, at 966.

³⁵² *Id.*

³⁵³ *Id.* at 990 (“The method for determining the scope of protection proceeds, first, by determining the purposes or values served by protected speech.”).

Two values, Baker asserted, are fundamental to freedom of speech.³⁵⁴ First, speech is indispensable because it leads to self-fulfillment or self-realization.³⁵⁵ Second and relatedly, speech is integral an individual must be able to participate in social and political change.³⁵⁶ Derivative to these two values are two additional free speech values: the unfettered ability to search for truth and the need for society to be adaptable to changing social and political winds.³⁵⁷

Baker viewed these values as fundamental, because they were required in order to bring legitimacy to the democratic system.³⁵⁸ Simply, if individuals were not allowed to achieve their maximum self-fulfillment and also affect change within society to reflect the fruits of their self-fulfillment, then the resulting society would itself be illegitimate.³⁵⁹ Instead, the liberty theory, which respects these values, justifies its “welfare maximization policies [by weighing and considering] each person’s concerns equally, thereby respecting the equal worth of each.”³⁶⁰

Baker colored in the lines of his theory by comparing it to the marketplace of ideas theory.³⁶¹ As an initial matter, the marketplace of ideas theory was insufficient to protect speech because it failed to protect “‘solitary’ uses of speech.”³⁶² Why would it, Baker argued, when those ideas never enter the marketplace?³⁶³ Moreover, because the marketplace of ideas theory was, in his view, based solely on the acquisition of “truth,” Baker believed that it would fail to protect forms of speech, like storytelling that existed for the sake of entertainment – not truth

³⁵⁴ *Id.* at 990-91.

³⁵⁵ *Id.* at 991.

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ *Id.*

³⁵⁹ *Id.* (“For the community legitimately to expect individuals to respect collective decisions, i.e., legal rules, the community must respect the dignity and equal worth of its members.”).

³⁶⁰ *Id.*

³⁶¹ *Id.* at 992.

³⁶² *Id.*

³⁶³ *Id.* at 993.

seeking.³⁶⁴ Additionally, Baker viewed the marketplace of ideas theory as one that draws lines on the basis of content; it would, he thought, protect only that speech that has something worthwhile to public controversy.³⁶⁵

Unlike the marketplace theory then, Baker asserted that his theory would protect solitary speech and entertaining speech.³⁶⁶ Indeed, “[t]o engage voluntarily in a speech act is to engage in self-definition or expression.”³⁶⁷ Frankly, it did not matter that the speaker spoke in private or simply intended to entertain others because both forms of speech aided self-fulfillment.³⁶⁸

Having defined what is protected, Baker turned to what speech was not protected: “to the extent that speech is involuntary, is not chosen by the speaker, the speech act does not involve the *self*-realization or *self*-fulfillment of the speaker.”³⁶⁹ Coercive speech interferes with others’ right to define their own self-fulfillment, and, therefore, should not be protected by a theory that places a premium on the autonomy of the individual in finding himself.³⁷⁰

To illustrate the theory, Baker imagined a woman telling a man that she will reveal to the world his bad acts unless he pays her \$1,000.³⁷¹ On the other hand, Baker offered a similar hypothetical where a woman told the same man only that she would reveal his bad acts only if he

³⁶⁴ *Id.* Of course, this supposes that storytelling in no way leads a citizen to truth about whatever topic.

³⁶⁵ *Id.*

³⁶⁶ *Id.* at 996.

³⁶⁷ *Id.* at 994.

³⁶⁸ *Id.* at 996.

³⁶⁹ *Id.*

³⁷⁰ *Id.* at 998. Non-coercive and non-violent speech acts were not protected, because, as the liberty theory is utilitarian based, they impinge on others’ right to self-realization. *Id.* As Baker put it, “The reasons why speech is protected do not apply if the speaker coerces the other or physically interferes with the other’s rights. Respect for individual autonomy hardly requires protection of speech when the listener is coerced – when [the listener] does something because of threats, the will of [the threatener] is operating or predominant.” *Id.* (citation and internal quotation marks omitted).

³⁷¹ *Id.* at 1002.

followed through with those bad intentions.³⁷² It is the story of the blackmailer and the whistleblower.³⁷³

According to Baker, while the marketplace of ideas theory would protect both acts of speech, because “in both whistle blowing and blackmailing, the content of the speech and its effect either on the person exposed or on the public could be the same,”³⁷⁴ the liberty model would only protect the speaker in the second example because the speaker in the first example is not respecting the individual autonomy of the man she is blackmailing:

In the first, the speaker attempts to transfer decision-making control to herself while, in the second, the speaker does not try to prevent the other from making his decision but merely forces him to take responsibility, an imposition that respects rather than subverts the other’s integrity and autonomy. Since whistle blowing, but not blackmailing, involves using speech directly to make the world correspond to the speaker’s substantive values rather than merely to increase the speaker’s wealth (or area of decision-making domination) and does so without disrespecting the listener’s integrity, it is not coercive; therefore, the first amendment should protect [the woman in the second example] In contrast, blackmail disrespects the other’s autonomy[;] . . . [thus,] the state can protect people’s autonomy by forbidding blackmail, a coercive use of speech.³⁷⁵

For the same reason that First Amendment protection under the liberty theory does not extend to the blackmailer, Baker also argues that it does not extend to disclosures of classified or other secret documents as part of calculated espionage.³⁷⁶ He admitted this, however, only begrudgingly:³⁷⁷ arguing that adversarial countries resort to threats of violence and a spy who releases sensitive information, either to a country directly or through a publisher, gives an antagonistic country leverage to make such threats.³⁷⁸ Therefore, the spy becomes a participant in violence or potential violence, which the First Amendment does not protect: “The [F]irst

³⁷² *Id.*

³⁷³ *Id.* at 1003.

³⁷⁴ *Id.* (“In each case, the speech could equally well serve the public’s interest in or need for information.”).

³⁷⁵ *Id.*

³⁷⁶ *Id.* at 1005.

³⁷⁷ *Id.* at 1004 (“Espionage – at least secret transmission to a foreign nation of information which relates to the security of this nation-presents, for me, a difficult issue.”).

³⁷⁸ *Id.* at 1005.

[A]mendment extends protection until one's speech becomes merely one's method of involvement in a coercive or violent project."³⁷⁹

In sum, under the liberty theory, the First Amendment's protections reach as far as the individual's non-coercive speech.³⁸⁰ For this reason, the liberty theory is indifferent to the non-coercive content of an individual's speech and to the motives behind the speech.³⁸¹ Indeed, the blackmailer may have good motives in trying to force another to divulge information, but those motives do not bring that coercive speech within the walls of the First Amendment's protections.³⁸² Similarly, the party being blackmailed may also have beneficent motives for his speech; nonetheless, these motives do not his their speech to be protected if the speech is coercive or violent.³⁸³

The Supreme Court and individual justices have recognized that the First Amendment protects "liberty."³⁸⁴ As Justices Stevens, Ginsburg, Breyer, and Sotomayor recognized in their dissent in *Citizens United*, "Freedom of speech helps 'make men free to develop their faculties,' it respects their 'dignity and choice,' and it facilitates the value of 'individual self-realization.'"³⁸⁵ Justices Brennan and Marshall agreed:

The First Amendment serves not only the needs of the polity but also those of the human spirit – a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the

³⁷⁹ *Id.*

³⁸⁰ *Id.* at 1004.

³⁸¹ *Id.* at 1003 ("If the [F]irst [A]mendment protects people's choices related to self-fulfillment and involvement in social, political, or cultural change, it must normally be agnostic in respect to content or effect."); *id.* at 1004 ("The agnosticism in respect to content must also apply to evaluation of motives.").

³⁸² *Id.* at 1004.

³⁸³ *Id.* at 1005.

³⁸⁴ *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 336 n.1 (1995) ("The term 'liberty' in the Fourteenth Amendment to the Constitution makes the First Amendment applicable to the States.").

³⁸⁵ *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876, 972 (2010) (Stevens, J., dissenting) (internal citations omitted).

individual's worth and dignity. Such restraint may be 'the greatest displeasure and indignity to a free and knowing spirit that can be put upon him.'³⁸⁶

Justice Marshall, writing for the Court in 1969, was most pointed in his belief that the First Amendment protects self-realization when he overturned the conviction of a Georgia man who possessed allegedly obscene films.³⁸⁷ In reversing the conviction, Justice Marshall explained, "[The First Amendment means] that a State has no business telling a man . . . alone in his own house, what books he may read or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."³⁸⁸

Accepting Baker's theory and the Court's recognition of it, how does the theory, a theory focused on the individual, apply to *the press as a commercial institution though*? Baker did not believe it did.³⁸⁹ He did not believe that the First Amendment's protections extended to commercial speech,³⁹⁰ because much like the blackmailer, who also did not merit protection under his theory, commercial speech lacked a "respect for human autonomy and self-

³⁸⁶ *Procunier v. Martinez*, 416 U.S. 396, 427-28 (1974), *overruled by* *Thornburgh v. Abbott*, 490 U.S. 401 (1989).

³⁸⁷ *Stanley v. Georgia*, 394 U.S. 557 (1969).

³⁸⁸ *Id.*

It is unclear how much the liberty theory proves. This is to say that a theory that is so expansive leaves little room for judicial interpretation. Said another way, the liberty theory, if given its full scope, could simply be invoked by anyone to protect almost any speech or expressive conduct that is at issue. See Bork, *supra* note 171, at 25. As Professor Bork explained, "[T]he important point is that these [self-realization] benefits do not distinguish speech from any other human activity." *Id.* Therefore, Bork believed that the rationales underlying the liberty theory are "to the principled judge, indistinguishable from the functions or benefits of all other human activity. He cannot, on neutral grounds, choose to protect speech that has only these functions more than he protects any other claimed freedom." *Id.*

³⁸⁹ BAKER, *supra* note 284, at 229 (rejecting the application of the liberty theory to the press).

Although Professor Baker did not view the liberty theory to touch the press, it was nonetheless worth the discussion of the theory as Justice Stewart, in passing, invoked the theory in *Branzburg*. *Branzburg v. Hayes*, 408 U.S. 665, 726 (1972) (Stewart, J., dissenting) (explaining that the press "enhance[s] personal self-fulfillment").

Moreover, the liberty theory may weigh on the right of an individual reporter not to reveal his source's identity, despite Professor Baker's concerns that the liberty theory could not be read to comport with providing protection to the institutional press. BAKER *supra* note 284, at 229 (conceding that "there are some reasons to think the argument [that the liberty theory cannot extend to commercial speech] should not apply to the press").

³⁹⁰ The exact definition of commercial speech is unsettled. Compare *Va. State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 762 (1976) (defining commercial speech as doing "no more than propose a commercial transaction") with *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561 (1980) (defining commercial speech as "expression related solely to the economic interests of the speaker and its audience").

determination.”³⁹¹ For many of the same reasons that he found no protection for commercial speech generally, he also found no protection for the profit-oriented, institutional press.³⁹²

Nonetheless, Baker contemplated some degree of protection for the press under his theory: he found this protection in the press clause – a “fourth estate theory” tangential to the liberty theory.³⁹³ To do this, he imported a theory similar to Blasi’s checking value – into the press clause only; it existed next to the liberty theory, but served a different purpose.³⁹⁴

Professor Baker described his tweak to Blasi’s theory, writing:

[T]he focus of the fourth estate theory is a *source* that the government does not control. Its basis is more a distrust of power than a faith in truth or rationality. The mandate of the press clause is to protect a limited *institutional* realm of private production and distribution of information, opinion, and vision, of fact and fancy.³⁹⁵

Baker’s reliance on a version of the checking value led him to find that the press has an institutional right not to testify as to the identity of their confidential sources.³⁹⁶ According to Baker, “The instrumental justification for protecting the [journalist’s] work product follows from

³⁹¹ BAKER, *supra* note 284, at 206. Professor Baker believed that the market of commerce was fundamentally different than the market of ideas:

Given the value consequences of commercial speech combined with its independence from anyone’s values, human freedom requires a realm in which people can make value choices that control commercial speech. That realm can only be a political sphere where people, not market forces, decide. The very purpose of legal regulation, of political choice, is often to consider which values we want to create and which we want to discourage – that is, to consider what type of people do we want to be. The market’s incapacity to embody this self-definitional dialogue makes a public or political sphere essential.

Id. at 205. As he explained by way of an example, “No one associated with [a] whiskey company need believe that more drinking would make for a better world. The only necessary belief is that promoting the advocated activities will increase profits.” *Id.* at 204. Bringing both points together, Professor Baker explained, “The market’s substitute for [the] political process is the market defining people in a manner that serves profit. From the perspective of human self-determination, this market substitute is rightly subject to severe criticism.” *Id.* at 205. Said another way, commercial speech offers only a unidirectional discussion, where the public is not normally allowed to contribute. For that reason, the public regulation of commercial speech is entirely appropriate. *Id.* (“Since different economic forms tend to create different types of persons, any defense of freedom as self-determination or any version of the person as being the subject of human will, necessarily implies that people should have a right to choose the content and determine the boundaries of the economic system.”).

³⁹² *Id.* at 229.

³⁹³ *Id.*

³⁹⁴ *Id.* at 233.

³⁹⁵ *Id.* at 233-34 (second emphasis added).

³⁹⁶ *Id.*

the belief that maintaining the integrity of the press promotes a better society and makes our liberty more secure.”³⁹⁷ For society to serve this function, the press must have “institutional integrity,” which would not exist if the government was allowed to appropriate its work product or otherwise interfere with its independence.³⁹⁸

The Content-based Nature of the Four Theories

Something different propels each of these theories. The self-governance theory protects political speech the most strenuously because it places that speech at the center of the First Amendment.³⁹⁹ The marketplace is propelled by the belief that ideas injected into the marketplace will benefit society through the rigmarole of public debate.⁴⁰⁰ A belief in an independent, expert branch of government whose job it is to reveal government malfeasance propels the checking value.⁴⁰¹ And, the liberty theory is propelled by a belief in the importance of self-realization.⁴⁰² While these theories are a rather motley bunch when considered together, they do all share a single characteristic: they are all content based.⁴⁰³

The marketplace of ideas only concerns itself with *true* speech that is “bartered” over in the marketplace.⁴⁰⁴ The political speech theories – the self-governance theory and the checking value – focus protection on political speech, while only protecting other speech, if at all, as a secondary concern.⁴⁰⁵ Finally, the liberty theory, while seemingly content neutral, admittedly

³⁹⁷ *Id.* at 244.

³⁹⁸ *Id.* at 246.

³⁹⁹ *See supra* notes 198-259 and accompanying text.

⁴⁰⁰ *See supra* notes 260-307 and accompanying text.

⁴⁰¹ *See supra* notes 308-349 and accompanying text.

⁴⁰² *See supra* notes 350-398 and accompanying text.

⁴⁰³ *See, e.g.,* Matthew L. Schafer, *The First Amendment as a Wall: A Pragmatic View*, LIPPMANN WOULD ROLL (Jan. 13, 2013), <http://www.lippmannwouldroll.com/2013/01/13/the-first-amendment-as-a-wall-a-pragmatic-view/> (“In general then, these theories all view some speech – implicitly or explicitly – as more deserving of protection than other speech. Speech that serves the underlying purpose of each theory is protected almost absolutely, but speech that only tangentially advances the underlying purpose is – or, at least, logically – should be protected to a lesser degree, if at all.”).

⁴⁰⁴ *See supra* notes 191 and 285 and accompanying text.

⁴⁰⁵ *See supra* notes 234-**Error! Bookmark not defined.** and accompanying text.

only protects speech that aids in citizens' self-realization.⁴⁰⁶ All rest on content-based distinctions.⁴⁰⁷

In deciding whether these theories argue in favor of protecting certain kinds of speech then, it makes sense that the content of the speech would be taken into account: the more political the speech the more protection it would deserve under political theories; the more truthful the speech the more protection it would deserve under the marketplace of ideas theory and so forth.⁴⁰⁸ Making this appraisal would be especially important in the context of the reporter's privilege because of the sheer breadth of possible leaks of personal, corporate, or government information.⁴⁰⁹ The information at stake in *Branzburg*, for example, arguably had relatively little First Amendment value because it related solely – at least in most respects – to private criminal matters.⁴¹⁰ Because few of four widely accepted First Amendment theories traffic in these types of informational goods, there may not be a great First Amendment interest in protecting the source in that instance.⁴¹¹ On the other hand, if the confidential source gave the reporter information about government malfeasance – corruption in the highest ranks of the

⁴⁰⁶ See *supra* notes 369-370 and accompanying text. As noted, the liberty theory protects self-realization in part because it believes that self-realization is necessary to democracy. See Baker, *supra* note 179, at 991.

⁴⁰⁷ See Schafer, *supra* note 403.

⁴⁰⁸ See *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141, 1164 (D.C. Cir. 2006) (Tatel, J., concurring in judgment) (arguing that an assessment of the newsworthiness of the leak should be undertaken); see also Monica Langley & Lee Levine, *Branzburg Revisited: Confidential Sources and First Amendment Values*, 57 GEO. WASH. L. REV. 13, 33-34 (1988) (arguing that First Amendment jurisprudence requires a sensitivity to the type of speech at issue in any given case). But see *id.* at 32 ("The *Branzburg* analysis, with its focus on preventing unwarranted impediments to the criminal prosecution of radical political groups and the so-called 'counterculture' by government, did not address the constitutional value of the expression at issue in such cases, much less in cases involving other definable categories of sources and the information provided by them for public dissemination." (emphasis added)).

⁴⁰⁹ David Abramowicz, *Calculating the Public Interest in Protecting Journalists' Confidential Sources*, 108 COLUM. L. REV. 1949, 1978-79 (2008) (explaining that "some journalistic uses of confidential sources benefit the public more than others"); see also Heidi Kitrosser, *Free Speech Aboard the Leaky Ship of State: Calibrating First Amendment Protections for Leakers of Classified Information*, 6 J. NAT'L SEC. L. & POLICY __ (2013) (forthcoming) (arguing that leaks by government employees are, by definition, leaks about the government and, therefore, worthy of First Amendment protection).

⁴¹⁰ See *supra* notes 69 and 78.

⁴¹¹ In *Branzburg* and the companion cases, it was alleged that the reporter witnessed criminal activity that was separate and apart from the source conveying information to the reporter. See *id.*

executive branch, for example – these four theories may require the protection of the confidential source.⁴¹² This may be the case, because the source would be directly serving the interests of at least three, and arguably four, of the First Amendment theories detailed: the self-governance, checking value, and marketplace of ideas theories.⁴¹³ In this way, First Amendment theory is pivotal in the calculus of whether a reporter should be compelled to divulge his source’s identity.⁴¹⁴

First Amendment Theory Applied: The Right of Access to Information, the Right to Publish, and Journalistic Liability

In *Branzburg v. Hayes*, the Supreme Court did not view the reporter’s privilege as a speech question, and, therefore did not consider how First Amendment theories may have related to the types of information that was sought to be disseminated.⁴¹⁵ The dissent, on the other hand, did.⁴¹⁶ The dissent viewed the subpoenas as directly interfering with speech for a number of reasons: subpoenas inhibited the right of access to information;⁴¹⁷ they interfered with right to

⁴¹² See generally Kitrosser, *supra* note 409.

⁴¹³ See *supra* notes 240-259 and 348-349 and accompanying text

⁴¹⁴ See Langley & Levine, *supra* note 408, at 50 (“Where the information sought to be disseminated involves the operation of government, information that is concededly at the ‘core’ of the First Amendment’s protections, constitutional jurisprudence, even in the context of asserted rights of ‘access to information’ or ‘newsgathering,’ indicates that a journalist should enjoy a broad privilege when he promises confidentiality in exchange for information about the government and its operations.”).

⁴¹⁵ *Branzburg v. Hayes*, 408 U.S. 665, 681-82 (1972) (“But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. . . . The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.”).

In order to even reach the question of how newsworthy the information was or how deserving of protection the information was under the four First Amendment theories outlined, the majority would have first had to find that the First Amendment was implicated. Since it did not believe it was, *id.*, there was no reason to establish a balance between the weight of the government’s interest and the reporter’s interest in disseminating information to the public.

⁴¹⁶ *Id.* at 723 (Stewart, J., dissenting) (“News must not be unnecessarily cut off at its source, for without freedom to acquire information the right to publish would be impermissibly compromised.”).

⁴¹⁷ *Id.* at 728 (“News must not be unnecessarily *cut off at its source*, for without freedom to acquire information the right to publish would be impermissibly compromised.” (emphasis added)).

publish the information without government interference;⁴¹⁸ and they punished the media for publishing information.⁴¹⁹ Because the dissent thought *Branzburg* was a First Amendment case, it considered whether the Amendment required the recognition of a reporter's privilege.⁴²⁰

Like the *Branzburg* dissent, the judge in James Risen's case, Judge Brinkema, also singled out First Amendment concerns in discussing a constitutional reporter's privilege.⁴²¹ Quoting a Fourth Circuit case, Judge Brinkema explained, "[I]f courts routinely required journalists to disclose their sources, 'the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.'"⁴²² This echoes the *Branzburg* dissent's concern about public access to information about how government works.⁴²³ In a later opinion, Judge Brinkema, again finding a privilege, cited to Risen's affidavit where Risen alleged that he could not have gathered the information absent a privilege.⁴²⁴ This also mirrors the *Branzburg* dissent's concern about a reporter's right of access to information.⁴²⁵

In Risen's case, the First Amendment concerns of the *Branzburg* dissent have, in some respects, been resurrected and must be grappled with to understand how courts approach reporter's privilege cases in general. As such, this section looks briefly at Supreme Court First Amendment cases relating to the right to gather news, publish news, and be free from

⁴¹⁸ *Id.* ("News must not be unnecessarily cut off at its source, for without freedom to acquire information *the right to publish would be impermissibly compromised.*" (emphasis added)).

⁴¹⁹ *Id.* at 731-32 ("In the event of a subpoena, under today's decision, the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics 10 and impairing his resourcefulness as a reporter if he discloses confidential information." (emphasis added) (internal footnote omitted)).

⁴²⁰ *Id.* at 733-36.

⁴²¹ June 28 Mem. Op., *supra* note 13, at 18-19.

⁴²² *Id.* at 19 (quoting *Ashcraft v. Conoco. Inc.* 218 F.3d 282, 287 (4th Cir. 2000)).

⁴²³ *Branzburg*, 408 U.S. at 728 (Stewart, J., dissenting).

⁴²⁴ July 29 Mem. Op., *supra* note 39, at 18 (quoting Risen Aff. ¶¶ 51-52 (I could not have written Chapter 9 of *State of War* (and many, if not all of the above-referenced articles and books) without the use of confidential source(s).")).

⁴²⁵ *Id.*

punishment for those actions. First, it offers an analytical framework to illustrate the relationship among these three different rights. Next, it briefly explains the scope of a reporter's right to publish information and provides an overview of existing case law relating to a reporter's right to gather news and to be free from punishment after publication. Thereafter, this section points out potential pitfalls to the Court's approach and concludes that these pitfalls have created confusion as to what rules apply in any given case.

Conceptualizing the Rights surrounding Publication

The disagreement between the *Branzburg* majority and dissent and the disagreement between the *Branzburg* majority and Judge Brinkema stems from the position of a newly asserted right, the reporter's privilege, in relation to the established and highly protected right to publish information free from government restraint. Said differently, the jurists disagree as to whether the reporter's privilege is enough like "speech" to implicate the First Amendment.⁴²⁶

⁴²⁶ As First Amendment theories are often used as guideposts for courts, the scope of protection for newsgathering is largely informed by whatever theory the Court finds most applicable, if any. See Blasi, *supra* note 180, at 591 ("The emphasis given various fundamental values dictates to a large degree how one responds to the category of First Amendment claims which can be grouped together under the heading 'newsgathering.'"). Professor Blasi, therefore, has argued that the Court failed to find protection in *Branzburg*, because it "rejected any theory of the First Amendment which assigns to the professional press a special watchdog function over public officials." *Id.* at 593. The rejection of any "watchdog theories" is unsurprising, because the reporting in *Branzburg* – on the Black Panthers and drug manufacturers – did not feature government incompetence or official abuses of power. *Id.* Instead, they were just stories about private parties involved in criminal acts and journalists had just as much of an obligation to respond to subpoenas about criminal acts as any other citizen. *Id.* As Blasi pointed out, "At no point in the [*Branzburg*] opinion did Justice White allude to the seditious libel analogy or the Meiklejohn theory, nor did he indicate that the reporters' claims would have been stronger had their unnamed sources been government officials willing to inform on the wrongdoing of their colleagues." *Id.*; see also Langley & Levine, *supra* note 408, at 32 ("The *Branzburg* analysis, with its focus on preventing unwarranted impediments to the criminal prosecution of radical political groups and the so-called 'counterculture' by government, did not address the constitutional value of the expression at issue in such cases, much less in cases involving other definable categories of sources and the information provided by them for public dissemination.").

As alluded to, unlike the majority, Justice Douglas, dissenting in a companion case to *Branzburg*, exalted Meiklejohn's self-governance theory. *U.S. v. Caldwell*, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting). Under this theory, he found that two principles should have animated the Court's opinion. *Id.* at 714-15. First, Douglas asserted that the Bill of Rights gave people the "absolute freedom of . . . their individual opinions." *Id.* at 714. Second (and important in the newgathering context of the case), he found that Meiklejohn's theory demonstrated that "effective self-government cannot succeed unless the people are immersed in a steady, robust, unimpeded, and uncensored flow of opinion and reporting which are continuously subjected to critique, rebuttal, and re-examination." *Id.* at 715. Because the majority refused to validate these principles, Douglas believed that sources of information would refuse to come forward and journalists would censor themselves. *Id.* at 721. As a result, the

Defining how close is close enough or how alike is alike enough to merit First Amendment protection, as the Court failed to do in *Branzburg*, is difficult; it is difficult to conceive how not protecting confidential sources amounts to infringing speech. Even when judges consider the same facts, their differing perspectives as to the similarity of government interference with speech and interference with newsgathering makes it difficult to predict the outcome of any given case.⁴²⁷ The result is dramatic: some judges will find First Amendment protections and others will completely ignore these considerations.⁴²⁸ Understanding how judges can come to such opposing conclusions is important, because without that understanding it is impossible to anticipate how courts will resolve newsgathering cases.⁴²⁹

public's right to know would be unconstitutionally interfered with; "The press has a preferred position in our constitutional scheme, not to enable it to make money, not to set newsmen apart as a favored class, but to bring fulfillment to the public's right to know. The right to know is crucial to the governing powers of the people." *Id.*

The public's right to know can be construed as similar to the right to receive information. The Supreme Court has recognized on various occasions that the First Amendment protects the right to speak as well as the right to receive that speech. *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943); *see also* *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) ("[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas."). For a robust discussion of the public's right to know see Genevra Kay Loveland, *Newsgathering: Second-Class Right Among First Amendment Freedoms*, 53 TEX. L. REV. 1440, 1445 (1975).

⁴²⁷ *See, e.g., Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449, 461 (1958) (explaining that government actions that only discourage but do not directly abridge First Amendment rights are only "struck down *when perceived* to have the consequence of *unduly* curtailing the liberty of[, for example,] the freedom of the press") (emphasis added)). In cases where government action only interferes with a right indirectly, that interference will be judged unconstitutional only if five justices "*perceive*" that the interference is "undue[.]" *Id.* The malleability of this approach to government actions that only indirectly interfere with First Amendment freedoms is obvious.

⁴²⁸ *Compare Branzburg*, 408 U.S. at 681 (majority opinion) *with* *U.S. v. Caldwell*, 408 U.S. 665, 713 (1972) (Douglas, J., dissenting).

⁴²⁹ *See, e.g., Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991); *see also* TURNER, TURNER, & LEWIS, *supra* note 78, at 61 (explaining that the First Amendment's protection for newsgathering is much more "attenuated" than it is at the moment of publication); Erik Ugland, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & POL'Y 113, 119 (2008) (explaining that subpoenas and other actions against journalists illustrate "the doctrinal, historical, and theoretical infirmities of the broader legal framework that governs newsgathering").

To begin, it is helpful to view newsgathering cases as within a reporting spectrum. At the center of the spectrum is speech itself: publication. Publication is strenuously protected.⁴³⁰ Certainly, the government may not, in almost all cases, prevent the publication of news.⁴³¹ Nor may the government censor parts of publications.⁴³² These actions would be prohibited by all of the main First Amendment theories.⁴³³ For a long time, the Court has subscribed to the view that “[l]iberty of the press within the meaning of the constitutional provision, it was broadly said, meant ‘principally although not exclusively, immunity from previous restraints or (from) censorship.’”⁴³⁴

Publication is only part of making the news. If publication is at center of the reporting spectrum, enjoying the most protection, to the left are those preparatory activities in the run up to publication, like editorial decision making and newsgathering.⁴³⁵ To the right are those activities that take place after publication but nonetheless relate to a journalists newsgathering, like protecting the process by which news was gathered and being free from punishment for what was published.⁴³⁶ The farther out from the center in either direction a claimed right lies on the continuum the more likely it is that judges will disagree as to whether the First Amendment is implicated.

⁴³⁰ *Near v. Minnesota*, 283 U.S. 697, 713 (1931) (“[T]he chief purpose of the guaranty to prevent previous restraints upon publication.”).

⁴³¹ *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.” (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))).

⁴³² *Grosjean v. Am. Press Co.*, 297 U.S. 233, 249 (1936) (“Liberty of the press within the meaning of the constitutional provision, it was broadly said, meant ‘principally although not exclusively, immunity from previous restraints or (from) censorship.’” (internal citation omitted)); *Hannegan v. Esquire, Inc.*, 327 U.S. 146, 151 (1946) (finding that upholding a postage order would “grant the Postmaster General a power of censorship” over *Esquire Magazine*).

⁴³³ See *TURNER, TURNER, & LEWIS*, *supra* note 78, at 61 (“First Amendment protection is at its maximum when government tries to prohibit *publication* of information.”).

⁴³⁴ *Grosjean*, 297 U.S. at 249 (internal citation omitted).

⁴³⁵ These activities include things like guaranteeing confidentiality to a source, attending trials, and reviewing government documents.

⁴³⁶ These activities include being free from searches, compulsion, or punishment resulting from publication.

This ambiguity on the fringes has not stopped reporters from arguing for greater First Amendment rights, however. On the left side of the spectrum, reporters have argued that the First Amendment prevents the government from injecting itself into the editorial process.⁴³⁷ Reporters have also argued that the government may not interfere with access to information: thus, they have claimed a constitutional right of access to information in or relating to public records,⁴³⁸ courtrooms,⁴³⁹ or prisons,⁴⁴⁰ among other things. As Lawrence Tribe said in oral argument in *Richmond Newspapers, Inc.*, “The First Amendment is violated when the government exercises . . . power” to limit the press’s access to information.⁴⁴¹

The right side of the reporting spectrum is home to those instances where the government or a private party attempts to punish a reporter or subsequently interfere with the reporter’s work as a result of publication. On this end of the spectrum, reporters have argued that they cannot be punished for publishing information illegally obtained by another.⁴⁴² They have asserted that the First Amendment prevents the search of newsrooms.⁴⁴³ Reporters have also contended that courts cannot enforce judgments against them for violating state tort laws absent certain

⁴³⁷ *Miami Herald Publ’g Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (“The choice of material to go into a newspaper, and the decisions made as to limitations on the size and content of the paper, and treatment of public issues and public officials – whether fair or unfair – constitute the exercise of editorial control and judgment. It has yet to be demonstrated how governmental regulation of this crucial process can be exercised consistent with First Amendment guarantees of a free press as they have evolved to this time.”).

⁴³⁸ *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (finding a First Amendment right to publish information contained in public records).

⁴³⁹ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (a majority of the court finding a First Amendment right of access to criminal trials); *see also* *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (finding a First Amendment right of access to a transcript of preliminary matters in a criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that the First Amendment guarantees a right of access to criminal trials).

⁴⁴⁰ *Pell*, 417 U.S. 817 (holding that the press has no special right of access to prisons); *see also* *Saxbe v. Wash. Post Co.*, 417 U.S. 843 (1974) (finding no violation of the First Amendment where warden prohibited face-to-face interviews of inmates and pre-selection of a specific interviewee); *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978) (finding no special right of access to prisons).

⁴⁴¹ Oral Argument at 22:40, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (No. 79-243), *available at* http://www.oyez.org/cases/1970-1979/1979/1979_79_243.

⁴⁴² *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514 (2001) (finding the broadcast of a phone call illegally intercepted by another to be protected by the First Amendment).

⁴⁴³ *See, e.g., Zurcher v. Stanford Daily*, 436 U.S. 547 (1978) (finding constitutional a search of the newsroom of a student newspaper under the Fourth Amendment).

circumstances.⁴⁴⁴ And, of course, reporters have advanced the claim that the First Amendment confers on them the right to decline answering subpoenas seeking the identities of their sources or their work product.⁴⁴⁵

The Right to Gather News and be Free from Punishment for Publication

Newsgathering rights of the press were not well established when the Supreme Court ruled on *Branzburg*.⁴⁴⁶ *Branzburg* began a trend toward recognizing these rights by establishing that “news gathering is not without [some degree of] First Amendment protections.”⁴⁴⁷ What it failed to do, however, was explain when and why some newsgathering activities deserved

⁴⁴⁴ See, e.g., *Time, Inc. v. Hill*, 385 U.S. 374 (1967) (finding unconstitutional a jury charge in a right of privacy case insofar as it failed to instruct the jury that it must find knowing or reckless disregard for the truth). Notably, reputational torts, like defamation, aimed at punishing the press after publication have traditionally been treated differently than those cases where the government itself is a party. The holdings of these cases are quite clear as compared to cases where the government is attempting to prosecute a newspaper or reporter. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (“We hold today that the Constitution delimits a State’s power to award damages for libel in actions brought by public officials against critics of their official conduct. Since this is such an action, the rule requiring proof of actual malice is applicable.” (internal footnote omitted)).

The decision in *Sullivan* was seen as so momentous that one First Amendment scholar said that it was an “occasion for dancing in the streets.” Kalven, *supra* note 237, at 221 n.125 (quoting Alexander Meiklejohn). *Sullivan* and its actual malice standard would eventually spawn a whole host of Supreme Court decisions that would create robust protections for those critical of government officials, public figures, and even private persons. *Masson v. New Yorker Magazine, Inc.*, 510 U.S. 496 (1991); *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1 (1990); *Harte-Hanks Commc’ns, Inc. v. Connaughton*, 491 U.S. 657 (1989); *Hustler Magazine v. Falwell*, 485 U.S. 46 (1988); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767 (1986); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985); *Bose Corp. v. Consumers Union*, 466 U.S. 485 (1984); *Wolston v. Reader’s Digest Ass’n, Inc.*, 443 U.S. 157 (1979); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Herbert v. Lando*, 441 U.S. 153, 185 (1979); *Time, Inc. v. Firestone*, 424 U.S. 448 (1976); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974); *Rosenbloom v. Metromedia*, 403 U.S. 29 (1971); *Greenbelt Cooperative Publ’g, Ass’n v. Bresler*, 398 U.S. 6 (1970); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Beckley Newspapers Corp. v. Hanks*, 389 U.S. 81 (1967); *Time, Inc. v. Hill*, 385 U.S. 274 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Garrison v. Louisiana*, 379 U.S. 64 (1964).

⁴⁴⁵ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665 (1972); see also App. C (listing courts of appeals reporter’s privilege cases).

⁴⁴⁶ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177, at § 1.05 (noting that even as of the 2000’s, “[t]he freedom of the press to gather the news, free of excessive governmental interference, and its ability to obtain access to government institutions and to information in the hands of government are . . . less well developed [than the right to publish]”).

⁴⁴⁷ *Branzburg*, 408 U.S. at 707; see also *Houchins v. KQED, Inc.*, 438 U.S. 1, 11 (1978) (“There is an undoubted right to gather news ‘from any source by means within the law’”); *id.* at 681 (“[W]ithout some protection for seeking out the news, freedom of the press could be eviscerated.”); *Zemel v. Rusk*, 381 U.S. 1, 17 (1965) (“The right to speak and publish does not carry with it the *unrestrained* right to gather information.” (emphasis added)).

protection and others did not. This work has been left to subsequent Supreme Court justices.⁴⁴⁸

As such, newsgathering cases after *Branzburg* are important because they are the only hints at how far a general newsgathering right exists.⁴⁴⁹

As a general matter, the Court's case law after *Branzburg* reveals that the right to gather news and the right to be free from punishment for publication are rights deserving of some degree of protection as newsgathering rights. In an attempt to define the scope of protection afforded to these rights, the Court has developed two main rules.⁴⁵⁰ The first rule, which rooted in the *Branzburg* majority, is a simple one: "[T]he First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."⁴⁵¹ The second rule is equally simple: the government cannot punish the press for publication "absent a need . . . of the highest order."⁴⁵² The Court applies the first principle in cases where it views the government interference with the press as an *indirect* restraint on speech and the second principle in cases where it views the government interference as a *direct* restraint on the press.⁴⁵³ The problem in these cases is not the rules themselves, but determining when one rule should take precedence over another – whether an interference is indirect or direct.⁴⁵⁴

Under *Branzburg*'s "indirect interference" principle, the Court has upheld numerous generally applicable laws and regulations that prevent reporters from accessing certain

⁴⁴⁸ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177, at § 1.05 (noting that, in most instances, the scope of the newsgathering right is uncertain).

⁴⁴⁹ See generally *id.* § 16.06 (discussing the effect of *Branzburg* on subsequent case law).

⁴⁵⁰ A complete review of newsgathering law is outside of the scope of this paper. For a full review of the Supreme Court's newsgathering jurisprudence see Barry McDonald, *The First Amendment and the Free Flow of Information: Towards A Realistic Right to Gather Information in the Information Age*, 65 OHIO ST. L.J. 249 (2004).

⁴⁵¹ *Branzburg*, 408 U.S. at 682; see also *Cohen v. Cowles Media Co.*, 501 U.S. 663, 669-70 (1991) (listing cases).

⁴⁵² See *Bartnicki v. Vopper*, 532 U.S. 514, 527-28 (2001) (listing cases).

⁴⁵³ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177, at § 1.05

⁴⁵⁴ See, e.g., Note, *The Rights of Sources – The Critical Element in the Clash over Reporter's Privilege*, 88 YALE L.J. 1202 (1979) (arguing that *Branzburg* could be viewed as a "direct" interference case, as the dissent did).

information for the purposes of newsgathering.⁴⁵⁵ In *Pell v. Procunier*, for example, the Court ruled against journalists and inmates who brought an action against the director of the California Department of Corrections.⁴⁵⁶ The parties sued the Department, because it had rescinded a previous regulation granting the press special access to prisoners.⁴⁵⁷ After the regulation was rescinded, the press could no longer interview specific prisoners.⁴⁵⁸ As such, the press was subject to the same generally applicable law that prevented *all* members of the public from interviewing specific inmates.⁴⁵⁹

In finding that the Department's actions were constitutional, the Court noted that the press was not arguing that its rights to publish were infringed.⁴⁶⁰ The Court used this fact to juxtapose the actions at issue against protected activities like publication, writing, "It is one thing to say . . . that government cannot restrain the publication of news emanating from such sources. It is quite another thing to suggest that the Constitution imposes upon government the affirmative duty to make available to journalists sources of information not available to members of the public generally."⁴⁶¹ The Court further explained, "The Constitution does not . . . require government to accord the press special access to information not shared by members of the public generally."⁴⁶² In other words, the generally applicable regulation preventing press access

⁴⁵⁵ See, e.g., *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978); *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974); *Pell v. Procunier*, 417 U.S. 817 (1974).

⁴⁵⁶ *Pell*, 417 U.S. at 820-21.

⁴⁵⁷ *Id.* at 819.

⁴⁵⁸ *Id.* at 831.

⁴⁵⁹ *Id.* (noting that "the promulgation of § 415.071 did not impose a discrimination against press access, but merely eliminated a special privilege formerly given to representatives of the press *vis-à-vis* members of the public generally").

⁴⁶⁰ *Id.* at 829.

⁴⁶¹ *Id.* at 834.

⁴⁶² *Id.*

to specific prisoners was not unconstitutional because the First Amendment did not require the government to provide the press with access in the first place.⁴⁶³

Certainly, the regulation promulgated by the Department in *Pell* limited the amount of information available to the press to publish.⁴⁶⁴ That interference, in the Court’s view, was only an indirect interference with the press’s right to publish – an interference not meriting serious First Amendment consideration.⁴⁶⁵ Or, as illustrated by the reporter spectrum, the right asserted lied too far from the point of publication to merit protection. As the Court said, “The media plaintiffs *do not claim any impairment of their freedom to publish*, for California imposes no restrictions on what may be published about its prisons, the prison inmates, or the officers who administer the prisons.”⁴⁶⁶

The Court took the same approach in *Zurcher v. Stanford Daily*, except in this instance, the government action came after publication (that is, from the right side of the spectrum).⁴⁶⁷ In *Zurcher*, Stanford University’s student newspaper published pictures of a student protest.⁴⁶⁸ After publication, city officials became aware of the pictures’ existence and searched the offices of the paper.⁴⁶⁹ For many of the same reasons explained in *Pell*, the Court found in favor of the city officials.⁴⁷⁰ First, the Court found that the right asserted was too tangentially related to the right to publish: “[S]urely a warrant to search newspaper premises for criminal evidence such as the one issued here for news photographs taken in a public place *carries no realistic threat of prior restraint or of any direct restraint whatsoever on the publication of the Daily or on its*

⁴⁶³ *Id.*

⁴⁶⁴ *Id.* at 819.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 829 (emphasis added).

⁴⁶⁷ *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978).

⁴⁶⁸ *Id.* at 551.

⁴⁶⁹ *Id.*

⁴⁷⁰ “[The Founders] . . . did not forbid warrants where the press was involved, did not require special showings that subpoenas would be impractical, and did not insist that the owner of the place to be searched, if connected with the press, must be shown to be implicated in the offense being investigated.” *Id.* at 565.

communication of ideas⁴⁷¹ Once again, the Court found the enforcement of a generally applicable law – here being subject to reasonable searches – only indirectly, if at all, interfered with publication itself.⁴⁷² As such, the Court never considered First Amendment concerns stemming from searches of newsrooms.⁴⁷³

Nevertheless, in other instances, the Court has found that even generally applicable laws can constitute direct interferences with the First Amendment. On several occasions, for example, it has upheld the right to gather information relating to the judicial process.⁴⁷⁴ Most prominently, the press has won cases where it argued for access to courtroom proceedings.⁴⁷⁵ In these cases, the closure of the courtroom extended to all people; they were generally applicable government actions preventing the press from gathering information and sharing it with the public.⁴⁷⁶ Even though the Court was dealing with generally applicable laws perhaps valid under the indirect interference rule (especially since they only prevented access to information as in *Pell* and not publication of information), it gave serious consideration to First Amendment values.⁴⁷⁷ It did so, because closing courtrooms would prevent “the individual citizen [from] effectively

⁴⁷¹ *Id.* at 567 (emphasis added).

⁴⁷² *Id.* at 554 (“Under existing law, valid warrants may be issued to search *any* property, whether or not occupied by a third party, at which there is probable cause to believe that fruits, instrumentalities, or evidence of a crime will be found.”).

⁴⁷³ *See generally id.*

⁴⁷⁴ *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (a majority of the court finding a First Amendment right of access to criminal trials); *see also* *Press-Enter. Co. v. Superior Court*, 478 U.S. 1 (1986) (finding a First Amendment right of access to a transcript of preliminary matters in a criminal trial); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982) (holding that the First Amendment guarantees a right of access to criminal trials).

⁴⁷⁵ *See supra* note 474.

⁴⁷⁶ *Press-Enter. Co.*, 478 U.S. at 3-4 (noting that all public was prevented from attending the preliminary hearing); *Globe Newspaper Co.*, 457 U.S. at 598 (explaining that all general public was excluded from the courtroom); *Richmond Newspapers, Inc.*, 448 U.S. at 560 (plurality opinion) (noting that the judge “ordered that the Courtroom be kept clear of all parties except the witnesses when they testify” (internal quotation marks omitted));

⁴⁷⁷ *See, e.g., Globe Newspaper Co.*, 457 U.S. at 604.

participat[ing] in and contribut[ing] to our republican system of self-government” by depriving him of information.⁴⁷⁸

The Court saw the generally applicable laws at issue in these cases differently because it viewed the interferences as *direct* interferences with First Amendment rights. As an initial matter, the Court saw the closure orders as preventing the press from acting as a check on government – in these cases the judicial branch.⁴⁷⁹ Second, it found that the *public* had a First Amendment right – the right to receive information – that was *directly* interfered with by the closure.⁴⁸⁰ As Chief Justice Burger said in one such case

Free speech carries with it some freedom to listen. In a variety of contexts this Court has referred to a First Amendment right to receive information and ideas. What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.⁴⁸¹

⁴⁷⁸ *Id.*

⁴⁷⁹ Justice Stevens, concurring in the judgment of the Court, incorporated his view of the First Amendment’s purpose from a dissent in an earlier case. *Richmond Newspapers, Inc.*, 448 U.S. at 584 (Stevens, J., concurring) (citing *Houchins v. KQED, Inc.*, 438 U.S. 1, 30-38 (1978) (Stevens, J., dissenting)). In that earlier case, Stevens adopted the self-governance theory as support for finding a newsgathering right: “It is not sufficient . . . that the channels of communication be free of governmental restraints. Without some protection for the acquisition of information about the operation of public institutions . . . , the process of *self-governance* contemplated by the Framers would be stripped of its substance.” *Houchins*, 438 U.S. at 31-32 (Stevens, J., dissenting) (emphasis added) (internal citation and quotations omitted).

Justice Brennan, writing for himself and Justice Marshall, essentially agreed with Stevens’ view of the self-governance theory and agreed with the Court that criminal trials must be open to the public. See *Richmond Newspapers, Inc.*, 448 U.S. at 586-87 (Brennan, J., concurring). “Implicit in this structural role is not only ‘the principle that debate on public issues should be uninhibited, robust, and wide-open,’ but also the antecedent assumption that valuable public debate – as well as other civic behavior – must be informed.” *Id.*

In future newsgathering cases, the Court would echo these Justices’ First Amendment views. For example, in *Globe Newspaper Co. v. Superior Court*, a case where the Court upheld the press’s right of access to pre-trial sexual assault testimony, the Court prefaced its discussion with an understanding of the First Amendment as “serve[ing] to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.” *Globe Newspaper Co. v. Superior Ct.*, 457 U.S. 596, 604 (1982). As Justice Brennan recognized for a majority of the Court in *Globe Newspaper Co.*, “The First Amendment is . . . broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights.” *Id.*

⁴⁸⁰ *Richmond Newspapers, Inc.*, 448 U.S. at 576 (plurality opinion) (“Instead of acquiring information about trials by firsthand observation or by word of mouth from those who attended, people now acquire it chiefly through the print and electronic media.”).

⁴⁸¹ *Id.* (internal quotation marks and citations omitted).

Justice Brennan, concurring in a similar case, echoed that sentiment, writing, “The ‘common core purpose of assuring freedom of communication on matters relating to the functioning of government’ that underlies the decision of cases of this kind provides protection to all members of the public ‘from abridgment of their rights of access to information about the operation of their government.’”⁴⁸²

Even outside the courtroom context, the Court has found generally applicable laws to directly infringe with freedom of speech when reporters are punished for the publication of information they have gathered.⁴⁸³ These are newsgathering liability cases where parties attempt to hold reporters liable for publication after publication has occurred.⁴⁸⁴ In some instances, reporters receive the information lawfully from someone who collected the information unlawfully.⁴⁸⁵ In others, reporters break promises with sources of information,⁴⁸⁶ they publish information found in public records,⁴⁸⁷ or they publish sensitive confidential information.⁴⁸⁸ In

⁴⁸² Press-Enter. Co. v. Superior Ct., 464 U.S. 501, 517 (1984) (Stevens, J., concurring).

⁴⁸³ See, e.g., Smith v. Daily Mail Co., 443 U.S. 97, 102 (1979) (“Our recent decisions demonstrate that state action to punish the publication of truthful information seldom can satisfy constitutional standards.”).

⁴⁸⁴ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177, at § 13.04.

⁴⁸⁵ See, e.g., Bartnicki v. Vopper, 532 U.S. 514 (2001) (emphasis added); see also *id.* at 544-45 (Rehnquist, C.J., dissenting) (“The anti disclosure provision is based solely upon the manner in which the conversation was acquired, not the subject matter of the conversation or the viewpoints of the speakers. The same information, if obtained lawfully, could be published with impunity.”).

⁴⁸⁶ Cohen v. Cowles Media Co., 501 U.S. 663 (1991) (“The question before us is whether the First Amendment prohibits a plaintiff from recovering damages, under state promissory estoppel law, for a newspaper’s breach of a promise of confidentiality given to the plaintiff in exchange for information.”).

⁴⁸⁷ Cox Broad. Corp. v. Cohn, 420 U.S. 469, 471 (1975); *Id.* at 472 n.1 (“It shall be unlawful for any news media or any other person to print . . . the name or identity or any female who may have been raped or upon whom an assault with intent to commit rape may have been made.” (emphasis added)).

In the 1975 case *Cox Broadcasting Corp. v. Cohen*, the Court addressed whether a state could sanction the press for publishing truthful information that was in the public sphere. *Id.* at 471. There, the reporter for a television station discovered the victim’s name after reviewing indictments available in the public court record. *Id.* at 472-73. Rejecting Cohen’s arguments, the Court found that the state could not punish the publication of truthful information on the public record. *Id.* at 491. The Court reasoned that individuals rely on the press for information about their government: “[I]n a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations.” *Id.* at 492 (emphasis added).

⁴⁸⁸ Virginia v. Landmark Commc’ns, Inc., 435 U.S. 829 (1978); *id.* at 830 n.1 (“Any person who shall divulge information in violation of the provisions of this section shall be guilty of a misdemeanor.” (emphasis added)).

In *Landmark*, a reporter was punished after publishing the name of a judge who was being investigated by a confidential judicial review board. *Id.* at 831. The Court held that the First Amendment did not permit such

all instances, the question is whether states can impose liability for the publication of the information.⁴⁸⁹

In *Bartnicki v. Vopper*, the Court addressed whether a plaintiff could bring an action against a radio commentator who broadcasted a telephone call that was illegally intercepted by an unknown third party for damages under federal and state statutes.⁴⁹⁰ The broadcaster argued that he could not be punished for the broadcast because the “disclosures were protected by the First Amendment.”⁴⁹¹ The Supreme Court found that the pertinent question was: “Where the punished publisher of information has obtained the information in question in a manner lawful in itself but from a source who has obtained it *unlawfully*, may the government punish the ensuing publication of that information based on the defect in a chain?”⁴⁹²

punishment, because the purpose of the First Amendment is “to protect the free discussion of governmental affairs.” *Id.* at 838; *see also* *Smith v. Daily Mail Co.*, 443 U.S. 97, 102 (1979) (a non-generally applicable law).

In *Smith v. Daily Mail Publishing Co.*, the Supreme Court made its first effort to distill a general rule from *Cox* and *Landmark* and their reliance on First Amendment theory relating to self-governance (and to a lesser degree the marketplace of ideas). *Id.* at 102-03. In *Daily Mail*, the *Charleston Daily Mail* refused to publish the name of a juvenile who allegedly shot and killed a student, because a state statute made doing so a misdemeanor. *Id.* at 99. Despite the prohibition, another newspaper, the *Charleston Gazette*, published the juvenile’s name, and the next day the *Daily Mail* followed suit since the name was public at that point. *Id.* at 99-100. The state indicted both newspapers for violating the non-disclosure statute. *Id.* at 100. The question before the Court was whether a newspaper could be punished for publishing truthful information that it legally obtained on its own. *Id.*

Relying in part on *Cox* and *Landmark*, the Court formulate[d] what would come to be known as the *Daily Mail* principle: “[I]f a newspaper *lawfully obtains truthful information* about a matter of public significance then state officials may not constitutionally punish publication of the information, *absent a need to further a state interest of the highest order.*” *Id.* at 103. The Court recognized that the state had an interest in protecting the identity of a juvenile offender, but ultimately concluded that “the [press] constitutional right must prevail . . .” *Id.* at 104 (citing *Davis v. Ala.*, 415 U.S. 308 (1974)). It thought this must be the case, because preventing a newspaper from publishing truthful information it gathered through the normal reporting process would inject the government into the editorial process; as the court put it, “A free press cannot be made to rely solely upon the sufferance of government to supply it with information.” *Id.* at 104. While in not so many words, the Court seemed concerned about press independence from government – a cornerstone of both the checking value and the self-governance theories. *Id.*

⁴⁸⁹ *See supra* notes 485-488.

⁴⁹⁰ *Bartnicki v. Vopper*, 532 U.S. 514, 518-19 (2001).

⁴⁹¹ *Id.* at 520.

⁴⁹² *Id.* at 528 (quoting *Boehner v. McDermott*, 191 F.3d 463, 484-85 (D.C. Cir. 1999) (Sentelle, J., dissenting) (emphasis added), *cert. granted, judgment vacated*, 532 U.S. 1050 (2001)).

The Court said no.⁴⁹³ In coming to that conclusion, the Court explained that no matter the initial illegal action by a third party to retrieve the information, the imposition of “sanctions on the publication of truthful information of public concern” infringes on “the core purposes of the First Amendment.”⁴⁹⁴ In short, the Court saw the damages sought under the statutes as *directly* infringing on protected speech,⁴⁹⁵ and, therefore, the application of the rule demanding a “need . . . of the highest order” for the imposition of liability to be constitutional.⁴⁹⁶

Direct interference cases like *Bartnicki* evidence the Court’s willingness to, under certain circumstances, even apply strict First Amendment scrutiny to even laws of general applicability.⁴⁹⁷ Again, it is a question of degree: would the interference caused by allowing recovery for damages so interfere with protected speech that First Amendment considerations must be analyzed? Depending on the facts of a case, the answer is not self-evident.⁴⁹⁸

Aggravating the matter, the Court has rarely explained *why* it views some laws as directly

⁴⁹³ *Id.* at 533-34.

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.* Notably, the Court never rebutted the dissent’s assertion that the laws did not directly interfere with speech because they were “content neutral; they only regulate information that was illegally obtained; they do not restrict republication of what is already in the public domain; they impose no special burdens upon the media; they have a scienter requirement to provide fair warning; and they promote the privacy and free speech of those using cellular telephones.” *Id.* at 548 (Rehnquist, C.J., dissenting) (arguing for the application of the indirect interference rule that holds that laws of general applicability are enforceable against the press as well as the public).

⁴⁹⁶ *Id.* at 527-28 (listing cases).

⁴⁹⁷ *See supra* notes 485-488. A legitimate criticism is that, for the most part, these laws are not laws of generally applicability because they apply only to certain types of speech even though their application to those types of speech applied to everyone. *Bartnicki*, however, was a law of general applicability in both ways: it applied to everyone equally and it applied to all types of speech. *See, e.g., Bartnicki*, 532 U.S. at 545 (Rehnquist, C.J., dissenting) (noting that the Court was extending the what was once a rule limited to “certain truthful information” to a law that was content neutral).

⁴⁹⁸ For example, Justice Stewart in *Zurcher* viewed the enforcement of a search warrant against a newspaper as interfering with speech, because the search would interfere with the day-to-day operations of the newsroom. *Zurcher v. Stanford Daily*, 436 U.S. 547, 571 (1978) (Stewart, J., dissenting). Thus, he would have given the speech more First Amendment protection. *Id.* Unfortunately, the majority in *Zurcher* failed to rebut Justice Stewart’s viewpoint or explain how a court should distinguish between permissible generally applicable laws and those generally applicable laws that impermissibly interfere with protected speech. *See generally id.* (majority opinion).

interfering with speech and requiring greater First Amendment protection, and some as only indirectly interfering and requiring less.⁴⁹⁹

Thus, even twenty years after *Branzburg* was decided, the internal confusion that existed between the majority and dissent's views in *Branzburg* – whether the imposition of generally applicable laws against the press required a weighing of First Amendment values – continues to rear its head.⁵⁰⁰ The inability of the Court to explain when a government action directly interferes with protected speech and when it does not makes it difficult to know when a court ought to apply one principle or the other; indeed, the answer obviously does not lie in whether a law is a generally applicable one or not.⁵⁰¹ As Erik Ugland has explained, “The mixed success of media litigants and the lack of conclusive rulings from the U.S. Supreme Court have yielded a body of law that is conflicted in both its outcomes and its rationales.”⁵⁰²

⁴⁹⁹ See generally *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991). This ambiguity in distinguishing between permissible and impermissible laws is best evidenced by the Court's opinion in *Cohen v. Cowles Media Co.* See *id.* In *Cohen*, the Court was presented with the question of whether a confidential source could, consistent with the First Amendment, recover damages when the newspaper revealed the source's identity. *Id.* The majority believed that the case was governed by the Court's line of cases holding that laws of general applicability – in this case, a state tort law – governed and, therefore, found that the First Amendment did not bar damages. *Id.* at 671-72. Indeed, the tort at issue was a generally applicable one. *Id.* (holding only that the First Amendment was not implicated without considering any First Amendment values).

The dissent, however, disagreed. *Id.* at 672 (Blackmun, J., dissenting); *id.* at 676 (Souter, J., dissenting). In the dissent's view, the case was not one where the media was attempting to avoid a generally applicable law. *Id.* at 673-74 (Blackmun, J., dissenting). Instead, the dissent viewed the damages award as a punishment for pure, truthful speech: the publication of the confidential source's name that had political value. *Id.* at 675-76. As such, the enforcement of liability would constitute direct infringement with speech. *Id.* Therefore, it would have applied the rule that publication could not be punished absent a need of the highest order. *Id.* at 676. “To the extent that truthful speech may ever be sanctioned consistent with the First Amendment, it must be in furtherance of a state interest ‘of the highest order.’ Because the [lower court's] opinion makes clear that the State's interest . . . was far from compelling, [we] would affirm that court's decision,” the dissent concluded. *Id.* (internal citations omitted).

⁵⁰⁰ See, e.g., *Bartnicki v. Vopper*, 532 U.S. 514, 544 (2001) (Breyer, J., concurring) (“The Court correctly observes that these are ‘content-neutral law[s] of general applicability’ which serve recognized interests of the ‘highest order’: ‘the interest in individual privacy and . . . in fostering private speech.’ It nonetheless subjects these laws to the strict scrutiny normally reserved for governmental attempts to censor different viewpoints or ideas. There is scant support, either in precedent or in reason, for the Court's tacit application of strict scrutiny.”).

⁵⁰¹ See *McDonald*, *supra* note 450, at 251.

⁵⁰² See Ugland, *supra* note 429, at 121.

The Reporter's Privilege as a Constitutional Newsgathering Right

Unsurprisingly, this has left the academic literature about a reporter's privilege in disarray. Some scholars have argued that courts should not recognize *any* right to gather news under the First Amendment.⁵⁰³ Others, however, have argued for relatively modest First Amendment protections.⁵⁰⁴ And still others have advocated for greater protections.⁵⁰⁵ Randall Bezanson has curtly summarized much of the discussion, describing the “boring, dull, and . . . repetitive” literature as standing for the unimpressive idea that the right to publish, protected by the First Amendment, means nothing without the right to gather news for publication:

(1) freedom of the press means freedom to publish; (2) because obtaining information is essential to its publication, newsgathering is an exercise of press freedom; (3) restrictions on newsgathering are, therefore, restrictions on the First Amendment freedom to publish, and should be valid only if First Amendment scrutiny can be satisfied (i.e. restrictions should be presumed unconstitutional, placing the burden of justification on the government); and (4) the level of scrutiny should be relatively strict (here is where the interstitial commentary focuses).⁵⁰⁶

Although academic writing focused on newsgathering is in general disarray, there are pockets of scholarly work that clearly tackle the problems posed by *Branzburg*.⁵⁰⁷ While many have argued in support of a constitutional reporter's privilege, Monica Langley, an investigative reporter at the *Wall Street Journal*, and Lee Levine, one of the nation's preeminent First Amendment lawyers, have argued most convincingly that the Court's subsequent jurisprudence

⁵⁰³ Randall P. Bezanson, *Means and Ends and Food Lion: The Tension Between Exemption and Independence in Newsgathering by the Press*, 47 EMORY L.J. 895, 924 (1998) (having no qualms with press liability stemming from generally applicable laws).

⁵⁰⁴ Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. Rich. L. Rev. 1143, 1161(2000) (advocating that “the government should be able to impose liability on the media only if it can prove that this is necessary to achieve an important government purpose”).

⁵⁰⁵ Ugland, *supra* note 429, at 183 (arguing for a “qualified protection” for those engaged in gather news).

⁵⁰⁶ See Bezanson, *supra* note 503, at 896.

⁵⁰⁷ See, e.g., Marcus A. Asner, *Starting from Scratch: The First Amendment Reporter-Source Privilege and the Doctrine of Incidental Restrictions*, 26 U. MICH. J.L. REFORM 593 (1993); Glenn A. Browne, *Just Between You and Me . . . for Now: Reexamining A Qualified Privilege for Reporters to Keep Sources Confidential in Grand Jury Proceedings*, 1988 U. ILL. L. REV. 739 (1988); Chemerinsky, *supra* note 504, at 1161; Lucy A. Dalglish & Casey Murray, *déjà Vu All over Again: How A Generation of Gains in Federal Reporter's Privilege Law Is Being Reversed*, 29 U. ARK. LITTLE ROCK L. REV. 13 (2006); Kielbowicz, *supra* note 68; Ugland, *supra* note 430, at 183.

actually undermines *Branzburg*'s reasoning and factual differences between the *Branzburg* leaks and other types of leaks merit varying amounts of First protection.⁵⁰⁸

First, Langley and Levine assert that in the case of information about government, a subpoena against journalists amounts to a direct interference with newsgathering and an impermissible punishment resulting from publication.⁵⁰⁹ “In the grand jury context, for example, a journalist who is held in contempt and jailed for refusing to testify about the source of his published report exposing governmental corruption is . . . effectively receiving punishment based on both the content of his published work *and* his newsgathering techniques,” Langley and Levine explain.⁵¹⁰ The same would also be true in the civil context where a government official sued a newspaper for libel.⁵¹¹

Langley and Levine additionally argue that government action in subpoena cases directly interferes with speech because, without protection, a source may not come forward.⁵¹² While they recognize that it is impossible to prove how many sources have refused to speak absent First Amendment protection, they assert that the First Amendment, in newsgathering contexts where information about the government is at stake, does not require such proof.⁵¹³ All that is required, they suggest, is the recognition “that information provided by confidential sources is increasingly necessary for the effective dissemination of information about government in this country, and

⁵⁰⁸ Langley & Levine, *supra* note 408, at 47.

⁵⁰⁹ As these commentators put it, “[I]t is difficult to draw a meaningful distinction between a right to gather news, on the one hand, and governmentally imposed punishment for publishing news [that is, pure speech], on the other.” *Id.* at 46.

⁵¹⁰ *Id.*

⁵¹¹ *Id.*

⁵¹² *Id.* at 44-45. This argument is a non-starter insofar as the Supreme Court rejected this argument in *Branzburg*. See *Branzburg v. Hayes*, 408 U.S. 665, 695 (1972) (rejecting the chilling effect argument in the context of a source who allegedly has been involved in criminal conduct or has been a witness to that type of conduct).

⁵¹³ Langley & Levine, *supra* note 408, at 44-45.

that such sources typically claim that such information will not be provided in the absence of a pledge of confidentiality by the press.”⁵¹⁴

Having attempted to frame the discussion as one of direct interferences with speech, Langley and Levine next address the First Amendment interests at stake: “[Case law subsequent to *Branzburg*] strongly suggest[s] . . . that the First Amendment would embrace at least a privilege protecting those confidential relationships that facilitate the dissemination of *information about government, information that is at the ‘core’ of the First Amendment.*”⁵¹⁵ As such, Langley and Levine distinguish *Branzburg* on the basis of the identities of the sources and the content of the information they are divulging.⁵¹⁶ As opposed to the politically violent sources and the drug manufacturers considered by the Court in *Branzburg* and the consolidated cases, confidential sources today are often public officials with important information about government.⁵¹⁷ Because of this difference, Langley and Levine argue that lower courts should not indiscriminately apply *Branzburg*’s when the source is a public official who has information lying at the core of the First Amendment.⁵¹⁸ Said differently, “Regardless of one’s evaluation of the Supreme Court’s balancing of competing interests in the factual context contemplated in *Branzburg*, the result reached in that case . . . is unsuited to resolving the constitutional considerations raised by the use of confidential sources to facilitate reporting about the government.”⁵¹⁹

⁵¹⁴ *Id.* at 45 (internal footnote omitted).

⁵¹⁵ *Id.* at 41-43 (emphasis added).

⁵¹⁶ *Id.* at 25; *see also id.* at 40 (styling the sources at issue in *Branzburg* and the consolidated cases as “nongovernmental groups suspected of criminal wrongdoing”).

⁵¹⁷ *Id.* at 25 (“The confidential source relationships presented to the Court in *Branzburg* are distinctly foreign to the primary use of anonymous sources today, which is in reporting about the government and its operations.”); *see also id.* at 28 (noting that “one empirical study found that forty-two percent of former federal officials in policymaking positions acknowledged that they had provided confidential information to the press while in office”).

⁵¹⁸ *Id.* at 33.

⁵¹⁹ *Id.*

While Langley and Levine attempt to argue around *Branzburg*, other supporters of a reporter's privilege have simply argued that the *Branzburg* Court was wrong. Most commentators argue, for example, that *Branzburg* failed to give sufficient credence to news organizations' arguments that the lack of a privilege would result in a "chilling effect."⁵²⁰ In fact, this is one of the most often invoked arguments in favor of a privilege.⁵²¹ There are two independent aspects to the chilling effect, which is a relatively simple argument.⁵²² First, a chilling effect occurs when sources who would otherwise come forward refuse to do so, because a reporter is unable to promise them confidentiality.⁵²³ This will often be the case, it is argued, because sources may suffer private, civil, or criminal ramifications if their identities' are released to an employer or a prosecutor.⁵²⁴ The second chilling effect occurs when journalists self-censor themselves out of fear that including certain information could put them in legal jeopardy.⁵²⁵

The chilling effect argument is rather attractive to proponents because it shows the effects of not recognizing a reporter's privilege as abridging several theories of the First Amendment. Certainly, if the result of requiring a journalist to testify before a grand jury is the *decrease* of information that would otherwise be available in the market, the marketplace of ideas theory

⁵²⁰ See, e.g., Jeffrey S. Nestler, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 248 (2005); Donna M. Murasky, *The Journalist's Privilege: Branzburg and Its Aftermath*, 52 TEX. L. REV. 829, 852 (1974). But see Randall D. Eliason, *Leakers, Bloggers, and Fourth Estate Inmates: The Misguided Pursuit of A Reporter's Privilege*, 24 CARDOZO ARTS & ENT. L.J. 385, 386 (2006) (arguing that whether a promise of confidentiality promotes whistleblowers to come forward is "open to serious question[ing]").

⁵²¹ Josi Kennon, *When Rights Collide: An Examination of the Reporter's Privilege, Grand Jury Leaks, and the Sixth Amendment Rights of the Criminal Defendant*, 17 S. CAL. INTERDISC. L.J. 543, 554 (2008) ("The main argument relied on by journalists in asserting the need for a reporter's privilege is that allowing grand juries the unbridled power to subpoena a reporter would have a 'chilling effect' on the free flow of information to the public.").

⁵²² See Murasky, *supra* note 520, at 852.

⁵²³ *Id.*

⁵²⁴ See Langley & Levine, *supra* note 408, at 26 ("A pledge of confidentiality is . . . typically the price that a journalist must pay to secure meaningful information about the operation of government for dissemination to the public.").

⁵²⁵ See Murasky, *supra* note 520, at 852; see also U.S. v. Caldwell, 408 U.S. 665, 721 (1972) (Douglas, J., dissenting) ("[F]ear of accountability will cause editors and critics to write with more restrained pens.").

would be violated.⁵²⁶ Moreover, when the information lost is related to self-governance, under the self-governance and checking value theories, a source's identity may be more deserving of protection than speech about private matters, for example.⁵²⁷ As one commentator argued, "When the source's message carries with it high value in the marketplace of ideas, it is easier to see the justification for the reporter's privilege, because there is a greater potential chilling effect on highly valued speech."⁵²⁸ Another has agreed on substantially the same terms: "When the source is a government official, the public interest in the information is more closely tied to the purposes of the First Amendment than when the source is a private actor . . . [and] the potential harm of a chilling effect on the public interest is much higher."⁵²⁹

In *Branzburg*, although the Court said that the chilling effect argument was "not irrational," it dismissed it as "speculative," without discussing how the type of speech at issue may affect the chilling effect argument.⁵³⁰ The Court further called into question the evidence of a chilling effect, explaining, "[T]he evidence fails to demonstrate that there would be a significant constriction of the flow of news to the public if this Court reaffirms the prior common-law and constitutional rule regarding the testimonial obligations of newsmen."⁵³¹ This demand for evidence has struck proponents of the privilege as odd, because the Court historically had not demanded empirical evidence of a chilling effect as a result of the government's

⁵²⁶ John T. White, *Smoke Screen: Are State Shield Laws Really Protecting Speech or Simply Providing Cover for Criminals Like the Serial Arsonist?*, 33 ARIZ. ST. L.J. 909, 928 (2001).

⁵²⁷ *Id.*

⁵²⁸ *Id.*

⁵²⁹ Elizabeth Coenia Sims, *Reporters and Their Confidential Sources: How Judith Miller Represents the Continuing Disconnect Between the Courts and the Press*, 5 FIRST AMEND. L. REV. 433, 471 (2007).

⁵³⁰ *Branzburg v. Hayes*, 408 U.S. 665, 693-95 (1972). The Court did, however, chastise those arguing for the privilege to the extent that it forcefully rejected the idea "that the First Amendment protects a newsman's agreement to conceal the *criminal conduct* of his source, or evidence thereof, on the theory that it is better *to write about crime* than to do something about it." *Id.* at 692. Apparently then, to some extent, the content of the reportage in *Branzburg* and the companion cases was at least an implicit consideration in the analysis. That is, the Court seemed more willing to refuse to find a privilege because the information in the articles was about the sources "criminal conduct" and "crime." *Id.*

⁵³¹ *Id.* at 693.

actions.⁵³² As Justice Stewart's *Branzburg* dissent pointed out, "The impairment of the flow of news cannot, of course, be proved with scientific precision, as the Court seems to demand."⁵³³ He saw this burden unsupportable by the Court's previous jurisprudence that required that government action cause only something more than a *de minimis* chill.⁵³⁴

Across the aisle, opponents of a reporter's privilege do not place an emphasis on the First Amendment, but, like the majority in *Branzburg*, view the question from the criminal law perspective.⁵³⁵ More specifically, these opponents note that the Constitution contains not only a First Amendment, but also a Fifth and Sixth Amendment⁵³⁶ that grant criminal defendants certain rights like due process of the law⁵³⁷ and a process allowing them to subpoena witnesses to testify in their favor.⁵³⁸ Moreover, others argue that recognizing a reporter's privilege, whether

⁵³² See Nestler, *supra* note 520, at 248 ("This demand [in *Branzburg* for empirical evidence] was without merit and epitomized the Court's antagonism toward the idea of press privileges. In contrast, the Supreme Court in several other cases has accepted at face value the premise that certain governmental actions would unnecessarily chill important First Amendment rights." (citing *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996); *Freedman v. Maryland*, 380 U.S. 51, 61 (1965); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Smith v. California*, 361 U.S. 147, 153-54 (1959))); see also Sims, *supra* note 529, at 471 (arguing that the government should have the burden of proving that the probability of a chilling effect is small); Murasky, *supra* note 520, at 853 ("In many of the cases in which the Court has decided that government action would impermissibly chill the exercise of first amendment rights, the Court reached its conclusion only by inference.").

⁵³³ *Branzburg*, 408 U.S. at 733 (Stewart, J., dissenting).

⁵³⁴ *Id.* at 734.

⁵³⁵ 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, 1458 (2002) (noting that "[o]pponents' arguments against journalist's privilege primarily focus on the realm of criminal law").

⁵³⁶ See U.S. CONST. amend V ("No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."); *id.* amend VI ("In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.").

⁵³⁷ Roma W. Theus, II, "Leaks" in *Federal Grand Jury Proceedings*, 10 ST. THOMAS L. REV. 551, 554 (1998) (arguing that "an accused may move to dismiss an indictment on the ground that grand jury 'leaks' violated his or her Fifth Amendment due process rights").

⁵³⁸ See Kennon, *supra* note 521, at 565 ("Leakers not only compromise a defendant's Sixth Amendment right, they 'undermine the legitimacy of government, distort the criminal justice system, and undermine the principles of the supremacy of the law.'"); Paul Marcus, *The Reporter's Privilege: An Analysis of the Common Law*, *Branzburg v.*

statutory or constitutional, would “handicap the enforcement of law” and “thwart[]” investigators “in their search for criminals or information needed to protect the public.”⁵³⁹ For that reason, law enforcement personnel are generally against such a privilege.⁵⁴⁰

Similarly, once at trial, some argue that a constitutional reporter’s privilege would inhibit the search for truth.⁵⁴¹ If a reporter’s privilege is recognized, a jury will no longer have access to “every man’s evidence” as a journalist could refuse to testify as to the identity of his source.⁵⁴² This would interfere with the Sixth Amendment’s promise of a compulsory process to the defendant, which allows him to subpoena witnesses to testify.⁵⁴³ “The rights of criminal defendants should not be overlooked,” one commentator explained. “First [A]mendment rights collide with the [S]ixth [A]mendment right to compulsory process and a fair trial when the reporter’s privilege is claimed in response to a discovery request by a criminal defendant.”⁵⁴⁴

For no apparent reason, some have resolved this conflict by asserting that a reporter’s First

Hayes, *and Recent Statutory Developments*, 25 ARIZ. L. REV. 815, 843 (1984) (“It would appear . . . that there are two principal bases for such a claim. First, the deprivation of important information may affect the defendant’s ability to fully present his case, raising due process concerns. Second, being unable to call the reporter as a witness may violate the sixth amendment right to compulsory process.” (citing U.S. CONST. amend. VI));

⁵³⁹ Thomas C. Desmond, *The Newsmen’s Privilege Bill*, 13 ALB. L. REV. 1 (1949).

⁵⁴⁰ Peter Meyer, *Balco, the Steroids Scandal, and What the Already Fragile Secrecy of Federal Grand Juries Means to the Debate over A Potential Federal Media Shield Law*, 83 IND. L.J. 1671, 1672 (2008) (“While, as a policy matter, a federal media shield law might seem imperative to an informed representative democracy, *law enforcement officials have reasonably bristled at its potential consequences.*” (emphasis added)).

⁵⁴¹ See Louis J. Capocasale, *Using the Shield As A Sword: An Analysis of How the Current Congressional Proposals for A Reporter’s Shield Law Wound the Fifth Amendment*, 20 ST. JOHN’S J. LEGAL COMMENT. 339, 371 (2006).

⁵⁴² See *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972) (citing *U.S. v. Bryan*, 339 U.S. 323, 331 (1950)) (“For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.” (footnote omitted)).

⁵⁴³ *Cross-Examination*, 12 TOURO L. REV. 761, 780 (1996) (explaining that there “are certain situations where ‘a reporter’s privilege may yield to the defendant’s Sixth Amendment rights,’ including a compulsory process). *But see* Annett Swierzbinski, *The Newsperson’s Privilege and the Right to Compulsory Process – Establishing an Equilibrium*, 48 FORDHAM L. REV. 694, 703 (1980) (suggesting that the defendant’s Sixth Amendment right to compulsory process should act as a limit on – not a bar to – the invocation of a reporter’s First Amendment privilege).

⁵⁴⁴ Leslye DeRoos Rood & Ann K. Grossman, *The Case for A Federal Journalist’s Testimonial Shield Statute*, 18 HASTINGS CONST. L.Q. 779, 810 (1991) (while these authors were not opponents to a privilege, they nonetheless noted that a defendant’s Sixth Amendment rights must be considered).

Amendment right to a privilege would “generally succumb to a defendant’s Sixth Amendment right.”⁵⁴⁵

The federal government’s intelligence community is especially antagonistic to the idea of a reporter’s privilege.⁵⁴⁶ Such a privilege, the government argues, would make it next to impossible for it to discover the identity of government officials and employees who leak information to the press.⁵⁴⁷ In opposing a statutory reporter’s privilege in 2007, the intelligence community, comprised of twelve government agencies, sent a joint letter to Senators Harry Reid and Mitch McConnell requesting that they kill consideration of the proposed statutory reporter’s privilege.⁵⁴⁸ “[T]he high burden placed on the Government by [a reporter’s privilege] will make it difficult, if not impossible, to investigate harms to the national security and only encourage others to illegally disclose the Nation’s sensitive secrets,” the officials cautioned.⁵⁴⁹

⁵⁴⁵ See Theodore Campagnolo, *The Conflict Between State Press Shield Laws and Federal Criminal Proceedings: The Rule 501 Blues*, 38 GONZ. L. REV. 445, 501 n.95 (2002).

This argument comes in spite of the Supreme Court’s explanation that “[t]he authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other.” See *Nebraska Press Ass’n v. Stuart*, 427 U.S. 539, 561 (1976). But see Kennon, *supra* note 521, at 564 (arguing that this statement “does not ring true[, because t]he federal courts, including the United States Supreme Court, have on numerous occasions compromised one right in favor of the other”).

⁵⁴⁶ See, e.g., Charlie Savage, *White House Proposes Changes in Bill Protecting Reporters’ Confidentiality*, N.Y. Times, Sept. 30, 2009, at A17 (“The Obama administration has told lawmakers that it opposes legislation that could protect reporters from being imprisoned if they refuse to disclose confidential sources who leak material about national security, according to several people involved with the negotiations.”).

⁵⁴⁷ See, e.g., Letter from J.M. McConnell, Dir. of Nat’l Intelligence, Office of the Dir. of Nat’l Intelligence, Robert Mueller, Dir., Fed. Bureau of Investigation, Randall Fort, Assistant Sec’y of State, Dep’t of State, Charlie Allen, Under Sec’y for Intelligence and Analysis, Dep’t of Homeland Sec., Scott Large, Dir., Nat’l Reconnaissance Office, Robert Murrett, Nat’l Geospatial-Intelligence Agency, James Clapper, Under Sec’y of Def. for Intelligence, Dep’t of Def., Michael Hayden, Dir., Cent. Intelligence Agency, Janice Gardner, Assistant Sec’y for Intelligence and Analysis, Dep’t of the Treasury, Keith Alexander, Dir., Michael Maples, Dir., Def. Intelligence Agency, & Rolf Mowatt-Larssen, Dir. of Intelligence & Counterintelligence, Dep’t of Energy, to Sens. Harry Reid & Mitch McConnell, U.S. Senate (Jan. 23, 2008) available at <http://www.justice.gov/archive/opa/mediashield/2008-01-23-intelligence-community.pdf>.

⁵⁴⁸ *Id.*

⁵⁴⁹ *Id.* at 1; see also *Free Flow of Information Act of 2007: Hearing on H.R. 2102 Before the H. Comm. on the Judiciary*, 110th Cong. (2007) (statement of Rachel Brand, Assistant Attorney General) (“It is therefore not an overstatement to say that the [reporter’s privilege] could encourage more leaks of classified information – by giving leakers a formidable shield behind which they can hide – while simultaneously discouraging criminal investigations and prosecutions of such leaks – by imposing such an unacceptably high evidentiary burden on the government that it virtually requires the disclosure of additional sensitive information in order to pursue a leaker.”).

Separate from the criminal process, other academics question whether a strong reporter's privilege would actually enrich public debate and knowledge.⁵⁵⁰ If a journalist was never held accountable, the public would essentially have to take the journalist at his word; the public would have no way to know whether the "renegade" journalist is actually telling the truth about what his source said.⁵⁵¹ As one scholar explains, "[A] major practical problem with granting an absolute privilege is the inability of the citizenry to determine if the information that is intended to make it 'better' informed is inaccurate due to an unverified source."⁵⁵² Simply, some are concerned that a reporter's privilege would encourage reporters to fabricate stories and make up sources.⁵⁵³

Focusing on a prominent argument of proponents of a reporter's privilege, opponents, like the majority in *Branzburg*, question the chilling effects purported magnitude. First Amendment scholar Lillian BeVier has aptly pointed out that despite the wails of journalists asserting a privilege, there is no evidence that sources have refused to come forward since *Branzburg*.⁵⁵⁴ As she has explained, "No matter how often or how confidently press advocates make [the] prediction [that sources will dry up], the extreme consequences they forecast were the

⁵⁵⁰ See Capocasale, *supra* note 541, at 370.

⁵⁵¹ *Id.*

⁵⁵² *Id.*

⁵⁵³ See Desmond, *supra* note 539, at 6-7 ("Public officials argue that if newsmen do not have to reveal their sources, they will be enabled to write so-called 'dope' stories, using the device of attributing information to 'informed quarters' or 'insiders' when such sources may be merely fictitious and designed to lend authenticity to unwarranted attacks on public figures"); see also Capocasale, *supra* note 541, at 373 ("To provide the news media with an absolute privilege to withhold confidential sources may increase the temptation for the news media to print false 'scandalous,' or 'controversial' stories about individuals in an effort to sell newspapers, since when confronted about the factual substance of the story if a federal investigation ensues, the newsgatherer could raise his or her shield."); Lillian BeVier, *The Journalist's Privilege – A Skeptic's View*, 32 OHIO N.U. L. REV. 467, 468 ("The implication that the Constitution empowers the press—just as it empowers elected officials—to act as the public's agent raises troubling issues of accountability. If it is correct to conceive of the press as having the constitutionally conferred power to act on the public's behalf as government agents do, then it is important to determine how the public is to hold the press accountable for the consequences of its performance. On the issue of accountability, I have been able to discern questions, but not answers."); Eliason, *supra* note 520, at 439 ("Where the leak to a reporter is itself a potential crime, however, a prosecutor must be able to discover the source if that crime is to be investigated. Typically there will be only two witnesses to such a crime: the source herself (who, if questioned, may invoke the Fifth Amendment), and the reporter.").

⁵⁵⁴ See BeVier, *supra* note 553, at 468.

privilege to be denied seem most unlikely to eventuate.”⁵⁵⁵ Others agree with her, relying on empirical studies that show a lack of any real chilling effect.⁵⁵⁶ As one former prosecutor bluntly said, “The truth remains that, despite a few recent high-profile cases and the protestations of large and well-funded media organizations, cases in which a reporter is compelled to testify and reveal confidential sources are still extremely rare.”⁵⁵⁷

In addition to the critics, some journalists have argued that a reporter’s privilege should be used sparingly to avoid courts curtailing the privilege as a result of abuse.⁵⁵⁸ Most prominent of these was Geneva Overholser’s *Times* editorial at the height of the Valerie Plame affair.⁵⁵⁹ There a columnist, Robert Novak, outed Valerie Plame, covert CIA agent, after her husband, Joseph Wilson, attempted to reveal government malfeasance and deception in the run up to the invasion of Iraq.⁵⁶⁰ He later initially refused to reveal the source inside the George W. Bush administration who had given him the information.⁵⁶¹ Overholser, a former journalist and ombudsman at the *Washington Post*, wrote at the height of the Plame affair:

It’s a cardinal rule of journalism: do not disclose the identity of someone who gives you information in confidence. As a staunch believer in this rule for decades, I have surprised myself lately by concluding that journalists’ proud absolutism on this issue – particularly in a case involving the syndicated columnist Robert Novak – is neither as wise nor as ethical as it has seemed.⁵⁶²

⁵⁵⁵ *Id.*

⁵⁵⁶ See Asner, *supra* note 507, at 612 (citing a 1971 and 1985 study for the proposition that empirical evidence does not show a chilling effect); see also Ryan J. Watson, David A. Becker et. al., *Recent Decisions of the United States Court of Appeals for the District of Columbia Circuit: Constitutional Law*, 74 GEO. WASH. L. REV. 676, 693 (2006) (“The [D.C. Circuit’s] reluctance to find a reporter’s privilege under federal common law or the First Amendment, however, will most likely not have a significant effect on the relationship between the news media and its confidential sources, much less cause the ‘chilling effect’ on news gathering predicted by appellants.”);

⁵⁵⁷ See Eliason, *supra* note 520, at 417.

⁵⁵⁸ See, e.g., Geneva Overholser, *The Journalist and the Whistle-blower*, N.Y. TIMES, Feb. 6, 2004, at A27.

⁵⁵⁹ See Geneva Overholser, *Reporter’s Privilege and the Novak Case*, POYNTER (Feb 12, 2004, 6:23 PM) (discussing reaction to Overholser’s *New York Times* editorial).

⁵⁶⁰ See generally VALERIE PLAME WILSON, FAIR GAME: HOW A TOP CIA AGENT WAS BETRAYED BY HER OWN GOVERNMENT 139-158 (2008).

⁵⁶¹ David Johnston, *Novak Told Prosecutor His Sources in Leak Case*, N.Y. TIMES, July 12, 2006, available at <https://www.nytimes.com/2006/07/12/washington/12leak.html>.

⁵⁶² See Overholser, *supra* note 559.

According to Overholser, a journalist abuses the privilege – which exists, at least in part, to protect a whistleblower from a hostile government – when he uses it to “deliver[] government retribution to the [initial] whistleblower.”⁵⁶³

The abuses highlighted by Overholser may also be contributing to courts’ apparent reluctance to expand or enforce existing law recognizing a reporter’s privilege.⁵⁶⁴ Pulling from the Plame case, as well as other suggested abuses,⁵⁶⁵ one commentator has explained, “The media’s inability to differentiate between a valid privilege claim and a contemptuous one has contributed to a shift in the courts and public opinion.”⁵⁶⁶ This failure to play the privilege card appropriately and responsibly hurts the press’s cause insofar as it fosters the “appear[ance] as if it is above the law.”⁵⁶⁷ As a result of the press’s over zealous invocation of the privilege, some argue, courts have walked back their support willingness to side with the press.⁵⁶⁸

The Murky Status Quo

It is clear that First Amendment theory has influenced how the press operates at the point of publication.⁵⁶⁹ It is less clear how the First Amendment influences the press at other points in the reporting process. The outcome of those cases on the margin largely depends on whether the Court views the government’s actions in any given case as directly interfering with protected speech. When the Court views the actions this way, the Court is more likely to find protection.

⁵⁶³ *Id.*

⁵⁶⁴ Kara A. Larsen, *The Demise of the First Amendment-Based Reporter’s Privilege: Why This Current Trend Should Not Surprise the Media*, 37 CONN. L. REV. 1235, 1261 (2005).

⁵⁶⁵ Larsen also singled out Dan Rather’s use of a confidential source who provided false information as an instance of reporter abuse of a reporter’s privilege. *Id.* at 1262

⁵⁶⁶ *Id.* at 1261.

⁵⁶⁷ *Id.*

⁵⁶⁸ *Id.*; cf. Amy Gajda, *Judging Journalism: The Turn toward Privacy and Judicial Regulation of the Press*, 97 CAL. L. REV. 1039, 1104 (2009) (explaining that in the context of privacy claims against the media, media abuses of personal privacy have created an “emerging trend toward[] a narrower and less predictable judicial conception of the news”).

⁵⁶⁹ *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 735 (1931) (“[F]reedom of the press guaranteed by the First Amendment to [means] that ‘every man shall be at liberty to publish what is true, with good motives and for justifiable ends.’ [This is] the definite declaration of the First Amendment.”).

When the Court views the actions as only indirectly interfering with speech, however, it is less likely to find any protection. Unfortunately, it is almost impossible to predict why the Court will find that an action either directly or indirectly interferes with speech.

This state of affairs has produced two rules that potentially govern in newsgathering cases. First, in some cases, the press's right to be free from punishment for the publication of truthful information will be vindicated absent a compelling government interest,⁵⁷⁰ and, in others, as was the case in *Branzburg*, the press will be subject to a wide variety of generally applicable laws, which are propelled by considerations outside the First Amendment.⁵⁷¹

Some, however, would argue that the Court in *Branzburg* got it wrong. First, the Court spoke in equivocal, broad terms and failed to distinguish between the types of information at issue in *Branzburg* and other types of information that might be at stake in other cases.⁵⁷² Second, proponents of the privilege argue that the Court impermissibly and without the support of existing case law shifted the burden to the press to show that a chilling effect actually existed.⁵⁷³

Opponents, however, stand by the Court's broad *Branzburg* opinion. They, like the *Branzburg* majority, focus on how a reporter's privilege would inhibit law enforcement.⁵⁷⁴ This is especially the case in national security prosecutions where often the only evidence of the source's identity lies with the reporter.⁵⁷⁵ Moreover, opponents also question the chilling effect

⁵⁷⁰ See *supra* notes 474-499 and accompanying text.

⁵⁷¹ See *supra* notes 455-473 and accompanying text.

⁵⁷² See *supra* notes 426 and accompanying text.

⁵⁷³ See, e.g., *Branzburg v. Hayes*, 408 U.S. 665, 733 (1972) (Stewart, J., dissenting) ("But we have never before demanded that First Amendment rights rest on elaborate empirical studies demonstrating beyond any conceivable doubt that deterrent effects exist.").

⁵⁷⁴ See *supra* notes 535-545 and accompanying text.

⁵⁷⁵ See *supra* notes 546-549 and accompanying text.

argument by pointing to empirical studies suggesting that sources have not been deterred from coming forward as a result of *Branzburg*.⁵⁷⁶

Unfortunately, the Supreme Court has never undertaken a review of *Branzburg*, letting lower courts play with the limits of a reporter's privilege. And, as noted, the Court's non-reporter's privilege case law is of little help in assessing the validity of either the proponents or opponents claims arising in the forty years since *Branzburg*.⁵⁷⁷ As such, the newsgathering law surrounding *Branzburg* and the reporter's privilege is murky at best. As the leading treatise *Newsgathering and the Law* explains, "The dimensions of the newsgathering right outside the context of access to judicial proceedings and records are . . . less certain. [Y]et, the First Amendment does extend [some] protection to newsgathering, as the judicial decisions enforcing the journalists' privilege attest."⁵⁷⁸

⁵⁷⁶ See *supra* notes 554-557 and accompanying text.

⁵⁷⁷ See *supra* notes 427-429 and accompanying text.

⁵⁷⁸ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177, at § 1.05.

CHAPTER 4. RESEARCH QUESTIONS

James Risen published classified information revealing how U.S. officials mismanaged the sensitive task of feeding Iran rigged nuclear blueprints. Risen's use of a confidential source to reveal information about the government and public officials was indicative of other national security reporters' newsgathering. Dana Priest, a prominent national security reporter for the *Washington Post*, explained the difficulty of reporting on national security without confidential sources, writing, "Because the U.S. government has made secret nearly every aspect of its counterterrorism program, it would have been impossible to report even on the basic contours of these decisions, operations and programs without the help of confidential sources."⁵⁷⁹

Under the current state of the law, neither the journalists nor the confidential sources implicated in the sharing of classified information can be sure that their confidential relationship will be protect. While this has always been the case since *Branzburg v. Hayes*, the situation is becoming more unmanageable in light of conflicting lower court rulings. First, the Court has never explained how to determine the line of demarcation between a government action that directly interferes with speech and government action that only indirectly interferes with speech.⁵⁸⁰ This creates a problem because lower courts have been unable to agree on whether even the same government action triggers First Amendment protections. Second, the Court's subsequent jurisprudence that arcs toward recognition of a relatively robust newsgathering right

⁵⁷⁹ See *Mot. to Quash*, *supra* note 4, Ex. 18 at 2 (Affidavit of Dana Priest). Numerous reporters have signed affidavits similarly discussing the importance of fostering confidential source relationships to report on issues of public concern. See *id.*, Ex. 14 at 4 (Affidavit of Scott Armstrong) ("I have frequently found it necessary to guarantee [sources] anonymity in regard to information provided about classified information . . ."); *id.*, Ex. 15 at 2 (Affidavit of Carl Bernstein) ("[My Watergate source], like all our confidential sources, would not have agreed to be a source . . . had [we] not been able to assure him total and absolute anonymity."); *id.*, Ex. 17 at 2 (Affidavit of Jack Nelson) ("I have found it essential to use confidential sources to adequately report and keep the public informed of government at the local, state and national level.").

⁵⁸⁰ See *supra* notes 500-502 and accompanying text.

causes some courts to question the continuing vitality of *Branzburg*, while others do not.⁵⁸¹ This leads to a third potential problem: for those courts that do believe that reporter's privilege cases do not rise and fall on the Court's opinion in *Branzburg*, they are left to fashion their own, and perhaps, conflicted rationales as to why some reporters should not be required to divulge their sources and why some should. These rationales may be based on First Amendment concerns or they may not.⁵⁸² Without guidance, there is no "right" answer.

These flames are fanned by current political winds, as well: the Obama administration has aggressively prosecuted reporters' confidential sources.⁵⁸³ In all, the administration has charged six former government employees under the Espionage Act, a statute that gives the government the power to prosecute those who disclose classified information.⁵⁸⁴ Before the Obama administration's prosecutions, in the ninety-one years after the Espionage Act was passed, only three prosecutions against government officials for leaking information to the media took place.⁵⁸⁵ Several critics have come out against the ramped-up prosecutions calling them "selective,"⁵⁸⁶ misdirected,⁵⁸⁷ and "abject failure[s]."⁵⁸⁸

⁵⁸¹ Cf. *supra* note 515.

⁵⁸² See *supra* notes 415-420.

⁵⁸³ See generally Josh Gerstein, *The 'Leaks' War*, POLITICO, June 8, 2012, <http://www.politico.com/news/stories/0612/77194.html>; see also Cora Currier, Sealing Loose Lips: Charting Obama's Crackdown on Leaks, PROPUBLICA, Mar. 9, 2012, <https://www.propublica.org/special/sealing-loose-lips-charting-obamas-crackdown-on-national-security-leaks>. One could argue that the prosecutions number seven. A former translator released allegedly classified information to the Stanford Library. See Pete Yost, *Linguist Charged Under Espionage Act*, BOSTON.COM, Nov. 7, 2012, <http://www.boston.com/news/nation/washington/2012/11/07/linguist-charged-under-espionage-act/SOMiPKGdB4t5QWc2q0XOcJ/story.html>.

⁵⁸⁴ See Gerstein, *supra* note 583.

⁵⁸⁵ David Carr, *Blurred Line between Espionage and Truth*, N.Y. TIMES, Feb. 26, 2012, at B1. The Bush administration toyed with the idea of prosecuting journalists, but never would. As early as 2006, then-Attorney General Alberto Gonzales said on *This Week*, "There are some statutes on the book which, if you read the language carefully, would seem to indicate that [prosecuting journalists for disclosing classified information] is a possibility." Adam Liptak, *Gonzales Says Prosecutions of Journalists Are Possible*, N.Y. TIMES, (May 22, 2006), <https://www.nytimes.com/2006/05/22/washington/22gonzales.html>.

⁵⁸⁶ See Gerstein, *supra* note 583 (quoting Steven Aftergood, Federation of American Scientists).

⁵⁸⁷ Phil Mattingly and Hans Nichols, *Obama Pursuing Leakers Sends Warning to Whistleblowers*, Bloomberg, Oct. 17, 2012, <http://www.bloomberg.com/news/2012-10-18/obama-pursuing-leakers-sends-warning-to-whistleblowers.html> (quoting Abbe Lowell, attorney to a whistleblowing defendant).

More recently, congressmen also have suggested that reporters should be prosecuted for disclosing classified information or subpoenaed to reveal the name of confidential sources.⁵⁸⁹ In mid-2012 after several news outlets released classified information relating to cyber warfare, the Obama administration's "Kill List," and the death of Osama bin Laden, Republicans in the House of Representatives held a hearing on the constitutionality of subpoenaing and prosecuting reporters.⁵⁹⁰ "Put them in front of the grand jury," South Carolina Representative Tim Gowdy advocated. "You either answer the question or you're going to be held in contempt and go to jail, which is what I thought all reporters aspire to do anyway."⁵⁹¹

Historically, the existence of a constitutional reporter's privilege had always been a powerful weapon for journalists to invoke against overzealous national security claims, and, to the government's credit, it had subpoenaed journalists only in the most exceptional circumstances in the twentieth century. Lee Levine, a First Amendment lawyer, told the U.S. Senate Committee on the Judiciary in 2005:

For almost three decades following the Supreme Court's decision in *Branzburg v. Hayes*, subpoenas issued by federal courts seeking the disclosure of journalists' confidential sources were rare. It appears that no journalist was finally adjudged in contempt or imprisoned for refusing to disclose a confidential source in a federal criminal matter during the last quarter of the twentieth century. That situation, however, has now changed.⁵⁹²

⁵⁸⁸ Conor Friedersdorf, *The Obama Administration's Abject Failure on Transparency*, THE ATLANTIC, Feb. 2, 2012, www.theatlantic.com/politics/archive/2012/02/the-obama-administrations-abject-failure-on-transparency/252387/.

⁵⁸⁹ Jamie Goldberg, *House Republicans consider prosecuting reporters over leaks*, L.A. TIMES, (July 12, 2012), <http://articles.latimes.com/2012/jul/11/nation/la-na-security-leaks-20120712>.

⁵⁹⁰ *Id.*

⁵⁹¹ *Id.*

⁵⁹² *See Reporters' Shield Legislation: Issues and Implications Before the S. Comm. on the Judiciary*, 109th Cong. (2005) (statement of Lee Levine, Partner, Levine, Sullivan, Koch, & Schulz L.L.P.).

While no journalists have been prosecuted for revealing classified information yet, journalists like Risen recently have been subpoenaed⁵⁹³ and served prison sentences for refusing to answer questions regarding their confidential sources.⁵⁹⁴ Over the last twelve years, the Office of the Attorney General has approved at least forty-three subpoenas against journalists, asking for, among other things, the identities of their confidential sources and their work product.⁵⁹⁵ Because it does not keep a file for such subpoenas, these numbers are likely conservative estimates.⁵⁹⁶

This current climate, where journalists are not only subject to an increasing number of subpoenas, but also threats of prosecution in the first instance as well, makes understanding reporter's privilege jurisprudence more important than ever.⁵⁹⁷ This thesis attempts to foster that understanding by asking several questions to inform how and why courts find or do not find a powerful reporters privilege. As such, this thesis asks:

RQ 1: How, if at all, have courts of appeals attempted to distinguish *Branzburg v. Hayes*?

RQ 2: How, if at all, have courts of appeals enumerated tests for deciding whether a reporter's privilege exists or made determinations essentially on an *ad hoc* basis?

RQ 3: How, if at all, have courts of appeals relied on the leading First Amendment theories when deciding whether a reporter's privilege exists or how broad the scope of the privilege is?

⁵⁹³ See, e.g., Keith Coffman, *Journalist asks delay in Colorado shooting case to fight subpoena*, REUTERS (Mar. 19, 2013), <http://www.news.yahoo.com/journalist-asks-delay-colorado-shooting-case-fight-subpoena-233255218.html> (explaining that a journalist was recently order to divulge the identities of law enforcement sources who provided her with information about the defendant's notebook detailing the mass murder).

⁵⁹⁴ See, e.g., *After 226 days, freelancer Josh Wolf released from jail*, ASSOCIATED PRESS (Apr. 4, 2007), <http://www.archive.firstamendmentcenter.org/news.aspx?id=18369> (describing the longest jail term served by a journalist released in 2007).

⁵⁹⁵ Letter from Carmen L. Mallon, Chief of Staff of the Office of Information Policy, Dep't of Justice, to author (Sept. 27, 2012) (on file with author).

⁵⁹⁶ See *id.*

⁵⁹⁷ Indeed, this confluence of anti-journalist actions may have a serious effect on national security reporting like Risen's specifically. See William H. Freivogel, *Publishing National Security Secrets: The Case for "Benign Indeterminacy,"* 3 J. NAT'L SECURITY L. & POL'Y 95, 95 (2009) ("More recently, national security cases have led to jail for some reporters, threats of jail for others, and warnings of criminal prosecution for still others. These cases, taken together, threaten to criminalize newsgathering of national security secrets." (internal footnote omitted)).

CHAPTER 5. METHOD

This thesis examines U.S. Courts of Appeals constitutional reporter's privilege decisions. Because the Supreme Court has never revisited *Branzburg v. Hayes*, these courts have been responsible for shaping the reporter's privilege over the last forty years.⁵⁹⁸ Consistent with similar past studies, this thesis collected all reporter's privilege decisions issued after *Branzburg*⁵⁹⁹ to December 31, 2012.

This thesis examines all cases relating to the reporter's privilege in the constitutional and common law context. There was no limitation placed on whether the proceeding in which the privilege was asserted was criminal or civil. Further, there was no limitation placed on whether the decisions of the courts of appeals were published or not. Nor was there a limitation placed on whether the reporter was attempting to expand the privilege outside the reporter-source context to a broader privilege, protecting, for example, the reporter's work product or information gathered by the reporter in the absence of a confidentiality agreement.

These decisions were all made to push the number of cases addressing the reporter's privilege upward, as relatively few appellate court decisions exist relating to the reporter's privilege as it relates to sources only.⁶⁰⁰ Moreover, any discussion regarding the courts of appeals' views on the privilege, whether in the context of the reporter-source relationship or not, may inform those courts' basic understanding of the privilege as it was traditionally understood in the context of the reporter-source relationship.

⁵⁹⁸ See Schmid, *supra* note 535, at 1446 ("These courts were chosen for analysis because, at the federal level, they have been the courts of 'last resort' in journalist's privilege cases, with the exception of the Supreme Court's intervention in *Branzburg*.").

⁵⁹⁹ The Court decided *Branzburg* in June 1972. See generally *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁶⁰⁰ See Schmid, *supra* note 535, at 1447 (undertaking a similar study looking at criminal cases, while noting: "One notable limitation of this Article is the small number of cases analyzed. Courts of appeals decided only fourteen [criminal cases]").

Cases falling within the indicated time period and limitations were gathered using WestlawNext, a searchable, legal database of all court decisions issued in the United States.⁶⁰¹ More specifically, this thesis used West's Key Number System,⁶⁰² which searches cases by topics (called headnotes in WestlawNext), and found 165 headnotes were found under the following West Key Numbers: Home > West Key Number System > 311H Privileged Communications and Confidentiality > VII. Other Privileges, k 400-k423 > Journalists k404. Next, cases that relied on state shield laws or state constitutions were discarded, as the focus here is on cases discussing First Amendment interests under the federal Constitution. This process was done manually, as WestlawNext is not sensitive enough to remove federal cases that apply state law. After removing these federal cases applying state law, forty-three cases remained.⁶⁰³

After narrowing the sample to forty-three cases, a second similar search was conducted to ensure that all reporter's privilege cases were accounted for. The second search was conducted using three separate West Headnotes related to the first search: Reporter's Privilege,⁶⁰⁴ Discovery Requests and Subpoenas,⁶⁰⁵ and Disclosure of Sources.⁶⁰⁶ These three separate headnotes yielded an additional thirty-eight cases. Of these, all were accounted for in the first search except four cases, which were included in the final sample, bringing the sample to forty-seven.⁶⁰⁷ Finally, six additional privilege cases cited within these forty-seven cases were added

⁶⁰¹ Press Release, Thompson Reuters, *Thomson Reuters Unveils WestlawNext, the Next Generation in Legal Research* (Feb. 1, 2010) available at https://store.westlaw.com/westlawnext/assets/pdf/WestlawNext_NexGeneration.pdf.

⁶⁰² According to Westlaw, "West topic and key numbers enable you to find cases stating or applying a legal concept, even if those terms aren't in the opinion." *Westlaw Advantage: The West Key Number System*, Westlaw STORE (last visited Jan. 10, 2013), <https://store.westlaw.com/westlaw/advantage/keynumbers/default.aspx>.

⁶⁰³ See App. A.

⁶⁰⁴ West Key Number System > 92 Constitutional Law > XVIII. Freedom of Speech, Expression, and the Press, k1490-k2309 > (U) PRESS IN GENERAL, k2070-k2084 > Reporter's Privilege, k 2073.

⁶⁰⁵ West Key Number System > 92 Constitutional Law > XVIII. Freedom of Speech, Expression, and the Press, k1490-k2309 > (U) PRESS IN GENERAL, k2070-k2084 > Discovery Requests and Subpoenas, k 2075.

⁶⁰⁶ West Key Number System > 92 Constitutional Law > XVIII. Freedom of Speech, Expression, and the Press, k1490-k2309 > (U) PRESS IN GENERAL, k2070-k2084 > Disclosure of Sources, k 2074.

⁶⁰⁷ See App. B. Cases with an asterisk denote those cases resulting from the second search.

to the sample because they were relevant, but were not captured by the first two search strategies. These final six cases brought the total number of cases reviewed to fifty-three.⁶⁰⁸

The cases were analyzed with a focus on several characteristics.⁶⁰⁹ First, note was made of whether the case was a civil or criminal case and what kind of civil or criminal case it was. Second, the kind of reporter's privilege being invoked (source identity or work product) was noted. Fourth, the analysis tracked whether the content alleged to be protected by the privilege is confidential or non-confidential information. Fifth, it noted whether a private party or the government subpoenaed the reporter. Sixth, it tracked who was subpoenaed – a reporter or a person with some other occupation, like an academic.

In addition to these categories, special attention was paid to courts' analyses of the parties' arguments with a focus on whether courts distinguished *Branzburg* and, if so, how. Similarly, it has taken special notice of which characteristics and First Amendment theories any single court stresses in finding or not finding a privilege.

⁶⁰⁸ See App. C. Cases with an asterisk denote those cases that were not accounted for in the first two search strategies.

⁶⁰⁹ See LEVINE, LIND, BERLIN & DIENES, *supra* note 177, at § 16.01 (“[T]he privilege’s many forms and legal bases do lead to real-world differences in its application and, therefore, call for an understanding of those differences and an appreciation of how they came to develop. Indeed, the truth is that the privilege, in all of its forms, continues to evolve, a phenomenon that renders a sense of how that evolution has progressed thus far essential.”); see also Schmid, *supra* note 535, at 1147 (discussing categories of focus).

CHAPTER 6. RESULTS

Before addressing each research question in turn, it is worth setting the scene. Of the cases reviewed, twenty-five or 47.2% were criminal cases⁶¹⁰ and twenty-seven or 50.9% were civil cases.⁶¹¹ One case was a combination of both, accounting for 1.9% of the total.⁶¹² In twenty-one cases or 39.6% of all cases, the government, grand jury, or some other form of government prosecutor requested a subpoena.⁶¹³ In twenty-two cases or 41.5% of cases, a non-

⁶¹⁰ Notably, four cases were technically civil cases relating to an underlying criminal action. These cases, however, were coded as criminal cases because of the criminal law enforcement interests underlying the civil action. *See* *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Reporters Committee for Freedom of Press v. American Tel. & Tel. Co.*, 593 F.2d 1030 (D.C. Cir. 1978); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975).

⁶¹¹ Criminal cases included: *In re Request*, 685 F.3d 1 (1st Cir. 2012); *U.S. v. Treacy*, 639 F.3d 32 (2d Cir. 2011); *In re Grand Jury Subpoena*, 201 Fed.Appx. 430 (9th Cir. 2006); *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006); *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004); *McKevitt*, 339 F.3d 530; *U.S. v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000); *U.S. v. Sanders*, 211 F.3d 711 (2d Cir. 2000); *U.S. v. Smith*, 135 F.3d 963 (5th Cir. 1998); *U.S. v. Cutler*, 6 F.3d 67 (2d Cir. 1993); *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993); *In re Shain*, 978 F.2d 850 (4th Cir. 1992); *U.S. v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *In re Grand Jury Proceedings*, 810 F.2d 580; *U.S. v. Caporale*, 806 F.2d 1487 (11th Cir. 1986); *In re Grand Jury Matter*, Gronowicz, 764 F.2d 983 (3d Cir. 1985); *U.S. v. Burke*, 700 F.2d 70 (2d Cir. 1983); *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980); *U.S. v. Criden*, 633 F.2d 346 (3d Cir. 1980); *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *U.S. v. Pretzinger*, 542 F.2d 517 (9th Cir. 1976); *Farr*, 522 F.2d 464; *Lewis v. U.S.*, 517 F.2d 236 (9th Cir. 1975); *Lewis v. U.S.*, 501 F.2d 418 (9th Cir. 1974).

Civil cases included: *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006); *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005); *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005); *Donohue v. Hoey*, 109 Fed.Appx. 340 (10th Cir. 2004); *Fox v. Township of Jackson*, 64 Fed.Appx. 338 (3d Cir. 2003); *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000); *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998); *In re Madden*, 151 F.3d 125 (3d Cir. 1998); *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993); *Church of Scientology Intern. v. Daniels*, 992 F.2d 1329 (4th Cir. 1993); *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990); *Smith v. BIC Corp.*, 869 F.2d 194 (3d Cir. 1989); *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987); *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986); *In re Selcraig*, 705 F.2d 789 (5th Cir. 1983); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir. 1982); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1980); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *U.S. v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977); *U.S. v. Steelhammer*, 539 F.2d 373 (4th Cir. 1976); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974); *Baker v. F and F Inv.*, 470 F.2d 778 (2d Cir. 1972); *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).

⁶¹² *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011).

⁶¹³ *In re Request*, 685 F.3d 1; *Treacy*, 639 F.3d 32; *In re Grand Jury Subpoena*, 201 Fed.Appx. 430; *Gonzales*, 459 F.3d 160; *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141; *In re Special Proceedings*, 373 F.3d 37; *McKevitt*, 339 F.3d 530; *Sanders*, 211 F.3d 711; *Smith*, 135 F.3d 963; *Cutler*, 6 F.3d 67; *In re Grand Jury Proceedings*, 5 F.3d 397; *In re Shain*, 978 F.2d 850; *In re Grand Jury Proceedings*, 810 F.2d 580; *In re Grand Jury Matter*, Gronowicz, 764 F.2d 983; *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5; *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *Steelhammer*, 561 F.2d 539; *Steelhammer*, 539 F.2d 373; *Farr*, 522 F.2d 464; *Lewis*, 517 F.2d 236; *Lewis*, 501 F.2d 418.

governmental plaintiff requested a subpoena.⁶¹⁴ In just ten cases or 18.9% of all cases, a non-government defendant requested a subpoena.⁶¹⁵ About 41.5% of the time or in twenty-two cases, the party requesting the subpoena sought the identity of a source,⁶¹⁶ while in twenty-three cases or 43.4% of the time, the parties sought work product like a reporter's notes or unpublished videotape from a broadcast.⁶¹⁷ In one instance or 1.9% of cases, the subpoenaing party sought both types of information.⁶¹⁸ In seven cases or 13.3% of the time, parties sought other types of information like testimony about the reporter's newsgathering process or telephone records.⁶¹⁹ Finally, in thirty instances or 56.6% of all cases, reporters offered some form of confidentiality.⁶²⁰ In twenty-two cases or 41.5% of the time, reporters did not offer any confidentiality but still asserted a reporter's privilege.⁶²¹

⁶¹⁴ *Chevron Corp.*, 629 F.3d 297; *Lee*, 413 F.3d 53; *Donohue*, 109 Fed.Appx. 340; *Fox*, 64 Fed.Appx. 338; *Ashcraft*, 218 F.3d 282; *Gonzales*, 194 F.3d 29; *Cusumano*, 162 F.3d 708; *In re Madden*, 151 F.3d 125; *Shoen*, 48 F.3d 412; *Shoen*, 5 F.3d 1289; *Church of Scientology Intern.*, 992 F.2d 1329; *Clyburn*, 903 F.2d 29; *von Bulow by Auersperg*, 811 F.2d 136; *LaRouche*, 780 F.2d 1134; *In re Selcraig*, 705 F.2d 789; *Zerilli*, 656 F.2d 705; *Bruno & Stillman, Inc.*, 633 F.2d 583; *Miller*, 621 F.2d 721; *Riley*, 612 F.2d 708; *Carey*, 492 F.2d 631; *Baker*, 470 F.2d 778; *Cervantes*, 464 F.2d 986.

⁶¹⁵ *Price*, 416 F.3d 1327; *Ahn*, 231 F.3d 26; *Smith*, 869 F.2d 194; *LaRouche Campaign*, 841 F.2d 1176; *Caporale*, 806 F.2d 1487; *Burke*, 700 F.2d 70; *Criden*, 633 F.2d 346; *Cuthbertson*, 630 F.2d 139; *Silkwood*, 563 F.2d 433; *Pretzinger*, 542 F.2d 517.

⁶¹⁶ *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141; *Lee*, 413 F.3d 53; *Price*, 416 F.3d 1327; *Donohue*, 109 Fed.Appx. 340; *In re Special Proceedings*, 373 F.3d 37; *Sanders*, 211 F.3d 711; *Ashcraft*, 218 F.3d 282; *Ahn*, 231 F.3d 26; *In re Madden*, 151 F.3d 125; *Clyburn*, 903 F.2d 29; *Caporale*, 806 F.2d 1487; *LaRouche*, 780 F.2d 1134; *In re Selcraig*, 705 F.2d 789; *Zerilli*, 656 F.2d 705; *Bruno & Stillman, Inc.*, 633 F.2d 583; *Miller*, 621 F.2d 721; *Riley*, 612 F.2d 708; *Pretzinger*, 542 F.2d 517; *Farr*, 522 F.2d 464; *Carey*, 492 F.2d 631; *Baker*, 470 F.2d 778; *Cervantes*, 464 F.2d 986.

⁶¹⁷ *In re Request*, 685 F.3d 1; *Treacy*, 639 F.3d 32; *Chevron Corp.*, 629 F.3d 297; *The New York Times Co.*, 459 F.3d 160; *In re Grand Jury Subpoena*, 201 Fed.Appx. 430; *McKevitt*, 339 F.3d 530; *Gonzales*, 194 F.3d 29; *Cusumano*, 162 F.3d 708; *Smith*, 135 F.3d 963; *Shoen*, 48 F.3d 412; *Cutler*, 6 F.3d 67; *Church of Scientology Intern.*, 992 F.2d 1329; *Shoen*, 5 F.3d 1289; *Smith*, 869 F.2d 194; *LaRouche Campaign*, 841 F.2d 1176; *von Bulow by Auersperg*, 811 F.2d 136; *In re Grand Jury Proceedings*, 810 F.2d 580; *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983; *Burke*, 700 F.2d 70; *Cuthbertson*, 630 F.2d 139; *Silkwood*, 563 F.2d 433; *Lewis*, 517 F.2d 236; *Lewis*, 501 F.2d 418.

⁶¹⁸ *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5.

⁶¹⁹ *Fox*, 64 Fed.Appx. 338; *In re Grand Jury Proceedings*, 5 F.3d 397; *In re Shain*, 978 F.2d 850; *Criden*, 633 F.2d 346; *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *Steelhammer*, 561 F.2d 539; *Steelhammer*, 539 F.2d 373.

⁶²⁰ *In re Request*, 685 F.3d 1; *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141; *The New York Times Co.*, 459 F.3d 160; *Price*, 416 F.3d 1327; *Lee*, 413 F.3d 53; *In re Special Proceedings*, 373 F.3d 37; *Sanders*, 211 F.3d 711; *Ashcraft*, 218 F.3d 282; *Ahn*, 231 F.3d 26; *Cusumano*, 162 F.3d 708; *In re Madden*, 151 F.3d 125; *In re Grand Jury Proceedings*, 5 F.3d 397; *Clyburn*, 903 F.2d 29; *In re Grand Jury Proceedings*, 810 F.2d 580; *LaRouche*, 780 F.2d 1134; *Caporale*, 806 F.2d 1487; *In re Selcraig*, 705 F.2d 789; *In re Petroleum Products*

In general, the courts approved slightly more subpoenas that were requested in the criminal context than in the civil context. Of all the subpoenas sought in criminal cases, just four or 16% of subpoenas were quashed.⁶²² Nineteen or 76% of subpoenas were not quashed.⁶²³ Two or 8% were either remanded without deciding whether to quash the subpoena or were quashed in part.⁶²⁴ In civil cases, on the other hand, sixteen subpoenas or 59.3% of civil subpoenas were quashed⁶²⁵ – nine or 33.3% were not quashed.⁶²⁶ The courts remanded two subpoenas or 7.4% of all subpoenas without deciding whether the subpoena should be quashed.⁶²⁷

Where no confidentiality was at issue, courts seemed less likely to find that a reporter's privilege protected the information sought – whether that information was non-confidential work product or a non-confidential source. For example, when the reporter promised confidentiality, thirteen subpoenas were quashed or about 43.3% of all subpoenas.⁶²⁸ On the other hand, fifteen

Antitrust Litigation, 680 F.2d 5; *Zerilli*, 656 F.2d 705; *Bruno & Stillman, Inc.*, 633 F.2d 583; *Criden*, 633 F.2d 346; *Cuthbertson*, 630 F.2d 139; *Miller*, 621 F.2d 721; *Riley*, 612 F.2d 708; *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *Pretzinger*, 542 F.2d 517; *Farr*, 522 F.2d 464; *Carey*, 492 F.2d 631; *Baker*, 470 F.2d 778; *Cervantes*, 464 F.2d 986.

⁶²¹ In one instance, it was unclear whether the reporter offered confidentiality. *Fox v. Township of Jackson*, 64 Fed.Appx. 338 (3d Cir. 2003).

⁶²² *Ahn*, 231 F.3d 26; *Caporale*, 806 F.2d 1487; *Burke*, 700 F.2d 70; *Pretzinger*, 542 F.2d 517.

⁶²³ *In re Request*, 685 F.3d 1; *Treacy*, 639 F.3d 32; *The New York Times Co.*, 459 F.3d 160; *In re Grand Jury Subpoena*, 201 Fed.Appx. 430; *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141; *In re Special Proceedings*, 373 F.3d 37; *McKevitt*, 339 F.3d 530; *Sanders*, 211 F.3d 711; *Smith*, 135 F.3d 963; *In re Grand Jury Proceedings*, 5 F.3d 397; *In re Shain*, 978 F.2d 850; *LaRouche Campaign*, 841 F.2d 1176; *In re Grand Jury Proceedings*, 810 F.2d 580; *In re Grand Jury Matter, Gronowicz*, 764 F.2d 983; *Criden*, 633 F.2d 346; *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *Farr*, 522 F.2d 464; *Lewis*, 517 F.2d 236; *Lewis*, 501 F.2d 418.

⁶²⁴ *Cutler*, 6 F.3d 67; *Cuthbertson*, 630 F.2d 139.

⁶²⁵ *Price*, 416 F.3d 1327; *Fox*, 64 Fed.Appx. 338; *Ashcraft*, 218 F.3d 282; *Cusumano*, 162 F.3d 708; *Shoen*, 48 F.3d 412; *Church of Scientology Intern.*, 992 F.2d 1329; *Shoen*, 5 F.3d 1289; *Clyburn*, 903 F.2d 29; *Smith*, 869 F.2d 194; *LaRouche*, 780 F.2d 1134; *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5; *Zerilli*, 656 F.2d 705; *Riley*, 612 F.2d 708; *Steelhammer*, 539 F.2d 373; *Baker*, 470 F.2d 778; *Cervantes*, 464 F.2d 986.

⁶²⁶ *Lee*, 413 F.3d 53; *Donohue*, 109 Fed.Appx. 340; *Gonzales*, 194 F.3d 29; *In re Madden*, 151 F.3d 125; *von Bulow by Auersperg*, 811 F.2d 136; *In re Selcraig*, 705 F.2d 789; *Miller*, 621 F.2d 721; *Steelhammer*, 561 F.2d 539; *Carey*, 492 F.2d 631.

⁶²⁷ *Bruno & Stillman, Inc.*, 633 F.2d 583; *Silkwood*, 563 F.2d 433.

⁶²⁸ *Price*, 416 F.3d 1327; *Ashcraft*, 218 F.3d 282; *Ahn*, 231 F.3d 26; *Cusumano*, 162 F.3d 708; *Clyburn*, 903 F.2d 29; *LaRouche*, 780 F.2d 1134; *Caporale*, 806 F.2d 1487; *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5; *Zerilli*, 656 F.2d 705; *Riley*, 612 F.2d 708; *Pretzinger*, 542 F.2d 517; *Baker*, 470 F.2d 778; *Cervantes*, 464 F.2d 986.

or about 55% of subpoenas were not.⁶²⁹ When a reporter did not promise confidentiality, subpoenas were only quashed in six instances or about 27.3% of the time.⁶³⁰ Fourteen subpoenas were not quashed or about 63.6% of all subpoenas seeking non-confidential information.⁶³¹

Finally, the government seemed to have much better luck with having its subpoenas enforced than non-governmental plaintiffs and defendants. Of the twenty-one cases where the government was the party seeking a subpoena, courts approved eighteen of those subpoenas or 85.7% of all requested subpoenas.⁶³² Two were quashed (9.5%)⁶³³ and one (4.8%) was remanded.⁶³⁴ In the twenty-two instances where a non-governmental plaintiff requested a subpoena, twelve or 54.5% of all such subpoenas were quashed,⁶³⁵ while nine or 40.9% were not quashed⁶³⁶ and one (4.5%) was remanded.⁶³⁷ When a defendant sought a subpoena, six

⁶²⁹ *In re Request*, 685 F.3d 1; *The New York Times Co.*, 459 F.3d 160; *In re Grand Jury Subpoena*, Judith Miller, 438 F.3d 1141; *Lee*, 413 F.3d 53; *In re Special Proceedings*, 373 F.3d 37; *Sanders*, 211 F.3d 711; *In re Madden*, 151 F.3d 125; *In re Grand Jury Proceedings*, 5 F.3d 397; *In re Grand Jury Proceedings*, 810 F.2d 580; *In re Selcraig*, 705 F.2d 789; *Criden*, 633 F.2d 346; *Miller*, 621 F.2d 721; *Farr*, 522 F.2d 464; *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *Carey*, 492 F.2d 631.

In one instance (3.3%), a subpoena was quashed in part. *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980). In another instance (3.3%), a subpoena was neither quashed nor not quashed, and the court remanded the case back to the lower court. *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1980).

⁶³⁰ *Shoen*, 48 F.3d 412; *Church of Scientology Intern.*, 992 F.2d 1329; *Shoen*, 5 F.3d 1289; *Smith*, 869 F.2d 194; *Burke*, 700 F.2d 70; *Steelhammer*, 539 F.2d 373.

⁶³¹ *Chevron Corp.*, 629 F.3d 297; *Treacy*, 639 F.3d 32; *In re Grand Jury Subpoena*, 201 Fed.Appx. 430; *Donohue*, 109 Fed.Appx. 340; *McKevitt*, 339 F.3d 530; *Gonzales*, 194 F.3d 29; *Smith*, 135 F.3d 963; *In re Shain*, 978 F.2d 850; *LaRouche Campaign*, 841 F.2d 1176; *von Bulow by Auersperg*, 811 F.2d 136; *In re Grand Jury Matter*, *Gronowicz*, 764 F.2d 983; *Steelhammer*, 561 F.2d 539; *Lewis*, 517 F.2d 236; *Lewis*, 501 F.2d 418.

Two subpoenas (9.1%) were remanded to the lower court. *Cutler*, 6 F.3d 67; *Silkwood*, 563 F.2d 433.

⁶³² *In re Request*, 685 F.3d 1; *Treacy*, 639 F.3d 32; *The New York Times Co.*, 459 F.3d 160; *In re Grand Jury Subpoena*, 201 Fed.Appx. 430; *In re Special Proceedings*, 373 F.3d 37; *McKevitt*, 339 F.3d 530; *Sanders*, 211 F.3d 711; *Smith*, 135 F.3d 963; *In re Grand Jury Proceedings*, 5 F.3d 397; *In re Shain*, 978 F.2d 850; *In re Grand Jury Proceedings*, 810 F.2d 580; *In re Grand Jury Matter*, *Gronowicz*, 764 F.2d 983; *Reporters Committee for Freedom of Press*, 593 F.2d 1030; *Steelhammer*, 561 F.2d 539; *Farr*, 522 F.2d 464; *Lewis*, 517 F.2d 236; *Lewis*, 501 F.2d 418; *Carey*, 492 F.2d 631.

⁶³³ *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5; *Steelhammer*, 539 F.2d 373 (4th Cir. 1976) (*Steelhammer* was later overruled on rehearing, but was included in the sample because its precedential value is still in question).

⁶³⁴ *Cutler*, 6 F.3d 67.

⁶³⁵ *Fox*, 64 Fed.Appx. 338; *Ashcraft*, 218 F.3d 282; *Cusumano*, 162 F.3d 708; *Shoen*, 48 F.3d 412; *Church of Scientology Intern.*, 992 F.2d 1329; *Shoen*, 5 F.3d 1289; *Clyburn*, 903 F.2d 29; *LaRouche*, 780 F.2d 1134; *Zerilli*, 656 F.2d 705; *Riley*, 612 F.2d 708; *Baker*, 470 F.2d 778; *Cervantes*, 464 F.2d 986.

⁶³⁶ *Chevron Corp.*, 629 F.3d 297; *Lee*, 413 F.3d 53; *Donohue*, 109 Fed.Appx. 340; *Gonzales*, 194 F.3d 29; *In re Madden*, 151 F.3d 125; *von Bulow by Auersperg*, 811 F.2d 136; *In re Selcraig*, 705 F.2d 789; *Miller*, 621 F.2d 721; *Carey*, 492 F.2d 631.

subpoenas (60%) were quashed⁶³⁸ and just two (20%) were not quashed.⁶³⁹ One (10%) was remanded.⁶⁴⁰

Although the small sample size prevents a showing of statistical significance, in broad terms, a few potential conclusions can be reached. First, courts seem less likely to quash subpoenas in criminal cases than in civil cases. Second, courts seem less likely to quash subpoenas when confidentiality is not at issue. Third, the courts appear much more likely to approve subpoenas when the party requesting the subpoena is the government.

RQ 1: How, if at all, have courts of appeals attempted to distinguish *Branzburg v. Hayes*?

Branzburg v. Hayes is the only reporter's privilege case the Supreme Court has ever decided. Therefore, Research Question 1 asked how courts of appeals did or did not distinguish *Branzburg* in order to find a reporter's privilege or not. In general, courts of appeals' treatment of *Branzburg* is extremely variable and, as with so many things in law, escapes an easy summation – numerical or otherwise. Overall, courts refused to distinguish *Branzburg* in the grand jury context – the same context that the Supreme Court was dealing with in *Branzburg* and its companion cases.⁶⁴¹ Other courts extended *Branzburg*'s logic, which focused heavily on the

⁶³⁷ *Bruno & Stillman, Inc.*, 633 F.2d 583.

⁶³⁸ *Price*, 416 F.3d 1327; *Ahn*, 231 F.3d 26; *Smith*, 869 F.2d 194; *Caporale*, 806 F.2d 1487; *Burke*, 700 F.2d 70; *Pretzinger*, 542 F.2d 517.

⁶³⁹ *LaRouche Campaign*, 841 F.2d 1176; *Criden*, 633 F.2d 346.

⁶⁴⁰ *Silkwood*, 563 F.2d 433.

⁶⁴¹ *See, e.g.*, In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1146 (D.C. Cir. 2006) (“As can be seen from the account of the underlying facts in *Branzburg*, there is no material factual distinction between the petitions before the Supreme Court in *Branzburg* and the appeals before us today.”); In re Grand Jury Subpoena, 201 F. App'x 430, 433 (9th Cir. 2006); In re Special Proceedings, 373 F.3d 37, 44 (1st Cir. 2004) (“The First Amendment argument is an uphill one in light of the Supreme Court's *Branzburg* decision, but it has several facets and we take them in order.”); In re Grand Jury Proceedings, 5 F.3d 397, 400 (9th Cir. 1993) (“The circumstances of the present case fall squarely within those of *Branzburg*.”); In re Grand Jury Proceedings, 810 F.2d 580, 584-86 (6th Cir. 1987); *cf.* *U.S. v. Sanders*, 211 F.3d 711, 720 (2d Cir. 2000) (“However, the First Amendment erects no absolute bar against government attempts to coerce disclosure of a confidential news source . . .” (citing *Branzburg v. Hayes*, 408 U.S. 665, 679-708 (1972)). *But see* *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (finding a common law privilege even in the grand jury context while refusing to find a First Amendment privilege); *id.* at 179 (Sack, J., dissenting) (“But, as the majority implicitly acknowledges by treating [First Amendment concerns] and the common law privilege separately, any limits on the constitutional protection imposed by *Branzburg* do not necessarily apply to the common law privilege . . .”).

public's interest in law enforcement, to the criminal context.⁶⁴² On the other hand, other courts were able to distinguish *Branzburg* in the criminal trial context and did find a reporter's privilege.⁶⁴³ In the civil context, some courts found that the logic of *Branzburg* extended even to subpoenas in civil cases, while others found *Branzburg*'s logic inapplicable in the civil context.⁶⁴⁴

Two circuits have refused to distinguish *Branzburg*, treating it as a talisman of sorts and finding that its holding applies not only to the grand jury context, but to other contexts as well. *McKevitt v. Pallasch*, a 2003 Seventh Circuit case, is the greatest exemplar of this type of case.⁶⁴⁵ *McKevitt* stands out for several reasons. First, Judge Posner took several other courts of appeals to task for actually finding a reporter's privilege in criminal cases in spite of *Branzburg*: "Some of the cases that recognize the privilege . . . essentially ignore *Branzburg* . . . [and] some

⁶⁴² See, e.g., *U.S. v. Smith*, 135 F.3d 963, 971 (5th Cir. 1998) ("[The television station], however, attempts to escape from the balance *Branzburg* struck between the public's interest in effective law enforcement and the press's First Amendment rights by arguing that the *Branzburg* decision only applies to grand jury proceedings, not the trial setting we have before us now. Although the district court agreed with [the television station], we find little persuasive force in this distinction. Surely the public has as great an interest in convicting its criminals as it does in indicting them. (internal citation omitted)); see also *In re Request*, 685 F.3d 1, 16 (1st Cir. 2012) ("Our analysis is controlled by *Branzburg*, which held that the fact that disclosure of the materials sought by a subpoena *in criminal proceedings* would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury." (emphasis added)).

⁶⁴³ See, e.g., *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) ("The policies supporting a First Amendment privilege would appear to be stronger here, where a defamation plaintiff seeks to compel disclosure of the name of a confidential informant, than they were in either *Branzburg*."); *U.S. v. Cuthbertson*, 630 F.2d 139 (3d Cir. 1980) ("First, the interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial. CBS's interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal."); *Farr v. Pitchess*, 522 F.2d 464, 467-68 (9th Cir. 1975) ("The precise holding of *Branzburg* subordinated the right of the newsmen to keep secret a source of information in face of the more compelling requirement that a grand jury be able to secure factual data relating to its investigation of serious criminal conduct. The application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest." (internal footnote omitted)).

⁶⁴⁴ Compare *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("Although *Branzburg* may limit the scope of the reporter's First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective criminal law enforcement is absent, that case is not controlling.") with *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003) (criticizing courts of appeals that have adopted a privilege even in the civil context); see also *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980) (distinguishing *Branzburg*).

⁶⁴⁵ *McKevitt*, 339 F.3d 530.

audaciously declare that *Branzburg* actually created a reporter's privilege."⁶⁴⁶ Second, *McKevitt*, although not a grand jury case like *Branzburg*, refused to find that fact important enough to distinguish it from the criminal context before it:

The federal interest in cooperating in the criminal proceedings of friendly foreign nations is obvious; and it is likewise obvious that the newsgathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality. Yet that was *Branzburg* and it is evident from the result in that case that the interest of the press in maintaining the confidentiality of sources is not absolute.⁶⁴⁷

Having found that *Branzburg* controlled even in the criminal context, the court refused to quash a subpoena.⁶⁴⁸

The Sixth Circuit is the only other circuit that has applied *Branzburg* as strictly as the Seventh Circuit.⁶⁴⁹ In a grand jury case, the court absolutely refused to ignore *Branzburg*.⁶⁵⁰ As the court said when it chose not to find a privilege, "Because we conclude that acceptance of the position urged upon us by [the reporter] would be tantamount to our substituting, as the holding of *Branzburg*, the dissent written by Justice Stewart (joined by Justices Brennan and Marshall) for the majority opinion, we must reject that position."⁶⁵¹ In so finding, the court approvingly cited the *Branzburg* majority's language, which found that there was no privilege in either the grand jury or the criminal trial context⁶⁵² and rejected reliance on Justice Powell's concurring

⁶⁴⁶ *Id.* at 532.

⁶⁴⁷ *Id.* at 532.

⁶⁴⁸ *Id.* at 535. In another case, Justice White apparently did not view *Branzburg*'s logic to be as sweeping as Judge Posner would seem to believe. In an in chambers opinion addressing a petition to stay a civil contempt order for the refusal of a reporter to produce documents, Justice White noted that *Branzburg* did not hold "either that newsmen are constitutionally privileged to withhold duly subpoenaed documents material to the prosecution or defense of a criminal case or that a defendant seeking the subpoena must show extraordinary circumstances before enforcement against newsmen will be had." *New York Times Co. v. Jascalevich*, 439 U.S. 1317, 1322 (1978) (White, J., in chambers).

⁶⁴⁹ *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987).

⁶⁵⁰ *Id.* at 583.

⁶⁵¹ *Id.* at 584.

⁶⁵² *Id.* at 583 (citing *Branzburg v. Hayes*, 408 U.S. 665, 689-91 (1972)).

opinion to find a privilege, writing, “Perhaps Justice Powell’s [concurrence] has provided too great a temptation for those inclined to disagree with the majority opinion.”⁶⁵³

Somewhat similar to the Sixth and Seventh Circuits, the Fourth Circuit at first seemed unlikely to adopt *any* reporter’s privilege as a result of *Branzburg*. Indeed, in its first reporter’s privilege case after *Branzburg*, *United States v. Steelhammer*, a civil case, the court found that “the absence of a claim of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify.”⁶⁵⁴ A few years later, however, the court explicitly relied on *Branzburg* to find a privilege in the civil context: “In determining whether the journalist’s privilege will protect the source in a given situation, it is necessary for the district court to balance the interests involved.”⁶⁵⁵ It cited *Branzburg* itself for that proposition that a reporter’s privilege exists.⁶⁵⁶ It failed, however, to cite its prior holding that no privilege existed absent confidentiality and vindictiveness.⁶⁵⁷ Thus, it is unclear whether the Fourth Circuit has or has not recognized a reporter’s privilege in the civil context.⁶⁵⁸

It has taken a stricter approach to the reporter’s privilege in the criminal context, focusing on the importance of confidentiality and vindictiveness.⁶⁵⁹ As the court said in *In re Shain*, a criminal case where the government subpoenaed reporters to testify as to a nonconfidential

⁶⁵³ *Id.* at 586.

⁶⁵⁴ *U.S. v. Steelhammer*, 539 F.2d 373, 376 (4th Cir. 1976) (Winter, J., dissenting), *adopted en banc*, *U.S. v. Steelhammer*, 561 F.2d 539 (4th Cir. 1977). *United States v. Steelhammer* could be interpreted as suggesting that balancing is appropriate but that, in absence of vindictiveness or confidentiality, it is unlikely that the scales will tip in favor of a reporter’s privilege. That proposition is difficult to maintain in light of *In re Shain*, 978 F.2d 850 (4th Cir. 1992).

⁶⁵⁵ *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986) (citing *Branzburg v. Hayes*, 408 U.S. 665, 710 (1972) (Powell, J., concurring)).

⁶⁵⁶ *Id.*

⁶⁵⁷ *See generally id.*

⁶⁵⁸ *Compare Steelhammer*, 539 F.2d 373 (Winter, J., dissenting), *adopted en banc*, *Steelhammer*, 561 F.2d 539 with *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (finding that *Branzburg* required courts to balance the interests of the reporter and the party seeking to compel the reporter’s testimony) and *LaRouche*, 780 F.2d 1134.

⁶⁵⁹ *In re Shain*, 978 F.2d 850.

source, “We hold that the incidental burden on the freedom of the press in the circumstances of this case does not require the invalidation of the subpoenas issued to the reporters, and absent evidence of governmental harassment or bad faith, the reporters have no privilege”⁶⁶⁰

According to the court, it based its decision on *Branzburg* and its opinion in *Steelhammer*,⁶⁶¹ finding that they stood for the proposition that there was no “reporter’s privilege not to testify in criminal prosecutions about relevant evidence known to the reporter.”⁶⁶²

Other courts, however, have taken a more conservative approach to interpreting *Branzburg*, limiting it to either the grand jury context or the broader criminal context. The Third Circuit has, arguably, taken the most restrictive view of *Branzburg*. In *Riley v. City of Chester*, for example, the court was presented with the question of whether a reporter had to name the source of her information about a candidate running for mayor.⁶⁶³ The court recognized that *Branzburg* held that “a journalist does not have an absolute privilege under the First Amendment to refuse to appear and testify before a grand jury.”⁶⁶⁴ The court refused to extend this holding beyond the grand jury context: “The limitation imposed by the Court in *Branzburg v. Hayes* on the ability of a journalist to refuse to disclose information is not applicable to the facts in this case.”⁶⁶⁵ The court there went on to find that a privilege did exist and quashed the subpoena.⁶⁶⁶

⁶⁶⁰ *Id.* at 852.

⁶⁶¹ *Id.*

⁶⁶² *Id.* It ignored its prior decision that found a privilege in the civil context.

⁶⁶³ See generally *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979). In *Riley*, the Third Circuit found a common-law privilege, as opposed to a First Amendment privilege. This case, as are all Third Circuit cases, are nonetheless included in this sample, as the concerns expressed in finding the privilege are, at bottom, First Amendment concerns. Cf. *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998) (asserting that whether the reporter’s privilege is considered a constitutional one or a common law one is largely a “semantic question” (internal quotation marks omitted)).

⁶⁶⁴ *Riley*, 612 F.2d at 714.

⁶⁶⁵ *Id.*

⁶⁶⁶ *Id.* at 718 (“Finally, the interests [of in the press] referred to earlier compel us to call for restraint in the judicial imposition of sanctions on the press. Because of the importance to the public of the underlying rights protected by the federal common law news writer’s privilege and because of the “fundamental and necessary interdependence of the Court and the press” recently referred to by Justice Brennan, trial courts should be cautious

Just a year later, the court also distinguished *Branzburg* in the criminal, non-grand jury context.⁶⁶⁷ In *United States v. Cuthbertson*, the court was presented with the question of whether Mike Wallace and *60 Minutes* could be forced by several defendants to turn over notes prepared during investigative reporting that concerned criminal conspiracy and fraud charges.⁶⁶⁸ The defendants specifically argued that the court's prior reasoning in *Riley* did not apply, because the current case was a criminal one.⁶⁶⁹ In finding that the privilege did exist in the criminal, non-grand jury context, the court failed to mention *Branzburg* at all, except for support for the proposition that there is a First Amendment right to gather news.⁶⁷⁰

The Second Circuit initially followed a similar tack to the Third Circuit. First, it found that there is a reporter's privilege in the civil context.⁶⁷¹ It did so by finding that *Branzburg*'s logic that focused on the interests of law enforcement did not apply in the civil context.⁶⁷² Similarly, like the Third Circuit, the court would also later find a privilege in the criminal

to avoid an unnecessary confrontation between the courts and the press. Although there may be cases in which the confrontation is inevitable, this was clearly not one of them.”).

⁶⁶⁷ U.S. v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).

⁶⁶⁸ See generally *id.*

⁶⁶⁹ *Id.* at 146.

⁶⁷⁰ *Id.* On the other hand, the Third Circuit did require a book author to produce certain documents relating to his book, which was also the subject of a mail and wire fraud case. In re Grand Jury Matter, Gronowicz, 764 F.2d 983 (3d Cir. 1985). Notably, although the court refused to uphold any privilege from having to produce the documents, it did not base its decision on *Branzburg*, which it failed to cite in the majority opinion at all. See generally *id.* The Third Circuit also ignored *Branzburg* in other subsequent cases like *In re Madden*, 151 F.3d 125 (3d Cir. 1998), where it cited the case for only an unrelated issue, and *Fox v. Township of Jackson*, 64 Fed.Appx. 338 (3d Cir. 2003), where the court dismissed a party's reliance on *Branzburg* in a footnote.

⁶⁷¹ See generally, e.g., In re Petroleum Products Antitrust Litigation, 680 F.2d 5 (2d Cir. 1982); Baker v. F and F Inv., 470 F.2d 778 (2d Cir. 1972). But see *Chevron Corp. v. Berlinger*, 629 F.3d 297 (2d Cir. 2011) (refusing to find a privilege where a filmmaker was not acting as a member of the “independent press” but rather as a hired storyteller); *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29 (2d Cir. 1999) (finding a weaker privilege when the information was non-confidential) and *von Bulow by Auersperg v. von Bulow*, 811 F.2d 136 (2d Cir. 1987) (refusing to find a privilege when the person asserting the privilege could not show she did so as part of a journalistic exploit).

⁶⁷² See, e.g., In re Petroleum Products Antitrust Litigation, 680 F.2d at 9 (“[T]his case presents a less compelling argument for disclosure than in *Branzburg v. Hayes*, . . . because we are dealing with a civil action rather than questioning by a grand jury.”); Baker v. F and F Inv., 470 F.2d at 784 (“*Branzburg v. Hayes* . . . , involving as it did the right of a journalist to withhold disclosure of confidential sources from a grand jury investigating criminal activities, is only of tangential relevance to this case.”).

context.⁶⁷³ In *United States v. Burke*, defendants subpoenaed a reporter for work product regarding an article that related to their criminal trial.⁶⁷⁴ Even though the case was a criminal one, the court held that there was “no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter’s interest in confidentiality should yield to the moving party’s need for probative evidence.”⁶⁷⁵ It cited *Branzburg* just once.⁶⁷⁶

After *Burke*, though, the court would walk back its privilege in the criminal context.⁶⁷⁷ In a later opinion, the court would find that “*Burke*’s articulation of a general test applicable to all phases of a criminal trial was not necessary to the resolution of that case[, and, therefore,] *Burke* should accordingly be considered as limited to its facts.”⁶⁷⁸ It then went on to hold that “[w]hatever the doctrinal considerations, we must certainly follow *Branzburg* when fact patterns parallel to *Branzburg* are presented for our decision” and refused to quash the defendant’s subpoena to the reporter because the conduct of the reporter in the present case – “refus[ing] to answer questions that directly related to criminal conduct that he had observed and written about” – was the same conduct at issue in *Branzburg*.⁶⁷⁹ In its most recent case, the court would seemingly reaffirm this view, finding that it had “recognized that our Court once set too *high* a bar for overcoming the privilege in criminal cases and consciously lowered that bar.”⁶⁸⁰

⁶⁷³ U.S. v. *Burke*, 700 F.2d 70 (2d Cir. 1983).

⁶⁷⁴ *Id.* at 76.

⁶⁷⁵ *Id.* at 77.

⁶⁷⁶ *Id.* (explaining that *Branzburg* applied only when “a reporter was asked to testify before a grand jury”).

⁶⁷⁷ See U.S. v. *Cutler*, 6 F.3d 67 (2d Cir. 1993).

⁶⁷⁸ *Id.* at 73.

⁶⁷⁹ *Id.* See also *The New York Times Co. v. Gonzales*, 459 F.3d 160 (2d Cir. 2006) (refusing to recognize a First Amendment privilege in light of *Branzburg*, but finding a common law privilege); cf. U.S. v. *Sanders*, 211 F.3d 711 (2d Cir. 2000) (finding no privilege preventing the government from prosecuting a book author when the author refused to name his source). In *Cutler*, the Second Circuit did not even acknowledge its holding in *The New York Times Co.* See generally *Cutler*, 6 F.3d 67.

⁶⁸⁰ U.S. v. *Treacy*, 639 F.3d 32, 43 (2d Cir. 2011).

The Ninth Circuit has recognized a reporter's privilege in both the civil and criminal context.⁶⁸¹ As the court said in the criminal context, "The application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed in light of the surrounding facts and a balance struck to determine where lies the paramount interest."⁶⁸² In that case, *Farr v. Pitchess*, a reporter received information about the Charles Manson trial that was supposed to be subject to a gag order.⁶⁸³ Even though the court held that the privilege existed, the court found that the interest in judicial enforcement of its orders was greater than the reporter's interest.⁶⁸⁴

Having previously found that the reporter's privilege existed in non-grand jury cases, the Ninth Circuit would later apply the privilege in the civil context as well.⁶⁸⁵ The court interpreted its prior decision in *Farr v. Pitchess* as finding that "a 'partial First Amendment shield' . . . protects journalists against compelled disclosure in all judicial proceedings, civil and criminal alike."⁶⁸⁶ Applying the reporter's privilege, the court quashed the subpoena issued by the plaintiff in a defamation case.⁶⁸⁷

In the first case the Eighth Circuit heard after the Supreme Court decided *Branzburg*, the Eighth Circuit found a reporter's privilege in the civil context.⁶⁸⁸ In that defamation case, the court relegated *Branzburg* to a mere footnote.⁶⁸⁹ In that footnote, the court severely limited *Branzburg*, confining it to the grand jury context and writing that the Court in *Branzburg* was

⁶⁸¹ *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975).

⁶⁸² *Id.* at 468. The court thought this was the case because the interests in the criminal trial context were less than the grand jury context. On the other hand, the court has refused to find a privilege in the grand jury context. *See, e.g.*, *In re Grand Jury Subpoena*, 201 Fed.Appx. 430 (9th Cir. 2006); *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993); *Lewis v. U.S.*, 517 F.2d 236 (9th Cir. 1975); *Lewis v. U.S.*, 501 F.2d 418 (9th Cir. 1974).

⁶⁸³ *Farr*, 522 F.2d at 466.

⁶⁸⁴ *Id.* at 469.

⁶⁸⁵ *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995); *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

⁶⁸⁶ *Shoen*, 5 F.3d at 1292 (citing *Farr*, 522 F.2d at 467).

⁶⁸⁷ *Id.* at 1296.

⁶⁸⁸ *Cervantes v. Time, Inc.*, 464 F.2d 986 (8th Cir. 1972).

⁶⁸⁹ *Id.* at 992 n.9.

only “asked to address the constitutional aspects of grand jury efforts to acquire from professional journalists information about possible law violations committed by their news sources.”⁶⁹⁰ Declining to give any weight to *Branzburg*, the court concluded, “The [Supreme] Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense.”⁶⁹¹

Although the First Circuit had previously applied the same logic as the Eighth Circuit to find a privilege in civil cases,⁶⁹² it has refused to find a privilege in the criminal context.⁶⁹³ In *In re Special Proceedings*, a journalist was subpoenaed after he broadcast a surveillance tape relating to a grand jury investigation despite a court order that restricted the attorneys in the case from releasing such videotapes.⁶⁹⁴ The court appointed a special prosecutor to investigate the leak, and the prosecutor subpoenaed the reporter for the identity of the source of the tape.⁶⁹⁵ The reporter refused to testify.⁶⁹⁶

The court refused to recognize a First Amendment privilege, admitting that “[t]he First Amendment argument is an uphill one in light of the Supreme Court’s *Branzburg* decision, but it has several facets and we take them in order.”⁶⁹⁷ Because the “Supreme Court flatly rejected any notion of a general-purpose reporter’s privilege for confidential sources,” the First Circuit Court

⁶⁹⁰ *Id.*

⁶⁹¹ *Id.*

⁶⁹² *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 594 (1st Cir. 1980) (“Whether or not such a privilege is available to a defendant in a civil defamation case where the plaintiff is not a public figure is a question left open by recent Supreme Court precedent.”); *see also* *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 716 (1st Cir. 1998) (quashing a subpoena and explaining that “when a subpoena seeks divulgement of confidential information compiled by a journalist or academic researcher in anticipation of publication, courts must apply a balancing test”). The Eighth Circuit has yet to have an opportunity to decide whether there is a privilege in the criminal context.

⁶⁹³ *In re Special Proceedings*, 373 F.3d 37 (1st Cir. 2004).

⁶⁹⁴ *Id.* at 40.

⁶⁹⁵ *Id.* at 41.

⁶⁹⁶ *Id.*

⁶⁹⁷ *Id.* at 44.

of Appeals in this case could not recognize one.⁶⁹⁸ Even though this was not a grand jury subpoena, the Court in *Branzburg* focused generally on “the importance of criminal investigations, the usual obligation of citizens to provide evidence, and the lack of proof that news-gathering required such a privilege” to find that *Branzburg* was still applicable.⁶⁹⁹

The Fifth Circuit has taken a similar position. Although it has narrowly construed *Branzburg* as holding that “reporters must disclose the names of confidential informants except where the grand jury power was abused,”⁷⁰⁰ it has found a privilege only in certain circumstances. In its first reporter’s privilege decision after *Branzburg*, for example, the Fifth Circuit found a reporter’s privilege, but only because it was a civil case.⁷⁰¹ In fact, it relied on the parts of *Branzburg* emphasizing the right to gather news to support its finding of a privilege in the civil context.⁷⁰² And, in any event, the majority opinion in *Branzburg*, the court would later say, was only a plurality opinion that was due less deference.⁷⁰³ This has created an odd set of circumstances where the court relied on *Branzburg* for support for broad pronouncements of the importance of newsgathering and the protection of confidential sources,⁷⁰⁴ but declined to rely on *Branzburg* for its main holding that journalists do not have a privilege.

In the criminal context, however, the Fifth Circuit has refused to distinguish *Branzburg*’s holding.⁷⁰⁵ In *United States v. Smith*, an arson case where a television station produced an

⁶⁹⁸ *Id.* The First Circuit would later refuse to find a privilege in general criminal proceedings as well. *See In re Request*, 685 F.3d 1 (1st Cir. 2012).

⁶⁹⁹ *In re Special Proceedings*, 373 F.3d at 44.

⁷⁰⁰ *Miller v. Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir. 1980).

⁷⁰¹ *Id.* at 725. In that case, the court actually held that the “case [was] controlled by . . . *Branzburg*.” *Id.* The controlling aspect of *Branzburg*, however, was not the Supreme Court’s refusal to find a privilege, but rather that cases “policies supporting a First Amendment privilege.” *Id.*

⁷⁰² *Id.*

⁷⁰³ *In re Selcraig*, 705 F.2d 789, 792 (5th Cir. 1983).

⁷⁰⁴ *Miller*, 621 F.2d at 725.

⁷⁰⁵ *U.S. v. Smith*, 135 F.3d 963 (5th Cir. 1998). Notably, the Eleventh Circuit, which was initially a part of the Fifth Circuit and is subject to the Fifth Circuit’s precedent prior to its creation, refused to find that *Branzburg* required that a court not allow journalists to assert a privilege. *See U.S. v. Caporale*, 806 F.2d 1487 (11th Cir. 1986). In *United States v. Caporale*, the court found that the defendants in a criminal trial failed to overcome the

interview with a suspect of the crime, the court did not accept the reporter's argument that *Branzburg* was distinguishable because this case was a criminal trial and not a grand jury.⁷⁰⁶ As the court explained:

[The television station . . . attempts to escape from the balance *Branzburg* struck between the public's interest in effective law enforcement and the press's First Amendment rights by arguing that the *Branzburg* decision only applies to grand jury proceedings, not the trial setting we have before us now. Although the district court agreed with [the station], we find little persuasive force in this distinction. Surely the public has as great an interest in convicting its criminals as it does in indicting them.]⁷⁰⁷

Moreover, the court noted that the Supreme Court had said in passing that the interests it considered applied both to "grand jury investigation[s and] criminal trial[s]."⁷⁰⁸ As such, the Fifth Circuit ordered the television station to hand over the video of the interview, including the outtakes.⁷⁰⁹

In its first chance to construe *Branzburg*, the D.C. Circuit noted that the civil context may be different from the criminal context, but declined to find that difference controlling insofar as it related to the Supreme Court's commentary on the interests of journalists to protect their sources.⁷¹⁰ As it said in *Carey v. Hume*, a libel case, "Although the differences between civil and criminal proceedings distinguish *Branzburg* from the case before us, we cannot ignore the fact that the interests asserted by the newsmen in the *Branzburg* trilogy of cases were not accorded determinative weight by five members of the [Supreme] Court."⁷¹¹ As to the existence of a

privilege and failed to even address *Branzburg*. See generally *id.*; see also *Price v. Time, Inc.*, 416 F.3d 1327 (11th Cir. 2005) (citing *Branzburg* and Fifth Circuit precedent for the proposition that the First Amendment provides a reporter's privilege).

⁷⁰⁶ *Id.* at 971.

⁷⁰⁷ *Id.* (internal citation omitted).

⁷⁰⁸ *Id.* The court also looked askance at the claimed privilege in this case because the information sought was nonconfidential. *Id.* at 972. As the court said, "The second important difference between this case and *Miller* relates to confidentiality. . . . Here . . . the confidentiality issue is absent." *Id.*

⁷⁰⁹ *Id.*

⁷¹⁰ See *Carey v. Hume*, 492 F.2d 631, 635-36 (D.C. Cir. 1974).

⁷¹¹ *Id.* (footnote omitted).

privilege, however, it nonetheless applied a balancing test that had been previously established because, as far as it could tell, *Branzburg* “left intact, insofar as civil litigation is concerned, the [balancing] *approach* taken [previously].”⁷¹²

In at least one criminal case, the D.C. Circuit rejected any suggestion that *Branzburg* left open a possibility for a reporter’s privilege in the criminal context.⁷¹³ Yet, in another, where the defendant in a criminal action subpoenaed a reporter, the court explicitly stated that he had “failed to carry his burden [to overcome the reporter’s privilege].”⁷¹⁴ Thus, it is unclear where the court stands as to the application of a reporter’s privilege in criminal contexts or whether it views *Branzburg* as controlling during criminal trials.⁷¹⁵

Finally, the Tenth Circuit has had two opportunities to discuss the reporter’s privilege issue in the civil context.⁷¹⁶ In the first case, *Silkwood v. Kerr-McGee Corp.*, the court refused to follow *Branzburg* because it saw it applicable only to the grand jury context:

The actual problem in [*Branzburg*] was whether a reporter was free to avoid altogether a grand jury subpoena. The Supreme Court in rejecting [*Branzburg*’s] claim required him to appear and testify before the grand jury, and ruled that the grand jury subpoena had to be obeyed. The actual decision of the Supreme Court is not surprising nor is it important in the solution of our problem.⁷¹⁷

⁷¹² *Id.* at 636; *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (also finding that *Branzburg* did not control in civil contexts beyond the Supreme Court’s appraisals of the journalists’ asserted interests); *see also* *Lee v. Department of Justice*, 413 F.3d 53 (D.C. Cir. 2005) (“[O]ur court, among others, has limited the applicability of the *Branzburg* precedent to the circumstances considered by the court in *Branzburg*—that is, the context of a criminal proceeding, or even more specifically, a grand jury subpoena.”); *Clyburn v. News World Communications, Inc.*, 903 F.2d 29 (D.C. Cir. 1990).

⁷¹³ *See, e.g.*, *Reporters Committee for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1050 (D.C. 1978) (“It is thus clear from *Branzburg* and related cases that the freedom to gather information guaranteed by the First Amendment is the freedom to gather information Subject to the general and incidental burdens that arise from good faith enforcement of otherwise valid criminal and civil laws that are not themselves solely directed at curtailing the free flow of information.”).

⁷¹⁴ *See, e.g.*, *U.S. v. Ahn*, 231 F.3d 26 (D.C. Cir. 2000) (finding that the defendant in the criminal context did not overcome the reporter’s privilege).

⁷¹⁵ The court has found that *Branzburg* is controlling in the context of grand jury subpoenas, however. *See generally* *In re Grand Jury Subpoena*, *Judith Miller*, 438 F.3d 1141 (D.C. Cir. 2006).

⁷¹⁶ *See* *Donohue v. Hoey*, 109 Fed.Appx. 340 (10th Cir. 2004); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977).

⁷¹⁷ *Silkwood*, 563 F.2d at 437.

Like the D.C. Circuit, the Tenth Circuit proceeded to adopt a balancing test from a previous case for the civil context, which it used to judge the strength of the reporter's privilege.⁷¹⁸

The Sixth and Seventh Circuits are the only courts that do not recognize a reporter's privilege as a result of *Branzburg*'s holding. Every other circuit, in either the criminal or civil context, has recognized the reporter's privilege in some form. More specifically, in the civil context, the First, Second, Third, Fourth, Fifth, Eighth, Ninth, and D.C. Circuits have all recognized – at least at one time or another – a reporter's privilege in spite of *Branzburg*. Of those courts to consider a reporter's privilege in the criminal context, the Second, Third, Ninth, and D.C. Circuits have found one in at least one instance.⁷¹⁹ The First Circuit has specifically rejected the idea that a privilege exists in the criminal context, citing *Branzburg* for support for its conclusion.⁷²⁰ This confusing breakdown shows just how splintered courts are when it comes to agreeing on the meaning of *Branzburg*, the only controlling precedent they can rely on. In most instances, courts either distinguish *Branzburg* by focusing on that case's special attention to the grand jury context or argue that the civil context provides a situation that is different enough to bring the discussion of a reporter's privilege outside of the four corners of the *Branzburg* opinion. As Judge Tatel of the Court of Appeals for the District of Columbia cogently summarized courts' treatment *Branzburg*, "Given *Branzburg*'s internal confusion and the 'obvious First Amendment problems' involved in '[c]ompelling a reporter to disclose the identity

⁷¹⁸ *Id.* at 438.

⁷¹⁹ The Fourth Circuit refused to find a privilege in the criminal context, but that case concerned only non-confidential information. *See, e.g., In re Shain*, 978 F.2d 850. Similarly, the Fifth Circuit has specifically rebuffed a request to find a privilege in the criminal context when the information is non-confidential. *U.S. v. Smith*, 135 F.3d 963 (5th Cir. 1998). It is possible that these courts may come out differently if confidential information were at stake. Language in both *McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003) and *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987) suggests that these circuits will not find a privilege in the criminal context. Neither the Eighth Circuit nor the Tenth have not had an opportunity to answer whether there is a privilege in the criminal context.

⁷²⁰ *See In re Special Proceedings*, 373 F.3d 37, 45 (1st Cir. 2004); *see also In re Request*, 685 F.3d 1, 18 (1st Cir. 2012).

of a confidential source,’ it is hardly surprising that lower courts have . . . ‘chipped away at the holding of *Branzburg*,’ finding constitutional protections for reporters”⁷²¹

RQ 2: How, if at all, have courts of appeals enumerated tests for deciding whether a reporter’s privilege exists or made determinations essentially on an *ad hoc* basis?

All of the courts of appeals that have recognized a reporter’s privilege have adopted a test to determine whether a reporter must disclose either the identity of his source or his work product. In most instances, the courts describe these tests as balancing tests where a reporter’s interest or the public’s interest in newsworthy information is balanced against the party who is seeking information from the reporter.⁷²² As one court explained, “[T]he district court must balance the defendant’s need for the material against the interests underlying the privilege to make this determination.”⁷²³ Despite this assertion, no courts have incorporated into their reporter’s privilege tests a factor that considers the value of the information at issue.⁷²⁴

The First Circuit, for example, has adopted a multi-step process for determining whether a recognized privilege should be overcome.⁷²⁵ First, the court applies a burden to each of the parties: “The plaintiff must establish relevance of the desired information and the defendant has the burden of establishing need for preserving confidentiality.”⁷²⁶ For the plaintiff to meet his burden, he must show that the evidence sought from the reporter is necessary to his case.⁷²⁷ That

⁷²¹ In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006) (Tatel, J., concurring) (citation omitted).

⁷²² See, e.g., U.S. v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).

⁷²³ *Id.* at 148.

⁷²⁴ At least one court, in *dicta*, has dabbled with the idea however. See *The New York Times Co. v. Gonzales*, 459 F.3d 160, 172 (2d Cir. 2006) (“Where . . . reporting involves the uncovering of government corruption or misconduct in the use of investigative powers, courts can easily find appropriate means of protecting the journalists involved and their sources.”). Another court considered a similar type of balancing, but would not have balanced the importance of the information. See *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998). Instead, it balanced the subpoenaing party’s interests against the likelihood that the newsgather’s interests would be inhibited in the future. *Id.* at 716-17.

⁷²⁵ See *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980).

⁷²⁶ *Id.* at 597.

⁷²⁷ *Id.*

evidence must be more than “remotely relevant.”⁷²⁸ As to the reporter, the court must access the degree confidentiality required.⁷²⁹ As the court explained, “Not all information as to sources is equally deserving of confidentiality.”⁷³⁰ This inquiry, however, is not directed at the newsworthiness of the information but *how* the reporter received the information.⁷³¹ After these burdens are met, the court can refuse to order production of the information or require production and institute procedures to protect the produced information.⁷³²

In *United States v. LaRouche Campaign*, for example, NBC asserted that confidentiality was important for several reasons.⁷³³ First, NBC asserted that the “disclosure of outtakes in this case will increase the chances of harassment of the interviewee-witness by the LaRouche organization.”⁷³⁴ Second, NBC argued that there was “the threat of administrative and judicial intrusion” into the newsgathering and editorial process.⁷³⁵ Third, it argued that requiring a journalist to testify would make the journalists look like “an investigative arm of the judicial system.”⁷³⁶ Fourth, it would sew disincentive to “compile and preserve nonbroadcast material.”⁷³⁷ Finally, the disclosure would place burdens on journalists’ time and resources in responding to subpoenas.⁷³⁸ Notably, all of these interests related to confidential sources generally and not the specific information at issue in this case.

⁷²⁸ *Id.*

⁷²⁹ *Id.*

⁷³⁰ *Id.* (“An unsolicited letter may be received with no mention of an interest in anonymity; such a letter may casually mention the wish for confidential treatment; it may specifically condition use on the according of such treatment; or it may defer communication of any substance until a commitment to confidentiality is received. Oral communications could also range from the cavalierly volunteered to the carefully bargained-for undertaking.”).

⁷³¹ *Id.*

⁷³² *Id.* at 598 (listing alternatives to full disclosure).

⁷³³ *See* *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1181-82 (1st Cir. 1988)

⁷³⁴ *Id.* at 1181.

⁷³⁵ *Id.* at 1182.

⁷³⁶ *Id.*

⁷³⁷ *Id.*

⁷³⁸ *Id.*

Against these interests, the court examined the plaintiff's need for the information.⁷³⁹ That need, the court said, was especially strong, because "[a]t stake on the defendants' side of the equation are their constitutional rights to a fair trial under the Fifth Amendment and to compulsory process and effective confrontation . . . of adverse witnesses under the Sixth Amendment."⁷⁴⁰ According to the court, "No one or all of NBC's asserted First Amendment interests can be said to outweigh these very considerable interests of the defendants."⁷⁴¹

The Second Circuit has adopted a different balancing test. In its first case explicitly adopting a test, the court explained that a lower court can only compel a reporter's testimony "upon a clear and specific showing that the information is: highly material and relevant, necessary or critical to the maintenance of the claim, and not obtainable from other available sources."⁷⁴² Thus, in *United States v. Burke*, where the defendant sought work product from a journalist to rebut the testimony of one witness, the court found that the magazine company could not be forced to produce documents to impeach the witness because the witness had already been impeached in other ways.⁷⁴³ Said differently, the evidence was not "critical" to his defense because the purpose the information would serve had already been achieved.⁷⁴⁴ Thus, the reporter's privilege prevented the reporter from having to testify.

The Third Circuit has adopted Justice Powell's view that each case must be judged based on its own facts.⁷⁴⁵ In such instances, the court found that lower courts should "stri[k]e the delicate balance between the assertion of the privilege on the one hand and the interest of either

⁷³⁹ *Id.*

⁷⁴⁰ *Id.*

⁷⁴¹ *Id.* (citing *Branzburg v. Hayes*, 408 U.S. 665, 690–91 (1972)). For another instance where the court has applied this test see *Cusumano v. Microsoft Corp.*, 162 F.3d 708 (1st Cir. 1998).

⁷⁴² *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 7 (2d Cir. 1982).

⁷⁴³ *U.S. v. Burke*, 700 F.2d 70, 77–78 (2d Cir. 1983).

⁷⁴⁴ *Id.* at 78.

⁷⁴⁵ *Riley v. City of Chester*, 612 F.2d 708, 715–16 (3d Cir. 1979) (explaining Justice Powell's proposed Ad hoc balancing test).

criminal or civil litigants seeking the information[,], the materiality, relevance and necessity of the information sought [on the other].”⁷⁴⁶ More specifically, the party “seeking the information must show ‘that his only practical access to crucial information necessary for the development of the case is through the newsman’s sources.’”⁷⁴⁷ The party seeking the information can make such a showing by proving that there is no alternative route to the information and that that information “go[es] to the heart of the (claim).”⁷⁴⁸ Notably, the balance to be struck is against the “assertion of the privilege” and not the type or importance of the information disclosed as a result of the confidential relationship.

In *Fox v. Township of Jackson*, the Third Circuit applied this test to find that the subpoenaing party had not met its burden.⁷⁴⁹ In *Fox*, the plaintiff who sought information from a reporter did not meet the burden, according to the court, because “information contained in the article was not specific enough to lead the reader to believe the journalist possessed any relevant and unique information . . . [that] r[is]e to the level of an admission [from the defendant].”⁷⁵⁰ There was no inquiry into how that weak interest in the information would stand up to the value of the information.

Although the status of the reporter’s privilege in the Fourth Circuit is unclear, where the court has recognized a privilege, it has adopted a balancing test similar to the Third Circuit’s.⁷⁵¹

The test asks “(1) whether the information is relevant, (2) whether the information can be

⁷⁴⁶ *Id.* at 716.

⁷⁴⁷ *Id.* at 717.

⁷⁴⁸ *Id.* The court has suggested that a less vigorous test is needed when the information sought is not the identity of sources. *U.S. v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980) (“Under the circumstances of this case it is not necessary to fashion a test other than *Riley* to decide these questions. . . . We need not develop a precise test for the peculiar circumstances presented here, although we will venture the view that the defendants probably should be required to prove less to obtain the reporter’s version of a conversation already voluntarily disclosed by the self-confessed source than to obtain the identity of the source itself.”).

⁷⁴⁹ *Fox v. Township of Jackson*, 64 Fed.Appx. 338, 341 (3d Cir. 2003) (“The moving party must demonstrate: (1) he has made an effort to obtain the information from other sources; (2) the only access to the information is through the journalist and his sources; and (3) the information sought is crucial to the claim.”).

⁷⁵⁰ *Id.*

⁷⁵¹ *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986).

obtained by alternative means, and (3) whether there is a compelling interest in the information.”⁷⁵² In addition to the Fourth Circuit, the Fifth and Eleventh Circuits have also adopted this test.⁷⁵³ The test is quite simple to apply and, often, rises and falls on whether the party requesting the subpoena has exhausted all reasonable alternatives to discovering the information it seeks from the reporter. For example, in *LaRouche v. National Broadcasting Co., Inc.*, the court found that the plaintiff could not subpoena the defendant because the plaintiff “did not exhaust all his non-party depositions before making the motion, and he failed to demonstrate to the court unsuccessful, independent attempts to gain the requested information.”⁷⁵⁴

In *Shoen v. Shoen*, a defamation case, the Ninth Circuit approached the situation differently than the other courts of appeals by setting out its own threshold requirement that must be met to overcome the reporter’s privilege.⁷⁵⁵ According to the court, which cited the Second and Third Circuits case law for support, “At a minimum, this [threshold] requires a showing that the information sought is not obtainable from another source.”⁷⁵⁶ In that case, the plaintiffs did not overcome this threshold because the information that they sought – information about what their defendant father told the reporter – was not first sought from the father himself.⁷⁵⁷

Two years later, in the same defamation case that came back to the Ninth Circuit after the plaintiffs exhausted their alternative avenues to the information, the court adopted a new multi-part test.⁷⁵⁸ In that case, the court found that a party wishing to overcome a privilege must show that the information is: “(1) unavailable despite exhaustion of all reasonable alternative sources;

⁷⁵² *Id.* at 1139.

⁷⁵³ *Price v. Time, Inc.*, 416 F.3d 1327, 1343 (11th Cir. 2005); *U.S. v. Caporale*, 806 F.2d 1487, 1504 (11th Cir. 1986); *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980).

⁷⁵⁴ *LaRouche*, 780 F.2d at 1139. For other applications of the test see *Ashcraft v. Conoco, Inc.*, 218 F.3d 282 (4th Cir. 2000) and *Church of Scientology Intern. v. Daniels*, 992 F.2d 1329, 1335 (4th Cir. 1993).

⁷⁵⁵ *Shoen v. Shoen*, 5 F.3d 1289 (9th Cir. 1993).

⁷⁵⁶ *Id.* at 1296.

⁷⁵⁷ *Id.*

⁷⁵⁸ *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995).

(2) noncumulative; and (3) clearly relevant to an important issue in the case.”⁷⁵⁹ After reviewing the facts, the court again found that the privilege had not been overcome because the statements given to the author came after the allegedly defamatory statements were made, making them irrelevant as a matter of state law.⁷⁶⁰ Thus, they were not “clearly relevant” to the case.⁷⁶¹

The Tenth and D.C. Circuits have adopted similar tests.⁷⁶² In *Silkwood v. Kerr-McGee Corp.*, the Tenth Circuit adopted a test from the Second Circuit’s pre-*Branzburg* case, *Garland v. Torre*: “1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful[;] 2. Whether the information goes to the heart of the matter[;] 3. Whether the information is of certain relevance[; and] 4. The type of controversy.”⁷⁶³ Thus, in *United States v. Ahn*, where a defendant sought to compel reporters to name their sources in an action to withdraw his guilty plea, the court refused to compel the reporter to produce the information because it was not “relevant to determining [his] guilt or innocence.”⁷⁶⁴

In sum, courts use various iterations of a single “balancing” test whereby courts ask, among other things, whether the information sought is available via other avenues, is relevant, or is necessary to the maintenance of the party’s claim or defense. The normal process goes something like this: courts first acknowledge that a reporter’s privilege exists; next, courts place the “balancing” test in front of the party seeking the information; and once the party checks off the two or three hurdles standing between him and the information sought, courts will compel the

⁷⁵⁹ *Id.* at 416.

⁷⁶⁰ *Id.* at 417.

⁷⁶¹ *Id.*

⁷⁶² See *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977); *Carey v. Hume*, 492 F.2d 631 (D.C. Cir. 1974).

⁷⁶³ See *Silkwood*, 563 F.2d at 438; see also *Clyburn v. News World Commc’ns, Inc.*, 903 F.2d 29 (D.C. Cir. 1990) (applying parts of the *Garland* test); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (same).

⁷⁶⁴ *U.S. v. Ahn*, 231 F.3d 26, 37 (D.C. Cir. 2000).

reporter to testify or produce work product.⁷⁶⁵ This approach, however, does not actually *balance* the competing interests. Indeed, none of the tests reviewed above consider in the balance the weight of the First Amendment interest as determined by the newsworthiness of the information the source disclosed or how that weight should be measured in light of First Amendment theory. Instead, they only place a burden on the party seeking the subpoena to meet. If, in fact, these cases really concern fundamental issues about freedom of speech as some courts suggest,⁷⁶⁶ it is unclear why those fundamental issues are not entertained in the balancing tests adopted by the courts of appeals.

RQ 3: How, if at all, have courts of appeals relied on the leading First Amendment theories when deciding whether a reporter's privilege exists or how broad the scope of the privilege is?

The vast majority of reporter's privilege cases discuss the First Amendment. Those courts of appeals recognizing a privilege spend more time discussing how its decisions are informed by First Amendment theory.⁷⁶⁷ (At the same time, some courts recognizing a reporter's privilege spend little time discussing such theories.⁷⁶⁸) These courts do not neatly separate out the different theories. Instead, they often speak of them interchangeably.⁷⁶⁹ Even the courts that do discuss the First Amendment, however, speak only in general terms about First Amendment

⁷⁶⁵ See, e.g., *U.S. v. Criden*, 633 F.2d 346 (3d Cir. 1980).

⁷⁶⁶ *Baker v. F and F Inv.*, 470 F.2d 778, 785 (2d Cir. 1972) (discussing a reporter's privilege as part of "our constitutional way of life").

⁷⁶⁷ See generally, e.g., *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981); *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).

⁷⁶⁸ In *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583 (1st Cir. 1980), for example, the court found that there was a First Amendment reporter's privilege in civil cases. Nonetheless, it failed to discuss in any real detail why that must be the case. See also *U.S. v. Caporale*, 806 F.2d 1487 (11th Cir. 1986) (recognizing a privilege but not discussing First Amendment theory); *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986) (same); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5 (2d Cir. 1982) (same); *Silkwood v. Kerr-McGee Corp.*, 563 F.2d 433 (10th Cir. 1977) (same); *Farr v. Pitchess*, 522 F.2d 464 (9th Cir. 1975) (same).

⁷⁶⁹ See generally, e.g., *Baker v. F and F Inv.*, 470 F.2d 778 (2d Cir. 1972) (discussing the marketplace of ideas, self-governance, and checking value theories in no particular order and somewhat interchangeably).

theory.⁷⁷⁰ They do not discuss how First Amendment theory might militate in favor of or against finding and protecting a reporter's privilege in a specific case.⁷⁷¹ Those courts that strictly follow *Branzburg* or those courts addressing facts indistinguishable from those in *Branzburg* however, do not discuss First Amendment or free speech theory in any real detail – much like the *Branzburg* court did not.⁷⁷²

Numerous courts have invoked the marketplace of ideas theory. In *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, where the First Circuit recognized a reporter's privilege in a civil case about product defects, for example, it explained – albeit in a footnote – that “the solicitude for First Amendment rights evidenced in [its] opinions reflects concern for the important public interest in a free flow of news and commentary.”⁷⁷³ The Second Circuit was more forceful in its nod to the marketplace of ideas theory in the civil context: “[There is] a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, . . . which has always been a principal concern of the First Amendment.”⁷⁷⁴ The Third Circuit was the most explicit in its invocation of the marketplace of ideas theory as it related to allegation resulting from a local mayor's race.⁷⁷⁵ It cited that theory when it found the reporter's privilege existed: “The strong

⁷⁷⁰ The Third Circuit once called First Amendment values “more abstract concerns.” *U.S. v. Criden*, 633 F.2d 346, 355 (3d Cir. 1980).

⁷⁷¹ This is likely the case because of the courts' reliance on their various balancing tests that do not take into account the First Amendment interests at stake in each individual case. *See, e.g.*, *U.S. v. Pretzinger*, 542 F.2d 517, 521 (9th Cir. 1976) (failing to even address the First Amendment interests). *But see, e.g.*, *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980) (discussing how source information about a public official deserved greater protection than source information about a private individual); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (similar).

⁷⁷² *See McKevitt v. Pallasch*, 339 F.3d 530 (7th Cir. 2003); *In re Grand Jury Proceedings*, 810 F.2d 580 (6th Cir. 1987); *Lewis v. U.S.*, 517 F.2d 236 (9th Cir. 1975); *Lewis v. U.S.*, 501 F.2d 418 (9th Cir. 1974).

⁷⁷³ *See generally Bruno & Stillman, Inc.*, 633 F.2d at 595 n.11.

⁷⁷⁴ *Baker v. F and F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972).

⁷⁷⁵ *Riley*, 612 F.2d at 715; *see also Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) (“If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public's understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.”).

public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy, expressly recognized in *Branzburg v. Hayes*, lead us to conclude that journalists have a . . . privilege.”⁷⁷⁶

In general, the cases focusing on the marketplace of ideas theory worried that not recognizing a privilege would lead to the often discussed chilling effect, which would prevent citizens from exchanging ideas in a free marketplace.⁷⁷⁷ As the Ninth Circuit explained in a case about a murder in a businessman’s family, “Rooted in the First Amendment, the privilege is a recognition that society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public.”⁷⁷⁸ The First Circuit, in trying to define the outer boundaries of the reporter’s privilege in a case about antitrust violations, similarly (and more elegantly) stated, “Courts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information. Journalists are the personification of a free press, and to withhold such protection would invite a ‘chilling effect on speech’ and thus destabilize the First Amendment.”⁷⁷⁹ Finally, the Third Circuit also believed a chilling effect is self-evident: “The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring.”⁷⁸⁰

⁷⁷⁶ *Riley*, 612 F.2d at 715.

⁷⁷⁷ *See, e.g.,* *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 n.10 (8th Cir. 1972) (“[T]o compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity.”).

⁷⁷⁸ *Shoen v. Shoen*, 5 F.3d 1289, 1292 (9th Cir. 1993); *see also* *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (discussing possible chilling effects if a privilege did not exist).

⁷⁷⁹ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998); *id.* (“Just as a journalist, stripped of sources, would write fewer, less incisive articles, an academician, stripped of sources, would be able to provide fewer, less cogent analyses. Such similarities of concern and function militate in favor of a similar level of protection for journalists and academic researchers.”); *see also* *U.S. v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *U.S. v. Criden*, 633 F.2d 346, 355-56 (3d Cir. 1980) (“More often than not, unless the declarant has faith that the recipient will preserve the confidence, he will not bestow it; also more often than not, when the recipient of the information conveys it to a third person, he respects the confidence of the original source.”).

⁷⁸⁰ *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979).

The Second Circuit has also expressed concern for the chilling effect resulting from forcing journalists to respond to subpoenas.⁷⁸¹ This was true even when the subpoenas sought only work product. In *Gonzales v. National Broadcasting Co., Inc.*, a plaintiff, who was suing the Louisiana Deputy Sheriff for violating his constitutional rights, subpoenaed NBC, which had related footage of the abusive police conduct at issue.⁷⁸² The court recognized a privilege for the work product:

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation.⁷⁸³

Because of these important interests, the court required the plaintiff to overcome a modified form of the reporter’s privilege test it had previously established.⁷⁸⁴

The D.C. Circuit, among others, has also recognized a chilling effect, but, even so, has held that it did not require a finding in favor of journalists asserting a privilege:

Not every Government action that affects, has an impact on, or indeed inhibits First Amendment activity constitutes the kind of “abridgment” condemned by the First Amendment. . . . In recent years, the Supreme Court has found in a number of cases that constitutional violations may arise from the deterrent, or “chilling”, effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights. Yet not every Government action that has an inhibiting or constrictive impact on First Amendment activity is said therefore to have an impermissible “chilling effect.”⁷⁸⁵

⁷⁸¹ *Gonzales v. National Broadcasting Co., Inc.*, 194 F.3d 29 (2d Cir. 1999).

⁷⁸² *Id.* at 30-31.

⁷⁸³ *Id.* at 35.

⁷⁸⁴ *Id.* at 36.

⁷⁸⁵ *Reporters Committee for Freedom of Press v. American Tel. & Tel. Co.*, 593 F.2d 1030, 1052 (D.C. Cir. 1978) (footnotes omitted).

This was essentially the view the Supreme Court laid out in *Branzburg* and by other circuit cases construing subpoenas as mere “incidental burdens” on First Amendment rights.⁷⁸⁶

To confuse the matter, however, the D.C. Circuit in other instances has found that a chilling effect is a legitimate interest to take into account.⁷⁸⁷ As the court explained at length in *Zerilli v. Smith*, a civil case about organized crime, protecting sources of information as a First Amendment concern is of the utmost importance:

The First Amendment guarantees a free press primarily because of the important role it can play as a vital source of public information. The press was protected so that it could bare the secrets of government and inform the people. Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.⁷⁸⁸

In short, the court invoked the marketplace of ideas, self-governance, and checking value theories as a reason to protect reporters’ interest in sources who feel comfortable to share information only in confidence.⁷⁸⁹

In several other instances, courts have also cited self-governance and checking value theories to support a finding of a privilege.⁷⁹⁰ In *Miller v. Transamerican Press, Inc.*, the first

⁷⁸⁶ See, e.g., *In re Shain*, 978 F.2d 850, 852 (4th Cir. 1992) (“[W]e hold that the incidental burden on the freedom of the press in the circumstances of this case does not require the invalidation of the subpoenas issued to the reporters.”); *Reporters Committee for Freedom of Press v. Am. Tel. & Tel. Co.*, 593 F.2d 1030, 1050 (D.C. 1978) (same).

⁷⁸⁷ *Zerilli v. Smith*, 656 F.2d 705, 707 (D.C. Cir. 1981) (“Because we believe that in this case the First Amendment interest in protecting a news reporter’s sources outweighs the interest in compelled disclosure, we affirm the District Court’s decision to deny the motion to compel discovery.”).

⁷⁸⁸ *Id.* at 710-11.

⁷⁸⁹ See also *In re Madden*, 151 F.3d 125, 128 (3d Cir. 1998) (“Premised upon the First Amendment, the privilege recognizes society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public.”); *U.S. v. Criden*, 633 F.2d 346, 356 (3d Cir. 1980) (“Moreover, there is a general expectation in certain sectors of society that information flows more freely from anonymous sources.”).

⁷⁹⁰ *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 n.12 (1st Cir. 1980) (“The issue is the public’s right to know. That right is the reporter’s by virtue of the proxy which the freedom of the press clause of

Fifth Circuit case to find a reporter's privilege, the court placed much weight on the plaintiff's status as a public official as a reason to recognize a privilege.⁷⁹¹ This was the case because compelling the production of confidential source information where the source gives information about a public official may dissuade sources to come forward or to only come forward anonymously.⁷⁹² The unavoidable result would make it more difficult for reporters to report on the malfeasance of government officials.⁷⁹³

The Third Circuit, which early on was extremely protective of the reporter's privilege, also invoked the checking value and self-governance theories, among others, to find a reporter's privilege.⁷⁹⁴ In that case, *Riley v. City of Chester*, the plaintiff was a former candidate for mayor.⁷⁹⁵ It was under these circumstances that the court thought the privilege was especially important: "The press was to serve the governed, not the governors. . . . The press was protected so that it could bare the secrets of government and inform the people."⁷⁹⁶

In *United States v. Criden*, the Third Circuit gave one of the most full-throated endorsements of the checking value and self-governance theories.⁷⁹⁷ In that case, several government officials were charged with multiple violations of federal law in the ABSCAM controversy.⁷⁹⁸ At trial, the defense called one of the reporters who reported on the story to

the First Amendment gives to the press in behalf of the public." (citing ALEXANDER BICKEL, *THE MORALITY OF CONSENT* (1975), at 85)); *Baker v. F and F Inv.*, 470 F.2d 778, 785 (2d Cir. 1972).

⁷⁹¹ *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725 (5th Cir. 1980).

⁷⁹² *Id.*

⁷⁹³ *Id.*; see also *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 287 (4th Cir. 2000) ("Such protection is necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain." (citing *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967))).

⁷⁹⁴ *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (citing *New York Times Co. v. U.S.*, 403 U.S. 713, 717 (1971) (Black, J., concurring)).

⁷⁹⁵ *Id.* at 710.

⁷⁹⁶ *Id.*

⁷⁹⁷ *U.S. v. Criden*, 633 F.2d 346 (3d Cir. 1980).

⁷⁹⁸ *Id.* at 348.

testify.⁷⁹⁹ She refused.⁸⁰⁰ Although the court found that the privilege was overcome under the facts of the case, it first explained the importance of reporting on newsworthy matters:

Our national commitment to the free exchange of information also embodies a recognition that the major sources of news are public figures, and that in addition to being newsmakers, these sources fashion public policy for government at all levels and in all branches. New ideas must be tested in the crucible of public opinion if our representatives are to receive guidance in deciding whether a suggested policy will receive public endorsement or opposition. It is extremely important therefore that varying concepts of public policy be defined and redefined, tested and retested, by wide public dissemination. In this respect, the communications media not only serve as the vehicle that widely disperses information but also constitute an important instrument of democracy that assists our officials in fashioning public policy. Without the protection of the source, the cutting edge of this valuable societal instrument would be severely dulled and public participation in decision-making severely restricted. The brute fact of human experience is that public officials are far more willing to test new ideas under the public microscope through anonymous disclosure than when they are required to be identified as the sources.⁸⁰¹

In sum, almost every court gives a hat tip to some First Amendment interest. This assertion alone, however, does not capture the true nature of the courts' treatment of First Amendment interests. It is more accurate to say that every court has invoked the self-governance, checking, and marketplace of ideas theories when discussing the existence of a constitutional reporter's privilege. (They do not seem to rely at all on the liberty theory.) What they have *not* done, however, is suggested which theory's interests are or should be prevailing or how each theory should or should not be applied to the facts of each case.

⁷⁹⁹ *Id.* at 350.

⁸⁰⁰ *Id.*

⁸⁰¹ *Id.* at 356. Similarly, in *U.S. v. Burke*, the Third Circuit emphasized the checking value and self-governance theories. *U.S. v. Burke*, 700 F.2d 70, 77 (2d Cir. 1983). In that case, which was a criminal case, the court found that the First Amendment function of the press may be even *more* important when criminality was at issue. *Id.* As the court explained, "[T]he important social interests in the free flow of information that are protected by the reporter's qualified privilege are particularly compelling in criminal cases. Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing." *Id.*

Understanding the Current State of Affairs

The research questions were aimed at mapping out the current reporter's privilege status by asking how courts have confronted *Branzburg*, how courts have applied a privilege, and whether courts focus on First Amendment theory in that application. While courts differ in how they confront *Branzburg*, most have limited *Branzburg*; courts apply the privilege by requiring the subpoenaing party to exhaust its alternatives and prove relevance,⁸⁰² and courts have little tolerance for appraising the value of information in any given case.⁸⁰³

As to the first question, there are two main ways courts deal with *Branzburg*. First, courts distinguish *Branzburg* by the type of proceeding before them, asserting that *Branzburg* was concerned with the grand jury context or the criminal context.⁸⁰⁴ Second, courts minimize *Branzburg* by asserting that the opinion was a plurality opinion as opposed to a majority opinion. Notably, no court asserted that subsequent jurisprudence has overruled *Branzburg*'s reasoning.⁸⁰⁵

Once *Branzburg* is discarded or limited, courts then have to decide how to enforce a reporter's privilege. Most courts enforce the privilege through multi-part tests that require the subpoenaing party to show that they have exhausted alternatives to finding the information, that the information sought is relevant to the case, and whether the information is important or critical to a case.⁸⁰⁶ Interestingly, although courts refer to the "important First Amendment values . . . at stake" in these cases,⁸⁰⁷ not a single test from a court of appeals asks how valuable – as measured by the First Amendment – the information at stake is.

⁸⁰² See *infra* note 822.

⁸⁰³ See *supra* note 768.

⁸⁰⁴ See *supra* note 665 and accompanying text.

⁸⁰⁵ See *supra* notes 77 and 703 and accompanying text.

⁸⁰⁶ See, e.g. *supra* note 762.

⁸⁰⁷ *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 710 (1st Cir. 1998).

Finally, if courts take into account the First Amendment interests of the information at stake, they do not do so explicitly in most cases. As such, it is impossible to say if, for example, a judge was influenced by the type of information at stake in finding that a privilege did or did not exist. As noted, however, some courts are explicit about the context in which a case comes before them, explaining that the reporter's privilege is especially important when it relates to public officials and the government.⁸⁰⁸

⁸⁰⁸ *See, e.g.*, U.S. v. Criden, 633 F.2d 346, 356 (3d Cir. 1980)

CHAPTER 7. DISCUSSION

The Problem: A Lack of Theory, Predictability, and Consistency

The findings of this thesis support prior assertions that: “Quite simply, *Branzburg* jurisprudence is a mess.”⁸⁰⁹ As has been shown, most courts fail to really deal with *Branzburg* when they find a reporter’s privilege. Some, however, attempt to by suggesting that concerns special to the grand jury context cannot dictate the result outside of that context. Or, when courts deviate from *Branzburg*’s holding, they do so without addressing the opinion’s main thrust that “newsmen are not exempt from the normal duty of appearing before a grand jury and answering questions relevant to a criminal investigation.”⁸¹⁰ At that time, the Court could have just as easily said that journalists are not exempt from appearing and responding to questions as a result of a subpoena. Said differently, the thrust of *Branzburg* seemed just as concerned with not giving journalists greater First Amendment freedoms than average non-journalist Americans. Courts finding a privilege in the criminal context are also willfully blind to the Court’s *dicta* “that reporters, like other citizens, [must] respond to relevant questions put to them in the course of a valid grand jury investigation *or criminal trial*.”⁸¹¹ From this perspective, courts that find a reporter’s privilege in civil and criminal cases may, as Judge Posner said, be “skating on thin ice.”⁸¹²

Other courts attempt to get around *Branzburg* by arguing that it really is *just* a plurality opinion. They argue that Justice Powell’s concurring opinion trumped the Court’s majority opinion. But, alas, these courts are ignoring the inescapable fact that Justice Powell’s concurring

⁸⁰⁹ See *supra* text accompanying note 58.

⁸¹⁰ *Branzburg v. Hayes*, 408 U.S. 665, 685 (1972).

⁸¹¹ *Id.* at 690-91.

⁸¹² *McKevitt v. Pallasch*, 339 F.3d 530, 533 (2003).

opinion cannot create a privilege, because – like it or not – Justice Powell *did* sign onto the majority opinion in full.⁸¹³ Again, this does not suffice to get courts around *Branzburg*.

This entire situation is made all the more difficult by various courts of appeals issuing conflicting opinions. In one instance, a court will hold that there is a reporter's privilege.⁸¹⁴ A few years later, however, the same court will come back and find a reporter's privilege *does* exist.⁸¹⁵ This result seems all the more unappealing and, in fact, inequitable, when it becomes apparent that courts are willing to find a privilege when the government is not the party requesting the subpoena but when it is that party, all of the sudden, a reporter's privilege does not exist.⁸¹⁶

Making matters even worse, when courts of appeals find that a reporter's privilege exists, they fail to actually undertake a balancing of the competing interests at stake. Indeed, as shown by the results to the second research question, the balance undertaken in these instances is not a true balancing. Instead, the balancing tests are more one-sided hurdles that a party seeking information from a journalist must clear.⁸¹⁷ Absent a few outliers dealing with confidential source information relating to a public official,⁸¹⁸ most all of the courts of appeals simply first recognize that a privilege attaches.⁸¹⁹ After a court recognizes that this privilege attaches, it goes on to appraise the need of the party seeking the information, whether the information is relevant

⁸¹³ *Id.*

⁸¹⁴ U.S. v. Ahn, 231 F.3d 26 (D.C. Cir. 2000).

⁸¹⁵ In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1147 (D.C. Cir. 2006); *see also id.* at 1164 (Tatel, J., concurring) (“We ourselves have affirmed the denial of a criminal defense subpoena on grounds that the defendant ‘failed to carry his burden’ of ‘demonstrat[ing] that the reporters’ qualified privilege should be overcome.’” (quoting U.S. v. Ahn, 231 F.3d 26, 37 (D.C.Cir. 2000))).

⁸¹⁶ *Id.*

⁸¹⁷ *See, e.g.,* In re Petroleum Products Antitrust Litigation, 680 F.2d 5, 7 (2d Cir. 1982); Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977); Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).

⁸¹⁸ *See, e.g.,* U.S. v. Criden, 633 F.2d 346, 356 (3d Cir. 1980) (describing First Amendment theory in the context of information about public officials); Riley v. City of Chester, 612 F.2d 708, 716 (3d Cir. 1979) (finding that the information in the news story “concern[ed] a candidate for high public office in a hotly contested campaign”).

⁸¹⁹ *See, e.g.,* U.S. v. Burke, 700 F.2d 70, 77 (2d Cir. 1983).

to the case, and whether the party has sufficiently exhausted its other avenues to the information.⁸²⁰ A showing on these three factors will be the key to open the locked reporter's privilege door without reference to what is behind that door. Simply, courts exhibit an extreme aversion to examining the quality or importance of the information that is behind the reporter's privilege door.⁸²¹ Thus, no matter what is behind that door – whether it reveals the largest government scandal to date or outs a CIA agent for no real reason – receives the same protection under the courts of appeals' balancing tests.⁸²²

This finding foreshadows the results of the third and final research question that asked how the courts of appeals rely on First Amendment theory in reporter's privilege cases. Certainly, many of the courts of appeals that find a privilege rely on the various theories undergirding the First Amendment: the marketplace of ideas, self-governance, and checking value theories.⁸²³ (Notably, not a single case in this sample discussed the liberty theory of the freedom of speech, although some did reference the fourth estate, which is close to Edwin Baker's view of the theory's relationship to the press.⁸²⁴) These mentions, however, ring rather hollow. In most, but not all cases, courts talk in lofty terms about First Amendment theory and its importance to the development of the American politic. Courts do not though like to discuss

⁸²⁰ *Id.* at 77-78.

⁸²¹ As one judge concurring in the Judith Miller case explained, "While [another concurring opinion] makes the centerpiece of [the] test the balancing of 'the public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's value,' this court (in the civil context), the United States Department of Justice and the lone district court that has recognized a federal common-law reporter's privilege in the grand jury context have declined to consider either of these factors in deciding whether to recognize a reporter's exemption from compulsory process." *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d 1141, 1162 (D.C. Cir. 2006) (Henderson, J., concurring).

⁸²² For more examples of the balancing tests see, e.g., *LaRouche v. National Broadcasting Co., Inc.*, 780 F.2d 1134 (4th Cir. 1986) (finding a failure to show that alternative sources were exhausted) and *Shoen v. Shoen*, 48 F.3d 412 (9th Cir. 1995) (finding that the information sought was not relevant).

⁸²³ See, e.g., *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 725-26 (5th Cir. 1980) (discussing the First Amendment in relation to exacting scrutiny on public figures); *Riley v. City of Chester*, 612 F.2d 708, 714 (3d Cir. 1979) (same); *Baker v. F and F Inv.*, 470 F.2d 778, 782 (2d Cir. 1972) (discussing the marketplace of ideas theory); *Cervantes v. Time, Inc.*, 464 F.2d 986, 993 n.10 (8th Cir. 1972) (same).

⁸²⁴ See *supra* note 393 and accompanying text.

these theories in the context of the cases before them. This is no doubt a result of the courts' "balancing" tests, where the courts are loathe to inquire into the type of information at issue.⁸²⁵ Indeed, if courts did undertake such an inquiry, they may have more of a moment to discuss First Amendment theory as it relates to their cases.⁸²⁶

Only a few opinions actually attempt to undertake this sort of information cost/benefit analysis.⁸²⁷ And, even these opinions undertake such an analysis by looking to *whom* the information is about, rather than *what* First Amendment value the information has in and of itself.⁸²⁸ Indeed, a situation is imaginable where even information about a private individual may have public importance. But, where courts only look to the status of the person as a public official, they run the risk of shortchanging the public of valuable information based solely on the identity of the person about whom the information concerns.⁸²⁹ More to the point, the courts that do give a nod to the type of information at issue nonetheless go on to apply the same type of balancing test, making it unclear how the value of the information actually works into the calculus – if at all.⁸³⁰ As a result, what the courts of appeals themselves style as cases of First Amendment importance are rarely treated as such by balancing the value of the information against the subpoenaing party's need for the information.

These results demonstrate a state of affairs that has created a nearly impenetrable area of constitutional law that is nigh impossible to make any sense of. Even more unfortunate, everyone knows that this is the case. As previously explained, "The mixed success of media

⁸²⁵ See *supra* notes 399-414 and accompanying text discussing the importance of the information content for the purposes of First Amendment theory.

⁸²⁶ In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

⁸²⁷ See, e.g., *Riley v. City of Chester*, 612 F.2d 708 (3d Cir. 1979).

⁸²⁸ *Id.*

⁸²⁹ Cf. *Cohen v. Cowles Media Co.*, 501 U.S. 663, 678 (1991) (Souter, J., dissenting) (explaining that in cases where reporters are punished for the publication of information, "[t]he importance of this public interest is integral to the balance that should be struck").

⁸³⁰ *Riley*, 612 F.2d at 716.

litigants and the lack of conclusive rulings from the U.S. Supreme Court have yielded a body of law that is conflicted in both its outcomes and its rationales.”⁸³¹ In spite of this accurate summation of the reporter’s privilege case law, no courts attempt to address either the differing outcomes or the conflicting rationales.

This hands-off approach to the current problem is so enmeshed in the case law that it has even been given a name by one former journalist and academic: “benign indeterminacy.”⁸³² As that journalist explained, “In a perfect First Amendment world, . . . activities as important as newsgathering and dissemination might have more legal and constitutional protection, but given the legal landscape, the limbo of the status quo is preferable to legal certainties that could be even less favorable to newsgathering.”⁸³³ Essentially, the argument is this: in general, most reporters do not go to jail, although some do; newsgathering has not been irreparably damaged by this fact; chancing an effort at changing the law at the Supreme Court, for example, could destroy all of the privileges in the courts of appeals, sending even more journalists to jail; and therefore, journalists should not try to advocate for a one off legal solution lest they lose the current middle ground. Therefore, the journalist concluded, “It may be that press freedom flourishes better in this disorderly state of indeterminacy than it would in a courtroom filled with ringing rhetoric about the First Amendment.”⁸³⁴

⁸³¹ See Ugland, *supra* note 429, at 121.

⁸³² See generally Freivogel, *supra* note 597.

⁸³³ *Id.* at 96.

⁸³⁴ *Id.* at 119. This section addresses *Branzburg*’s main rationale that generally applicable laws only indirectly interfere with speech. It does not deal with *Branzburg*’s secondary rationale that a privilege should not be created because creating such a privilege would require courts to define who qualifies as a journalist. This section does not focus on this issue because the courts of appeals have dealt with this issue without much difficulty at all, extending the privilege to documentarians, book authors, and academics.

As the Ninth Circuit explained, “The purpose of the journalist’s privilege . . . [is] not solely to protect newspaper or television reporters, but to protect the activity of ‘investigative reporting’ more generally. . . . [I]t makes no difference whether ‘[t]he intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill’ because ‘[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.’” *Shoen v. Shoen*, 5 F.3d 1289, 1293 (9th Cir. 1993) (internal citations omitted); see also *Cusumano v. Microsoft Corp.*, 162 F.3d 708, 714 (1st Cir. 1998)

First, it must be said that this argument is not a specious one – it is a practical one. For the most part, journalists do not end up in jail. And, for the most part, the flow of news has not completely shriveled in the shadow of a possible future prosecution or civil suit. Unfortunately, the argument proves nothing and assumes – for the most part – that the messy status quo tips in favor of the journalist. The results in this thesis, however, suggest that – for the most part – journalists who do get subpoenaed are going to lose (at least at the court of appeals level) if they try to fight the subpoena. In a sense then, this argument may be as optimistic as it is hopeful. Moreover, it assumes that the supposed beneficial situation will remain tipped in favor of journalists. This, also, is unlikely, as even if one concedes that the status quo benefits journalists, which is far from apparent, such consistency ten years out is impossible to predict. For that reason, it is necessary to confront the problem head on.

One Potential Solution: Clarify where Interference with Speech is Direct versus Indirect and Adopt an Actual Balancing Test

The Supreme Court’s newsgathering jurisprudence has created a false dichotomy which *Branzburg*, in part, is responsible for spawning: generally applicable laws that only indirectly interfere with speech do not violate the First Amendment, while laws that hold reporter’s liable for information they publish do directly interfere with speech and violate the First Amendment. In finding that reporters must respond to subpoenas, the Court explained that *Branzburg* “involve[d] no intrusions upon speech or . . . on what the press may publish . . .,” as the only alleged interference of speech was a generally applicable subpoena seeking the identity of a

(“Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended ‘at the inception of the newsgathering process’ to use the fruits of his research ‘to disseminate information to the public.’”).

source.⁸³⁵ Indeed, “[c]itizens generally are not constitutionally immune from grand jury subpoenas.”⁸³⁶

The problem with this approach is that the Court has found in other circumstances that even generally applicable laws *can and do* implicate the First Amendment.⁸³⁷ The Court has found generally applicable laws to run up against the First Amendment when they attempt to exact costs on the speaker as a result of the speech.⁸³⁸ Certainly, where plaintiffs in *Bartnicki* tried to hold journalists liable for allegedly violating generally applicable state and federal eavesdropping laws as a result of the publication of a recorded cellphone call, the Court found that the First Amendment was implicated.⁸³⁹ The fact that subpoenas are generally applicable laws, like the eavesdropping laws in *Bartnicki*, then, cannot be the determinative factor in deciding whether First Amendment rights are implicated by subpoenas. Rather, courts must go beyond asking whether the subpoenas are generally applicable laws and look at the relation of the allegedly unconstitutional action to the speech.⁸⁴⁰

Courts are still grappling to explain how exactly subpoenas interfere with speech. In *United States v. Criden*, for example, the Third Circuit found that enforcement of a subpoena would directly interfere with speech because, “[m]ore often than not, unless the declarant has faith that the recipient will preserve the confidence, he will not bestow it.”⁸⁴¹ On the other hand, other courts have doubted this conclusion in some circumstances.⁸⁴² Still others have accepted

⁸³⁵ *Branzburg v. Hayes*, 408 U.S. 665, 681-682 (1972).

⁸³⁶ *Id.* at 682.

⁸³⁷ *Bartnicki v. Vopper*, 532 U.S. 514, 526 (2001); *see also supra* note 497 and accompanying text.

⁸³⁸ *Id.*

⁸³⁹ *Id.*

⁸⁴⁰ *Bartnicki*, 532 U.S. 514, 526 (2001) (examining the relationship of the generally applicable law to speech).

⁸⁴¹ *U.S. v. Criden*, 633 F.2d 346, 355-56 (3d Cir. 1980); *see also, e.g., U.S. v. LaRouche Campaign*, 841 F.2d 1176 (1st Cir. 1988); *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981).

⁸⁴² *U.S. v. Smith*, 135 F.3d 963, 970 (5th Cir. 1998) (rejecting the suggestion that requiring a television station to turn over unbroadcast footage from a non-confidential source would cause a chilling effect); *see also Branzburg*, 408 U.S. at 695.

this conclusion but failed to find that it amounts to a violation of the First Amendment.⁸⁴³ Thus, it is clear that relying on the chilling effect argument is unlikely to work magic in courts' quests to decide whether subpoenas against journalists interfere with speech in such a way as to implicate the First Amendment.

A new paradigm is necessary: subpoenas interfere with speech because they are adverse to the speaker and are the direct result of the speech itself – in these cases, the publication of news.⁸⁴⁴ In other circumstances, the Court has already impliedly reached the conclusion that the First Amendment is implicated when the government or a private party burdens speech *because of* either the content of the speech or its character.⁸⁴⁵ The Court could not have concluded that this was the case in 1972 when the *Branzburg* opinion was handed down, however, because it would not begin to establish this rule until three years after *Branzburg*.⁸⁴⁶ With the benefit of hindsight, this appears to be the only bright line way to determine whether subpoenas issued against journalists actually directly interfere with the First Amendment.⁸⁴⁷

⁸⁴³ See, e.g., *McKevitt v. Pallasch*, 339 F.3d 530, 532 (7th Cir. 2003).; *In re Grand Jury Proceedings*, 5 F.3d 397 (9th Cir. 1993) (“Wolf and amici also argue that the district court’s order will have a chilling effect on Wolf’s ability to gather news because groups will perceive him as being an investigative arm of the law. This argument has also been rejected by the Supreme Court.” (citing *Branzburg v. Hayes*, 408 U.S. 665, 699-700 (1972))).

⁸⁴⁴ Cf. *Smith v. Daily Mail Publ’g Co.*, 443 U.S. 97, 103 (1979) (“[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information . . .”). This is perhaps the only honest way left to distinguish or minimize *Branzburg*. Indeed, simply appealing to the chilling effect and arguing that the Court got it wrong does not suffice. Certainly, whether right or wrong, the Court rejected the idea that the First Amendment mandates a reporter’s privilege as a result of the chilling effect. See *Branzburg*, 408 U.S. at 695 (“Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes . . .”).

⁸⁴⁵ See *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975). As will be shown, the argument is not made that subpoenas can only be enforced where a need of the highest order is shown, as required in the above-cited cases. Simply, it is suggested that the principle discussed in *Bartnicki* and *Cox* illustrate that, in fact, there is a direct interference with speech as a result of subpoenas issued against journalists.

⁸⁴⁶ *Cox Broad. Corp.*, 420 U.S. at 471.

⁸⁴⁷ But see *Langley & Levine*, *supra* note 408, at 46. (“[I]t is difficult to draw a meaningful distinction between a right to gather news, on the one hand, and governmentally imposed punishment for publishing news, on the other.”).

Take an example: in *Cox Broadcasting Corp. v. Cohn*, the Supreme Court addressed whether a state law that allowed subsequent penalties for publishing the name of a rape victim was permissible under the First Amendment.⁸⁴⁸ According to the Court, the question was whether, under the First Amendment, “the [government] may impose sanctions on the accurate publication of the name of a rape victim obtained from public records.”⁸⁴⁹ The Court held that it could not because allowing such sanctions would directly interfere with the press’s “responsibility . . . to report the operations of government” by exacting penalties on reporters for the information they have published.⁸⁵⁰ In short, the Court found that targeting publication with some sort of sanction implicated the First Amendment because that action resulted because of speech and could have the effect of disrupting the press’s role in informing the electorate.⁸⁵¹ Twenty-five years later, the Court in *Bartnicki v. Vopper* would reaffirm this view.⁸⁵²

The logic of cases that run from *Cox* to *Bartnicki* graft easily onto subpoena cases. This is so because subpoenas exact a burden on reporters⁸⁵³ (like the punishment in *Cox* and

⁸⁴⁸ *Cox Broad. Corp.*, 420 U.S. at 491.

⁸⁴⁹ *Id.* at 496-97.

⁸⁵⁰ *Id.* at 492; *see also id.* at 491-92 (“In the first place, in a society in which each individual has but limited time and resources with which to observe at first hand the operations of his government, he relies necessarily upon the press to bring to him in convenient form the facts of those operations. Great responsibility is accordingly placed upon the news media to report fully and accurately the proceedings of government, and official records and documents open to the public are the basic data of governmental operations. Without the information provided by the press most of us and many of our representatives would be unable to vote intelligently or to register opinions on the administration of government generally. With respect to judicial proceedings in particular, the function of the press serves to guarantee the fairness of trials and to bring to bear the beneficial effects of public scrutiny upon the administration of justice.”).

⁸⁵¹ Some might argue that the application of the rationales of these cases is inappropriate because these cases directly prohibited publication in the first place by making it illegal to publish, for example, the name of a rape victim. Notably, however, the Court based its rationale on whether the government or a private party could punish a journalist *after publication* – not on whether the law’s prohibition against publishing certain information was, in the first place, unconstitutional. *See, e.g., Bartnicki v. Vopper*, 532 U.S. 514, 528 (2001) (“Simply put, the issue here is this: ‘Where the punished publisher of information has obtained the information . . . , may the government punish the ensuing publication of that information based on the defect in a chain?’ (emphasis added) (citation omitted)).

⁸⁵² *See Bartnicki*, 532 U.S. 514.

⁸⁵³ Quantifying these burdens is not an easy task. A few examples are in order, however. First, a reporter pursuit of his trade depends on his ability to assure is confidential sources that he will keep their confidences. Without this ability, a reporter’s ability to seek his desired professional will either be limited or altogether destroyed if that reporter is forced to testify as to the identity of his sources. *See supra* note 579; *see Langley & Levine, supra*

Bartnicki) and are a direct reaction to and result from publication itself (just as it was in *Cox* and *Bartnicki*). Had a reporter chosen not to publish certain information about the government or a private party, the government or the private party would not have reason or cause to issue the subpoena to the reporter in the first place. That is, the resulting burdens of a subpoena occur solely *because of* the reporter's speech, which, if anything, make the subpoena a direct interference with speech.⁸⁵⁴ As the Supreme Court recently explained in *Holder v.*

Humanitarian Law Project, "[W]e [have] recognized that [when] the generally applicable law was directed at [the speaker] because of what his speech communicated . . . [, we must] . . .

note 408, at 26 n.80 ("A large portion of the stock-in-trade of any Washington journalist is a collection of sources, which is simply another name for contacts." (quoting JUDY WOODRUFF, "THIS IS JUDY WOODRUFF AT THE WHITE HOUSE" 102 (1982))); *Mot. to Quash*, *supra* note 4, at Ex. 14 at 6 (Affidavit of Scott Armstrong) ("Were Mr. Risen to comply [with the subpoena], in my opinion, the damage would significantly undermine the confidence of a wide variety of confidential sources across many U.S. government agencies and institutions, as well as any knowledgeable individual sources not associated with the U.S. government."). If the reporter decides not to identify his source or turn over the requested work product, then the reporter will be left to suffer the consequences of that choice. Those consequences come in the form of criminal or civil contempt findings, which are no doubt burdensome. In short, the reporter is being forced into the ultimate catch-22: identify your sources and damage your own reputation and professional caché or do not identify your sources and land in jail or face stiff fines. As Justice Stewart observed in *Branzburg*, "In the event of a subpoena, . . . the newsman will know that he must choose between being punished for contempt if he refuses to testify, or violating his profession's ethics and impairing his resourcefulness as a reporter if he discloses confidential information." *Branzburg*, 408 U.S. at 731-32 (Stewart, J., dissenting) (internal footnote omitted).

These two burdens lead to another burden: the reporter's refusal to use confidential sources in the future lest the reporter be drug in front of a grand jury. *See, e.g.*, Ron Bellamy, *Idaho Editor Urges Press to Stand Up for Its Rights*, THE REGISTER GUARD, Feb. 19, 1978, at 13A (quoting journalist, who was subpoenaed over confidential source and sentenced to thirty days in jail for refusing to identify that source, saying that journalists should not "be so eager to flag anonymous sources," because doing so can lead to protracted litigation); *see also* *Caldero v. Tribune Publ'g Co.*, 562 P.2d 791 (Id. 1977), *cert. denied*, 434 U.S. 930 (1977). Perhaps perceiving this, at least one court of appeals broadly interpreted the Supreme Court's precedent holding that the government and third parties may not punish reporters for the publication of newsworthy information. In handing down its own decision in *Bartnicki* before it made its way up to the Supreme Court, the Third Circuit broadly construed the Court's newsgathering liability line of cases as standing for the proposition that "attempts to punish *or deter* the press's publication of truthful information [are] unconstitutional." *Bartnicki v. Vopper*, 200 F.3d 109, 116 (3d Cir. 1999) (emphasis added), *aff'd*, *Bartnicki*, 532 U.S. 514. This broad interpretation, which finds that First Amendment protections kick in even when an action merely *deters* future speech, correctly extrapolates from the Court's jurisprudence the underlying rationale – actions targeting the communication of newsworthy information are subject to First Amendment scrutiny when they have the potential to *deter* speech. *Id.*

⁸⁵⁴ The suggested approach would likely not change the outcome in *Pell*. Indeed, in *Pell* the issue was whether the government was required to *provide* the journalist with access to information that the public did not have access to. *Pell v. Procunier*, 417 U.S. 817, 834 (1974). Here, it is not a question of whether the government has to provide journalists access to information, but whether the government can take actions that directly interfere with a journalist attempting to disseminate information that he or she already has of his or her own accord. On the other hand, it may change the outcome in *Zurcher*, where the search and seizure resulted directly from the publication of protest photos in the student newspaper. *Zurcher v. Stanford Daily*, 436 U.S. 547, 551 (1978).

appl[y] more rigorous scrutiny.”⁸⁵⁵ Therefore, under *Cox* and similar cases, subpoenas *directly* interfere with speech and, as such, must pass First Amendment scrutiny.⁸⁵⁶

Of course, one might argue that the effect of subpoenas on the press is not as exacting as the penalties entertained in cases like *Cox*, and, therefore, the First Amendment is not implicated. This, however, is a distinction without a difference and weighs only on the inquiry into the *strength* of the First Amendment interests at stake – not the existence of an interest in the first place.⁸⁵⁷ The real question when deciding whether the First Amendment is implicated under cases like *Cox* is whether the government or a private party’s action adverse to a speaker occurs *because of* the speech itself and burdens that speech.⁸⁵⁸

Finding that the First Amendment applies to subpoenas issued to reporters only answers one part of the question; it does not answer the other part: how much protection the First

⁸⁵⁵ Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724 (2010).

⁸⁵⁶ This argument is different than Monica Langley and Lee Levine’s. See *supra* notes 509-519 and accompanying text. Langley and Levine implicitly argued that subpoenas implicated the First Amendment because they amounted to punishment for publication. See Langley & Levine, *supra* note 408, at 47. As they put it, “In the grand jury context, for example, a journalist who is held in contempt and jailed for refusing to testify about the source of his published report exposing governmental corruption is, in equal doses, effectively receiving punishment based on both the content of his published work *and* his newsgathering techniques.” *Id.* at 40. As noted, however, whether the First Amendment is implicated under the Court’s opinions is more a question of whether the government’s actions result from or target publication, rather than whether they, in fact, “punish” the journalist for the publication itself.

A closer analogy to the test suggested here is laid out by Marcus Asner. According to Asner, the First Amendment is implicated based on “whether it is the particular reporter’s knowledge of the source’s identity or the publication of the source’s information that bothered the government enough to compel disclosure of the source’s identity.” See Asner, *supra* note 507, at 624. The difference between Asner’s view and the one offered here is the view put forward here would find *any* subpoena issued *because of* the publication of news would, at least, trigger the First Amendment. While this test is more sweeping than Asner’s, it is unclear exactly how Asner’s test would be employed in reality. Certainly, it would be difficult, if not impossible, for a court to delve in the minds of government officials to find out whether the officials issued the subpoena because of a legitimate law enforcement need or to indirectly punish the journalist for disclosing government secrets.

Finally, this conclusion, as has been shown, is not undercut by the *Branzburg* Court’s assertion that subpoenas are not direct interferences with speech because they are laws of general applicability, which has not been a determinative factor in past cases. *Branzburg v. Hayes*, 408 U.S. 665, 682-83 (1972).

⁸⁵⁷ See Langley & Levine, *supra* note 408, at 47 (“It is a well-respected and widely accepted tenet of First Amendment theory that within the realm of political expression, the degree of constitutional protection can and should vary with the nature of the restraint at issue.”).

⁸⁵⁸ Said more generally, “[T]he First Amendment’s application to a civil or criminal sanction is not determined solely by whether that action is viewed ‘as a prior restraint or as a penal sanction.’” *Alexander v. U.S.*, 509 U.S. 544, 571 (1993) (Kennedy, J., dissenting).

Amendment requires. It is suggested that the First Amendment requires courts to balance the specific First Amendment interests at stake in each case against the subpoenaing party's interests.⁸⁵⁹ Because the concern with the direct interference with the press exists primarily out of a conviction that that interference prevents the press from "inform[ing] citizens about the public business," the weight of the First Amendment interest in non-disclosure should be tied to the informative value of the speech at issue.⁸⁶⁰ As Judge Tatel put it in his concurring opinion *In re Grand Jury Subpoena, Judith Miller* when he advocated for a similar test, "[T]he approach in every case must be to strike the proper balance between the public's interest in the free dissemination of ideas and information and the public's interest in effective law enforcement and the fair administration of justice."⁸⁶¹ More specifically, Judge Tatel argued that "courts . . . must consider not only the government's need for the information and exhaustion of alternative sources, but also the . . . public interest in compelling disclosure, measured by the harm the leak caused, against the public interest in newsgathering, measured by the leaked information's

⁸⁵⁹ Essentially, this thesis is arguing for an *ad hoc* balancing test that does not establish a presumption in favor of one party's interests to the other's but asks, simply, whose interest should prevail. Justice Breyer explained this type of inquiry in another First Amendment case:

In determining whether a statute violates the First Amendment, this Court has often found it appropriate to examine the fit between statutory ends and means. In doing so, it has examined speech-related harms, justifications, and potential alternatives. In particular, it has taken account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision's countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so. Ultimately the Court has had to determine whether the statute works speech-related harm that is out of proportion to its justifications.

U.S. v. Alvarez, 132 S. Ct. 2537, 2551 (2012) (Breyer, J., concurring in the judgment).

⁸⁶⁰ *Cox Broad. Corp.*, 420 U.S. at 496. As explained, in the context of political speech, the amount of First Amendment protection is tied to the type of restraint. See Langley & Levine, *supra* note 408, at 47. Thus, where the restraint is a prohibition of publication (that is, the restraint prevents speech at the center of the reporting spectrum based on the content of the information), the government carries the most heavy burden and a must rebut the presumption of unconstitutionality. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971). Not all restraints, however, are created equal – and some come to the table less constitutionally infirm than others. Compare, e.g., *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729 (2011) with *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2753, 105 L. Ed. 2d 661 (1989). Because subpoenas against journalists are not so severe as to censor the publication of information, the First Amendment scrutiny should not be as severe either. As such, a true balancing test is proposed; as will be seen, this test does not require a "compelling" interest from the government to tip the scale in favor of the government.

⁸⁶¹ *Id.* at 1174. Judge Tatel was discussing a common law privilege, which provided a way around *Branzburg's* holding. Nonetheless, the logic is illustrative here.

value.”⁸⁶² This is similar to the viewpoint advocated for by Monica Langley and Lee Levine fifteen years earlier, except Langley and Levine would have called the privilege a constitutional one, while Judge Tatel spoke of a federal common law privilege.⁸⁶³ These are true “balancing” tests that weigh the particular interest of the First Amendment against either the government or private party’s interest in the disclosure of source identity or work product.

To be clear, to weigh the value of information, courts should use First Amendment theory as a scale – and not just as fodder for broad sweeping statements about the importance of information generally. The weight of all four theories should be assessed in each case.⁸⁶⁴ The marketplace of ideas theory places an emphasis on information injected into the social conversation – especially when that information contradicts widely accepted ideas.⁸⁶⁵ The liberty theory’s “fourth estate” theory protects “a limited *institutional* realm of private production and distribution of information, opinion, and vision, of fact and fancy.”⁸⁶⁶ The checking value, from which the liberty theory borrows to some extent, is also primarily concerned with “the particular problem of misconduct by government officials.”⁸⁶⁷ Finally, the self-governance theory places a premium on “ideas for the bringing about of political and social changes desired by the people.”⁸⁶⁸

A few general principles regarding information value can be distilled from the overlap of these rules. First, information about government malfeasance is perhaps the most important type of information under these theories. Arguably, the marketplace of ideas and the liberty theory

⁸⁶² *Id.* at 1175.

⁸⁶³ *See supra* note 408 and accompanying text. It is different from Judge Tatel’s approach, however, in that Langley and Levine would have put a thumb on the reporter interest side of the scale by requiring the government to show that its interests were compelling. *See* Langley & Levine, *supra* note 408, at 48.

⁸⁶⁴ The liberty theory would be accounted for in the checking value theory. *See supra* note

⁸⁶⁵ *See* MILL, *supra* note 167, at 68.

⁸⁶⁶ BAKER, *supra* note 284, at 233-34 (emphasis added).

⁸⁶⁷ Blasi, *supra* note 180, at 648

⁸⁶⁸ *New York Times, Co. v. Sullivan*, 376 U.S. 254, 269 (1964).

would protect confidential source information about government malfeasance, because not doing so would – for all of the wrong reasons – allow government to interfere with the independence of the press, which is sacrosanct under these theories. More to the point, the checking value and self-governance theories militate strongly in favor of protecting the reporter-source relationship when the information is information about government malfeasance, because, under these theories, the main purpose of the First Amendment was not just to keep government out of the business of telling reporters what to report but to ensure that reporters have the autonomy to uncover government abuses.⁸⁶⁹ Thus, where information is about government abuse or, less scandalously, about government performance in general, these theories should weigh especially heavy in any First Amendment calculus.⁸⁷⁰

When the information, however, does not have anything to do with government malfeasance or the government generally, the application of the checking value and the self-governance theories become much less obvious. In a case about corporate environmental abuses, for example, it is unclear how, if at all, the self-governance theory would influence a potential outcome. The liberty theory and the marketplace of ideas theory would still apply though – likely with similar weight as they do in the governmental information cases. Indeed, the marketplace of ideas theory is much more broad than the theories related to self-governance and seeks to protect any information that is injected in the marketplace and has the potential to

⁸⁶⁹ *Id.*

⁸⁷⁰ *See, e.g.,* U.S. v. Criden, 633 F.2d 346 (3d Cir. 1980); *cf.* Near v. State of Minnesota ex rel. Olson, 283 U.S. 697, 722 (1931) (“Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that even a more serious public evil would be caused by authority to prevent publication. ‘To prohibit the intent to excite those unfavorable sentiments against those who administer the Government, is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which, again, is equivalent to a protection of those who administer the Government, if they should at any time deserve the contempt or hatred of the people, against being exposed to it by free animadversions on their characters and conduct.’”).

improve society's standing by upsetting falsehoods.⁸⁷¹ If information would give the consumer a greater awareness of his or her relationship to a corporation vis-à-vis the corporation's past actions, for example, the marketplace of ideas theory would be extremely protective of that information.⁸⁷² The liberty theory would also protect non-governmental source information for the sake of protecting press autonomy because "maintaining the integrity of the press promotes a better society and makes our liberty more secure."⁸⁷³ Indeed, the liberty theory like the marketplace of ideas theory would seem to require the same amount of protection in most cases.

On the other hand, in the case of information that was disclosed for disclosure's sake or the disclosure of valueless information, nearly all of the theories would provide relatively little protection. Simply, not all information is created equal under these First Amendment theories.⁸⁷⁴ The classic example of valueless speech is child pornography; as the Supreme Court explained in that context, "[It is] unlikely that visual depictions of children performing sexual acts . . . would often constitute an important and necessary part of a literary performance or scientific or educational work."⁸⁷⁵ Speech need not be completely valueless, however, to merit less First Amendment protection. Disclosure for the sake of disclosure would likely not merit a great deal of First Amendment protection, because it does not enrich the marketplace of ideas or provide citizens with information that they need to make informed decisions about their government.⁸⁷⁶

This is exactly why Geneva Olverholser cautioned reporters who were advocating for Robert

⁸⁷¹ As the court has recognized of the marketplace of ideas theory in the commercial context, "[T]he particular consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763 (1976).

⁸⁷² *Cf. id.*

⁸⁷³ *BAKER, supra* note 284, at 244.

⁸⁷⁴ *See Kitrosser, supra* note 409 ("In short, . . . classified information carries a very different constitutional status than virtually any other type of information or speech about government or public policy."); *see also supra* note 409.

⁸⁷⁵ *New York v. Ferber*, 458 U.S. 747, 762-63 (1982).

⁸⁷⁶ *See Olverholser, supra* note 558.

Novak and Judith Miller.⁸⁷⁷ Indeed, the revelation in those reporters' articles (that Valerie Plame was a covert CIA agent) were made to "get back at" Plame's husband for his comments about Iraq's connections to weapons of mass destruction and had no real public informational value.⁸⁷⁸

On the other side of the equation are the competing interests.⁸⁷⁹ Depending on the identity of the party issuing the subpoena (whether the government or a private party), the competing interests may vary. When the government subpoenas a reporter who has information about the commission of the crime, the government and the public would have an interest in effective law enforcement.⁸⁸⁰ The same can be said for grand jury investigations.⁸⁸¹ Where the reporter has information about national security, the government and the public might have an interest both in effective law enforcement and in protecting national security.⁸⁸² When the party subpoenaing the reporter is a private party, that party may have an interest in supporting his civil claim, like, for example, a defamation claim.⁸⁸³ If that private party is a defendant in a criminal trial, that defendant has an interest in a fair trial and a compulsory process.⁸⁸⁴

⁸⁷⁷ *Id.*

⁸⁷⁸ In re Grand Jury Subpoena, Judith Miller, 397 F.3d 964, 1002 (D.C. Cir. 2005) (Tatel, J., concurring) ("The leak of Plame's apparent employment . . . had marginal news value. To be sure, insofar as Plame's CIA relationship may have helped explain her husband's selection for the Niger trip, that information could bear on her husband's credibility. . . . Compared to the damage of undermining covert intelligence-gathering, however, this slight news value cannot, in my view, justify privileging the leaker's identity."); *see also* Olverholser, *supra* note 558 (arguing that the information was disclosed to be retributive and not for the sake of informing the public).

⁸⁷⁹ *See supra* notes 535-545 and accompanying text.

⁸⁸⁰ *See, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) ("Fair and effective law enforcement aimed at providing security for the person and property of the individual is a fundamental function of government . . .").

⁸⁸¹ *Id.*

⁸⁸² *See, e.g.*, *C.I.A. v. Sims*, 471 U.S. 159, 175 (1985) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service." (quoting *Snepp v. U.S.*, 444 U.S. 507, 512 (1980) (per curiam))).

⁸⁸³ *Clyburn v. News World Communications, Inc.*, 903 F.2d 29, 35 (D.C. Cir. 1990) (discussing the plaintiff public figure's need for information in a defamation action); *see also* *Bruno & Stillman, Inc. v. Globe Newspaper Co.*, 633 F.2d 583, 595 (1st Cir. 1980) ("Although the discovery needs of a non-public figure plaintiff are generally less than those of a grand jury or a public figure, this is not always true. Such a plaintiff may be seeking punitive damages and thus held to the actual malice burden of proof. Also, it can be argued that if a plaintiff is not even a limited public figure, the public interest in keeping open the flow of information to the press usually diminishes.").

⁸⁸⁴ *U.S. v. LaRouche Campaign*, 841 F.2d 1176, 1182 (1st Cir. 1988) ("At stake on the defendants' side of the equation are their constitutional rights to a fair trial under the Fifth Amendment and to compulsory process and

Just as with a reporter's interests in protecting his source, not every situation will demand the same amount of deference to an asserted governmental interest. Where the interest is in national security, for example, the government may have less of an interest in forcing a journalist to reveal the source of relatively trifling information that causes little to no harm to government interests than information that could seriously undermine national security.⁸⁸⁵ Similarly, a private party would have less of an interest in forcing a journalist to reveal information that does little to help prove the elements of his or her case.⁸⁸⁶ Moreover, both parties would have little interest in confidential source information or reporter work product where that evidence would be cumulative of evidence the parties already have.⁸⁸⁷

Taking the First Amendment inquiry together with the competing interests inquiry, a process emerges to decide whether a First Amendment privilege exists under circumstances of any given case. First, a court must ask whether the subpoena was issued against the journalist because of his speech. If yes, then a court must balance the competing interests. This approach is a "down in the weeds" approach and requires the court to identify the type of information published by the reporter.⁸⁸⁸ Once the type of information is identified, a court, using First

effective confrontation and cross-examination of adverse witnesses under the Sixth Amendment."); *see also, e.g.*, *U.S. v. Criden*, 633 F.2d 346, 358 (3d Cir. 1980) ("The Court has placed particular emphasis on the production of evidence in criminal trials. It has grounded this need for evidence on both the confrontation and compulsory process clauses of the sixth amendment and on the due process clause of the fifth amendment. To protect these constitutionally-founded rights, courts must assure that all relevant and admissible evidence is produced.").

⁸⁸⁵ *See* Freivogel, *supra* note 597, at 112-14.

⁸⁸⁶ *See* *Miller v. Transamerican Press, Inc.*, 621 F.2d 721, 726 (5th Cir. 1980) (explaining that "[a] final First Amendment consideration, in a case involving a public figure, is that it will often be possible to establish malice or lack of malice without disclosure of the identity of the informant").

⁸⁸⁷ *See, e.g.*, *Shoen v. Shoen*, 48 F.3d 412, 417 (9th Cir. 1995) (finding evidence held by a reporter to be cumulative where it would weigh on a question already demonstrated by other evidence).

⁸⁸⁸ The information being analyzed here is the information that has already been made public in, for example, news reports. That is, courts should ask whether the confidential source's information disclosed by the reporter was valuable information. Information that was not published normally should not be considered in this calculus, as this information is not benefitting the public since it has never been released to the public – nor was it the reason for the subpoena in the first place. Information that has never been released to the public has significantly less First Amendment value from the standpoint of the marketplace of ideas, self-governance, and checking value theories. Indeed, such information cannot spur social or political change if it is secreted. At bottom, the concern here is interference with the newsgathering process by exacting a burden on the reporter to respond (or not) to a subpoena.

Amendment theory, must investigate how valuable the information is to the public. That value judgment should then be weighed against the competing interests. Just as with the First Amendment interests, the court should identify the interests and then determine the weight of those interests by appealing to the constitutional or common law that informs those interests.

Application of One Potential Solution: Risen, the Government, and Newsworthiness

As an initial matter, it is outside the scope of this thesis to catalog every conceivable First Amendment interest that may be at stake in James Risen's case. But, a cursory appraisal of this case is in order. It is known that Operation Merlin occurred eight years before Risen ever published a word about the botched attempt to sabotage the Iranian nuclear program.⁸⁸⁹ Risen agreed with the government not to publish the information when the government alleged that the release of the information might damage U.S. interests.⁸⁹⁰ It was not until several years later that Risen published the information. According to Risen, he finally decided to publish the information "only after [he] realized that U.S. intelligence on Iran's supposed weapons of mass destruction was so flawed, and that the information [he] had was so important, that this was a story that the public had to know about before yet another war was launched."⁸⁹¹ Risen went on to say, "The story was so old that it could not harm national security, and in fact [he] believe[d] he had] performed a vitally important public service by exposing the reckless and badly mismanaged nature of intelligence on Iran's efforts to obtain [WMDs]."⁸⁹²

Having identified the information at stake, it is next necessary to examine the First Amendment value of that information. First, the release of this information no doubt acted as a

Where that result of any single newsgathering process is democratically valuable information, interference with that process should be met with a healthy dose of doubt.

⁸⁸⁹ See *supra* note 21-23.

⁸⁹⁰ See *supra* notes 20-21 and accompanying text.

⁸⁹¹ Risen Declaration at 8, *U.S. v. Sterling*, No. 10-cr-485 (E.D. Va. June 21, 2011) (stating that "Merlin was deeply flawed and mismanaged from the start").

⁸⁹² *Id.* at 8-9.

check on the government, which is of the utmost importance under the checking value and self-governance theories.⁸⁹³ The information here yielded apparent government ineptitude.⁸⁹⁴ This information is especially important when one takes into account the historical follies of U.S. intelligence and WMDs:

[J]ust as President Bush and his aides were making the case in 2004 and 2005 that Iran was moving rapidly to develop nuclear weapons, the American intelligence community found itself unable to provide the evidence to back up the administration's public arguments. On the heels of the CIA's failure to provide accurate pre-war intelligence on Iraq's alleged weapons of mass destruction, the agency was once again clueless in the Middle East.⁸⁹⁵

Another journalist explained the leak, writing, "Such tales of incompetence coming after the fiasco over Iraq's weapons of mass destruction, will raise fresh doubts about the accuracy of Western intelligence reports that claim Iran is bent on building nuclear weapons."⁸⁹⁶ Obviously then this type of information would qualify under the self-governance theory as information deserving of protection as this information would inform the citizenry as to the actions of its government and allow it to react accordingly.⁸⁹⁷

Because the information also discloses incompetence on the part of government officials, the information would also be deserving of near full protection under the checking value theory, assuming that its disclosure would outweigh the detriments attached to the disclosure.⁸⁹⁸

Similarly, it would also deserve a good deal of weight under the liberty theory's fourth estate theory, which like the checking value theory, is also focused on preventing government abuses and holds the across-the-board position that any government interference with the press

⁸⁹³ Compare note 14 with note 23.

⁸⁹⁴ See *supra* note 18 and 892 and accompanying text.

⁸⁹⁵ James Risen, *George Bush insists that Iran must not be allowed to develop nuclear weapons. So why, six years ago, did the CIA give the Iranians blueprints to build a bomb?*, THE GUARDIAN (Jan. 4, 2006), <http://www.guardian.co.uk/environment/2006/jan/05/energy.g2>; see also

⁸⁹⁶ Anton La Guardia Diplomatic & Alec Russell, *CIA bungling 'may have put nuclear weapons into Iranian hands'*, THE DAILY TELEGRAPH, Jan. 5, 2006, at 19.

⁸⁹⁷ See *supra* notes 199-210 and accompanying text.

⁸⁹⁸ See Blasi, *supra* note 180, at 559.

necessarily inhibits the press's ability to watch the government.⁸⁹⁹ All of these interests can be captured by one scholar's explanation of the value of national security speech:

National security information generally can be extremely high value speech, and its disclosure to the public often promotes a deliberative democracy. Furthermore, to permit the government to restrict any speech that involves national security would give the government too much power to hide its actions from public scrutiny. As the Fourth Circuit has said, "[h]istory teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions."⁹⁰⁰

The Operation Merlin disclosure also contributes to the marketplace of ideas in several ways. First, it increased the amount of information in the public sphere.⁹⁰¹ Second, more importantly, it introduced a different narrative into the public sphere that was not being heard prior.⁹⁰² The marketplace of ideas theory is based, in part, on the idea that information is a benefit to society, because it requires the continual testing of what the public knows and how strongly it believes what it knows is an accurate depiction of the state of things in the world.⁹⁰³ Not only was the information disclosed by the source in Operation Merlin a different narrative but it also ran up against the official narrative, making it especially valuable under the marketplace of ideas competition paradigm.

On the other side of the equation is the government's asserted interest in nondisclosure. According to the government, the disclosure of the information in Risen's book "could cause exceptionally grave damage to national security."⁹⁰⁴ The government, however, did not produce

⁸⁹⁹ See *supra* notes 393-398 and accompanying text.

⁹⁰⁰ Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 278 (2008).

⁹⁰¹ See *supra* notes 260-270.

⁹⁰² This proposition cannot be contested as the information was classified and undisclosed at the time Risen disclosed it.

⁹⁰³ See *supra* note 288.

⁹⁰⁴ Brief for Petitioner at 10, *U.S. v. Sterling*, No. 11-5028 (4th Cir. Jan. 13, 2012).

any evidence that such “grave damage” has, in fact, occurred.⁹⁰⁵ This may be unsurprising, as, in the past, “government officials have exaggerated the damage to national security caused by the publication of national security secrets.”⁹⁰⁶ Where no actual damage has occurred or where the only asserted damage is the leak itself, the government’s interest is, if anything, limited to the enforcement of criminal law relating to the leak itself.⁹⁰⁷ Moreover, according to the district court, the information that the government sought was merely cumulative; as the district court explained, “[T]he government already had strong evidence against Sterling and . . . Risen’s testimony would simply amount to the icing on the cake.”⁹⁰⁸

Weighing the interests at stake, without any actual showing of damage caused to U.S. interests and taking into account the importance of information to the public, it would seem that the First Amendment scale would tip in favor of Risen. This is not to dismiss the interests in the government in this case, but rather to recognize that where the government’s interest is limited to prosecuting the leaker himself, the leak has not caused actual harm to national security, and the evidence the government seeks from the reporter in the leaker’s case is cumulative, its interest is not compelling. That relatively weak interest cannot outweigh the important value of the speech

⁹⁰⁵ Cf. *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (finding against the government despite its conclusory assertion of a national security interest).

⁹⁰⁶ See Freivogel, *supra* note 597, at 112.

⁹⁰⁷ See Langley & Levine, *supra* note 408, at 48 n.197 (“It is submitted, however, that at least in the context of news reports about the government and its operations, the government’s own interest in law enforcement does not constitute a compelling justification for subordinating the First Amendment values at stake.” (citing *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 10-13 (1986) (finding that law enforcement interests alone was not cause alone to close the courtroom); see also *Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) (“The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.”); *In re Petroleum Products Antitrust Litigation*, 680 F.2d 5, 8 (2d Cir. 1982); (“The necessity for confidentiality, essential to fulfillment of the pivotal function of reporters to collect information for public dissemination, cannot be overcome simply by suggesting – with no basis to support the assertion – that the reporter may unknowingly have been used by those sources in their illegal activities.”)).

⁹⁰⁸ June 28 Mem. Op., *supra* note 13, at 9 (internal quotation marks omitted).

at issue.⁹⁰⁹ Indeed, when the interests are so unbalanced, it is appropriate to find in favor of the First Amendment; as Justice Black said in the *Pentagon Papers* case, “The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁹¹⁰

Limitations and Future Research

There are numerous limitations in this thesis. As an initial matter, it lumped all types of reporter’s privilege cases into a same category. It did not distinguish between reporter’s privileges asserted in the cases of subpoenas for work product or for the identities of sources. Moreover, it collected both civil and criminal cases, which arguably amounts to comparing apples and oranges. Both of these limitations, however, were purposeful ones. To date, there had been no omnibus study looking at how all courts of appeals’ decisions attempted to deal with *Branzburg* in whatever context. Moreover, because the underlying rationale – the First Amendment – is called into question whether the cases are civil or criminal or seeking work product or source identities, there is no apparent reason why such cases should not be considered together.

Perhaps the most damning limitation of this thesis is the lack of data gathered on the use of the reporter’s privilege in the district courts. This thesis did not collect such data. Although numerous reporter’s privilege cases are decided at the district court level, the sheer amount of such data rendered it outside of the scope of this thesis. It should be noted that these opinions are less important as they do not carry binding weight.⁹¹¹

⁹⁰⁹ On the other hand, if, for example, the government demonstrated that some harm occurred from the publication of Risen’s book – like compromising a covert agent, then, of course, the balance would be much closer and would likely tip in favor of the government. This is not that case, however.

⁹¹⁰ See *New York Times Co. v. U.S.*, 403 U.S. 713, 719 (1971) (Black, J., concurring).

⁹¹¹ See, e.g., *U.S. v. Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 572 (7th Cir. 1987).

This thesis attempted to show the contradictions among and within the courts of appeals when it comes to determining what exactly *Branzburg* means. As explained in the Results and in the case summaries in Appendix D, the contradictions are many. The contradictions stem from *Branzburg* itself. This thesis attempted to move the discussion beyond *Branzburg* by dispelling *Branzburg*'s logic and illustrating that subsequent case law has redefined when the First Amendment is implicated. Future research should continue on this path of independence from *Branzburg*. A first step to doing so may be a study of reporter's privilege cases at the district court level. A second step may be defining, with greater precision, the exact point at which indirect interference becomes direct interference with speech. A third step may be a more thorough analysis of how First Amendment theories inform what exactly the word "newsworthy" means.

Alternatively, future research could take a few different approaches. For example, it may be illuminating to view reporter's privilege jurisprudence from a political perspective. Is a reporter's privilege more likely to be found when Republican or Democratic appointees are sitting? A majority of states have passed reporter's shield laws since *Branzburg* was decided. By comparing those statutes with federal case law, some interrelationships between the two may help to explain the privilege from a policy perspective.

Summing Up

This chapter began by acknowledging and discarding as untenable the courts of appeals' approaches to distinguishing *Branzburg*. These approaches were discarded because they ignored certain portions of the *Branzburg* opinion itself or incorrectly described *Branzburg* as only a plurality opinion. It also explained, perhaps as a result of these less-than-neat attempts to get around *Branzburg*, that the case law even within courts of appeals is contradictory. Finally, it

found that once a privilege is established, courts of appeals do not attempt to appeal to First Amendment interests, and, instead, place only procedural hurdles in front of the party wishing to subpoena the reporter. Thus, whether the information is important does not enter into a court's analysis aimed at deciding whether a privilege is overcome. It concludes that this status quo is both untenable and confusing. As a result, it argues that past scholarship finding this climate advantageous to journalists was too optimistic. As such, it argues that a new approach should be developed.

Conscientious of not suggesting fixes based on rationales that the Supreme Court rejected in *Branzburg*, the chapter argues for the natural progression of a strain of newsgathering liability cases to capture instances where journalists are served subpoenas. It does so by first explaining that the Court's approach in *Branzburg* (that a law of general applicability that only indirectly weighs on speech does not implicate the First Amendment) is fundamentally flawed as a result of inconsistent and contradictory application of the principle. In search of a new rule, it then asserts that a subpoena issued against a journalist as a result of a journalist's publication is an action adverse to speech that triggers at least some degree of First Amendment protection under the Court's jurisprudence subsequent to *Branzburg*.

Having found that the First Amendment is implicated under the Court's jurisprudence, it was next argued that, unlike the courts of appeals' current approach to balancing interests with a procedural hurdle, courts should undertake a true balancing that compares competing interests. That is, courts should identify the information that the reporter published and, using First Amendment theory, weigh the importance of that information by asking whether it fulfilled values of various First Amendment theories. That result should then be weighed against the countervailing interests.

In the case of *Risen*, it concluded that the lack of an actual harm and the cumulative nature of the information sought were outweighed by the value of the information at stake. That information, which is about government officials and their actions, is valued by all of the theories. Indeed, it lies at the center of at least three theories – and arguably four. As a result of the imbalance in favor of the First Amendment, it was suggested that the subpoena should be quashed.

CHAPTER 8. CONCLUSION

Outside the grand jury context, *Branzburg* has done little to inform a discussion of the reporter's privilege and has become the Court's Gordian Knot.⁹¹² Courts of appeals have been unable to consistently explain *Branzburg* or describe its influence outside of the grand jury context. Even those in agreement that a reporter's privilege does exist under *Branzburg* cannot agree on the rationale for that conclusion. Exacerbating these problems is academia's proclivity for attempting to (mis)construe what *Branzburg* said or put forward, just in different words, arguments that *Branzburg* rejected. This quagmire, although viewed by some to be a good thing, is untenable in the long run, and, therefore, must be confronted head on.

As such, this thesis has taken a different approach than most prior scholarship. It has argued that decisions subsequent to *Branzburg* fundamentally changed the formula for deciding *when* First Amendment interests are implicated. More specifically, it has asserted that where the government or a private party targets speech as a result of the speech itself and burdens that speech, the First Amendment is implicated; whether speech is targeted is determined not by the strength of the attack on the speech, but rather ask only whether the government or a private party's actions targeted a journalist's speech because of the speech itself. For example, if the government subpoenas a reporter for information after the publication of certain information, that action alone triggers the First Amendment because the government has acted *because of* the speech itself.

Once the First Amendment has been triggered, First Amendment interests must be calibrated to determine the strength of the reporter's privilege to keep information confidential.

⁹¹² Cf. As one former Supreme Court clerk said in another similarly split First Amendment Case, "Fragmentation and division are one thing in constitutional jurisprudence; hopeless splintering [among the members of the Court] is quite another, and creates consequence ranging from uncertainty to chaos." Robert M. O'Neil, *A Tale of Two Greenmoss Builders*, 88 WASH. L. REV. 125, 126 (2013).

In cases where the information lies at the core of the First Amendment, the reporter's privilege should be at its pinnacle. On the other hand, if the information was published only for publication's sake or has little informative value, the First Amendment interests in the information become substantially weaker.

There is little doubt that the solution offered here is not a perfect one. Indeed, it requires courts to judge whether some disclosure of information was "newsworthy enough" to deserve strong First Amendment protection. This approach will likely lead to varying results based on what some judges view to be newsworthy and what some judges do not view as newsworthy. In other instances, however, judges already assess the "newsworthiness" of a situation.⁹¹³ And, in any event, any inconsistency stemming from this approach will occur because of the individual factual circumstances of different cases and not because courts cannot even agree on the legal question of whether a reporter's privilege exists in the first place. This type of variation is much less problematic than the current divergence among courts that results from their inability to agree about the legal question itself.

There is no point to wringing *Branzburg* for another drop of questionable support for a reporter's privilege. Instead, courts should recognize that the Supreme Court's subsequent case law has, over four decades, fundamentally eroded the basis of the *Branzburg* decision that "these [reporter's privilege] cases involve no intrusions upon speech."⁹¹⁴ Once that is recognized, the real endeavor – the application of the First Amendment to the facts of each case – can finally be undertaken with solicitude for the values underlying the First Amendment – a solicitude that is achieved by first identifying the information at stake and then asking whether that information is

⁹¹³ See, e.g., *Lluberes v. Uncommon Productions, LLC*, 663 F.3d 6, 13 (1st Cir. 2011); *Silvester v. Am. Broad. Companies, Inc.*, 839 F.2d 1491, 1495 (11th Cir. 1988); *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287, 1296-97 (D.C. Cir. 1980) (discussing newsworthiness in the context of deciding whether a person is a limited purpose public figure).

⁹¹⁴ See *Branzburg v. Hayes*, 408 U.S. 665, 681 (1972).

important information vis-à-vis the value underlying widely accepted First Amendment theory. Once that judgment is made, the First Amendment interests must be weighed against the countervailing interests to determine which should prevail. This should be the job of the courts in the coming years.

APPENDIX A

First Circuit

In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004).
Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998).
U.S. v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988).
Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).

Second Circuit

U.S. v. Treacy, 639 F.3d 32 (2d Cir. 2011).
Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011).
The New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).
U.S. v. Sanders, 211 F.3d 711 (2d Cir. 2000).
Gonzales v. National Broadcasting Co., Inc., 194 F.3d 29 (2d Cir. 1999).
von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987).
U.S. v. Burke, 700 F.2d 70 (2d Cir. 1983).
In re Petroleum Products Antitrust Litigation, 680 F.2d 5 (2d Cir. 1982).
Baker v. F and F Inv., 470 F.2d 778 (2d Cir. 1972).

Third Circuit

Fox v. Township of Jackson, 64 Fed.Appx. 338 (3d Cir. 2003).
In re Madden, 151 F.3d 125 (3d Cir. 1998).
Smith v. BIC Corp., 869 F.2d 194 (3d Cir. 1989).
In re Grand Jury Matter, Gronowicz, 764 F.2d 983 (3d Cir. 1985).
U.S. v. Criden, 633 F.2d 346 (3d Cir. 1980).
U.S. v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).
Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979).

Fourth Circuit

Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000).
Church of Scientology Intern. v. Daniels, 992 F.2d 1329 (4th Cir. 1993).
In re Shain, 978 F.2d 850 (4th Cir. 1992).
LaRouche v. National Broadcasting Co., Inc., 780 F.2d 1134 (4th Cir. 1986).
U.S. v. Steelhammer, 561 F.2d 539 (4th Cir. 1977).

Fifth Circuit

U.S. v. Smith, 135 F.3d 963 (5th Cir. 1998).
In re Selcraig, 705 F.2d 789 (5th Cir. 1983).
Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

Sixth Circuit

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

Seventh Circuit

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

Eighth Circuit

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

Ninth Circuit

In re Grand Jury Subpoena, 201 Fed.Appx. 430 (9th Cir. 2006).

Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995).

U.S. v. Pretzinger, 542 F.2d 517 (9th Cir. 1976).

Tenth Circuit

Donohue v. Hoey, 109 Fed.Appx. 340 (10th Cir. 2004).

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

Eleventh Circuit

Price v. Time, Inc., 416 F.3d 1327 (11th Cir. 2005).

U.S. v. Caporale, 806 F.2d 1487 (11th Cir. 1986).

D.C. Circuit

Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005).

U.S. v. Ahn, 231 F.3d 26 (D.C. Cir. 2000).

Clyburn v. N9ews World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990).

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

Reporters Committee for Freedom of Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

APPENDIX B

First Circuit

In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004).
Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998).
U.S. v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988).
Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980).

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U.S. v. Burke, 700 F.2d 70 (2d Cir. 1983).
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In re Grand Jury Subpoena, 201 Fed.Appx. 430 (9th Cir. 2006).

Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995).

In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993).*

U.S. v. Pretzinger, 542 F.2d 517 (9th Cir. 1976).

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975).*

Tenth Circuit

Donohue v. Hoey, 109 Fed.Appx. 340 (10th Cir. 2004).

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

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Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005).

U.S. v. Ahn, 231 F.3d 26 (D.C. Cir. 2000).

Clyburn v. News World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990).

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

Reporters Committee for Freedom of Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).*

* Denotes cases that were not included in first search.

APPENDIX C

First Circuit

In re Request, 685 F.3d 1 (1st Cir. 2012).^{*}
In re Special Proceedings, 373 F.3d 37 (1st Cir. 2004).
Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998).
U.S. v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988).
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Gonzales v. National Broadcasting Co., Inc., 194 F.3d 29 (2d Cir. 1999).
U.S. v. Cutler, 6 F.3d 67 (2d Cir. 1993).^{*}
von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987).
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LaRouche v. National Broadcasting Co., Inc., 780 F.2d 1134 (4th Cir. 1986).
U.S. v. Steelhammer, 561 F.2d 539 (4th Cir. 1977).
U.S. v. Steelhammer, 539 F.2d 373 (4th Cir. 1976).^{*}

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In re Selcraig, 705 F.2d 789 (5th Cir. 1983).
Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

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In re Grand Jury Subpoena, 201 Fed.Appx. 430 (9th Cir. 2006).

Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995).

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).*

In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993).

U.S. v. Pretzinger, 542 F.2d 517 (9th Cir. 1976).

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975).

Lewis v. U.S., 517 F.2d 236 (9th Cir. 1975).*

Lewis v. U.S., 501 F.2d 418 (9th Cir. 1974).*

Tenth Circuit

Donohue v. Hoey, 109 Fed.Appx. 340 (10th Cir. 2004).

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

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Clyburn v. News World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990).

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

Reporters Committee for Freedom of Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).

* Denotes cases that were not included in first or second search.

APPENDIX D

First Circuit Case Summaries

Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583 (1st Cir. 1980)

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Interlocutory appeal.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identities.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Remand.

The Boston Globe published an article about a well-to-do boat manufacturer. In the article, the Globe stated that there were “some thirteen defects observed in one or more of the five named boats built by the company.” After a series of articles, the Globe’s ombudsman wrote an article explaining that the subject was “news” and was also “fairly written, but noting matters that had come to light that were more favorable to the company and concluding that definitive answers were yet to be awaited.”

During discovery, the Globe produced “some 1500 pages in 66 file folders” about the report, but withheld “the names of and some information from three sources who were said to have given information in the expectation that their identity would be kept in confidence.”

The lower court “relied on *Garland v. Torre* and adopted its prudential guidelines predicated disclosure of a confidential source on criticality of the information sought to plaintiff’s claim, non-availability of the information from other sources, and non-frivolousness of plaintiff’s cause of action.” Under these factors, the court required the reporter to identify the three remaining unnamed sources.

First, the court found that there was not enough evidence to find that the boat manufacturer was a public figure under *New York Times v. Sullivan*.

Moving onto the confidentiality issue, the court first noted that the confidential sources were just a few sources among many. Next, the court explained that “[n]o specific reasons for the basis of the confidentiality claim shielding these two sources appear[ed] in the record.”

The Globe framed its argument as such:

The Globe asserts a conditional privilege on its part to refuse to disclose a reporter’s confidential source until the party seeking disclosure establishes generally that the public interest in disclosure is compelling enough to override the disruption or threat to the continued free flow of information to the media by

showing specifically that (1) the information sought is critical to plaintiff's claim and (2) the information is not available from other sources.

Turning to its analysis, the court first explicitly emphasized that the Supreme Court in *Branzburg v. Hayes* left open whether a reporter's privilege existed in a defamation case where the plaintiff was a private figure. As the court framed *Branzburg*, it only "denied such a privilege to a reporter called as a grand jury witness in a criminal investigation." The importance of the grand jury militated against a privilege in that instance.

Addressing the Court's opinion in *Hebert v. Lando*, the Court explained that "the Court noted the substantial burden upon a public figure to prove 'the ingredients of malice' with 'convincing clarity.'" Thus, the Court allowed the plaintiff to pry into the editorial process.

Distinguishing both of these cases, the court explained, "[D]espite this refusal to give doctrinal recognition to any automatic, categorical, across-the-board privileges, in neither case did the Court suggest the opposite, that the interests underlying the asserted privileges were a priori and by definition beyond the pale of any protection."

The court relied heavily on Justice Powell's opinions both in *Hebert* and in *Branzburg* to conclude that "in both cases the First Amendment concerns articulated by the parties asserting privileges were in fact taken into consideration." It was only "in the contexts of those cases" that the Court found those concerns outweighed by countervailing considerations. The court then curiously explained:

Whether or not the process of taking First Amendment concerns into consideration can be said to represent recognition by the Court of a "conditional", or "limited" privilege is, we think, largely a question of semantics. The important point for purposes of the present appeal is that courts faced with enforcing requests for the discovery of materials used in the preparation of journalistic reports should be aware of the possibility that the unlimited or unthinking allowance of such requests will impinge upon First Amendment rights.

According to the court, the interests were self-governance ones. Quoting Alexander Bickel, the court noted, "The issue is the public's right to know. That right is the reporter's by virtue of the proxy which the freedom of the press clause of the First Amendment gives to the press on behalf of the public." The court also quoted Justice Powell, who explained that the Court's opinions "reflect[] a concern for the important public interest in a free flow of news and commentary."

The court then adopted the rule that "[i]n determining what, if any, limits should accordingly be placed upon the granting of such requests, courts must balance the potential harm to the free flow of information that might result against the asserted need for the requested information." The court explained that it was justified in this view, because "[T]he [Supreme] Court is, if anything, more hospitable to this approach than ever The Court's [*Richmond Newspapers, Inc. v. Virginia*] reference to a 'right to gather information' that 'without some protection for seeking out the news, freedom of the press could be eviscerated' seems

inescapably to point to the kind of constitutionally sensitized balancing process stressed by Mr. Justice Powell in both *Branzburg* and *Herbert*.”

In the court’s opinion, then, it was its duty to apply its normal discovery rules “with a heightened sensitivity to any First Amendment implication that might result from the compelled disclosure of sources.” Under this modified discovery, “The plaintiff must establish relevance of the desired information and the defendant has the burden of establishing need for preserving confidentiality.”

The court then attended to several pertinent elements. It concluded that the current claim was not frivolous and further concluded that “the desired information appears more than remotely relevant.” As such, the court was left to address “the extent to which there [was] a need for confidentiality.” According to the court, “Not all information as to sources is equally deserving of confidentiality.” That is, some assertions of privilege may be somewhat offhand, while others “may specifically condition use on the according of [confidentiality].” Because the record was incomplete, the court ordered a remand:

If the claimed confidentiality seems unsupported, unlikely, or speculative, the court may order discovery. If it is in doubt, it may defer resolution of the confidentiality issue and turn to the relevance issue. It may, for example, conduct an in camera inspection of reporters’ notes. If such notes did not create an inference of negligence or suggest leads for developing such evidence, it could refuse disclosure. The court might also conclude that disclosure of the sources’ names would be most unlikely to lead to relevant evidence.

The court continued:

While obviously the discretion of the trial judge has wide scope, it is a discretion informed by an awareness of First Amendment values and the precedential effect which decision in any one case would be likely to have. Given the sensitivity of inquiry in this delicate area, detailed findings of fact and explanation of the decision would be appropriate.

Finally, it concluded that each case required a case-by-case analysis:

It is difficult ... to accept that a reporter’s First Amendment protection should be tailored to the whim, to the irrational anxiety, the arbitrary edict, the ideological fixation of one or another news source; difficult to accept such a veto over the reporter in the pursuit of his profession, or the government in the discharge of its responsibility to administer justice.

U.S. v. LaRouche Campaign, 841 F.2d 1176 (1st Cir. 1988)

Type of Proceeding:	Criminal – Fraud and Conspiracy.
Stage of Proceeding:	Appeal from pretrial contempt ruling.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

Lyndon LaRouche was under investigation for mail and wire fraud. As a result of that trial, the district court ordered NBC to turn over the outtakes from a one-hour-and-forty minute interview at the behest of one of the defendants. NBC had only broadcast a minute of the interview.

First, the court found that even though the evidence was likely only going to be used to impeach a witness, the district court did not abuse its discretion by finding that the requested information was relevant.

Next, the court was cognizant of its prior statement that First Amendment concerns depended on the facts of each specific case. According to the court, “This is because disclosure of such confidential material would clearly jeopardize the ability of journalists and the media to gather information and, therefore, have a chilling effect on speech.”

Turning to the facts of this case, the court first stated that “the identification of First Amendment interests is a more elusive task” when “there is no confidential source or information at stake.” According to NBC, there were five separate concerns in this case:

[1] [D]isclosure of outtakes in this case will increase the chances of harassment of the interviewee-witness by the LaRouche organization[;] [2] “the threat of administrative and judicial intrusion” into the newsgathering and editorial process; [3] the disadvantage of a journalist appearing to be “an investigative arm of the judicial system” or a research tool of government or of a private party; [4] the disincentive to “compile and preserve nonbroadcast material”; [5] and the burden on journalists’ time and resources in responding to subpoenas.

The court rejected the first interest, because it believed that interest related to confidentiality, which was not promised in this case. Indeed, the interview subject did appear on TV, however briefly.

As to the other concerns, the court found that there was “some merit” to them. Indeed, it “discern[ed] a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled.” At the same time though, it did not believe that disclosure had yet become “routine.”

In fact, it emphasized, citing Justice Powell in *Branzburg v. Hayes*, that it “certainly . . . [did] not hold . . . that state and federal authorities are free to annex the news media as an investigative arm of the government.”

The court next considered the defendant’s interests: “At stake on the defendants’ side of the equation are their constitutional rights to a fair trial under the Fifth Amendment and to compulsory process and effective confrontation and cross-examination of adverse witnesses under the Sixth Amendment.” Citing *Branzburg*, the court concluded, “[n]o one or all of NBC’s asserted First Amendment interests can be said to outweigh these very considerable interests of the defendants.”

Although the court refused to overturn the lower court’s order to compel, it stated that its decision was limited:

Contrary to NBC’s argument, allowing the production for in camera inspection ordered by the district court does not foreshadow allowance of a subpoena in the ordinary run of cases. The factors narrowing our holding are that this is a criminal case; the materials sought concern a major witness who was closely connected with the defendants in activities that are the subject of their indictment; the witness is predictably—from his past testimony—hostile; and the material sought is an extensive interview likely to offer the basis for impeachment.

Cusumano v. Microsoft Corp., 162 F.3d 708 (1st Cir. 1998).

Type of Proceeding:	Civil – Rule 45.
Stage of Proceeding:	Appeal from trial verdict.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Work product.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Academic investigators.
Subpoena quashed?	Yes.

Microsoft was under investigation for anti-trust violations. In connection with that investigation, Microsoft made a “motion to compel production of research materials compiled by two academic investigators.” The district court denied its request.

As Microsoft was preparing for its anti-trust trial, it “learned about a forthcoming book . . . and obtained a copy of the manuscript.” The book investigated the “‘browser war’ waged between Microsoft and Netscape.” For the book, the investigators “interviewed over 40 current and former Netscape employees.”

Confidentiality was promised. First, the authors “signed a nondisclosure agreement with Netscape.” Second, the authors “requested and received permission from interview subjects to record their discussions, and, in return, promised that each interviewee would be shown any quotes attributed to him upon completion of the manuscript, so that he would have a chance . . . to object to quotations selected by the authors for publication.”

After receiving the subpoenas, the authors did provide some material. They did not, however, provide any of the “notes, tapes, or transcripts.” Nonetheless, the district court refused to compel the authors to produce the information.

On appeal, Microsoft asserted that “the district court underestimated its need for the subpoenaed information.” It also argued that it could not discover the information except through the authors. On the other hand, the authors argued that turning the information over “would endanger the values of academic freedom safeguarded by the First Amendment and jeopardize the future information-gathering activities of academic researchers.”

As an initial matter, the court addressed whether the authors’ status as academics as opposed to journalists changed the analysis. The court rejected this assertion out of hand. As “information gatherers,” the academics here were not that different from journalists – except in name. The court elaborated:

Whether the creator of the materials is a member of the media or of the academy, the courts will make a measure of protection available to him as long as he intended “at the inception of the newsgathering process” to use the fruits of his research “to disseminate information to the public.”

Moving on to the merits of the privilege, the court explained that “[c]ourts afford journalists a measure of protection from discovery initiatives in order not to undermine their ability to gather and disseminate information.” This was the case, because they “are the personification of a free press, and to withhold such protection would invite a ‘chilling effect on speech,’ . . . and thus destabilize the First Amendment.”

The court next explained, “[l]eaving confidential sources to one side,” it was unsettled whether the privilege extended to “information [that] cannot fairly be characterized as confidential.” It did, however, note that, it had previously explained that “a lurking and subtle threat to journalists and their employers if disclosure of outtakes, notes, and other unused information, even if nonconfidential, becomes routine and casually, if not cavalierly, compelled.” Despite this discussion, the court refused to decide the issue because it accepted the lower court’s finding that the information was confidential. It did nevertheless note that there were degrees of confidentiality where a high degree of confidentiality would require greater protection.

Having found the necessary prerequisites, the court again “decline[d] to spend [its] energies on semantics” and explained that courts should balance “a myriad of factors . . . uniquely drawn out of the factual circumstances of the particular case.” This occurs after the requesting party made a “prima facie showing . . . of need and relevance.”

Turning to the present case, the court found that Microsoft carried its prima facie showing. Turning to the author’s interests, the court found that the interests there were many:

Scholars studying management practices depend upon the voluntary revelations of industry insiders to develop the factual infrastructure upon which theoretical conclusions and practical predictions may rest. These insiders often lack enthusiasm for divulging their management styles and business strategies to academics, who may in turn reveal that information to the public. Yet, pathbreaking work in management science requires gathering data from those companies and individuals operating in the most highly competitive fields of industry, and it is in these cutting-edge areas that the respondents concentrate their efforts. Their time-tested interview protocol, including the execution of a nondisclosure agreement with the corporate entity being studied and the furnishing of personal assurances of confidentiality to the persons being interviewed, gives chary corporate executives a sense of security that greatly facilitates the achievement of agreements to cooperate. Thus, in the *Bruno & Stillman* taxonomy, the interviews are “carefully bargained-for” communications which deserve significant protection.

Weighing the interests, the court concluded that “allowing Microsoft to obtain the notes, tapes, and transcripts it covets would hamstring not only the respondents’ future research efforts but also those of other similarly situated scholars.” According to the court, this chilling effect was “of concern in and of itself.” More to the point, “compelling the disclosure of such research materials would infrigate the free flow of information to the public, thus denigrating a fundamental First Amendment value.”

The court concluded by noting that “concern for the unwanted burden thrust upon non-parties is a factor entitled to special weight in evaluating the balance of competing needs.”

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

Type of Proceeding:	Criminal – Mail and wire fraud and conspiracy to obstruct justice.
Stage of Proceeding:	Appeal from pretrial contempt ruling.
Party Requesting Subpoena:	Special Prosecutor.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

A grand jury was impaneled in a criminal case. In an effort “to safeguard the on-going grand jury investigation . . . and to avoid pretrial publicity that could prejudice the defendants’ right to a fair trial,” the court “entered a protective order prohibiting counsel . . . from disclosing the contents of audio and video surveillance tapes that had been made by law enforcement.” Only the court and the parties’ attorneys had access to the tapes.

Despite the order, a television reporter obtained one of the tapes and aired it. Thereafter, the district court gave a special prosecutor powers to investigate the leak. The prosecutor interviewed fourteen people and, believing that he had no other choice, “sought and received the issuance of a subpoena by the court requiring [the reporter] to appear for a deposition.” The reporter invoked his privilege upon questioning. The district court later charged the reporter with civil contempt and “gave him until noon the following day to purge himself of the contempt order by answering the questions posed by the special prosecutor, and ordered him to pay a sum of \$1,000 a day for each day thereafter until he complied.”

After discarding an unrelated argument, the court turned to the First Amendment argument. It began by explaining that “[i]n *Branzburg*, the Supreme Court flatly rejected any notion of a general-purpose reporter’s privilege for confidential sources, whether by virtue of the First Amendment or of a newly hewn common law privilege.” The court then explained that “Justice Powell, who wrote separately but joined in the majority opinion as the necessary fifth vote, also rejected any general-purpose privilege.”

According to the court, even though there was no grand jury here, *Branzburg* still applied. The court went on to explain, “What *Branzburg* left open was the prospect that in certain situations-e.g., a showing of bad faith purpose to harass-First Amendment protections might be invoked by the reporter.”

Turning to its past case law, the court summarized its cases as requiring “‘heightened sensitivity’ to First Amendment concerns and invite a ‘balancing’ of considerations (at least in situations distinct from *Branzburg*).” Nonetheless, the court rejected these cases’ applicability in this instance.

Therefore, it upheld the district court’s order.

In re Request, 685 F.3d 1 (1st Cir. 2012).

Type of Proceeding:	Criminal – Foreign criminal investigation.
Stage of Proceeding:	Appeal from dismissal.
Party Requesting Subpoena:	Commissioner.
Type of Information Sought:	Work product.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Researcher.
Subpoena quashed?	No.

Boston College (“BC”) was subpoenaed by an Assistant United States Attorney acting as a “commissioner.” The attorney was appointed to “effectuate a request from law enforcement authorities in the United Kingdom” under a U.S. statute and a treaty between the United States and the United Kingdom.

The attorney sought “oral history recordings and associated documentation from interviews BC researchers had conducted with two former members of the Irish Republican Army.” The college released the records relating to one of the two members because that member had died and, therefore, no longer had a “confidentiality interest[.]” The college made a motion to quash the second subpoena, however. Another “set of subpoenas issued [later] . . . sought any information related to the [death of an alleged British informer of the IRA] contained in any other interview materials held by BC.” The college made motions to quash this subpoena and the remaining first subpoena. The district court denied the college’s motions.

Thereafter, the researchers – apart from the college – filed an action in the district court to prevent the execution of the subpoenas. It is this separate action that the court’s opinion actually concerns. The district court dismissed the researchers’ case.

Turning to the researchers’ motions to quash, the court affirmed the district court’s dismissal of the researchers’ case. According to the court, it was “required to do [so] by *Branzburg v. Hayes*”: “Our analysis is controlled by *Branzburg*, which held that the fact that disclosure of the materials sought by a subpoena in criminal proceedings would result in the breaking of a promise of confidentiality by reporters is not by itself a legally cognizable First Amendment or common law injury.”

The court then noted that, in its view, *Cohen v. Cowles Media Co.*, *University of Pennsylvania v. EEOC*, and *Zurcher v. Stanford Daily* all affirmed the Court’s “basic principles” enunciated in *Branzburg*.

According to the court, *Branzburg* explained that “the strong interests in law enforcement precluded the creation of a special rule granting reporters a privilege [that] other citizens [did] not enjoy.”

The court distinguished between its past criminal cases where it upheld orders holding journalists in contempt, and its civil cases where it did not because “the government and public’s strong interest in investigation of crime was not an issue.”

The court further refused to find that the absence of a grand jury in this case could distinguish *Branzburg*. Instead, it looked to the law enforcement interest: “The law enforcement interest here—a criminal investigation by a foreign sovereign advanced through treaty obligations—is arguably even stronger than the government’s interest in *Branzburg* itself.”

Next, the court also rejected any suggestion that a chilling effect required a finding that the researchers should not be compelled to hand over the information sought, because “*Branzburg* took into account precisely this risk.”

Second Circuit Case Summaries

Baker v. F and F Inv., 470 F.2d 778 (2d Cir. 1972).

Type of Proceeding:	Civil – Denial of constitutional rights.
Stage of Proceeding:	Discovery.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Editor.
Subpoena quashed?	Yes.

A group of African Americans brought a lawsuit alleging “that defendants sold homes at excessive prices by engaging in racially discriminatory practices.” During discovery, the plaintiffs deposed the editor of the Columbia Journalism Review who had written an article about similar practices and also used a confidential source who was given a fake name. Unlike many reporters, “it was apparent that [the editor] was highly sympathetic to appellants’ cause and was anxious to cooperate.”

Although the editor offered to “verify” the information in his article, he refused to identify the source in his article and invoked his First Amendment right to “gather information.” Thereafter, the plaintiffs sought to compel him to testify. The district court denied the motion. The plaintiffs appealed.

Pointing to the recently decided opinion in *Branzburg v. Hayes*, the court began by explaining that “[a]lthough it is safe to conclude . . . that federal law does not recognize an absolute or conditional journalist’s testimonial ‘privilege’, neither does federal law require disclosure of confidential sources in each and every case, both civil and criminal, in which the issue is raised.”

Because *Branzburg* had not been decided when the question was at the district court, the district court judge relied on several state laws regarding privileges:

New York and Illinois State law, while not conclusive in an action of this kind, reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.

The court further explained that “[c]ompelled disclosure of confidential sources unquestionably threatens a journalist’s ability to secure information that is made available to him only on a confidential basis-and the district court so found.” As such, requiring a journalist to divulge his sources “undermines values which traditionally have been protected.”

And, of course, on the other side of the equation was the public's important interest in criminal justice. According to the court, this interest was not, however, determinative:

While we recognize that there are cases-few in number to be sure-where First Amendment rights must yield, we are still mindful of the preferred position which the First Amendment occupies in the pantheon of freedoms. Accordingly, though a journalist's right to protect confidential sources may not take precedence over that rare overriding and compelling interest, we are of the view that there are circumstances, at the very least in civil cases, in which the public interest in non-disclosure of a journalist's confidential sources outweighs the public and private interest in compelled testimony. The case before us is one where the First Amendment protection does not yield.

Moving to the plaintiffs' arguments, the court first found that neither *Garland v. Torre* nor *Branzburg v. Hayes* were controlling. *Garland* did not control because the information the source sought in this case was not shown to be "necessary, much less critical, to the maintenance of their civil rights action." *Branzburg*, according to the court, was "only of tangential relevance to this [civil] case." As far as the court could tell, "The [Supreme] Court in *Branzburg* . . . applied traditional First Amendment doctrine . . . and found . . . an overriding interest in the investigation of crime by the grand jury which '[secure[d]] the safety of the person and property of the citizen'" that outweighed the First Amendment rights. The court also emphasized Justice Powell's concurring opinion and found that "even in criminal proceedings" a court should weigh the interests. In sum, "the Court's concern with the integrity of the grand jury as an investigating arm of the criminal justice system distinguishes *Branzburg* from the case presently before us."

The court ended its affirmance with an appeal to the First Amendment's underlying values:

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.

In re Petroleum Products Antitrust Litigation, 680 F.2d 5 (2d Cir. 1982).

Type of Proceeding:	Civil – Antitrust.
Stage of Proceeding:	Appeal from contempt judgment.
Party Requesting Subpoena:	Several plaintiff states.
Type of Information Sought:	Source identities and work product.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Publishing company.
Subpoena quashed?	Yes.

Several states brought an antitrust action against several oil companies for allegedly conspiring “to fix the prices of refined oil products.” The states “[b]eliev[ed] that the conspiracy may have been facilitated by communications to and from trade publications, the States on May 1, 1980 caused a subpoena duces tecum to be served upon Platt’s Oilgram Price Service, a division of McGraw-Hill, Inc.” McGraw-Hill refused to produce the requested documents, arguing that it did not have to under the First Amendment. The district court ordered McGraw-Hill to comply with the subpoena, and McGraw-Hill appealed after being held in contempt.

The court began by noting that

[t]he law in this Circuit is clear that to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources, disclosure may be ordered only upon a clear and specific showing that the information is: [1] highly material and relevant, [2] necessary or critical to the maintenance of the claim, and [3] not obtainable from other available sources.

It also emphasized *Branzburg v. Hayes*’ narrow holding, citing Justice Powell’s concurrence, which, as the majority-making concurrence, was “particularly important in understanding the decision.” Specifically, the court cited Justice Powell explaining that “if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation . . . he will have access to the court on a motion to quash.”

Moving to the facts of this case, the court found that the confidential sources’ identities “bear[ed] at most a tenuous and speculative relationship to [the] antitrust claims.” Although the states argued that the companies communicated the prices by taking advantage of reporters, the court found that such a claim was not found in the states’ original pleading: “This critical omission is compounded by the complete failure of the States to present any evidence indicating that the involvement of [McGraw-Hill] in fact occurred.”

In reversing the lower court’s contempt motion, the court emphasized, “The necessity for confidentiality, essential to fulfillment of the pivotal function of reporters to collect information for public dissemination, cannot be overcome simply by suggesting-with no basis to support the assertion-that the reporter may unknowingly have been used by those sources in their illegal activities.”

The court also found it important that the states did not seek the information from alternative sources. Although “hundreds of depositions have already been taken, there is no indication that anyone was asked the simple question “Have you ever communicated pricing information to [McGraw-Hill publications]?”

Lastly, the court rejected the idea that the importance of antitrust laws automatically vitiate the privilege: “Although it is true that the Sherman Act represents Congress’s strong commitment to fostering a competitive marketplace, enactment of a statute cannot defeat a constitutional provision.”

U.S. v. Burke, 700 F.2d 70 (2d Cir. 1983).

Type of Proceeding:	Criminal – Racketeering.
Stage of Proceeding:	Post-trial appeal.
Party Requesting Subpoena:	Defendants.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Magazine company.
Subpoena quashed?	Yes.

A college basketball player agreed to fix games for money in connection with a scheme intended to maximize gambling earnings. After the scheme was tested and failed, the backers of the scheme sought to have more players involved to ensure the system would work. While the scheme worked for some time, the head of the scheme was eventually arrested on other charges and revealed the inner-workings of the exploit in exchange for leniency. Everyone involved was convicted.

On appeal from their convictions for their role in the point-shaving scheme, the defendants argued that *Sport Illustrated*, which published an article by one of the main organizers of the scheme and a reporter, should have been required to respond to its subpoena which sought “production of virtually every document and tape in the possession of SI that in any way related to the . . . article.” The district court had granted *Sports Illustrated*’s motion to quash as the defendants had an opportunity to question the main organizer on the stand. More specifically, “The court noted that the only important evidentiary purpose served by production of these documents, i.e., impeaching the credibility of [the main organizer], did not defeat [the *Sports Illustrated* reporter’s] First Amendment privilege.” This was the case, because the main organizer was already “thoroughly impeached at trial.”

Citing *Baker v. F & F Investment*, the court began by noting that the privilege in the civil context was “well settled”: “This demanding burden has been imposed by the courts to ‘reflect a paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters, an interest which has always been a principal concern of the First Amendment.’”

Then, the court importantly held that it did not view the criminal context any differently than it viewed the civil context with respect to the reporter’s privilege. “We see no legally-principled reason for drawing a distinction between civil and criminal cases when considering whether the reporter’s interest in confidentiality should yield to the moving party’s need for probative evidence.” Although the criminal defendant’s interests may be greater in a criminal case, that was not enough: “[T]he important social interests in the free flow of information that are protected by the reporter’s qualified privilege are particularly compelling in criminal cases. Reporters are to be encouraged to investigate and expose, free from unnecessary government intrusion, evidence of criminal wrongdoing.”

As the court had recognized previously without a written opinion, “[W]hat is required is a case by case evaluation and balancing of the legitimate competing interests of the newsman’s claim to First Amendment protection from forced disclosure of his confidential sources, as against the defendant’s claim to a fair trial which is guaranteed by the Sixth Amendment.”

Turning to those interests in this case, the court found that the “appellant ha[d] completely failed to make the clear and specific showing that these documents were necessary . . . to the maintenance of his defense.” This was especially the case where the main purpose of the documents – impeachment – had already been achieved.

von Bulow by Auersperg v. von Bulow, 811 F.2d 136 (2d Cir. 1987).

Type of Proceeding:	Civil – Racketeering, among other things.
Stage of Proceeding:	Appeal from contempt order.
Party Requesting Subpoena:	Plaintiffs.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Book author.
Subpoena quashed?	No.

The book author was an “intimate friend” of the patriarch of the von Bulow family. von Bulow was, at one time, tried for the murder of his wife multiple times, but was never convicted. As part of the suit by Martha von Bulow and her children, the plaintiffs here, the plaintiffs subpoenaed the author. They asked for the author “to testify and to produce certain documents at her deposition.” Included in those documents was “‘any book being written’ about the von Bulow matter.”

The author did turn over to the court several documents and notes. She refused, however, to turn over her draft of her book. The district court held a show cause hearing to discuss whether the author should be held in contempt. The author argued that she was protected by “the journalist’s privilege along with ‘any other privilege that exists under the sun.’” To bolster her claim, she produced several press passes and “asserted that she ‘was acting as a writer’ for the German magazine Stern, that she had ‘drafted’ an article about von Bulow that had appeared in Stern, and that she had supplied a German editor with a ‘long’ article on von Bulow.”

Noting the misrepresentations of her claims – some of which were not true – the district court found that the author was not actually “involved actively in the gathering and dissemination of news.” Nonetheless, the court did negotiate a “confidentiality order” to protect the author’s interest in the unpublished manuscript. When the author still did not produce the manuscript, it held the author in contempt.

Turning to the law, the court, as usual, emphasized that “testimonial exclusionary privileges are not favored.” With that understanding, it framed the question as “whether one who gathers information initially for a purpose other than traditional journalistic endeavors and who later decides to author a book using such information may then invoke the First Amendment to shield the production of the information and the manuscript.”

Beginning its analysis, the court reiterated its previously created test:

First, the process of newsgathering is a protected right under the First Amendment, albeit a qualified one. This qualified right, which results in the journalist’s privilege, emanates from the strong public policy supporting the unfettered communication of information by the journalist to the public. Second, whether a person is a journalist, and thus protected by the privilege, must be determined by the person’s intent at the inception of the information-gathering

process. Third, an individual successfully may assert the journalist's privilege if he is involved in activities traditionally associated with the gathering and dissemination of news, even though he may not ordinarily be a member of the institutionalized press. Fourth, the relationship between the journalist and his source may be confidential or nonconfidential for purposes of the privilege. Fifth, unpublished resource material likewise may be protected.

Next, the court briefly discussed *Branzburg v. Hayes*, explaining that the Supreme Court "held that a journalist does not have an absolute privilege under the First Amendment to refuse to appear and testify before a grand jury to answer questions relevant to an investigation into the commission of crime." Despite this, the court was quick to add that "a qualified privilege may be proper in some circumstances because newsgathering was not without First Amendment protection."

Moving to its own case law, it interpreted *Baker v. F & F Investment* to hold "that the public interest in non-disclosure of a journalist's confidential sources outweighed the public and private interest in compelled testimony." The court so held because of the concern for the free flow of information gathered during investigative reporting.

Based on this, the court explained that "[t]his rationale suggests that the critical question in determining if a person falls within the class of persons protected by the journalist's privilege is whether the person, at the inception of the investigatory process, had the intent to disseminate to the public the information obtained through the investigation." Indeed, "[a] person who gathers information for personal reasons, unrelated to dissemination of information to the public, will not be deterred from undertaking his search simply by rules which permit discovery of that information in a later civil proceeding." Simply, the rationale of *Baker* required that the person invoking the privilege intended to engage in newsgathering from the outset.

The court next reviewed several cases from other circuits and the New York shield law, which it found all supported the proposition that "the individual claiming the privilege must demonstrate, through competent evidence, the intent to use material-sought, gathered or received-to disseminate information to the public and that such intent existed at the inception of the newsgathering process."

Thus, what was important, the court thought, was the function that the person claiming the privilege was serving; "[t]he intended manner of dissemination may be by newspaper, magazine, book, public or private broadcast medium, handbill or the like, for '[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.'"

Turning to the facts of this case, the court did not find the investigative reports possessed by the author were privileged because she admitted that they were not compiled in the first instance for reportage. The same could be said for the notes sought.

As to the manuscript, the court also found it discoverable because the book was simply the author's memories about the von Bulow affair. Because none of the information in the

manuscript was not public information, the court found that the later attempt to protect those memories from being divulged by placing them in book form was futile. Despite the assertions from the author that some confidential sources were used in that manuscript, the court did not believe that she presented enough evidence to prove the point. The court concluded, “Since [the author] gathered information initially for purposes other than to disseminate information to the public, we decline to serve as a judicial seamstress to alter the protective cloak of the First Amendment in order that it fit her now.”

United States v. Cutler, 6 F.3d 67 (2d Cir. 1993).

Type of Proceeding:	Criminal – Contempt.
Stage of Proceeding:	Appeal from contempt order.
Party Requesting Subpoena:	Plaintiff and defendant.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished and published.
Type of Person Subpoenaed:	Reporters and broadcasters.
Subpoena quashed?	No.

A lawyer violated a court order that prohibited the dissemination of information to the media when that information concerned pending criminal cases, if the information could compromise the trial. When a lawyer violated this order, the judge appointed a special prosecutor to investigate. As part of that investigation, both the government and the defendant issued subpoenas to the media parties who interviewed the defendant. After receiving the subpoenas, the reporters and broadcasters made a motion to quash the subpoenas, asserting their First Amendment rights. The trial judge agreed to limit the subpoenas but refused to quash the subpoenas in their entirety. The reporters still refused to comply and were held in contempt.

The court began by reviewing its “guiding precedent[,]” *United States v. Burke*. In that case, the court had quashed a subpoena in a criminal matter. Turning to *Branzburg v. Hayes*, the court noted that it only made “indirect” reference to that case in *Burke*. It also found that *Branzburg* “explicitly declined to create a reporter’s privilege ‘by interpreting the First Amendment to grant newsmen a testimonial privilege that other citizens do not enjoy.’” On the other hand, the court did note that Justice Powell’s opinion seemed to add a gloss to the majority:

Justice Powell concurred in the majority opinion, but also wrote a separate concurring opinion in which he emphasized that reporters would have judicial protection against grand jury investigations that were “not being conducted in good faith,” sought “information bearing only a remote and tenuous relationship to the subject of the investigation,” or called for the disclosure of “confidential source relationships without a legitimate need of law enforcement.”

The court went on to explain that “[w]hatever the doctrinal considerations, we must certainly follow *Branzburg* when fact patterns parallel to *Branzburg* are presented for our decision.” That was this case because the reporter in *Branzburg* had refused to testify as to the criminal conduct that he witnessed, just as the reporters were doing here. Therefore, *Branzburg* required that the reporters testify.

Moreover, the information was also being sought by the source himself: “Cutler is clearly entitled to examine the Reporters regarding the context, background, and content of those statements, and to scrutinize their relevant unpublished notes . . . , as well as the Outtakes in the possession of the TV Stations, to defend against the charge that his statements were criminally contemptuous.” Indeed, where the source himself wants the information revealed, the privilege is relatively weak.

Gonzales v. National Broadcasting Co., Inc., 194 F.3d 29 (2d Cir. 1999).

Type of Proceeding:	Civil – Denial of constitutional rights.
Stage of Proceeding:	Appeal from contempt order.
Party Requesting Subpoena:	Plaintiffs.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Broadcaster.
Subpoena quashed?	No.

The plaintiff brought a civil suit against the Louisiana Deputy Sheriff for a violation of his Fourth Amendment rights. Relatedly, NBC investigated and aired a broadcast about abuses within Louisiana police departments. As part of the investigation, NBC outfitted a car with video cameras and travelled Louisiana in hopes that the police would pull the car over. The car was eventually pulled over despite the reporters not violating the law; “[t]he actual video images broadcast in the report, however, showed only a few brief clips of the car in motion, as well as footage of [the officer] pulling over the vehicle and examining the currency compartment of a passenger’s wallet.” The officer in the video was the same officer who pulled over the plaintiff.

As part of his lawsuit, Gonzales subpoenaed NBC asking for “the original, unedited camera footage” from the broadcast. The officer also served NBC with a subpoena. NBC refused to comply with the subpoenas, asserting its privilege. When NBC refused to comply after the district court granted the motions to compel, it was held in contempt.

The court began by reviewing its precedent in *Baker v. F & F Investment*. There, the court explained that the court recognized a privilege “grounded . . . in a broader concern for the potential harm to the ‘paramount public interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.’” It characterized a subsequent case, *In re Petroleum Products*, as reinforcing the idea that a reporter’s privilege was necessary “to protect the important interests of reporters and the public in preserving the confidentiality of journalists’ sources, disclosure may be ordered only.”

Although the court’s prior cases had focused on confidential information, the court also recognized that “subsequent decisions of this court have repeatedly stated that the privilege also extends to nonconfidential materials, and have enforced the privilege in that context.” Citing *United States v. Burke*, the court noted, “It was clear that the privileged materials included (and indeed may have consisted entirely of) information not received by the publisher in confidence, as the ‘source’ of the information was the author of the article.”

After summarizing these cases and others, the court concluded that it had never “expressed in detail the reasons for applying the journalists’ privilege to nonconfidential materials.” These cases did, however, “impl[y] that there were also broader concerns undergirding the qualified privilege for journalists.” These concerns included “the ‘pivotal function of reporters to collect information for public dissemination’ and the ‘paramount public

interest in the maintenance of a vigorous, aggressive and independent press capable of participating in robust, unfettered debate over controversial matters.’”

The court found the protection of even nonconfidential information important:

If the parties to any lawsuit were free to subpoena the press at will, it would likely become standard operating procedure for those litigating against an entity that had been the subject of press attention to sift through press files in search of information supporting their claims. The resulting wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation. Incentives would also arise for press entities to clean out files containing potentially valuable information lest they incur substantial costs in the event of future subpoenas. And permitting litigants unrestricted, court-enforced access to journalistic resources would risk the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.

Nonetheless, the court still noted that the privilege for nonconfidential information was not as strong for the privilege for confidential information. As such, the court fashioned a narrower test for the protections of nonconfidential information:

Where a civil litigant seeks nonconfidential materials from a nonparty press entity, the litigant is entitled to the requested discovery notwithstanding a valid assertion of the journalists’ privilege if he can show that the materials at issue [1] are of likely relevance to a significant issue in the case, and [2] are not reasonably obtainable from other available sources.

In this case, the court found that both factors were met.

U.S. v. Sanders, 211 F.3d 711 (2d Cir. 2000).

Type of Proceeding:	Criminal – Conspiracy to remove aircraft parts.
Stage of Proceeding:	Appeal from district court verdict.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Book author.
Subpoena quashed?	No.

Two individuals, one with access to the collected debris from a plane crash, collaborated to have the individual remove some of the debris. The results of the other individual's investigation, including information he learned from the removed debris, ended up in a book. A newspaper noted that the book author, "through a confidential source, had obtained samples of residue from the wreckage."

A grand jury was convened. The United States "offered to enter into a non-prosecution agreement with [the book author] in exchange for the disclosure of his confidential source." He declined to name his source. Eventually the government discovered who the individual on the inside was and that individual agreed to testify against the book author – as well as the book author's wife, who was also implicated.

On appeal, the book author argued that the prosecution against him and his wife was vindictive and motivated by the book author's refusal to disclose his source. More specifically, the author argued that the court "should adopt a balancing test weighing 'the governmental interest served by prosecution' against 'the detrimental impact of permitting such a prosecution to be used as a means of coercing disclosure of a journalist's source.'"

The court refused to do so: "*Baker* [v. *F & F Investments*] (and its progeny) involved the power of a court to supervise its own compulsory discovery processes, whereas the case here involves the power of a prosecutor to decide when and on what terms to bring charges against a defendant." In this context, the court found "that no journalist's privilege is applicable."

Indeed, the court deferred to the prosecutor's discretion: "In our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion." Moreover, "the First Amendment erects no absolute bar against government attempts to coerce disclosure of a confidential news source, nor does it invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."

The court concluded, "[T]he defendants have not shown that the prosecution was leveled with actual vindictiveness To the contrary, the prosecution acted forthrightly in . . . offering [the defendants] immunity if they would identify the person . . . who violated a federal criminal statute"

The New York Times Co. v. Gonzales, 459 F.3d 160 (2d Cir. 2006).

Type of Proceeding:	Criminal – Disclosure of classified material.
Stage of Proceeding:	Appeal from grant of motion for declaratory judgment.
Party Requesting Subpoena:	Government.
Type of Information Sought:	Work product.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporters.
Subpoena quashed?	No.

Two *New York Times* reporters discovered that the government planned to search two organizations in connection with the 9/11 attacks. When the government found out that the *Times* reporters new of the impending searches, it convened a grand jury. As part of that grand jury, it sought the phone records of the reporters. The reporters refused, and the government threatened to obtain the records from third parties. As a result, the reporters sought a judgment from a district court. The district court held that the government defeated the reporter's privilege.

First, the court found that even though the telephone records it sought were possessed by a third party the reporters could assert the privilege. Next, it noted that the phone records did not simply reveal phone numbers, but rather were “a first step of an inquiry into the identity of the reporters’ source(s).” The court also explained that while the government only sought the identity of the sources in relation to the current story, the production of the phone records would nonetheless reveal “the reporters’ sources on matters not relevant to the investigation at hand.”

Turning to the legal analysis relating to the common law privilege, the court found that it was unnecessary to determine whether a privilege existed because even if it did, the privilege would be a qualified one that would be overcome in this case. In short, the court gave credence to the argument that “[t]he government has a compelling interest in maintaining the secrecy of imminent asset freezes or searches lest the targets be informed and spirit away those assets or incriminating evidence.” More specifically, the court found that both the need to keep law enforcement activities secret, but “also . . . [the] informing the targets of those [activities] . . . may constitute a serious obstruction of justice.”

Moreover, the court found that the information sought was critical to the government's case. Indeed, “as the recipients of the disclosures, [the reporters] are the only witnesses . . . available to identify the conversations in question and to describe the circumstances of the leaks.” The reporters were not benign either. Indeed, they themselves were the ones who called the organizations to ask for a comment about the impending raids. As a result, “[t]here [was] simply no substitute for the evidence they have.”

The court also found that the sources who may appear in the phone records who were not part of the current situation could be protected by simple redaction of those phone numbers. As such, the court concluded, “There is therefore a clear showing of a compelling governmental interest in the investigation, a clear showing of relevant and unique information in the reporters’

knowledge, and a clear showing of need.” The court was quick to add, however, that its decision applied only to the facts of this case and that while it believed that the government’s assertion that it had exhausted all other alternatives to achieve the information was enough here, it “in no way suggest[ed] that such a showing would be adequate in a case involving less compelling facts.”

The court seemed especially concerned with the reporters conduct in the case: contacting the targets of the search: “We see no danger to a free press in so holding. Learning of imminent law enforcement asset freezes/searches and informing targets of them is not an activity essential, or even common, to journalism.”

Turning to the First Amendment argument, the court declined to revisit its prior cases as none involved facts similar to this case. Instead, it simply held that because *Branzburg v. Hayes* also dealt with grand juries, it was “governing precedent.”

Chevron Corp. v. Berlinger, 629 F.3d 297 (2d Cir. 2011).

Type of Proceeding:	Civil and Criminal.
Stage of Proceeding:	Appeal from grant of motion for declaratory judgment.
Party Requesting Subpoena:	Plaintiffs.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Documentary Filmmaker.
Subpoena quashed?	No.

Joseph Berlinger was a documentary filmmaker who made a documentary about environmental abuses by large oil companies. The film detailed litigation relating to the abuses taking place in Ecuador. As part of the litigation, which included both a civil suit and a criminal suit against certain officials, the district court order Berlinger to turn over his raw film sought by the plaintiffs in an Ecuadorian suit against an oil company sought. For “three years[] Berlinger shadowed the plaintiffs’ lawyers and filmed ‘the events and people surrounding the trial,’ compiling six hundred hours of raw footage.”

The court began its discussion by explaining that the qualified privilege Berlinger was claiming was “intended to protect the public’s interest in being informed by ‘a vigorous, aggressive and independent press.’” That privilege “is at its highest when the information sought to be protected was acquired by the journalist through a promise of confidentiality.” Of course, the privilege also exists even when the information sought to be protected is nonconfidential, although this information is not protected as strenuously as confidential information:

We have observed, even where there was no issue of betrayal of a promised confidence, that “wholesale exposure of press files to litigant scrutiny would burden the press with heavy costs of subpoena compliance, and could otherwise impair its ability to perform its duties—particularly if potential sources were deterred from speaking to the press, or insisted on remaining anonymous, because of the likelihood that they would be sucked into litigation.” We have noted, furthermore, that unrestricted litigant access to press files would create socially wasteful incentives for press entities “to clean out files containing potentially valuable information lest they incur substantial costs” of subpoena compliance, and would risk “the symbolic harm of making journalists appear to be an investigative arm of the judicial system, the government, or private parties.”

Next, the court discussed who could claim the privilege:

For determining the existence, or in any event the strength, of the press privilege, all forms of intention to publish or disseminate information are not on equal footing. While freedom of speech and of the press belongs to virtually anyone who intends to publish anything (with a few narrow exceptions), all those who intend to publish do not share an equal entitlement to the press privilege from compelled disclosure. Those who gather and publish information because they

have been commissioned to publish in order to serve the objectives of others who have a stake in the subject of the reporting are not acting as an independent press. Those who do not retain independence as to what they will publish but are subservient to the objectives of others who have a stake in what will be published have either a weaker privilege or none at all.

This was the crux of the matter for the court. As the court said, “An undertaking to publish matter in order to promote the interests of another, regardless of justification, does not serve the same public interest [as objective, independent reporting], regardless of whether the resultant work may prove to be one of high quality.” Because the film was essentially requested to be filmed on behalf of the plaintiffs in the lawsuit in Ecuador, the filmmaker was not independent and, therefore, could not claim the privilege.

U.S. v. Treacy, 639 F.3d 32 (2d Cir. 2011).

Type of Proceeding:	Criminal – Securities fraud.
Stage of Proceeding:	Appeal from grant of motion for declaratory judgment.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

The defendant was charged with securities fraud when he backdated stock options. During his trial, the government subpoenaed a reporter who had written an article about the defendant's alleged involvement in the backdated scheme as the article quoted the defendant. According to the government, the statements made by the defendant to the reporter "were made in furtherance of the conspiracy, showed his consciousness of guilt, and demonstrated his knowledge of the stock option process at [the company]."

The reporter made a motion to quash the subpoena. Although the district court did not grant the reporter's motion, it did "tightly limit" the testimony the reporter would have to give. At trial, the court only allowed both the government and the defendant to ask the reporter specific questions. On appeal, the defendant argued that that approach was improper, because it violated his Confrontation Clause rights.

The court began by explaining that the law of the circuit was that reporters did have a privilege – at least in civil cases. Next, the court recognized that the information at stake was not obtained under confidentiality. Indeed, "not only was [the reporter] not protecting any confidential material or source, he sought to withhold evidence that his source[, the defendant,] desired be disclosed." As a result, the privilege, the court found, was less forceful. In such a case, the party seeking the information only had to show that "the materials at issue are of likely relevance to a significant issue in the case[] and are not reasonably obtainable from other available sources." It further held that this test was the same in both criminal and civil cases no matter who sought the subpoena.

Turning to the facts of the case, the court found that the district court did not err in limiting the government's questioning of the reporter. As to the same actions directed against the defendant, however, the court found that the court did err. This was the case, because it impermissibly limited the defendant's Sixth Amendment rights:

The only privilege [the reporter] possessed in this case was the qualified *Gonzales* privilege, and the question before the district court during cross-examination was the same as on direct examination, namely, whether the answers defense counsel sought were of "likely relevance to a significant issue in the case, [and] not reasonably obtainable from other available sources."

Third Circuit Case Summaries

Riley v. City of Chester, 612 F.2d 708 (3d Cir. 1979).

Type of Proceeding:	Civil – Denial of constitutional rights.
Stage of Proceeding:	Appeal from contempt.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identities.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?:	Yes.

An action was filed in federal court arguing that several city officials violated the constitutional rights of the plaintiff-candidate for office. According to the plaintiff, the city officials kept him under surveillance and investigated his “performance of duties as a [city] policeman.” The plaintiff also testified that “there were leaks to the press with respect to internal investigations conducted by the Police Department after he had become a candidate for mayor, that the newspaper articles . . . contained some inaccurate information, [and that he never authorized . . . [the] release [of] such information.”

At a hearing on a motion for a preliminary injunction, the plaintiff called a reporter to testify. When the plaintiff asked for the source of her information, the reporter refused to answer the question, asserting a First Amendment interest. As a result, the court held the reporter in contempt.

Thereafter, the plaintiff also questioned the police department’s inspector, but he did not ask the inspector the names of “any of the other persons who had access to the files regarding [the] investigations.” The plaintiff also questioned another reporter who named her sources, although those sources were named in her article as well. The plaintiff also called the mayor to testify, and the mayor admitted to talking with reporters. Another witness, who was also a reporter, also testified that the mayor was his source and that such was noted in his article. Finally, another reporter called to testify explained that he also used the mayor for his source.

After this testimony, the defendants asked the judge to dismiss the motion for a preliminary injunction. The judge refused to do so, however, without first hearing from the reporter who refused to testify. The circuit court reversed the lower court and, thereafter, issued this opinion.

The court began by explaining that under Federal Rule of Evidence 501, it could recognize a privilege as part of federal common law. Turning to *Branzburg v. Hayes*, the court found that the Supreme Court “acknowledged the existence of First Amendment protection for ‘newsgathering.’” The court agreed:

The interrelationship between newsgathering, news dissemination and the need for a journalist to protect his or her source is too apparent to require belaboring.

A journalist's inability to protect the confidentiality of sources s/he must use will jeopardize the journalist's ability to obtain information on a confidential basis.

According to the court, this state of affairs would "seriously erode the essential role played by the press in the dissemination of information and matters of interest and concern to the public." Moreover, "[t]he roll of 'an untrammelled press as a vital source of public information,' was one of the primary bases for its First Amendment protection." As far as the court could see, "the press was to serve the governed, not the governors[, and t]he press was protected so that it could bare the secrets of government and inform the people."

Taking this into account, the court found that *Branzburg* limitation was not controlling in this case, because this case had nothing to do with "appear[ing] and testify[ing] before a grand jury to answer questions relevant to an investigation into the commission of crime."

Having distinguished *Branzburg*, the court held that "[t]he strong public policy which supports the unfettered communication to the public of information, comment and opinion and the Constitutional dimension of that policy . . . lead us to conclude that journalists have a federal common law privilege, albeit qualified."

The court also found support for such a holding in the Pennsylvania Supreme Court's holding that "important information, tips and leads will dry up and the public will often be deprived of the knowledge of dereliction of public duty. . . , unless newsmen are able to Fully and completely protect the sources of their information."

Despite these concerns, the court also found that often compelling interests on the other side of the calculus would be present. These interests would require a court to make an "Ad hoc" determination as to which interests should prevail.

Turning to this case, the court explained, "When a privilege is grounded in constitutional policy, a 'demonstrated, specific need for evidence' must be shown before it can be overcome." As such, the court held that it must "balance on one hand the policies which give rise to the privilege and their applicability to the facts . . . against the need for the evidence."

First, the court explained what this case was not:

[1] This is not a case where the reporter witnessed events which are the subject of grand jury investigations into criminal conduct. [2] This is not a situation where the reporter is alleged to possess evidence relevant to a criminal investigation. [3] This case does not place in apposition the journalist's privilege and the constitutional right of a criminal defendant to be afforded every reasonable opportunity to develop and uncover exculpatory information. [4] This is not a case where a reporter waived the privilege by filing suit to vindicate his own rights. [5] Nor is this a situation in which the journalist and/or publisher are defendants in a suit brought for damages caused by publications alleged to have contained knowing or reckless falsehoods.

On the contrary, the case before the court was “simply a situation where a journalist has been called as a witness to a civil suit in which neither she nor her employer has any personal interest.” The articles here were “concededly written by [the reporter] in the course of her newspaper employment on matters of public interest concerning a candidate for high public office in a hotly contested campaign.”

As a result of these important interests, “All courts which have considered this issue have agreed that the federal common law privilege of news writers shall not be breached without a strong showing by those seeking to elicit the information that there is no other source for the information requested.” According to the court then, the plaintiff was required to show that his interest in vindicating his own rights was “dependent upon the information sought.” The plaintiff could do this by showing both “relevance and [the] necessity of the information sought.” Moreover, the plaintiff would also be required to show that he pursued other sources for the information he sought such that “his only practical access to crucial information necessary for the development of the case is through the newsman’s sources.”

The court reversed the lower court, because its “findings only contain[ed] a general assertion of necessity[, and its] . . . conclusory statements fall far short of the type of specific findings” necessary. Indeed, there were other avenues to the information, including asking the mayor directly if he was the source of the information in the reporter’s article. Moreover, the article “referred to investigations completed long before the election campaign began” – a time before the plaintiff ever alleged harassment. Thus, for the most part, they were not relevant. The court concluded:

Because of the importance to the public of the underlying rights protected by the federal common law news writer’s privilege and because of the “fundamental and necessary interdependence of the Court and the press” recently referred to by Justice Brennan, trial courts should be cautious to avoid an unnecessary confrontation between the courts and the press. Although there may be cases in which the confrontation is inevitable, this was clearly not one of them.

U.S. v. Cuthbertson, 630 F.2d 139 (3d Cir. 1980).

Type of Proceeding:	Criminal – Conspiracy and fraud.
Stage of Proceeding:	Appeal from contempt.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Work product.
Confidentiality:	Yes, but waived by sources.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Broadcaster.
Subpoena quashed?	In part.

Mike Wallace and *60 Minutes* aired a report about a restaurant chain. Evidently as a result of the story, a grand jury indicted some of the restaurant's management for conspiracy and fraud. Before the trial, the defendants subpoenaed CBS, the producer of *60 Minutes*, asking for all investigative notes relating to the aired report.

Due to timing issues, the court ordered CBS to produce "all verbatim or substantially verbatim statements in CBS's possession made by persons named in the witness list" for in camera inspection. The court stated that it would not "release . . . any of these statements to the defendants before trial." Instead, "it would entertain a motion by the defendants for disclosure of such statements after each witness in question testified."

After the court's ruling, but before CBS responded, "the defendants served CBS with a second subpoena[, which] sought production directly to the defendants of all verbatim or substantially verbatim statements relating or referring to [the restaurant] made by roughly 100 names persons." At another hearing, the court refused to enforce this subpoena as is but modified it, as it did the first one.

When CBS refused to comply with the court's modified requests, it was held in contempt. CBS argued that the contempt finding was inappropriate, because the material sought "is protected by a qualified [F]irst [A]mendment privilege not to disclose unpublished information and that the district court did not give proper weight to this privilege when it ordered production for in camera review."

Turning to the facts of this case, the court first noted an important difference between the two subpoenas. The first subpoena was limited to statements made by to-be witness, while the second referred to all statements by "franchisees and potential franchisees." Thus, the court explained that "statements made by nonwitnesses have no value as possible prior inconsistent statements to impeach trial testimony." Therefore, there was no need for these statements; "the defendants' broad request, which was only slightly limited by the district court, was based solely on the mere hope that some exculpatory material might turn up." As such, this second subpoena "should have been quashed."

Turning to the second subpoena, which made it past the initial relevance inquiry, the court stated, "[W]e have held that journalists have a federal common-law qualified privilege," citing its prior decision in *Riley v. City of Chester*. According to the court, that case "was based,

in part, on the strong public policy supporting the unfettered communication to the public of information and opinion, a policy [it] found . . . in the [F]irst [A]mendment.”

The defendants argued that *Riley* should not control this case, because this was a criminal case. The court found otherwise, holding the *Riley* was “persuasive authority.” It thought so, because “the interests of the press that form the foundation for the privilege are not diminished because the nature of the underlying proceeding out of which the request for the information arises is a criminal trial.” Indeed, “CBS’s interest in protecting confidential sources, preventing intrusion into the editorial process, and avoiding the possibility of self-censorship created by compelled disclosure of sources and unpublished notes does not change because a case is civil or criminal.”

Moreover, the court found that the defendants’ argument that “their constitutional interests in a criminal trial preclude the existence of a journalists’ privilege in criminal cases” would impermissibly suggest that those “interests always prevail” over free speech and free press concerns. Finding this conclusion unacceptable, the court cited to the Supreme Court’s opinion in *Nebraska Press Association v. Stuart*, where the court rejected a similar argument:

The authors of the Bill of Rights did not undertake to assign priorities as between First Amendment and Sixth Amendment rights, ranking one as superior to the other. . . . (I)f the authors of these guarantees, fully aware of the potential conflicts between them, were unwilling or unable to resolve the issue by assigning to one priority over the other, it is not for us to rewrite the Constitution by undertaking what they declined to do.

This did not mean, however, that those interests did not matter. Instead of “affecting the existence of the qualified privilege, we think that these rights are important factors that must be considered in deciding whether, in the circumstances of an individual case, the privilege must yield to the defendant’s need for the information.”

Next, the court noted that in *Riley*, the court was dealing with confidential sources. Here, however, the government received confidentiality waivers from the witnesses. Therefore, there was no confidentiality issue. Even though confidentiality was not at issue, CBS still argued that the privilege “protect[ed] unpublished material held by it.”

The court agreed in part, finding that “the privilege can[not] be limited solely to protection of sources”: “The compelled production of a reporter’s resource materials can constitute a significant intrusion into the newsgathering and editorial processes.”

Next, the court also found that the waiver obtained by the government did not constitute a waiver of the reporter’s privilege. This was the case, because “[t]he privilege belong[ed] to CBS, not the potential witnesses, and it may be waived only by its holder.” The court concluded, “[W]e hold that journalists possess a qualified privilege not to divulge confidential sources and not to disclose unpublished information in their possession in criminal cases.”

Because the district court did not make a balancing decision and only required CBS to produce the document *in camera*, the issue before the court did not relate to the eventual or potential balancing that would take place.

Turning to the facts of the case specifically, the court noted that the defendants did meet “their burden of establishing that the district court ordered [sic] produced for in camera review is not available from another, unprivileged source.” Indeed, the requested material was verbatim statements, which would not be available from other sources due to the characteristics of a verbatim statement made to a single person. Moreover, the statements were relevant, as they related to witnesses at trial. Thus, the court held that “the part of the district court’s production order requiring CBS to produce the witnesses’ statements for in camera review was consistent with the privilege.”

The court did not hold, however, “whether any additional showing must be made by the defendants to overcome the privilege and to compel production of these statements to them at trial.”

U.S. v. Criden, 633 F.2d 346 (3d Cir. 1980).

Type of Proceeding:	Criminal – Anti-Racketeering, among other things.
Stage of Proceeding:	Motion to Dismiss.
Party Requesting Subpoena:	Defendant
Type of Information Sought:	Whether a conversation occurred with a source.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

On his motion to dismiss, the defendant argued that the prosecution “released sensational and prejudicial information to the news media with intent to create an atmosphere inimical to the rights of the defendants.” The defendants were implicated in an FBI investigation, ABSCAM, which related, in part, to corruption of state and federal officials. One investigator testified that he had phoned a reporter about the investigations. At trial, the defense subpoenaed the reporter to testify about that conversation, and the reporter refused to answer a question about her own investigation into the corruption scandal. Thereafter, the court held the reporter in contempt.

As an initial matter, the Department of Justice argued that the unanswered question “[w]as wholly immaterial to the proceedings below because it could not have produced the kind of evidence of prejudice either in the grand jury or the petit jury that would justify dismissal of the indictment.” The court rejected this argument.

Moving on, the court thought the question was whether the defendants should “be allowed to develop a full record to support their allegations of outrageous prosecutorial misconduct.” More specifically, the case “highlights a tension between the first amendment and the fifth and sixth amendments.”

As to the First Amendment, the court explained that:

All the specific rights and privileges granted to the press have been established by means of judicial interpretations of naked constitutional text, and every court formulation of a specific nuance of the Constitution’s text has been accompanied by stated reasons. The reasons for the courts’ pronouncements are as important as the pronouncements themselves.

Summarizing those pronouncements, the court pointed to the free exchange of ideas and vibrant public debate about government affairs. The court added, “This characterization is justified not because of the journalist’s role as a private citizen employed by a private enterprise, but because reporters are viewed ‘as surrogates for the public.’” The court also thought that a chilling effect would likely occur if sources realized that “the recipient [would not] preserve the confidence.” Moreover, the keeping of confidence “protect[s] the source from retribution.”

Next, the court turned to the self-governance rationale:

Our national commitment to the free exchange of information also embodies a recognition that the major sources of news are public figures, and that in addition to being newsmakers, these sources fashion public policy for government at all levels and in all branches. New ideas must be tested in the crucible of public opinion if our representatives are to receive guidance in deciding whether a suggested policy will receive public endorsement or opposition.

Said slightly differently, the news media “not only serve as the vehicle that widely disperses information but also constitute an important instrument of democracy that assists our officials in fashioning public policy. Without the protection of the source, the cutting edge of this valuable societal instrument would be severely dulled.”

The court concluded its discussion with a comment about the scope of the privilege:

These extremely impressive pragmatic reasons, as well as conceptually abstract a priori principles, underlie the precept that a journalist does in fact possess a privilege that is deeply rooted in the first amendment. When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits.

Moving to the test, the court reiterated its view that the competing concerns must be weighed against each other. As to the defendant’s need, the court explained, “The Court has placed particular emphasis on the production of evidence in criminal trials . . . , grounded [in the] need for evidence on both the confrontation and compulsory process clauses of the sixth amendment and the due process clause of the fifth.”

Applying the test from *Riley*, the court found that the “defendants ha[d] established a record sufficient to demonstrate their entitlement to the limited information sought.” The court contemplated adopting a more lenient test since no confidential information was at stake but ultimately concluded that that was unnecessary, because the defendants’ showing met that required in *Riley*.

In re Grand Jury Matter, Gronowicz, 764 F.2d 983 (3d Cir. 1985).

Type of Proceeding:	Criminal – Mail and wire fraud.
Stage of Proceeding:	Grand Jury.
Party Requesting Subpoena:	Grand Jury.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Author.
Subpoena quashed?	No.

Antoni Gronowicz, an author of a book about the Pope, was subpoenaed as part of an investigation into violations of the law by Gronowicz. Gronowicz's book was a fraud; Gronowicz was subpoenaed as part of an investigation into allegations of mail and wire fraud. After being subpoenaed, he argued that, as an author, he had a common law privilege not to have to produce the documents sought by the grand jury.

The court began by noting that this case was different from prior cases, because no previous case “recognized a press privilege to be absolutely free from inquiry into the legality of the reporter's own activities, even those reflected in a publication.” The court did note, however, that the Supreme Court “has held that authors may be accountable for culpable falsehoods.”

Under these circumstances, “[i]f the author of a culpable falsehood had a common law privilege such as Gronowicz contends for, simply because the alleged falsehood had been published, it would be extremely difficult to hold that author accountable.” The Supreme Court's decision in *Herbert v. Lando*, where it held that a libel plaintiff could discover information about the reporter's editorial process, made it even more unlikely that a privilege should be sustained in a case like this.

Moving to the context of this case, the court explained that “post-publication punishment” did have a chilling effect on speech; indeed, that was its very purpose. Moreover, the court found that post-publication punishment was constitutional, because it is accompanied by strict “scienter requirements.” Thus, the application of the mail fraud statute, with its scienter requirement, was constitutional.

Smith v. BIC Corp., 869 F.2d 194 (3d Cir. 1989).

Type of Proceeding:	Civil – Products liability, among other things.
Stage of Proceeding:	Discovery.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

No significant discussion of the reporter’s privilege was had. The subpoena was quashed, because “much of the information sought was irrelevant.”

In re Madden, 151 F.3d 125 (3d Cir. 1998).

Type of Proceeding:	Civil – Unfair trade practices and copyright infringement.
Stage of Proceeding:	Discovery.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identities.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Video commentator for defendant.
Subpoena quashed?	No.

Two pro-wrestling production companies were in a business dispute. One company sued the other for a variety of things, including “unfair trade practices and copyright infringement.” During discovery, one company subpoenaed a video commentator who worked for the other company. According to the court, “[t]hese commentaries promote upcoming WCW wrestling events and pay-per-view television programs, announce the results of wrestling matches and discuss wrestlers’ personal lives and careers.” As part of these commentaries, the video commentator argued that he relied on confidential sources, but “admit[ted] . . . that his announcements are as much entertainment as journalism.” When asked about some information in his commentaries, he invoked the reporter’s privilege and the subpoenaing party filed a motion to compel. The district court denied the motion to compel.

According to the court, “The issue [was] whether [the video commentator] ha[d] status as a journalist to invoke the protections of the privilege.” At the outset, the court noted that privileges should not be granted lightly and should be narrowly tailored. It also noted, however, that it had recognized a reporter’s privilege in both criminal and civil case; “[p]remised upon the First Amendment, the privilege recognizes society’s interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public.”

Moving to the question before it, the court noted that “only one other court of appeals has fashioned a test to answer the question of who has status to invoke a journalistic privilege.” Citing the Second Circuit’s opinion in *von Bulow v. von Bulow*, the court explained first that journalists are protected, because of “the strong public policy supporting the unfettered communication of information by a journalist to the public.” Moreover, that court “required a true journalist, at the beginning of the news-gathering process, to have the intention of disseminating her information to the public.” Finally, it also required that “an individual may successfully claim the journalist’s privilege if she is involved in activities traditionally associated with the gathering and dissemination of news.” In short, the Second Circuit’s jurisprudence found that “the purpose of the journalist’s privilege was not solely to protect newspaper or television reporters, but to protect the activity of ‘investigative reporting.’”

The court adopted the Second Circuit’s reasoning: the test “emphasizes the intent behind the newsgathering process rather than the mode of dissemination, [and] it is consistent with the Supreme Court’s recognition that the ‘press’ includes all publications that contribute to the free flow of information.”

Turning to the facts of the case, that court found that the district court construed the activities at issue too broadly and, therefore, impermissibly labeled them “newsgathering.” As the court explained, “By [the reporter’s] own admission, he is an entertainer, not a reporter, disseminating hype, not news.”

Fox v. Township of Jackson, 64 Fed.Appx. 338 (3d Cir. 2003).

Type of Proceeding:	Civil – Denial of constitutional rights, among other things.
Stage of Proceeding:	Trial.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Information about news article.
Confidentiality:	Unclear.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

A township refused to renew a contract with an employee, and the employee brought suit alleging that the township and certain township employees fired him because of his political affiliations. The jury found against the plaintiff. On appeal, the plaintiff argued, among other things, that the trial court erred by not compelling a newspaper reporter to testify.

A reporter had written an article about the township's politics as they related to the plaintiff. The plaintiff subpoenaed the reporter who wrote the article and the reporter made a motion to quash the subpoena. The trial court granted the motion.

Turning to the privilege, the court first explained that the common law privilege "recognizes society's interest in protecting the integrity of the news gathering process, and in ensuring the free flow of information to the public." According to the court, in the context of a civil trial, there is a "heavy burden" for a subpoenaing party to overcome in order to force the testimony of a reporter: "The moving party must demonstrate: (1) he has made an effort to obtain the information from other sources; (2) the only access to the information is through the journalist and his sources; and (3) the information sought is crucial to the claim."

The court affirmed the trial court, finding that the "information contained in the article was not specific enough to lead the reader to believe the journalist possessed any relevant and unique information." Moreover, the plaintiff never made a showing that the information possessed by the reporter was "crucial" to his case.

Fourth Circuit Case Summaries

U.S. v. Steelhammer, 539 F.2d 373 (4th Cir. 1976).

Type of Proceeding:	Civil - Contempt.
Stage of Proceeding:	Appeal from contempt ruling.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Information about the circumstances of a rally.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

Reporters had attended a union rally where two union members arguably violated a court order by advocating the continuation of a strike. A hearing on the union members' actions was called. The court held reporters in contempt when he refused to testify. The reporters refused to testify arguing that "if a reporter is compelled to testify to what he has observed or heard while present at a rally or meeting of persons assembled to discuss problems peculiar to their interests, but also of general concern, then thereafter, in retaliation, the sponsors of the occasion will in all probability bar them from later gatherings." This result would be "injurious to the rank and file people" because they would "los[e] such advantages as might accrue to them from this information."

The court began its analysis by cautioning that its "determination is limited to the circumstances of this case." Those circumstances included the following: "[1] it does not contemplate the contingency of the reporter being the sole or only competent witness to an incident . . . [2] it is conceded that the reporters had not acquired their knowledge through confidential communications[;] . . . [3] the information could have been adduced for the Court through the testimony of any of many others."

Turning to the privilege, the court said that the privilege was not actually a reporter's privilege, but rather it was the public's privilege. Thus, it decided to balance "two vital considerations": "protection of the public by exacting the truth versus protection of the public through maintenance of free press." Because alternative sources of the information needed was available through others, the court found that the scales weighed "in favor of . . . avoid[ing] . . . unnecessary incurrence of any potential danger of sterilizing the sources of newsworthy items." As such, the court vacated the judgments of contempt.

Judge Winter wrote a concurring opinion. He first noted that confidentiality was not at issue. Then he explained, "[I]n the balancing of interests suggested by Mr. Justice Powell in his concurring opinion in *Branzburg v. Hayes*, the absence of confidentiality and the lack of evidence of vindictiveness tip the scale to the conclusion that the district court was correct in requiring the reporters to testify." He continued:

These absences convert the majority's conclusion into a broad holding that journalists called as witnesses in civil cases have a privilege to refuse to testify

about all events they have observed in their professional capacity if other witnesses to the same events are available, despite the avowal that the holding is limited to the facts of the case.

Moving to the reporters' arguments, Judge Winter next rejected their assertions that they would "lose [the union members] trust" if made to testify. He believed that the union members "would [not] scorn the journalists for respecting these obligations [to testify]."

Judge Winter also rejected the reporters' arguments that if they were made to testify they would not be admitted to future union activities. To him, even if that was the case, none of the reporters rights "would be violated."

He also found that the reporters' attempts to avail themselves of *Branzburg*'s language that stated that "news gathering is not without its First Amendment protections" were unconvincing. To him, that language had to be read in light of the Court's prior precedent, like *Pell v. Procunier*, which held that journalists had no special right of access above that of the general public.

U.S. v. Steelhammer, 561 F.2d 539 (4th Cir. 1977).

Type of Proceeding:	Civil – Contempt.
Stage of Proceeding:	Appeal from contempt ruling.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Information about the circumstances of a rally.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

The court granted a rehearing en banc to determine whether the panel’s prior decision supported the conclusion that the reporters did have a privilege not to testify. In the court’s brief opinion, it explained:

On this issue, Chief Judge Haynsworth, Judge Winter, Judge Russell and Judge Widener are of the view that they may for the reason sufficiently stated in Judge Winter’s dissenting panel opinion. Judge Bryan, Judge Craven and Judge Butzner are of the contrary view for the reasons sufficiently stated in Judge Bryan’s majority panel opinion.

Thus, “[i]t . . . appear[ed] that a majority of the court conclude[d] that the district court properly required the reporters to answer and therefore their convictions for contempt should be affirmed.” Nonetheless, the court affirmed the appellate court’s judgment vacating the contempt order for other reasons.

LaRouche v. National Broadcasting Co., Inc., 780 F.2d 1134 (4th Cir. 1986).

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Appeal from trial verdict.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identities.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

The plaintiff, Lyndon LaRouche, brought a defamation action against NBC after NBC ran two stories suggesting that “LaRouche believe[d] that Jews are responsible for all the evils in the world.”

During discovery the plaintiff filed a motion to compel NBC to identify its confidential sources. That motion, however, was denied, because “LaRouche had not exhausted other possible sources of . . . information.” Just before discovery concluded, LaRouche made another motion to compel NBC to name its sources. The court also denied those motions, because LaRouche still had not interviewed several persons, including, for example, “Larry Cooper, the revealed source of [one] story.” On appeal, LaRouche argued, among other things, that the district court erred by failing to compel NBC to divulge its sources.

Recognizing again that a privilege existed, the court cited Justice Powell’s concurring opinion in *Branzburg v. Hayes* for the proposition that “it is necessary for the district court to balance the interests involved.” Next, the Court explained that courts should apply a three-party test that balances “(1) whether the information is relevant, (2) whether the information can be obtained by alternative means, and (3) whether there is a compelling interest in the information.” Because the plaintiff failed to exhaust his alternative sources of information, the court affirmed the district court’s ruling.

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

Type of Proceeding:	Criminal – Bribery.
Stage of Proceeding:	Appeal from contempt ruling.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporters.
Subpoena quashed?	No.

Reporters interviewed a South Carolina senator after it became apparent from an FBI investigation that the senator may have been involved in bribery. In the interview, the senator claimed that he only took legal funds from a lobbyist. The reporters conceded that the interviews were not given under confidentiality and even quoted the senator by name in his article. The senator was later indicted for accepting bribes.

After the indictment, a federal prosecutor subpoenaed the reporters because the “information in the newspaper articles . . . was relevant to the question of [the senator’s] intent.” The prosecutor only asked the reporters to “testify for no more than five minutes each to confirm that [the senator] had in fact made the statements they had reported.” According to the prosecuting attorney, there were no alternative sources of the information. The reporters refused to comply and were held in contempt.

After receiving the subpoenas the reporters made a motion to quash the subpoenas, arguing, among other things, that the “First Amendment affords news reporters a qualified privilege against being compelled to testify concerning newsgathering.”

The court affirmed the district court’s ruling:

[W]e hold that the incidental burden on the freedom of the press in the circumstances of this case does not require the invalidation of the subpoenas issued to the reporters, and absent evidence of governmental harassment or bad faith, the reporters have no privilege different from that of any other citizen not to testify about knowledge relevant to a criminal prosecution.

According to the court, *Branzburg* held that reporters did not possess a “privilege not to testify in criminal prosecutions about relevant evidence known to the reporter, regardless of whether the information was obtained during newsgathering.” Turning to Justice Powell’s concurrence, the court summarized it as concluding, “[W]hen evidence is presented to question the good faith of a request for information from the press, a ‘proper balance’ must be struck ‘between freedom of the press and the obligation of all citizens to give relevant testimony.’”

Next, the court reviewed its own precedent in *United States v. Steelhammer* and explained that Judge Winter’s opinion found that absent confidentiality and bad faith, there was no privilege.

In response, the reporters argued that the government did not have a compelling need for the testimony, because it “already ha[d] video and audiotape of the defendant accepting a bribe.” The court found this unimportant, however, because the reporters did not argue that “their testimony would be irrelevant or duplicative.” Indeed, the government still had an interest in “demonstrating [the senator’s] knowledge of his guilt through his attempts to minimize what occurred before he became aware that he had been taped.” The court concluded, “[T]he absence of confidentiality or vindictiveness in the facts of this case fatally undermines the reporters’ claim to a First Amendment privilege.”

Judge Wilkinson filed a concurring opinion. He began by explaining that “[g]overnment subpoenas of news reporters inevitably involve tensions between the needs of law enforcement and those of newsgathering.” The majority opinion, Judge Wilkinson believed, implied that there was no “privilege on the part of reporters in the absence of governmental bad faith.” Instead, Judge Wilkinson thought the court’s balancing test from *LaRouche v. National Broadcasting Co.* should have been applied. According to the Judge:

These reporters were neither parties nor witnesses to any criminal activity. They have been subpoenaed for doing nothing more than effectively covering the news. All four reporters have covered for extended periods the scandal which led to this trial, yet they are now unable to cover the trial because they reported “false exculpatory statements” made by the defendant, Senator Long. Using the power of subpoena to remove reporters with a special background on a story is a troubling matter. It will not enhance the public’s understanding of events, and it may restrain the flow of information in a way that ordinary subpoenas do not.

Judge Wilkinson thought subpoenas under these circumstances would be also deprive the public of important information:

In an attempt to achieve vindication or to turn public opinion in their favor, those suspected of wrongdoing will often seek to get out their side of the story through the media. Denials of misconduct, honest and otherwise, will be commonplace. In routinely reporting such denials, the press acts in its own way to protect the presumption of innocence. Now, however, every reporter who reports a putative defendant’s false exculpatory statement is a potential witness at trial. That potential increases markedly when the statement was not made at a news conference, but to the reporter individually. Reporters facing the prospect of becoming prosecution witnesses if they report a false exculpatory statement may think twice about conducting exclusive interviews or reporting statements of denial that may be open to question. I am troubled by any rule which says that a reporter’s exclusive “scoop” of a public figure’s version of events makes that same reporter uniquely vulnerable to a government subpoena. The values served by an independent press will be diminished if reporters covering a case are routinely dragged into its midst.

Nonetheless, Judge Wilkinson also believed that the government had an interest in the information the reporters had because that information “serve[d] to rebut the defendant’s claim that the monies he received were in the nature of a campaign contribution.”

Placing the interests side by side, the Judge believed that the deference owed to the district court tipped the scales in favor of upholding the district courts ruling. Nonetheless, he cautioned that “[a]n appellate court should encourage the full articulation of the competing interests at stake when government seeks to compel the testimony of those whose job it is to gather and report the news.”

Church of Scientology Intern. v. Daniels, 992 F.2d 1329 (4th Cir. 1993).

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Appeal from motion for summary judgment.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Plaintiff.
Subpoena quashed?	Yes.

The Church of Scientology ran an advertisement in *USA Today* impugning the character of a drug company. Thereafter, the vice president of the company issued a statement that, among other things, said that “the Church of Scientology is no church.” The church later filed a defamation lawsuit against the vice president, asking for \$50,000 in compensatory damages and \$20 million in punitive damages. The district court granted the vice president’s motion for summary judgment after finding that there was no defamation.

On appeal, the church argued that the magistrate judge erred when it refused to compel *USA Today* to produce “all materials relating to the June editorial board meeting, including editors’ notes, tapes, and draft article.” The magistrate judge refused to compel *USA Today*, because the church “failed to make the required showing for a need for the privilege materials.”

Because the court was only reviewing the magistrate judge’s decision for an abuse of discretion, it chose not to overturn the ruling, which it viewed as reasonable. As the court explained, “[T]he consideration that [the defendant] offered to stipulate to the accuracy of the quotation that appeared in *USA Today* makes the relevance of the materials CSI seeks questionable, rather than critical to the case, as the law requires.”

Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000).

Type of Proceeding:	Civil – Environmental Tort.
Stage of Proceeding:	Appeal from motion for summary judgment.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identities.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

The government brought an environmental torts suit against Conoco for allegedly contaminating two wells in North Carolina. A jury awarded the residents who drank off the wells compensatory and punitive damages. After the verdict, “the jury heard additional evidence relating to the amount of the punitive damages award.”

The jury never had a chance to make a decision, however. While deliberating, the parties settled for \$36 million. That agreement was meant to remain confidential and was sealed by the court.

A reporter eventually found two anonymous sources who revealed the \$36 million settlement. Thereafter, he published that number. After publication, Conoco moved the district court to hold the reporter in civil contempt. The government argued that the court should hold the reporter in criminal contempt.

The court convened a hearing on the motions and the reporter refused to identify the sources of his information. First, the court denied the government’s motion. Second, the court refused to find the reporter in civil contempt, finding that “the sources’ identities were not relevant to civil contempt proceedings then pending and also that Conoco had failed to exhaust all reasonable alternative means for obtaining the sources’ names.”

Nonetheless, Conoco would later refile a motion to compel, “rel[ying] entirely on the district court’s own alleged interest in learning the sources’ identities.” The district court granted this third motion, holding that “the sources’ identities were ‘relevant to the case in general’ and ‘will help this court determine who violated’ the sealing order.” More specifically, the court found that it had a “‘compelling’ need to know the sources’ identities in order to enforce its order. It did not find, however, that Conoco did.

This time, the district court found that Conoco had exhausted all of the possible alternative avenues to the information sought. Even though the court ordered the reporter to divulge his name, he refused to do so, and the court held him in civil contempt.

The court began with the general proposition “reporters are ‘entitled to some constitutional protection of the confidentiality of [their] sources.’” According to the court, this protection was “necessary to ensure a free and vital press, without which an open and democratic society would be impossible to maintain.” Said differently, “[a] broadly defined freedom of the

press assures the maintenance of our political system and an open society.” Emphasizing the point, the court explained, “If reporters were routinely required to divulge the identities of their sources, the free flow of newsworthy information would be restrained and the public’s understanding of important issues and events would be hampered in ways inconsistent with a healthy republic.”

The court noted that such a privilege is not absolute, however: “[T]he reporter’s privilege recognized by the Supreme Court in *Pell* and *Branzburg* is not absolute and will be overcome whenever society’s need for the confidential information in question outweighs the intrusion on the reporter’s First Amendment interests.” It went on to characterize Justice Powell’s concurring opinion as requiring that a “reporter’s claim of privilege should be judged on [a] case-by-case basis.”

Turning to its own case law, the court affirmed its use of the three-part test established in *LaRouche v. National Broadcasting Company*. The court focused first on the “compelling interest” prong: “Under other circumstances, enforcement of a validly entered confidentiality order might well provide a compelling interest.” Although, the court was quick to add that “[i]n any case, of course, the compelling nature of the interest in enforcing a sealing order would have to be balanced against the reporter’s interest in protecting the confidentiality of his sources.”

Despite this, the court, in another opinion, had found that the sealing order was inappropriate in this case. In any sealing case, a district court must consider three elements, and the district court failed to do that. Therefore, the sealing was inappropriate and, as such, there was no compelling need for the sources of the information.

Fifth Circuit Case Summaries

Miller v. Transamerican Press, Inc., 621 F.2d 721 (5th Cir. 1980).

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Interlocutory appeal from denial of motion to compel.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

A union leader sued a reporter and Transamerican Press for libel. The reporter, through *Overdrive*, a Transamerican publication, accused the leader of “swindle[ing] the pension fund out of \$1.6 million.”

After the case was filed and discovery was sought, the plaintiff discovered that the source for the allegation was a “confidential informant.” The plaintiff filed several motions to force the reporter to name his source, but the district court denied these requests, because the plaintiff “had not exhausted the alternative means of proving that Transamerican was reckless.”

Thereafter, the plaintiff gathered evidence that indicated that he “had never borrowed any money” as the story suggested. As such, “the district judge ordered the defendants to produce summaries of non-privileged parts of the file used in preparation of the article.” Evidently, the reporter complied with this order.

Later, the plaintiff would again ask the court to compel the reporter to name his source, which the judge finally granted, “concluding that the informant’s identity went to the heart of the matter.”

First, the court found that the plaintiff was a public figure and, therefore, was required to prove actual malice. Turning to whether the reporter had a First Amendment privilege, the court held that “a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants, however, the privilege is not absolute and in a libel case as is here presented, the privilege must yield.”

According to the court, *Branzburg v. Hayes* held that “reporters must disclose the names of confidential informants except where the grand jury power was abused.” In the court’s view though, “[t]he policies supporting a First Amendment privilege would appear to be stronger . . . where a defamation plaintiff seeks to compel disclosure of the name of a confidential informant.” This was the case, because “forced disclosure of journalists’ sources might deter informants from giving their stories to newsmen, except anonymously. This might cause the press to face the unwelcome alternatives of not publishing because of the inherent unreliability of anonymous tips, or publishing anonymous tips and becoming vulnerable to charges of recklessness.”

In addition to its concerns about forcing journalists to use anonymous sources, the court believed that there was “a more apparent interest” in protecting confidential sources in defamation cases than in grand jury cases. As the court explained it:

In *Branzburg*, the prosecutor had an interest in keeping the informant’s identity secret in order to protect him from reprisal. The government and the press had a similar purpose, both were ferreting out wrongdoing and seeking to correct it. In a libel case, the plaintiff and the press are on opposite sides. And a defamed plaintiff might relish an opportunity to retaliate against the informant.

What’s more, under the Court’s jurisprudence, the court thought it important that “there is a First Amendment policy of free investigation of public figures because their activities are matters of public concern.” Thus, “[t]he First Amendment interest in granting a privilege is particularly strong when the article concerns a public figure.”

Finally, the court, noting the high standard of actual malice, explained that “often” a reporter could present enough evidence of “prudence [that] would carry the burden in support of a motion for summary judgment.”

The court then adopted the *Garland v. Torre* test. It noted that the information sought was relevant and the plaintiff had already exhausted alternative avenues to the information. Thus, the court only addressed whether there was “a compelling interest in the information.” The court held that the need was compelling. It did so, because there was only one source for the information printed in the article. As such, “[t]he only way that Miller [could] establish malice and prove his case is to show that Transamerican knew the story was false or that it was reckless to rely on the informant.” Thus, the court affirmed the district court’s ruling.

In re Selcraig, 705 F.2d 789 (5th Cir. 1983).

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Interlocutory appeal from denial of motion to compel.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

A school official was fired and later brought a defamation action against other school officials for allegedly “publicizing false and stigmatizing charges against him.” Those charges were publicized to a newspaper reporter. The district court found that the name of the source was “central to the claim” and “that alternative ways of confirming that hypothesis had been exhausted.” As such, “the district court ordered that the journalist testify *in camera* and there respond to narrowly limited questions directed only to ascertaining whether a school district officer was the source of his information.” The reporter still refused to answer questions, and the court held the reporter in contempt. On appeal, the reporter invoked “the journalist’s qualified privilege under the [F]irst [A]mendment not to reveal his confidential sources.”

The court began by noting that in *Miller v. Transamerican Press*, the court “recognized that the [F]irst [A]mendment shields a reporter from being required to disclose the identity of persons who have imparted information to him in confidence.” Under that decision, a qualified privilege yield to the plaintiff’s need for the information if:

the party who seeks disclosure of the identity of a confidential informant establishes by substantial evidence that [1] the statement attributed to the informant was published and is both factually untrue and defamatory; [2] that reasonable efforts have been made to learn the identity of the reporter’s informant by alternative means; [3] that no other reasonable means is available; and [4] that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case.

According to the plaintiff, the identities of the confidential sources was important, because “he ha[d] the right to exemplary or punitive damages [against the school officials] if the publication was malicious.” The court also found that the plaintiff had exhausted his alternative avenues to discovering the information sought.

Having so found, the court set up an *in camera* hearing, where the “court would first ask [the reporter] whether his confidential sources occupied such positions that their publication of the charges against [the plaintiff] could be attributed to [the school district leadership].” If the answers were no, then the court would not force the reporter to continue to testify. If the answer was yes, however, then the court was going to require the reporter to name the position that his source held. “Only if the inquiry reached [this] stage would the court reveal anything to

counsel.” In spite of this “deliberate” solution, the reporter still refused to testify, and the court had him jailed.

On appeal, the plaintiff argued “that the act of publishing the information about him constitute[d] a denial of substantive due process.” The court rejected this argument. Second, the court addressed the plaintiff’s § 1983 claim. The court also rejected this claim. The court held that “[u]nless [the plaintiff] can set aside the waiver contained in his resignation, he cannot establish that he was denied a hearing, and thus he cannot establish the defendants’ liability.” Because he could not even establish a prima facie case under § 1983, he could not “recover punitive damages against the individual defendants.” As such, the court held that, “Because [the reporter’s] testimony is necessary only to determine [the plaintiff’s] punitive damages claim, it is evident that [the plaintiff] has not yet shown the necessity for it.” Thus, he also did not defeat the reporter’s privilege.

Simply, the court was not going to have the reporter testify to reveal information necessary to a damages assessment without first requiring the plaintiff to show he had a chance to succeed on the merits of the claim. In short, the reporter’s testimony was not “necessary” at this stage of the litigation.

The court went on to address the reporter’s other claim that even if the plaintiff established a case, the reporter should not be required to testify. The court rejected this suggestion. The court noted that the identity of the source himself was an element of the suit. Thus, the reporter was a “percipient witness to a fact at issue.” As a result, “his testimony is relevant and necessary to the resolution of [the plaintiff’s] claim for punitive damages.”

U.S. v. Smith, 135 F.3d 963 (5th Cir. 1998).

Type of Proceeding:	Criminal – Arson.
Stage of Proceeding:	Interlocutory appeal from denial of motion to compel.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

After a fire destroyed a New Orleans building, federal agents questioned Frank Smith. Smith was an employee at the destroyed building. Shortly after he spoke with federal agents, Smith reached out to a local broadcaster and alleged that others burned the building down – not him. Smith also spoke with New Orleans fire officials. He told the officials that “after the first fire occurred, he overheard the manager and assistant manager of the [building] plotting to set the second blaze.” The officials gave that recorded statement to the federal prosecutor. Smith would later repeat the same story to federal officials.

Smith was later arrested for arson. After he was arrested, the local broadcaster broadcasted a small portion of its videotaped interview with Smith. The station identified Smith. After additional evidence suggested that the second fire resulted from faulty wiring, the government became increasingly interested in Smith’s story about the other employees plotting to set the second fire.

Because the broadcaster refused to hand over the entire tape absent a subpoena, the government requested permission to subpoena the station according to the Department of Justice’s guidelines. The Department granted permission, and, “[b]elieving that the videotape might contain exculpatory evidence, Smith later joined the government’s subpoena request.”

The broadcaster made a motion to quash the subpoena under the First Amendment. The district court granted the motion and the government appealed.

The court began by explaining that “the [lower] court determined that the government was not entitled to the videotape outtakes, as they were cumulative of what the government already had in its possession.”

Turning to *Branzburg v. Hayes*, the court summarized the Supreme Court’s opinion, stating, “Although the Court recognized that [responding to the subpoena] would be a burden . . . for newsreporters to reveal their sources, it held that the public’s interest in law enforcement outweighed the concerns of the press.” It went on to summarize that the “Court instructed that the needs of the press are not to be weighed against the needs of the government in considering grand jury subpoenas.”

The court next addressed the effect of Justice Powell’s concurring opinion, and also conceded that the court had “construed *Branzburg* as a plurality opinion.” The court found that

Justice Powell wrote only to “emphasize[] that at a certain point, the First Amendment must protect the press from government intrusion. To Justice Powell, however, that point occurs only when the ‘grand jury investigation is not being conducted in good faith.’”

Thus, the court stated that journalists are only protected from subpoenas that are issued in bad faith: “A single subpoena issued only after considered decision by the Attorney General of the United States to compel production of evidence at a federal trial of a multicount felony indictment is no harassment.”

The court next addressed the difference between the privilege asserted here – to protect work product – and the one in *Branzburg* – to protect confidential sources. The broadcaster made several arguments:

[1] It contends that absent a privilege, prosecutors will “ ‘annex’ the news media as ‘an investigative arm of government.’” On this theory, [2] future news-sources will be wary of the media’s close connection to the government, so they will hesitate before approaching reporters, even for on-the-record interviews. In addition, WDSU-TV argues that without a privilege, [3] the media will be swamped with criminal discovery requests. Having to respond to these requests would hamper the media’s ability to provide the public with newsworthy information. [4] As a result, contends WDSU-TV, rather than comply with future demands for evidence, the media might instead simply destroy its work product once it was printed or aired, thereby depriving itself of valuable archival material. [5] Alternatively, WDSU-TV fears that the press might hesitate before reporting on important matters that could get it enmeshed in criminal litigation.

The court rejected these concerns, because they were similar to the ones rejected in *Branzburg*. Moreover, it emphasized that, although responding to subpoenas may be onerous, “the Supreme Court has consistently refused to exempt the media from the reach of generally-applicable laws, simply because those laws might indirectly burden its newsgathering function.”

Next, the court rejected the distinction between the criminal trial at present and the grand jury context. It stated, “Surely the public has as great an interest in convicting criminals as it does in indicting them.” It also pointed to language in *Branzburg* that explicitly mentioned that the rationale applied to criminal trials. It concluded, “*Branzburg* will protect the press if the government attempts to harass it. Short of such harassment, the media must bear the same burden of producing evidence of criminal wrongdoing as any other citizen.”

Finally, the court rejected the argument that *Miller v. Transamerica Press, Inc.* controlled. It based this on the fact that *Miller* was a civil case – *Branzburg* only “emphasized that the public’s interest in effective law enforcement outweighed the press’s entitlement to a First Amendment privilege against the disclosure of information.” Indeed, “the public has much less of an interest in the outcome of civil litigation.”

In addition, *Miller* involved confidentiality while the current case did not: “We have never recognized a privilege for reporters not to reveal nonconfidential information.”

Sixth Circuit Case Summaries

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

Type of Proceeding:	Civil – Habeas corpus
Stage of Proceeding:	Appeal from denial of writ.
Party Requesting Subpoena:	Grand Jury.
Type of Information Sought:	Work product.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

A reporter in Detroit had set out intending to capture gang members on camera. After running into gang members, the reporter asked to conduct interviews with the members of the gang. Notably, “[a]s a condition of filming, [the reporter] agreed not to broadcast or disclose to anyone the portion of the film already taken [earlier that day], in which the faces of gang members could be seen[, and] promised to do all future filming in the silhouette.” Evidently, the gang members threatened retribution if the reporter disclosed their identities.

In a separate incident, a detective was investigating a murder. The detective interviewed a gang member who identified the gang member who allegedly shot another police officer, but that gang member refused to testify. Although eyewitnesses alleged that “they could identify the [suspect] if provided with photographs,” the detective had no photographs. The detective alleged, however, that he was told that the suspect was at the original filming and, therefore, the tape was “the most reliable means for identification.”

Based on that allegation, a grand jury subpoenaed the reporter’s employer. His employer later moved to quash that subpoena. The trial court denied the motion to quash, ruling that the reporter “had no constitutional privilege to refuse to divulge to the grand jury the material sought.” Thereafter, the reporter was found in contempt.

On the petition for habeas corpus, the court refused to accept the reporter’s argument that the court, under Justice Powell’s concurring opinion must require the government to show that the subpoena was relevant, crucial, and a last resort. Rejecting this position, the court explained that the *Branzburg* court “specifically dealt with, and rejected, the claim that newsmen are entitled to a ‘conditional, not absolute’ privilege – testimonial privilege conditioned upon the inability of prosecutors to establish relevancy, unavailability from other sources, and a need so compelling as to override invasion of first amendment interests occasioned by the disclosure.” Turning to its own analysis, the court relied on Professor Wigmore’s “four fundamental conditions” to establishing a privilege:

- (1) the communications must originate in a confidence that they will not be disclosed;
- (2) confidentiality must be essential to the maintenance of the relationship between the parties;
- (3) the relationship must be one which, in the opinion of the community, ought to be fostered; and
- (4) the injury that would

inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

According to the court, the reporter-source relationship only met the first fundamental condition. As such, it “decline[d] to join some other circuit courts, to the extent that they have stated their contrary belief that those predicates do exist, and have thereupon adopted the qualified privilege balancing process urged by the three *Branzburg* dissenters and rejected by the majority.”

In its view, the court believed that those courts failed to understand Justice Powell’s opinion. Although Justice Powell did indicate that some reporter’s privilege cases must be judged on a “case-by-case basis,” the court read that language to relate specifically to instances where the government brought the subpoena in bad faith. In this court’s view, what *Branzburg* actually required a court to consider was this:

courts should . . . make certain that the proper balance is struck between freedom of the press and the obligation of all citizens to give relevant testimony, by determining [1] whether the reporter is being harassed in order to disrupt his relationship with confidential news sources, [2] whether the grand jury’s investigation is being conducted in good faith, [3] whether the information sought bears more than a remote and tenuous relationship to the subject of the investigation, and [4] whether a legitimate law enforcement need will be served by forced disclosure of the confidential source relationship.

Based on this, the court held that the trial court did not err and denied his habeas petition.

Seventh Circuit Case Summaries

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

Type of Proceeding:	Civil – Order to turn over work product relating to foreign criminal investigation.
Stage of Proceeding:	Appeal from denial of writ.
Party Requesting Subpoena:	Grand Jury.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Biographers.
Subpoena quashed?	No.

The plaintiff, Michael McKevitt, was “being prosecuted in Ireland for membership in a banned organization and directing terrorism.” As part of his defense, he asked a district court to compel reporters “to produce tape recordings that he thinks will be useful to him in the cross-examination of David Reupert, who according to McKevitt’s motion is the key witness for the prosecution.”

The journalists subpoenaed had “a contract to write Rupert’s biography,” and as such, had conducted several interviews with him. Under a statute that allows a district court to compel testimony or produce evidence to be used in a foreign trial, the district court granted McKevitt’s motion. The court refused to stay the district court’s grant.

In explaining why it refused to stay the district court’s order, the court began by noting that although *Branzburg* declined to recognize a First Amendment privilege, “Justice Powell, whose vote was essential to the 5-4 decision rejecting the claim of privilege, stated in a concurring opinion that such a claim should be decided on a case-by-case basis by balancing the freedom of the press against the obligation to assist in criminal proceedings.”

The court then admitted, “Since the [four] dissenting Justices would have gone further than Justice Powell in recognition of the reporter’s privilege, and preferred his position to that of the majority opinion (for they said that his ‘enigmatic concurring opinion gives some hope of a more flexible view in the future,’) maybe his opinion should be taken to state the view of the majority of the Justices – though this is uncertain, because Justice Powell purported to join Justice White’s ‘majority’ opinion.”

The court then noted that a “large number of cases concluded . . . that there is a reporter’s privilege.” The court summarized other circuits’ prior jurisprudence quite succinctly, all things considered:

Some of the cases that recognize the privilege, such as *Madden*, essentially ignore *Branzburg*; some treat the “majority” opinion in *Branzburg* as actually just a plurality opinion, such as *Smith*; some audaciously declare that *Branzburg* actually created a reporter’s privilege, such as *Shoen and von Bulow v. von Bulow*.

The approaches that these decisions take to the issue of privilege can certainly be questioned. A more important point, however, is that the Constitution is not the only source of evidentiary privileges, And while the cases we have cited do not cite other possible sources of the privilege besides the First Amendment and one of them, LaRouche, actually denies, though without explaining why, that there might be a federal common law privilege for journalists that was not based on the First Amendment, other cases do cut the reporter's privilege free from the First Amendment.

Turning to the present case, the court explained that the United States had an interest in helping facilitate the adequacy of foreign criminal trials. The court found that "it is . . . obvious that the newsgathering and reporting activities of the press are inhibited when a reporter cannot assure a confidential source of confidentiality." The court concluded that "that was *Branzburg* and it is evident from the result in that case that the interest of the press in maintaining confidentiality of sources is not absolute."

Here, nevertheless, the court noted that the source was known and that that source did not care whether the tapes of the interviews were released to McKevitt. Thus, the court found that there was "no conceivable interest in confidentiality in the present case."

As to non-confidential information, it recognized that other courts had found a privilege, expressing "concern with harassment, burden, using the press as an investigative arm of government, and so forth." The court, however, questioned these decisions, because they "were rejected by *Branzburg* even in the context of a confidential source."

The court next questioned the entire premise of court's prior opinions: "It seems to use that rather than speaking of privilege, courts should simply make sure that a subpoena duces tecum directed to the media, like any other subpoena . . . , is reasonable in the circumstances."

Using this "reasonable[ness]" approach, the court explained that "[w]hen the information in the reporter's possession does not come from a confidential source, it is difficult to see what possible bearing the First Amendment could have on the question of compelled disclosure." Indeed, the court stated, the source actually wanted the information released. The court believed that the biographers did not want to release the information because "the biography . . . that they are planning to write [would] be less marketable the more information in it that has already been made public."

Because there were no reasonable grounds on which to prevent the disclosure of the information, the court, therefore, had refused to stay the motion.

Eighth Circuit Case Summaries

Cervantes v. Time, Inc., 464 F.2d 986 (8th Cir. 1972).

Type of Proceeding:	Civil – Libel
Stage of Proceeding:	Appeal from summary judgment.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Magazine and reporter.
Subpoena quashed?	Yes.

A Life Magazine article accused the mayor of St. Louis, Cervantes, of having “business and personal ties with the gangsters [who] operate in his city.” As a result of the article, the mayor filed a defamation action in federal court, alleging that “4 paragraphs of the article contained false statement which were authored, published, and communicated with knowledge of their falsity or, alternatively, with reckless disregard as to their truth.”

In discovery, the mayor “deposed the reporter who testified that he gathered information which formed the basis for most of the story from informants within the Federal Bureau of Investigation and within the United States Department of Justice.” During the deposition, the reporter was asked and refused to answer whom his sources in the federal government were. The reporter refused to divulge the information for a variety of reasons. First, “assum[ing] a contrary position would be to subject his informants to retaliation or reprisals and physical danger.” Second, “compulsory disclosure of confidential sources would violate the First Amendment’s freedom of the press by impeding the dissemination of news which can be obtained only if he, as a professional journalist, may effectively guarantee anonymity of the source.” Third, “he, as a professional journalist and as a resident and citizen of the State of New York, possesses a statutory reportorial privilege to withhold the source of news coming into his possession.”

Soon after the reporter asserted his privilege, the mayor asked the court to compel the reporter to testify. The defendants, on the other hand, made a motion for summary judgment. The district court did not address the motion to compel, because he “entered summary judgment for the defendants on the grounds that neither defendant had knowledge of falsity.” The mayor appealed.

At the appellate court, the mayor argued that “he cannot possibly meet his burden of proof if the reporter is allowed to hide behind anonymous news sources.” More specifically,

[h]is arguments in favor of compulsory disclosure may be summarized as follows: [a] disclosure enables the plaintiff to scrutinize the accuracy and balance of the defendant’s reporting and editorial processes; [b] through disclosure it is possible to derive an accurate and comprehensive understanding of the factual data forming the predicate for the news story in suit; [c] disclosure assists successful

determination of the extent to which independent verification of the published materials was secured; and [d] disclosure is the sole means by which a libeled plaintiff can effectively test the credibility of the news source, thereby determining whether it can be said that the particular source is a perjurer, a well-known libeler, or a person of such character that, if called as a witness, any jury would likely conclude that a publisher relying on such a person's information does so with reckless disregard for truth or falsity.

Because of these concerns, the mayor argued that the district judge was wrong to consider a summary judgment motion on the limited facts before him.

The court began its discussion by noting that the mayor's claims did not "strike [it] as frivolous." "Especially [was] this so when much of the information supplied by the anonymous informants has been obtained from the private files of Government." Despite these concerns, the court thought the mayor's "preoccupation with the identity of Life's news sources" was not material to the summary judgment motion. Instead, the court made clear that the evidence already in the record "establish[ed], without room for substantial argument, facts that entitled both defendants to judgment as a matter of law."

Next, the court addressed prior case law, explaining that it was "aware of the prior cases holding that the First Amendment does not grant to reporters a testimonial privilege to withhold news sources." In a footnote, it cited many of those early cases and *Branzburg v. Hayes*. In the court's estimation, *Branzburg* presented the question of whether the First amendment allows a grand jury to compel "professional journalists [to divulge] information about possible law violations committed by their news sources." It went on to explain that "[i]t was held, over 4 dissents, that a newsman does not possess a First Amendment privilege to refuse to answer relevant and material questions asked during a good-faith grand jury investigation." It distinguished that holding on the basis of the type of proceeding: "The Court was not faced with and, therefore, did not address, the question whether a civil libel suit should command the quite different reconciliation of conflicting interests pressed upon us here by the defense."

In the context of its opinion, the court went on to note that "to routinely grant motions seeking compulsory disclosure of anonymous news sources without first inquiring into the substance of a libel allegation would utterly emasculate the fundamental principles that underlay the line of cases articulating the constitutional restrictions to be engrafted upon the enforcement of State libel laws." In a footnote to that statement, the court cited to the Supreme Court's admonition that "without some protection for seeking out the news, freedom of the press could be eviscerated." Moreover, the court seemed concerned that the filing of libel suits could be used as a form of harassment: "[T]o compel a newsman to breach a confidential relationship merely because a libel suit has been filed against him would seem inevitably to lead to an excessive restraint on the scope of legitimate newsgathering activity."

Turning to the summary judgment motion, the court laid down a rule: "Where there is a concrete demonstration that the identity of defense news sources will lead to persuasive evidence on the issue of malice, a District Court should not reach the merits of a defense motion for summary judgment until and unless the plaintiff is first given a meaningful opportunity to cross-

examine those sources, whether they be anonymous or known.” The court explained, “The point of principal importance is that there must be a showing of cognizable prejudice before the failure to permit examination of anonymous news sources can rise to the level of error. Mere speculation or conjecture about the fruits of such examination simply will not suffice.”

The court found that the plaintiff made no showing in this case. Indeed, there was significant evidence that the reporter did not violate the actual malice standard:

[T]he record contains substantial evidence indicating that it was over a period of many months that Life’s reporter carefully collected and documented the data on the basis of which the article was written and published. In turn, Life’s key personnel, including one researcher, four editors and three lawyers, spent countless hours corroborating and evaluating this data. Once suit was instituted, the mayor was provided with hundreds of documents utilized in preparation of the article. He then deposed virtually every Life employee who possessed any connection whatever with the article’s preparation and publication and, with one exception, each affirmed his or her belief in the truth of the article and each gave deposition testimony sufficient to raise a strong inference that there was good reason for that belief.

Weighed against the plaintiff’s self-serving affidavits, the evidence was too great to overcome – even if the mayor had the identity of the sources. The court concluded:

Where, as here, the published materials, objectively considered in the light of all the evidence, must be taken as having been published in good faith, without actual malice and on the basis of careful verification efforts, that is, they were published in good faith without regard to the identity of the news sources, there is no rule of law or policy consideration of which we are aware that counsels compulsory revelation of news sources.

Ninth Circuit Case Summaries

Lewis v. United States, 501 F.2d 418 (9th Cir. 1974).

Type of Proceeding:	Criminal – Bombing.
Stage of Proceeding:	Grand jury.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Published, in part.
Type of Person Subpoenaed:	General manager of radio station.
Subpoena quashed?	No.

A radio station general manager received two things. First, he received a “three-page . . . document purportedly issued by an organization calling itself ‘The Weather Underground,’ which contained information relative to a recent bombing of a government building.” It ran a story about that document and also provided the original to federal authorities. Second, he “received a tape purportedly issued by ‘The Symbionese Liberation Army’ which contained information relative to Patricia Hearst and William and Emily Harris.” He also ran a story about that receipt and provided a copy to law enforcement officers.

The grand jury issued a subpoena against the station’s attorney asking him “to appear forthwith and bring . . . the original of the document that the station had received from persons claiming to be responsible for the [Symionese] bombing.” The attorney for the station appeared without producing the requested document. The attorney also told the assistant United States attorney that “he intended to claim a privilege based upon the station’s right to protect the sources of news information.”

Thereafter, the grand jury issued a subpoena against the station manager. “On June 12, Mr. Lewis appeared and stated that the document and the tape both existed and that he had access to them but that he had purposely refused to bring them before the Grand Jury.” A week later, the manager refused again to produce the items sought or testify. At that point, he was held in contempt.

The court rejected the manager’s First Amendment argument. It did begin by noting that “appellant is not forsaken by the Constitution simply because a Federal Grand Jury would obtain information from him.” And explained that, under *Branzburg*, the manager could receive protection if the subpoena was issued in bad faith, but held that there was no evidence of bad faith present. Moreover, “there was no request by the suppliers of the document and the tape to keep the information contained in them private or to withhold the articles themselves from examination. Even had there been such, the lesson from *Branzburg* is that such a request, either explicit or implicit, may not override the authority of the Grand Jury.”

Lewis v. United States, 517 F.2d 236 (9th Cir. 1975).

Type of Proceeding:	Criminal – Bombing.
Stage of Proceeding:	Grand jury.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	General manager of radio station.
Subpoena quashed?	No.

A radio station general manager received a “communiqué” “from a group claiming responsibility for the explosion of a bomb in a Los Angeles hotel on October 5, 1974.” After being held in contempt for refusing to comply with a grand jury subpoena, the manager appealed his contempt conviction on, among other things, First Amendment grounds. The circuit court affirmed the lower courts contempt finding.

The court first explained that “[t]he holding of *Branzburg v. Hayes* is that the first amendment does not afford a reporter a privilege to refuse to testify before a federal grand jury as to information received in confidence.” Moreover, the court noted that a reporter will only be protected under *Branzburg* when the government has instituted the proceeding in bad faith. Because the “Appellant has shown no basis for relief under these standards,” the manager had no privilege to assert.

Farr v. Pitchess, 522 F.2d 464 (9th Cir. 1975).

Type of Proceeding:	Civil – Habeas corpus.
Stage of Proceeding:	Appeal from denial of habeas corpus.
Party Requesting Subpoena:	Court.
Type of Information Sought:	Source identities.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

The plaintiff was a reporter who was found guilty of contempt after he refused to tell the court who supplied him with information relating to a murder trial. More specifically, a state trial judge ordered all parties to abstain from “dissemination [of] the contents or nature of proposed trial testimony or other evidence” relating to the trial of Charles Manson. The plaintiff, despite the order, received two copies of a transcript of inadmissible testimony. After the judge found out, he summoned the reporter to his chambers to discover the identity of his sources at which time the reporter “rejected the invitation of the judge to disclose the name or names of those from whom he received copies of the Graham statement.” The day after the refusal, a Los Angeles newspaper carried the leaked material.

One month after the trial against Manson ended, the judge ordered the plaintiff to appear and “show cause why he should not be compelled to disclose the names of the persons who had supplied him with copies of the [the evidence].” At the show cause hearing, the reporter “continued to refuse to answer specific questions as to identity, appellant was adjudged to be in contempt and ordered incarcerated until he divulged the names.” The reporter argued that the incarceration was illegal, because he had a First Amendment privilege “to refuse to disclose to the court the names” of his sources.

The court began by explaining that “[u]ntil very recent times, it was not seriously thought by most that this provision of the First Amendment gave any personal right to a newspaper reporter to keep confidential his sources of information.” Indeed, the First Amendment historically was thought to only prevent the prior restraint of the government. Nonetheless, the court argued that the recent trend in state legislatures, Congress, and the Supreme Court was toward a recognition of a privilege: “[T]he Supreme Court of the United States has considered the question and appears to have fashioned at least a partial First Amendment shield available to newsmen who are subjected to various demands to divulge the source of confidentially secured information.” Moreover, the court argued that *Branzburg*’s logic “applied to other civil or criminal judicial proceedings” beyond the grand jury context.

Without much analysis, the court explained that “*Branzburg* recognizes some First Amendment protection of news sources.” It then found that the “application of the *Branzburg* holding to non-grand jury cases seems to require that the claimed First Amendment privilege and the opposing need for disclosure be judicially weighed.”

Turning to the facts of the case, the court said that “the First Amendment protection announced by *Branzburg* [had] collided head-on with a compelling judicial interest in disclosure of the identity of those persons frustrating a duly entered order of the court.” The court found that the interest in guaranteeing a fair trial outweighed the reporter’s First Amendment interest. The court explained: “[T]he purpose of eliminating collaboration between counsel and the press is to protect the constitutionally guaranteed right of the defendants in criminal cases to due process by means of a fair trial. . . . If the newsman’s privilege against disclosure of news sources is to serve as a bar to disclosure of the names of those who disobey the court order, then the court is powerless to enforce this method of eliminating encroachment on the due-process right of the defendants.” Thus, the power of the court to enforce the order was more important than the reporter’s interest.

U.S. v. Pretzinger, 542 F.2d 517 (9th Cir. 1976).

Type of Proceeding:	Criminal - Conspiracy
Stage of Proceeding:	Appeal from criminal trial.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Television reporter.
Subpoena quashed?	Yes.

A reporter received a call from an informant, directing the reporter to the scene of a drug arrest that was supposed to take place the next morning. At trial, the defendants, who were arrested on various drug charges, made a motion “to have the court order the newsman to reveal the name of his source.” The lower court denied the motion “but entered a finding of fact that the informant was a government agent.”

The circuit court affirmed the lower court’s ruling. First, it noted that a trial judge “must balance the interest of confidentiality of news sources against the needs of the criminal justice system to know the identity of the source in determining whether or not to require disclosure.” The defendant argued that the name of the source was material, because if the source was from inside the DEA, the defendant could show that the DEA knew an arrest was going to take place but refused to get a warrant. The court rejected this argument: “Even with prior knowledge of a potential drug exchange somewhere north and west of Phoenix, the government could not have possessed adequate specific information about Pretzinger’s truck to obtain a warrant to search it.” As such, the trial judge was correct in refusing to force the reporter to testify.

In re Grand Jury Proceedings, 5 F.3d 397 (9th Cir. 1993).

Type of Proceeding:	Criminal – Vandalism, among other things.
Stage of Proceeding:	Grand jury.
Party Requesting Subpoena:	Government.
Type of Information Sought:	Information about an exchange after alleged illegality.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Ph.D. student.
Subpoena quashed?	No.

In 1991, a group known as the Animal Liberation Front broke into Washington State University and released test animals and also “spread hydrochloric acid throughout the laboratories, causing approximately \$100,000 in damages.” One known member of the Liberation Front, Rodney Coronado, was also a house sitter for Richard Scarce, a Ph.D. student at the University. Although Scarce and his family had been on vacation, they arrived back in Washington and were picked up at the airport by Coronado. The next morning, Scarce and Coronado, and possibly others, had a conversation about a newspaper article regarding the break in.

The government later subpoenaed Scarce to testify about his conversation the morning after the newspaper published the article about the break in. Scarce, who wrote extensively on militant animal rights groups, refused to answer the subpoena arguing that he had a “scholar’s privilege” that allowed him to decline to answer. The lower court rejected the claimed privilege, and Scarce appeared at the grand jury but “refused to testify concerning the breakfast conversation, claiming that this concerned confidential information.” As a result, he was in contempt.

The court of appeals agreed with the government. As the court framed Scarce’s argument, “Scarce asserts that he is privileged by the First Amendment not to disclose to the grand jury the identity of his confidential informants or the information they provided him because his conversation with those informants was incident to his work as a scholar.” Moreover, “Scarce argues that because that work involves the collection and dissemination of information to the public, he is entitled to the same privileges afforded members of the institutional press under the First Amendment’s Freedom of Press Clause.”

In declining to recognize Scarce’s argument, the court essentially adopted Justice Powell’s concurrence. Justice Powell would have found First Amendment protection “where the information sought ‘bear[s] only a remote and tenuous relationship to the subject of the investigation,’ or where there is ‘some other reason to believe that [the] testimony implicates confidential source relationships without a legitimate need of law enforcement.’” Noting that Scarce did not argue any of these factors, the court found that he was “not entitled to a First Amendment privilege.”

The court also rejected Scarce’s argument that “*Branzburg* grants a news gatherer a privilege not to testify to the grand jury concerning confidentially obtained information, unless

the Government demonstrates that its interest in the information sought out-weighs the news gatherer's First Amendment rights." Instead, the only time balancing comes into play, the court found, was "in the limited circumstances he mentioned, where there is, in effect, an abuse of the grand jury function."

The court distinguished *Farr v. Pitchess*, on the basis that that "case-unlike *Branzburg* or the present case-did not involve testimony before a grand jury." Therefore, the court felt it necessary to balance the "conflicting interests raised by that case where the societal interest was different in order to determine the existence of a privilege."

Shoen v. Shoen, 5 F.3d 1289 (9th Cir. 1993).

Type of Proceeding:	Civil – Libel
Stage of Proceeding:	Pretrial discovery.
Party Requesting Subpoena:	Plaintiff
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Investigative Author
Subpoena quashed?	Yes.

The plaintiffs subpoenaed an author of a set of books that chronicled a fight between members of the family that owned U-Haul after he interviewed the founder of U-Haul. In a civil defamation suit, the plaintiffs, the sons of the U-Haul founder, sued their father for statements he made regarding his sons' involvement in the death of a family member. The subpoena demanded that the author produce notes and tape recordings of the interviews he held with the alleged defamer, their father. The district court ordered the author to comply with the subpoena. The district court, after the author's refusal to comply, granted a motion to compel from the plaintiffs.

First, the court reviewed its prior jurisprudence. It noted that in *Farr v. Pitchess*, it found that *Branzburg v. Hayes* recognized a qualified privilege. And, it also noted that “[e]ight of the other nine circuits that have decided the question read *Branzburg* the same way.” The court explained that the privilege was an important one for two reasons. First, it gave credence to “society’s interest in protecting the integrity of the newsgathering process.” Second, it “ensur[ed] the free flow of information to the public.”

Turning to the facts of the case, the court first asked whether the privilege applied to an author, as opposed to a journalist. The court adopted the Second Circuit reasoning, finding a privilege even for non-traditional journalists. As the Second Circuit explained,

The purpose of the journalist’s privilege . . . was not solely to protect newspaper or television reporters, but to protect the activity of “investigative reporting” more generally. Thus, . . . it makes no difference whether “[t]he intended manner of dissemination [was] by newspaper, magazine, book, public or private broadcast medium, [or] handbill” because “[t]he press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion.”

The Ninth Circuit concluded, “Indeed, it would be unthinkable to have a rule that an investigative journalist, such as Bob Woodward, would be protected by the privilege in his capacity as a newspaper reporter writing about Watergate, but not as the author of a book on the same topic.”

Next, the court addressed whether the lack of confidentiality destroyed the privilege. It held that it did not, following reasoning, at least in part, of the First, Second, and Third Circuits,

which acknowledged that even divulging information gathered from non-confidential sources could “constitute a significant intrusion into the newsgathering and editorial processes. . . . [I]t may substantially undercut the public policy favoring the free flow of information that is the foundation for the privilege.”

Turning to the scope of the privilege, the court set down the hard and fast rule that a party seeking information from a reporter or author must show “that the information sought is not obtainable from another source.” Here, the court found that the plaintiffs did not make this showing, because they “failed to take [the father’s] deposition before trying to penetrate the journalist’s shield that protects [reporter’s] source materials.”

Shoen v. Shoen, 48 F.3d 412 (9th Cir. 1995).

Type of Proceeding:	Civil – Libel
Stage of Proceeding:	Discovery
Party Requesting Subpoena:	Plaintiff
Type of Information Sought:	Work product.
Confidentiality:	No
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Investigative Author
Subpoena quashed?	Yes.

The plaintiffs subpoenaed an author of a set of books that chronicled a fight between members of the family that owned U-Haul after he interviewed the founder of U-Haul. In a civil defamation suit, the plaintiffs, the sons of the U-Haul founder, sued their father for statements he made regarding his sons' involvement in the death of a family member. The subpoena demanded that the author produce notes and tape recordings of the interviews he held with the alleged defamer, their father. The district court ordered the author to comply with the subpoena. The district court, after the author's refusal to comply, ordered the author jailed; that order was stayed for review on appeal.

The court began its discussion by reviewing its previous privilege case. In that case, the Court said, "Rooted in the First Amendment, the privilege is a recognition that society's interest in protecting the integrity of the newsgathering process, and in ensuring the free flow of information to the public, is an interest 'of sufficient social importance to justify some incidental sacrifice of sources of facts needed in the administration of justice.'" The court found in that case that the privilege covers authors and also extends to nonconfidential sources and information. Having found a privilege, the court explained that the privilege could only be overcome if the subpoenaing party could show that "the information sought is not obtainable from another source."

Next, the court turned to defining a test for when the reporter's privilege could be overcome. The court noted that it "recognized that routine court-compelled disclosure of research materials poses a serious threat to the vitality of the newsgathering process." The court also emphasized that:

[t]he threat of administrative and judicial intrusion into the newsgathering and editorial process; the disadvantage of a journalist appearing to be an investigative arm of the judicial system or a research tool of government or of a private party; the disincentive to compile and preserve non-broadcast material; and the burden on journalists' time and resources in responding to subpoenas.

The court recognized that the information sought is non-confidential, which was "an important element in balancing the . . . need for material sought." Thereafter it found that defamation plaintiff "is entitled to requested discovery notwithstanding a valid assertion of the journalist's privilege by a nonparty only upon a showing that the requested material is: (1)

unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case.”

Applying the test, the court first rejected the argument that the interview materials were relevant to the case. It did so, because all of the alleged twenty-nine libels occurred before the interviews even occurred. It also found that the material was cumulative, because it was sought to demonstrate ill will, which was already demonstrated.

In re Grand Jury Subpoena, 201 Fed.Appx. 430 (9th Cir. 2006).

Type of Proceeding:	Criminal – Vandalism.
Stage of Proceeding:	Grand jury.
Party Requesting Subpoena:	Government.
Type of Information Sought:	Work product.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Videographer.
Subpoena quashed?	No.

The subpoenaed party took a videotape of protesters lighting a police car on fire. The grand jury, which believed that the tape “might contain evidence of the perpetrators who set the fire,” subpoenaed the videographer. He refused to comply, and the district court held him in contempt.

The circuit court affirmed. It forcefully explained that, under *Branzburg*, “[r]eporters have no First Amendment right to refuse to answer ‘relevant and material questions asked during a good-faith grand jury investigation.’” The only exception to this rule is under the Scarce exceptions and includes bad faith, an illegitimate need, or the evidence sought only bearing tangentially on the investigation. The court found none of these exceptions to be met.

In rejecting the videographer’s common law privilege, the court refused to give credit to the chilling effect argument, explaining that that “argument has also been rejected by the Supreme Court.” It did not search below the argument to address whether this situation is different enough to distinguish *Branzburg* on this point.

Tenth Circuit Case Summaries

Silkwood v. Kerr-McGee Corp., 563 F.2d 433 (10th Cir. 1977).

Type of Proceeding:	Civil – Denial of constitutional rights
Stage of Proceeding:	Discovery.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Work product.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Documentary Filmmaker.
Subpoena quashed?	Remanded.

A documentary filmmaker was subpoenaed by the defendant corporation for “all documents and writings in connection with his investigation” of the death of Karen Silkwood. In the case, the defendant corporation allegedly “violated [Silkwood’s] constitutional rights by conspiring to prevent her from organizing a labor union, by conspiring to prevent her from filing complaints against Kerr-McGee under the Atomic Energy Act and by willfully and wantonly contaminating her with toxic plutonium radiation.” The documentary filmmaker was later deposed, but only answered questions not relating to his sources. During the making of the documentary, the filmmaker did offer confidentiality to those who asked for it; “[h]e also assured those interviewees who requested that their identities be not revealed that he would respect their requests.” The defendant corporation argued on appeal that “they sought first to get facts concerning the basis for [the] lawsuit from the representative plaintiffs” to no avail.

The question was “whether a privilege exists in favor of a non-party witness which permits him to resist pretrial discovery in order to protect a confidential source of information.” First, the court addressed whether a reporter’s privilege extended to a documentary filmmaker. It held, that under the facts of the case, it did. As the court said, “His mission in this case was to carry out investigative reporting for use in the preparation of a documentary film.” Moreover, the “Supreme Court has not limited the privilege to newspaper reporting. It has in fact held that the press comprehends different kinds of publications which communicate to the public information and opinion.” And, “the presence of an underlying public interest in this communication and particularly in maintaining it free in the public interest” could not be ignored. Finally, the filmmaker also had “a legitimate interest in seeking to protect the fruits of his labor.”

The court then dismissed *Branzburg* outright: “The Supreme Court in rejecting his claim required him to appear and testify before the grand jury, and ruled that the grand jury subpoena had to be obeyed. The actual decision of the Supreme Court is not surprising nor is it important in the solution of our problem.” After citing some general language from *Branzburg*, the court explained that “the present privilege is no longer in doubt[, and i]n holding that a reporter must respond to a subpoena, the Court is merely saying that he must appear and testify. He may, however, claim his privilege in relationship to particular questions which probe his sources.”

Having recognized a privilege – without much analysis or reasoning and in a somewhat unclear way – the court went on to explain what factors a court should consider when determining whether the privilege applies. Citing *Garland v. Torre*, the court found the following factors important: “1. Whether the party seeking information has independently attempted to obtain the information elsewhere and has been unsuccessful. 2. Whether the information goes to the heart of the matter. 3. Whether the information is of certain relevance. 4. The type of controversy.” Because the record was incomplete, the court remanded the case with instructions to the district judge to balance these factors.

Donohue v. Hoey, 109 Fed.Appx. 340 (10th Cir. 2004).

Type of Proceeding:	Civil – Denial of constitutional rights.
Stage of Proceeding:	Appeal from motion for summary judgment.
Party Requesting Subpoena:	Plaintiffs.
Type of Information Sought:	Source identity and other information.
Confidentiality:	No.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporters.
Subpoena quashed?	No.

Underlying this case is an extremely protracted murder investigation. Plaintiffs in this case argued that the police department's investigation into the murder of their family member was so bad as to violate their constitutional rights. At one point during the investigation, an AP reporter met with police officers who had worked the case. It was unclear whether the officers were the source of the information, but, in any event, it was clear that the reporter had found out several embarrassing facts about the family, which could have discredited their complaints against the police department's handling of the case. As part of the court case, the plaintiff's subpoenaed to reporters who had written about the murder investigation. The district court quashed these subpoenas.

Mainly due to procedural errors, the court affirmed the quashed subpoenas under its prior precedent in *Silkwood v. Kerr-McGee Corp.*

Eleventh Circuit Case Summaries

U.S. v. Caporale, 806 F.2d 1487 (11th Cir. 1986).

Type of Proceeding:	Criminal – Racketeering.
Stage of Proceeding:	Appeal from trial convicting co-defendants.
Party Requesting Subpoena:	Defendants.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporters.
Subpoena quashed?	Yes.

Eight defendants were convicted of violating federal racketeering statutes. “Several weeks after the verdict in this case was returned, a Miami newspaper reported that the government was conducting an investigation into allegations of jury tampering. The defendants moved for a new trial and other relief based on the news report. The district court denied the motions.”

The government, nonetheless, submitted to remanding the case to the district court in order to conduct a hearing regarding the tampering. At the end of the hearing the jurors were deposed, and the “court took evidence from FBI agents and a federal prosecutor who investigated the jury tampering claim.” It also took evidence “from several persons identified as possible sources of the rumor.” At the end of the hearing, the court found that the defendants failed to show that “any extrinsic matter had tainted the jury’s deliberation.”

On appeal, the defendants argued that “the court improperly refused to compel the testimony of two reporters involved in the spread of the jury tampering rumor.” The defendants had subpoenaed two reporters who wrote articles about the potential jury tampering. One reporter invoked the First Amendment reporter privilege; that reporter, however, “did reveal that his information originated from . . . one of the acquitted defendants.” That reporter also cited health reasons. As such, the court ordered the defendants to submit to the reporter interrogatories, which the court would compel the reporter to answer. The defendants failed to submit the interrogatories promptly, however, and, as such, the court never forced the reporter to answer any questions.

The circuit affirmed this decision. It found the district court’s actions reasonable as the reporter already divulged the information about his source and the defendants failed to timely seek any more information from the reporter.

The second reporter also refused to testify based on a reporter’s privilege. At the trial level, the court found that “the [defendants] failed to show that [the reporter’s] information was otherwise unavailable and that there was a compelling interest in securing his testimony.” The court found a reporter’s privilege based on the Fifth Circuit’s decision in *Miller v. Transamerican Press, Inc.*, which as a result of the Fifth Circuit splitting into the Fifth and Eleventh Circuits was binding precedent in the Eleventh Circuit.

The Eleventh Circuit found that *Miller* stands for the proposition that “information may only be compelled from a reporter claiming privilege if the party requesting the information can show that it is highly relevant, necessary to the proper presentation of the case, and unavailable from other sources.”

According to the second reporter’s article, “the FBI had received allegations concerning possible tampering.” Because the defendants had the opportunity to question the FBI agents at the jury tampering hearing, the court affirmed the lower court’s ruling that the defendants “failed to show that [the second reporter] had information that was unavailable from other sources or necessary to the proper presentation of the case in light of the fact that the FBI’s information was provided to appellants in court.”

Price v. Time, Inc., 416 F.3d 1327 (11th Cir. 2005).

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Appeal from trial court order enforcing subpoena.
Party Requesting Subpoena:	Defendants.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

Alabama football coach Mike Price took a trip to Pensacola, Florida, where he visited a strip club. After Sports Illustrated published an article about the transgression, Price sued for defamation. He also sought to compel Sports Illustrated and a reporter to identify the source for the article about his visiting the strip club.

Initially, Price served interrogatories on the defendants asking them to name the source for the information about his visiting the strip club. The defendants refused, asserting protection under the Alabama shield law, as well as a First Amendment reporter’s privilege. After their refusal, Price made a motion to compel their cooperation with the interrogatories.

The reporter did, however, give a deposition. In the deposition, he answered several questions as to the timing and process of his reporting, but again refused to name his confidential source. This was the case despite the source’s version of events being called into question by subsequent conversations with several employees of the strip club.

“After hearing argument and considering Yaeger’s deposition testimony, the district court concluded that Alabama’s shield law did not apply to magazine reporters like Yaeger, and that Price had made a sufficient showing to overcome the First Amendment qualified reporter’s privilege that the defendants had asserted.” Therefore, the “court granted Price’s motion to compel the defendants to answer Price’s interrogatories seeking the identity of the confidential sources.”

On reconsideration, however, the district court certified to the Alabama Supreme Court the question of whether a magazine reporter qualifies for the state’s state shield law protection. The Alabama Supreme Court, however, declined to answer the question.

As to the first question of whether a magazine reporter was contemplated under the Alabama shield law, the court held that it was not. Therefore, it moved on to address the First Amendment privilege question.

Turning to its First Amendment discussion, the Court began by recognizing that it had “held that “a reporter has a First Amendment privilege which protects the refusal to disclose the identity of confidential informants.”” It cited to *Branzburg* and a binding Fifth Circuit case, *Miller v. Transamerican Press, Inc.* in support of the proposition. The privilege is a qualified one, however. Under *Miller*,

[i]t may be pierced if the party seeking the reporter's confidential source presents: "substantial evidence[:] [1] that the challenged statement was published and is both factually untrue and defamatory; [2] that reasonable efforts to discover the information from alternative sources have been made and that no other reasonable source is available; and [3] that knowledge of the identity of the informant is necessary to proper preparation and presentation of the case."

The court next moved into a discussion about *Miller*. It noted that the court protected the press in that case because it "thought that there was a way to independently verify the truth of the libelous allegations in the article." Once that other option was exhausted, however, the Fifth Circuit concluded that "the privilege is not absolute and [that] in a libel case as is here presented, the privilege must yield."

Equating *Miller* to the present case, the court found that Price had showed that "the challenged statement was published and is both factually untrue and defamatory." He did this by submitted "[h]is own sworn testimony."

Moving on to the third element, the court found that the "knowledge of the identity of the informant is necessary to proper preparation and presentation of the case." Indeed, Price would have to prove actual malice, which could only be done by deposing the "source for the allegedly libelous comments." In so finding, the court approvingly cited several cases, which, essentially stood for the general proposition that "[w]hen the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure."

Turning to the second factor, the court explained that "Price must show that he has already used 'reasonable efforts to discover the information from alternative sources' and that no other reasonable means for discovering it are available." Price failed to do this. Although he had taken a few depositions, he did not depose all of the women who may have been the reporter's source. More specifically, the reporter admitted that "the confidential source was one of the two women who allegedly had sex with Price." Further, he "identified four women" who may have been the source as a result of their connection with Price's Florida hotel room.

The court was comfortable with requiring Price to depose the four women, because it felt that it was "virtually certain" that the name of the source would be uncovered. It thought so, because the attorney for the defendants told the court that he would correct any false testimony that the confidential source gave by denying that she was, in fact, the confidential source.

Moreover, even if the depositions did not reveal the name of the source, the court explained that at that point "Price will have exhausted all reasonable efforts to obtain her identity by other means and the district court can re-instate its disclosure order."

D.C. Circuit Case Summaries

Carey v. Hume, 492 F.2d 631 (D.C. Cir. 1974).

Type of Proceeding:	Civil – Libel
Stage of Proceeding:	Interlocutory appeal.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Columnist.
Subpoena quashed?	No.

A columnist writing the “Washington Merry-Go-Round” accused two union officials of falsely claiming that the union headquarters were broken into to cover up the destruction of some documents. The complaint argued that the suggestions in the column were defamatory. The parties engaged in “[e]xtensive discovery proceedings.” The columnist was deposed.

In responding to the complaint, the columnist explained, “Our report was based upon information supplied by eyewitnesses, and we will not retract.” Upon discovering the existence of a source or sources, the plaintiff “asked the identity of those sources.” The columnist refused to name the sources, but “he did indicate that there was more than one such informant, and that they were [union] employees.” He also noted that “[h]e was unsure whether he had taken notes of the revelations made to him by his informants, and, if so, whether he had preserved them.”

Thereafter, the plaintiff asked the court to compel the testimony of the columnist’s sources. The court first explained that the high standard of proof developed in *New York Times v. Sullivan* applied in this case, because the plaintiff was a public figure.

Interestingly, the court digressed briefly into an examination of the effect of *Sullivan* on the reporter’s privilege. Picking up on the Supreme Court’s concern in *Sullivan* that libel suits might cause reporter’s to not write certain stories, the court explained:

On the one hand, the Court’s concern that the spectre of potential libel actions might have an inhibiting effect on the exercise of press freedom militates against compulsory disclosure of sources. Contrarily, the heavy burden of proof imposed upon the plaintiff in such a case will often make discovery of confidential sources critical to any hope of carrying that burden.”

Simply, harassment reasons under *Sullivan* merited the recognition of the privilege, while the high burden of proof in *Sullivan* seemed to argue against the recognition of a rule that could bar plaintiffs from ever recovering.

Next, the court turned to a relatively well-known, court of appeals case, *Garland v. Torre*, which dealt with anonymous sources before the Supreme Court did. In that case, “[t]he

key factor which the Second Circuit identified as allowing it to move confidently to this conclusion was that the ‘question asked of (Torre) went to the heart of the plaintiff’s claim.’”

In *Garland*, then-Judge Stewart adopted a balancing test: “The decisional process with respect to the constitutional issue before it, said the court, involved a determination of ‘whether the interest to be served by compelling the testimony of the witness in the present case justifies some impairment of this First Amendment freedom’” Thus, the court in *Garland* did recognize that there would be “some impairment” of First Amendment freedoms by requiring testimony.

Stewart recognized in his balancing that “freedom of the press is ‘basic to a free society,’ the court went on to say that ‘basic too are courts of justice, armed with the power to discover truth’, and that the ‘concept that it is the duty of a witness to testify in a court of law has roots fully as deep in our history as does the guarantee of a free press.’” He went on to explain, “If an additional First Amendment liberty — the freedom of the press — is here involved, we do not hesitate to conclude that it too must give place under the Constitution to a paramount public interest in the fair administration of justice.” In sum, Stewart recognized the First Amendment issues at stake, but thought that the court’s quest for truth was more important.

Turning back to *Sullivan*, the court suggested that that case may have “so downgraded [defamation’s actions] social importance that a plaintiff’s interest in pressing such a claim can rarely, if ever, outweigh a newsman’s interest in protecting his sources.” Perhaps then, defamation claims should be viewed as less important than the grand juries at issue in *Branzburg v. Hayes*: “The tenor of the Court’s opinion in *Sullivan* may be thought to reflect an attitude toward libel actions palpably different from its approach to grand jury proceedings in *Branzburg*.”

The court nevertheless rejected the idea that defamation actions were not important. Citing to the Court’s continued citations to *Garland*, the court explained, “This strongly suggests the continuing vitality of the latter case, and negates any inference that the Court does not consider the interest of the defamed plaintiff an important one.”

As such, the court rejected the idea that it mattered whether a proceeding was a civil one or a criminal one: “*Branzburg*’s lengthy discussion of a newsman’s duty to testify before a grand jury undoubtedly has implications with respect to the deference to be accorded a newsman’s claim of privilege in other areas as well.” It went on to note, “Although the differences between civil and criminal proceedings distinguish *Branzburg* from the case before us, we cannot ignore the fact that the interests asserted by the newsmen in the *Branzburg* trilogy of cases were not accorded determinative weight by five members of the Court.” Notably, the court did, however, acknowledge in a footnote that there was some difference between civil and criminal cases in this context:

Although it is certainly necessary to consider carefully the emphasis in *Branzburg* upon the public interest in the giving of testimony, we do not believe that it automatically controls this case. This is a civil libel suit rather than a grand jury inquiry into crime, and the dispute over disclosure is between the press and a

private litigant rather than between the press and the Government. This difference is of some importance, since the central thrust of Justice White's opinion for the Court concerns the traditional importance of grand juries and the strong public interest in effective enforcement of the criminal law. Justice White also relied on the various procedures available to prosecutors and grand juries to protect informants and on careful use by the Government of the power to compel testimony. Private litigants are not similarly charged with the public interest and may be more prone to seek wholesale and indiscriminate disclosure.

In an odd turn, however, the court in the next paragraph explained that *Branzburg* did not "seem to disturb the basic balancing approach set forth in *Garland*": That approach essentially is that the court will look to the facts on a case-by-case basis in the course of weighing the need for the testimony in question against the claims of the newsman that the public's right to know is impaired."

Turning to the facts of this case, the court first noted that the "most important factor" in *Garland* – whether "the information sought appears to go to the heart of appellee's libel action" – weighed in favor of the plaintiff.

Next, the court asked if the plaintiff's claim was "frivolous." The court held that it was not. It distinguished the present case from the Eighth Circuit's case *Cervantes v. Time, Inc.* In *Cervantes*, the court held that the Eighth Circuit did not require the reporter to divulge his sources, because "regardless of the identity of the confidential sources, the plaintiff would be unable to establish malice." It continued, "[T]he extensive documentation and uncontroverted accuracy of the bulk of the article, combined with the evidence as to the prolonged, careful, and comprehensive nature of the defendant's investigation, made it so unlikely that the plaintiff could succeed in his suit that compulsory disclosure of the confidential source was unwarranted." Contrasting the current case with *Cervantes*, the court found that the present case showed no evidence of an extensive investigation similar to that in *Cervantes*. Indeed, "[a]side from the confirmation of the burglary report, his description of appellee's actions appears to have been based solely on the confidential sources in question." As such, the Court concluded, "[T]he facts disclosed by the record before us at this time are inadequate to support a conclusion that appellee is so unlikely to meet the admittedly heavy Sullivan burden that no purpose would be served by disclosure of the identity of the sources."

Finally, the court turned to whether the information could be obtained from another source. As the court explained, "The values resident in the protection of the confidential sources of newsmen certainly point towards compelled disclosure from the newsman himself as normally the end, and not the beginning, of the inquiry." Here, because the reporter's own "vague" information as to where the information came from was "imprecise," the court found that the plaintiff could not know "where to begin" finding the information from another source. Thus, the court explained:

The courts must always be alert to the possibilities of limiting impingements upon press freedom to the minimum; and one way of doing so is to make compelled disclosure by a journalist a last resort after pursuit of other opportunities has

failed, But neither must litgants [sic] be made to carry wide-ranging and onerous discovery burdens where the path is as ill-lighted as that emerging from appellant's deposition.

Reporters Committee for Freedom of Press v. American Tel. & Tel. Co., 593 F.2d 1030 (D.C. Cir. 1978).

Type of Proceeding:	Civil – Declaratory and injunctive relief.
Stage of Proceeding:	Interlocutory appeal.
Party Requesting Subpoena:	Government.
Type of Information Sought:	Telephone numbers.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Columnist.
Subpoena quashed?	No.

Reporters Committee is a special case. Here, journalists, among others, brought an action against telephone companies arguing that “the First . . . Amendment[] require[s] that prior notice be provided to them before defendants turn over their long distance telephone billing records to Government law enforcement officials.” The United States intervened and the district court granted summary judgment in favor of the telephone companies and the United States. The telephone records that the government would request from reporters revealed the number that reporters would call, but not the content of the conversation that the reporter and the source had with each other. The telephone companies would not release the number information unless the government presented “a subpoena or summons, valid on its face, issued under the authority of a statute, court, or legislative body.” They would normally also notify the subscriber reporter as soon as the subpoena was requested.

At one point, the journalists sent the telephone companies a letter “demanding assurances that their toll-billing records and those of other journalists . . . not be released to government investigative agencies without prior notice to the journalists concerned.”

After the telephone companies failed to give those assurances, the journalists filed a complaint that “sought a judicial declaration that it was unlawful for defendants to release the toll-billing records of journalists to government investigative agencies without prior notification to the journalists concerned.”

According to the court, the government had only issued five subpoenas against journalists, while the total number of subpoenas issued ran up to 100,000. Because the subpoenas were only issued in the instance of criminal investigations and not civil investigations, the court stated that “the central issue . . . [is] whether plaintiffs are entitled to prior notice of subpoenas issued in the course of criminal investigations.”

As to the First Amendment, “Plaintiffs contend[ed] that, as journalists, they are entitled under the First Amendment to prior notice of toll-call-record subpoenas issued in the course of felony investigations.” They argued this for two reasons.

“The first theory relates to the impact of good faith toll-call-record subpoenas on plaintiffs’ First Amendment rights and the need for judicial balancing before such records are released to Government investigators.” First:

Plaintiffs develop this theory as follows:

- (1) The First Amendment guarantees journalists the freedom to gather information from clandestine sources.
- (2) Because toll-call records may disclose the identity of a clandestine source, this freedom is abridged whenever the Government gains access to a journalist's toll records, even where access is gained in the course of a Good faith felony investigation.
- (3) In order to determine whether this infringement on First Amendment rights is justified, the Government's investigation "interests" must be judicially balanced in each case against the journalist's First Amendment "interests".
- (4) A journalist, therefore, must receive prior notice of a toll-record subpoena so that he may challenge the subpoena and thus prompt the requisite judicial balancing before the records are released.

Second, the journalists argued that they must be notified of a subpoena when that subpoena is issued in bad faith.

The court summarized these arguments, explaining, "Common to both theories is the proposition that journalists have a right under the First Amendment to gather information from clandestine sources."

The court began its analysis, noting, "[T]he Supreme Court specifically noted in *Branzburg v. Hayes* that First Amendment challenges to Good faith investigative action and First Amendment challenges to Bad faith investigative action 'pose wholly different issues for resolution.'"

As to the plaintiffs' first argument, the court asked first "whether Government access to toll-call records in the course of a good faith felony investigation actually "Abridges" a "freedom" guaranteed plaintiffs under the First Amendment."

The court first explained that the government could issue a "grand jury subpoena [to] the journalist and compel him to disclose his source." This, the court found, would be completely acceptable under *Branzburg*: "According to the Court, the journalist may be Required to testify in any and all good faith criminal investigations there is no case-by-case consideration given to a claim of privilege."

The court further explained, "The Court found that the possibility that a source might refuse or be reluctant to furnish information to a journalist out of fear that his identity might be revealed was at best a 'burden' on the First Amendment right to gather news."

Building on *Branzburg*'s holding, the court found that "[i]t is logically inescapable that if, as held, journalists have no right to resist such subpoenas [to testify in court], then they certainly have no right to resist good faith subpoenas duces tecum directed at a third-party's business records."

The court thought that the plaintiffs' arguments here were even bolder and less supported by *Branzburg* than the plaintiffs' arguments in *Branzburg*, because in *Branzburg* plaintiffs argued for a personal right not to testify. Here, on the other hand, "plaintiffs [argue] that the First Amendment entitles them to reach out and suppress the testimony of third parties whom they have injudiciously made witting of their secrets." The court concluded:

It is thus clear from *Branzburg* and related cases that the freedom to gather information guaranteed by the First Amendment is the freedom to gather information subject to the general and incidental burdens that arise from good faith enforcement of otherwise valid criminal and civil laws that are not themselves solely directed at curtailing the free flow of information.

Even after rejecting the plaintiffs' argument, the court went on to hold that "it is clear that Government access to defendants' toll-call records in no sense 'abridges' plaintiffs' news-gathering activities within the meaning of the First Amendment." Simply, the court did not feel that the government's attempts to discover reporters' sources actually weighed on speech in any event:

Not every Government action that affects, has an impact on, or indeed inhibits First Amendment activity constitutes the kind of "abridgment" condemned by the First Amendment. Historically considered, freedom of the press means primarily, although not exclusively, immunity from prior restraints or censorship, but the guarantee also affords protection from the imposition of post-publication sanctions and punishments. Additionally, in recent years, the Supreme Court has found in a number of cases that constitutional violations may arise from the deterrent, or "chilling", effect of governmental action that falls short of a direct prohibition against the exercise of First Amendment rights. Yet not every Government action that has an inhibiting or constrictive impact on First Amendment activity is said therefore to have an impermissible "chilling effect." The constrictive impact must arise from the present or future exercise, or threatened exercise, of coercive power.

Here, the government's investigative powers only touched incidentally on the "journalists' information-gathering." Thus, there was no "abridgment" of speech.

Second, the court addressed the plaintiffs' argument that they had a First Amendment right to be free from bad faith subpoenas against telephone companies. The court agreed that, if the plaintiffs' allegations that the government had issued subpoenas to harass journalists, "there [would] be no doubt that . . . such bad faith action would constitute an abridgment of a journalist's First Amendment rights." As the court explained, "[W]hile the First Amendment does not immunize the information-gathering activities of a journalist or any other citizen from

good faith law enforcement investigation, it does protect such activities from official harassment” The court thought this was so, because:

[u]nlike good faith investigation to which all citizens are subject, official harassment places a Special burden on information-gathering, for In such cases the ultimate, though tacit, design is to obstruct rather than to investigate, and the official action is proscriptive rather than observatory in character.

Nonetheless, the court rejected the plaintiffs’ argument that the remedy in such cases was “ongoing judicial audit of future government investigations in order to screen out bad faith subpoenas.” Without a showing that the government would inflict “an imminent threat of harm but also that the threatened harm is irreparable.” Thus, the court rejected the reporters’ bad faith argument.

Zerilli v. Smith, 656 F.2d 705 (D.C. Cir. 1981).

Type of Proceeding:	Civil – Privacy Act and Fourth Amendment violations.
Stage of Proceeding:	Summary Judgment.
Party Requesting Subpoena:	Plaintiffs.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

Zerilli and a co-plaintiff brought an action against several government officials, alleging that the officials “violated their constitutional and statutory rights by leaking to the *Detroit News* transcripts of conversations in which [they] discussed various illegal activities.” The plaintiffs deposed the reporter for the *Detroit News* and asked him from whom he received the transcripts. The reporter refused to provide the names to the plaintiffs, and the plaintiffs filed a motion to compel the reporter to do so. The district court denied the motion to compel and granted summary judgment in favor of the United States.

In a prior criminal trial against the plaintiffs, the government confessed that it had, in violation of the Fourth Amendment, tapped the phones of the plaintiffs. As a result, the transcripts of those recording were suppressed and the district court judge “ordered that the logs be sealed, forbidding their dissemination to the public.”

Despite this, the *Detroit News* would later publish several articles implicating the plaintiffs in Detroit’s mafia culture. The articles themselves indicated that they were based on the sealed transcripts. The government denied that any government officials gave the transcripts to the newspaper.

The plaintiffs’ attorneys accepted the government’s denial as true, because “[t]hey hoped” doing so would satisfy the First Amendment requirement concerning the reporter’s privilege that they “show that they had exhausted any alternative sources of information.” Because the plaintiffs’ counsel accepted the government’s statement, they did not question several government employees.

Thereafter, plaintiffs deposed the reporter, who refused to disclose the names of his sources. Plaintiffs then sought to compel the reporter’s answer, “claiming that their rights as civil litigants superseded the reporter’s qualified First Amendment privilege.” The district court denied the plaintiffs’ motion and granted the government’s summary judgment motion. At the appellate level, plaintiffs argued that the district court erred, because “the First Amendment reporter’s privilege should not prevail, since their interest in disclosure outweighs any public interest in protecting the sources.”

Turning to the merits, the court first explained that “[c]ompelling a reporter to disclose the identity of a confidential source raises obvious First Amendment problems.” More specifically, the court found that it interfered with a specific First Amendment value:

The First Amendment guarantees a free press primarily because of the important role it can play as “a vital source of public information.” “The press was protected so that it could bare the secrets of government and inform the people.” Without an unfettered press, citizens would be far less able to make informed political, social, and economic choices. But the press’ function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired. Compelling a reporter to disclose the identity of a source may significantly interfere with this news gathering ability; journalists frequently depend on informants to gather news, and confidentiality is often essential to establishing a relationship with an informant.

In an attempt to distinguish the Supreme Court’s holding in *Branzburg v. Hayes*, the court explained that the Court only rejected an absolute privilege, because of “the traditional importance of grand juries and the strong public interest in effective criminal investigation[s].” The court went on to characterize that case as standing for the proposition that “a qualified privilege would be available in some circumstances even where a reporter is called before a grand jury to testify.”

Next, the court limited the scope of *Branzburg*: “Although *Branzburg* may limit the scope of the reporter’s First Amendment privilege in criminal proceedings, this circuit has previously held that in civil cases, where the public interest in effective criminal law enforcement is absent, that case is not controlling.” Relying on its earlier case, *Carey v. Hume*, the court explained that in the case of civil actions “[w]e held that to determine whether the privilege applies courts should look to the facts of each case, weighing the public interest in protecting the reporter’s sources against the private interest in compelling disclosure.” It supported its decision by explaining that “[e]very other circuit that has considered the question has also ruled that a privilege should be readily available in civil cases, and that a balancing approach should be applied.”

The court began its balancing analysis by explaining that “[i]n general, when striking the balance between the civil litigant’s interest in compelled disclosure and the public interest in protecting a newspaper’s confidential sources, we will be mindful of the preferred position of the First Amendment and the importance of a vigorous press.” As such, “in the ordinary case the civil litigant’s interest in disclosure should yield to the journalist’s privilege.”

The court thought this must be the case, because “if the privilege does not prevail in all but the most exceptional cases, its value will be substantially diminished. Unless potential sources are confident that compelled disclosure is unlikely, they will be reluctant to disclose any confidential information to reporters.”

Next, the court explained that courts should examine several factors: first, the court should look to see if the “information sought goes to ‘the heart of the matter,’” and second, the court should examine “[t]he efforts made by the litigants to obtain the information from alternative sources.”

The court also stated that whether the reporter was a party to the action or not should enter the calculus. As the court said, “When the journalist is a party, and successful assertion of the privilege will effectively shield him from liability, the equities weigh somewhat more heavily in favor of disclosure.” Despite this, the court cautioned against indiscriminate disclosure orders anytime the reporter was a party to the action.

In this case, the court found that the plaintiffs’ suit was “not frivolous” and the names of the sources were “crucial to their case.” Nonetheless, the court found that they had not “fulfilled their obligation to exhaust possible alternative sources of information.” As such, at present, they could not overcome the reporter’s privilege.

A concurring judge agreed with the court’s decision that the plaintiffs had not exhausted all reasonable sources of the information before going after the reporter’s testimony. He did not, however, “join in the broad statements concerning the ‘reporter’s privilege’ set out in the majority opinion[, because they were] unnecessary to the decision.”

Clyburn v. News World Communications, Inc., 903 F.2d 29 (D.C. Cir. 1990).

Type of Proceeding:	Civil – Libel.
Stage of Proceeding:	Summary Judgment.
Party Requesting Subpoena:	Plaintiffs.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

The *Washington Times* wrote an article suggesting that the plaintiff “waited ‘several critical hours’” to call an ambulance for another person who later died. The court found that the plaintiff was a limited purpose public figure and, as such, had to prove actual malice.

The plaintiff argued that the name of the one single source that evidently suggested that the plaintiff waited several hours to call an ambulance was needed to prove actual malice. The court, citing *Zerilli v. Smith*, disagreed:

We recognize that where the primary source of evidence is the reporter’s own (naturally self-interested) testimony of what a confidential source told him, the combination of the burden of proof and the reporter’s privilege to withhold the source’s identity confront a defamation plaintiff with unusual difficulties. But the reporter’s privilege is a qualified one. If the plaintiff exhausts all reasonable alternative means of identifying the source, the privilege may yield. Here the district court found that Clyburn ‘utterly failed’ to pursue “obvious alternative sources of information[]” and accordingly upheld the privilege.

U.S. v. Ahn, 231 F.3d 26 (D.C. Cir. 2000).

Type of Proceeding:	Criminal – Motion to withdraw guilty plea.
Stage of Proceeding:	Appeal from Motion to withdraw guilty plea.
Party Requesting Subpoena:	Defendant.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	Yes.

The defendant, Ahn, a police officer in the District of Columbia, pled guilty to “receiving illegal gratuities from massage parlors that were flagrantly violating local law.” The defendant later sought to withdraw his guilty plea. He argued, in part, that “the Government breached its duty of good faith and an implied promise of secrecy by leaking information to news media about his arrest, and submits that the district court erred in quashing a subpoena he sought in order to obtain the confidential sources of the reporters who broadcast the story.”

After Ahn made an agreement with the government, the case was sealed. At the same time, “Ahn was secretly assisting the Government in a sting operation attempting to catch then-Mayor Marion Barry accepting a bribe.” At that time, “two televised news reports described Ahn’s arrest.” Thereafter, “Ahn filed a motion to withdraw his plea, contending that by leaking information about his case the Government had breached its implied promise to maintain the secrecy of his cooperation.” The district court denied Ahn’s motion, however. It held that “Ahn failed to establish that the Government had leaked the information.”

On appeal, “Ahn contend[ed] that only one way exist[ed] for him to prove that the Government caused the leak and thereby breached its duty of good faith: by subpoenaing the reporters to reveal their sources.” The reporters moved to quash these subpoenas. The district court sided with the reporters: “The district court found that the reporters’ testimony was not ‘essential and crucial’ to Ahn’s case and was not relevant to determining Ahn’s guilt or innocence.” Despite this being a criminal proceeding, the court affirmed the district court’s finding of a privilege, holding that “Ahn failed to carry his burden” of showing that the “reporters’ qualified privilege should be overcome.”

Lee v. Department of Justice, 413 F.3d 53 (D.C. Cir. 2005).

Type of Proceeding:	Civil – Privacy Act
Stage of Proceeding:	Motion to withdraw guilty plea.
Party Requesting Subpoena:	Plaintiff.
Type of Information Sought:	Source identity.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

Wen Ho Lee, a Department of Energy employee, was investigated by the government “on suspicion of espionage.” He later plead guilty to one count of “mishandling . . . classified computer files.” After the indictment, Lee filed a complaint against several government agencies that he alleged “had improperly disclosed personal information about Lee and about the investigation to members of the news media.”

In early 1999, several news agencies reported about the investigation of Lee. Later articles named Lee explicitly. Lee “claimed that the leaked information included his and his wife’s employment history, their financial transactions, details of their trips to Hong Kong and China,” and other things. According to the record, Lee “made at least 420 written requests to the government defendants, but was largely rebuffed by assertions of law enforcement privilege and learned nothing identifying the source of the leaks.” Lee also deposed six Department of Energy employees, but those employees were “unable (or unwilling) to identify the leaker(s).”

As a result of these failed attempts, Lee subpoenaed a group of journalists who had previously written about him. Although the journalists attempted to quash the subpoenas, the district court denied the motions and ordered the journalists to “truthfully answer questions as to the identity of any officer or agent of defendants.” The court did so after finding under the *Zerilli v. Smith* test that the information sought went to “the heart of the matter[,]” and Lee had “exhausted ‘every reasonable alternative source of information’ so that journalists are not simply a default source of information for plaintiffs.”

On appeal, the reporters argued that “the First Amendment and federal common law create a privilege that protects the right of a journalist to conceal confidential sources of information in the face of otherwise legitimate compulsion of testimony in federal courts.”

Reviewing its prior jurisprudence, the court explained that the D.C. Circuit “limited the applicability of the *Branzburg* precedent to the circumstances considered by the court in *Branzburg*—that is, the context of a criminal proceeding, or even more specifically, a grand jury subpoena.” Indeed, under *Carey v. Hume*, the court explained that it had suggested “that some such privilege might survive *Branzburg* in the context of a civil action.” The court recognized that it went even further in *Zerilli v. Smith* to hold that “there is a reporter’s privilege in civil actions, and that ‘in the ordinary case the civil litigant’s interest in disclosure should yield to the journalist’s privilege.’”

Nonetheless, under the standard of review, the court found that the district court “did not abuse its discretion in requiring the journalists to testify.” First, the information was crucial, because if Lee could not discover the name of the sources for the stories, he could not prove essential elements of his Privacy Act case. Indeed, even though success “might be possible” without the sources’ identities, it would be “very unlikely.”

The court also found that Lee had exhausted alternative avenues to discovering the information. As a general rule, “the number of depositions necessary for exhaustion must be determined on a case-by-case basis.” According to the court, “While Lee did not depose every individual who conceivably could have leaked the information, *Carey* makes clear that this is not necessary.” Even though other sources existed, the court believed that requiring Lee to depose each and every one would be too burdensome. As such, the court sustained the district court’s contempt order.

In re Grand Jury Subpoena, Judith Miller, 438 F.3d 1141 (D.C. Cir. 2006).

Type of Proceeding:	Criminal – Disclosure of classified information
Stage of Proceeding:	Grand Jury.
Party Requesting Subpoena:	Government.
Type of Information Sought:	Source identities, among other things.
Confidentiality:	Yes.
State of Publication:	Unpublished.
Type of Person Subpoenaed:	Reporter.
Subpoena quashed?	No.

In 2003, President Bush told the country in his State of the Union Address that “[t]he British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa.” Shortly thereafter, former Ambassador Joseph Wilson wrote an editorial for the New York Times where he explained that he was sent to Africa to determine whether that assessment was credible. He concluded that it was not and disclosed that information in the editorial.

After the editorial was published, a columnist for the *Chicago Sun-Times*, Robert Novak, disclosed in a column that Wilson’s wife was a covert CIA operative. According to the media at the time, “[T]wo top White House officials called at least six Washington journalists and disclosed the identity and occupation of Wilson’s wife.” As such, several articles disclosed the identity of Wilson’s wife.

As a result of the leak a grand jury was impaneled. The grand jury later issued a subpoena to one reporter, Matthew Cooper, but he refused to cooperate. He also made a motion to quash the subpoena, which was denied. The grand jury also subpoenaed Cooper’s employer, Time, but Time also made a motion to quash that subpoena. That motion was denied, and the court later held both parties in civil contempt.

Thereafter, while an appeal was pending, Cooper worked out a deal with the prosecutor and “agreed to provide testimony and documents relevant to a specific source who had stated that he had no objection to their release.” As such, the contempt order was vacated. Later, however, the grand jury would issue another far-reaching subpoena asking for documents relating to his sources for his articles.

The grand jury also issued a subpoena to Judith Miller, “seeking documents and testimony related to conversations between her and a specified government official.” The district court also denied the motion to quash that Miller would file. It also held her in contempt.

Both Cooper and Miller appealed, arguing four separate points. First, they claimed that “the First Amendment affords journalists a constitutional right to conceal their confidential sources even against the subpoenas of grand juries.” Second and third, they argued that the common law protected them from disclosing sources. Finally, they argued that “the Special Counsel failed to comply with Department of Justice guidelines for the issuance of subpoenas to journalists.”

As to the First Amendment claim, the reporters asserted that the lower court's holding that "a reporter called to testify before a grand jury regarding confidential information enjoys no First Amendment protection" was erroneous. The court disagreed.

First, it refused to distinguish *Branzburg v. Hayes*:

Each of the reporters in *Branzburg* claimed to have received communications from sources in confidence, just as the journalists before us claimed to have done. At least one of the petitioners in *Branzburg* had witnessed the commission of crimes. On the record before us, there is at least sufficient allegation to warrant grand jury inquiry that one or both journalists received information concerning the identity of a covert operative of the United States from government employees acting in violation of the law by making the disclosure. Each petitioner in *Branzburg* and each journalist before us claimed or claims the protection of a First Amendment reporter's privilege. The Supreme Court in no uncertain terms rejected the existence of such a privilege. As we said at the outset of this discussion, the Supreme Court has already decided the First Amendment issue before us today.

The court concluded, "Unquestionably, the Supreme Court decided in *Branzburg* that there is no First Amendment privilege protecting journalists from appearing before a grand jury or from testifying before a grand jury or otherwise providing evidence to a grand jury regardless of any confidence promised by the reporter to any source."

Moreover, the court refused to read a limit on the opinion in *Branzburg* based on Justice Powell's concurring opinion, because he "joined the majority by its terms." The court also refused to give any credence to its prior case, *Zerilli v. Smith*, stating that that case was not controlling, because it was decided in the civil context. The court went on to reject the reporters' non-constitutional arguments as well.

Judge Tatel wrote a concurring opinion to emphasize that he found *Branzburg* "more ambiguous than [his] colleagues [did]." He argued that the balancing test set forth in Justice Powell's concurring opinion "must have meant, at the very least, that the First Amendment demands a broader notion of 'harassment' for journalists than for other witnesses." Nevertheless, he joined the majority's view that the First Amendment did not protect the reporters, because "although this circuit has limited *Branzburg* in other contexts, with respect to criminal investigations [it had] twice construed that decision broadly."

VITA

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In the past, Matt has worked as a summer associate at a national media law firm located in D.C. that focuses on defamation law, news gathering, and press access. Matt also has worked at the Office of General Counsel at National Public Radio, Inc., the United States District Court for the District of Columbia, the Court of Appeals for Maryland, the Superior Court for the District of Columbia, and Free Press, a large national non-profit media reform organization.

Matt writes about political communication, defamation, media access, technology and privacy, fact-checking, and free speech and free press issues generally. His writing appears both in print and on his blog, Lippmann Would Roll.